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BEFORE THE WORLD TRADE ORGANIZATION

***UNITED STATES – MEASURES RELATING TO
ZEROING AND SUNSET REVIEWS***

WT/DS322

OPENING STATEMENT OF JAPAN

(AB-2006-5)

20 NOVEMBER 2006

I. INTRODUCTION

1. Mr. Chairman and Members of the Appellate Body, staff of the Secretariat, Japan appreciates the opportunity to present this opening statement to you, and looks forward to answering your questions. We would also like to thank you for your hard work in this appeal.

2. This is the third appeal in 2006 regarding the United States' zeroing procedures and, by this point, there is very little new to say. Indeed, the United States' appellee's submission raises no new arguments whatsoever. Instead, it simply repeats tired arguments that were rejected by the Appellate Body in *US – Zeroing (EC)* (“*US – Zeroing*”) and *US – Softwood Lumber V (Article 21.5 – Canada)* (“*Lumber*”). Strikingly, the United States ignores these Reports, presenting its arguments as if this were the first time they had been advanced to the Appellate Body. Apparently, while WTO law has moved on, the United States' arguments have not.

3. In this statement, Japan will highlight the United States' main arguments, explaining when and how they were previously rejected by the Appellate Body. We start with zeroing in T-to-T comparisons in original investigations, before turning to periodic reviews, new shipper reviews and, finally, Japan's as applied claims in periodic and sunset reviews. Japan will address the reasons why the Appellate Body should reject the *amicus* submission at the end of the questioning period, as suggested by the Appellate Body in its letter of 15 November.

II. T-TO-T COMPARISONS IN ORIGINAL INVESTIGATIONS

4. In asserting that zeroing is WTO-consistent in T-to-T comparisons, the United States never addresses the fact that, in *Lumber*, the Appellate Body found precisely the reverse, just three months ago. This failing discredits the United States' entire position.

5. To defend zeroing in T-to-T comparisons, the United States also merely recycles four old arguments: *first*, it argues that Article 2.1 of the *Anti-Dumping Agreement* does not define “dumping” in relation to the product as a whole; *second*, it contends that the prohibition on zeroing stems from the phrase “all comparable export transactions” in

Article 2.4.2, which does not apply to T-to-T comparisons; *third*, it repeats its so-called “mathematical equivalence” argument; and, *fourth*, it maintains that zeroing involves a “fair comparison” under Article 2.4.

6. *First*, the United States continues to believe that there is no duty in Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 to define “dumping” and “margins of dumping” for the “product” as a whole.¹ The United States also claims that, in *Lumber*, the Appellate Body “disregarded” or “abandoned” its “product as a whole” interpretation of Article 2.1, and adopted a new *rationale* for prohibiting zeroing.²

7. These arguments are untenable. In *US – Zeroing*, the Appellate Body “stated unambiguously”, and repeatedly, that “dumping” and “margins of dumping” are defined in relation to the “product as a whole”.³ In that Report, and also in *Lumber*, the Appellate Body stated expressly that this interpretation was “based” on the context found in Article 2.1.⁴ Further, in *Lumber*, the Appellate Body cited a lengthy passage from *US – Zeroing* in which it stated that “dumping” is defined for the “product as a whole”.⁵ The Appellate Body even stated that its reasoning was “consistent” with previous “zeroing” reports, quoting a statement to the effect that the results of all multiple comparisons must be taken into account “to establish margins of dumping for the product as a whole”.⁶

8. In these circumstances, Japan considers that it is implausible in the extreme to believe that, in *Lumber*, the Appellate Body “disregarded” or “abandoned” its “product as

¹ US appellee’s submission, paras. 1, 13 to 23.

² US appellee’s submission, paras. 11 and 22; US Statement to the DSB on the adoption of the Appellate Body Report in *US – Softwood Lumber V (Article 21.5 – Canada)* on 1 September 2006 (“Interestingly, the Appellate Body report in this dispute abandons the “product as a whole” terminology used in prior reports such as *Zeroing (Complaint by the EC)* and *Softwood Lumber V*, and on which Canada heavily relied. *Indeed, the Appellate Body report acts as though the Appellate Body had never relied on this concept in its past findings and the Appellate Body never refers to it in its own reasoning. The Appellate Body thus leaves Members wondering if the Appellate Body has disavowed that concept, but does not want to tell Members, or if the concept still has force for the Appellate Body, but it will leave it to Members to guess how and in what circumstances.*” Emphasis added.)

