

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

**AB-2006-5**

*Report of the Appellate Body*



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Short Title	Full Case Title and Citation
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US - DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, reversed by Appellate Body Report, WT/DS264/AB/RW
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, circulated to WTO Members 20 September 2006

LIST OF ABBREVIATIONS USED IN THIS REPORT

<b>Abbreviation</b>	<b>Description</b>
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Panel Report	Panel Report, <i>US – Zeroing (Japan)</i>
Panel request	<i>United States – Measures Relating to Zeroing and Sunset Reviews, Request for the Establishment of a Panel by Japan, WT/DS322/8</i>
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
T-T	Transaction-to-transaction (comparison) of export price and normal value
Tariff Act	Tariff Act of 1930, codified in Title 19 of the <i>United States Code</i>
<i>TRIPS Agreement</i>	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
W-W	Weighted average normal value-to-weighted average export price (comparison)
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005</i>
W-T	Weighted average normal value-to-prices of individual export transactions (comparison)
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Measures Relating to Zeroing and Sunset Reviews**

Japan, *Appellant/Appellee*  
United States, *Appellant/Appellee*

Argentina, *Third Participant*  
China, *Third Participant*  
European Communities, *Third Participant*  
Hong Kong, China, *Third Participant*  
India, *Third Participant*  
Korea, *Third Participant*  
Mexico, *Third Participant*  
New Zealand, *Third Participant*  
Norway, *Third Participant*  
Thailand, *Third Participant*

AB-2006-5

Present:

Sacerdoti, Presiding Member  
Abi-Saab, Member  
Ganesan, Member

**I. Introduction**

1. Japan and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by Japan concerning the calculation of margins of dumping by the United States based on a methodology that disregards the amounts by which the export prices are above the normal value in certain transactions.<sup>2</sup>

2. Before the Panel, Japan challenged, under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"):

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<sup>1</sup>WT/DS322/R, 20 September 2006.

<sup>2</sup>See Panel Report, paras. 2.1 and 7.1. The Panel noted that, "with regard to periodic reviews and new shipper reviews, Japan challenges zeroing not only with respect to the calculation of *margins of dumping* but also with respect to the calculation of *assessment rates*." (Panel Report, footnote 630 to para. 7.1) (original emphasis)

- (a) the United States' "zeroing procedures"<sup>3</sup> and the "standard zeroing line"<sup>4</sup>, "as such", in the context of "original investigations"<sup>5</sup>, "periodic reviews"<sup>6</sup>, "new shipper reviews"<sup>7</sup>, "changed circumstances reviews"<sup>8</sup>, and "sunset reviews"<sup>9</sup>; and
- (b) the application of the "zeroing procedures" in one "original investigation"<sup>10</sup>, in 11 "periodic reviews"<sup>11</sup>, and in two "sunset reviews".<sup>12</sup>
3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 20 September 2006, the Panel made the following findings in respect of "model zeroing"<sup>13</sup> and "simple zeroing"<sup>14</sup>:

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<sup>3</sup>Before the Panel, Japan used the term "zeroing" to denote the methodology under which the United States Department of Commerce (the "USDOC") "disregards intermediate negative dumping margins ... through the USDOC's AD Margin Calculation Computer Programme and other related procedures, in the process of establishing the overall dumping margin for the product as a whole". (Panel Report, footnote 668 to para. 7.45, quoting Request for the Establishment of a Panel by Japan, para. 1(a)-(d) (attached as Annex III to this Report)) The Panel used the term "zeroing procedures" to refer to "the zeroing methodology *per se*, as distinguished from the standard zeroing line". (*Ibid.*, para. 7.47)

<sup>4</sup>The term "standard zeroing line" is used in the Panel Report to refer to a specific line of computer programming code used by the USDOC when it develops a specific computer program to calculate a margin of dumping in a particular anti-dumping proceeding. (See Panel Report, paras. 4.17 and 7.20, and footnote 644 to para. 7.20)

<sup>5</sup>In our discussion, we use the term "original investigations" to refer to investigations within the meaning of Article 5 of the *Anti-Dumping Agreement*.

<sup>6</sup>In our discussion, we use the term "periodic review" to describe the periodic review of the amount of anti-dumping duty, as required by Section 751(a) of the Tariff Act of 1930 (the "Tariff Act").

<sup>7</sup>In our discussion, we use the term "new shipper review" to describe the review to establish an individual weighted-average dumping margin for the exporter or foreign producer, as required by Section 751(2)(B)(i)(II) of the Tariff Act. That provision requires the USDOC to review and determine the individual dumping margin for an exporter or foreign producer that did not export the product during the original period of investigation.

<sup>8</sup>In our discussion, we use the term "changed circumstances review" to describe the review of a final affirmative dumping determination or suspension agreement, as required by Section 751(b) of the Tariff Act. That provision requires the USDOC to review a final dumping determination or a suspension agreement based upon a request by an interested party demonstrating that changed circumstances warrant a review of such a determination.

<sup>9</sup>In our discussion, we use the term "sunset review" to describe the review of an anti-dumping duty order at the end of five years, as required by Section 751(c) of the Tariff Act. That provision requires the USDOC to conduct a review to determine whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and of material injury five years after the date of publication of an anti-dumping duty order.

<sup>10</sup>See Exhibit JPN-10 submitted by Japan to the Panel; further details may be found in Panel Report, para. 2.3.

<sup>11</sup>The 11 periodic reviews challenged by Japan are listed in Exhibits JPN-11 through JPN-21 submitted by Japan to the Panel; further details may be found in Panel Report, para. 2.3.

<sup>12</sup>The two sunset reviews challenged by Japan are listed in Exhibits JPN-22 and JPN-23 submitted by Japan to the Panel; further details may be found in Panel Report, para. 2.3.

- (a) By maintaining model zeroing procedures in the context of original investigations, the United States Department of Commerce (the "USDOC") acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.
- (b) By using model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan, the USDOC acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.
- (c) By maintaining simple zeroing procedures in the context of original investigations, the USDOC does not act inconsistently with Articles 1, 2.1, 2.4, 2.4.2, 3.1-3.5, 5.8, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.
- (d) By maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews, the USDOC does not act inconsistently with Articles 1, 2.1, 2.4, 2.4.2, 9.1-9.3, 9.5, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.
- (e) By applying simple zeroing in the 11 periodic reviews listed in Exhibits JPN-11 through JPN-21, the USDOC did not act inconsistently with Articles 1, 2.1, 2.4, 2.4.2, and 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

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<sup>13</sup>The Panel used the term "model zeroing" to refer to the methodology whereby the USDOC "makes [weighted] average-to-[weighted] average [("W-W")] comparisons of export price and normal value within individual 'averaging groups' established on the basis of physical characteristics ('models') and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping." (Panel Report, para. 7.2) (footnote omitted)

<sup>14</sup>The Panel used the term "simple zeroing" to refer to the methodology whereby the USDOC "determines a weighted average margin of dumping based on [weighted] average-to-transaction [("W-T")] or transaction-to-transaction [("T-T")] comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value in aggregating the results of these multiple comparisons." (Panel Report, para 7.3)

- (f) Japan has failed to make a *prima facie* case that, by maintaining zeroing procedures in the context of changed circumstances reviews and sunset reviews, the USDOC acts inconsistently with Articles 2 and 11 of the *Anti-Dumping Agreement*.
- (g) By relying on dumping margins calculated in previous proceedings in the sunset reviews of corrosion-resistant carbon steel from Japan and of anti-friction bearings from Japan, the United States International Trade Commission (the "USITC") and the USDOC did not act inconsistently with Articles 2 and 11 of the *Anti-Dumping Agreement*.<sup>15</sup>

4. On 11 October 2006, Japan notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal<sup>16</sup> pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>17</sup> On 18 October 2006, Japan filed an appellant's submission.<sup>18</sup> On 23 October 2006, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Other Appeal<sup>19</sup> pursuant to Rule 23 of the *Working Procedures*. On 26 October 2006, the United States filed an other appellant's submission.<sup>20</sup> On 6 November 2006, Japan and the United States each filed an appellee's submission<sup>21</sup> and China, the European Communities, Korea, Mexico, Norway, and Thailand each filed a third participant's submission.<sup>22</sup> On the same day, Argentina, Hong Kong, China, India, and New Zealand each notified its intention to appear at the oral hearing as a third participant and to make an oral statement.<sup>23</sup>

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<sup>15</sup>See Panel Report, paras. 7.258-7.259. The Panel decided to exercise judicial economy and did not rule on Japan's claim that maintaining model zeroing procedures in the context of original investigations was inconsistent with Articles 1, 2.1, 2.4, 3.1-3.5, 5.8, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. The Panel also decided to exercise judicial economy and did not rule on Japan's claim that the use of model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan was inconsistent with Articles 1, 2.4, and 3.1-3.5 of the *Anti-Dumping Agreement*. (*Ibid.*, para. 7.260)

<sup>16</sup>WT/DS322/12 (attached as Annex I to this Report).

<sup>17</sup>WT/AB/WP/5, 4 January 2005.

<sup>18</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>19</sup>WT/DS322/13 (attached as Annex II to this Report).

<sup>20</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>21</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

<sup>22</sup>Pursuant to Rule 24(1) and (3) of the *Working Procedures*.

<sup>23</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

5. By letter dated 20 October 2006, Japan requested authorization from the Appellate Body Division hearing the appeal to correct a clerical error in its appellant's submission, pursuant to Rule 18(5) of the *Working Procedures*. On 23 October 2006, the Division invited, pursuant to Rule 18(5), all participants and third participants to comment on Japan's request. No objection to Japan's request was received and, on 25 October 2006, the Division authorized Japan to correct the clerical error in its appellant's submission.

6. The oral hearing in this appeal was held on 20 November 2006. The participants and the third participants (with the exception of Argentina, Hong Kong, China, and India) presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

## II. Arguments of the Participants and the Third Participants

### A. Claims of Error by Japan – Appellant

#### 1. Zeroing As Such in Transaction-to-Transaction Comparisons in Original Investigations

7. Japan submits that the Appellate Body should reverse the Panel's finding that the zeroing procedures are not "as such" inconsistent with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when used in transaction-to-transaction ("T-T") comparisons of export price and normal value in original investigations. Japan's appeal is based on several arguments.

8. First, Japan submits that zeroing is inconsistent with the definitions of "dumping" and "margins of dumping" in Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Pursuant to these provisions, "'dumping' and 'margins of dumping' must be defined in relation to the 'product' under investigation as a whole."<sup>24</sup> Thus, if an investigating authority conducts multiple comparisons for individual transactions or for groups of transactions, it must aggregate "the results of all of the multiple comparisons, including those where the export price exceeds the normal value".<sup>25</sup> The requirement in Article 2.1 to aggregate multiple comparison results to produce a margin of dumping for the "product" as a whole applies to all types of comparisons, including when an investigating authority conducts model-specific weighted average normal value-to-weighted average export price ("W-W") comparisons, transaction-specific weighted average normal

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<sup>24</sup>Japan's appellant's submission, para. 9 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 91; Appellate Body Report, *US – Zeroing (EC)*, paras. 126-129; Appellate Body Report, *EC – Bed Linen*, para. 53; and Appellate Body Report, *US – Softwood Lumber V*, para. 99).

<sup>25</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 127 (quoted in Japan's appellant's submission, para. 81).

value-to-prices of individual export transactions ("W-T") comparisons, and T-T comparisons.<sup>26</sup> Japan argues that, by disregarding negative comparison results, "the United States' 'dumping' determination excludes an entire category of the export transactions that form part of the 'product'".<sup>27</sup> According to Japan, the United States therefore "makes a 'dumping' determination solely for a part of the investigated product, not for the product as a whole."<sup>28</sup>

9. Japan underscores that the Panel erred in finding that Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 do not require that dumping be defined on a "product-wide" basis.<sup>29</sup> Referring to the Appellate Body Report in *US – Softwood Lumber V (Article 21.5 – Canada)*, Japan asserts that "no inference could be drawn from the fact that [the] phrase ['all comparable export transactions'] does not appear in relation to the [T-T] methodology", because, under T-T comparisons, export transactions are not sub-divided into models.<sup>30</sup> Japan further notes that the Appellate Body found, in that case, that the reference to "export prices" and "a comparison" in the text of Article 2.4.2 "suggests an overall calculation exercise involving aggregation of these multiple transactions"<sup>31</sup> and therefore provides "a textual basis for the product-wide definition of 'dumping' and 'margins of dumping' in the context of [T-T] comparisons in Article 2.4.2."<sup>32</sup> Japan also dismisses the Panel's "'difficulty' in understanding the phrase 'multiple comparisons ... at an intermediate stage'"<sup>33</sup> as requiring an aggregation of intermediate comparisons, claiming that the Appellate Body's finding in *US – Zeroing (EC)* clarified that this phrase means that aggregation is required whenever "multiple model- or transaction-specific comparisons are made".<sup>34</sup>

10. Secondly, Japan contends that the Panel erred in accepting the United States' argument that, if zeroing is prohibited in the context of the W-T comparison methodology set out in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, "the use of this [methodology] will necessarily always yield a result identical to that of a [W-W] comparison" methodology under the

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<sup>26</sup>Japan's appellant's submission, para. 82 (referring to Appellate Body Report, *US – Softwood Lumber V*, paras. 97-98; Appellate Body Report, *US – Zeroing (EC)*, para. 132; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 122).

<sup>27</sup>*Ibid.*, para. 11.

<sup>28</sup>*Ibid.*

<sup>29</sup>*Ibid.*, para. 96.

<sup>30</sup>*Ibid.*, para. 98 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91).

<sup>31</sup>*Ibid.*, para. 101 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87).

<sup>32</sup>*Ibid.*, para. 102.

<sup>33</sup>*Ibid.*, para. 104 (referring to Panel Report, para. 7.100).

<sup>34</sup>*Ibid.*, para. 111 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 127).

first sentence.<sup>35</sup> Japan notes that the Appellate Body rejected a similar argument made by the United States in *US – Softwood Lumber V (Article 21.5 – Canada)*.<sup>36</sup> In doing so, the Appellate Body noted that the second sentence, "[b]eing an exception, cannot determine the interpretation of the two methodologies provided in the first sentence".<sup>37</sup> The Appellate Body further noted the "considerable uncertainty regarding how precisely the third methodology should be applied"<sup>38</sup>, observing that, in that case, Japan had suggested that the W-T comparison methodology should be applied only to those transactions that make up the pricing pattern. In the same case, the United States had argued that it would apply the W-T comparison methodology to those transactions falling within the pricing pattern and the W-W comparison methodology to the remaining export transactions. However, Japan points out, "the United States failed to explain how precisely the results of the two comparison methodologies would be combined".<sup>39</sup>

11. Turning to the requirement to make a "fair comparison" in the first sentence of Article 2.4 of the *Anti-Dumping Agreement*, Japan argues that the Appellate Body addressed, in *US – Softwood Lumber V (Article 21.5 – Canada)*, "the fairness of the United States' zeroing procedures under Article 2.4"<sup>40</sup>, and notes that "[t]he zeroing procedures at issue in that dispute are the same as those at issue in the current dispute."<sup>41</sup> Like the Panel in this case, "the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* ruled that zeroing was 'fair' under Article 2.4 because it was permitted under the 'more specific provisions of Article 2.4.2'.<sup>42</sup> Japan notes that the Appellate Body disagreed, stating, *inter alia*, that "the introductory clause to Article 2.4.2 expressly makes it '[s]ubject to the provisions governing fair comparison' in Article 2.4."<sup>43</sup> In Japan's view, "like the panel in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Panel in this dispute misinterpreted the relationship

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<sup>35</sup>Panel Report, para. 7.127 (quoted in Japan's appellant's submission, para. 116). (emphasis added)

<sup>36</sup>Japan's appellant's submission, para. 117 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97).

<sup>37</sup>Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97 (quoted in Japan's appellant's submission, para. 117).

<sup>38</sup>Japan's appellant's submission, para. 118 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98).

<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.*, para. 128.

<sup>41</sup>*Ibid.*

<sup>42</sup>*Ibid.*, para. 129 (referring to Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.75).

<sup>43</sup>*Ibid.* (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 136).

between Articles 2.4 and 2.4.2."<sup>44</sup> According to Japan, "[t]he Panel should have commenced its analysis under Article 2.4, not under Article 2.4.2."<sup>45</sup>

12. Japan refers to the reasoning of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* and submits that, on the same grounds, the Appellate Body should find that the maintenance of the United States' zeroing procedures is "as such" inconsistent with Article 2.4 in this case. In addition, Japan submits that the salient features of the zeroing procedures further support the Appellate Body's conclusion that zeroing is unfair.<sup>46</sup> Japan recalls that, "[u]nder the zeroing procedures, the United States makes an initial comparison for all comparable export transactions, but in aggregating the comparison results into an overall margin, it includes solely the positive comparison results, disregarding negative results. However, the dumping determination resulting from this 'partial' comparison of selected transactions is then applied to all export transactions on a product-wide basis for purposes of: [making] an injury determination; deciding whether to terminate or pursue an investigation; justifying the imposition of duties; and assessing the amount of duties due."<sup>47</sup> Japan concludes that, "[i]n light of these features, the 'partial' comparison that occurs pursuant to the zeroing procedures is 'inherently biased' and not 'fair'."<sup>48</sup>

## 2. Zeroing As Such in Periodic Reviews and New Shipper Reviews

13. Japan also requests that the Appellate Body reverse the Panel's finding that zeroing, as it relates to periodic reviews and new shipper reviews, is not "as such" inconsistent with Articles 2.1, 2.4, 9.1-9.3, and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

14. In relation to periodic reviews, Japan submits that the chapeau of Article 9.3 requires a comparison of "the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole' to ensure that the total amount of the former does not exceed the latter."<sup>49</sup> Pursuant to Article 11.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, "anti-dumping duties may be imposed 'to counteract *dumping*', which arises because of a 'foreign producer's

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<sup>44</sup>Japan's appellant's submission, para. 130 (referring to Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.75).

<sup>45</sup>*Ibid.*, para. 130.

<sup>46</sup>*Ibid.*, para. 134.

<sup>47</sup>*Ibid.* (referring to Appellate Body Report, *US – Softwood Lumber V*, para. 99).

<sup>48</sup>*Ibid.*, para. 134.

<sup>49</sup>*Ibid.*, para. 142 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 132).

or exporter's pricing behaviour', and not that of an importer."<sup>50</sup> In other words, "[a]lthough duties may be imposed on and collected from *importers*, margins of dumping are determined for *foreign exporters or producers*."<sup>51</sup> Japan points out that the Appellate Body has found that "when multiple comparisons are made in a periodic review in a retrospective assessment system, the results of all comparisons must be aggregated to establish the margin of dumping", and that it reached a similar conclusion regarding the refund of duties under a prospective system.<sup>52</sup> According to Japan, "[t]he Panel, therefore, erred in finding that the imposition of duties on individual import transactions constitutes the determination of a margin of dumping for those transactions, and it incorrectly examined the broader contextual implications of Article 9 ... in the context of a [prospective normal value] system."<sup>53</sup> Japan submits that Article 9.3 requires investigating authorities to calculate a margin of dumping for the product as a whole for a given exporter or foreign producer, and to ensure that the total amount of duties imposed does not exceed that margin of dumping.<sup>54</sup> According to Japan, the United States violates these requirements by virtue of zeroing, which causes "the total amount of dumping [to be] overstated by the amount of excluded negative values".<sup>55</sup> In consequence, the United States collects "more definitive anti-dumping duties than it would absent zeroing".<sup>56</sup> Japan submits, therefore, that the United States acts inconsistently with Articles 2.1, 2.4, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 by applying a zeroing methodology that results in "amounts of assessed anti-dumping duties that exceed[] the foreign producers' or exporters' margins of dumping".<sup>57</sup>

15. In a similar vein, with respect to new shipper reviews, Japan underscores that the Panel erred in finding that, when the margin of dumping for a new shipper review is determined by using a W-T comparison, "there is no general requirement to determine dumping and margins of dumping for the product as a whole".<sup>58</sup> Japan emphasizes that, under Article 9.5, an authority must "aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal

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<sup>50</sup>Japan's appellant's submission, para. 155 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 129). (emphasis by Japan)

<sup>51</sup>*Ibid.* (original emphasis)

<sup>52</sup>*Ibid.*, para. 159 (referring to Appellate Body Report, *US – Zeroing (EC)* para. 132; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112).

<sup>53</sup>*Ibid.*, para. 161. (footnote omitted)

<sup>54</sup>*Ibid.*, para. 166.

<sup>55</sup>*Ibid.*, para. 167.

<sup>56</sup>*Ibid.*, para. 171 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 133).

<sup>57</sup>*Ibid.*, para. 147 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 133).

<sup>58</sup>*Ibid.*, para. 181 (quoting Panel Report, para. 7.194).

value."<sup>59</sup> According to Japan, such "interpretation [is] also based on the definition of 'dumping' in Article VI:1 of the GATT 1994 and of 'margin of dumping' in Article VI:2."<sup>60</sup> Accordingly, Japan requests the Appellate Body to reverse the Panel's finding that the zeroing procedures are not "as such" inconsistent with Articles 2.1, 2.4, and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, when maintained for use in new shipper reviews.<sup>61</sup>

### 3. Zeroing As Applied in Periodic Reviews and Sunset Reviews

16. For the same reasons as those set out above, Japan submits that the Panel erred in finding that zeroing, as applied by the USDOC in the 11 periodic review determinations at issue in this case, is not inconsistent with Articles 2.1, 2.4, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Japan therefore requests the Appellate Body to reverse these findings and to find, instead, that the United States acted inconsistently with its obligations under these provisions.<sup>62</sup>

17. Japan further requests the Appellate Body to reverse the Panel's finding that the two specific sunset review determinations identified in Exhibits JPN-22 and JPN-23 are not inconsistent with Articles 2 and 11 of the *Anti-Dumping Agreement*. According to Japan, the Panel's only reason for rejecting Japan's "as applied" sunset review claims was its "incorrect finding that zeroing is permissible in periodic reviews under Article 9.3".<sup>63</sup> Japan disputes this finding and argues, instead, that these sunset review determinations are without "proper foundation", because the USDOC relied on "legally flawed" margins from periodic reviews calculated using zeroing.<sup>64</sup> Japan requests the Appellate Body to reverse the Panel's finding that the United States was entitled to rely on margins of dumping calculated in periodic reviews using zeroing in the two sunset reviews at issue in this case and to find, instead, that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.<sup>65</sup> Furthermore, "[b]ecause the violations of Article 11.3 stem from the reliance upon margins of dumping calculated using the zeroing procedures that violated Articles 2.1 and 2.4 of the

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<sup>59</sup>Japan's appellant's submission, para. 182 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 127).

