ANNEX B

THIRD PARTIES' WRITTEN SUBMISSIONS

Contents		Page
Annex B-1	Third Party Written Submission of Japan	B-2
Annex B-2	Third Party Written Submission of the Republic of Korea	B-23
Annex B-3	Third Party Written Submission of Norway	B-29
Annex B-4	Third Party Written Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	B-42
Annex B-5	Third Party Written Submission of Thailand	B-48

ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF JAPAN

TABLE OF CONTENTS

Page

TABLE OF CASES CITED **3**

TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION **4**

I. INTRODUCTION AND EXECUTIVE SUMMARY **5**

II. THE ZEROING PROCEDURES **6**

III. THE ZEROING PROCEDURES USED BY THE USDOC IN THE MEASURES CHALLENGED BY THE EC ARE INCONSISTENT WITH THE OBLIGATIONS ESTABLISHED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 ..... **7**

A. THE GOVERNING LEGAL PRINCIPLES 7

1. Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 **7**

2. Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement* **11**

3. Article 2.4 of the Anti-Dumping Agreement **13**

B. ZEROING AS USED BY THE USDOC IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLES 2.1, 2.4.2 AND 2.4 OF THE ANTI-DUMPING AGREEMENT 14

1. Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* **14**

2. Article 2.4 of the Anti-Dumping Agreement **15**

C. ZEROING AS USED BY THE USDOC IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 9.3 OF THE ANTI-DUMPING AGREEMENT 16

1. Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* **16**

2. Article 2.4 of the Anti-Dumping Agreement **19**

D. ZEROING AS USED BY THE USDOC IN SUNSET REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 11.3 OF THE ANTI-DUMPING AGREEMENT 20

E. THE ANTI-DUMPING ORDERS CHALLENGED BY THE EC ARE ALSO INCONSISTENT WITH ARTICLES 2.1, 2.4, 2.4.2, 9.3 AND 11.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES VI:1 AND VI:2 OF THE GATT 1994 21

IV. CONCLUSION **22**

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion - Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, modified by the Appellate Body Report, WT/DS244/AB/R, DSR 2004:I, 85
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – OCTG Sunset Reviews (Mexico)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 20 February 2007
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION

Abbreviation	**Description**
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
FWS	First Written Submission
GATT 1994	*General Agreement on Tariffs and Trade 1994*
PNV	Prospective normal value
T-to-T comparison	Transaction-to-transaction comparison
USDOC	United States Department of Commerce
W-to-T comparison	Weighted average-to-transaction comparison
W-to-W comparison	Weighted average-to-weighted average comparison

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this dispute, the EC presents a series of claims against the United States' continued use of the so-called "zeroing" procedures in calculating margins of dumping in a large number of anti-dumping proceedings. Japan welcomes the opportunity to make this third party submission to the Panel because of its systemic interest in the proper interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*") as regards zeroing.

2. Without prejudice to the issues that Japan may address in its oral statement, Japan's written submission will address the prohibition on zeroing when used in the types of anti-dumping proceedings identified by the EC.

3. The operation of zeroing in the measures at issue is no different from the operation of zeroing considered in previous disputes. The USDOC conducts multiple comparisons, either comparing a weighted average normal value with a weighted average export price ("W-to-W") or a weighted average normal value with an individual export price ("W-to-T"). Specifically, the United States used the W-to-W comparison method in the measures at issue resulting from investigations, and it used the W-to-T method in the periodic reviews. In all these measures, to determine the overall amount of "dumping", the USDOC aggregated the multiple comparison results. Under the zeroing procedures, the USDOC summed solely the positive comparison results, ignoring all the negative comparison results. In other words, the USDOC disregarded – or treated as "zero" value – the negative comparison results for export transactions which the USDOC itself deemed to be comparable.[1]

4. The consequences of zeroing in the measures at issue are precisely the same as the consequences of zeroing addressed in previous disputes. *First*, by excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those transactions that generate the negative comparison results. "Dumping" is, therefore, *not* determined for the "*product*" as defined by the investigating authority, but for a sub-part of it.

5. In *EC – Bed Linen*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Softwood Lumber V (Article 21.5 – Canada)*, and *US – Zeroing (Japan)*, the Appellate Body ruled that a partial determination of this type is inconsistent with the definition of "dumping" in Article 2.1 of the *Anti-Dumping Agreement*, and Article VI of the GATT 1994, because it is *not* made for the "*'product' as a whole*".[2] The Appellate Body also ruled that this definition of "dumping" "*applies to the entire [Anti-Dumping] Agreement*", including all the provisions governing reviews.[3] By applying the zeroing procedures in the measures at issue, the United States failed to comply with this definition because the amount of "dumping" is determined in reviews for a sub-part of the product, not for the "product" as a whole.

6. *Second*, zeroing means that an affirmative "dumping" determination is much more likely to be made than not.[4] The reason is that the positive comparison results *included* in the determination relate to export transactions with prices that are *lower* than normal value; in sharp contrast, the *excluded*

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[1] *See* EC First Written Submission, paras. 6-29.

[2] Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, para. 99; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87 and 89; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 109; Appellate Body Report, *US – Softwood Lumber V*, para. 93; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126.

[4] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

negative results relate to export transactions with prices *higher* than normal value. The export transactions selected for inclusion in the determination, therefore, relate to the sub-part of the product that is the most likely to generate an affirmative dumping determination.

7. As a result, zeroing can produce a "dumping" determination where, in fact, the product as a whole is not dumped.[5] The exclusion of negative comparison results also "inflates" the amount of any "dumping" determination that is made.[6]

8. Thus, zeroing systematically prejudices the interests of foreign producers and exporters because the negative comparison results that are favourable to them are purposefully set aside by the USDOC. As a result, the Appellate Body has held that the zeroing procedures with these effects involves an "inherent bias" and "distortion" in the comparison of export price and normal value.[7] This is the very antithesis of the "fair comparison" required by Article 2.4 of the *Anti-Dumping Agreement*.

9. For these reasons, the United States' zeroing procedures, and anti-dumping measures adopted using these procedures, have been found to be incompatible with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *Anti-Dumping Agreement* in a series of previous disputes.[8]

10. In the current dispute, the United States' defence consists entirely of a lengthy repetition of arguments that have been made in previous disputes. Indeed, the United States makes no new arguments whatsoever. Each of the United States' arguments has, therefore, been refuted by the complainants and third parties in previous disputes, and rejected by the Appellate Body.

11. The heart of the United States' objection is that the text of the *Anti-Dumping Agreement* does not support the Appellate Body's interpretation that the terms "dumping" and "margin of dumping" must be defined in relation to the investigated "product" as a whole. It is common for parties to disputes to believe firmly that their own interpretation of the covered agreements is properly rooted in the text of those agreements. Yet, the purpose of WTO dispute settlement is to allow the Dispute Settlement Body – acting through panels and, ultimately, the Appellate Body – to resolve disputes by clarifying the meaning of the text on a multilateral basis. In Article 3.2 of the DSU, Members have also underscored that dispute settlement serves to promote the "security and predictability" of the multilateral trading system. Japan does not consider that these ends would be served if the Panel were to reject the Appellate Body's previous rulings on zeroing, which are based on the text of the covered agreements, and have been consistently rendered.

