US – ZEROING (JAPAN)[1]

(DS322)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*Japan*	*ADA Arts. 2, 9 and 11* *GATT 1994 Arts. VI* *DSU Art. 11*	Establishment of Panel	*28 February 2005*
			Circulation of Panel Report	*20 September 2006*
Respondent	*United States*		Circulation of AB Report	*9 January 2007*
			Adoption by the DSB	*23 January 2007*

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The United States' "zeroing" procedures in the context of original investigations, periodic reviews, new shipper and changed circumstances reviews, and sunset reviews; and the application of "zeroing" in an original investigation, periodic reviews, and sunset review determinations.

- Product at issue: Various carbon steel and bearing products from Japan.

2. SUMMARY OF KEY PANEL/AB FINDINGS

As such claims

- ADA Arts. 2.1, 2.4, and 2.4.2 and GATT Arts. VI:1 and VI:2 (zeroing in transaction-to-transaction comparisons in original investigations): The Appellate Body reversed the Panel's finding that the United States did not act inconsistently with ADA Arts. 2.1, 2.4, and 2.4.2 by maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of transaction-to-transaction comparisons. The Appellate Body noted that because dumping and margins of dumping can only be found to exist in relation to the product under investigation, and not at the level of an individual transaction, all of the comparisons of normal value and export price must be considered. By disregarding certain comparison results, the United States acted inconsistently with ADA Art. 2.4.2, with the "fair comparison" requirement of ADA Art. 2.4, given that zeroing artificially inflates the magnitude of dumping.

- ADA Arts. 2.1, 2.4, 9.1-9.3, and 9.5 and GATT Arts VI:1 and VI:2 (zeroing in periodic reviews and new shipper reviews): The Appellate Body reversed the Panel's finding that zeroing in periodic and new shipper reviews was not inconsistent with the ADA and relevant articles of the GATT. The Appellate Body found, instead, that the United States had acted inconsistently with ADA Arts. 9.3 and 9.5 and GATT Art. VI:2, and with the "fair comparison" requirement of ADA Art. 2.4, as explained above.

As applied claims

- ADA Arts. 2, 9.1-9.3, 9.5, and 11 and GATT Arts. VI:1 and VI:2 (zeroing in specific periodic and sunset review investigations): The Appellate Body reversed the Panel's finding regarding zeroing used in 11 periodic review determinations and 2 sunset reviews, and found that the United States had acted inconsistently with ADA Arts. 2.4 and 9.3, GATT Art. VI:2, and ADA Art. 11.3.

3. OTHER ISSUES[2]

- Measure: The Appellate Body upheld the Panel's finding that the United States' zeroing procedures constituted a measure that could be challenged *as such* in WTO dispute settlement proceedings, and rejected the United States' claim under DSU Art. 11 that the Panel did not assess objectively whether a single rule or norm exists by virtue of which the USDOC applies zeroing, regardless of the basis upon which export price and normal value are compared, and regardless of the type of proceeding in which margins of dumping are calculated.

1 *United States – Measures Relating to Zeroing and Sunset Reviews*

2 Other issues addressed: standard zeroing line (measure); ADA Art. 2.4.2 (zeroing in weighted average-to-weighted average comparisons in original investigations): prima facie case; ADA Arts. 2 and 11 (zeroing in new shipper, changed circumstances, and sunset reviews); judicial economy.

US – ZEROING (JAPAN) (ARTICLE 21.5 – JAPAN)[1]

(DS322)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*Japan*	*ADA Arts. 2.4, 2.4.2, 9.3, 9.5 and 11.3*	Referred to the Original Panel	*18 April 2008*
			Circulation of Panel Report	*24 April 2009*
Respondent	*United States*	*GATT 1994 Arts. II and VI:2*	Circulation of AB Report	*18 August 2009*
		DSU Arts. 6.2 and 21.5	Adoption	*31 August 2009*

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS

- The compliance proceedings related to the following measures: the maintenance of zeroing procedures in the context of transaction-to-transaction comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews; the liquidation of duties based on importer-specific assessment rates determined in five periodic reviews found to be WTO-inconsistent in the original proceedings; certain liquidation instructions and notices; the use of zeroing in four other periodic reviews; and one sunset review determination.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- Panel's terms of reference: The Appellate Body upheld the Panel's finding that a periodic review that had been initiated before the matter was referred to the Panel and was completed during the Art. 21.5 proceedings was properly within the scope of the Panel's terms of reference.