<sup>60</sup>*Ibid.*

<sup>61</sup>*Ibid.*, para. 190.

<sup>62</sup>*Ibid.*, para. 178.

<sup>63</sup>*Ibid.*, para. 196.

<sup>64</sup>*Ibid.*, paras. 191 and 193.

<sup>65</sup>*Ibid.*, paras. 197.

*Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, Japan submits the two challenged sunset reviews also violate these provisions."<sup>66</sup>

B. *Arguments of the United States – Appellee*

1. Zeroing As Such in Transaction-to-Transaction Comparisons in Original Investigations

18. The United States argues that the Panel was correct in finding that Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 do not establish a general prohibition of zeroing. In the United States' view, Japan's interpretation of these provisions contradicts, for several reasons, the ordinary meaning, the negotiating history, and the Appellate Body's interpretation of the relevant treaty texts.

19. First, the United States considers that the Panel was correct in concluding that Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 do not require that investigating authorities establish margins of dumping "for the 'product' under investigation as a whole".<sup>67</sup> The United States disagrees with Japan's argument that the Appellate Body, in *US – Softwood Lumber V (Article 21.5 – Canada)*, found that "dumping" and "margins of dumping" cannot occur at a transaction-specific level, because the phrases "product as a whole" and "product under investigation as a whole" did not form part of the Appellate Body's reasoning in that case.<sup>68</sup> The United States further submits that "because the phrase 'all comparable export transactions' in Article 2.4.2 is limited to the [W-W] [comparison] context, the 'product as a whole' rationale for precluding zeroing in the original *US – Softwood Lumber V* report is likewise limited to the [W-W] context."<sup>69</sup> For the United States, "the terms 'dumping' and 'margin of dumping' do not necessarily require the aggregation of [T-T] comparisons and the provision of an offset for one transaction against another."<sup>70</sup> Therefore, according to the United States, the Panel was correct in finding that the ordinary meaning, context, and negotiating history of Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 "provide[] no basis for concluding that zeroing is prohibited by requiring an examination of aggregated transactions."<sup>71</sup>

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<sup>66</sup>Japan's appellant's submission, para. 197. (footnote omitted)

<sup>67</sup>United States' appellee's submission, para. 11.

<sup>68</sup>*Ibid.*, para. 11 (referring to Japan's appellant's submission, para. 92).

<sup>69</sup>*Ibid.*, para. 13 (referring to Panel Report, footnote 715 to para. 7.92).

<sup>70</sup>*Ibid.*, para. 18.

<sup>71</sup>*Ibid.*, para. 19 (referring to Panel Report, para. 7.107).

20. Secondly, the United States considers that the Panel's textual analysis of Article 2.4.2 "rests on a permissible interpretation" of the *Anti-Dumping Agreement*.<sup>72</sup> The United States submits that the Panel was correct in concluding that dumping can occur at a transaction-specific level, since "a [T-T] comparison is inherently conducted at the level of an individual transaction, and Article 2.4.2 does not speak to the methodology for converting those individual comparisons into 'margins of dumping'".<sup>73</sup> The United States considers that the use of the plural in "margins of dumping" in the text of Article 2.4.2 implies that "there is one comparison of normal value and export price, that each such comparison is a margin of dumping, and that all such comparisons constitute 'margins of dumping'".<sup>74</sup> Therefore, according to the United States, "there is no basis for concluding that a [T-T] comparison must produce one margin, or that in calculating any such margin, the negative results from one comparison must be offset against the positive results from another."<sup>75</sup>

21. In addition, the United States submits that the Panel was correct in finding that a general prohibition of zeroing would deprive the methodology provided under the second sentence of Article 2.4.2 of its effectiveness. For the United States, the Panel correctly concluded that "the principle of effective treaty interpretation meant that zeroing had to be permitted [in W-T comparisons] in order to avoid rendering the [W-T] comparison a nullity"<sup>76</sup>, given that, absent zeroing, W-T and W-W comparisons would produce the same results. The United States recalls that Japan tried to rebut this argument before the Panel by stating that the "results of a[] [W-W] and [W-T] comparison would differ because the investigating authority would only examine a *subset* of export transactions in a[] [W-T] comparison."<sup>77</sup> When confronted with evidence that the USDOC "would examine *all* transactions, along with the Panel's interim report which explained that there is no basis in Article 2.4.2 for examining a *subset* of such transactions, Japan withdrew its 2.4.2 claim, rather than substantiate it."<sup>78</sup> Further, the United States dismisses Japan's argument that the "mathematical equivalence" argument rests on an "untested hypothesis"<sup>79</sup>, by referring to evidence in the *US –*

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<sup>72</sup>United States' appellee's submission, para. 24. (footnote omitted)

<sup>73</sup>*Ibid.*, para. 25 (referring to Panel Report, para. 7.119).

<sup>74</sup>*Ibid.*, para. 29. (footnote omitted)

<sup>75</sup>*Ibid.*, para. 32. (footnote omitted)

<sup>76</sup>*Ibid.*, para. 35 (referring to Panel Report, para. 7.127).

<sup>77</sup>*Ibid.*, para. 39 (referring to Japan's oral statement at the first Panel meeting, para. 52). (original emphasis)

<sup>78</sup>*Ibid.*, para. 41. (original emphasis)

<sup>79</sup>*Ibid.*, para. 37 (referring to Japan's appellant's submission, para. 117, where Japan quotes the Appellate Body Report in *US – Softwood Lumber V (Article 21.5 – Canada)*, at para. 97, as rejecting the so-called "mathematical equivalence" argument on the basis that it "rests on a non-tested hypothesis").

*Softwood Lumber V (Article 21.5 – Canada)* dispute that demonstrates, according to the United States, that the European Communities has actually used the W-T comparison in investigations.<sup>80</sup>

22. Thirdly, the United States disagrees with Japan's argument that the Panel concluded that zeroing in T-T comparisons was not inconsistent with the "fair comparison" requirement in Article 2.4 because zeroing was permitted under the "more specific" provisions of Article 2.4.2.<sup>81</sup> For the United States, the Panel examined the fair comparison requirement in Article 2.4 as an "independent legal obligation"<sup>82</sup>, and, on that basis, reasoned that "a general prohibition on zeroing in Article 2.4 was not a proper interpretation of the [*Anti-Dumping Agreement*] because it would render the second sentence of Article 2.4.2 inutile."<sup>83</sup> The United States dismisses Japan's argument that zeroing is unfair because it "artificially inflates the magnitude of dumping", as predicated on the assumption that zeroing is prohibited.<sup>84</sup> According to the United States, zeroing does not produce an "artificially inflated" magnitude of dumping but, rather, the correct magnitude of the margin of dumping.<sup>85</sup> The United States further submits that the "fair comparison" requirement must be neutrally defined, as the Appellate Body itself has recognized "the 'need' to balance ... the rights and obligations of respondents with those of other interested parties", including the domestic industry.<sup>86</sup>

## 2. Zeroing As Such in Periodic Reviews and New Shipper Reviews

23. The United States requests the Appellate Body to uphold the Panel's finding that zeroing is consistent with Article 9.3 of the *Anti-Dumping Agreement*. The United States agrees with the Panel's conclusion that "Article 9.3 contains no language requiring such an aggregate examination of export transactions in determining the final liability for payment of anti-dumping duties under Article 9.3.1 or in determining the amount, if any, of refund due under Article 9.3.2."<sup>87</sup> In the United States' view, the Panel took note of the "important contextual support" provided by Article 9.4(ii) and prospective normal value systems in its examination of Article 9.<sup>88</sup> The United States agrees with the Panel's rejection of Japan's argument that "in a prospective normal value system final liability for payment of

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<sup>80</sup>United States' appellee's submission, para. 44 (referring to Case T-274/02, *Ritek Corp. and Prodisc Technology Inc. v. Council of the European Union*, 24 October 2006, para. 94, annexed as Attachment-1 to the United States' appellee's submission).

<sup>81</sup>*Ibid.*, para. 48.

<sup>82</sup>*Ibid.*, para. 49.

<sup>83</sup>*Ibid.*, para. 50.

<sup>84</sup>*Ibid.*, para. 51.

<sup>85</sup>*Ibid.*

<sup>86</sup>*Ibid.*, para. 52 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 243).

<sup>87</sup>*Ibid.*, para. 54 (quoting Panel Report, para. 7.199).

<sup>88</sup>*Ibid.*, para. 55.

antidumping duties must be determined through a review under Article 9.3.2."<sup>89</sup> Like the Panel, the United States believes that it would be "inconsistent with the *prospective* nature of such a system" if the liability for duty payments "were calculated on the basis of a retrospective examination of transactions".<sup>90</sup> Therefore, according to the United States, "[t]he margin of dumping and the ceiling on the liability for antidumping duties are mathematically equivalent".<sup>91</sup> This, for the United States, corroborates the Panel's conclusion that "margins [of dumping] may be calculated on the basis of a single transaction, rather than an aggregation of transactions."<sup>92</sup>

24. The United States considers that Japan's arguments on appeal are based on the "product as a whole" theory, which the Panel correctly found to be limited to W-W comparisons in original investigations.<sup>93</sup> Contrary to Japan's assertion, the United States argues that the Panel made no finding that margins of dumping under Article 9.3 are determined on an importer-specific basis. Rather, the United States submits that the Panel concluded that Article 9 does not require aggregation of multiple export transactions, because "there is no indication in the text of the Anti[-D]umping Agreement that the drafters intended to create a system of duty liability on the part of importers by establishing the ceiling for such liability on the *totality* of transactions by exporters."<sup>94</sup> The United States also challenges Japan's assertion that the Panel confused margins of dumping with the amount of anti-dumping liability. According to the United States, "[t]he Panel carefully examined the difference between the margin of dumping and the amount of the duty, particularly noting that in a prospective normal value system, final liability for payment of antidumping duties attaches at the time of importation, rather than *retrospectively*."<sup>95</sup>

25. The United States further submits that "Japan's arguments [with respect to] Article 2.4 in assessment reviews are the same as those [with respect to] investigations, and for the same reason, they [should] fail."<sup>96</sup>

26. The United States agrees with Japan that the reasons that led the Panel to conclude that the use of zeroing in periodic reviews is consistent with Article 9.3 of the *Anti-Dumping Agreement* also led to the conclusion that zeroing in new shipper reviews is consistent with Article 9.5.<sup>97</sup> The United

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<sup>89</sup>United States' appellee's submission, para. 55 (referring to Panel Report, para. 7.204).

<sup>90</sup>*Ibid.* (quoting Panel Report, para. 7.204).

<sup>91</sup>*Ibid.*, para. 56.

<sup>92</sup>*Ibid.*, para. 60.

<sup>93</sup>*Ibid.*, para. 61.

<sup>94</sup>*Ibid.*, para. 64. (original emphasis)

<sup>95</sup>*Ibid.*, para. 67 (referring to Panel Report, para. 7.205). (original emphasis)

<sup>96</sup>*Ibid.*, para. 69.

<sup>97</sup>*Ibid.*, para. 70 (referring to Japan's appellant's submission, para. 180).

States, however, disagrees with Japan that the Panel failed to analyze the impact of the text, "determining individual margins of dumping for any exporters or producers" who have not exported during the period of investigation, in Article 9.5 when concluding that zeroing was permitted in the context of new shipper reviews.<sup>98</sup> For the United States, the Panel did precisely that when it expressly found that, even "in conjunction with a requirement to establish margins of dumping for exporters or foreign producers", "there is no general requirement to determine dumping and margins of dumping for the product as a whole."<sup>99</sup> The United States further submits that "[n]othing in the text of Article 9.5 implies that the 'individual margins of dumping' are necessarily and always a 'single' dumping margin determined on the basis of the 'product as a whole' for each exporter or producer."<sup>100</sup>

### 3. Zeroing As Applied in Periodic Reviews and Sunset Reviews

27. The United States requests the Appellate Body to uphold the Panel's findings that it did not act inconsistently with Articles 2.1, 2.4, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* in applying zeroing in the 11 periodic reviews challenged by Japan.<sup>101</sup> The United States considers that these findings are merely consequential to Japan's appeal with respect to the Panel's findings that zeroing in the context of duty assessment proceedings is not "as such" inconsistent with these provisions. For the same reasons as those adduced with respect to Japan's appeal of the Panel's "as such" findings under Articles 2.1, 2.4, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement*, the United States submits that the Panel's conclusions with respect to Japan's "as applied" claims in the 11 periodic reviews at issue in this dispute "should be affirmed".<sup>102</sup>

28. Regarding zeroing "as applied" in the context of the two sunset review proceedings at issue in this dispute, the United States contends that the Panel did not err in its conclusion that zeroing is permissible in determining margins of dumping in assessment reviews. On this basis, the United States submits that the Panel's conclusions with respect to Japan's "as applied" claims in the two sunset reviews at issue in this dispute "should be affirmed".<sup>103</sup>

#### C. *Claims of Error by the United States – Other Appellant*

29. The United States challenges the Panel's finding that the zeroing procedures used by the USDOC, as they relate to original investigations in which margins of dumping are calculated on the

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<sup>98</sup>See United States' appellee's submission, para. 71.

<sup>99</sup>*Ibid.*, para. 70 (quoting Panel Report, para. 7.194).

<sup>100</sup>*Ibid.*, para. 73.

<sup>101</sup>See Exhibits JPN-11 through JPN-21 submitted by Japan to the Panel.

<sup>102</sup>United States' appellee's submission, para. 74.

<sup>103</sup>*Ibid.*, para. 75.

basis of T-T or W-T comparisons, constitute a measure that can be challenged "as such" in WTO dispute settlement. The United States' challenge is based on several arguments.

30. First, the United States contends that the Panel failed to make an objective assessment of the matter before it—including an objective assessment of the facts of the case—as required by Article 11 of the DSU, by concluding that a single unwritten rule or norm exists by virtue of which the USDOC will apply zeroing in any anti-dumping proceeding, regardless of the comparison methodology used. In the United States' view, the evidence relied on by the Panel "does not support the proposition that there are rules or norms taken by the United States concerning the use of zeroing as it relates to [T-T] and [W-T] comparisons in investigations."<sup>104</sup> In support of its view, the United States points out that it has never applied the W-T comparison methodology in original investigations, and has only once applied the T-T comparison methodology, after the Panel in this dispute was established. Moreover, the USDOC has "never pronounced on how it would conduct such comparisons, including whether it would or would not 'zero' in connection with those comparisons."<sup>105</sup>

31. Referring to the Appellate Body Report in *US – Zeroing (EC)*, the United States further emphasizes that, "particularly when the measure alleged is unwritten, the evidence of the existence of a measure must in fact relate to the full scope of the measure claimed, and that there can be no finding of such a measure where such evidence does not exist."<sup>106</sup> The United States argues that, "[j]ust as a single measure may often consist of elements that may themselves be considered measures, the Panel's error may be viewed either as having failed to identify the precise content of a single measure—that is, whether any 'zeroing procedures' maintained by [the USDOC] actually relate to [T-T] and [W-T] comparisons in investigations—or as having failed to establish the existence of separate [USDOC] 'zeroing procedures' as they relate to each of these comparison[] [methodologies] in investigations."<sup>107</sup> The United States notes in this regard that "the approach taken by the panel and Appellate Body in *US – Zeroing (EC)*, and by Japan in its consultation request [in this dispute], was to consider the existence of separate measures for each context."<sup>108</sup>

32. The United States also submits that the Panel did not discuss the types of investigations in which the W-W, T-T, and W-T comparison methodologies can be used, and whether the USDOC has

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<sup>104</sup>United States' other appellant's submission, para. 26. The United States does not challenge the Panel's finding regarding zeroing procedures as they relate to original investigations based on W-W comparisons. The United States acknowledges that "there is at least an evidentiary record in connection with those questions". (*Ibid.*, para. 3)

<sup>105</sup>*Ibid.*, para. 2.

<sup>106</sup>*Ibid.*, para. 14. (footnote omitted)

<sup>107</sup>*Ibid.*, footnote 22 to para. 14.

<sup>108</sup>*Ibid.*

engaged in any of these comparisons in investigations, periodic reviews, and changed circumstances reviews. Moreover, according to the United States, the Panel Report provides no evidence that the USDOC's comments in the periodic review of anti-friction bearings, to which the Panel referred, pertain to T-T or W-T proceedings in investigations.<sup>109</sup>

33. The United States further notes that the statements made by the United States Department of Justice that the Panel relied on were made in connection with cases that did not involve T-T or W-T comparisons in investigations.<sup>110</sup> Moreover, "none of [these] statements does anything more than describe what [the USDOC] had done in the past—in connection with [W-W] comparisons in investigations and [W-T] comparisons in reviews."<sup>111</sup> According to the United States, the same applies to the statements cited by the Panel from the United States Congress and the United States Court of International Trade.<sup>112</sup>

34. The United States concludes that "[t]he evidence put forward by Japan in this proceeding simply does not support the Panel's finding that [the USDOC] maintains an unwritten zeroing measure regardless of the basis of the dumping comparison and in all antidumping proceedings."<sup>113</sup> Moreover, "[t]he Panel made no effort to 'carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' relating to [the USDOC]'s use of zeroing in the context of [T-T] and [W-T] comparisons in investigations, because there are no such instrumentalities."<sup>114</sup> As a result, the United States argues that the Panel "failed to make an objective assessment of the matter", as required by Article 11 of the DSU.<sup>115</sup>

35. The United States further notes that the Panel relied on the criteria set forth by the Appellate Body in *US – Zeroing (EC)* to determine the existence of a measure that is challengeable "as such": whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application.<sup>116</sup> The United States submits that the term "attributable to" means "taken" by a Member within its territory, because Article 3.3 of the DSU refers to a measure "taken" by a Member and Article 4.2 refers to a measure "taken" within the territory of a Member. According to the United

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<sup>109</sup>United States' other appellant's submission, para. 29 and footnote 45 thereto.

<sup>110</sup>*Ibid.*, para. 30.

<sup>111</sup>*Ibid.*

<sup>112</sup>*Ibid.*

<sup>113</sup>*Ibid.*, para. 31.

<sup>114</sup>*Ibid.* (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 198).

<sup>115</sup>*Ibid.*, para. 31.

<sup>116</sup>*Ibid.*, para. 4 (referring to Panel Report, para. 7.43; and Appellate Body Report, *US – Zeroing (EC)*, para. 198).

States, this suggests that "as such" challenges of "a mere abstract principle" are not contemplated by the DSU.<sup>117</sup> Thus, "the Panel exceeded its terms of reference by including within the scope of the dispute measures not taken by the United States."<sup>118</sup>

36. The United States further argues that the zeroing procedures as they relate to T-T and W-T comparisons in original investigations are not within the Panel's terms of reference, because Japan failed to identify these measures in its request for consultations.<sup>119</sup> The United States notes that it "did not raise this issue in the Panel proceedings because it was focusing on the fact that these 'measures' [did] not exist at all."<sup>120</sup> However, "a failure to consult is a jurisdictional matter and, as such, can be raised at any time."<sup>121</sup>

37. As a separate matter, the United States requests the Appellate Body to declare moot the Panel's findings regarding Articles 1, 2.1, 2.4, 2.4.2, 3.1-3.5, 5.8, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:4 of the GATT 1994, and Article XVI:4 of the *WTO Agreement* as they apply to T-T comparisons in original investigations, arguing that these findings were made in respect of a measure that did not fall within the Panel's terms of reference.<sup>122</sup>

#### D. *Arguments of Japan – Appellee*

38. Japan requests the Appellate Body to reject the United States' other appeal in its entirety and to uphold the Panel's finding that the zeroing procedures constitute a measure that can be challenged "as such" in WTO dispute settlement proceedings, including as they relate to W-T and T-T comparisons in original investigations. Japan considers that, in reaching its conclusion that a single rule or norm exists that mandates the application of zeroing in all circumstances, the Panel conducted an assessment of the facts and evidence as required by Article 11 of the DSU, and acted within the limits of its discretion as the "trier of facts". Japan submits the following reasons in support of its contention.

39. First, Japan contends that the United States failed to produce any evidence showing that differences between the three specific comparison methodologies exist as far as zeroing is concerned that required the Panel to undertake a comparison-specific assessment of the evidence before it.

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<sup>117</sup>United States' other appellant's submission, para. 6 (referring to Appellate Body Report, *US – Zeroing (EC)*, footnote 342 to para. 198).

<sup>118</sup>*Ibid.*, para. 31.

<sup>119</sup>*Ibid.*, para. 18.

<sup>120</sup>*Ibid.*, footnote 29 to para. 18.

<sup>121</sup>*Ibid.* (referring to Appellate Body Report, *US – Carbon Steel*, para. 123).

<sup>122</sup>*Ibid.*, para. 33.

According to Japan, the differences in comparison methodologies and anti-dumping proceedings do not "imply any difference in the operation or application of the zeroing procedures that requires an independent assessment whether a rule or norm exists for each setting."<sup>123</sup> Thus, there was "no need for the Panel to have parsed the evidence as to each specific comparison method[ology] and procedural [context]" in its determination that there exists a single rule or norm that can be challenged as such.<sup>124</sup> Japan argues that, instead of introducing evidence that demonstrates that the content or operation of the zeroing measure would be different in the W-T and T-T comparison methodologies in original investigations, the United States merely refers to statements by the Appellate Body, the Panel, and Japan to support its contention that the Panel should have assessed the evidence before it specifically for each type of proceeding and for each comparison methodology.<sup>125</sup> Japan submits that none of these statements establish that the Panel should have assessed the evidence exclusively with respect to the specific comparison methodology to which it related.

40. Secondly, Japan submits that the evidence before the Panel was sufficient for it to conclude that the zeroing rule or norm covers W-T and T-T comparisons in original investigations. Japan maintains that "long-standing GATT and WTO jurisprudence holds that actual application of the rule or norm is not required", although the Appellate Body recognized, in *US – Zeroing (EC)*, that "systematic application" may be relevant in determining that an unwritten rule or norm exists, and can be challenged as such.<sup>126</sup> In any event, Japan argues that "[t]he Panel had before it considerable evidence of the actual and ... systematic application of the [United States'] zeroing procedures in numerous cases, across all procedural contexts that have arisen thus far."<sup>127</sup> Specifically, Japan presented to the Panel evidence demonstrating that the USDOC included the zeroing procedures in the dumping determination in an investigation involving the W-W comparison methodology, in an investigation involving the T-T comparison methodology, in 11 periodic reviews (involving W-T comparisons), in one new shipper review (involving the W-T comparison methodology), and in two sunset reviews (in which the USDOC relied on zeroed margins of dumping calculated on the basis of W-W comparisons). In each of these cases, the substantive content of the zeroing procedures applied by the USDOC was identical: "the USDOC disregarded negative comparison results where export price exceeds normal value."<sup>128</sup> In these circumstances, Japan argues that "the Panel's reliance on the 'systematic application' of the zeroing procedures in every procedural context that has arisen to date

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<sup>123</sup>Japan's appellee's submission, para. 68.

