Final Version

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BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

(WT/DS322)

(AB-2009-2)

ORAL STATEMENT OF JAPAN

29 JUNE 2009

1. Mr. Chairman and members of the Division, Japan would like to thank you and the Secretariat for your efforts in these proceedings. Appreciating that the Division has read our submissions, we limit the scope of our statement today to certain key issues.

2. These proceedings involve, broadly speaking, two sets of measures: measures that were found to be WTO-inconsistent in the original proceedings; and, measures taken to comply that were found to be WTO-inconsistent in these compliance proceedings. We address these measures in turn.

I. Original Measures

3. The first set of measures is a series of periodic reviews found to be WTO-inconsistent in the original proceedings – Reviews 1, 2, 3, 7 and 8.

4. Articles 3.7, 19.1, 21.1 and 21.3 of the DSU required the United States to "bring the[se] measure[s] into conformity" with its WTO obligations by the end of the RPT. The Panel found that, from the end of the RPT, these provisions required the United States, with respect to Reviews 1, 2, 3, 7 and 8, to refrain from nullifying or impairing benefits accruing to Japan by, *inter alia*, collecting inflated duties at importer-specific assessment rates found to be WTO-inconsistent in the original proceedings.[1] Because the United States had taken no action to revise those WTO-inconsistent rates, and because duties remained to be collected pursuant to these measures after the end of the RPT, the Panel found that the United States had failed to "bring the measure[s] into conformity".

5. This interpretation of the relevant provisions of the DSU is purely *prospective*, because it ensures that *future actions* to enforce the original measure, taken after the end of the RPT, must be WTO-consistent. The Panel correctly reached this conclusion by interpreting the terms actually used in the treaty. It did not accept the United States' invitation – similarly extended to you in this appeal – to interpret the words "prospective" and "retrospective", which are not themselves treaty text.

6. In this appeal, the United States asks you to revisit an argument that has been rejected three times, namely, by the Panel in these proceedings, and by both the panel and the Appellate Body in *U.S. – Zeroing (EC) (21.5)*.[2] Specifically, the United States argues that the

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[1] Panel Report, para. 7.149.
[2] Panel Report, para. 7.147; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 308-309.

date of entry is decisive for assessing its obligations to bring the original reviews into conformity with WTO law. The United States considers that it may continue, *after* the RPT, to collect inflated duties at importer-specific assessment rates found to be WTO-inconsistent in the original proceedings, because the goods to which those rates apply entered *before* the end of the RPT. Of course, goods subject to importer-specific assessment rates in U.S. periodic reviews found to be WTO-inconsistent *always* enter before the end of the RPT. This U.S. interpretation must fail, because it would render unenforceable Article 9.3 of the *Anti-Dumping Agreement*, as it applies to importer-specific assessment rates.

7. Even if the date of duty collection, rather than the date of entry, is decisive for assessing implementation obligations, the United States asserts that actions of U.S. courts should excuse it from the obligation to refrain from collecting WTO-inconsistent duties after the end of the RPT. The United States argues that "but for" actions by U.S. courts enjoining liquidation of entries covered by Reviews 1, 2, 3, 7 and 8, duty collection would have been completed before the end of the RPT.[3]

8. This argument must fail, for three reasons. *First*, the United States is responsible in WTO law for the actions of its courts. The injunctions at hand were issued by U.S. courts, under standards set out in U.S. law, and constitute action attributable to the United States.[4] The U.S. argument is tantamount to saying that it should be "exonerate[d]"[5] from the requirement to bring WTO-inconsistent measures into conformity where its own actions, under its own laws, lead to the collection of inflated duties after the end of the RPT.

9. *Second*, the fact that delays caused by domestic litigation arise in the process of providing the type of judicial review called for by Article 13 of the *Anti-Dumping Agreement* does not excuse the United States from performing its other WTO obligations. The United States correctly observes that footnote 20 to the *Anti-Dumping Agreement* excuses it from adherence to certain deadlines included in Article 9.3 of that *Agreement*, where delays result from Article 13 judicial review.[6] However, footnote 20 does not exempt the United States from the duty, under Article 19.1 of the DSU, to bring WTO-inconsistent reviews into

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[3] United States' Appellant's Submission, paras. 4, 96, 100. *See also* Panel Report, para. 7.131.
[4] Appellate Body Report, *U.S. – Shrimp*, para. 173 (A Member "bears responsibility for acts of all its departments of government, including its judiciary").
[5] Panel Report, *Brazil – Retreaded Tyres*, para. 7.305. *See also* Appellate Body Report, *Brazil – Retreaded Tyres*, para. 252.
[6] United States' Appellant's Submission, paras. 95-96.

conformity with WTO law. Nor does footnote 20 excuse the United States from meeting the substantive obligation to refund excessive anti-dumping duties under Article 9.3, once any delay associated with judicial review has passed. There is no textual support for the U.S. view that diminished implementation obligations apply due to actions by its own courts.