- "As such" findings: The Panel found that the United States failed to comply with the recommendations and rulings of the DSB regarding the maintenance of zeroing procedures challenged "as such" in the original proceedings. In particular, the Panel found that the United States failed to implement the DSB's recommendations and rulings in the context of transaction-to-transaction comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews. Consequently, the United States remained in violation of ADA Arts. 2.4, 2.4.2, 9.3 and 9.5 and GATT Art. VI:2.

- Scope of compliance obligations: As regards the WTO-consistency of the liquidation of the entries subject to the nine periodic reviews at issue, the Appellate Body explained that WTO-inconsistent conduct must cease by the end of the reasonable period of time. The obligation to comply with the DSB's recommendations and rulings covered actions or omissions subsequent to the reasonable period of time, even if they related to imports that entered the territory of the United States at an earlier date. Moreover, the fact that the periodic reviews had been challenged in domestic judicial proceedings did not excuse the United States from complying with the DSB's recommendations and rulings by the end of the reasonable period of time. The Appellate Body therefore upheld the Panel's finding that the United States failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in the five periodic reviews challenged in the original proceedings and thus remained in violation of ADA Arts. 2.4 and 9.3 and GATT Art. VI:2. The Appellate Body also upheld the Panel's finding that the United States acted inconsistently with ADA Arts. 2.4 and 9.3 and GATT Art. VI:2 by applying zeroing in the context of the four subsequent periodic reviews.

- Tariff bindings: The Appellate Body upheld the Panel's consequential finding that certain liquidation actions taken by the United States after the end of the reasonable period of time in connection with certain periodic reviews violated GATT Arts. II:1(a) and II:1(b).

- Sunset review: The Panel found that the United States' omission to take any action to implement the recommendations and rulings of the DSB with respect to one sunset review determination found to be WTO-inconsistent in the original proceedings meant that the United States had failed to comply with the DSB's recommendations and rulings, and that the violation of ADA Art. 11.3 continued.

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

US – ZEROING (EC)[1]

(DS294)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*European Communities*	*ADA Arts. 9.3, 2.4 and 2.4.2*	Establishment of Panel	*19 March 2004*
			Circulation of Panel Report	*31 October 2005*
Respondent	*United States*	*GATT Art. VI:2*	Circulation of AB Report	*18 April 2006*
			Adoption	*9 May 2006*

1. MEASURE AT ISSUE

- Measures at issue: US application of the so-called "zeroing methodology" in determining dumping margins in anti-dumping proceedings as well as the zeroing methodology *as such*.

2. SUMMARY OF KEY PANEL/AB FINDINGS

As applied claims

- ADA Art. 9.3 and GATT Art. VI:2 (imposition and collection of anti-dumping duties): Reversing the Panel, the Appellate Body found that the zeroing methodology, *as applied* by the United States in the administrative reviews at issue, was inconsistent with ADA Art. 9.3 and GATT Art. VI:2, as it resulted in amounts of anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping. Under ADA Art. 9.3 and Art. VI:2 (GATT), investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter.

- ADA Art. 2.4, third to fifth sentences (due allowance or adjustment): The Appellate Body agreed with the Panel that, conceptually, zeroing is not 'an allowance or adjustment' falling within the scope of Art. 2.4, third to fifth sentences, which covers allowances or adjustments that are made to take into account the differences relating to characteristics of the export and domestic transactions, such as differences in conditions and terms of sale, taxation, levels of trade, etc. Thus, the Appellate Body upheld the Panel's finding that zeroing is not an impermissible allowance or adjustment under Art. 2.4, third to fifth sentences.