<sup>124</sup>*Ibid.*, para. 67.

<sup>125</sup>See *Ibid.*, paras. 72-85.

<sup>126</sup>*Ibid.*, para. 92.

<sup>127</sup>*Ibid.*, para. 93.

<sup>128</sup>*Ibid.*, para. 95.

was objective and well within the bounds of its discretion."<sup>129</sup> Japan also considers that the Panel acted within its discretion in relying on other evidence presented by Japan—which included, *inter alia*, statements by government agencies and courts in the United States—to support its conclusion that "the zeroing procedures are *always* an element in [United States] anti-dumping proceedings, no matter what the procedural context or comparison method[ology] employed."<sup>130</sup>

41. Thirdly, Japan disputes the United States' assertion that Japan's request for consultations did not identify the zeroing procedures in the context of T-T and W-T comparisons in original investigations. According to Japan, its request for consultations "broadly identifies, as one of the 'measures' subject to consultations, the United States' practice of 'zeroing', or the treatment of 'transactions with negative dumping margins as having margins equal to zero in determining weighted average dumping margins'."<sup>131</sup> Therefore, in identifying the measure subject to consultations, Japan did not limit its request to any particular comparison methodology. Japan concludes that the zeroing procedures as they relate to T-T and W-T comparisons in original investigations were properly within the Panel's terms of reference in this dispute.<sup>132</sup>

42. Finally, Japan contests the United States' request for the Appellate Body to declare moot the Panel's findings with respect to the consistency of the zeroing procedures in T-T comparisons in original investigations with Articles 1, 2.1, 2.4, 2.4.2, 3.1-3.5, 5.8, and 18.4 of the *Anti-Dumping Agreement*.

E. *Arguments of the Third Participants*

43. Pursuant to Rule 24(2) of the *Working Procedures*, Argentina, Hong Kong, China, India, and New Zealand chose not to submit a third participant's submission but attended the oral hearing. New Zealand, in its statement at the oral hearing, addressed issues relating to Articles 2.4.2, 3, and 3.1 of the *Anti-Dumping Agreement*. New Zealand argued, *inter alia*, that a general prohibition of zeroing would deprive the three comparison methodologies set out in Article 2.4.2 of their full effect. New Zealand also argued that non-dumped transactions should be treated consistently throughout the investigation, including for purposes of calculating margins of dumping and making an injury determination under Article 3.

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<sup>129</sup>Japan's appellee's submission, para. 101. (footnote omitted)

<sup>130</sup>*Ibid.*, para. 108. (footnote omitted)

<sup>131</sup>*Ibid.*, para. 21.

<sup>132</sup>*Ibid.*, para. 22. (footnote omitted)

1. China

44. China argues that the Panel erred in finding that the zeroing procedures are not "as such" inconsistent with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when used in T-T comparisons in original investigations. China submits that the T-T comparison methodology fulfils the same function as the W-W comparison methodology, and "also involves multiple comparisons if the product under investigation has more than one export transaction."<sup>133</sup> Referring to the Appellate Body Report in *US – Softwood Lumber V*, China emphasizes that Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 require that "dumping" and "margins of dumping" be established "for the product under investigation *as a whole*".<sup>134</sup> In China's view, this indicates that investigating authorities are required to aggregate intermediate comparison results to establish a margin of dumping for a product. China further argues that the term "margins of dumping" has "the same meaning for [W-W] and [T-T] comparisons"<sup>135</sup>, and that prohibiting zeroing in the context of W-W comparisons while permitting it in T-T comparisons "is illogic[al]".<sup>136</sup> Moreover, China maintains that the zeroing procedures in the context of T-T comparisons in original investigations are inconsistent with the "fair comparison" requirement of Article 2.4, because zeroing introduces an "inherent bias" that may not only distort the magnitude of a dumping margin, but may also lead to a wrongful finding of the very existence of dumping.<sup>137</sup>

45. China further argues that the requirement imposed by Article 2.1 that "dumping" and "margins of dumping" must be established for the product as a whole applies to the entire *Anti-Dumping Agreement*. Referring to the findings of the Appellate Body in *US – Zeroing (EC)*, China submits that Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 establish that the margin of dumping for the product as a whole "operates as a 'ceiling' for the [total] amount of [anti-dumping duties]" that may be collected in periodic reviews.<sup>138</sup> China argues that, by systematically disregarding all negative comparison results, the zeroing procedures result in an assessment of an anti-dumping duty that exceeds the foreign producers' or exporters' margins of dumping. This, according to China, is inconsistent with Articles 2.1, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

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<sup>133</sup>China's third participant's submission, para. 23.

<sup>134</sup>*Ibid.*, para. 25. (original emphasis)

<sup>135</sup>*Ibid.*, para. 30.

<sup>136</sup>*Ibid.*, para. 31.

<sup>137</sup>*Ibid.*, para. 45 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135). See also para. 48.

<sup>138</sup>*Ibid.*, para. 58.

46. China further submits that "the USDOC[s] zeroing procedures in new shipper reviews are inconsistent with Articles 2.1 and 9.5 of the [*Anti-Dumping*] Agreement and Articles VI:1 and VI:2 of the GATT 1994."<sup>139</sup> The term "individual margins of dumping" under Article 9.5 also refers to a margin of dumping that "must be established for the product under investigation as a whole".<sup>140</sup>

## 2. European Communities

47. The European Communities argues that the Panel erred in concluding that zeroing is permissible when calculating margins of dumping on the basis of T-T comparisons in original investigations. For the European Communities, Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* require that dumping margins are always calculated for the product as a whole and, therefore, when only "certain export transactions" are selected, the dumping margin is not calculated "for the product as a whole".<sup>141</sup> In this regard, the European Communities underscores that "[t]he results of [T-T] *intermediate comparisons* are not margins of dumping for the product as a whole."<sup>142</sup>

48. The European Communities submits that the W-T comparison methodology in the second sentence of Article 2.4.2 is an exception to the "normal" rule in the first sentence of that provision. It provides three criteria for identifying a pattern when dumping is targeted to certain purchasers, regions, or time periods.<sup>143</sup> According to the European Communities, this exceptional methodology "contains within it the possibility of focusing on the export transactions making up the targeted dumping pattern."<sup>144</sup> However, the European Communities submits that, in aggregating intermediate results to calculate a margin of dumping for the product as a whole, "an investigating authority cannot effectively select certain export transactions as the basis for the calculation of the dumping margin, excluding others, in whole or in part, other than on the basis of the three express targeted dumping criteria."<sup>145</sup>

49. The European Communities further argues that the Panel erred in finding that zeroing was permissible under the T-T comparison methodology, because it did not consider properly the Appellate Body Report in *US – Softwood Lumber (Article 21.5 – Canada)*. The European Communities points out that, in that case, the Appellate Body found that the use of zeroing when using the T-T methodology in original proceedings is inconsistent with Articles 2.4 and 2.4.2 of the

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<sup>139</sup>China's third participant's submission, para. 15.

<sup>140</sup>*Ibid.*, para. 68.

<sup>141</sup>European Communities' third participant's submission, para. 2. (emphasis omitted)

<sup>142</sup>*Ibid.*, para. 5. (original emphasis)

<sup>143</sup>See *Ibid.*, paras. 6-7.

<sup>144</sup>*Ibid.*, para. 7.

<sup>145</sup>*Ibid.*

*Anti-Dumping Agreement*.<sup>146</sup> Similarly, the European Communities argues that the Panel erred in finding that zeroing in the context of duty assessment proceedings is not inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, because the Appellate Body concluded in *US – Zeroing (EC)* that the use of zeroing when applying the W-T comparison methodology in assessment proceedings is inconsistent with those provisions.<sup>147</sup>

50. Noting that Japan does not appeal the Panel's findings with respect to Article 2.4.2 of the *Anti-Dumping Agreement* in the context of duty assessment proceedings, the European Communities argues that the provisions of Article 2.4.2 apply whenever an investigating authority determines margins of dumping, including duty assessment proceedings. The European Communities draws this conclusion from the ordinary meaning of the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2, which "refers to a period of time during which a dumping margin *exists* (that is, an investigation period), not a period of time during which it is established."<sup>148</sup> The European Communities finds additional support for this position in "the *immediate context* of Article VI:2 of the GATT 1994, which defines the term 'margin of dumping' [as] a unitary concept" throughout the *Anti-Dumping Agreement*.<sup>149</sup>

51. The European Communities further asserts that Articles 5, 11.4, and 18, as well as numerous cross-references between Articles 5, 3.3, 7, and 10 of the *Anti-Dumping Agreement*, provide no support for the position that the word "investigation" is to be interpreted as having a "special meaning" limited to original investigations under Article 5.<sup>150</sup> For the European Communities, "there is no reason why the unitary concept of 'margin of dumping' should change during an assessment proceeding, when a *contemporaneous* margin of dumping for each exporter is investigated and determined".<sup>151</sup> For the same reason, the European Communities maintains that "zeroing in newcomer proceedings under Article 9.5 of the *Anti-Dumping Agreement*, whether using the [W-T] method[ology] or some other method[ology], is inconsistent with Articles 9.5, 2.1 and 2.4 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994."<sup>152</sup>

52. With respect to prospective normal value systems, the European Communities argues that "[t]he possibility of imposing duties on the basis of a prospective normal value indicated in

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<sup>146</sup>European Communities' third participant's submission, para. 10 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 147).

<sup>147</sup>*Ibid.*, para. 11 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 135).

<sup>148</sup>*Ibid.*, paras. 12 and 13. (original emphasis)

<sup>149</sup>*Ibid.*, para. 15. (original emphasis)

<sup>150</sup>*Ibid.*, para. 16.

<sup>151</sup>*Ibid.*, para. 17. (original emphasis)

<sup>152</sup>*Ibid.*, para. 18.

*Article 9.4(ii)* is subject always to the possibility of refund under Article 9.3.2.<sup>153</sup> For the European Communities, this shows that investigating authorities may initially capture targeted dumping, subject to the possibility of refunds under Article 9.3.2.

53. The European Communities agrees with Japan that "any measure adopted following a sunset proceeding in which the investigating authority determines or relies on a margin of dumping calculated using zeroing is inconsistent with Articles 11.3, 2.1 and 2.4 of the *Anti-Dumping Agreement*."<sup>154</sup> For the European Communities, this is particularly true in this case, because the United States' investigating authority relied on margins of dumping calculated with the use of zeroing procedures in assessment review proceedings.

54. The European Communities further submits that the Appellate Body has, in *US – Zeroing (EC)*, already made findings regarding the existence and precise content of an "as such" United States' measure, namely, the "zeroing methodology".<sup>155</sup> The European Communities argues that, in the present dispute, "the Panel has made all the necessary factual findings concerning the existence and precise content of the 'as such' [United States'] measure with respect to original proceedings, assessment proceedings and newcomer proceedings."<sup>156</sup> Finally, the European Communities argues that "the factual and evidential situation with respect to zeroing is remarkable" because of the existence of a written print-out of a computer program that contains the zeroing rule, and because of the mathematical character of the zeroing rule, "which eliminates all scope for ambiguity or interpretation in its implementation".<sup>157</sup>

### 3. Korea

55. Korea argues that the Panel erred in finding that zeroing in T-T comparisons in original investigations and in subsequent reviews is consistent with the *Anti-Dumping Agreement*. In Korea's view, zeroing is prohibited "in all anti-dumping proceedings and dumping calculations since the methodology constitutes a direct violation of Articles 2.4.2 and 9.3 of the [*Anti-Dumping Agreement*]."<sup>158</sup> Korea agrees with the Panel that zeroing procedures are measures that can be challenged "as such", but disagrees with the Panel's conclusion that margins of dumping can be defined for a single export transaction.<sup>159</sup> According to Korea, "[w]hen the investigating authorities

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<sup>153</sup>European Communities' third participant's submission, para. 15. (original emphasis)

<sup>154</sup>*Ibid.*, para. 19.

<sup>155</sup>*Ibid.*, para. 22.

<sup>156</sup>*Ibid.*

<sup>157</sup>*Ibid.*, para. 24 (referring to Exhibits JPN-6 and JPN-7 submitted by Japan to the Panel).

<sup>158</sup>Korea's third participant's submission, para. 5.

<sup>159</sup>*Ibid.*, para. 7.

choose to engage in multiple comparisons, they are required to combine the results of those comparisons to determine the overall dumping margin for the product as a whole."<sup>160</sup> Korea refers to the Appellate Body statement in *US – Softwood Lumber V (Article 21.5 – Canada)* that "Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the [T-T] comparison methodology."<sup>161</sup> Korea emphasizes that zeroing "[systematically] excludes certain results in a [T-T] comparison, [and, as such,] it is inconsistent with Article 2.4.2"<sup>162</sup>, and therefore "must be prohibited" in all anti-dumping proceedings.<sup>163</sup>

56. Korea further submits that the chapeau of Article 9.3 does not permit the use of zeroing in subsequent reviews. Referring to the rulings of the Appellate Body in *US – Zeroing (EC)*, Korea argues that "in subsequent reviews, the investigating authority must compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product *as a whole* taking into account all intermediate comparisons made."<sup>164</sup> Korea claims that "to set a clear and reasonable legal standard applicable to both original investigations and subsequent reviews, the zeroing methodology's arbitrary exclusion of certain data in subsequent reviews must also be prohibited."<sup>165</sup>

57. For all these reasons, Korea requests the Appellate Body "to follow its own logic" and find that the zeroing methodology is inconsistent with the *Anti-Dumping Agreement* and "prohibited in all anti-dumping proceedings".<sup>166</sup> In Korea's view, zeroing is inconsistent with the "fair comparison" requirement in Article 2.4. In support of its argument, Korea refers to previous findings of the Appellate Body<sup>167</sup>, including the finding that the use of zeroing under the T-T comparison methodology "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely".<sup>168</sup> Korea agrees with this finding and submits that, "by disregarding 'negative' dumping margins and including solely the 'positive' dumping

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<sup>160</sup>Korea's third participant's submission, para. 8.

<sup>161</sup>*Ibid.*, para. 9 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 123).

<sup>162</sup>*Ibid.*

<sup>163</sup>*Ibid.*

<sup>164</sup>*Ibid.*, para. 10 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 132).

<sup>165</sup>*Ibid.*

<sup>166</sup>*Ibid.*, para. 11.

<sup>167</sup>*Ibid.*, para. 13 (referring to Appellate Body Report, *EC – Bed Linen*, paras. 55 and 59; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 134; Appellate Body Report, *US – Softwood Lumber V*, para. 63; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138).

<sup>168</sup>*Ibid.*, para. 14 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 138 and 142).

margins, 'zeroing' in *all* dumping calculations and proceedings creates a partial result in favo[u]r of a finding of dumping."<sup>169</sup> According to Korea, "such systematic exclusions of negative comparisons do not ensure a 'fair comparison' as required by Articles 2.4 and 2.4.2".<sup>170</sup>

#### 4. Mexico

58. Mexico agrees with Japan that the Panel erred in finding that zeroing in the context of T-T comparisons in original investigations is consistent "as such" with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Mexico notes that the Appellate Body has found, in previous cases, that Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 "define the terms 'dumping' and 'margins of dumping' in relation to the product under investigation or review 'as a whole'".<sup>171</sup> Mexico agrees with Japan that the zeroing procedures "necessarily disregard all negative comparison results, under any comparison method[ology]", thereby excluding "an entire category of the export transactions that form part of the 'product'".<sup>172</sup> Mexico submits that the Panel wrongly assumed that the requirement to calculate a margin of dumping for the "product as a whole" was derived solely from the reference to "all comparable export transactions" in Article 2.4.2, and applies only to W-W comparisons in original investigations.<sup>173</sup> Mexico underscores that, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body dismissed this view.<sup>174</sup>

59. Mexico further argues that the Panel's findings with respect to the "mathematical equivalence" between the W-W and W-T comparison methodologies are also erroneous. Mexico submits that the assumption of "mathematical equivalence" "is demonstrably false as a matter of mathematics, and is also erroneous as a matter of proper legal interpretation."<sup>175</sup> For Mexico, "the mathematical equivalence on which the Panel relies does not apply if the monthly [W-T] methodology is employed."<sup>176</sup>

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<sup>169</sup>Korea's third participant's submission, para. 15. (original emphasis)

<sup>170</sup>*Ibid.*

<sup>171</sup>Mexico's third participant's submission, para. 8 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 126, in turn, quoting Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93); see also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 91; and Appellate Body Report, *EC – Bed Linen*, para. 53).

<sup>172</sup>*Ibid.*, para. 12 (quoting Japan's appellant's submission, para. 11).

<sup>173</sup>*Ibid.*, para. 15.

<sup>174</sup>*Ibid.*, para. 18.

<sup>175</sup>*Ibid.*, para. 19.

<sup>176</sup>*Ibid.*, para. 20.

60. Mexico also claims that the Panel erred in finding that zeroing does not violate the "fair comparison" requirement of Article 2.4. In this regard, Mexico points to the statement of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* that "zeroing under the [T-T] comparison methodology is difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the 'fair comparison' requirement in Article 2.4."<sup>177</sup>

61. Mexico further argues that the Panel erroneously concluded that the requirement to calculate margins of dumping for the product as a whole does not apply to periodic reviews under Article 9.3. Mexico asserts that this requirement extends to periodic reviews not only because of the express reference to Article 2 in the chapeau of Article 9.3, but also because the definitions of "dumping" and "margins of dumping" in Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 apply "throughout" the *Anti-Dumping Agreement*.<sup>178</sup> Referring to the Appellate Body's findings in *US – Zeroing (EC)*, Mexico considers that it is not possible to interpret the term "margins of dumping" "as applying on a transaction-specific basis in periodic reviews".<sup>179</sup> In Mexico's view, this would be contrary to the obligation "to compare the anti-dumping duties collected on *all* entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping *for the product as a whole*".<sup>180</sup> Mexico claims that "there is a clear distinction between the assessment or collection of duties and the margin of dumping that establishes the ceiling on the amount of duties that can be assessed or collected."<sup>181</sup> Mexico adds that, while there is "a prohibition on determining margins of dumping at the sub-level of individual import transactions, it is clearly permissible to *assess* duties on an import- or importer-specific basis as long as the amount of duties assessed does not exceed the margin of dumping for the product, as established for the exporter or foreign producer."<sup>182</sup>

62. Finally, Mexico submits that the Panel erred in finding that zeroing in the context of new shipper reviews and sunset reviews is not inconsistent with Articles 9.5 and 11.3 of the *Anti-Dumping Agreement*. In Mexico's view, the requirement of Article 2.1 to establish the margin of dumping for the product as whole, and the "fair comparison" requirement in Article 2.4, apply to the entire

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<sup>177</sup>Mexico's third participant's submission, para. 36 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138).

<sup>178</sup>*Ibid.*, paras. 42 and 43 (quoting Appellate Body Report, *US – Softwood Lumber V*, para. 93; and Appellate Body Report, *EC – Bed Linen*, para. 51).

<sup>179</sup>*Ibid.*, para. 47. (footnote omitted)

<sup>180</sup>*Ibid.*, para. 49 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 132). (emphasis added by Mexico)

<sup>181</sup>*Ibid.*, para. 51.

<sup>182</sup>*Ibid.*, para. 52 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 130-131).

*Anti-Dumping Agreement*, including in the context of new shipper reviews and sunset reviews.<sup>183</sup> Mexico relies on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* to support its position that "the United States' reliance upon these [dumping] margins [calculated with zeroing] in connection with sunset reviews also is inconsistent with the 'fairness requirement' under Article 2.4."<sup>184</sup>

5. Norway

63. Norway submits that the prohibition of zeroing is not limited to original investigations in which margins of dumping are calculated on the basis of W-W comparisons. Instead, "all forms of zeroing in all forms of proceedings" under the *Anti-Dumping Agreement* are prohibited, because zeroing results in margins that are not established for the "product as a whole".<sup>185</sup> Norway asserts that Articles 2.1, 5.8, 6.10, 9.2, 9.3, and 9.5 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994, define "dumping" and "margins of dumping" in relation to a "product". Moreover, in Norway's view, the Appellate Body's findings in past cases make it clear that margins of dumping must be calculated for the product as a whole in all proceedings under the *Anti-Dumping Agreement*.<sup>186</sup>

64. Norway submits that the Appellate Body's ruling that zeroing in the W-W methodology does not result in a margin of dumping for the product as a whole "applies equally to other forms of zeroing and to other forms of [anti-dumping] proceedings".<sup>187</sup> Norway agrees with Japan that "the requirement in Article 2.1 ... to aggregate multiple comparison results to produce a margin of dumping for the product as a whole applies both when an authority conducts ... model-specific [W-W] comparisons, ... transaction-specific [W-T] comparisons and multiple [T-T] comparisons."<sup>188</sup> Norway concludes that it would be "illogical" to interpret the *Anti-Dumping Agreement* in a manner that would

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<sup>183</sup>Mexico's third participant's submission, paras. 58-61.

<sup>184</sup>*Ibid.*, para. 63.

<sup>185</sup>Norway's third participant's submission, para. 7 (referring to Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, para. 99; Appellate Body Report, *US – Zeroing (EC)*, para 127; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 122).

<sup>186</sup>*Ibid.*, paras. 10-20 (referring to Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 99; Appellate Body Report, *US – Zeroing (EC)*, para 126; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 105, 107, and 108).

<sup>187</sup>*Ibid.*, para. 24 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; and Appellate Body Report, *US – Softwood Lumber V*, para. 98).

<sup>188</sup>*Ibid.*, para. 27 (referring to Japan's appellant's submission, para. 82).

"allow the investigating authorities to apply a duty in a review, where the requirements of the Anti-[D]umping Agreement would have made it illegal to impose [such] a duty in the first place."<sup>189</sup>

65. Norway further argues that the Panel erred in finding that the use of zeroing procedures is not inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*. Norway emphasizes that "the Panel erred when considering Article 2.4 as *lex specialis* in regard to Articles 2.4.2 and 9.3" of the *Anti-Dumping Agreement*.<sup>190</sup> Norway submits that previous Appellate Body findings indicate that "there is an inherent bias in a zeroing methodology" and that zeroing is not a "fair comparison".<sup>191</sup> Although Norway acknowledges that the Appellate Body made these findings in connection with W-W and T-T comparisons in original investigations, this interpretation should also be extended to W-T comparisons given the "overarching role" of the chapeau of Article 2.4.<sup>192</sup>

66. Similarly, with respect to periodic reviews, Norway is of the view that there is an obligation to calculate one single margin for the product as a whole. Norway submits that zeroing is prohibited in periodic reviews by virtue of the "fair comparison" requirement in Article 2.4.<sup>193</sup> Since the "[a]greement-wide" definition of dumping also applies to the definition of "margins of dumping" for purposes of new shipper reviews, Norway concludes that the prohibition of zeroing, based on Articles 2.1 and 2.4 "logically extends to Article 9.5".<sup>194</sup>

67. Norway concludes that, since zeroing is contrary to Article 2.4, it follows that sunset reviews relying on dumping margins calculated by using zeroing procedures may be contrary to both Article 2.4 and Article 11.3.<sup>195</sup> Norway disagrees with the distinction drawn by the Panel between "margins from original investigations [and] those from any periodic review"<sup>196</sup>, and considers that "[t]he key issue is whether the margin that the investigating authorities relied upon [was] calculated with or without zeroing."<sup>197</sup>

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<sup>189</sup>Norway's third participant's submission, para. 30.

