UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

(AB-2006-5)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

November 20, 2006

1. Members of the division, good morning. The United States welcomes this opportunity to present its views on some of the issues in this dispute.

The Measures At Issue

2. I would like to start with a discussion of the Panel's conclusion on the measure subject to challenge "as such." The Panel found that a single measure existed with respect to zeroing based on any type of comparison in any type of antidumping proceeding. We will not repeat all of our arguments here. However, we would like to reiterate that it is not possible to reconcile the Panel's finding with Japan's own argumentation before the Panel. Japan repeatedly altered the nomenclature it used to identify the measure at issue, beginning with the consultation request ("practice"), through the panel request ("procedure"), to its panel submissions ("model and simple zeroing procedures set forth in the United States' standard computer programs")[1] – and the constant shift in terminology and argumentation continues right through to Japan's appellate submissions. Indeed, while Japan had before the Panel expressly argued that the "measures" at issue were "model and simple zeroing" as set forth in computer programs, Japan now contends that it used the terms "model" and "simple" zeroing only "for explanatory purposes."[2]

3. It is worth recalling the Appellate Body's statement that "as such" challenges are "serious challenges"[3] to measures where there is a presumption that the measures in question

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[1] Japan First Submission, Section III.D and para. 57.

[2] Japan Appellant Submission, para. 39.

[3] Appellate Body Report, *United States – Antidumping Measures on Oil Country Tubular Goods from Argentina,* WT/DS268/AB/R (adopted 17 December 2004), para. 172.

have undergone scrutiny to ensure compliance with WTO obligations.[4] The Appellate Body further cautioned that "as such" challenges should be made with particular diligence and clarity. The claims must state "unambiguously" the measures under municipal law that are subject to challenge, in order to leave the responding Member with "little doubt" as to what is being challenged.[5] Japan's shifting description of the measure at issue cannot be described as either unambiguous or clear; moreover, far from *removing* doubt about what is being challenged, Japan's chosen course of action *increased* doubt.

4. Not only did Japan fail to identify the measure consistently or clearly, but Japan also failed to supply evidence to demonstrate the existence of the measure. The Appellate Body has noted that the existence of an unwritten measure may not be lightly assumed,[6] and the Panel recognized that the analysis of a claim involving an unwritten measure "raises particular problems with respect to the evidence required to establish that the measure constitutes a rule or norm of general and prospective application."[7] While it is true that a measure need not have been applied in order to be subject to challenge as such, and it is true that a measure need not be written in order to be subject to challenge as such, the question here is whether Japan has proven the existence of an unwritten measure that has never been applied. Japan "lightly assumes" the existence of the measure, even though, as the Appellate Body has cautioned, the "very existence" of an unwritten measure "may be uncertain."[8] Indeed, the only way in which Japan

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[4] Para. 173.
[5] Para. 173.
[6] Appellate Body Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, para. 196.
[7] Panel Report, para. 7.50.
[8] *US – Zeroing (EC)*, para. 197.

has attempted to establish the existence of the measure is through an assumption, since there is no evidence that such a measure exists.

5. The United States raises a single claim of error with respect to the Panel's finding of an "as such" measure that applies to transaction-to-transaction and average-to-transaction comparisons in an investigation. The United States recalls that it has *never* used an average-to-transaction comparison in an investigation, had never used a transaction-to-transaction comparison in a final determination prior to Japan's panel request, and has utilized it only on a single occasion since.

6. The United States notes that nowhere does Japan assert that the parties in fact consulted on an "as such" measure involving transaction-to-transaction comparisons. Japan focuses its argument instead on its misleading statement that the United States "did not object" to the lack of consultations. It is not that the United States failed to object to the lack of consultations but that the United States was not aware that Japan had included a challenge to transaction-to-transaction comparisons in its consultation request. Furthermore, the United States made clear in its first submission that Japan had failed to identify any measure involving the transaction-to-transaction comparison.[9] Japan's "as such" measure had been limited to computer programming lines, and the United States noted that Japan had failed to provide any computer programming lines pertaining to the transaction-to-transaction comparison. Japan failed to respond to that argument, but instead simply confirmed that the measures it was challenging were computer

[9] U.S. First Submission, n. 23.

programming lines, without identifying where in its panel request such lines had been identified with respect to transaction-to-transaction comparisons.[10]