12. Therefore, for the reasons that led the Appellate Body to find, in previous disputes, that the United States' zeroing measures are WTO-inconsistent, Japan urges the Panel to uphold the European Communities' ("EC") claims that the measures at issue are inconsistent with the *Anti-Dumping Agreement* because of the United States' use of zeroing.

II. THE ZEROING PROCEDURES

13. Japan generally agrees with the EC's detailed description of the zeroing procedures as used by the USDOC in various types of anti-dumping proceedings, its use in conjunction with different

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[5] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[6] Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Softwood Lumber V*, para. 101; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[7] *See* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 134 to 135; *and* Appellate Body Report, *EC – Bed Linen*, para. 55.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 190; Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Softwood Lumber V*, para. 183.

comparison methodologies (W-to-W, transaction to transaction ("T-to-T"), and W-to-T), and the computer programming language used by the USDOC to implement the zeroing methodology.[9] Japan notes that the United States has not contested the EC's description of these matters.

III. THE ZEROING PROCEDURES USED BY THE USDOC IN THE MEASURES CHALLENGED BY THE EC ARE INCONSISTENT WITH THE OBLIGATIONS ESTABLISHED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994

A. THE GOVERNING LEGAL PRINCIPLES

13. The legal principles governing the WTO-inconsistency of the zeroing procedures have been thoroughly canvassed by the Appellate Body in past WTO disputes, and are well established by now. Two general provisions of the *Anti-Dumping Agreement* – Article 2.1 (in conjunction with Article VI:1 of the GATT 1994) and Article 2.4 – establish the relevant obligations. Both of those provisions apply to the various types of anti-dumping proceedings (original investigations, periodic reviews, and sunset reviews) involved in the measures challenged by the EC in this dispute. In original investigations, investigating authorities are required to determine "margins of dumping", under Article 2.4.2, in a manner that is consistent with the definition of "dumping" in Article 2.1 and Article VI:1. Similarly, the authorities must make a "fair comparison" of export price and normal value pursuant to Article 2.4. The obligations imposed by Articles 2.1 and 2.4 apply to periodic reviews and sunset reviews through the operation of these provisions and Articles 9.3 and 11.3, respectively.

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

15. As the United States accepts, the analysis of the zeroing issue begins with the concepts of "dumping" and "margins of dumping", as defined in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.[10] Article 2.1 has particular importance among the "agreed disciplines" set out in Article 2 for determining "dumping" and "margins of dumping"[11], because it provides a definition of "dumping":

> *For the purpose of this Agreement, a product* is to be considered as being *dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price … for the like product when destined for consumption in the exporting country. (Emphasis added)

16. This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994[12], which states that, in relevant part:

> … a *product* is to be considered as being introduced into the commerce of an importing country at less than its normal value [i.e. dumped], if the *price of the product* exported from one country to another … is less than the comparable *price, in the ordinary course of trade, for the like product* when destined for consumption in the exporting country … (Emphasis added.)

17. The text of both these provisions refers to the dumping of "a *product*". In addition, they state that dumping of "*a product*" occurs when "*the* [export] *price of the product*" is less than "*the*

[9] EC First Written Submission, paras. 6-31.
[10] United States' First Written Submission ("FWS"), para. 90.
[11] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 109; *and* Appellate Body Report, *US – Softwood Lumber V*, para. 92.

comparable *price* … for *the like product*". The text, therefore, defines "dumping" in terms of the difference between two prices, each one an *aggregate* price for "the product". The "dumping" determination is, therefore, made by reference to a single, overall price difference for the product.[13] As the Appellate Body held,

> . . . "dumping" and "margins of dumping" can be found to exist only in relation to [the] product as defined by [the] authority. They cannot be found to exist for only a type, model or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction.[14]

18. Thus, whether or not the investigating authority decides initially to make multiple comparisons at the sub-product level, the wording of Article 2.1 and Article VI emphasizes that "dumping is defined in relation to a product".[15] In *EC – Bed Linen (Article 21.5 – India)*, in confirming that "dumping" is determined for the "product", and not individual transactions, the Appellate Body agreed with the United States that import transactions "need not be separated into two categories – dumped and non-dumped transactions".[16] This is because a "dumping" determination is made in respect of a single category pertaining to the "product" as a whole.

19. On the basis of this interpretation of Article 2.1 and Article VI:1, the Appellate Body further found that

> . . . if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value.[17]

Thus, "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".[18]

20. This interpretation of the terms "dumping" and "margin of dumping" is supported by Article 6.10 of the *Anti-Dumping Agreement*, which requires, as a rule, that the investigating authority determines "an *individual* margin of dumping for *each* known exporter or producer of *the product* under investigation".[19] Similar language appears in Articles 6.10.2 and 9.5.

21. Thus, for each individually examined producer or exporter, the text of the *Anti-Dumping Agreement* expressly contemplates the determination of only a *single* margin of dumping *for the product*. As stated by Article 2.1, this language underscores that a single, overall dumping determination is made for the product as a whole on the basis of aggregate price comparisons, even if multiple intermediate comparisons are undertaken at the sub-product level. In contrast, this language cannot support the view that "dumping" and the "margin of dumping" can be determined for *each and every* transaction or model, as the United States contends. Otherwise, if every transaction- or model-

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[13] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[14] Appellate Body Report, *US – Zeroing (Japan)*, para. 115. Underlining added.

[15] Appellate Body Report, *US – Softwood Lumber V*, para. 93. *See also* Appellate Body Report, *US – Zeroing (Japan)*, paras. 109, 115.

[16] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 143 and footnote 177.

[17] Appellate Body Report, *US – Zeroing (EC)*, para. 127. Underlining added. *See also* Appellate Body Report, *US – Softwood Lumber V*, para. 98.

[18] Appellate Body Report, *US – Zeroing (Japan)*, para. 122.

[19] *See* Appellate Body Report, *US – Softwood Lumber V*, footnote 158, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

specific comparison constituted a "margin of dumping", there would be multiple margins – one for each transaction or model – and not "an *individual* margin of dumping" for "the product".

22. Finally, as noted above, Article 2.1 sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In light of these words, and absent any other definition of "dumping", the Appellate Body has held that the definition in Article 2.1 "applies to the entire Agreement"[20], and it expressly rejected the notion that the terms "dumping" and "margins of dumping" could have "different meanings under different provisions of the *Anti-Dumping Agreement*".[21] Therefore, a uniform definition of "dumping" relating to the product as a whole applies throughout the *Anti-Dumping Agreement*, and to the different types of anti-dumping proceedings that are conducted pursuant to the *Agreement*.[22]

23. Having set forth the Appellate Body's interpretation of the terms "dumping" and "margins of dumping" – which Japan has shown is based in the text of the *Agreement* – Japan now addresses specific arguments raised by the United States to support its argument that "dumping" in Article 2.1 and Article VI:1 need not be defined in relation to the "product" as a whole.

