

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX F-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY JAPAN

WORLD TRADE ORGANIZATION

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UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Recourse to Article 21.5 of the DSU by Japan

Request for the Establishment of a Panel

The following communication, dated 7 April 2008, from the delegation of Japan to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Articles 6 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 17.4 of the Agreement on Implementation of Article VI of the GATT 1994 ("*Anti-Dumping Agreement*") in connection with the United States' failure to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this dispute.

The documentation for the panel establishment request is attached and we would like to ask you to circulate the attached document to the members.

I. BACKGROUND TO THIS REQUEST

1. On 23 January 2007, the DSB adopted the Appellate Body Report, and the Panel Report, as modified by the Appellate Body Report. The DSB ruled that:

- (i) by maintaining zeroing procedures¹ in original investigations when calculating margins of dumping on the basis of weighted average-to-weighted average

¹ The term "zeroing procedures" refers to the methodology under which the United States Department of Commerce ("USDOC") disregards intermediate negative comparison results in the process of establishing the

comparisons, the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;²

- (ii) by maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of transaction-to-transaction comparisons, the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*;³
- (iii) by applying zeroing procedures in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;⁴
- (iv) by maintaining zeroing procedures in periodic reviews, the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;⁵
- (v) by maintaining zeroing procedures in new shipper reviews, the United States acts inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement*;⁶
- (vi) by applying zeroing procedures in the 11 periodic reviews identified in Japan's Request for the Establishment of a Panel⁷, 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;⁸ and
- (vii) by relying on margins of dumping calculated in previous proceedings using the zeroing procedures in the two sunset reviews identified in Japan's Request for the Establishment of a Panel⁹, the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.¹⁰

2. At the DSB meeting on 20 February 2007, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB. The United States and Japan thereafter agreed, under Article 21.3(b) of the DSU, that the reasonable period of time ("RPT") for the United States to implement the DSB's recommendations and rulings would expire on 24 December 2007.

3. On 10 March 2008, Japan and the United States decided on procedures that would apply between them under Articles 21 and 22 of the DSU for purposes of this dispute.¹¹ Paragraph 1(a) of that decision provides that Japan need not hold consultations with the United States prior to requesting the establishment of a panel; paragraph 1(b) states that the United States will accept the establishment of a panel at the first DSB meeting at which Japan's panel request appears on the agenda.

overall dumping margin for the product as a whole for a foreign producer or exporter. See Appellate Body Report, footnote 3.

² Panel Report, para. 7.258(a).

³ Appellate Body Report, para. 190(b).

⁴ Panel Report, para. 7.258(a).

⁵ Appellate Body Report, para. 190(c).

⁶ Appellate Body Report, para. 190(d).

⁷ WT/DS322/8.

⁸ Appellate Body Report, para. 190(e).

⁹ WT/DS322/8.

¹⁰ Appellate Body Report, para. 190(f).

¹¹ WT/DS322/26.

II. DECLARED IMPLEMENTATION ACTION AND INACTION

4. In its status report to the DSB of 8 November 2007, the United States informed the DSB that:

"On 6 March 2006, the US Department of Commerce published a notice requesting comments on its intention to no longer perform average-to-average comparisons in anti-dumping investigations without offsets. On 26 January 2007, the Department published a notice that the date after which it would no longer perform such comparisons would be 22 February 2007. Accordingly, as of 22 February 2007, the United States is no longer performing average-to-average comparisons in anti-dumping investigations without offsets."¹²

In the same report, the United States added that it was "continuing to consult internally on steps to be taken with respect to the other DSB recommendations and rulings."

5. On 6 December 2007, the United States provided an identical report to the DSB, with no additional information.¹³

6. On 27 December 2007, the United States Department of Commerce ("USDOC") announced publicly that it had taken steps to implement the DSB's recommendations and rulings with respect to the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products. In particular, the USDOC recalculated the margin of dumping without zeroing.¹⁴

7. On 10 January 2008, the United States informed the DSB that:

"With respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the DSB."¹⁵

8. At the DSB meeting on 21 January 2008, the United States informed the DSB of its view that the elimination of zeroing in average-to-average comparisons in anti-dumping investigations, as described in paragraph 4 above, also implemented the DSB's recommendations and rulings with respect to the maintenance of zeroing procedures in transaction-to-transaction comparisons in anti-dumping investigations, and in periodic and new shipper reviews.

III. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS

A. ZEROING PROCEDURES

9. The DSB made four separate recommendations and rulings that the United States bring the zeroing procedures into conformity with its WTO obligations. These recommendations and rulings related to the maintenance of zeroing procedures as a general rule: (1) in weighted average-to-weighted average ("W-to-W") comparisons in original investigations;¹⁶ (2) in transaction-to-

¹² WT/DS322/22.

¹³ WT/DS322/22/Add.1.

¹⁴ See Issues and Decision Memorandum for the Final Results, Investigation A-588-847, Section 129 Proceeding (Dec. 27, 2007), available at <http://ia.ita.doc.gov/ia-news-2007.html>.

¹⁵ WT/DS322/22/Add.2.

¹⁶ Panel Report, para. 7.258(a).

transaction ("T-to-T") comparisons in original investigations;¹⁷ (3) in any comparison methodology in periodic reviews;¹⁸ and (4) in any comparison methodology in new shipper reviews.¹⁹

10. Although, as noted in paragraph 4, the United States informed the DSB that, with effect from 22 February 2007, it withdrew the zeroing procedures in W-to-W comparisons in original investigations, Japan is unaware of the adoption by the United States of any measures to implement the DSB's recommendations and rulings regarding the maintenance of zeroing procedures: (1) in T-to-T comparisons in original investigations; (2) in any comparison methodology in periodic reviews; and (3) in any comparison methodology in new shipper reviews.