<sup>190</sup>*Ibid.*, para. 32.

<sup>191</sup>*Ibid.*, para. 34 (referring to Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142).

<sup>192</sup>*Ibid.*, para. 35.

<sup>193</sup>*Ibid.*, para. 37 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 133).

<sup>194</sup>*Ibid.*, para. 39.

<sup>195</sup>*Ibid.*, para. 38.

<sup>196</sup>*Ibid.* (referring to Panel Report, para. 7.256).

<sup>197</sup>*Ibid.*, para. 38.

6. Thailand

68. Thailand argues that the Panel erred in finding that the use of zeroing in T-T comparisons or in the context of periodic, new shipper, and sunset reviews is consistent with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement*. According to Thailand, the Panel's finding that zeroing is permitted in certain circumstances is based on its erroneous assumption that there is no requirement in the *Anti-Dumping Agreement* to calculate a margin of dumping for the product under investigation as a whole. Thailand asserts that the Panel's findings "are inconsistent both with the express language of the *Anti-Dumping Agreement* and the previous jurisprudence of the Appellate Body."<sup>198</sup> Thailand submits that the Appellate Body has held that, "whenever an investigating authority uses intermediate comparisons between subgroups of export prices and normal values—whether on a model-by-model, [T-T] or any other basis—as a step to arrive at the overall dumping margin for that product, the investigating authority may not, in aggregating those intermediate comparisons, 'zero' the results of some of those comparisons."<sup>199</sup>

69. Thailand also considers that the Panel misinterpreted the 1960 Report of the Group of Experts by reading a single sentence "out of context".<sup>200</sup> In Thailand's view, the Group of Experts' Report, when read in full, does not suggest that "it is permissible to determine dumping with respect to a different universe of goods than is used to determine injury or, in doing so, to 'zero' the export prices for the goods under investigation."<sup>201</sup> To the contrary, according to Thailand, it is entirely consistent with the interpretation that dumping must be determined for the "product" under investigation. Thailand notes that the Group of Experts' Report emphasizes that "a determination of *both dumping and injury* ... made for each importation" would be the "ideal method".<sup>202</sup> In that circumstance, "there would be symmetry between the universe of goods with respect to which the determination of dumping and injury would be made and, therefore, the determinations could also be said to be made with respect to the same 'product'."<sup>203</sup> Therefore, Thailand claims that "[n]othing in the Group of Experts' Report suggests that it may be permissible, in determining dumping margins on a 'product'

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<sup>198</sup>Thailand's third participant's submission, para. 7.

<sup>199</sup>*Ibid.*, paras. 8 and 9 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 94).

<sup>200</sup>*Ibid.*, para. 14 (referring to GATT Second Report of the Group of Experts, *Anti-Dumping and Countervailing Duties*, L/1141, adopted 27 May 1960, BISD 9S/194).

<sup>201</sup>*Ibid.*, para. 15.

<sup>202</sup>*Ibid.*, paras. 14 and 15. (original emphasis)

<sup>203</sup>*Ibid.*, para. 15.

basis, to reduce systematically the prices of certain importations in a manner that makes it more likely that the 'product' will be found to be dumped."<sup>204</sup>

70. Finally, Thailand disagrees with the Panel's description of the "fair comparison" requirement of Article 2.4 as "indeterminate" and reflecting a "somewhat subjective" determination.<sup>205</sup> The concept of fairness is, in Thailand's view, essentially "an objective standard, designed to reduce, if not eliminate, subjectivity from the investigating authority's determination."<sup>206</sup> Thailand concludes that zeroing is inconsistent with Article 2.4, not because of its effect on the outcome *per se*, but because its use deprives the exporter of its "equal chance of success" in the investigation.<sup>207</sup>

### **III. Issues Raised in This Appeal**

71. The following issues are raised in this appeal:

- (a) whether the Panel erred in finding that the United States' "zeroing procedures", inasmuch as they relate to the calculation of margins of dumping on the basis of transaction-to-transaction and weighted average normal value-to-transaction comparisons in original investigations, constitute a measure that can be challenged, as such, in WTO dispute settlement; and, in so doing, whether the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU;
- (b) whether the Panel erred in finding that the United States does not act inconsistently with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, by maintaining "zeroing procedures" when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;

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<sup>204</sup>Thailand's third participant's submission, para. 18.

<sup>205</sup>*Ibid.*, para. 19 (quoting Panel Report, para. 7.158).

<sup>206</sup>*Ibid.*

<sup>207</sup>*Ibid.*, para. 20.

- (c) whether the Panel erred in finding that the United States does not act inconsistently with Articles 2.1, 2.4, and 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, by maintaining "zeroing procedures" in periodic reviews;
- (d) whether the Panel erred in finding that the United States does not act inconsistently with Articles 2.1, 2.4, and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, by maintaining "zeroing procedures" in new shipper reviews;
- (e) whether the Panel erred in finding that the United States did not act inconsistently with Articles 2.1, 2.4, and 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, in applying "zeroing procedures" in the 11 periodic reviews at issue in this appeal; and
- (f) whether the Panel erred in finding that the United States did not act inconsistently with Articles 2 and 11 of the *Anti-Dumping Agreement* in the sunset reviews at issue in this appeal, by relying on margins of dumping calculated in previous proceedings using "zeroing procedures".

#### **IV. Zeroing As Such in Original Investigations Based on Transaction-to-Transaction and Weighted Average-to-Transaction Comparisons**

72. We first examine the preliminary issue of whether the Panel erred in finding that the United States' "zeroing procedures", inasmuch as they relate to the calculation of margins of dumping on the basis of transaction-to-transaction ("T-T") and weighted average normal value-to-prices of individual export transactions ("W-T") comparisons in original investigations<sup>208</sup>, constitute a measure that can be challenged, as such, in WTO dispute settlement. This is the subject of the United States' other appeal.

73. The measures challenged by Japan before the Panel were the "zeroing procedures" and the "standard zeroing line".<sup>209</sup> Japan claimed before the Panel that these "measures" were, as such, inconsistent with various provisions of the *Anti-Dumping Agreement* and the GATT 1994 in the

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<sup>208</sup>In our discussion, we use the term "original investigations" to refer to investigations within the meaning of Article 5 of the *Anti-Dumping Agreement*.

<sup>209</sup>The term "standard zeroing line" is used in the Panel Report to refer to a specific line of computer programming code used by the USDOC when it develops a specific computer program to calculate a margin of dumping in a particular anti-dumping proceeding. (See Panel Report, paras. 4.17 and 7.20, and footnote 644 thereto)

context of original investigations, periodic reviews, new shipper reviews, changed circumstances reviews, and sunset reviews.<sup>210</sup>

74. The Panel first reviewed the nature and scope of "measures" that may be subject to "as such" challenges in WTO dispute settlement. The Panel recalled the Appellate Body's finding in *US – Corrosion-Resistant Steel Sunset Review* that, "[i]n principle, any act or omission attributable to a WTO Member can be a 'measure' of that Member for purposes of WTO dispute settlement proceedings."<sup>211</sup> The Panel further recalled the Appellate Body's statement that measures that can be subject to WTO dispute settlement include not only acts applying a law in a specific situation, but also "acts setting forth rules or norms that are intended to have general and prospective application."<sup>212</sup> The Panel also noted the conclusion of the Appellate Body in that case that, in principle, there is no bar to "non-mandatory measures" being challenged as such.<sup>213</sup>

75. For purposes of determining the existence of such a rule or norm, the Panel recalled the Appellate Body's finding, in *US – Zeroing (EC)*, that a "panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document"<sup>214</sup>, and that, when a challenge is brought against such a rule or norm, "a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application."<sup>215</sup> On this basis, the Panel concluded that the question it was required to address in this dispute was whether it is possible to identify the precise content of the zeroing procedures, whether the zeroing procedures are attributable to the United States, and whether they can be considered to be a "rule or norm" intended to have general and prospective application.<sup>216</sup>

76. On the basis of an assessment of the evidence before it, the Panel concluded that "a rule or norm exists providing for the application of zeroing whenever [the] USDOC calculates margins of

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<sup>210</sup>The term "zeroing procedures" is used in the Panel Report to refer to the United States' "zeroing methodology" *per se*, as distinguished from the "standard zeroing line". (See Panel Report, para. 7.47) The Panel concluded that the "standard zeroing line" is not a measure that can be challenged as such. (See *Ibid.*, para. 7.46) This finding of the Panel is not appealed by Japan. For a description of the United States' "zeroing procedures", see *supra*, footnote 3.

<sup>211</sup>*Ibid.*, para. 7.37 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).

<sup>212</sup>*Ibid.* (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

<sup>213</sup>*Ibid.*, para. 7.39 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88).

<sup>214</sup>*Ibid.*, para. 7.43 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 196).

<sup>215</sup>*Ibid.* (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 198).

<sup>216</sup>*Ibid.*, para. 7.45.

dumping or duty assessment rates."<sup>217</sup> The Panel noted that the evidence before it was "sufficient to identify the precise content of what Japan terms as 'zeroing procedures', that these procedures are attributable to the United States, and that they are a rule or norm of general and prospective application".<sup>218</sup> The Panel therefore found that the United States' "zeroing procedures" constitute "a measure which can be challenged as such."<sup>219</sup>

77. Before examining the participants' arguments on appeal, we note that the United States' other appeal is limited to the question whether "zeroing procedures" constitute a measure that can be challenged as such, inasmuch as they relate to T-T and W-T comparisons in original investigations; the United States does not appeal the Panel's finding regarding "zeroing procedures", as far as weighted average normal value-to-weighted average export price ("W-W") comparisons in original investigations are concerned.<sup>220</sup> The United States "acknowledges that there is at least an evidentiary record" in connection with W-W comparisons.<sup>221</sup> The United States also does not appeal the Panel's finding inasmuch as it relates to "zeroing procedures" in the context of periodic reviews and new shipper reviews.<sup>222</sup>

A. *The Measure at Issue*

78. The United States contends that the Panel failed to make an objective assessment of the matter before it—including an objective assessment of the facts of the case—as required by Article 11 of the DSU, when it concluded that a single rule or norm exists by virtue of which the USDOC will apply zeroing in any anti-dumping proceeding, regardless of the comparison methodology used. According to the United States, the evidence relied on by the Panel "does not support the proposition that there are rules or norms taken by the United States concerning the use of zeroing as it relates to [T-T] and [W-T] comparisons in investigations."<sup>223</sup> In support of its view, the United States points out that, in original investigations, it has never applied the W-T comparison methodology and has only once applied the T-T comparison methodology. Moreover, the USDOC has "never pronounced on how it would conduct such comparisons, including whether it would or would not 'zero' in connection with those comparisons."<sup>224</sup> The United States therefore submits that measures that did

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<sup>217</sup>Panel Report, para. 7.50.

<sup>218</sup>*Ibid.*, para. 7.55.

<sup>219</sup>*Ibid.*, para. 7.58.

<sup>220</sup>United States' other appellant's submission, para. 3.

<sup>221</sup>*Ibid.*

<sup>222</sup>United States' response to questioning at the oral hearing.

<sup>223</sup>United States' other appellant's submission, para. 26.

<sup>224</sup>United States' other appellant's submission, para. 2.

not exist at all have been found by the Panel to be "measures" that can be challenged, as such, in WTO dispute settlement.

79. The United States emphasizes that, "particularly when the measure alleged is unwritten, the evidence of the existence of a measure must in fact relate to the full scope of the measure claimed, and that there can be no finding of such a measure where such evidence does not exist."<sup>225</sup> The United States argues that, "[j]ust as a single measure may often consist of elements that may themselves be considered measures, the Panel's error may be viewed either as having failed to identify the precise content of a single measure—that is, whether any 'zeroing procedures' maintained by [the USDOC] actually relate to [T-T] and [W-T] comparisons in investigations—or as having failed to establish the existence of separate [USDOC] 'zeroing procedures' as they relate to each of these comparison[] [methodologies] in investigations."<sup>226</sup>

80. According to the United States, "[t]he evidence put forward by Japan in this proceeding simply does not support the Panel's finding that [the USDOC] maintains an unwritten zeroing measure regardless of the basis of the dumping comparison and in all antidumping proceedings."<sup>227</sup> Moreover, the Panel has made "no effort to 'carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" relating to [the USDOC]'s use of zeroing in the context of [T-T] and [W-T] comparisons in investigations, because there are no such instrumentalities."<sup>228</sup>

81. In contrast, Japan maintains that "[t]he Panel had before it considerable evidence of the actual and, indeed, systematic application of [zeroing] in numerous cases, across all procedural contexts that have arisen thus far."<sup>229</sup> Japan emphasizes that, in each of these cases, the substantive content of the zeroing procedures was identical: the USDOC disregarded comparison results where the export price exceeded the normal value.<sup>230</sup> Japan also points out that the United States failed to produce any evidence to demonstrate that differences in comparison methodologies, or differences in anti-dumping proceedings, would "imply any difference in the operation or application of the zeroing procedures that requires an independent assessment whether a rule or norm exists for each setting."<sup>231</sup> Thus, there was "no need for the Panel to have parsed the evidence as to each specific comparison [methodology]

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<sup>225</sup>*Ibid.*, para. 14. (footnote omitted)

<sup>226</sup>*Ibid.*, footnote 22 to para. 14.

<sup>227</sup>*Ibid.*, para. 31.

<sup>228</sup>*Ibid.* (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 198).

<sup>229</sup>Japan's appellee's submission, para. 93.

<sup>230</sup>See *Ibid.*, para. 95.

<sup>231</sup>Japan's appellee's submission, para. 68.

and procedural [context]" in its determination that there exists a single rule or norm that can be challenged as such.<sup>232</sup>

82. As we see it, the United States' challenge under Article 11 of the DSU is directed at the Panel's appreciation and weighing of the evidence. The Appellate Body has stated on several occasions that panels enjoy a certain margin of discretion in assessing the credibility and weight to be ascribed to a given piece of evidence.<sup>233</sup> At the same time, the Appellate Body has underscored that Article 11 of the DSU requires panels "to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence."<sup>234</sup> Moreover, panels must not "make affirmative findings that lack a basis in the evidence contained in the panel record."<sup>235</sup> Provided that a panel's assessment of evidence remains within these parameters, the Appellate Body will not interfere with the findings of the panel.<sup>236</sup>

83. The evidence before the Panel in this case included model computer programs used by the USDOC that serve as a basis for programs used in specific original investigations and periodic reviews. These programs include an instruction to apply zeroing through the "standard zeroing line".<sup>237</sup> The Panel also had evidence before it regarding the application of the zeroing procedures in 16 different anti-dumping proceedings, including four original investigations<sup>238</sup>, one new shipper review<sup>239</sup>, and 11 periodic reviews.<sup>240</sup>

84. Although the Panel did not consider the "standard zeroing line" to be a measure in itself<sup>241</sup>, it found that zeroing has been a "constant feature of [the] USDOC's practice for a considerable period of

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<sup>232</sup>*Ibid.*, para. 67.

<sup>233</sup>See Appellate Body Report, *EC – Hormones*, para. 132. See also Appellate Body Report, *EC – Sardines*, para. 299.

<sup>234</sup>Appellate Body Report, *US – Carbon Steel*, para. 142. See also Appellate Body Report, *EC – Hormones*, para. 133.

<sup>235</sup>*Ibid.* See also Appellate Body Report, *US – Wheat Gluten*, paras. 160-162.

<sup>236</sup>See Appellate Body Report, *US – Gambling*, para. 330.

<sup>237</sup>Exhibits JPN-6, at 15, and JPN-7, at 16, submitted by Japan to the Panel.

<sup>238</sup>Exhibits JPN-8, JPN-10A, JPN-22A, JPN-22B, and JPN-23C submitted by Japan to the Panel.

<sup>239</sup>Exhibit JPN-9 submitted by Japan to the Panel.

<sup>240</sup>Exhibits JPN-11 through JPN-21 submitted by Japan to the Panel; further details may be found in Panel Report, para. 2.3.

<sup>241</sup>Panel Report, para. 7.46.

time".<sup>242</sup> The Panel further found that the "standard zeroing line" "has been included in the vast majority of computer program[s] used by [the] USDOC to calculate margins of dumping ... and [even] where the line has not been included, [the] USDOC has used other methods to exclude export prices higher than the normal value from the numerator of the weighted average margin of dumping."<sup>243</sup> In addition, the Panel noted that the United States had "not identified a single case in which a decision was taken to provide such an offset."<sup>244</sup>

85. Moreover, the Panel observed that the evidence before it "shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases."<sup>245</sup> According to the Panel, "[t]he manner in which [the] USDOC's use of zeroing has been characterized in statements by [the] USDOC [and] other United States' agencies and courts ... confirms that [the] USDOC's consistent application of zeroing reflects a deliberate policy."<sup>246</sup> For the Panel, the USDOC "has repeatedly stated that '[it does] not allow' export sales at prices above normal value to offset dumping margins on other export sales, has referred to its 'practice' or 'methodology' of not providing for offsets for non-dumped sales, has pointed out that the United States Court of Appeals for the Federal Circuit has ruled that the 'zeroing practice' ... is a reasonable interpretation of the law, that the US Congress was aware of [the] USDOC's methodology when it adopted the Uruguay Round Agreements Act, and that not granting an offset for non-dumped sales 'has consistently been an integral part of the [USDOC]'s [W-W] analysis'."<sup>247</sup> The Panel added that "the United States Department of Justice has stated that the USDOC 'has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the [Uruguay Round Agreements Act]' and has referred to [the] USDOC's 'long-standing methodology' and to 'the zeroing practice, which has been followed for at least 20 years' and which 'predated the passage of the latest major amendment of the Anti-dumping law'."<sup>248</sup> Finally, the Panel noted that the "United States Court of International Trade has stated that '[the USDOC's] zeroing methodology in its calculation of dumping margins is grounded in long-standing practice'."<sup>249</sup>

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<sup>242</sup>Panel Report, para. 7.51.

<sup>243</sup>*Ibid.*

<sup>244</sup>*Ibid.*

<sup>245</sup>*Ibid.*, para. 7.52.

<sup>246</sup>*Ibid.*

<sup>247</sup>*Ibid.* (footnotes omitted)

<sup>248</sup>*Ibid.* (footnote omitted)

<sup>249</sup>*Ibid.*

86. The United States argues that the statements which the Panel deemed to reflect a "deliberate policy" consist "primarily of quotations from one assessment review".<sup>250</sup> Although this may be so, we cannot fault the Panel for concluding that these statements, when considered in conjunction with the other evidence before the Panel, lend support to the conclusion that a single rule or norm of general and prospective application that provides for disregarding negative comparison results exists. As the Appellate Body has previously said, the appreciation of "a given piece of evidence is part and parcel of the fact-finding process and is, in principle, left to the discretion of a panel as the trier of facts."<sup>251</sup>

87. The thrust of the United States' argument is that context-specific evidence is required to demonstrate the existence of the zeroing procedures in T-T and W-T comparisons in original investigations.<sup>252</sup> In other words, according to the United States, the existence of a rule or norm requiring the application of zeroing must be examined separately for each comparison methodology and for each type of anti-dumping proceeding. Japan submitted evidence to the Panel indicating that zeroing is a constant feature whenever a margin of dumping is calculated regardless of the comparison methodology used. In contrast, the United States did not adduce evidence of a single case in which zeroing was not applied.<sup>253</sup> Nor did it indicate how the use of alternative comparison methodologies would make a difference in the operation or application of the zeroing procedures. Moreover, the United States did not explain why the rationale underlying the zeroing procedures in W-W comparisons in original investigations, or W-T comparisons in periodic reviews<sup>254</sup>, does not apply to the calculation of margins of dumping on the basis of T-T and W-T comparisons in original investigations. The fact that the consistency of zeroing may be challenged in relation to a specific comparison methodology, or a specific type of anti-dumping proceeding, does not necessarily mean that the existence of a general rule or norm directing its use must be established through evidence of

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<sup>250</sup>United States' other appellant's submission, para. 29. (footnote omitted)

<sup>251</sup>Appellate Body Report, *EC – Hormones*, para. 132.

<sup>252</sup>United States' other appellant's submission, para. 14 and footnote 22 thereto.

<sup>253</sup>Panel Report, para. 7.51.

<sup>254</sup>The United States acknowledges that there is an evidentiary record to support a finding as to the existence of the "zeroing procedures" in these contexts. (United States' response to questioning at the oral hearing. See also United States' other appellant's submission, para. 3)

the actual application of those procedures in all possible situations, as long as they were applied every time the occasion arose.<sup>255</sup>

88. In sum, we agree with the Panel's understanding of the Appellate Body's previous jurisprudence and the manner in which the Panel framed the question before it. We also consider that the Panel had sufficient evidence before it to conclude that the "zeroing procedures" under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm.<sup>256</sup> The Panel also examined ample evidence regarding the precise content of this rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States. In our view, the Panel properly assessed this evidence. We therefore disagree with the United States that the Panel did not assess objectively the issue of whether a single rule or norm exists by virtue of which the USDOC applies zeroing "regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated."<sup>257</sup>

B. *Japan's Request for Consultations*

89. In support of its claim under Article 11 of the DSU, the United States asserts that Japan's request for consultations<sup>258</sup> did not include a reference to any "zeroing measure" in the context of W-T or T-T comparisons in original investigations.<sup>259</sup> The United States argues that "Japan's failure to consult on any such measures means that they are not within the terms of reference of this dispute, and the Appellate Body should reverse the Panel's finding as to the existence of such [United States]

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<sup>255</sup>The United States attributes significance to the fact that Japan abandoned its claim before the Panel regarding the consistency of zeroing in the context of W-T comparisons in original investigations. According to the United States, this confirms that Japan "appreciated that the evidence [before the Panel] did not support the existence of a [United States] unwritten measure" as it relates to W-T comparisons in original investigations. (United States' other appellant's submission, para. 23) Before the Panel, Japan rejected the notion that the withdrawal of its claim regarding the use of zeroing under the second sentence of Article 2.4.2 indicated a lack of evidentiary basis upon which to conclude that the zeroing procedures apply in the context of the W-T comparisons in original investigations. Japan claimed, instead, that "there is a *single [zeroing] measure* that applies to [W-W] comparisons, [T-T] comparisons and [W-T] comparisons, used in any type of anti-dumping proceeding" and that "[w]ith respect to [that] *single zeroing measure*, Japan makes a *series of claims*." (Panel Report, para. 6.19) (original emphasis)

<sup>256</sup>See Panel Report, footnote 688 to para. 7.53.