7. Japan contends that its consultation request *did* include transaction-to-transaction comparisons in investigations because the request references the "zeroing practice." First, this only highlights the absurdity of challenging as a "practice" something which had not even taken place at the time of the consultation request. Second, it is circular - a "zeroing practice" would only include transaction-to-transaction comparisons if it is assumed that there is a "practice" with respect to transaction-to-transaction comparisons. Third, Japan could not have meant to include "zeroing practice" zeroing in all possible comparisons in all types of proceedings. Otherwise, Japan would not have specifically identified average-to-average comparisons in investigations and average-to-transaction comparisons in reviews in the very same consultation request. Japan fails to explain how the United States was supposed to understand "zeroing practice" to refer to all comparisons in all proceedings when Japan itself only identified two comparisons in two proceedings. Fourth, Japan's reliance on the phrase "zeroing practice" further highlights the moving target that has been Japan's identification of the measure at issue. It was "zeroing practice" in the consultation request, "zeroing procedure" in the panel request, and "model and simple zeroing as set forth in the Standard Zeroing Line" in the submissions to the Panel.

8. The United States also wishes to address Japan's misapprehension of the Appellate Body report in the *Mexico Corn Syrup* Article 21.5 proceeding. The issue in that dispute did not relate

[10] Japan First Opening Statement, paras. 1-18.

to the fact that consultations had not been held with respect to a particular measure, but, rather, to the fact that consultations had not been held *at all*.[11] Significantly, Mexico *knew* that no consultations had taken place at the time the panel request was filed, yet expressly stated to the panel that it *did not object* to the absence of consultations.[12] By contrast, the question here is not whether consultations were held, but whether consultations were held with respect to a particular "measure". The United States made it clear in its very first submission that Japan had not even been able to *identify* any measure involving the transaction-to-transaction comparison.[13] As a result, Japan and the United States could not have consulted on a measure that had not been identified, let alone a measure that did not exist.

9. Finally, in its appellee submission, Japan argues that the Panel correctly identified one measure encompassing all forms of zeroing, including transaction-to-transaction and average-to-transaction comparisons in investigations. Japan contends that the "mechanics of zeroing are the same" regardless of proceeding or comparison[14] and that it is the United States that suggests that there is "something different about T-to-T or W-to-T comparisons in original investigations that required the Panel to treat them differently in determining the precise content of the zeroing procedures . . . ."[15] However, Japan took a very different position when it decided to withdraw its claim before the panel concerning average-to-transaction comparisons in investigations. At that time, Japan contended that the basis for its withdrawal of the claim was the "uncertainty"

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[11] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn (HFCS) Syrup from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW (adopted November 21, 2001), paras. 35, 42-43, 51.

[12] *Mexico – Corn Syrup (21.5) (AB),* para. 42.

[13] U.S. Fist Submission, para. 23.

[14] Japan Appellee Submission, para. 7.

[15] Japan Appellee Submission, para. 9.

about how the average-to-transaction comparison works. But that argument makes no sense if, as Japan argues to the Appellate Body, zeroing is the same regardless of comparison or proceeding. Furthermore, Japan's own notice of appeal in this proceeding shows that Japan considers them to be different – Japan made clear that in its view zeroing in transaction-to-transaction comparisons is to be distinguished from zeroing in other contexts. Japan cannot have it both ways: either zeroing is the same in all proceedings and comparisons, or it is not. As the United States has demonstrated, and as Japan at one time acknowledged, it is not.

Zeroing as a Permissible Interpretation of the Antidumping Agreement

10. In our appellee submission, we have demonstrated that the Panel report is a thorough and well-reasoned interpretation of the Antidumping Agreement in accordance with customary rules of treaty interpretation. The Panel ultimately concluded that the use of zeroing in reviews and investigations using a transaction-to-transaction or average-to-transaction comparison is based on a permissible interpretation of the Antidumping Agreement pursuant to Article 17.6. Japan has failed to explain why the Panel's reasoning is flawed. To succeed in its claim of legal error, Japan must do more than propose an alternative interpretation of the provisions in question that it prefers over the Panel's interpretation; instead, Japan must demonstrate that the Panel's interpretation of the text of the Antidumping Agreement is not permissible. Japan has not done so.

11. This morning, we wish to focus on the fundamental misinterpretations of the Antidumping Agreement that underlie the positions advanced by Japan and certain third parties in this appeal.