³ Appellate Body Report, *US – Zeroing (EC)*, para. 126, 127, 128 and 132.

⁴ Appellate Body Report, *US – Zeroing (EC)*, para. 126 and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92.

⁵ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92, citing Appellate Body Report, *US – Zeroing (EC)*, para. 126. *See, further*, Japan’s appellant’s submission, paras. 76 to 92.

⁶ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89, citing Appellate Body Report, *US – Softwood Lumber V*, para. 98. Emphasis added.

a whole” interpretation of Article 2.1 in favour of a new approach. Instead, the Appellate Body’s reasoning appears to be rooted in the *Agreement*-wide definition of “dumping” and “margins of dumping” that stems, among others, from Article 2.1 and Article VI. The United States is simply trying to undermine the perfectly consistent case-law with which it disagrees, by creating a false impression of interpretative chaos in the Appellate Body reports.

9. **Second**, the United States’ argument that zeroing is permitted in a T-to-T comparison under Article 2.4.2 is highly misleading because it overlooks the fact that the Appellate Body found precisely the reverse in *Lumber*. In making this argument, the United States mistakenly persists in attaching importance to the phrase “all comparable export transactions”.⁷ The Appellate Body examined the significance of that phrase in *Lumber*, explaining that – in a comparison between the prices of *one* home market transaction and *one* export transaction – the reference to “*all*” export transactions “is not pertinent”.⁸ The United States ignores the Appellate Body’s reasoning.

10. **Third**, the United States reiterates its “mathematical equivalence” argument to the effect that, absent zeroing, the outcomes of W-to-W and W-to-T comparisons would be identical.⁹ Yet, the United States fails to acknowledge that the *very same* argument was expressly rejected by the Appellate Body in *Lumber*. The United States contends that the Panel’s erroneous findings on this argument are beyond the scope of appellate review because they are factual findings.¹⁰ This is incorrect.

11. By their nature, facts pertain to *events and circumstances that have actually occurred*.¹¹ Under the “mathematical equivalence” argument, the Panel did not inquire into real events or circumstances. Rather, the Panel was engaged in the *interpretation* of Article 2.4.2 using an interpretative “*hypothesis*” invented by the United States on the basis of specific *assumptions*.¹² In other words, under the “mathematical equivalence”

⁷ See, for example, US appellee’s submission, paras. 1, 13 to 17, and 28.

⁸ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

⁹ US appellee’s submission, paras. 35 ff.

¹⁰ US appellee’s submission, para. 42.

¹¹ Appellate Body Report, *US – Lamb*, para. 136.

¹² US appellee’s submission, para. 43.

argument, the Panel created *afiction* as part of its legal *interpretation*. The Panel's erroneous examination of the "mathematical equivalence" argument did not, therefore, involve fact finding.

12. Indeed, in *Lumber*, the Appellate Body rejected the same "mathematical equivalence" argument – even though Canada made no appeal of the facts.¹³ The Appellate Body found that the United States' argument: (1) rests on "*misguided*" factual "*assumptions*",¹⁴ as well as a *contested interpretation* of the second sentence of Article 2.4.2,¹⁵ (2) does *not* demonstrate that "mathematical equivalence" occurs "in all cases, or at least most of them";¹⁶ (3) fails to explain how the United States would combine W-to-W and W-to-T comparison results;¹⁷ (4) does not address the fact that – even if zeroing were permitted in a W-to-T comparison under the second sentence of Article 2.4.2 – that comparison is an "exception" that "cannot determine the interpretation" of the comparisons in the first sentence.¹⁸ (5) Finally, the "mathematical equivalence" argument is, in any event, a red-herring because it concerns the W-to-W and W-to-T comparisons, not the T-to-T comparison at issue in *Lumber*.¹⁹

13. On appeal, the United States submits a judgment of the Court of First Instance of the EC ("CFI") that was delivered on 24 October 2006. Given its date, this judgment is not part of the record in this dispute, and Japan has never had an opportunity to comment fully on it. This judgment may still be appealed to the EC Court of Justice.