10. *Third*, the injunctions issued by U.S. courts do not, as the United States contends, "sever[] any so-called 'mechanical' link between the assessment of liability" and duty collection pursuant to Reviews 1, 2, 3, 7 and 8.[7] With or without litigation, and with or without injunctions, the mechanism for duty collection in U.S. law takes exactly the *same* ordinary course: USDOC determines assessment rates; USDOC communicates those rates to USCBP through liquidation instructions; and, USCBP computes the amount of duties by multiplying the USDOC's assessment rates by the entered values of the goods.

II. Measures "Taken to Comply"

11. The second set of measures are those that are "taken to comply" with the DSB's recommendations and rulings, within the meaning of Article 21.5. There are two groups of measures "taken to comply" at issue in these proceedings. *First*, a series of subsequent periodic reviews with which the United States asserted that "compliance was accomplished"[8] – Reviews 4, 5, 6 and 9. *Second*, a series of post-RPT measures effecting duty collection on entries covered by Reviews 1, 2, 7 and 8. Article 21.5 tells us that the Panel's mandate was to assess the "consistency" of these measures "taken to comply" with the covered agreements.

12. The United States does not assert that these measures are WTO-consistent. Nor does it explicitly appeal the Panel's finding that these measures are "taken to comply". Nonetheless, the United States contends that these measures "cannot serve as the *basis* for a finding of WTO-inconsistency in this dispute".[9]

13. This sounds curiously like an appeal from the Panel's findings that the measures are "taken to comply". After all, the "basis" for a panel to examine the "consistency" of a given measure in Article 21.5 proceedings is the status of that measure as one "taken to comply".

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[7] United States' Appellant's Submission, para. 97.
[8] United States' Second Written Submission, para. 18; United States' First Written Submission, paras. 52, 67. *See also* citations at Japan's Appellee's Submission, paras. 320-326.
[9] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, paras. 21, 24, 86, 89, 108.

For this reason, Japan has explained that the subsequent reviews and the duty collection measures are "taken to comply".[10]

14. To enjoy the authority, or the "basis", to assess the "consistency" of a "measure taken to comply", that measure must also be properly within a panel's terms of reference. The United States asserts that it was impossible for Review 9, one of the measures "taken to comply", to fall within the Panel's terms of reference, because it was taken during the panel proceedings.

15. We disagree. To begin, our panel request explicitly identifies a category of closely-related subsequent measures with sufficient specificity to enable the United States, in its first written submission, to ascertain with remarkable precision the measure Japan intended to challenge.[11]

16. Moreover, the Appellate Body has found that measures coming into existence during panel proceedings can, in certain circumstances, properly be included in a panel's terms of reference. In our view, these Article 21.5 proceedings present circumstances, in the context of implementation, justifying inclusion of Review 9 within the Panel's terms of reference.

17. The adoption of Review 9, as the latest in a chain of measures "taken to comply", illustrates that the process of achieving and undermining compliance is continuous and ongoing. Review 9 "withdraws" and "supercedes" the cash deposit rate established in Review 6 under the Ball Bearing order, but does so in an equally WTO-inconsistent fashion, through the use of the zeroing procedures.[12] Thus, by the United States' *own actions*, the compliance process is evolving and changing. Failure to include Review 9 would result in an incomplete resolution to a disagreement regarding compliance. In a similar situation, the Appellate Body has cited approvingly to the inclusion by a compliance panel of a post-establishment measure within its terms of reference.[13]

18. Mr. Chairman, that completes Japan's oral statement. We look forward to answering your questions.

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[10] Japan's Appellee's Submission, paras. 310-353, 498-506.
[11] Panel Report, para. 7.105, *quoting* United States' First Written Submission, para. 50 (Interpreting the phrase "any subsequent closely connected measures", in Japan's panel request, as identifying "any future administrative reviews related to the eight identified in its panel request").
[12] Japan's Appellee's Submission, paras. 413-421.
[13] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 74, *citing* Panel Report, *Australia – Salmon (21.5)*. *See also* Panel Report, para. 7.116 (footnote 142).