24. *First*, the United States appears to argue that the meaning of the treaty terms "dumping" and "margins of dumping" must be based on "real-world commercial conduct" in the marketplace, where prices are often determined for individual transactions.[23] This argument is without foundation. First, as a commercial matter, it is by no means evident that companies engaging in "real-world commercial conduct" develop their market strategies and assess their relative positions in the marketplace by reference to individual transactions. Thus, it is likewise not evident that the concept of "dumping" should be construed in such a narrow and short-sighted manner. Second, the fact that prices may be set on a transaction-specific basis does not mean that, as a matter of law, the words "product", "dumping" and "margin of dumping" have a transaction-specific ordinary meaning under the *Vienna Convention*. As Japan has explained, the text of the *Anti-Dumping Agreement* requires that a comparison be made of *aggregate* prices for the "product" to arrive at a *single* margin of dumping for each foreign producer or exporter. Moreover, as the United States knows, investigating authorities, including the USDOC, routinely aggregate prices for multiple transactions into a single price for a product. As a result, there is no necessity to determine margins for individual transactions simply because prices can be transaction-specific.

25. Moreover, the Appellate Body has explained that the requirement to determine "dumping" and "margins of dumping" for the product as a whole "is in consonance with *the need for consistent treatment of a product in an anti-dumping investigation*".[24] This consistent treatment of the product as a whole serves important purposes in anti-dumping proceedings. A dumping determination has a series of regulatory consequences that affect the product as a whole. For example, on the basis of a dumping determination, the investigating authority: decides whether to terminate an investigation into the "product" under Article 5.8; determines that all entries of the product are dumped and treats them as such for the purposes of an injury determination under Article 3; and, imposes an anti-dumping duty "*on the product*" under Articles 9.2 and 9.5, and Article VI:2. By defining "dumping" in relation to a product as a whole, the *Anti-Dumping Agreement* ensures parallelism between the scope of a dumping determination and the scope of the regulatory consequences the determination entails.

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[20] Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 99; Appellate Body Report, *US – Zeroing (EC)*, para. 125; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 126 and 127.

[21] Appellate Body Report, *US – Zeroing (Japan)*, para. 151.

[22] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[23] US FWS, paras. 82 and 83.

[24] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

26. Thus, the fact that prices may be determined in the marketplace for individual transactions is not the sole consideration that motivated WTO Members. Instead, mindful of the product-wide consequences of a dumping determination, the Members settled upon treaty text that defines "dumping" in relation to the "product" as a whole.

27. *Second*, the United States argues that *Ad* Article VI:1 "provides for importer-specific comparisons" and, as a result, "the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" ".[25] This interpretation of *Ad* Article VI:1 is incorrect. *Ad* Article VI:1 does not provide a definition of either "dumping" or "margins of dumping". Nor does it provide that margins are calculated for individual transactions. Rather, it addresses the *price* that may be used for certain export transactions in the process of calculating the margin of dumping. The *Ad* Article does not purport to alter the requirement in Article 2.1 and Article VI:1 that dumping, and margins of dumping, are determined for a "product". Instead, consistent with these provisions, the term "margin of dumping" in the *Ad* Article can, and must, be read to refer to the margin for the "product".

28. *Third*, the United States relies on Article 2.2 of the *Anti-Dumping Agreement*, arguing that a product-wide definition of dumping "would require the use of constructed [normal] value for the "product as a whole"".[26] The Appellate Body rejected this argument in *US – Softwood Lumber V (Article 21.5 – Canada)*.[27] It held that an authority may sub-divide the product for purposes of conducting intermediate comparisons on a model-specific basis. In so doing, it may assess whether the conditions in Article 2.2 for construction of normal value are met on a model-specific basis, and it may conduct intermediate comparisons on that basis under Article 2.4.2.[28] However, whether or not normal value is constructed for some or all models under Article 2.2, the results of the intermediate comparisons must all be aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1.

29. *Fourth*, the United States relies on certain historical arguments in support of its argument that zeroing is permissible. It refers, in particular, to the following: the second report of a Group of Experts from 1960; two GATT panel reports; and the negotiating history of the *Anti-Dumping Agreement*.[29] The United States made virtually the same arguments in previous disputes. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body dismissed these arguments as follows:

> The same historical materials submitted in these Article 21.5 proceedings were also raised by the United States before the Appellate Body in the original [*Softwood Lumber V*] dispute. The Appellate Body stated in response that "[t]he material to which the United States refer[red] does not ... resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing". The Appellate Body noted that, "[i]n any event", it had "concluded, based on the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology". In our view, the historical materials referred to by the Panel and the United States are of limited relevance. The Group of Experts Report dates back to 1960. Both pre-WTO panel reports examined the issue under the provisions of the *Tokyo Round Anti-Dumping Code*, which did not contain a provision equivalent to Article 2.4.2 of the *Anti-Dumping Agreement*. The latter Agreement entered into force in 1995, as part of the Uruguay Round results, long

[25] US FWS, para. 96.
[26] US FWS, para. 97.
[27] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104.
[28] Appellate Body Report, *US – Softwood Lumber V*, paras. 82 and 97.
[29] US FWS, paras. 86 and 89.

> after the 1960 Group of Experts Report and after the panels referred to by the United States and the Panel had been established. Furthermore, one of the two panel reports was not adopted. Finally, the negotiating proposals referred to by the United States are inconclusive and, in any event, reflected the positions of some, but not all, of the negotiating parties. In sum, the historical materials do not provide any additional guidance for the question whether zeroing under the transaction-to-transaction comparison methodology is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[30]

30. In sum, although the United States believes that the negotiations produced an outcome permitting zeroing, nothing in the text shows that the Membership "as a whole" agreed to this view. Instead, the Members agreed to wording that – in light of the text, context, and object and purpose – shows that "dumping" and "margins of dumping" are defined in relation to the "product" as a whole, and that definition renders zeroing WTO-inconsistent.

2. Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement*

31. As it has done in previous disputes, the United States attaches particular importance to the second sentence of Article 2.4.2. In particular, it contends that a "general prohibition of zeroing" would be "inconsistent" with the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*[31], and specifically would "reduce to inutility" the comparison methodology authorized by that sentence.[32] The United States made this argument, without success, in *US – Zeroing (EC)*, *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Zeroing (Japan)*.

32. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body rejected Panel's conclusion (and the United States' argument) that the prohibition of zeroing would render the second sentence of Article 2.4.2 inutile. *First*, it noted that the United States has never applied the methodology authorized by the second sentence, so the argument as to "mathematical equivalence" between the W-to-W and W-to-T comparisons "rests on an untested hypothesis".[33]

33. *Second*, the Appellate Body noted that the methodology authorized in the second sentence is an "exception" to the methodologies authorized in the first sentence, and as such, the second sentence "alone cannot determine the interpretation of the two methodologies provided in the first sentence …".[34] Because the second sentence constitutes an exception, the requirements that attach to determinations made under the first sentence do not apply under the second sentence.