As such claims

- Zeroing methodology *as such*: Although it disagreed with some aspects of the Panel's reasoning, the Appellate Body upheld the Panel's finding that the United States' zeroing methodology (which is not in a written form), as it relates to original investigations in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, *as such*, in WTO dispute settlement (given the sufficient evidence before the Panel), and that it is a "norm" that is inconsistent, *as such*, with ADA Art. 2.4.2 (original investigation) and GATT Art. VI:2.

3. OTHER ISSUES[2]

- Measure: The Appellate Body found that an unwritten rule or norm can be challenged as a measure of general and prospective application in WTO dispute settlement. It emphasized, however, that particular rigour is required on the part of a panel to support a conclusion as to the existence of such a "rule or norm" that is *not* expressed in the form of a written document. A complaining party must establish, through sufficient evidence, at least (i) that the alleged "rule or norm" is attributable to the responding Member; (ii) its precise content; and (iii) that it does have "general and prospective" application.

1 *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*

2 Other issues addressed: standard of review (ADA Art. 17.6(ii)); ADA Art. 2.4, first sentence (fair comparison); conditional appeal (Art. 2.4.2); ADA Art. 11.1 and 11.2; "measure" (general (DSU Art. 3.3) and under ADA); mandatory/discretionary distinction; DSU Art. 1.1 (Panel's obligations); prima facie case; judicial economy (Panel); "standard zeroing procedures"; zeroing "practice" as such; dissenting opinion (Panel).

US – ZEROING (EC) (Article 21.5 – EC)[1]

(DS294)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*European Communities*	*DSU Arts. 8.7, 11, 19 and 21.5* *ADA Arts. 9.3, 9.4 and 11.3* *GATT 1994 Art. VI:2*	Referred to the Original Panel	*25 September 2007*
			Circulation of Panel Report	*17 September 2008*
Respondent	*United States*		Circulation of AB Report	*14 May 2009*
			Adoption	*11 June 2009*

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The United States discontinued the use of zeroing in original investigations in which the weighted average-to-weighted average comparison methodology was used. The United States Department of Commerce issued Section 129 determinations in which it recalculated, without zeroing, the margins of dumping for the orders covered in the original proceedings.

2. SUMMARY OF KEY PANEL/AB FINDINGS[2]

- Panel's terms of reference: The Appellate Body reversed the Panel's finding that the reviews subsequent to the original determination that pre-dated the adoption of the recommendations and rulings of the DSB did not fall within the Panel's terms of reference. The Appellate Body found, instead, that five specific sunset reviews had a sufficiently close nexus with the declared measures taken to comply, and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference. The Appellate Body upheld the Panel's finding that two specific periodic reviews, which established assessment rates calculated with zeroing after the end of the reasonable period of time ("RPT"), fell within the Panel's terms of reference, insofar as those periodic reviews had a sufficiently close nexus, in terms of nature, effects, and timing, with the declared measures taken to comply and with the recommendations and rulings of the DSB.

- Scope of the United States' compliance obligations: The Appellate Body reversed the Panel and found that the recommendations and rulings of the DSB required the United States to cease using zeroing by the end of the RPT, even when the assessment review had been concluded before the end of the RPT. The Appellate Body considered that the United States' implementation obligations extended to connected and consequent measures that are mechanically derived from the results of an assessment review and applied in the ordinary course of the imposition of anti-dumping duties. The Appellate Body upheld the Panel's findings that the United States had acted inconsistently with ADA Art. 9.3 and GATT Art. VI:2 by assessing and collecting anti-dumping duties calculated with zeroing in two specific periodic reviews concluded after the end of the RPT.

- The subsequent sunset reviews: Having reversed the Panel's findings in this regard, the Appellate Body found that the United States had acted inconsistently with ADA Art. 11.3 in five sunset reviews in which zeroing was relied upon. This resulted in the extension of the relevant anti-dumping duty orders beyond the expiry of the RPT.

- Alleged arithmetical error: The Appellate Body reversed the Panel's finding that the European Communities could not raise claims before the Art. 21.5 Panel in relation to an alleged arithmetical error in the calculation of margins of dumping because it could have raised them in the original proceedings, but failed to do so. However, the Appellate Body was unable to complete the analysis and therefore did not rule on whether the United States had failed to comply by not correcting such alleged error in one of its implementing measures.