<sup>257</sup>*Ibid.*, para. 7.53. (footnote omitted)

<sup>258</sup>See Request for Consultations by Japan, WT/DS322/1, 29 November 2004.

<sup>259</sup>United States' other appellant's submission, para. 17. The United States referred to Articles 6.2 and 7.1 of the DSU in its Notice of Other Appeal and in its other appellant's submission. However, at the oral hearing, the United States explained that it is not requesting the Appellate Body to make a specific finding that the Panel failed to comply with these provisions. Instead, the United States refers to those provisions as arguments in support of its claim that the Panel acted inconsistently with Article 11 of the DSU. We understand the references to Articles 3.3 and 4.2 in the United States' Notice of Other Appeal and in the United States' other appellant's submission in the same way.

measures on that basis."<sup>260</sup> The United States explains that "[it] did not raise this issue in the Panel proceedings because it was focusing on the fact that these 'measures' do not exist at all"<sup>261</sup>, but adds that a failure to consult is a jurisdictional matter that can be raised at any time.

90. Japan disagrees with the United States for two reasons. First, Japan asserts that its request for consultations did identify the zeroing procedures as a single "measure" on which it wished to consult, without limitation as to its application in any particular comparison methodology. Secondly, Japan argues that the United States' failure to object before the Panel to the alleged lack of consultations means it relinquished its right to consult, and that the Panel was not required to explore the issue on its own initiative.

91. A panel's terms of reference are circumscribed by the "specific measures at issue" and the "legal basis of the complaint" (that is, "claims") set out in the complaining party's request for the establishment of a panel.<sup>262</sup> Japan's panel request identifies the measures subject to an "as such challenge" in the following terms:

*In original investigations, periodic reviews, new shipper reviews, sunset reviews, and changed circumstances reviews where the redetermination of margins of dumping occurs, the United States Department of Commerce ("USDOC") disregards intermediate negative dumping margins calculated by comparing normal value and export price, including on a weighted average-to-weighted average basis, weighted average-to-transaction basis, and transaction-to-transaction basis, through the USDOC's AD Margin Calculation computer program and other related procedures, in the process of establishing the overall dumping margin for the product as a whole ("hereinafter collectively referred to as "Zeroing")."*<sup>263</sup> (emphasis added)

92. Japan's panel request, thus, refers to zeroing in the context of all types and stages of anti-dumping proceedings, and in all comparison methodologies. The United States does not appear to dispute this. Rather, the United States argues that, because Japan's request for consultations does not include a reference to zeroing in the context of all comparison methodologies in original investigations, zeroing in the context of T-T and W-T comparisons in original investigations is outside the Panel's terms of reference.

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<sup>260</sup>United States' other appellant's submission, para. 18.

<sup>261</sup>*Ibid.*, para. 18 and footnote 29 thereto.

<sup>262</sup>Article 7.1 of the DSU. Article 6.2 of the DSU provides that a panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

<sup>263</sup>Request for the Establishment of a Panel by Japan, WT/DS322/8, 7 February 2005 (attached as Annex III to this Report), p. 2, item B.1.(a).

93. Japan's request for consultations refers, in the relevant part, to:

... certain measures imposed by the United States including: (1) the zeroing practice by which the United States Department of Commerce ("USDOC") treats transactions with negative dumping margins as having margins equal to zero in determining weighted average dumping margins in anti-dumping investigations, administrative reviews, and sunset reviews, and also in assessing the final anti-dumping duty liability on entries upon liquidation ...

...

(6) the methodology of the United States for determining dumping margins and material injury in anti-dumping investigations ...<sup>264</sup>

94. We do not agree with the United States' reading of Japan's request for consultations. A careful examination of this request indicates that the use of "zeroing procedures" in the context of all types and stages of anti-dumping proceedings, and regardless of the comparison methodology used, was covered by that request.

95. The language in Japan's request for consultations should, in our view, have sufficiently alerted the United States to the fact that Japan wished to consult on zeroing in the context of all comparison methodologies, including T-T and W-T comparisons in original investigations. Put differently, the measure upon which Japan wished to consult was the United States' "methodology ... for determining dumping margins ... in [original] investigations".<sup>265</sup> That "zeroing procedures" may manifest themselves differently when calculating a margin of dumping under the W-W, T-T, and W-T comparison methodologies does not necessarily mean that these manifestations of zeroing would have to be listed in a request for consultations.<sup>266</sup>

96. For these reasons, we disagree with the United States' contention that the "zeroing procedures", inasmuch as they relate to T-T and W-T comparisons in original investigations, were not within the Panel's terms of reference.<sup>267</sup> In these circumstances, we need not rule on Japan's contention that the "United States' failure to raise the alleged lack of consultations on its zeroing

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<sup>264</sup>Request for Consultations by Japan, WT/DS322/1, 29 November 2004, p. 1.

<sup>265</sup>*Ibid.*, p. 2, item (6).

<sup>266</sup>Articles 4 and 6 of the DSU do not "require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the [panel] request" (Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis in original)), as long as the complaining party does not expand the scope of the dispute. Requiring such an identity "would substitute the request for consultations for the panel request." (Appellate Body Report, *US – Upland Cotton*, para. 293) We need not reach this question because we have found above that the use of "zeroing procedures" in the context of all types of anti-dumping proceedings, and regardless of the comparison methodology used, was covered in both the request for consultations and in the panel request, which defines a panel's terms of reference.

<sup>267</sup>United States' other appellant's submission, para. 18.

procedures in the context of [W T] and [T-T] comparisons in original investigations until this appeal means that it 'consented to the lack of consultations' on these measures, and 'relinquished whatever right to consult it may have had'.<sup>268</sup> Accordingly, we uphold the Panel's finding, in paragraph 7.58 of the Panel Report, that the "zeroing procedures" constitute a measure which can be challenged as such and, therefore, dismiss the United States' claim that the Panel acted inconsistently with Article 11 of the DSU by concluding that the zeroing procedures, as they relate to original investigations based on transaction-to-transaction and weighted average normal value-to-prices of individual export transactions comparisons, constitute a measure that can be challenged, as such, in WTO dispute settlement.

97. The United States additionally requests the Appellate Body to declare moot the Panel's finding that the "zeroing procedures", inasmuch as they relate to T-T comparisons in original investigations, are consistent with various provisions of the *Anti-Dumping Agreement* and the GATT 1994.<sup>269</sup> This request is premised on our reversing the Panel's finding that the "zeroing procedures" in T-T comparisons in original investigations constitute a measure that can be challenged as such. Given that this condition is not met, we need not rule on this request of the United States.<sup>270</sup>

#### **V. Zeroing As Such in Original Investigations, Periodic Reviews, and New Shipper Reviews**

98. We turn now to certain issues raised by Japan in this appeal.<sup>271</sup> Before the Panel, Japan referred to both "model zeroing" and "simple zeroing"<sup>272</sup> procedures, and claimed that the USDOC's "zeroing procedures", as they relate, *inter alia*, to original investigations, periodic reviews, and new shipper reviews, are inconsistent, as such, with certain provisions of the *Anti-Dumping Agreement* and the GATT 1994.

99. The Panel found that, by maintaining "model zeroing procedures" when calculating margins of dumping on the basis of W-W comparisons in original investigations, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>273</sup> The United States does not appeal this finding of the Panel.

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<sup>268</sup>Japan's appellee's submission, para. 18 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 63).

<sup>269</sup>United States' other appellant's submission, paras. 32-33 and 34(b).

<sup>270</sup>We examine the WTO-consistency of zeroing under the T-T comparison methodology below.

<sup>271</sup>These issues are described, *supra*, in para. 71(b)-(d).

<sup>272</sup>For a description of "model zeroing" and "simple zeroing" see, *supra*, footnotes 13 and 14.

<sup>273</sup>Panel Report, para. 7.86.

100. The Panel, however, rejected Japan's claims regarding "simple zeroing procedures" in T-T comparisons in original investigations. The Panel took the view that it is "permissible" to interpret Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, as well as Article VI of the GATT 1994, to mean that "there is no general requirement to determine dumping and margins of dumping for the product as a whole."<sup>274</sup> According to the Panel, "the fact that the terms 'dumping' and 'margin of dumping' in Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 are defined in relation to 'product' and 'products' does not warrant the conclusion that these terms, by definition, cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level in which the same weight is accorded to export prices that are above normal value as to export prices that are below normal value."<sup>275</sup> In addition, the Panel reasoned that, because "'dumping' occurs when the export price of a product is less than its normal value, the fact that Article 2.4.2 expressly permits the use of a [T-T] comparison [methodology] ... logically means that a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal value."<sup>276</sup> The Panel further held that "in the context of the [T-T comparison] methodology in the first sentence of Article 2.4.2 the term 'margins of dumping' can be understood to mean the total amount by which transaction-specific export prices are less than transaction-specific normal values."<sup>277</sup>

101. As contextual support for its line of reasoning, the Panel also examined what it called the "logical impossibility of reconciling a general prohibition of zeroing with the express provision for the use of [a W-T comparison methodology] in the second sentence of Article 2.4.2."<sup>278</sup> The Panel took the view that such a "general prohibition" of zeroing under all the three methodologies listed in Article 2.4.2 would be contrary to the principle of effective treaty interpretation, because it would mean that the application of the W-T comparison methodology provided in the second sentence of Article 2.4.2 would "necessarily always yield" the same mathematical result as the application of the W-W comparison methodology provided in the first sentence of the same provision.<sup>279</sup> In addition, the Panel saw no basis in the text of Article 2.4.2 to support the view that zeroing, while not prohibited under the W-T comparison methodology, is prohibited under the T-T comparison methodology.<sup>280</sup>

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<sup>274</sup>Panel Report, para. 7.142.

<sup>275</sup>*Ibid.*, para. 7.112.

<sup>276</sup>*Ibid.*, para. 7.119.

<sup>277</sup>*Ibid.*

<sup>278</sup>*Ibid.*, para. 7.114.

<sup>279</sup>*Ibid.*, para. 7.127.

<sup>280</sup>See *Ibid.*, para. 7.139.

102. On this basis, the Panel concluded that, "by maintaining simple zeroing procedures in the context of original investigations", the USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.<sup>281</sup>

103. With regard to Article 2.4 of the *Anti-Dumping Agreement*, the Panel took the view that the "'fair comparison' requirement may not be interpreted in a manner that renders [the] more specific provisions of the [*Anti-Dumping*] *Agreement* completely inoperative."<sup>282</sup> Because the Panel had found that zeroing was permissible in T-T comparisons under Articles 2.4.2 and 9, it concluded that zeroing does not breach the "fair comparison" requirement in Article 2.4.<sup>283</sup>

104. The Panel applied the same line of reasoning in rejecting Japan's claims relating to zeroing in the context of periodic reviews and new shipper reviews.<sup>284</sup>

105. Japan challenges these findings on appeal. Japan argues that, pursuant to Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, "'dumping' and 'margins of dumping' must be defined in relation to the 'product' under investigation as a whole."<sup>285</sup> Japan emphasizes that the definition of "dumping" in Article 2.1 and the "fair comparison" requirement in Article 2.4 "are overarching rules in the *Anti-Dumping Agreement* that an authority must respect when it makes a determination of 'dumping' in any anti-dumping proceeding."<sup>286</sup> Because the zeroing procedures lead to addressing only a "sub-part" of the product in a dumping determination, they violate Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994.<sup>287</sup> Similarly, in periodic reviews under Article 9.3, in order to ensure that the total amount of duties collected does not exceed the margin of dumping, as required by that provision, an authority must establish a dumping margin for the exporter or foreign producer consistently with the definitions of "dumping" and "margin of dumping" in Article 2.1 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2<sup>288</sup> of the GATT 1994, and with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*. Japan adds that "[a]n authority must also determine

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<sup>281</sup>Panel Report, para. 7.143.

<sup>282</sup>*Ibid.*, para. 7.158.

<sup>283</sup>See *Ibid.*, para. 7.159.

<sup>284</sup>See *Ibid.*, paras. 7.210, 7.211, 7.216, 7.218 and 7.219.

<sup>285</sup>Japan's appellant's submission, para. 9. (footnote omitted)

<sup>286</sup>*Ibid.*, para. 15.

<sup>287</sup>See *Ibid.*, paras. 9 and 16.

<sup>288</sup>*Ibid.*, para. 16 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 130-133).

'margins of dumping' in *new shipper reviews* under Article 9.5 consistently with these requirements."<sup>289</sup>

106. The United States argues that these findings of the Panel should be upheld. According to the United States, the Panel correctly concluded that Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 do not require investigating authorities to establish margins of dumping for a "product as a whole".<sup>290</sup> For the United States, "the terms 'dumping' and 'margin of dumping' do not necessarily require the aggregation of [T-T comparison results] and the provision of an offset for one transaction against another."<sup>291</sup> According to the United States, the Panel correctly concluded that the prohibition of zeroing in W-W comparisons in original investigations does not apply to T-T or W-T comparisons and, thus, cannot serve as the source of any alleged general prohibition of zeroing. The United States also dismisses Japan's argument that zeroing is "unfair" because it "artificially inflates the magnitude of dumping", as this argument is predicated on the assumption that zeroing is prohibited in T-T comparisons.<sup>292</sup> According to the United States, zeroing does not produce an "artificially inflated" magnitude of dumping but, rather, the correct magnitude of the margin of dumping.<sup>293</sup> The United States further agrees with the Panel that Article 9.3 of the *Anti-Dumping Agreement* "contains no language requiring such an aggregate examination of export transactions in determining the final liability for payment of anti-dumping duties under Article 9.3.1 or in determining the amount, if any, of refund due under Article 9.3.2."<sup>294</sup> In relation to new shipper reviews, the United States adds that "[n]othing in the text of Article 9.5 implies that the 'individual margins of dumping' are necessarily and always a 'single' dumping margin determined on the basis of the 'product as a whole' for each exporter or producer."<sup>295</sup>

107. Our analysis begins with a discussion of the fundamental disciplines that apply under the *Anti-Dumping Agreement* and the GATT 1994 to all anti-dumping proceedings, including original investigations, periodic reviews, and new shipper reviews. We will then examine Japan's claim that zeroing in T-T comparisons in original investigations is, as such, inconsistent with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Finally, we examine Japan's claim that zeroing in periodic reviews and new shipper reviews is, as such,

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<sup>289</sup>Japan's appellant's submission, para. 17. (original emphasis)

<sup>290</sup>United States' appellee's submission, para. 18.

<sup>291</sup>*Ibid.*

<sup>292</sup>*Ibid.*, para. 51.

<sup>293</sup>*Ibid.*

<sup>294</sup>*Ibid.*, para. 54 (quoting Panel Report, para. 7.199).

<sup>295</sup>United States' appellee's submission, para. 73.

inconsistent with Articles 2.1, 2.4, 9.1-9.3, and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

A. *The Concepts of "Dumping" and "Margins of Dumping"*

108. First, we recall that dumping is defined in Article VI:1 of the GATT 1994 as occurring when a "product" of one country is introduced into the commerce of another country at less than the normal value of the "product". Consistent with this definition, Article VI:2 provides for the levying of anti-dumping duties in respect of a "dumped product" in order to offset or prevent the injurious effect of dumping.

109. This definition of dumping is carried over into the *Anti-Dumping Agreement* by Article 2.1. Furthermore, by virtue of the opening phrase of Article 2.1—" [f]or the purposes of this Agreement"—this definition applies throughout the Agreement.<sup>296</sup> Thus, the terms "dumping", as well as "dumped imports", have the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews. In each case, they relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country.

110. Article VI:2 defines "margin of dumping" as the difference between the normal value and the export price and establishes the link between "dumping" and "margin of dumping".<sup>297</sup> The margin of dumping reflects the magnitude of dumping. It is also one of the factors to be taken into account to determine whether dumping causes or threatens material injury.<sup>298</sup> Article VI:2 lays down that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Thus, the margin of dumping also is defined in relation to a "product".

111. Secondly, the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices, both of which relate to the pricing behaviour of that exporter or foreign producer. In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation

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<sup>296</sup>See Appellate Body Report, *US – Softwood Lumber V*, para. 93. See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 127.

<sup>297</sup>See Appellate Body Report, *US – Zeroing (EC)*, para. 125.

<sup>298</sup>Article 3.4 of the *Anti-Dumping Agreement*.

and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.

112. Other provisions of the *Anti-Dumping Agreement* also make it clear that "dumping" and "margins of dumping" relate to the exporter or foreign producer. Article 6.10 requires, "as a rule", that investigating authorities determine "an individual margin of dumping for each known exporter or producer".<sup>299</sup> Similarly, Article 9.4 of the *Anti-Dumping Agreement* refers to situations where anti-dumping duties are applied to exporters or foreign producers not examined individually in an investigation, and provides that such duties shall not exceed "the weighted average margin of dumping established with respect to the selected exporters". In addition, Article 9.5 indicates that the purpose of new shipper reviews is to determine "individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product" and refers to a "determination of dumping in respect of such producers or exporters".

113. Thirdly, the *Anti-Dumping Agreement* and the GATT 1994 are not concerned with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry.<sup>300</sup> Article 3.1 stipulates that a determination of injury shall be based on an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products. Furthermore, Article 3.5 of the *Anti-Dumping Agreement* lays down that "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry and the injuries caused by these other factors must not be attributed to dumped imports." Among the non-attribution factors listed in this Article are "the volume and prices of imports not sold at dumping prices".

114. Thus, it is evident from the design and architecture of the *Anti-Dumping Agreement* that: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped

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<sup>299</sup>In certain cases, however, an investigating authority may, in accordance with Articles 6.10 and 9.4 of the *Anti-Dumping Agreement*, determine an anti-dumping duty rate to be applied to exporters and foreign producers who were not individually examined. Article 8.1 also speaks of voluntary undertakings in relation to exporters.

<sup>300</sup>In this regard, Article VI:1 of the GATT 1994 states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry". Article VI:6(a) also stipulates that no anti-dumping duty shall be levied unless the importing Member "determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry." Article 11.1 of the *Anti-Dumping Agreement* further provides that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer.<sup>301</sup> These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the *Anti-Dumping Agreement*.

115. A product under investigation may be defined by an investigating authority.<sup>302</sup> But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product.<sup>303</sup> Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction.<sup>304</sup> Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping.<sup>305</sup> Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."<sup>306</sup>

116. Having reviewed certain fundamental concepts of the *Anti-Dumping Agreement* relevant to this appeal, we turn to examine Japan's claim that zeroing, in relation to the T-T comparison methodology in original investigations, is, as such, inconsistent with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

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<sup>301</sup>We note in this regard that Article 9.1 of the *Anti-Dumping Agreement* encourages levy of anti-dumping duties at less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry.

<sup>302</sup>This definition is usually made in the light of an application under Article 5.2 of the *Anti-Dumping Agreement* or, in special circumstances, under Article 5.6 of the *Anti-Dumping Agreement*.

<sup>303</sup>See Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 96.

<sup>304</sup>See Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87-93. See also Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 96.

<sup>305</sup>Appellate Body Report, *US – Softwood Lumber V*, para. 97; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87.

<sup>306</sup>Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87. See also paras. 94 and 114 (quoting Appellate Body Report, *US – Softwood Lumber V*, para. 98).

B. *Determination of Margins of Dumping Based on Transaction-to-Transaction Comparisons in Original Investigations*

1. Article 2.4.2 of the Anti-Dumping Agreement

117. We note at the outset that, although Japan withdrew, at the interim review stage, its claim regarding the W-T comparison methodology provided for in the second sentence of Article 2.4.2<sup>307</sup>, the Panel drew guidance from that sentence for its interpretation of the first sentence of Article 2.4.2, as well as Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

118. Article 2.4.2 sets out three comparison methodologies that investigating authorities may use to calculate margins of dumping. The *first sentence* of Article 2.4.2 provides for two comparison methodologies (W-W and T-T) involving symmetrical comparisons of normal value and export price. Article 2.4.2 stipulates that these two methodologies "shall normally" be used by investigating authorities to establish margins of dumping. As an exception to the two normal methodologies, the *second sentence* of Article 2.4.2 sets out a third comparison methodology which involves an asymmetrical comparison between weighted average normal value and prices of individual export transactions. This methodology may be used only if the following two conditions are met: (i) that the authorities find a pattern of export prices that differ significantly among different purchasers, regions, or time periods; and (ii) that an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a W-W or T-T comparison.

(a) *The First Sentence of Article 2.4.2 of the Anti-Dumping Agreement*

119. Under the T-T comparison methodology at issue in this appeal, the margin of dumping is established by a comparison between the normal value and the export price in individual transactions. The issue before us is whether zeroing procedures are, as such, inconsistent with the first sentence of Article 2.4.2 in the context of T-T comparisons in original investigations.

120. Recently, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body dealt for the first time with a determination of margins of dumping based on T-T comparisons in an original

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<sup>307</sup>The Panel noted that the withdrawal of Japan's claim under the second sentence of Article 2.4.2 "does not in any way detract from the significance of this sentence as an important contextual element that must necessarily be taken into account in any analysis of the issue of zeroing." (Panel Report, para. 7.127 and footnote 765 thereto) We agree that the second sentence of Article 2.4.2 may be relevant for the interpretation of the first sentence, irrespective of the withdrawal by Japan of its claim under that sentence.

investigation. For the Appellate Body, the reference in the first sentence of Article 2.4.2 to "'a comparison' in the singular suggest[ed] an overall calculation exercise involving aggregation of these multiple transactions."<sup>308</sup> Therefore, "[t]he transaction-specific results are mere steps in the comparison process" and the "individual transaction comparisons are not the final results of the calculation, but, rather, are inputs for the overall calculation exercise."<sup>309</sup> Thus, the text of Article 2.4.2 indicates that the calculation of a margin of dumping using the T-T comparison methodology is a "multi-step exercise in which the results of transaction-specific comparisons are inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."<sup>310</sup> The Appellate Body found that, in aggregating the results of transaction-specific comparisons, "an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value."<sup>311</sup> The Appellate Body concluded, therefore, that zeroing, as applied in the determination made on the basis of the T-T comparison methodology at issue in that case, was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

121. We see no reason to depart from the Appellate Body's reasoning in *US – Softwood Lumber V (Article 21.5 – Canada)*, which is in consonance with the Appellate Body's approach in the earlier case of *US – Softwood Lumber V* and is consistent with the fundamental disciplines that apply under the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, as highlighted above. In the latter case, the Appellate Body held that, "[i]f an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."<sup>312</sup> The Appellate Body addressed there the issue of model zeroing under the W-W comparison methodology in an original investigation. That methodology involved the division of the product under investigation into sub-groups of identical, or similar, product types. In aggregating the results of the sub-group comparisons to calculate the dumping margin for the product under investigation, the USDOC had treated as zero the results of the sub-groups in which weighted average normal value was equal to or less than the weighted average export price. Thus, zeroing did not occur

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<sup>308</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87. The Appellate Body explained that the reference in the first sentence of Article 2.4.2 to "export prices", in the plural, in the phrase "a comparison of normal value and export prices on a [T-T] basis" "suggests that the comparison will generally involve multiple transactions". (*Ibid.*)

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*, para. 122.