34. *Third*, the Appellate Body noted that "there is considerable uncertainty regarding how precisely the third methodology [i.e. the methodology in the second sentence] should be applied", because it has never been invoked, and the United States could not provide details regarding how this never-used methodology would work. The Appellate Body held that the uncertainties regarding the application of the W-to-T methodology "undermine the Panel's reasoning based on the 'mathematical equivalence' argument".[35]

35. The Appellate Body noted that Japan and others have "suggested that the weighted average-to-transaction methodology could be applied only to the pattern of exports transactions that have

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[30] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 121. Footnotes omitted.
[31] US FWS, para. 112 ff.
[32] US FWS, para. 113.
[33] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[34] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[35] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98.

prices that differ significantly among different purchasers, regions, or time periods".[36] The United States indicated to the Appellate Body that its use of W-to-T comparison method would be limited to the export transactions making up the "pricing pattern", and that W-to-W comparisons would be conducted for the remaining export transactions. However, "the United States failed to explain how precisely the results of the two comparison methodologies would be combined".[37]

36. *Finally*, the Appellate Body agreed with the arguments of Japan and others that "mathematical equivalence" does not necessarily arise when using the W-to-T and W-to-W comparisons without zeroing because, in various circumstances, different outcomes would obtain. Thus, it concluded:

> One 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.[38]

37. Rather, applying the proper test for inutility, the Appellate Body found that "[i]t has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results".[39] The Appellate Body, therefore, found that the concerns regarding "mathematical equivalence" were unwarranted.[40]

38. In *US – Zeroing (Japan)*, the Appellate Body also rejected a similar argument advanced by the United States. After recalling its analysis from *US – Softwood Lumber V (Article 21.5 – Canada)*[41], summarized above, the Appellate Body added that the second sentence of Article 2.4.2 does not provide contextual support for a finding that zeroing is permissible because, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology [under the second sentence] to the prices of export transactions falling within the relevant pattern".[42] On this interpretation, absent zeroing, a comparison based on this sub-set of transactions would not produce the same outcome as a W-to-W comparison under the first sentence. There is, therefore, no need to permit zeroing under the second sentence in order to avoid the inutility of the second sentence.

39. The United States now dismisses the Appellate Body's finding in *US – Zeroing (Japan)* by noting that (1) it is "unaware of any Member ever having done this" or suggesting this (i.e. limiting the W-to-T comparison to export transactions making up the pricing pattern), and (2) "[t]he language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis".[43]

40. As to the United States' first point, the United States' own regulations recognize that, in a situation that may involve "targeted dumping", the W-to-T comparison set forth in the second sentence of Article 2.4.2 is confined to the export transactions making up the pricing pattern. Specifically, the regulations state that where "there is targeted dumping in the form of export prices … that differ significantly among purchasers, regions, or periods of time" "*the Secretary*

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[36] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98. *See also* Japan's Third Participant's Submissions in *US – Zeroing (EC)*, paras. 187 to 194, and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 52 to 61, which set forth in detail Japan's interpretation of the second sentence of Article 2.4.2. Japan adopts those passages into this submission.

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

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

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

[40] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100.

[41] Appellate Body Report, *US – Zeroing (Japan)*, para. 133.

[42] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

[43] US FW Submission, para. 116.

normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping … ."[44] Thus, at least one Member – the United States – agrees with the Appellate Body that the W-to-T comparison method under the second sentence is confined to the transactions making up the relevant pricing pattern.

41. In reply, the United States has argued in previous disputes that it would combine the W-to-T method with a W-to-W method on the transactions outside the pricing pattern. Although the United States is free to do so, this approach is not compelled by the text of the *Anti-Dumping Agreement*. Under Article 2.4.2, each comparison method provides an independent basis for determining margins of dumping. Further, as described in paragraph 0, the Appellate Body noted that the United States has failed to demonstrate how it would combine the results of a W-to-T and W-to-W comparison methods.

42. In any event, the United States' argument misses the point. The interpretive issue is what type of W-to-T comparison is required by the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The United States' regulations follow the Appellate Body's interpretation that this comparison is confined to the export transactions making up the relevant pricing pattern. The fact that the United States chooses, additionally, to conduct a W-to-W comparison does not alter the nature of the W-to-T comparison.

43. The United States' second point – that the Appellate Body's ruling lacks textual basis – ignores that the Appellate Body based its interpretation on the language of the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. In particular, the Appellate Body relied on the phrase "pattern of export prices which differs significantly among different purchasers, regions or time periods". To give meaning to these words, the Appellate Body held that the comparison must focus on the transactions that fall within the pattern, and not transactions that are outside it. It is, therefore, the United States that seeks to ignore the text of the *Anti-Dumping Agreement*.

44. For these reasons, Japan submits that the United States' argument regarding mathematical equivalence is unwarranted. Properly interpreted, absent zeroing, a W-to-W comparison under the first sentence of Article 2.4.2 and a W-to-T comparison under the second sentence of that provision do not necessarily produce identical outcomes. As the Appellate Body found in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Zeroing (Japan)*, the general prohibition of zeroing does not render the second sentence of Article 2.4.2 inutile.

3. Article 2.4 of the Anti-Dumping Agreement

45. Regarding Article 2.4 of the *Anti-Dumping Agreement*, the first sentence of this Article obliges an investigating authority to conduct a "*fair* comparison" of normal value and export price. Under Article 2.4, the process by which investigating authorities compare – that is, establish the "price difference" between – normal value and export price for a product, must not be biased, lack even-handedness, favour particular interests or outcomes, or otherwise distort the facts, in particular to the detriment of exporters or foreign producers.[45] Moreover, the "fair comparison" requirement set forth in the first sentence of Article 2.4 is understood to be an "overarching" obligation that is independent of the specific obligations described in the remaining sentences of the Article, and which applies to the price comparability provisions of Article 2 generally.[46]

46. In previous zeroing disputes, the Appellate Body has observed that an "inherent bias"[47] infects the zeroing procedures – the very antithesis of fairness. It is not surprising, therefore, that the

[44] USDOC Anti-dumping regulations, 19 C.F.R. § 351.414(f)(2). Emphasis added. Exhibit EC-3.
[45] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193, 196.
[46] Appellate Body Report, *US – Zeroing (EC)*, para. 146.
[47] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

Appellate Body stated that a comparison methodology that includes the use of zeroing "is *not* a "fair comparison" between export price and normal value, as required by Articles 2.4 and 2.4.2".[48] This statement was initially made in an evaluation of "model zeroing" used under the W-to-W comparison methodology, but the Appellate Body subsequently held in the T-to-T situation:

> [T]he 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". In this way, "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".[49]

In *US – Zeroing (Japan)*, the Appellate Body concluded that the use of the zeroing procedures in any comparison methodology cannot be considered "impartial, even-handed, or unbiased", and that it therefore is "inconsistent with the fair comparison requirement of Article 2.4".[50]

47. As noted above, the obligations established in Articles 2.1 and 2.4 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994, apply to all three of the types of anti-dumping proceedings involved in the measures challenged by the EC – i.e., original investigations, periodic reviews, and sunset reviews.[51] In the remainder of this submission, Japan reviews the application of the obligations set forth in the *Agreement* and the GATT 1994 to the individual types of proceedings.