12. Japan contends that a "harmonious" interpretation of Article 2.4.2 requires zeroing to be prohibited under both average-to-average and transaction-to-transaction comparisons.[16] However, that argument is premised on the flawed theory that there is some kind of "systematic" relationship between the results of these two distinct ways of comparing export price with normal value. As the United States demonstrated in its submission, and as the WTO Dumping Handbook explains, average-to-average and transaction-to-transaction comparisons almost always lead to different results. In a transaction-to-transaction comparison, the investigating authority begins with the export price transactions and must compare every export price to a single normal value transaction that is the best match for each export price transaction. The investigating authority must determine the single best matching normal value from among multiple normal value transactions that are each potentially comparable to the export price transaction. By contrast, in making an average to average comparison all such comparable normal value transactions would figure into the average normal value. The matching determination in a transaction-to-transaction comparison may take into account characteristics, such as exact date of the transaction, which are generally not appropriate for consideration in determining an average normal value. Moreover, there may be more export transactions than normal value transactions, or vice versa. Thus, the process of individual matching means that some normal values that are included in an average normal value across the period of investigation may not be included in a transaction-to-transaction comparison. Conversely, some normal value transactions may turn out to be the best match for multiple export price

[16] Japan Appellant Submission, para. 115.

transactions. Because the basis of normal value differs in this manner between average-to-average and transaction-to-transaction comparisons, the margins will not be the same. In fact, a transaction-to-transaction comparison could lead to a higher margin or lower margin than an average-to-average comparison, depending on what normal values are ultimately used. Therefore, the existence of dumping may well depend on what comparison is chosen, but that is a function of the distinct nature of the comparisons themselves, not the use of zeroing. If Members had considered a disparity in the magnitude of the margin to be problematic, they would not have included both average-to-average and transaction-to-transaction comparisons in Article 2.4.2, but rather would have picked one or the other.

13. Indeed, the fact that transaction-to-transaction and average-to-transaction comparisons produce different results contradicts Japan's assertion that a general prohibition on zeroing must exist to ensure a "harmonious" interpretation of Article 2.4.2. Further confirmation that a general prohibition on zeroing does not exist is the fact that such a prohibition would collapse average-to-average and average-to-transaction comparisons. The European Communities has come to agree with this view, at least when speaking to its domestic courts.

14. In addition to the fact that these comparisons produce different results, Japan's argument ignores a key finding of the Panel in this dispute based on the text of the relevant provisions. In particular, the Panel's detailed textual analysis found that the definition of dumping in the Antidumping Agreement and the GATT 1994 "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales

transactions."[17] As the Panel report demonstrates in detail, the terms "dumping" and "margins of dumping" are applicable at a transaction-specific level. Thus "margins of dumping" may refer to the result of a single transaction-to-transaction comparison. An interpretation of the term "margins of dumping" as inapplicable at a transaction-specific level denies this term an ordinary meaning that is apparent from the text of the definition of dumping in Article VI of the GATT 1994 and Article 2.1 of the Antidumping Agreement. The Panel properly found that nothing in the text of Article 2.4.2 requires that the term margins of dumping be interpreted in such a manner so as to conflict with the definition of dumping.

15. That a dumping margin can be calculated on a transaction-specific basis has direct bearing on the determination of final liability for dumping. Article 9.3 establishes the relationship between the margin of dumping and the amount of the dumping duty; the duty cannot exceed the margin. Therefore, if the margin of dumping can be calculated on a transaction-specific basis, the amount of the duty can also be calculated on a transaction-specific basis. Japan had argued that a "margin of dumping" must refer to an aggregated margin of dumping for the "product as a whole" on an exporter-specific basis. In evaluating Japan's argument, the Panel examined the text of Article 9 and explained why Japan's interpretation was wrong. In particular, the Panel reasoned that prospective normal value systems calculate margins of dumping on a transaction-specific basis and do not have reviews. The United States considers that to properly appreciate the Panel's reasoning, it is critical to understand the operation of a prospective normal value system.

[17]Panel Report, para. 7.107.

16. In such a system, the investigating authority calculates an average normal value. For example, an importer imports a product on November 20, and that importation provides the export price. Normal value and export price are compared; if export price is less than normal value, then the importer must pay the difference. The next day, a second importer imports the same product. Export price is *greater than* normal value. Does the government pay either of the *importers* the difference? No. The second transaction is treated as if it were zero, and nothing is paid. Canada, a Member with a PNV system, said as much in the *Softwood Lumber 21.5* dispute.[18] What does that mean? It means that if the dumping margin on the first transaction is $5, then the ceiling on the amount of duties that can be collected is $5, and if the dumping margin on the second transaction is -$3, the ceiling is $0, not -$3.