14. The CFI's judgment examines an EC dumping determination made using a W-to-T comparison under the second sentence of Article 2.4.2. The EC apparently included *all* export transactions in the W-to-T comparison, and not solely those in the "pricing

¹³ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 97 to 99; Canada's Notice of Appeal is document WT/DS264/25. Japan addressed the mathematical equivalence argument in detail in paras. 49 to 69 in its third participant's submission in *Lumber*.

¹⁴ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

¹⁵ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98.

¹⁶ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

¹⁷ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98. Japan addressed, in detail, the United States' argument that it would combine W-to-W and W-to-T comparison results in its Comments on the United States' Response to Japan's Opening Statement at the Second Panel Meeting of 2 November 2005, paras. 1 to 13.

¹⁸ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.

¹⁹ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

pattern” justifying recourse to this exceptional comparison method. Japan and the United States *agree* that this is the wrong approach to a W-to-T comparison under the second sentence.²⁰ The interpretative assumptions underlying the CFI’s approach are, therefore, incorrect.

15. Also, the CFI appears to have accepted the “mathematical equivalence” argument on the basis of “*ceteris paribus*” factual assumptions, which the Appellate Body described as “misguided”.²¹ These assumptions fail to take into account the fact that the outcome of a dumping determination depends on the inter-play of many decisions made by the authority, besides the choice of comparison method.²² Thus, although an authority *can* construct W-to-W and W-to-T comparisons that produce identical outcomes, that is neither inevitable in practice nor compelled by the *Anti-Dumping Agreement*.

16. In any event, a decision of a domestic court, ruling on domestic law, according to a standard of review arguably favourable to a domestic authority, is irrelevant in interpreting WTO law. In that respect, the CFI’s understanding of WTO anti-dumping law is wrong in key respects because, for example, it incorrectly finds that “dumping” can be determined for individual export transactions.²³

17. A further feature of the United States’ “mathematical equivalence” argument deserves mention. The United States is at pains to dispute the view that multiple T-to-T comparison results must be “aggregated” into “one margin” for the product as a whole.²⁴ Yet, in illustrating the “mathematical equivalence” argument, the United States did as USDOC always does: it aggregated multiple comparison results to produce a single

²⁰ To recall, Japan believes that the W-to-T comparison includes solely the *sub-set* of the export transactions making up the “pricing pattern”. Similarly, under U.S. law, the W-to-T comparison *must* be confined to this sub-set of transactions (USDOC Anti-Dumping Regulations, 19 C.F.R. § 351.414(f)(2), Exhibit JPN-3). See Japan’s opening statement at the second meeting with the Panel, 15 September 2005, para 59. In addition, the United States believes that the result of this limited W-to-T comparison *must* be combined with the results of a W-to-W comparison conducted for the remaining export transactions.

²¹ *Ritek* Judgment, para. 109, citing the Opinion of Advocate-General Jacobs in *Petrotub*, where the Advocate-General used a *ceteris paribus* approach. Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

²² See Japan’s third participant’s submission in *US – Zeroing*, para. 209.

²³ *Ritek* Judgment, para. 110.

²⁴ See, for example, US appellee’s submission, paras. 18 to 23 and 31 to 33.

overall margin.²⁵ In short, the United States' example illustrates that it respects the product as a whole requirement in all respects, the only exception being the exclusion of *negative* comparison results.²⁶

18. Through the “mathematical equivalence” argument, the United States also continues to insist that zeroing in a W-to-T comparison in original investigations is a *necessity* to ensure that the second sentence of Article 2.4.2 is not deprived of meaning.²⁷ This vigorously asserted argument shows that the United States' claim, in its own appeal, that it might not zero in a W-to-T comparison in an original investigation is hollow.²⁸

19. **Fourth**, the United States repeats that zeroing in a T-to-T comparison is “fair” under Article 2.4 of the *Anti-Dumping Agreement*.²⁹ Yet again, the United States is rehashing old arguments that were dismissed in *Lumber*. The Appellate Body correctly found that zeroing in a T-to-T comparison “artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely”; this, it held, is not “impartial, even-handed, or unbiased”.³⁰

20. Now the United States suggests that zeroing is “fair” because of the need to protect the injured U.S. industry.³¹ This is nonsense. Even-handed treatment of U.S. and foreign interests requires that *both* positive *and* negative comparison results be fully reflected in the dumping determination. It is true that U.S. interests would be prejudiced if the USDOC decided to treat *positive* comparison results as *zero*, just as foreign interests are prejudiced by the current U.S. zeroing rule. However, the USDOC has not yet engaged in the zeroing of positive results.