B. ZEROING AS USED BY THE USDOC IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLES 2.1, 2.4.2 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

48. Japan agrees with the EC that the USDOC's use of the zeroing procedures in original investigations has been found to be inconsistent with Article 2.4 and 2.4.2 of the *Anti-Dumping Agreement*. Japan will only briefly survey this issue, because the United States in recent WTO disputes has ceased defending the USDOC's use of the zeroing methodology in original investigations, at least in the situation in which the W-to-W comparison methodology is employed.[52] Further, in late 2006 the USDOC published a notice implementing the DSB's recommendations and rulings in *US – Zeroing (EC)* by abandoning the use of zeroing in that situation.[53]

1. Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*

49. The Appellate Body has explained that the first sentence of Article 2.4.2 provides for two comparison methodologies (W-to-W and T-to-T) that "shall normally" be used by an investigating authority to determine the existence and margin of dumping.[54] Regardless of the comparison methodology or type of zeroing employed by the USDOC ("model" or "simple", in the terminology

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[48] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135. Original emphasis. *See also* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; *and* Appellate Body Report, *EC – Bed Linen*, para. 55.

[49] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

[50] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

[51] *See supra* para. 0.

[52] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 99; *and* Panel Report, *US – Shrimp (Ecuador)*, para. 7.25.

[53] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, Federal Register, vol. 71, at 77722 (USDOC) (27 December 2006), Exhibit EC-6.

[54] Appellate Body Report, *US – Zeroing (Japan)*, para. 118. As discussed above, the second sentence of Article 2.4.2 permits the use of a third (W-to-T) comparison methodology in original investigations if certain conditions are satisfied.

used by the EC[55]), the authority's obligation to determine the margin of dumping under Article 2.4.2 by (i) aggregating the results of all intermediate comparisons, and (ii) in doing so, incorporating the results of all of the intermediate comparisons (including those whose export prices are greater than normal value), applies with equal force. This obligation arises from both the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, as well as Article 2.1[56], which, as noted above, defines "dumping" in terms of "a product" – i.e., for all transactions of the product under investigation.

50. The USDOC fails to meet these requirements by incorporating zeroing into the calculation of dumping margins. Under the zeroing procedures, the USDOC conducts multiple comparisons at the sub-product level for all export transactions that it finds to be comparable, but in determining the amount of dumping, the USDOC sums exclusively the positive comparison results, systematically ignoring the negative comparison results. In consequence, the USDOC fails to determine an amount of dumping for the product as a whole.

51. The multiple comparison results do not express an amount of "dumping", nor are they "margins of dumping" within the meaning of the *Anti-Dumping Agreement* and the GATT 1994. In the words of the Appellate Body, each comparison is merely an "intermediate calculation" and each comparison result is merely an "intermediate value".[57] As the Appellate Body stated in *US – Softwood Lumber V*:

> We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types.[58]

52. Indeed, after noting that "model zeroing" had already been found to be inconsistent with Article 2.4.2 in *US – Zeroing (EC)* when used in W-to-W comparisons, the Appellate Body in *US – Zeroing (Japan)* went on to explain that (simple) zeroing in T-to-T comparisons is likewise inconsistent.[59] Accordingly, it has been established that the USDOC's use of zeroing in original investigations, regardless of the comparison methodology, is inconsistent with the obligations established in Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*.

2. Article 2.4 of the Anti-Dumping Agreement

53. As to Article 2.4, the USDOC's zeroing procedures operate uniformly in all anti-dumping proceedings, and therefore the zeroing procedures at issue in the investigations that are the subject of this dispute produce the same prejudicial effects previously described by the Appellate Body. Thus, the USDOC has conducted multiple comparisons in these investigations, and in determining the amount of dumping the USDOC has summed solely the positive comparison results, systematically ignoring the negative results. The zeroing methodology, therefore, has resulted in an overstatement of the amount of dumping by an amount equal to the excluded negative values.

54. As a result, again like the zeroing measures considered in previous disputes, in situations where the value of the *excluded* negative results *exceeds* the value of the *included* positive results, the zeroing methodology produces a dumping determination that would not arise, absent zeroing. Moreover, the level of any dumping margin is necessarily inflated by the value of the excluded negative comparison results. Accordingly, the zeroing procedures as used in the original investigations that are the subject of the current dispute cannot be considered "impartial, even-handed,

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[55] *See* EC First Written Submission, paras. 10, 25.

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

[57] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[58] Appellate Body Report, *US – Softwood Lumber V*, para. 98. Original emphasis.

[59] Appellate Body Report, *US – Zeroing (Japan)*, para. 123.

or unbiased", and the measures resulting from those investigations are, therefore, "inconsistent with the fair comparison requirement of Article 2.4".[60]

55. Japan notes that the United States' defence under Article 2.4 is based, in important part, on its view that "dumping" and "margins of dumping" are not defined in relation to the "product" as a whole.[61] However, for the reasons set forth already, the United States' arguments on the meaning of these terms are incorrect, and not based on the text of the *Anti-Dumping Agreement*.

C. ZEROING AS USED BY THE USDOC IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 9.3 OF THE ANTI-DUMPING AGREEMENT

1. Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*

56. Regarding zeroing's inconsistency with the *Anti-Dumping Agreement* when employed in periodic reviews, the starting point of the analysis is Article 9.3, which governs those reviews. The *chapeau* of Article 9.3 states: "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This requirement parallels the language of Article VI:2 of the GATT 1994, which provides 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". It also reflects the rule in Article 9.1 that the amount of duty can be no more than the margin of dumping.

57. As a discipline on the "magnitude" of the duty imposed[62], the rule that the maximum amount of anti-dumping duty cannot exceed the "margin of dumping" reflects the "*overarching principle*" in Article VI of the GATT 1994 and Article 11.1 of the *Anti-Dumping Agreement* that duties may be imposed solely "*to the extent necessary* to counteract *dumping*" during the time period covered by the review.[63]

58. On the basis of this treaty text, the Appellate Body held that "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".[64] In other words, the "margin of dumping" and the amount of the duty imposed are independent concepts, with the magnitude of the former serving as a constraint on the total amount of the latter.

59. The express reference to Article 2 in the *chapeau* of Article 9.3 includes, among others, Article 2.1, which, as noted above, sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In *US – Zeroing (EC)*, relying on these textual cross-references, the Appellate Body made an explicit interpretive connection between the "product as a whole" requirement of Article 2.1 and dumping determinations in periodic reviews under Article 9.3:

> We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole".[65]

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[60] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[61] US FWS, para. 143.
[62] Appellate Body Report, *US – Carbon Steel*, para. 70.
[63] Appellate Body Report, *US – OCTG Sunset Reviews (Mexico)*, para. 115.
[64] Appellate Body Report, *US – Zeroing (EC)*, para. 130. Original emphasis. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 155.
[65] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

60. Accordingly, if, in a periodic review, the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not permitted to take into account the results of only some of the multiple comparisons, while disregarding others.[66] Thus, for purposes of these reviews, the investigating authority must aggregate all multiple comparisons to establish a margin of dumping for the "product" under investigation as a whole. It is required to compare the anti-dumping duties collected on all entries of the subject merchandise 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.[67]

61. The Appellate Body also rejected the United States' argument – reiterated in this dispute[68] – that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer - or import-specific basis. In doing so, the Appellate Body relied in part on Article 6.10 of the *Anti-Dumping Agreement* as context, which requires an authority to calculate "an individual margin of dumping for each known exporter or producer concerned of the production under investigation". Article 6.10, therefore, precludes the calculation of a margin of dumping for each individual import transaction, and it also requires that margins be calculated for exporters and foreign producers, not importers.[69]