17. Let us now examine the U.S. assessment system, with the same transactions, occurring on the same dates, November 20 and 21. Let us assume the period of review ends December 31. On December 31, the authority goes back and examines all of the transactions for the period of review. It does so in a way that is the same as a PNV system: an average normal value is calculated and compared to the export price of the transaction in question. Assume the two transactions in November are the only transactions in the entire period of review. If zeroing is prohibited any time there is an aggregation of transactions, as Japan argues, then the United States is entitled to collect $5 for the November 20 transaction, but, in order to provide an offset, it is obliged to give back $3 for the November 21 transaction, for a total collection of $2. But

[18] Panel Report, *United States – Softwood Lumber V – Recourse to Article 21.5 of the DSU by Canada,* WT/DS264/RW (adopted 1 September 2006), para. 5.55.

nothing in the Antidumping Agreement requires an authority to *give money back* to an importer, as the Appellate Body has itself noted.[19]

18. The question then becomes: Why is Canada permitted to collect $5, but the United States is only permitted to collect $2? The answer Canada offered to the panel in *Softwood Lumber 21.5* is that the United States aggregates its transactions. But why does it matter whether a Member collects the duties on the day of importation, one at a time, or it does so at some later date, on an aggregated basis? There is no textual – or otherwise rational – basis to conclude that the date upon which the Member decides to calculate the liability, whether it is the date of importation or some period of time after that, is relevant to the amount of duties that can be collected.

19. The permissibility of transaction-specific margins of dumping similarly precludes Japan from prevailing on its claims with regard to new shipper reviews and sunset reviews, as demonstrated by the Panel's reasoning in its report and as demonstrated in our appellee submission.

The Promotion of Security and Predictability

20. Before concluding, we would like to comment on Japan's assertion that the DSU contains "requirements . . . for dispute settlement to promote security and predictability"[20] and that the Panel erred because it was "require[d] to promote" security and predictability.[21] The United States agrees that the dispute settlement system does provide security and predictability.

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[19] *US – Zeroing (EC) (AB)*, n. 234.
[20] Japan Appellant Submission, para. 5.
[21] Japan Appellant Submission, para. 103.

However, the dispute settlement system only provides security and predictability when it follows the approach set forth in, and meets the requirements of, Article 3.2 of the DSU – which the Panel did. Article 3.2 contains the only reference in a covered agreement to the phrase "security and predictability." Article 3.2 explains that the dispute settlement system *itself* is a central element in providing security and predictability to the multilateral trading *system*. Japan's argument appears to be premised on a misreading of Article 3.2 - Japan appears to read Article 3.2 as an independent obligation for panels to provide security and predictability to trade flows rather than to the multilateral trading system. These are two very different concepts and Japan's approach fails to respect the text agreed in the DSU.

21. Security and predictability is not an independent obligation for panels – such an independent obligation would be difficult to reconcile with the functions assigned to panels under Article 11 of the DSU. Rather, the remainder of Article 3.2 provides context for how the dispute settlement system provides security and predictability to the multilateral trading system.

22. Article 3.2 explains that the dispute settlement system serves to *preserve* the rights and obligations of Members under the covered agreements and to clarify the *existing provisions* of the covered agreements in accordance with customary rules of interpretation of public international law. It notes that DSB recommendations and rulings cannot add to or diminish the rights and obligations of Members provided in the covered agreements. Thus, Article 3.2 makes clear that the dispute settlement system provides security and predictability through application of agreed-upon interpretive principles to agreed-upon WTO provisions, in order to preserve the rights and obligations to which the Members agreed. DSB recommendations and rulings can

clarify those WTO provisions but are not themselves the source of rights and obligations. Article 3.2 demands a correct interpretation of the covered agreements. If a dispute settlement finding is not in accord with the outcome that can be predicted to result from the proper application to an agreement provision of the customary rules of interpretation of public international law, that finding cannot be considered predictable. Nor is security provided to the multilateral trading system if Members can not be confident that the dispute settlement system will adhere to the correct interpretive approach, and will not add rights and obligations not agreed to by the Members, or diminish those rights and obligations. That is the only form of security and predictability provided for in, and by, the DSU. In other words, what Japan views as an independent obligation imposed upon panels and the Appellate Body – the promotion of security and predictability – is instead the *result* that obtains when the dispute settlement system functions as provided in Article 3.2.

Conclusion

23. In conclusion, we want to thank you for this opportunity to address the issues in this dispute, and we look forward to responding to any questions that you may have.