UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

WT/DS322

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

JUNE 28, 2005

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel. We do not intend to offer a lengthy statement; our first written submission responds to the arguments Japan raised in its first written submission.

2. Instead, we would like to focus on a few points regarding Japan's argument. First, we will offer a few comments on procedural issues, issues concerning injury, and then issues concerning dumping.

Procedural Issues

3. Japan's "as such" claims are limited to the so-called "standard computer programs" or the so-called "standard zeroing line" within those "standard computer programs." Mr. Chairman, there may come a day when our technical creations order us around, but that day has not come with respect to the computer programs Commerce officials use in their investigations and reviews. The programs are merely tools that make the job of calculating dumping margins more accurate. Commerce officials instruct the computer how to perform the operations, and not the other way around. The programs do not mandate that Commerce officials take any action inconsistent with the WTO agreements, or prevent them from taking any action consistent with the agreements. If Commerce decided to provide an offset in any proceeding, it would simply

provide the computer with a different set of instructions. Japan's "as such" claims, therefore, should be rejected.

Injury

4. As noted above, the "computer program" Japan is challenging is not a measure that mandates a breach by Commerce; Japan has also failed to show how the "computer program" mandates a breach by the ITC. Japan asserts that certain results "might" have been different if Commerce had provided an offset. But the nature of an "as such" claim is that a measure must *mandate* a breach, not that it *might* result in a breach.

5. Japan makes the same mistake with respect to its applied claims, failing to substantiate its argument that the determinations in this dispute were based on a lack of positive evidence. Japan makes vague and unsubstantiated assertions, without more. In short, Japan has not met its burden of proof with respect to either these "as such" or "as applied" claims.

Dumping

6. Turning now to Japan's claims regarding dumping, the key issue here is whether the text of the Antidumping Agreement[1] contains any obligation to provide an offset to dumping for transactions that exceed normal value.

7. With respect to Japan's argument that the Antidumping Agreement imposes on Members an obligation to provide an offset to dumping in all antidumping proceedings, including assessment proceedings, the starting point is what the text of the Agreement actually says, and

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

what the text does not say. Essentially, Japan is attempting to read an obligation into the Antidumping Agreement that simply is not there.

8. Assuming for the moment that the Appellate Body's finding in *Softwood Lumber* is correct, namely that the Article 2.4.2 of the Antidumping Agreement imposes on Members the obligation to provide offsets when using the average-to-average methodology in an investigation,[2] Japan's arguments concerning other antidumping proceedings still fail.

9. First, such an offset obligation simply cannot flow from the text of Article 2.4 of the Antidumping Agreement. The text of Article 2.4 provides for the obligation to make a "fair comparison." The text further explains that a "fair comparison" is made by considering levels of trade, considering the timing of the sales being compared, and making adjustments for differences in the home market and export sales that affect price comparability. The text of Article 2.4 speaks to the adjustments that are appropriate in order that export price and normal value may be appropriately compared. It does not address the treatment of the results of those comparisons and, for that reason, cannot support Japan's claim that the United States has an obligation to provide offsets in all antidumping proceedings, regardless of methodology used for calculating the margin of dumping.

10. This interpretation of Article 2.4, as not creating an offset obligation, is supported by the text of Article 2.4.2. Article 2.4.2 provides for three comparison methodologies in an investigation: average-to-average comparisons, transaction-to-transaction comparisons, and, when certain conditions exist, average-to-transaction comparisons. This average-to-transaction

[2]Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, para. 108, adopted 31 August 2004

methodology, commonly referred to as the targeted dumping methodology, is provided as an exception to the other two comparison methodologies. It is not an exception to the "fair comparison" obligation of Article 2.4.

11. Japan's effort to read into the "fair comparison" requirement an obligation to offset dumping with non-dumped transactions cannot be reconciled with the obligation to interpret treaty provisions so as to give them meaning. If, as Japan suggests, the obligation to make a "fair comparison" requires the recognition of "negative dumping," a concept nowhere recognized in the Antidumping Agreement or the GATT 1994, the targeted dumping provision would be rendered a nullity. This is because the result of applying the targeted dumping methodology would necessarily be the same as the result of applying the average-to-average comparison methodology. Again, this is an unacceptable result when applying the customary rules of treaty interpretation.[3]

12. Moreover, contrary to Japan's assertions, neither Article 2.4.2 of the Antidumping Agreement nor GATT 1994 contains an obligation to calculate the margin of dumping for "the product as a whole." As stated, Article 2.4.2 provides for three different comparison methodologies: (1) average-to-average, (2) transaction-to-transaction, and (3) average-to-transaction. Logically, where there are numerous transactions, the second and third methodologies will result in multiple comparisons. Each export transaction will result in its own separate comparison. The text of Article 2.4.2 simply does not address whether or how a

[3]See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 23, adopted 20 May 1996; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p.12, adopted 1 November, 1996; Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, para. 7.277, adopted October 1, 2002.

Member should aggregate the results of multiple comparisons into a single overall margin. In fact, the text of Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all. Furthermore, there is no obligation in the text of Article 2.4.2 that requires the expression of a margin of dumping as a percentage.

13. In fact, the phrase "all comparable export transactions," as used in Article 2.4.2, applies only to the use of the average-to-average comparison methodology in an investigation. It does not apply to the use of the transaction-to-transaction comparison methodology or the average-to-transaction comparison methodology.

14. Thus, the obligation to provide for an offset arises, if at all, as a consequence of using the average-to-average comparison methodology in an investigation. Any offset obligation cannot be based on language generally applicable to all three comparison methodologies in Article 2.4.2 without rendering the third comparison methodology a nullity.

15. Moreover, Japan has failed to establish that the obligations of Article 2.4.2 have any application outside the investigation phase. By its own terms Article 2.4.2 applies only to the determination of "the existence of margins of dumping in the investigation phase," a limitation utterly ignored by Japan in its first written submission (and again this morning).

16. The inclusion of the phrase "during the investigation phase" was clearly meant to limit the effect of Article 2.4.2. It stands in stark contrast to text found elsewhere in the Antidumping Agreement where the drafters clearly indicated that these particular provisions were to apply to the entire Agreement. For example, Article 2.1, uses the phrase "For the purpose of this Agreement" to define when a product is "dumped," thus demonstrating that this definition applies to all antidumping proceedings covered by the Agreement.

17. Article 2.4.2 does not contain text such as "for the purpose of this Agreement," or "as used in this Agreement." Quite the opposite, the text of Article 2.4.2 refers specifically to the "investigation phase," thereby demonstrating that the rules it establishes apply only to an investigation to establish the existence of dumping, and not to any other phase of an antidumping proceeding. While the chapeau to Article 9.3 refers to the provisions of Article 2, generally, that general reference cannot overcome the more specific limitation found in Article 2.4.2.

18. Clearly, if any obligation to provide for an offset against dumping exists, it exists only as a consequence of using the average-to-average comparison methodology in an investigation, and not to any other antidumping proceeding. Japan's claims that such an obligation exists beyond these confines should be rejected.

19. As discussed in our written submission, the United States respectfully disagrees with the Appellate Body's reasoning in *Softwood Lumber* and *Bed Linen* for finding such an obligation to exist when using the average-to-average methodology in an investigation. For the reasons stated therein, we urge this Panel not to follow the Appellate Body's reasoning in *Softwood Lumber*, and instead find that the Antidumping Agreement contains no obligation to provide for an offset to dumping in any antidumping proceeding, regardless of the comparison methodology utilized.

20. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.