62. This interpretation is consistent with the principles underlying the imposition of anti-dumping duties under the *Anti-Dumping Agreement* and the GATT 1994. As the Appellate Body explained in *US – Zeroing (Japan)*: "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".[70] And in *US – Zeroing (EC)*, it stated:

> Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour. Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping. For all of these reasons, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters.[71]

63. As it has done in previous disputes, the United States objects to the Appellate Body's interpretation that margins of dumping are determined for foreign producers or exporters. It alleges that this interpretation disturbs the conditions of competition between different importers that import goods from a single foreign producer or exporter.[72] However, as the Appellate Body has previously explained, the United States' misgivings are misplaced. Although *margins of dumping* are established for foreign producers or exporters for the product as a whole, Members can assess anti-dumping *duties* on "a transaction- or importer-specific basis", "provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping".[73] Subject to this proviso, Members enjoy discretion to apportion liability appropriately among importers to avoid disturbing competitive conditions. Furthermore, there is no question of the authorities being

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[66] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[67] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[68] US FWS, paras. 130 to 136.

[69] Appellate Body Report, *US – Zeroing (EC)*, para. 128. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

[70] Appellate Body Report, *US – Zeroing (Japan)*, para. 156. Citation omitted.

[71] Appellate Body Report, *US – Zeroing (EC)*, para. 129.

[72] US FWS, paras. 132 and 135.

[73] Appellate Body Report, *US – Zeroing (EC)*, para. 131.

obliged to refund to importers an amount that exceeds the duties initially paid in the event that export price is higher than normal value for the product as a whole.[74]

64. In the context of periodic reviews, the United States also argues that Members using a prospective normal value ("PNV") system are entitled to assess duties on the basis of a transaction-specific margin of dumping.[75] Thus, it says, the same entitlement to make transaction-specific assessments should be afforded to users of retrospective systems. This argument has also been dismissed by the Appellate Body.

65. The argument confuses two distinct concepts – the "*amount* of anti-dumping *duty*" imposed under Article 9 and the "*margin* of *dumping*" determined under Article 2. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body held that "the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties".[76]

66. In response to this same argument, the Appellate Body explained further in *US – Softwood Lumber V (Article 21.5 – Canada)* that, under Article 2, the margin of dumping is first established during the investigation phase; when an anti-dumping order has been imposed, Articles 9.1 and 9.2, and Article VI:2, allow duties to be collected in appropriate amounts not exceeding the margin of dumping (determined either during the investigation or a subsequent review); and, the amount of duties imposed may be reviewed under Article 9.3 in light of the margin of dumping determined for the review period.[77] However, the manner in which a Member chooses to impose and collect duties under Article 9 – retrospectively or prospectively – does not alter the uniform definition of "dumping" in Article 2.1 and Article VI:1. Accordingly, as the Appellate Body held in *US – Zeroing (EC)* and *US – Zeroing (Japan)*:

> *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.[78]

67. The United States makes a similar argument that Article 9.4(ii) of the *Anti-Dumping Agreement* authorizes Members using a PNV system to determine margins of dumping on a transaction-specific basis.[79] This argument, again, conflates the distinct concepts of the "amount of anti-dumping *duty*" that may be imposed under Article 9.4 and the "*margin* of *dumping*" determined under Article 2. Article 9.4 does *not* set forth any rules on the definition or determination of *"margins of dumping"* that could justify zeroing. Instead, Article 9.4, and Article 9.4(ii) in particular, establishes rules on the *imposition of duties* that apply to non-sampled producers precisely where *no individual margin is determined*.[80] As the Appellate Body held, rules, such as Article 9.4, governing the imposition of dumping *duties* "do not have a bearing on" the rules governing the determination of dumping *margins*.[81]

68. The United States' arguments on PNV systems are, therefore, misplaced, and do not justify the use of zeroing.

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[74] Appellate Body Report, *US – Zeroing (EC)*, footnote 234.
[75] US FWS, paras. 137 ff.
[76] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.
[77] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.
[78] Appellate Body Report, *US – Zeroing (Japan)*, para. 162; Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[79] US FWS, para. 137.
[80] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 125.
[81] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 124 and 125.

69. Japan turns now to consider the periodic reviews at issue. As described in the EC's first written submission, in periodic reviews, the USDOC calculates: (1) a margin of dumping for each *exporter* that becomes the duty deposit rate for all entries of the product exported to the United States by that exporter until the completion of the next review; and (2) an *importer*-specific assessment rate based on the total amount of dumping attributable to each importer, which determines that importer's liability for the review period.[82] In both cases, the United States applies the zeroing procedures as part of its dumping determination.

70. In light of its interpretation of Article 9.3 and Article VI:2, in conjunction with other relevant provisions including Article 2.1 and Article VI:1, the Appellate Body in *US – Zeroing (EC)* found that, because the USDOC "systematically disregarded" negative comparison results under the zeroing procedures, "the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared".[83] Accordingly, the zeroing procedures, and reviews based on them, were found to be inconsistent with Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

71. For the same reasons, Japan submits that the periodic review measures at issue are inconsistent with Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994. Japan takes no position on the consistency of zeroing in periodic reviews with Articles 2.4.2 and 11.2 of the *Anti-Dumping Agreement*.

2. Article 2.4 of the Anti-Dumping Agreement

72. Regarding the inconsistency of zeroing with the "fair comparison" obligation of Article 2.4 in the context of periodic reviews, as the *chapeau* of Article 9.3 states, margins of dumping in such reviews must be established consistently with Article 2, including Article 2.4. Accordingly, periodic reviews are subject to the same "fair comparison" requirement as original investigations, which prohibits the use of the zeroing methodology in the calculation of margins of dumping.

73. The Appellate Body expressly reached that conclusion in *US – Zeroing (Japan)*, in which it stated,

> 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 meaning of the first sentence of Article 2.4. 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.[84]

74. Accordingly, Japan agrees with the EC's argument that the zeroing procedures used by the USDOC to calculate margins of dumping in the periodic reviews that are the subject of this dispute render those reviews inconsistent with the obligations set forth in Article 2.4, as well as Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.

75. Japan notes, again, that the United States defence under Article 2.4 is based, in important part, on its view that "dumping" and "margins of dumping" are not defined in relation to the "product" as a

[82] EC First Written Submission, paras. 20-22.
[83] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[84] Appellate Body Report, *US – Zeroing (Japan)*, para. 168. Footnotes omitted.

whole.[85] However, for the reasons set forth already, the United States' arguments on the meaning of these terms are incorrect, and not based on the text of the *Anti-Dumping Agreement*.