<sup>312</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 98. (original emphasis)

within the sub-groups but occurred across the sub-groups in the process of aggregating the results of the sub-group comparisons.<sup>313</sup>

122. The Appellate Body held that dumping and margins of dumping can be found to exist only for the product under investigation as a whole, and that they cannot be found to exist for a type, model, or category of that product. The comparisons at the sub-group level are not margins of dumping within the meaning of Article 2.4.2. It is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole. The Appellate Body therefore found that the model zeroing was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>314</sup>

123. We fail to see why, if, for the purpose of establishing a margin of dumping, such a product is dealt with under the T-T comparison methodology in an original investigation, zeroing would be consistent with Article 2.4.2 of the *Anti-Dumping Agreement*. If anything, zeroing under the T-T comparison methodology would inflate the margin of dumping to an even greater extent as compared to model zeroing under the W-W comparison methodology. This is because zeroing under the T-T comparison methodology disregards the result of each comparison involving a transaction in which the export price exceeds the normal value, whereas under the W-W comparison methodology, zeroing occurs, as noted above, only across the sub-groups in the process of aggregation.

124. We do not consider that the absence of the phrase "all comparable export transactions" in the context of the T-T comparison methodology suggests that zeroing should be permissible under that methodology. Because transactions may be divided into groups under the W-W comparison methodology, the phrase "all comparable export transactions" requires that each group include only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under that methodology. Furthermore, the W-W comparison methodology involves the calculation of a weighted average export price. By contrast, under the T-T comparison methodology, all export transactions are taken into account on an individual basis and matched with the most appropriate transactions in the domestic market. Therefore, the phrase "all comparable export transactions" is not pertinent to the T-T comparison methodology. Consequently, no inference may be drawn from the fact that these words do not appear in relation to this methodology.<sup>315</sup>

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<sup>313</sup>See Appellate Body Report, *US – Softwood Lumber V*, para. 64.

<sup>314</sup>The Panel in this dispute adhered to the finding of the Appellate Body in *Softwood Lumber V*, and concluded that the model zeroing procedures of the United States in W-W comparisons in the context of original investigations are, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. (Panel Report, para. 7.85) The United States has not appealed this finding of the Panel.

<sup>315</sup>See Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

125. We acknowledge that the W-W and T-T comparison methodologies are distinct and may not produce identical results. However, as the Appellate Body stated in *US – Softwood Lumber V (Article 21.5 – Canada)*, the W-W and T-T comparison methodologies "fulfil the same function", they are "alternative means for establishing margins of dumping", and "there is no hierarchy between them".<sup>316</sup> It would therefore be "illogical to interpret the [T-T] comparison methodology in a manner that would lead to results that are systematically different from those obtained under the [W-W] methodology".<sup>317</sup> Indeed, if zeroing is prohibited under the W-W comparison methodology and permitted under the T-T comparison methodology, the application of the T-T methodology would lead to results that are systematically different from those obtained through the application of the W-W methodology. Moreover, by systematically disregarding comparison results involving export transactions occurring at prices above the normal value, the zeroing methodology fails to establish margins of dumping for the product under investigation properly, as required under Article 2.4.2.

126. We recall that the *Anti-Dumping Agreement* requires the determination of an individual margin of dumping for each known exporter or foreign producer.<sup>318</sup> If it is permissible to determine a separate margin of dumping for each transaction, the consequence would be that several margins of dumping could be found to exist for each known exporter or foreign producer. The larger the number of export transactions, the greater the number of such transaction-specific margins of dumping for each exporter or foreign producer. This would create uncertainty and divergences in determinations to be made in original investigations and subsequent stages of anti-dumping proceedings.<sup>319</sup>

127. As we have stated, the *Anti-Dumping Agreement* does not contemplate the determination of dumping or a margin of dumping at the model- or transaction-specific level. The *Anti-Dumping Agreement* contemplates the aggregation of all the comparisons made at the transaction-specific level in order to establish an individual margin of dumping for each exporter or foreign producer examined. As we understand it, the position of the United States is that Article 2.4.2 does not address the issue of aggregation of transaction-specific comparison results, but if aggregation is performed, the results of comparisons where the export transactions occurred above normal value may be disregarded in the calculation of the margin of dumping, because such transactions do not involve dumping.

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<sup>316</sup>Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.

<sup>317</sup>*Ibid.* See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, footnote 238 to para. 141.

<sup>318</sup>See, *supra*, paras. 111, 112, and 114, and Articles 6.10 and 9.4 of the *Anti-Dumping Agreement*.

<sup>319</sup>For example, when the investigating authority considers imports as being "dumped" for the purposes of an injury determination under Article 3; and, when assessing the amount of anti-dumping duty to be levied on the "product" under Articles 9.2-9.5 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.

128. In this respect, we recall that the *Anti-Dumping Agreement* deals with injurious dumping and that the "volume of dumped imports" is a critical factor in injury determination.<sup>320</sup> As we understand it, under United States law, if an exporter or foreign producer is found to be dumping, the USITC may include all imports from that exporter or foreign producer in the volume of dumped imports for purposes of determining injury.<sup>321</sup> If, as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of calculating margins of dumping, but taken into consideration for determining injury, this would mean that the same transactions are treated as "non-dumped" for one purpose, and as "dumped" for another purpose. This is not in consonance with the need for consistent treatment of a product in an anti-dumping investigation.<sup>322</sup>

129. For these reasons, we disagree with the Panel that dumping may be determined at the level of individual transactions, and that multiple comparison results are margins of dumping in themselves.<sup>323</sup> We also disagree with the Panel that the terms "product" and "products" can apply to individual transactions and do not require an examination of export transactions at an aggregate level.<sup>324</sup> Nor can we agree with the Panel that "a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal value."<sup>325</sup> Accordingly, we disagree with the Panel's finding that, "in the context of the [T-T] methodology in the first sentence of Article 2.4.2, the term 'margins of dumping' can be understood to mean the total

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<sup>320</sup>See, *supra*, paras. 113-114.

<sup>321</sup>We recognize that the issue of injury determination is not before us in this case. We are not suggesting that an injury determination would be vitiated if the volume of imports involved in the zeroed transactions is not taken into account for the purposes of the injury determination.

<sup>322</sup>In *US – Softwood Lumber V*, the Appellate Body stated:

Our view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole[.]

(Appellate Body Report, *US – Softwood Lumber V*, para. 99) (original emphasis)

<sup>323</sup>See Appellate Body Report, *US – Softwood Lumber V*, para. 97; Appellate Body Report, *US – Zeroing (EC)*, para. 132; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87-93.

<sup>324</sup>See Panel Report, para. 7.112.

<sup>325</sup>*Ibid.*, para. 7.119.

amount by which transaction-specific export prices are less than transaction-specific normal values."<sup>326</sup>

(b) The Panel's Contextual Arguments Relating to the Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement*

130. We turn next to the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* from which the Panel drew contextual support for its finding that zeroing is permitted under the T-T comparison methodology in original investigations. This sentence reads:

A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

131. We recall that, under the first sentence of Article 2.4.2, an investigating authority is "normally" required to use either of the two symmetrical comparison methodologies provided for in that sentence. The second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a pattern of "targeted" dumping found among certain purchasers, in certain regions, or during certain time periods. By its terms, this methodology may be used if two conditions are met: first, that the investigating authorities "find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and secondly, that an "explanation" be provided as to why such differences in export prices cannot be taken into account appropriately by the use of either of the two *symmetrical* comparison methodologies set out in the first sentence of Article 2.4.2. The second requirement thus contemplates that there may be circumstances in which targeted dumping could be adequately addressed through the normal symmetrical comparison methodologies. The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used.

132. In its reasoning, the Panel assumed that there was a "logical impossibility of reconciling a general prohibition of zeroing with the express provision for the use of a [W-T comparison methodology] in the second sentence of Article 2.4.2."<sup>327</sup> According to the Panel, if zeroing were prohibited under all comparison methodologies, application of the second sentence of Article 2.4.2 would always yield results that would be "mathematically equivalent" to those obtained by applying the W-W comparison methodology, thereby rendering the second sentence of Article 2.4.2 *inutile*.

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<sup>326</sup>Panel Report, para. 7.119.

<sup>327</sup>*Ibid.*, para. 7.114.

The Panel further assumed that, if zeroing were permitted under the W-T comparison methodology, it should, by logical implication, be permitted under the T-T comparison methodology as well.<sup>328</sup>

133. We recall that the Appellate Body had occasion to discuss this "mathematical equivalence" argument in *US – Softwood Lumber V (Article 21.5 – Canada)*, but rejected it for several reasons. The Appellate Body said, *inter alia*, that "[o]ne part of a provision setting forth a methodology is not rendered *inutile* simply because, *in a specific set of circumstances*, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision."<sup>329</sup> The Appellate Body also found that the mathematical equivalence argument is based on certain assumptions that may not hold good in all situations. The Appellate Body further observed that the second sentence provides for an "exception", and as such, "the comparison methodology in the second sentence of Article 2.4.2 ([W-T]) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, [T-T] and [W-W]."<sup>330</sup> In addition, the Appellate Body noted that, even if W-W and W-T methodologies were to yield equivalent results in certain situations, this would not be sufficient to compel a finding that zeroing is permissible under the T-T comparison methodology, because the mathematical equivalence argument does not relate to this methodology.<sup>331</sup> The Appellate Body added that it could be argued, in reverse, that "the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*."<sup>332</sup>

134. As regards the relationship between the T-T comparison methodology and the W-T comparison methodology of the second sentence of Article 2.4.2, the Panel's reasoning appears to assume that the universe of export transactions to which these two comparison methodologies apply is the same, and that these two methodologies differ only in that, under the W-T comparison methodology, a normal value is established on a weighted average basis, while it is established on a transaction-specific basis under the T-T comparison methodology. Thus, according to the Panel, if

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<sup>328</sup>Panel Report, paras. 7.138 and 7.139.

<sup>329</sup>Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99. (emphasis added)

<sup>330</sup>*Ibid.*, para. 97.

<sup>331</sup>See *Ibid.*, para. 99.

<sup>332</sup>*Ibid.*, para. 100. (original emphasis) See also Panel Report, para. 7.125. There, the Panel recognized that "to interpret Article 2.4.2 as permitting the use of zeroing under the [T-T] method[ology] raises the question under what circumstances it would not be possible to take account of a pattern of export prices described in the second sentence of Article 2.4.2 by using the [T-T] method[ology]."

zeroing is permitted under the W-T comparison methodology in the second sentence of Article 2.4.2, it should logically be permitted under the T-T comparison methodology as well.<sup>333</sup>

135. We disagree with the assumption underlying the Panel's reasoning. The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.

136. For these reasons, we are unable to agree with the Panel that the second sentence of Article 2.4.2 provides contextual support for a finding that zeroing is permissible under the T-T comparison methodology. We wish to emphasize, however, that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision.

(c) Conclusion

137. In the light of our analysis of Article 2.4.2 of the *Anti-Dumping Agreement*, we conclude that, in establishing "margins of dumping" under the T-T comparison methodology, an investigating authority must aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value.<sup>334</sup>

138. Accordingly, we reverse the Panel's finding, in paragraphs 7.143 and 7.259(a) of the Panel Report, that the United States does not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations, and find, instead, that the United States acts inconsistently with that provision.

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<sup>333</sup>See Panel Report, para. 7.139.

<sup>334</sup>Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122.

2. Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994

139. As a consequence, we reverse the Panel's findings, in paragraphs 7.143 and 7.259(a) of the Panel Report, that "simple zeroing" in original investigations is not inconsistent with Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, because these findings are simply based on the Panel's findings and reasoning relating to Article 2.4.2 of the *Anti-Dumping Agreement*, which we have reversed. The Panel offers no additional reasoning that could independently support its findings under Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

140. We note that Japan requests the Appellate Body not only to reverse the Panel's findings of consistency, but also to find that the United States acted inconsistently with these provisions in using zeroing in the context of T-T comparisons in original investigations. At the oral hearing, Japan confirmed that it wished us to complete the Panel's legal analysis to this effect. Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the *Anti-Dumping Agreement* and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping.<sup>335</sup> But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations. As we have found that the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures in original investigations on the basis of T-T comparisons, we do not consider it necessary to make additional findings on Japan's claims under these provisions. Japan has not explained why such additional findings under Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 would be necessary to resolve this dispute.<sup>336</sup>

3. Article 2.4 of the *Anti-Dumping Agreement*

141. Next, we examine whether zeroing is inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*.

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<sup>335</sup>See Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 85. See also Appellate Body Report, *US – DRAMS*, para. 205 and footnote 377 thereto.

<sup>336</sup>Appellate Body Report, *Australia – Salmon*, para. 223. We recognize that Article VI:2 of the GATT 1994 is not merely a definitional provision. Nevertheless, given our finding under Article 2.4.2 of the *Anti-Dumping Agreement*, we do not consider it necessary to make an additional finding on Japan's claim under Article VI:2 of the GATT 1994 for purposes of resolving this dispute.

142. Regarding the relationship between Articles 2.4 and 2.4.2, the Panel stated that the "somewhat indeterminate standard of fairness underlying the 'fair comparison' requirement may not be interpreted in a manner that renders more specific provisions of the [*Anti-Dumping*] Agreement completely inoperative."<sup>337</sup>

143. On appeal, Japan submits that the Panel erred in making Article 2.4 subject to the allegedly "more specific" provisions of Article 2.4.2. In Japan's view, this is contrary to the introductory phrase of Article 2.4.2. We agree with Japan that the Panel's reasoning implies that the "fair comparison" requirement in Article 2.4 is dependent on Article 2.4.2. The Panel appears to have considered Article 2.4.2 as *lex specialis*. To the extent that it did, this would not be a correct representation of the relationship between the two provisions. Rather the introductory clause to Article 2.4.2 expressly makes it "[s]ubject to the provisions governing fair comparison" in Article 2.4.<sup>338</sup>

144. Japan further argues that, "[u]nder the zeroing procedures, the United States makes an initial comparison for all comparable export transactions, but in aggregating the comparison results into an overall margin, it includes solely the positive comparison results, disregarding negative results."<sup>339</sup> According to Japan, "the 'partial' comparison that occurs pursuant to the zeroing procedures is 'inherently biased' and not 'fair'"<sup>340</sup> in T-T comparisons in original investigations.

145. In contrast, the United States contends that zeroing does not produce an "artificially inflated" magnitude of dumping but, rather, the correct magnitude of the margin of dumping.<sup>341</sup> The United States further submits that the "fair comparison" requirement must be neutrally defined, as the Appellate Body itself has recognized "the 'need' to balance ... the rights and obligations of respondents with those of other interested parties", including the domestic industry.<sup>342</sup>

146. The Appellate Body has previously made it clear that the use of zeroing under the T-T comparison methodology distorts the prices of certain export transactions because the "prices of [certain] export transactions [made] are artificially reduced."<sup>343</sup> In this way, "the use of zeroing under the [T-T] comparison methodology artificially inflates the magnitude of dumping, resulting in higher

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<sup>337</sup> Panel Report, para. 7.158.

<sup>338</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 133.

<sup>339</sup> Japan's appellant's submission, para. 134.

<sup>340</sup> *Ibid.*

<sup>341</sup> United States' appellee's submission, para. 51.

<sup>342</sup> *Ibid.*, para. 52 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 243).

<sup>343</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 139.

margins of dumping and making a positive determination of dumping more likely."<sup>344</sup> The Appellate Body has further stated that "[t]his way of calculating cannot be described as impartial, even-handed, or unbiased."<sup>345</sup> As the Appellate Body has previously found, under the first sentence of Article 2.4.2, "an investigating authority must consider the results of all the comparisons and may not disregard the results of comparisons in which export prices are above normal value."<sup>346</sup> Therefore, we consider that zeroing in T-T comparisons in original investigations is inconsistent with the fair comparison requirement in Article 2.4.

147. Accordingly, we reverse the Panel's finding, in paragraphs 7.161 and 7.259(a) of the Panel Report, that the United States does not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations, and find, instead, that the United States acts inconsistently with that provision.

C. *Zeroing As Such in Periodic Reviews and New Shipper Reviews*

148. We now examine Japan's claims relating to zeroing, as such, in periodic reviews and new shipper reviews. We first analyze Japan's appeal as it relates to Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Next, we examine Japan's appeal relating to the "fair comparison" requirement set out in Article 2.4 of the *Anti-Dumping Agreement*. Finally, we review Japan's claims under Articles 2.1, 9.1, and 9.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994.

1. Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

149. The Panel found that the United States does not act inconsistently with Articles 2.1, 2.4, 9.1-9.3, and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 by maintaining "zeroing procedures"<sup>347</sup> in periodic reviews and new shipper reviews.<sup>348</sup>

150. In reaching this conclusion, the Panel relied on its earlier reasoning regarding the permissibility of zeroing procedures in original investigations. Its reasoning was also based on its understanding of the concept of "dumping" and "margins of dumping", as well as on its interpretation

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<sup>344</sup>Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

<sup>345</sup>*Ibid.*

<sup>346</sup>See, *supra*, para. 137. See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122.

<sup>347</sup>See, *supra*, footnote 3.

<sup>348</sup>Panel Report, paras. 7.216, 7.219, 7.222, and 7.259(b).

of the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>349</sup> Under the Panel's rationale, the terms "dumping" and "margins of dumping", as they appear in Article 9 of the *Anti-Dumping Agreement*, refer to results of transaction-specific comparisons.

151. As we have stated<sup>350</sup>, "dumping" and "dumping margins" under the *Anti-Dumping Agreement* are defined in relation to the product under investigation. Thus, "dumping" and "margins of dumping" can be found to exist only at the level of a "product": they cannot be found to exist at the level of a type, model, or category of a product under consideration; nor can they be found to exist at the level of an individual transaction.<sup>351</sup> Rather, "if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole."<sup>352</sup> We therefore disagree with the Panel's approach, which is premised on the view that the terms "dumping" or "margins of dumping" can have different meanings under different provisions of the *Anti-Dumping Agreement*.

(a) Periodic Reviews and Importer-Specific Duty Assessment

152. We examine next the "important considerations specific to Article 9"<sup>353</sup> identified by the Panel as supporting its view that it is permissible to interpret Article VI of the GATT 1994 and relevant provisions of the *Anti-Dumping Agreement* "to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing."<sup>354</sup>

153. The "important considerations" identified by the Panel relate to the operation of retrospective and prospective duty assessment systems under Articles 9.3.1 and 9.3.2 of the *Anti-Dumping Agreement*. The Panel noted that these provisions specify how to implement the requirement in Article 9.3 "that *the amount of anti-dumping duty not exceed the margin of dumping*".<sup>355</sup> The Panel's

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<sup>349</sup>Panel Report, para. 7.194.

<sup>350</sup>See, *supra*, paras. 108-115.

<sup>351</sup>See Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104; Appellate Body Report, *US – Zeroing (EC)*, para. 126; and Appellate Body Report, *US – Softwood Lumber V*, para. 93.

<sup>352</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 132. Rather, they are merely "inputs that are aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer." (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87)

<sup>353</sup>Panel Report, para. 7.196.

<sup>354</sup>*Ibid.*

<sup>355</sup>*Ibid.*, para. 7.198. (original emphasis)

interpretative approach also relies on Article 9.4(ii), which refers to the calculation of the "liability for payment" of anti-dumping duties "on the basis of a prospective normal value".<sup>356</sup>

154. The Panel stated that, under Articles 9.3.1 and 9.3.2, a margin of dumping is calculated for determining the *final liability for payment of anti-dumping duties* in a retrospective duty assessment system, and for determining *the amount of anti-dumping duty* that must be *refunded* in a prospective duty assessment system.<sup>357</sup> The Panel added that "the obligation to pay an anti-dumping duty is incurred on an *importer-* and *import-specific* basis."<sup>358</sup> For the Panel, "the importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of 'margin of dumping.'"<sup>359</sup> Under the Panel's rationale, if certain export sales to a given *importer* are made at prices above normal value, those sales do not need to be taken into account in determining the margin of dumping for the relevant *exporter* that has made the sale to the importer.

155. We are unable to agree with the reasoning of the Panel. As the Appellate Body has stated previously, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, investigating authorities "are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter"<sup>360</sup>, in accordance with Article 2.<sup>361</sup> Put differently, "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding."<sup>362</sup> The Appellate Body has further emphasized that "[a]lthough Article 9.3 sets out a requirement regarding the amount of the assessed anti-dumping duties, it does not prescribe a specific methodology according to which the duties should be assessed."<sup>363</sup> In

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<sup>356</sup>Article 9.4(ii) provides that an anti-dumping duty applied to imports from exporters or foreign producers not examined individually shall not exceed, "where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined."

<sup>357</sup>Panel Report, para. 7.198.

<sup>358</sup>*Ibid.* (original emphasis)

<sup>359</sup>*Ibid.*, para. 7.199.

<sup>360</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 130.

<sup>361</sup>The chapeau of Article 9.3 provides that "[t]he amount of anti-dumping duty shall not exceed the margin of dumping as established in Article 2."

<sup>362</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 130. (original emphasis)

<sup>363</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 131. The Appellate Body has stated that, "under the methodology currently applied by the USDOC to assess anti-dumping duties, the aggregation of the results of the multiple comparisons performed at an intermediate stage might result in a negative value, for a given importer, if zeroing is not allowed. Of course, this would not mean that the authorities would be required under the *Anti-Dumping Agreement* or Article VI of the GATT 1994 to compensate an importer for the amount of that negative value (that is, when export prices exceed normal value)." (*Ibid.*, footnote 234 to para. 131)

particular, the Appellate Body has underscored that "a reading of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 does not suggest that final anti-dumping duty liability cannot be *assessed* on a transaction- or importer-specific basis, or that the investigating authorities may not use specific methodologies that reflect the distinct nature and purpose of proceedings governed by these provisions, for purposes of assessing final anti-dumping duty liability, provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping."<sup>364</sup>

156. Finally, the Panel expresses its concern that, if a Member applies a retrospective duty assessment system, it "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value."<sup>365</sup> This concern is not well founded. The concept of dumping relates to the pricing behaviour of exporters or foreign producers; it is the exporter, not the importer, that engages in practices that result in situations of dumping.<sup>366</sup> At the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales, including those occurring at above the normal value. However, in a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in *all* sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The same "ceiling" applies in review proceedings under Article 9.3.2, because the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems.

