CLOSING STATEMENT OF JAPAN AT THE SECOND PANEL MEETING
15-16 SEPTEMBER 2005

1. Mr. Chairman, members of the Panel, let me thank you, and the Secretariat, for your attention and close questioning throughout the panel proceedings.

2. Let me begin this closing statement with comments on the only part of this dispute that is novel – namely, its scope. In this dispute, for the first time, Japan challenges the general zeroing rules as they relate to all anti-dumping proceedings. In challenging these administrative procedures, as such, Japan seeks to bring to an end the United States' persistent violation of WTO rules. The United States' reply is an attempt to evade WTO scrutiny of its anti-dumping calculation procedures. Even though the United States does not deny that it has relied on the zeroing procedures in every margin calculation undertaken in the past decade, it asserts incorrectly that the zeroing procedures do not exist.

3. However, contrary to the United States' arguments, the Appellate Body has properly prevented Members from using the domestic form of proven general rules as a means of escaping WTO dispute settlement. What matters in WTO dispute settlement is substance.[1] In this dispute, the evidence taken in its entirety shows that, in substance, the two zeroing measures are general rules, norms or standards providing a methodology for calculating dumping margins in investigations and reviews.

4. Mr. Chairman and members of the Panel, let me turn now to the aspects of this dispute that are *not* novel. As we said in our First Written Submission, this dispute is the latest in a long line of disputes regarding zeroing.[2] In resolving this dispute, you can draw on a steady line of precedents from panels and the Appellate Body that have ruled that zeroing is WTO-inconsistent. In these earlier disputes, the Appellate Body found that zeroing results in determinations that violate the *Agreement's* definition of "dumping" as relating to a "product" as a whole, and that are unfair to foreign producers and exporters. Our claims in this dispute do nothing more than invite the Panel to follow a path already well furrowed by the Appellate Body.

5. The Appellate Body's interpretations of the *Anti-Dumping Agreement* in earlier disputes cover provisions that deal with original investigations, as well as reviews under

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[1] Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Reviews*, footnote 87.
[2] Japan's First Written Submission, para. 5.

Articles 9 and 11. In its rulings, the Appellate Body has insisted that, throughout anti-dumping proceedings, the term "dumping" has a consistent meaning related to the product at issue.[3] This holding is not mere invention on the part of the Appellate Body; it is rooted firmly in the text that the negotiators settled upon.

6. In particular, Article 2.1 of the *Anti-Dumping Agreement* sets forth an agreed definition for the term "dumping" that applies "to the entire *Agreement*".[4] The United States struggles to reconcile its zeroing measures with the Appellate Body's interpretation of the definition of "dumping" in Article 2.1. The United States accepts that, to prevail, this Panel would have to reverse the Appellate Body's interpretations of the *Anti-Dumping Agreement*. Japan subscribes fully to that view. However, unlike the United States, Japan sees no reason why the Appellate Body's reading of Article 2.1 of the *Agreement* should be reversed.

7. Yesterday, the United States suggested that the meaning of "dumping" and "margin of dumping" must be understood on the basis of the specific context of each provision of the *Anti-Dumping Agreement*. The United States thereby invites the Panel to make the novel finding that the term "dumping" should have different meanings for different purposes, throughout the *Anti-Dumping Agreement*. For purposes of the W-to-W comparison in Article 2.4.2 and for Article 5.8, the United States appears to accept that the terms "dumping" and the "margin of dumping" refer to the "product" under investigation as a whole.[5] However, in Articles 9 and 11, at the discretion of the investigating authorities, these terms could be defined by reference to individual transactions, groups of transactions, or the product as a whole. Thus, for the crucial purposes of reviews that determine the duties to be paid – possibly in excess of scheduled concessions – there would be no uniform multilaterally agreed definition of "dumping".

8. Mr. Chairman, the text of both Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 rightly exclude this conclusion, as does the Appellate Body's interpretation of these provisions.

9. In a bid to avoid the definition of "dumping" for purposes of administrative reviews, the United States suggests that the investigating authorities do not determine the

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[3] *See*, Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99; Appellate Body Report, *EC – Bed Linen*, para. 53; and *U.S. – Corrosion-Resistant Steel Sunset Reviews*, para. 126.
[4] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93.
[5] United States SWS, paras. 63 – 65 (Article 2.4.2) and United States 20 July Answers, para. 56 (Article 5.8).

"existence" of dumping in reviews.[6] Unsurprisingly, though, the United States is wholly unable to explain how the authorities can possibly determine the magnitude – that is, the margin[7] – of dumping in reviews without determining that "dumping" exists because the two terms refer to a single concept. It is simply not possible to conclude that the definition of "dumping" in Article 2 does not govern dumping margin determinations in reviews under Articles 9 and 11.

10. Mr. Chairman, as you know, Japan also claims that the United States' zeroing measures involve "inherent bias" that is prohibited by the duty of fairness in Article 2.4 of the *Anti-Dumping Agreement*.[8] Under the United States' system, the zeroing measures at issue in this dispute result in a "*partial*" comparison of export transactions with a resulting dumping margin determination applied to *all* export transactions for the investigation or review period. The zeroing measures distort the prices that the United States purports to compare, and they do so with a view to "inflating" the margin of dumping that has product-wide consequences.[9]

11. In making this claim, Japan again invites the Panel to follow the Appellate Body's repeated rulings that zeroing is unfair, within the meaning of Article 2.4. Significantly, the Appellate Body's statements to this effect have been made in the context of claims regarding both investigations and reviews. Indeed, the Appellate Body held that, "whether in an original investigation *or otherwise*", zeroing "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[10]

12. This conclusion is perfectly logical. What is unfair to foreign producers and exporters in an original investigation must even more certainly be unfair in reviews, particularly because reviews determine the final liability for duties.

13. A cornerstone of the United States' defense is that the prohibition on zeroing renders the third comparison methodology in Article 2.4.2 redundant. However, as Japan has shown, properly interpreted, it does not. Specifically, in an interpretation of Article 2.4.2 that mirrors closely the USDOC's own Regulations, Japan advocates that the W-to-T comparison under that provision includes solely the export transactions making up the

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[6] United States' SWS, paras. 64 and 67.
[7] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96, holding that "the term 'margin of dumping' refers to the magnitude of dumping."
[8] Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Reviews*, para. 135.
[9] Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Reviews*, para. 135.
[10] Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Reviews*, para. 135.

pricing pattern. The "limitation"[11] of the *W-to-T* comparison to the "patterned" transactions is not altered by the fact that the authorities might permissibly choose to conduct a separate *W-to-W* comparison on the "non-patterned" transactions. The significant point is that the *W-to-T* comparison addressed in the second sentence is confined to the "patterned" transactions.

14. Japan has also shown that, even without this interpretation of the second sentence of Article 2.4.2, absent zeroing, the W-to-T method produces different outcomes from the W-to-W comparison method. The United States has, therefore, failed to demonstrate its assertion that a prohibition on zeroing under Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* would render redundant the W-to-T comparison method in Article 2.4.2 of the *Agreement*.

15. In conclusion, Mr. Chairman, Japan claims that the zeroing measures are, as such, inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 because, in investigations and reviews, the United States fails to determine dumping, and margins of dumping, for the product as a whole and because the United States conducts a biased comparison that is inherently unfair. The details of these claims, and Japan's series of "as applied" claims, are set forth in Japan's written submissions.

16. Mr. Chairman and members of the Panel, Japan wishes to thank you, and the Secretariat, for your time and attention.

[11] United States Code of Federal Regulations, 19 C.F.R § 351.414(f)(2). Exhibit JPN-03 (at page numbered 266).