D. ZEROING AS USED BY THE USDOC IN SUNSET REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 11.3 OF THE ANTI-DUMPING AGREEMENT

76. It is by now well established that the results of sunset reviews are inconsistent, as applied, with the obligations established by the *Anti-Dumping Agreement*, to the extent that they are based upon prior determinations that are themselves obtained through the use of the zeroing methodology.[86]

77. *First*, in sunset reviews, the investigating authority determines whether termination of a duty would be likely to lead to continuation or recurrence of "*dumping*" and injury. The Appellate Body has already ruled that, with respect to sunset reviews, "the word 'dumping' as used in Article 11.3 has the meaning described in Article 2.1".[87] The Appellate Body also held that, if a sunset determination is made in reliance on a margin of dumping determined in earlier proceedings, the margin must have been determined consistently with Article 2. Otherwise, the reliance upon the earlier margin that is inconsistent with Article 2 "taints" the subsequent sunset determination.[88]

78. *Second*, regarding the obligations established by Article 2.4 of the *Anti-Dumping Agreement*, according to the Appellate Body, the requirement of a "fair comparison" involves "a *general* obligation" that "informs *all of Article 2* …".[89] These requirements apply whenever an authority determines the existence or amount of "dumping", whether in original investigations or review proceedings.

79. This conclusion is borne out by the Appellate Body's reasoning in *US – Corrosion-Resistant Steel Sunset Review* and its conclusions in *US – Zeroing (Japan)*. In *US – Corrosion-Resistant Steel Sunset Review*, Japan claimed that a sunset determination violated Article 11.3 because the USDOC had relied on dumping margins calculated using zeroing in a periodic review.[90] The Appellate Body opined that:

> … should investigating authorities choose to rely upon dumping margins in making their likelihood determination [under Article 11.3], the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in *two particular* administrative reviews. If 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, but also with Article 11.3 of the *Anti-Dumping Agreement*.[91]

Zeroing creates just such "legally flawed" margins, because they are calculated in a manner inconsistent with Article 2.4.

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[85] US FWS, para. 143.

[86] Appellate Body Report, *US – Zeroing (Japan)*, para. 183; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[87] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 126.

[88] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 127 and 130; *see also* Appellate Body Report, *US – Zeroing (Japan)*, para. 183.

[89] Appellate Body Report, *EC – Bed Linen*, para. 59. Emphasis added.

[90] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 116; Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.150 and 7.155.

[91] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127. Underlining added. *See also* Appellate Body Report, *US – Zeroing (Japan)*, paras. 183-185.

80. Because of the flawed basis on which the USDOC rested its determinations in the sunset reviews at issue in *US – Zeroing (Japan)*, the Appellate Body explained:

> We have previously concluded that zeroing, as it relates to periodic reviews, is inconsistent, as such, with Articles 2.4 and 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.[92]

81. Japan does not know the factual details underlying the USDOC's "likelihood" determinations in the sunset reviews challenged by the EC in this dispute. However, the same principles apply here as described in the preceding paragraphs. To the extent that the USDOC relied on margins of dumping determined in original investigations and periodic reviews using the zeroing procedures, those margins were "legally flawed" and cannot constitute a proper foundation for a determination in a sunset review. As a result, the challenged sunset reviews are tainted by the same legal flaws that infected the margins of dumping from earlier proceedings on which the USDOC relied. The United States, therefore, violated Articles 2.1, 2.4 and 11.3 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994.[93]

E. THE ANTI-DUMPING ORDERS CHALLENGED BY THE EC ARE ALSO INCONSISTENT WITH ARTICLES 2.1, 2.4, 2.4.2, 9.3 AND 11.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES VI:1 AND VI:2 OF THE GATT 1994

82. Japan notes that, in addition to challenging certain investigations, periodic reviews, and sunset reviews, the EC also challenges certain United States anti-dumping orders ("Orders"). In United States law, these Orders provide the legal basis for the imposition of anti-dumping duties following an investigation in which it is established that the conditions for the imposition of anti-dumping duties are met. The amount of definitive duties imposed under an Order is varied over time by, among others, periodic reviews, and the life of an Order is extended by subsequent sunset reviews. In Japan's view, these Orders are measures that may be challenged in WTO dispute settlement.

83. It is settled that, under Article 6.2 of the DSU, a measure may be any act that is attributable to a WTO Member.[94] An Order is undoubtedly an act of the United States.

84. In terms of Article 17.4 of the *Anti-Dumping Agreement*, in disputes under the *Anti-Dumping Agreement*, a Member must challenge one of three types of measure. One of these measures is "final action … to levy definitive anti-dumping duties". In Japan's view, Orders constitute, among others, the final action by which the United States imposes definitive anti-dumping duties. Indeed, it is these Orders that provide the initial, and the on-going, legal basis for the imposition of definitive duties. As a result, the Orders may be challenged in WTO dispute settlement under the *Anti-Dumping Agreement*. The past practice of Members in challenging US anti-dumping actions does not alter the legal status of Orders as "final action" that may be challenged under Article 17.4.

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[92] Appellate Body Report, *US – Zeroing (Japan)*, para. 185. Footnote omitted.

[93] Having found the sunset reviews in *US – Zeroing (Japan)* to violate Article 11.3 of the *Anti-Dumping Agreement*, the Appellate Body exercised judicial economy and stated that it did 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". Appellate Body Report, *US – Zeroing (Japan)*, para. 187. However, Japan submits that because the violations of Article 11.3 are premised on underlying violations of Articles 2.1 and 2.4 (as well as Articles VI:1 and VI:2 of the GATT 1994), a finding of a violation of Article 11.3 leads *a fortiori* to the conclusion that those provisions have been violated as well.

[94] Appellate Body Report, *US – Zeroing (Japan)*, para. 74; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

IV. CONCLUSION

85. Japan submits the following:

(1) the use of the zeroing procedures in the original investigations identified by the EC renders those investigations, and the anti-dumping Orders resulting from them, inconsistent with, *inter alia*, Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, and Article VI:1 of the GATT 1994;

(2) the use of the zeroing procedures in the periodic reviews identified by the EC renders those measures, and the continuation of the relevant anti-dumping Orders, inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994; and

(3) to the extent that, in the sunset reviews identified by the EC, the USDOC relied on margins of dumping calculated in prior proceedings (investigations or periodic reviews) in which the zeroing methodology had been employed, those sunset reviews, and the continuation of the relevant anti-dumping Orders, are inconsistent with Articles 2.1, 2.4, and 11.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.

86. Japan therefore supports the EC's conclusion that the measures at issue in this dispute are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

ANNEX B-2

THIRD PARTY WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

I. INTRODUCTION

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the first written submissions by the European Communities (the "EC") dated 20 August 2007 and by the United States dated 12 September 2007, respectively, in *United States – Continued Existence and Application of Zeroing Methodology (DS350)*.

2. Korea has systemic interests in the interpretation and application of provisions of Articles 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), which lay out legal guidelines for investigating authorities of the Members in calculating dumping margins in an anti-dumping investigation or a subsequent review. Therefore, Korea reserved its third party rights pursuant to Article 10.2 of Understanding on Rules and Procedures Governing the Settlement of Dispute. Korea appreciates this opportunity to present its view to the Panel.

3. The EC challenges, as applied, a wide range of zeroing practices adopted by the United States Department of Commerce ("USDOC"). The challenged measures consist of two groups; the first group includes 18 instances of continued application of anti-dumping duty orders as a result of erroneous dumping margin calculation because of zeroing, and the second group includes 52 instances of utilization of zeroing either in original investigations, administrative reviews or sunset reviews. In Korea's view, this dispute catalogues all possible variations of the distortive nature of the zeroing practice maintained by the United States.