III. PERIODIC REVIEWS

21. In defending the Panel's findings that the zeroing procedures are permitted in periodic reviews, the United States ignores the Appellate Body's rulings to the contrary

²⁵ US appellee's submission, Table 1, page 19.

²⁶ See Appellate Body Report, *US – Softwood Lumber V*, para. 99.

²⁷ See US appellee's submission, para. 45.

²⁸ See Japan's appellee's submission, para. 105.

²⁹ US appellee's submission, para. 48 ff.

³⁰ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

³¹ US appellee's submission, paras. 51 and 52.

in *US – Zeroing*. Again, the United States’ arguments lack both credibility and intellectual rigor.

22. The United States makes three arguments: *first*, it maintains that there is no duty to determine “margins of dumping” in periodic reviews under Article 9.3 of the *Anti-Dumping Agreement* for the “product” as a whole; *second*, it argues that, in a prospective normal value (“PNV”) duty assessment system, margins are calculated on importation for individual transactions; and, *third*, it contends that the “importer- and import-specific” basis of duty assessment means that margins must be calculated in periodic reviews on this basis.

23. *First*, the United States persists in arguing that “margins of dumping” need not be established in periodic reviews for the “product” as a whole. However, the United States disregards the fact that, in *US – Zeroing*, the Appellate Body found that, under Article 9.3, “the amount of the assessed anti-dumping duties shall not exceed the *margin of dumping as established ‘for the product as a whole’*”.³² The United States has no answer to this point except to argue that the Appellate Body’s interpretation is wrong.³³

24. *Second*, the United States continues to argue that, under a PNV system, “margins of dumping” may be calculated for individual import transactions, and that the total amount of duties need not be reviewed in light of the margin of dumping determined for the review period.³⁴ Once again, the Appellate Body has previously considered, and rejected, this argument.³⁵ A “margin of dumping” is not determined at the time of importation on a transaction specific basis.³⁶ Margins are first calculated in original investigations; anti-dumping duties are imposed on that basis on each importation of the product; the amount of duties initially imposed may be reviewed, and in the case of the prospective system, a “refund” must be paid under Article 9.3.2 “when the duties paid

³² Appellate Body Report, *US – Zeroing (EC)*, para. 127. Emphasis added. See, further, Japan’s appellant’s submission, paras. 138 to 147.

³³ Communications from the United States to the DSB, 17 May and 19 June 2006, WT/DS294/16 and WT/DS294/18.

³⁴ US appellee’s submission, paras. 55 and 56.

³⁵ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.

³⁶ Appellate Body Report, *US – Zeroing (EC)*, para. 128. See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87 (“the results of transaction-specific comparisons are not, in themselves, ‘margins of dumping’”).

exceed the actual margin of dumping”.³⁷ In *any* review under Article 9.3 – under *any* system of duty collection – the authority must determine a margin of dumping for the product as a whole by aggregating all multiple comparison results.³⁸

25. For the first time, the United States introduces evidence regarding Canada’s PNV system to support its interpretation of Article 9.3. This evidence is not part of the Panel record. In any event, under the *Vienna Convention*, Canada’s practice is not relevant to the interpretation of Article 9.3 because, on its own, it does not establish “subsequent practice” that expresses, far less implies, agreement on the meaning of that provision among Members.³⁹

26. *Third*, the United States reiterates that, because duties are imposed on an “importer- and import-specific” basis, margins must be determined on the same basis in periodic reviews.⁴⁰ In dismissing this argument in *US – Zeroing*, the Appellate Body noted that, under the *Anti-Dumping Agreement*, margins are calculated for exporters and foreign producers, not for importers, even though duties may be assessed on an importer- and import-specific basis.⁴¹ The Appellate Body explained that this interpretation “is consistent with the notion of dumping, which is designed to counteract the *foreign producer’s or exporter’s pricing behaviour*. Indeed, it is the *exporter*, not the importer, that engages in practices that result in situations of dumping.”⁴² In other words, under Article 9 of the *Anti-Dumping Agreement*, the United States assumed *international* obligations on the maximum amount of duties to safeguard the interests of *foreign* exporters, not to protect *U.S.* importers.