11. By continuing to maintain zeroing procedures in these contexts, and failing to implement the DSB's recommendations and rulings, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU and, as set forth in the DSB's recommendations and rulings, Article 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Additionally, as also set forth in the DSB's recommendations and rulings, in connection with T-to-T comparisons in original investigations, the United States violates Article 2.4.2 of the *Anti-Dumping Agreement*; in connection with periodic reviews, it violates Article 9.3 of the *Anti-Dumping Agreement*; and, in connection with new shipper reviews, it violates Article 9.5 of the *Anti-Dumping Agreement*.

B. PERIODIC REVIEWS

12. This request concerns five of the 11 periodic reviews mentioned in paragraph 1(vi), plus three closely connected periodic reviews that the United States argues "superseded" the original reviews. The United States used zeroing in each of these reviews and, despite the DSB's recommendations and rulings, has omitted to eliminate zeroing from any of them. These eight periodic reviews are identified in Annex 1 of this Request, and stem from anti-dumping duty orders on "Ball Bearings and Parts Thereof From Japan", "Cylindrical Roller Bearings and Parts Thereof From Japan", and "Spherical Plain Bearings and Parts Thereof From Japan". This request also concerns United States Government instructions and notices, issued since the end of the RPT, to liquidate entries covered by these eight reviews. Further, the request concerns any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures.

13. Since the end of the RPT, through the eight periodic reviews at issue, and the United States Government instructions and notices, the United States has improperly continued to impose, collect, and/or assess anti-dumping duties in excess of the proper margin of dumping, and will continue to do so. The United States thereby improperly imposes duties on the importation of Japanese goods in excess of the duties permitted under the United States' Schedule of Concessions.

14. The United States' failure to take measures to eliminate zeroing and, thereby, to bring itself into conformity with its WTO obligations, is inconsistent with Articles 17.14, 21.1 and 21.3 of the DSU. As a result of this omission, the United States continues to act inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, as set forth in the DSB's recommendations and rulings. Further, the United States' measures taken to comply, if and to the extent they exist, are inconsistent with Articles 2.4, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles II:1(a), II:1(b), VI:1 and VI:2 of the GATT 1994 for the reasons given in the previous paragraph.

¹⁷ Appellate Body Report, para. 190(b).

¹⁸ Appellate Body Report, para. 190(c).

¹⁹ Appellate Body Report, para. 190(d).

C. SUNSET REVIEWS

15. The United States has failed to take any action to bring the sunset review determination of 4 November 1999 regarding the anti-dumping duty order on Anti-Friction Bearings from Japan, covered by paragraph 1(vii) above, as well as the sunset review determination of the same order, of 4 May 2006, into conformity with its WTO obligations. Both measures are identified in Annex 2. As a result, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU and, as set forth in the DSB's recommendations and rulings, Article 11.3 of the *Anti-Dumping Agreement*.

IV. CONCLUSION

16. Japan requests that a panel be established under Article 21.5 of the DSU with standard terms of reference, as set forth in Article 7.1 of the DSU, and asks that this request be placed on the agenda of the DSB meeting scheduled for 18 April 2008.

ANNEX I: PERIODIC REVIEWS

ORDER (CASE NUMBER)	NO.	PERIODIC REVIEW (MEASURES AT ISSUE)	COMPANIES
Ball Bearings and Parts Thereof From Japan (A-588-804)	1	1 May 1999 – 30 April 2000 (66 Fed. Reg. 36551, 12 July 2001) (As amended: 72 Fed. Reg. 67892, 3 December 2007) (NTN))	JTEKT ²⁰ and NTN
	2	1 May 2000 – 30 April 2001 (67 Fed. Reg. 55780, 30 August 2002) (As amended: 73 Fed. Reg. 15481, 24 March 2008)	NTN
	3	1 May 2002 – 30 April 2003 (69 Fed. Reg. 55574, 15 September 2004)	JTEKT, NSK and NTN
	4	1 May 2003 – 30 April 2004 (70 Fed. Reg. 54711, 16 September 2005) (As amended: 70 Fed. Reg. 61252, 21 October 2005 (NSK)) (As amended: 70 Fed. Reg. 69316, 15 November 2005 (Nippon Pillow Block))	JTEKT, Nippon Pillow Block, NSK and NTN
	5	1 May 2004 – 30 April 2005 (71 Fed. Reg. 40064, 14 July 2006)	JTEKT, NSK, Nippon Pillow Block and NTN
	6	1 May 2005 – 30 April 2006 (72 Fed. Reg. 58053, 12 October 2007)	Asahi Seiko, JTEKT, NSK, Nippon Pillow Block and NTN
Cylindrical Roller Bearings and Parts Thereof From Japan (A-588-804)	7	1 May 1999 – 31 December 1999 (66 Fed. Reg. 36551, 12 July 2001)	JTEKT and NTN
Spherical Plain Bearings and Parts Thereof From Japan (A-588-804)	8	1 May 1999 – 31 December 1999 (66 Fed. Reg. 36551, 12 July 2001)	NTN

²⁰ JTEKT is formerly known as Koyo Seiko Co. Ltd.

ANNEX 2: SUNSET REVIEWS

ORDER (CASE NUMBER)	NO.	SUNSET REVIEWS (MEASURES AT ISSUE)
Antifriction Bearings from Japan (A-588-804)	9	1994 – 1999 (64 Fed. Reg. 60275, 4 November 1999)
	10	2000 – 2005 (71 Fed. Reg. 26321, 4 May 2006)