(b) Arguments Related to Prospective Normal Value Systems

157. Next, we examine the Panel's reasoning relating to Article 9.4(ii) of the *Anti-Dumping Agreement*, which deals with the calculation of the liability for payment of anti-dumping duties on the basis of a so-called "prospective normal value".<sup>367</sup>

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<sup>364</sup> *Ibid.* (original emphasis)

<sup>365</sup> Panel Report, para. 7.199.

<sup>366</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 129.

<sup>367</sup> In a prospective normal value system, the authorities announce in advance a prospective normal value that applies to future entries of a given product and anti-dumping duties are assessed on the basis of the difference between this "prospective normal value" and the prices of individual export transactions for that product.

158. Before the Panel, Japan argued that the collection of a variable duty on an entry-by-entry basis under a prospective normal value system does not involve the establishment of margins of dumping with respect to individual export transactions, because the actual margin of dumping in such a system is only determined in a review under Article 9.3.2. Moreover, according to Japan, in a prospective normal value system, "the *final liability* for duties must be assessed in a review under Article 9.3.2".<sup>368</sup>

159. The Panel disagreed, noting that Japan's argument was "inconsistent with the *prospective* nature of such a system".<sup>369</sup> The Panel added that "[i]t is clear from the text of Article 9.4(ii) of the [*Anti-Dumping*] *Agreement* that in a prospective normal value system '*liability for payment of anti-dumping duties* is calculated on the basis of a prospective normal value'."<sup>370</sup> Moreover, "[a]lthough Article 9.3.2 provides for a refund procedure when the amount of anti-dumping duties is assessed on a prospective basis, a requirement that arguably also applies to prospective normal value systems referred to in Article 9.4(ii), a refund procedure in a prospective duty assessment system is not a *determination of final liability for payment of anti-dumping duties*."<sup>371</sup> The Panel further noted that "[t]he phrase '*determination of the final liability for payment of anti-dumping duties*' is used in Article 9.3.1 in connection with retrospective duty assessment procedures but does not figure in Article 9.3.2."<sup>372</sup>

160. The Panel stated that, "notwithstanding the possibility of a refund, liability for payment of anti-dumping duties is final in a prospective normal value system at the time of importation of a product."<sup>373</sup> This may be so, but it does not mean that the anti-dumping duty collected at the time of importation represents a "margin of dumping".<sup>374</sup> Nor does it mean that the total amount of anti-dumping duties that are levied can exceed the exporter's or foreign producer's "margin of dumping". Under a prospective normal value system, exporters may choose to raise their export prices to the level of the prospective normal value in order to avoid liability for payment of anti-dumping duties on each export transaction. However, under Article 9.3.2, the amount of duties collected is subject to review so as to ensure that, pursuant to Article 9.3 of the *Anti-Dumping Agreement*, the amount of the anti-dumping duty collected does not exceed the margin of dumping as

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<sup>368</sup>Panel Report, para. 7.202 (quoting Japan's oral statement at the second Panel meeting, para. 32). (emphasis added)

<sup>369</sup>*Ibid.*, para. 7.204. (original emphasis)

<sup>370</sup>*Ibid.* (emphasis added by the Panel)

<sup>371</sup>*Ibid.* (original emphasis)

<sup>372</sup>*Ibid.*

<sup>373</sup>*Ibid.*, para. 7.205.

<sup>374</sup>See, *supra*, para. 114.

established under Article 2.<sup>375</sup> It is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter.

161. The Panel stated that, in a prospective normal value system, "liability for payment of anti-dumping duties is incurred only to the extent that prices of individual export transactions are below normal value."<sup>376</sup> Therefore, Article 9.4(ii) "confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value."<sup>377</sup> The Panel also stated that "[i]f in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value", there is no reason why duties may not be similarly assessed under the United States' retrospective duty assessment system.<sup>378</sup>

162. We are unable to agree. Under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping.<sup>379</sup>

163. The *Anti-Dumping Agreement* is neutral as between different systems for levy and collection of anti-dumping duties. The Agreement lays down the "margin of dumping" as the ceiling for collection of duties regardless of the duty assessment system adopted by a WTO Member, and provides for a refund if the ceiling is exceeded. It is therefore incorrect to say that the *Anti-Dumping Agreement* favours one system, or places another system at a disadvantage.

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<sup>375</sup>Panel Report, para. 7.198.

<sup>376</sup>*Ibid.*, para. 7.205.

<sup>377</sup>*Ibid.*

<sup>378</sup>*Ibid.*, paras. 7.206.

<sup>379</sup>See Appellate Body Report, *US – Zeroing (EC)*, para. 131.

(c) New Shipper Reviews

164. The Panel's reasoning, which we rejected<sup>380</sup>, relates to periodic reviews under Article 9.3, as well as to new shipper reviews under Article 9.5. On appeal, Japan notes in this regard that the Panel "gave no separate interpretive consideration" to the latter types of reviews.<sup>381</sup>

165. Article 9.5 of the *Anti-Dumping Agreement* makes it clear that, upon request, investigating authorities "shall promptly carry out a review for the purpose of determining individual margins of dumping" for exporters or foreign producers that did not ship the subject product during the period of investigation.<sup>382</sup> As noted above<sup>383</sup>, under the *Anti-Dumping Agreement*, dumping determinations relate to the exporter, and both "dumping" and "margins of dumping" relate to the pricing behaviour of the exporter. Moreover, negative comparison results may not be disregarded when calculating a margin of dumping for an exporter. For the same reasons, we consider that zeroing, in establishing "individual margins of dumping" for new shippers, is also inconsistent with Article 9.5 of the *Anti-Dumping Agreement*.

166. In the light of these considerations, we reverse the Panel's finding, in paragraphs 7.222 and 7.259(b) of the Panel Report, that the United States does not act inconsistently with Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews and new shipper reviews, and find, instead, that the United States acts inconsistently with these provisions.

2. Article 2.4 of the *Anti-Dumping Agreement*

167. We turn next to examine whether zeroing in periodic reviews and new shipper reviews is, as such, inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*.

168. If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the

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<sup>380</sup>See, *supra*, paras. 150 and 151.

<sup>381</sup>Japan's appellant's submission, para. 180.

<sup>382</sup>This is subject to the proviso that such new shippers "can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." (Article 9.5 of the *Anti-Dumping Agreement*)

<sup>383</sup>See, *supra*, paras. 111-112 and 114.

meaning of the first sentence of Article 2.4.<sup>384</sup> This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.<sup>385</sup>

169. Accordingly, we reverse the Panel's finding, in paragraphs 7.219 and 7.259(b) of the Panel Report, that zeroing in the context of periodic reviews and new shipper reviews is not, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, and find, instead, that zeroing, is, as such, inconsistent with that provision.

3. Articles 2.1, 9.1 and 9.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994

170. As a consequence, we reverse the Panel's findings, in paragraphs 7.216, 7.222, and 7.259(b) of the Panel Report, that zeroing is not, as such, inconsistent with Articles 2.1, 9.1, and 9.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994, because these findings are based on the Panel's findings and reasonings relating to Articles 2.4, 2.4.2, and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, which we have reversed. The Panel offers no additional reasoning that could independently support its findings under Articles 2.1, 9.1, and 9.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994.

171. Japan requests us not only to reverse the Panel's findings, but also to find that the United States acted inconsistently with these provisions. Having found that the United States acts inconsistently with Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews and new shipper reviews, we do not consider it necessary to rule on Japan's claims under Articles 2.1, 9.1, and 9.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994.<sup>386</sup>

## **VI. Zeroing As Applied in Periodic Reviews**

172. The Panel found that zeroing, as applied by the United States in the periodic reviews at issue in this appeal, is not inconsistent with Articles 1, 2.1, 2.4, 2.4.2, and 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.<sup>387</sup> In support of its findings, the Panel referred to the reasoning that led it to conclude that zeroing, as it relates to periodic reviews, is not, as

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<sup>384</sup>For our interpretation of Article 2.4 see, *supra*, para. 146.

<sup>385</sup>See, *supra*, para. 155.

<sup>386</sup>Our approach here is consistent with the Appellate Body's approach in *US – Zeroing (EC)*. (See Appellate Body Report, *US – Zeroing (EC)*, para. 147)

<sup>387</sup>Panel Report, paras. 7.225-7.227.

such, inconsistent with certain provisions of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.<sup>388</sup>

173. On appeal, Japan challenges the Panel's findings under Articles 2.1, 2.4, 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Japan requests the Appellate Body to reverse these findings and find, instead, that the United States acted inconsistently with its obligations under these provisions.<sup>389</sup> Japan does not, however, pursue its claims under Articles 1 and 2.4.2 of the *Anti-Dumping Agreement*.<sup>390</sup>

174. We have found<sup>391</sup> that zeroing, as it relates to periodic reviews, is, as such, inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. We further recall that the Appellate Body has previously found zeroing, as applied in periodic reviews, to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, on the grounds that application of that methodology "result[s] in amounts of assessed anti-dumping duties that exceed[ed] the foreign producers' or exporters' margins of dumping".<sup>392</sup>

175. In the periodic reviews at issue in this case, the USDOC assessed the anti-dumping duties according to a W-T comparison methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because the results of such comparisons were systematically disregarded, the amount of anti-dumping duties collected in the periodic reviews at issue exceeded the exporters' proper margins of dumping.

176. For these reasons, we reverse the Panel's finding, in paragraphs 7.227 and 7.259(c) of the Panel Report, that zeroing, as applied by the United States in the 11 periodic review determinations at issue in this appeal, is not inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and find, instead, that the United States acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

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<sup>388</sup>Panel Report, para. 7.226.

<sup>389</sup>Japan's appellant's submission, para. 178.

<sup>390</sup>See *Ibid.* and footnote 213 thereto. Japan also states that it is not pursuing its claim under Article 18.4 of the *Anti-Dumping Agreement*.

<sup>391</sup>See, *supra*, paras. 166 and 169.

177. In relation to Articles 2.1 and 9.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994, we note that Japan requests us not only to reverse the Panel's findings, but also to find that the United States acted inconsistently with these provisions. At the oral hearing, Japan confirmed that it wished us to complete the Panel's legal analysis to this effect. However, having found that zeroing, as applied by the USDOC in the 11 periodic review determinations at issue in this dispute, is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, we do not consider it necessary to make additional findings on Japan's claims under Articles 2.1 and 9.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 for the reasons set out earlier.<sup>393</sup>

## VII. Margins of Dumping in Sunset Reviews

178. Before the Panel, Japan argued that two specific sunset review determinations<sup>394</sup> were inconsistent with Articles 11.1 and 11.3 of the *Anti-Dumping Agreement*, because they were based on margins of dumping that were calculated inconsistently with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement*.

179. The Panel agreed with Japan that the USDOC "relied on" margins of dumping established in prior proceedings when making its likelihood-of-dumping determination.<sup>395</sup> Noting, however, that "the margins of dumping relied upon by [the] USDOC were margins calculated during periodic reviews"<sup>396</sup>, and recalling its previous finding that the *Anti-Dumping Agreement* does not prohibit zeroing in the context of such reviews, the Panel found that the USDOC did not act inconsistently with Articles 2 and 11 of the *Anti-Dumping Agreement*.<sup>397</sup>

180. Japan challenges this finding on appeal. According to Japan, the Panel's only reason for rejecting Japan's claim was the Panel's "incorrect finding that zeroing is permissible in periodic reviews under Article 9.3."<sup>398</sup> Japan, therefore, requests the Appellate Body to reverse the Panel's

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<sup>392</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 133.

<sup>393</sup>See, *supra*, para. 140.

<sup>394</sup>"Final Results of Expedited Sunset Reviews: Antifriction Bearings From Japan" (USDOC sunset review in case number A-588-804), *United States Federal Register*, Vol. 64, No. 213 (4 November 1999), p. 60275 (Exhibit JPN-22 submitted by Japan to the Panel); "Final Results of Full Sunset Reviews: Corrosion-Resistant Carbon Steel Flat Products from Japan" (USDOC sunset review in case number A-588-826), *United States Federal Register*, Vol. 65, No. 149 (2 August 2000), p. 47380 (Exhibit JPN-23 submitted by Japan to the Panel).

<sup>395</sup>See Panel Report, para. 7.255. In our discussion, we refer to the USDOC's determination of continuation or recurrence of dumping as the "likelihood-of-dumping determination".

<sup>396</sup>*Ibid.*, para. 7.256.

<sup>397</sup>See *Ibid.*, para. 7.257.

<sup>398</sup>Japan's appellant's submission, para. 196.

finding under Articles 2 and 11 of the *Anti-Dumping Agreement* and to find, instead, that, in relying on these previously determined margins, the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*. Japan also claims that, "[b]ecause the violations of Article 11.3 stem from the reliance upon margins of dumping calculated using the zeroing procedures" that are inconsistent with Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the underlying sunset reviews are also inconsistent with these provisions.<sup>399</sup>

181. In contrast, the United States argues that the Panel did not err in its conclusion that zeroing is permissible in determining margins of dumping in periodic reviews. The United States, therefore, submits that the Panel's conclusions with respect to Japan's "as applied" claims in the two sunset reviews at issue in this dispute should be affirmed.<sup>400</sup>

182. The Appellate Body has previously indicated that the ordinary meanings of the terms "determine" and "review" in the text of Article 11.3 of the *Anti-Dumping Agreement* requires a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination" by an investigating authority.<sup>401</sup> Moreover, a sunset review determination under Article 11.3 must be on the basis of a "rigorous examination"<sup>402</sup> leading to "reasoned and adequate conclusions"<sup>403</sup>, and be supported by "positive evidence" and a "sufficient factual basis".<sup>404</sup>

183. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained that, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4."<sup>405</sup> The Appellate Body added that, "[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4,

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<sup>399</sup>*Ibid.*, para. 197. We note that, on appeal, Japan does not pursue its claims regarding Articles 1, 2.4.2, 9.1-9.3, 11.1, and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. (See *Ibid.*, para. 197 and footnote 233 thereto) We further note that Japan does not appeal the Panel's conclusion regarding the USITC's likelihood-of-injury determination. Nor does Japan appeal the Panel's finding that Japan had failed to make a *prima facie* case that, by maintaining zeroing procedures in the context of changed circumstances and sunset reviews, the USDOC acted inconsistently with Articles 2 and 11 of the *Anti-Dumping Agreement*.

<sup>400</sup>See United States' appellee's submission, para. 75.

<sup>401</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 283 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111).

<sup>402</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113.

<sup>403</sup>*Ibid.*, para. 114 (quoting Panel Report in *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

<sup>404</sup>*Ibid.*

<sup>405</sup>*Ibid.*, para. 127. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180.

but also with Article 11.3 of the *Anti-Dumping Agreement*.<sup>406</sup> In such circumstances, "the likelihood[-of-dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3."<sup>407</sup>

184. In the present case, the Panel found, as a matter of fact, that, in its likelihood-of-dumping determination, the USDOC relied "on margins of dumping established in prior proceedings".<sup>408</sup> The Panel further found that these margins were calculated during periodic reviews "on the basis of simple zeroing".<sup>409</sup>

185. We have previously concluded<sup>410</sup> that zeroing, as it relates to periodic reviews, is inconsistent, as such, with Article 2.4 and Article 9.3. As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement.

186. For these reasons, we reverse the Panel's finding, in paragraphs 7.257 and 7.259(e) of the Panel Report, that the United States acted consistently with Articles 2 and 11 of the *Anti-Dumping Agreement* by relying on margins of dumping calculated in previous proceedings in the sunset reviews at issue in this case, and find, instead, that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.

187. In these circumstances, we do not consider it necessary to rule on whether the same sunset review determinations are also inconsistent with Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Furthermore, Japan has not explained why additional findings under these provisions would be necessary to resolve the dispute.<sup>411</sup>

### **VIII. Article 17.6(ii) of the *Anti-Dumping Agreement***

188. The Panel and the United States have referred to Article 17.6(ii) of the *Anti-Dumping Agreement*<sup>412</sup>, which provides:

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<sup>406</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180; and Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 181.

<sup>407</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 130.

<sup>408</sup>Panel Report, para. 7.255.

<sup>409</sup>*Ibid.*, para. 7.256.

<sup>410</sup>See, *supra*, paras. 166 and 169.

<sup>411</sup>Appellate Body Report, *Australia – Salmon*, para. 223. See also Japan's responses to questions at the oral hearing.

<sup>412</sup>See Panel Report, para. 7.142. See also United States' appellee's submission, paras. 30 and 34.

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

189. In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii). However, we consider that there is no room for recourse to the second sentence of Article 17.6(ii) in this appeal. This is because, in our view, Articles 2.4, 2.4.2, 9.3, 9.5, and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii), do not admit of another interpretation of these provisions as far as the issue of zeroing before us is concerned.

#### **IX. Findings and Conclusions**

190. For the reasons set forth in this Report, the Appellate Body:

- (a) upholds the Panel's finding, in paragraph 7.58 of the Panel Report, that the United States' "zeroing procedures" constitute a measure which can be challenged as such and, therefore, dismisses the United States' claim that the Panel acted inconsistently with Article 11 of the DSU by concluding that the zeroing procedures, as they relate to original investigations based on transaction-to-transaction and weighted average normal value-to-prices of individual export transactions comparisons, constitute a measure that can be challenged, as such, in WTO dispute settlement;
- (b) reverses the Panel's finding, in paragraphs 7.143, 7.161, and 7.259(a) of the Panel Report, that the United States does not act inconsistently with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and finds, instead, that the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;
- (c) reverses the Panel's findings, in paragraphs 7.216, 7.219, 7.222, and 7.259(b) of the Panel Report, that the United States does not act inconsistently with Articles 2.1, 2.4, and 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and finds, instead, that 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 by maintaining zeroing procedures in periodic reviews;

- (d) reverses the Panel's findings, in paragraphs 7.216, 7.219, 7.222 and 7.259(b) of the Panel report, that the United States does not act inconsistently with Articles 2.1, 2.4, and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and finds, instead, that the United States acts inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement* by maintaining zeroing procedures in new shipper reviews;
- (e) reverses the Panel's findings, in paragraphs 7.227 and 7.259(c) of the Panel Report, that the United States did not act inconsistently with Articles 2.1, 2.4, and 9.1-9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and finds, instead, that 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 by applying zeroing procedures in the 11 periodic reviews at issue in this appeal;
- (f) reverses the Panel's finding, in paragraphs 7.257 and 7.259(e) of the Panel Report, that the United States did not act inconsistently with Articles 2 and 11 of the *Anti-Dumping Agreement* in the sunset reviews at issue in this appeal, when it relied on margins of dumping calculated in previous proceedings through the use of zeroing, and finds, instead, that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.

191. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and with the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 14th day of December 2006 by:

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Giorgio Sacerdoti  
Presiding Member

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Georges Abi-Saab  
Member

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A.V. Ganesan  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

WT/DS322/12  
11 October 2006

(06-4940)

Original: English

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

Notification of an Appeal by Japan  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 11 October 2006, from the Delegation of Japan, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *United States – Measures Relating to Zeroing and Sunset Reviews* (WT/DS322/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute. Japan seeks review by the Appellate Body of the Panel's findings and conclusions that:

1. By maintaining the zeroing procedures for use in original investigations under a transaction-to-transaction comparison method, the United States acts consistently with Articles 2.1, 2.4 and 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*"), and Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").<sup>413</sup> This conclusion is based on an erroneous interpretation and application of these provisions. In particular, the Panel erred in law in finding that:
  - (i) Articles 2.1 and 2.4.2 and Articles VI:1 and VI:2 do not require that "dumping" and "margins of dumping" be determined for the "product" under investigation as a whole and, instead, permit a determination of dumping for individual export transactions;<sup>414</sup>

<sup>413</sup> See Panel Report, paras. 7.143, 7.161 and 7.259(a).

<sup>414</sup> See, for example, Panel Report, paras. 7.92 to 7.102, 7.104 to 7.112, 7.118 to 7.120, 7.139, and 7.141 to 7.143.

- (ii) Article 2.4.2 permits the use of the zeroing procedures under the transaction-to-transaction comparison method set out in the first sentence of that provision;<sup>415</sup> and,
  - (iii) Article 2.4 is subject to the allegedly "more specific" provisions of Articles 2.4.2 and 9, and the zeroing procedures entail a "fair comparison" of export price and normal value.<sup>416</sup>
2. By maintaining the zeroing procedures for use in periodic reviews, the United States acts consistently with Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.<sup>417</sup> This conclusion is based on an erroneous interpretation and application of these provisions. In particular, the Panel erred in law in finding that:
- (iv) Articles 2.1, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2, do not require, for purposes of periodic reviews, that "dumping" and "margins of dumping" be determined for the "product" under investigation as a whole and, instead, permit a determination of dumping for individual export transactions;<sup>418</sup>
  - (v) Articles 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2, permit, as a consequence, the assessment of the maximum amount of anti-dumping duties payable on the basis of a transaction-specific margin of dumping, instead of a margin of dumping for the "product" as a whole, for the foreign exporter or producer;<sup>419</sup> and,
  - (vi) Article 2.4 is subject to the "more specific" provisions of Articles 2.4.2 and 9, and the zeroing procedures involve a "fair comparison" of export price and normal value under this provision.<sup>420</sup>
3. By applying the zeroing procedures in eleven periodic reviews identified in Exhibits JPN-11 to JPN-21, the United States acted consistently with Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.<sup>421</sup> This conclusion is based on an erroneous interpretation and application of these provisions, as described in paragraph 2 above.<sup>422</sup>
4. By maintaining the zeroing procedures for use in new shipper reviews, the United States acts consistently with Articles 2.1, 2.4 and 9.5 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.<sup>423</sup> This conclusion is based on an erroneous interpretation and application of these provisions. In particular, the Panel erred in law in finding that:

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<sup>415</sup> See, for example, Panel Report, paras. 7.118 to 7.120, 7.127 to 7.143.

<sup>416</sup> See, for example, Panel Report, paras. 7.157 to 7.161.

<sup>417</sup> See Panel Report, paras. 7.216, 7.219, 7.222, and 7.259(b).

<sup>418</sup> See, for example, Panel Report, paras. 7.194 to 7.209, 7.216, 7.221 and 7.222.

<sup>419</sup> See, for example, Panel Report, paras. 7.194 to 7.209, 7.216, 7.221 and 7.222.

<sup>420</sup> See, for example, Panel Report, paras. 7.218 and 7.219. See also Panel Report, paras. 7.157 to 7.160, and 7.196 to 7.209.