27. The United States offers an example aimed at illustrating the alleged “absurdity” of the exporter-oriented approach to periodic reviews that the Appellate Body has already upheld.⁴³ The United States’ example shows that, under an exporter-oriented approach, the ceiling imposed by Article 9 can *always* be respected by allocating among the

³⁷ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.

³⁸ Appellate Body Report, *US – Zeroing (EC)*, para. 132.

³⁹ Appellate Body Report, *EC – Chicken Cuts*, para. 259.

⁴⁰ US appellee’s submission, paras. 63, 64 and 65.

⁴¹ Appellate Body Report, *US – Zeroing (EC)*, paras. 128 and 129.

⁴² Appellate Body Report, *US – Zeroing (EC)*, para. 129. Emphasis added.

⁴³ US appellee’s submission, Table 2, page 28.

different importers the maximum amount of duties that may be imposed on imports from a particular exporter.⁴⁴ There is nothing absurd to this exporter-oriented approach because, as the Appellate Body said, anti-dumping duties counteract the *exporter's* pricing behaviour, and not the importer's.

IV. NEW SHIPPER REVIEWS

28. The United States' arguments on the prohibition of zeroing in new shipper reviews are as scant as those of the Panel. The United States acknowledges that the Panel disposed of Japan's claim under Article 9.5 of the *Anti-Dumping Agreement* without even citing to the text of the provision.⁴⁵ This hardly demonstrates a thorough examination by the Panel of Japan's claim. The mainstay of the United States' defence of the Panel is that there is no requirement to determine "dumping" and "margins of dumping" for the "product" as a whole.⁴⁶ Japan has explained already the flaws in this argument.⁴⁷

29. As well as denying the product-wide definition of "dumping", the United States proposes a reading of Article 9.5 that modifies the text of that provision. Like Article 6.10, Article 9.5 refers to "*individual margins of dumping* for any exporters or producers" that did not export the product during the investigation. As with Article 6.10, the word "individual" qualifies the term "margins of dumping", indicating that *one* (individual) margin is determined for *each new exporter or producer*.

30. The United States interprets this phrase to allow the determination of "[*multiple*] margins of dumping for any [*individual*] exporters or producers". In other words, the word "individual" is moved to another location in the text, and is replaced in its original location by a word that has the opposite meaning. This interpretation is not consistent with the rules of treaty interpretation in the *Vienna Convention*. Instead, consistent with the definition of "dumping" in Article 2.1 and Article VI, an individual margin of dumping must be established under Article 9.5 for each new shipper for the "product" as a whole.

⁴⁴ US appellee's submission, para. 63 (second and third example).

⁴⁵ US appellee's submission, para. 72.

⁴⁶ US appellee's submission, paras. 70 and 73.

⁴⁷ See para. 6 above. See, further, Japan's appellant's submission, paras. 76 to 92.

V. AS APPLIED CLAIMS REGARDING PERIODIC AND SUNSET REVIEWS

31. Japan appeals the Panel's findings regarding 11 periodic reviews and two sunset reviews. The United States agrees that the outcome of these appeals turns on the prohibition of zeroing in periodic reviews. In that regard, Japan recalls that, in the two contested sunset reviews, the USDOC relied on margins previously determined using zeroing in periodic reviews.⁴⁸ If the Appellate Body finds – as it did in *US – Zeroing* – that zeroing is prohibited in periodic reviews, the Panel's findings with respect to the 11 periodic reviews and two sunset reviews must be reversed.

VI. CONCLUSION

32. In sum, Mr. Chairman, the United States' defence of the Panel contains no arguments that have not been previously considered and rejected. Thank you again for your efforts in this appeal.

⁴⁸ See Japan's appellant's submission, para. 194.