- Calculation of the "all others" rate: The Appellate Body disagreed with the Panel's interpretation that ADA Art. 9.4 imposes no obligation in the calculation of the "all others" rate when all margins of investigated exporters individually are zero, de minimis, or based on facts available. However, the Appellate Body found it unnecessary to make findings on the European Communities' claim regarding the calculation of the "all others" rate in three specific cases.

1 *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*

2 *Other issues addressed: panel composition (DSU Arts. 8.7 and 21.5 and the Director-General's composition of the Panel with three new panelists) and a request for a suggestion pursuant to DSU Art. 19.1.*

THAILAND – H-BEAMS[1]

(DS122)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*Poland*	*ADA Arts. 2, 3, 5 and 17.6*	Establishment of Panel	*19 November 1999*
			Circulation of Panel Report	*28 September 2000*
Respondent	*Thailand*		Circulation of AB Report	*12 March 2001*
			Adoption	*5 April 2001*

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Thailand's definitive anti-dumping determination.
- Product at issue: H-beams from Poland.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 5 (initiation and notification): The Panel rejected Poland's claim that the Thai authorities' initiation of the investigation could not be justified due to the insufficiency of evidence originally contained in the application. The Panel considered that the application need not contain analysis, but only information. The Panel also rejected Poland's claim that Thailand violated Art. 5.5 by failing to provide a written notification of the filing of application for initiation of investigation. The Panel considered that a formal meeting could satisfy the requirement.
- ADA Art. 2.2 (constructed normal value): Having found that, (i) for the purpose of calculating a dumping margin under Art. 2.2, Thailand used the narrowest product category that included the like product; and (ii) that no separate reasonability test was required in choosing a profit figure for constructed normal value, the Panel concluded that Thailand had not violated Art. 2.2.
- ADA Art. 3.4 (injury factors): Having upheld the Panel's interpretation of Art. 3.4 that an investigating authority should consider *all* the injury factors listed in Art. 3.4, the Appellate Body upheld the Panel's finding that Thailand acted inconsistently with Art. 3.4.
- ADA, Arts. 3.1 and 17.6 (injury determination): (Thailand only appealed the Panel's legal interpretations of Arts. 3.1 and 17.6, and not the Panel's substantive findings of a violation of certain Art. 3 provisions.) The Appellate Body reversed the Panel's interpretations that Art. 3.1 requires an anti-dumping authority to base its determination only upon evidence that was disclosed to interested parties during the investigation. Similarly, it also reversed the Panel's interpretation that, under Art. 17.6, panels are required to examine only an investigating authority's injury analysis based on the documents shared with the interested parties. The Appellate Body found that the scope of the evidence that can be examined under Art. 3.1 depends on the "nature" of the evidence, not on whether the evidence is confidential or not. A panel should consider all facts, both confidential and non-confidential, in its assessment of the establishment and evaluation of the facts by investigating authorities under Art. 17.6.

3. OTHER ISSUES[2]

- DSU Art. 6.2 (panel request): The Appellate Body upheld the Panel's finding that Poland's panel request met the requirements of Art. 6.2. However, it rejected the Panel's rationale for finding Poland's mere listing of Art. 5 (without sub-provisions) in the panel request to be sufficient, i.e. the fact that several of the issues related to Art. 5 had already been raised by the exporters before the Thai authority. The Appellate Body rejected this reasoning because (i) there is not always continuity between claims raised in an investigation and those in WTO dispute settlement related to that investigation; and (ii) third parties to the dispute might not be on notice of the legal basis of the claims as they would not know specific issues raised in the underlying investigation. The Appellate Body considered that reference only to Art. 5 was sufficient in the present case because the sub-provisions of Art. 5 set out "closely related procedural steps".

1 *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*

2 Other issues addressed in this case: *amicus curiae* submission (breach of confidentiality, DSU Arts. 17. 10 and 18.2); burden of proof and standard of review; confidential information (working procedures).