<sup>421</sup> See Panel Report, paras. 7.227 and 7.259(c).

<sup>422</sup> See Panel Report, paras. 7.226 and 7.227.

<sup>423</sup> See Panel Report, paras. 7.216, 7.219, 7.222, and 7.259(b).

- (vii) Articles 2.1 and 9.5, and Articles VI:1 and VI:2, do not require that "dumping" and "margin of dumping" be determined for the "product" under investigation as a whole and, instead, permit a determination of dumping for individual export transactions,<sup>424</sup> and,
  - (viii) Article 2.4 is subject to the "more specific" provisions of Articles 2.4.2 and 9, and the zeroing procedures involve a "fair comparison" of export price and normal value.<sup>425</sup>
5. By relying, in the two sunset reviews identified in Exhibits JPN-22 and JPN-23, on margins of dumping calculated using the zeroing procedures in previous periodic reviews, the United States acted consistently with Articles 2.1, 2.4 and 11.3 of the *Anti-Dumping Agreement*.<sup>426</sup> This conclusion is in error because it is based on the Panel's erroneous conclusion, described in paragraph 2 above, that the zeroing procedures are permitted in periodic reviews.<sup>427</sup>

In sum, Japan considers that the Panel erred in law in the interpretation and application of Articles 2.1, 2.4, 2.4.2, 9.1, 9.2, 9.3, 9.5 and 11.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994. Japan requests that, upon reversal of the Panel's erroneous findings and conclusions identified above, the Appellate Body resolve this dispute promptly by finding that the United States violates these provisions by maintaining and applying the zeroing procedures.

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<sup>424</sup>See, for example, Panel Report, paras. 7.194 to 7.209, 7.216, 7.221 and 7.222.

<sup>425</sup>See, for example, Panel Report, paras. 7.218 and 7.219. See also Panel Report, paras. 7.157 to 7.160 and 7.196 to 7.209.

<sup>426</sup>See Panel Report, paras. 7.257 and 7.259(e).

<sup>427</sup>See also Panel Report, paras. 7.256 and 7.257.

ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS322/13**  
23 October 2006

(06-5130)

Original: English

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

Notification of an Other Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 23 October 2006, from the Delegation of the United States, is being circulated to Members.

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Pursuant to Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Measures Relating to Zeroing and Sunset Reviews* (WT/DS322/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

The United States seeks review by the Appellate Body of the Panel's finding and related legal interpretations that the United States maintains a measure referred to as "zeroing procedures" in transaction-to-transaction and average-to-transaction comparisons in the context of original investigations.<sup>428</sup> This finding is in error and is based on an erroneous application of the law and related legal interpretations. In addition, the Panel failed to make an objective assessment of the matter before it in connection with the issue of the existence of "zeroing procedures" that may be challenged as such in transaction-to-transaction and average-to-transaction comparisons in the context of original investigations, including a failure to make an objective assessment of the facts of the case, contrary to Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). The Panel's finding and related legal interpretations were also contrary to Articles 3.3, 4.2, 6.2, and 7.1 of the DSU.

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<sup>428</sup>Panel Report, paras. 7.34 through 7.59, 7.90, 7.143, 7.161, 7.166, 7.170, 7.175, and 7.259(a).

ANNEX III

**WORLD TRADE  
ORGANIZATION**

**WT/DS322/8**  
7 February 2005

(05-0498)

Original: English

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

Request for the Establishment of a Panel by Japan

The following communication, dated 4 February 2005, from the delegation of Japan to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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Upon instructions from my authorities, I hereby wish to convey the request of the Government of Japan for the establishment of a panel pursuant to Article XXIII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), and Article 17 of the Agreement on Implementation of Article VI of GATT 1994 (the "Anti-Dumping Agreement") regarding certain measures imposed by the United States.

**A. Consultations**

On 24 November 2004, the Government of Japan requested consultations with the Government of the United States under Article 4 of the DSU, Article XXII:1 of the GATT 1994, and Article 17.2 of the Anti-Dumping Agreement.<sup>429</sup> Consultations were held on 20 December 2004, which allowed a better understanding of the positions of the parties, but failed to achieve a mutually agreed solution of the dispute.

**B. Measures and Claims**

Pursuant to Article 6 of the DSU and Article 17 of the Anti-Dumping Agreement, Japan considers that the specific measures identified in this request are inconsistent with the United States' obligations under the Marrakesh Agreement Establishing the World Trade Organization (the "Marrakesh Agreement"), including the agreements annexed thereto. By infringing those obligations, the United States' measures nullify or impair benefits accruing to Japan directly or indirectly under such agreements, as set forth in Article 3.8 of the DSU. Specifically, the United States has acted in a manner inconsistent with the provisions of the Anti-Dumping Agreement, the GATT 1994, and the Marrakesh Agreement that are identified below.

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<sup>429</sup>WT/DS322/1 (24 November 2004).

1. The Government of Japan considers that the United States measures including laws, regulations and administrative procedures, as such, are inconsistent with certain provisions of the Anti-Dumping Agreement, the GATT 1994, and the Marrakesh Agreement, for the following reasons.

- (a) In original investigations, periodic reviews, new shipper reviews, sunset reviews and changed circumstances reviews where the redetermination of margins of dumping occurs, the United States Department of Commerce ("USDOC") disregards intermediate negative dumping margins calculated by comparing normal value and export price, including on a weighted-average-to-weighted-average basis, weighted-average-to-transaction basis, and transaction-to-transaction basis, through the USDOC's AD Margin Calculation computer program and other related procedures, in the process of establishing the overall dumping margin for the product as a whole (hereinafter collectively referred to as "Zeroing"). As a result, the USDOC artificially inflates the dumping margins. Zeroing is inconsistent with:
  - (i) Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement because the comparison of normal value and export price is not in conformity with those provisions;
  - (ii) Articles 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement through the imposition and collection of anti-dumping duties in excess of the margin or amount of dumping as properly determined pursuant to Article 2 of the Anti-Dumping Agreement;
  - (iii) as to original investigations, Article 5.8 of the Anti-Dumping Agreement insofar as *de minimis* dumping margins are determined to be greater than *de minimis* as a result of the impermissible use of the Zeroing procedure, and the Zeroing procedure results in the failure to immediately terminate an investigation;
  - (iv) as to original investigations, Article 3.3 of the Anti-Dumping Agreement insofar as the Zeroing procedure results in the cumulative assessment of the effect of imports for which dumping margins are erroneously determined to be greater than *de minimis*;
  - (v) as to new shipper reviews, changed circumstances reviews and sunset reviews, Articles 9.5, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement to the extent that dumping margins calculated by using the impermissible Zeroing procedure results in erroneous determination; and
  - (vi) Article 1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994 to the extent that the Zeroing procedure and the resulting imposition and collection of anti-dumping duties are inconsistent with the Anti-Dumping Agreement.
- (b) Injury investigations by the United States International Trade Commission ("USITC") are inconsistent with:
  - (i) Article 3, including Articles 3.1, 3.2, 3.4 and 3.5, of the Anti-Dumping Agreement insofar as the injury and causation determinations are based on the examination of the inflated dumping margin and volume of "dumped imports" that include imports from companies which would have been excluded as non-dumped imports (due to the calculation of *de minimis* or

- zero margins) had the margins been calculated without using the Zeroing procedure;
- (ii) Article 3.3 of the Anti-Dumping Agreement insofar as the Zeroing procedure allows the cumulative assessment of the effect of imports for which dumping margins are erroneously determined to be greater than *de minimis*;
  - (iii) Article 5.8 of the Anti-Dumping Agreement insofar as the volume of dumped imports or injury is determined not to be negligible as a result of the impermissible use of the Zeroing procedure, and the USITC consequently fails to immediately terminate the investigation; and
  - (iv) Articles 1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994 to the extent that the injury investigation and the resulting imposition and collection of anti-dumping duties are inconsistent with the Anti-Dumping Agreement.
- (c) In sunset reviews, the USDOC and the USITC base their determinations that the expiry of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury on margins previously calculated using the Zeroing procedure. Thus, the sunset reviews by the US authorities are inconsistent with:
- (i) Articles 11.1 and 11.3 of the Anti-Dumping Agreement, insofar as the likelihood determinations in the sunset reviews are based on dumping margins determined using the Zeroing procedure that is inconsistent with Article 2 including Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement; and
  - (ii) Article 1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 to the extent that the sunset reviews and the resulting continued imposition and collection of anti-dumping duties are inconsistent with the Anti-Dumping Agreement.
- (d) Changed circumstances reviews are inconsistent with:
- (i) Articles 11.1 and 11.2 of the Anti-Dumping Agreement insofar as the determinations in the changed circumstances reviews are based on dumping margins determined using the Zeroing procedure that is inconsistent with Article 2, including Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement; and
  - (ii) Article 1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 to the extent that the changed circumstances reviews and the resulting continued imposition and collection of anti-dumping duties are inconsistent with the Anti-Dumping Agreement.
- (e) By adopting and maintaining the WTO-inconsistent measures identified above, the United States has violated its obligations under Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement, because the United States has failed to take all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the Anti-Dumping Agreement.

2. The Government of Japan also considers that the United States laws, regulations and administrative procedures described above were applied in the specific original investigation, periodic reviews and sunset reviews identified in the Annex to this panel request. As a result of the application of the Zeroing procedure, the anti-dumping orders and determinations adopted in the proceedings identified in the Annex are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the Marrakesh Agreement for the same reasons as set out in point B.1.(a)–(e) above:

- (a) in the original investigation:
  - (i) Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.8, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994; and
  - (ii) Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement ; and
- (b) in the periodic and sunset reviews:
  - (i) Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994; and
  - (ii) Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement.

3. The foregoing measures include, and/or are adopted or applied pursuant to, the following United States laws, regulations, and administrative procedures:

- (1) the Tariff Act of 1930, as amended (in particular, by the Uruguay Round Agreements Act of 1994 (the "URAA")), in particular, sections 731, 751, 752, 771(7), 771(35)(A), 771(35)(B) and 777A(d);
- (2) the Statement of Administrative Action that accompanied the URAA, H.R. Doc. No. 103-316, vol. I;
- (3) the implementing regulations of the USDOC, 19 C.F.R. section 351; and
- (4) the USDOC Import Administration's Antidumping Manual (1997 edition), including the AD Margin Calculation computer program(s) to which it refers.

The foregoing text identifies the specific measures at issue and describes in brief the legal bases for the Government of Japan's claims, and is without prejudice to any arguments that the Government of Japan may develop and present to the Panel regarding the WTO-inconsistency of the measures at issue.

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Accordingly, the Government of Japan requests the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17 of the Anti-Dumping Agreement. The terms of reference shall be the terms set out in Article 7 of the DSU and Article 17 of the Anti-Dumping Agreement. The Government of Japan requests that the establishment of a panel in this matter be placed on the agenda of the meeting of the Dispute Settlement Body on 17 February 2005.

***United States – Anti-Dumping Duties on Imports of Certain Cut-To-Length Carbon-Quality Steel Plate Products from Japan***

Specific Case No. 1

The measure

This case concerns the imposition of anti-dumping duties on Certain Cut-To-Length Carbon-Quality Steel Plate Products ("CTL Plate") from Japan (USDOC case number A-588-847, 64 FR 73215, 13 December 1999). The rate of the *ad valorem* anti-dumping duty was 10.78% for Kawasaki Steel Corporation and all others.

Use of Zeroing

In the United States Department of Commerce's ("USDOC's") original investigation of CTL Plate from Japan, the USDOC utilized the Zeroing procedure by which the USDOC disregards negative dumping margins calculated for averaging groups in the process of establishing the dumping margin for the product as a whole.

This procedure is functionally identical to the procedure that was held to be inconsistent with the WTO Anti-Dumping Agreement in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (Panel Report, WT/DS141/R, and Appellate Body Report, WT/DS141/AB/R, adopted 12 March 2001), and also in *United States – Final Dumping Determination on Softwood Lumber from Canada* (Panel Report, WT/DS264/R, and Appellate Body Report, WT/DS264/AB/R, adopted 31 August 2004).

In addition, in the United States International Trade Commission's ("USITC's") affirmative determination in Cut-to-Length Carbon Steel Plate from Japan, Investigation No. 731-TA-820, the USITC, pursuant to Section 771(7) of the Act, relied on a "magnitude of dumping" and "volume of dumped imports," that were inflated by the use of the Zeroing procedure.

Dumping margin without Zeroing

By using the above procedure, the USDOC calculated a dumping margin of 10.58% for Kawasaki Steel Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [lower].

***United States – Anti-Dumping Periodic Review on Imports of Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan***

Specific Case No. 2

The measure

This case concerns the imposition of anti-dumping duties on Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan (USDOC case number A-588-054, 66 Fed. Reg. 15078, 15 March 2001). The period of review is 1 October 1998 through 30 September 1999, and the rate of the *ad valorem* anti-dumping duty was 14.86% for Koyo Seiko Co., Ltd.

Use of Zeroing

In this periodic review of Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, the USDOC utilized the Zeroing procedure by which the USDOC disregards negative dumping margins calculated for the export transactions under review in the process of establishing the dumping margin for the product as a whole.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 14.86% for Koyo Seiko Co., Ltd., while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [negative], and no anti-dumping duty would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan***

Specific Case No. 3

The measure

This case concerns the imposition of anti-dumping duties on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan (USDOC case number A-588-604, 65 Fed. Reg. 11767, 6 March 2000). The period of review is 1 October 1997 through 30 September 1998, and the rate of the *ad valorem* anti-dumping duty was 17.58% for NTN Corporation.

Use of Zeroing

In this periodic review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 17.58% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [negative], and no anti-dumping duty would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan***

Specific Case No. 4

The measure

This case concerns the imposition of anti-dumping duties on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan (USDOC case number A-588-604, 66 Fed. Reg. 15078, 15 March 2001). The period of review is 1 October 1998 through 30 September 1999, and the rate of the *ad valorem* anti-dumping duty was 17.94% for Koyo Seiko Co., Ltd.

Use of Zeroing

In this periodic review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 17.94% for Koyo Seiko Co., Ltd., while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [lower].

***United States – Anti-Dumping Periodic Review on Imports of Ball Bearings and Parts Thereof From Japan***

Specific Case No. 5

The measure

This case concerns the imposition of anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 65 Fed. Reg. 49219, 11 August 2000). The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 6.14% for NTN Corporation.

Use of Zeroing

In this periodic review of Ball Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 6.14% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [negative], and no anti-dumping duty would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Cylindrical Roller Bearings and Parts Thereof From Japan***

Specific Case No. 6

The measure

This case concerns the imposition of anti-dumping duties on Cylindrical Roller Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 65 Fed. Reg. 49219, 11 August 2000). The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 3.49% for NTN Corporation.

Use of Zeroing

In this periodic review of Cylindrical Roller Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 3.49% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [negative], and no anti-dumping duty would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Spherical Plain Bearings and Parts Thereof From Japan***

Specific Case No. 7

The measure

This case concerns the imposition of anti-dumping duties on Spherical Plain Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 65 Fed. Reg. 49219, 11 August 2000). The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 2.78% for NTN Corporation.

Use of Zeroing

In this periodic review of Spherical Plain Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 2.78% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [negative], and no anti-dumping duty would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Ball Bearings and Parts Thereof From Japan***

Specific Case No. 8

The measure

This case concerns the imposition of anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 66 Fed. Reg. 36551, 12 July 2001). The period of review is 1 May 1999 through 30 April 2000, and the rates of the *ad valorem* anti-dumping duty were 10.10% for Koyo Seiko Co., Ltd., 9.16% for NTN Corporation, and 4.22% for NSK Ltd.

Use of Zeroing

In this periodic review of Ball Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated dumping margins of 10.10% for Koyo Seiko Co., Ltd., 9.16% for NTN Corporation, and 4.22% for NSK Ltd., while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margins would have been [negative] for Koyo Seiko Co., Ltd., [negative] for NTN Corporation, and [negative] for NSK Ltd., and no anti-dumping duties would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Cylindrical Roller Bearings and Parts Thereof From Japan***

Specific Case No. 9

The measure

This case concerns the imposition of anti-dumping duties on Cylindrical Roller Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 66 Fed. Reg. 36551, 12 July 2001). The period of review is 1 May 1999 through 31 December 1999, and the rates of the *ad valorem* anti-dumping duty were 5.28% for Koyo Seiko Co., Ltd. and 16.26% for NTN Corporation.

Use of Zeroing

In this periodic review of Cylindrical Roller Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated dumping margins of 5.28% for Koyo Seiko Co., Ltd. and 16.26% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margins would have been [negative] for Koyo Seiko Co., Ltd. and [negative] for NTN Corporation, and no anti-dumping duties would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Spherical Plain Bearings and Parts Thereof From Japan***

Specific Case No. 10

The measure

This case concerns the imposition of anti-dumping duties on Spherical Plain Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 66 Fed. Reg. 36551, 12 July 2001). The period of review is 1 May 1999 through 31 December 1999, and the rate of the *ad valorem* anti-dumping duty was 3.60% for NTN Corporation.

Use of Zeroing

In this periodic review of Spherical Plain Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated a dumping margin of 3.60% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margin would have been [negative], and no anti-dumping duty would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Ball Bearings  
and Parts Thereof From Japan***

Specific Case No. 11

The measure

This case concerns the imposition of anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 67 Fed. Reg. 55780, 30 August 2002, as amended by 67 Fed. Reg. 63608, 15 October 2002). The period of review is 1 May 2000 through 30 April 2001, and the rates of the *ad valorem* anti-dumping duty were 6.07% for NSK Ltd., 2.51% for Asahi Seiko Co., Ltd., and 9.34% for NTN Corporation.

Use of Zeroing

In this periodic review of Ball Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated dumping margins of 6.07% for NSK Ltd., 2.51% for Asahi Seiko Co., Ltd., and 9.34% for NTN Corporation, while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margins would have been [negative] for NSK Ltd., [negative] for Asahi Seiko Co., Ltd., and [negative] for NTN Corporation, and no anti-dumping duties would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Ball Bearings  
and Parts Thereof From Japan***

Specific Case No. 12

The measure

This case concerns the imposition of anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 68 Fed. Reg. 35623, 16 June 2003). The period of review is 1 May 2001 through 30 April 2002, and the rates of the *ad valorem* anti-dumping duty were 4.51% for NTN Corporation and 2.68% for NSK Ltd.

Use of Zeroing

In this periodic review of Ball Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated dumping margins of 4.51% for NTN Corporation and 2.68% for NSK Ltd., while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margins would have been [negative] for NTN Corporation and [negative] for NSK Ltd., and no anti-dumping duties would have been collected.

***United States – Anti-Dumping Periodic Review on Imports of Ball Bearings  
and Parts Thereof From Japan***

Specific Case No. 13

The measure

This case concerns the imposition of anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804, 69 Fed. Reg. 55574, 15 September 2004). The period of review is 1 May 2002 through 30 April 2003, and the rates of the *ad valorem* anti-dumping duty were 5.56% for Koyo Seiko Co., Ltd., 2.74% for NTN Corporation, 2.46% for NSK Ltd., and 3.37% for Nippon Pillow Block Co., Ltd.

Use of Zeroing

In this periodic review of Ball Bearings and Parts Thereof From Japan, the USDOC utilized the same Zeroing procedure as that used in Specific Case No. 2.

Dumping margin without Zeroing

By using this procedure, the USDOC calculated dumping margins of 5.56% for Koyo Seiko Co., Ltd., 2.74% for NTN Corporation, 2.46% for NSK Ltd., and 3.37% for Nippon Pillow Block Co., Ltd., while without the Zeroing procedure (i.e. with the negative unit margins included), the dumping margins would have been [negative] for Koyo Seiko Co., Ltd., [negative] for NTN Corporation, [negative] for NSK Ltd., and [negative] for Nippon Pillow Block Co., Ltd., and no anti-dumping duties would have been collected.

***United States – Sunset Review of Antifriction Bearings From Japan***

Specific Case No. 14

The measure

This case concerns the Final Results of the USDOC in the Expedited Sunset Review of Antifriction Bearings from Japan, in which the USDOC found that revocation of the anti-dumping order on Ball Bearings from Japan would be likely to lead to continuation or recurrence of dumping (USDOC case number A-588-804, 64 Fed. Reg. 60275, 4 November 1999); and the Determination of the USITC in Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, Investigations Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review), that revocation of the anti-dumping order on Ball Bearings from Japan would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

Use of Zeroing

In making this determination, the USDOC specifically relied on the "margins determined in the original investigation and subsequent periodic reviews," and concluded that because "dumping has continued over the life of the orders, the [USDOC] determines that dumping is likely to continue if the orders were revoked." (64 Fed. Reg. at 60278.) Japan submits that because the USDOC's likelihood determination was based on margins in both the original investigation and subsequent periodic reviews that were calculated using the Zeroing procedure, which is inconsistent with the Anti-Dumping Agreement, the USDOC's decision not to revoke the anti-dumping order on Ball Bearings from Japan is equally inconsistent with the Anti-Dumping Agreement.

In addition, Japan submits that because the USITC relied on a "magnitude of dumping" and "volume of dumped imports" that were inflated by the use of the Zeroing procedure,, the USITC's likelihood determination and the decision not to revoke the anti-dumping order on Ball Bearings from Japan are also inconsistent with the Anti-Dumping Agreement.

***United States – Sunset Review of Corrosion-Resistant  
Carbon Steel Flat Products From Japan***

Specific Case No. 15

The measure

This case concerns the Final Results of the USDOC in the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan, in which the USDOC concluded that revocation of the anti-dumping order on Corrosion-Resistant Carbon Steel Flat Products from Japan would be likely to lead to continuation or recurrence of dumping (USDOC case number A-588-826, 65 Fed. Reg. 47380, 2 August 2000); and the Determination of the USITC in Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), that revocation of the anti-dumping order on Corrosion-Resistant Carbon Steel Flat Products from Japan would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

Use of Zeroing

In making this determination, the USDOC specifically relied on the margins determined in the investigation, and concluded that because "dumping has continued to occur throughout the life of the order," dumping was likely to continue if the order was revoked. USDOC, *Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results* at Comment 1 (2 August 2000). Japan submits that because the USDOC's likelihood determination was based on margins in the original investigation that were calculated using the Zeroing procedure, which is inconsistent with the Anti-Dumping Agreement, the USDOC's decision not to revoke the anti-dumping order on Corrosion-Resistant Carbon Steel Flat Products From Japan is equally inconsistent with the Anti-Dumping Agreement.

In addition, Japan submits that because the USITC relied on a "magnitude of dumping" and "volume of dumped imports" that were inflated by the use of the Zeroing procedure, the USITC's likelihood determination and the decision not to revoke the anti-dumping order on Corrosion-Resistant Carbon Steel Flat Products from Japan are also inconsistent with the Anti-Dumping Agreement.

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