

US – ZEROING (JAPAN)¹

(DS322)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Japan	ADA Arts. 2, 9 and 11	Establishment of Panel	28 February 2005
		GATT 1994 Arts. VI	Circulation of Panel Report	20 September 2006
Respondent	United States		DSU Art. 11	Circulation of AB Report
		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 ISSUES²

- 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 DSU Arts. 6.2 and 21.5	Circulation of AB Report	18 August 2009
			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*