4. Korea therefore generally supports the arguments raised by the EC in its first written submission. Rather than covering all the arguments, however, Korea will address in this submission certain critical issues in Korea's view to assist the panel in reaching a decision.

II. LEGAL ARGUMENTS

A. AS THE APPELLATE BODY HAS CONSISTENTLY FOUND, "ZEROING" MUST BE PROHIBITED IN ALL ANTI-DUMPING PROCEEDINGS INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEWS, AND SUNSET REVIEWS

5. First of all, Korea notes that in *US – Zeroing (Japan)*, the most recent decision relating to zeroing, in which the Appellate Body exercised a comprehensive review of all aspects of the zeroing practice under the AD Agreement, the Appellate Body unequivocally held that zeroing in *all* respects violates relevant provisions of the AD Agreement.[1] Korea requests the Panel to reiterate in this dispute that "zeroing" must be prohibited in *all* anti-dumping proceedings.

6. As a matter of fact, even before *US – Zeroing (Japan)* the Appellate Body has held on a number of occasions that "zeroing" is inconsistent with the requirements of the AD Agreement. It has

[1] *See United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted 23 January 2007) ("*US – Zeroing (Japan)*"), at paras. 137-138, 147, 166, 167-169, 177, 186-187.

consistently indicated that "zeroing" should be condemned as unfair and prohibited in *both* the original investigations and reviews.[2]

7. Given the long history of zeroing disputes at the WTO involving the USDOC, as with any other Member, Korea also would like to observe the final compliance from the United States, *i.e.*, the USDOC's complete elimination of the zeroing practice in all types of anti-dumping proceedings.[3] This dispute, therefore, provides the Panel with an important opportunity to pronounce again that zeroing must be prohibited in all contexts of anti-dumping proceedings, so that the United States could accelerate its internal procedure to completely abolish the practice.

B. "ZEROING", AS USED IN ORIGINAL INVESTIGATIONS, VIOLATES ARTICLES 2.4 AND 2.4.2 OF THE AD AGREEMENT

8. Furthermore, there is an ample body of precedents, where panels and the Appellate Body found that the zeroing practice used in an average-to-average comparison in an original investigation (that is, the first methodology in the first sentence of Article 2.4.2 of the AD Agreement) violates Article 2.4.2 of the AD Agreement.[4] In Korea's view, therefore, the Panel could easily render its determination on this issue in the present dispute.

9. In *Bed Linen*, the Appellate Body relied on both Article 2.4 and Article 2.4.2 in finding "zeroing" to be inconsistent with the requirements of the AD Agreement. The Appellate Body first addressed the requirements of Article 2.4.2, and found that by "zeroing" the models with negative dumping margins, the EC effectively failed to take into account the prices of some export transactions when calculating the overall dumping margin for the product *as a whole* and that the EC instead discounted these prices, thereby inflating the dumping margin. As a result, the Appellate Body concluded that the EC did not establish the existence of margins of dumping for the product at issue on the basis of *all* export transactions, as required by Article 2.4.2.[5]

10. The Appellate Body then turned to the "fair comparison" requirement of Article 2.4, and held that a comparison between export price and normal value that does not take into account *all* transactions does not constitute a "fair comparison" between export price and normal value, as

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[2] *See European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted 1 March, 2001; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, adopted 15 December 2003; *United States – Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, adopted 11 August 2004.

[3] *See the First Written Submission of the European Communities* dated 20 August 2007 ("EC First Written Submission"), at para. 4.

[4] *See, e.g.*, Panel Report, *US – Zeroing (Japan)*, para. 7.86; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Panel Report, *US – Softwood Lumber V*, para. 7.224 and 8.1(a)(i); Panel Report, *US – Zeroing (EC)*, paras. 7.31-32; Appellate Body Report, *EC – Bed Linen*, paras. 46-66.

[5] *Id.* In *EC – Bed Linen*, the Appellate Body found that:

> Under [the weighted average] method, the investigating authorities are required to compare the weighted average normal value with the weighted average prices of *all* comparable export transactions…. By "zeroing" the negative dumping margins, the European Communities did *not* fully take into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than they were. This, in turn, inflated the result form the calculation of the margin of dumping…
>
> *Id.* para. 55.

required by Articles 2.4 and 2.4.2.[6] The Appellate Body's subsequent decision in *Japanese Steel Sunset Review* reaffirmed that "zeroing" was inconsistent with both Articles 2.4 and 2.4.2.[7] In *Canadian Lumber*, the Appellate Body based its analysis solely on the language of Article 2.4.2 — and its requirement that the calculation of dumping margins on an average-to-average basis must consider "*all* comparable export transactions".[8] Then the Appellate Body concluded again that "zeroing" is inconsistent with Article 2.4.2.

11. In these precedents, the Appellate Body has noted the inherent bias of "zeroing" that generally inflates the margins calculated and can, in some instances, find that dumping exists where there is none, and consequently found that "zeroing" is inconsistent with the "fair comparison" requirements of Articles 2.4 and 2.4.2 of the AD Agreement.[9] Thus, the Appellate Body's precedents as noted above collectively evidence that "zeroing", which the United States has consistently used for calculating dumping margins in original investigations, is inconsistent with the requirements of the AD Agreement and, therefore, must be prohibited.

12. In this dispute, therefore, Korea requests the Panel to determine that the zeroing practice of the USDOC as applied to listed original investigations against EC products constitutes violations of Articles 2.4 and 2.4.2 of the AD Agreement.

C. THE PERIODIC REVIEW UNDER ARTICLE 9.3 IS ALSO GOVERNED BY THE PRINCIPLES OF ARTICLES 2.4 AND 2.4.2 AND THUS ZEROING IN THE PERIODIC REVIEWS VIOLATES ARTICLE 9.3 AND SUBSEQUENTLY ARTICLE 11.2

13. The "fair comparison" requirement of Article 2.4 is an overarching and independent obligation, which applies to *all* dumping calculations, and "zeroing" in administrative reviews, therefore, constitutes violation of the obligation.

14. Article 2.4 of the AD Agreement provides that "[a] fair comparison shall be made between the export price and the normal value". Article 2.4 thus establishes an overarching and independent obligation to make a fair comparison between normal value and export price. Korea is of the view that a comparison of the text of the current AD Agreement to the corresponding provision of the Tokyo Round Anti-dumping Code suggests that the "fair comparison" requirement of the first sentence of Article 2.4 was intended to be independent of the provisions in the subsequent sentences of Article 2.4.

15. Under the Tokyo Round Code, the "fair comparison" requirement was set forth as an introductory clause to a sentence describing the mechanics of the comparison. Thus, the first sentence of Article 2.6 of the Tokyo Round Code stated:

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[6] *See id.*

[7] The Appellate Body held that:

> In *EC – Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using a "zeroing" methodology in the anti-dumping investigation at issue in that case. We held that the European Communities' use of this methodology "inflated the result from the calculation of the margin of dumping". We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a "fair comparison" between export price and normal value as required by Articles 2.4 and 2.4.2.

Japanese Steel Sunset Review, Report of the Appellate Body, para. 134.

[8] *See United States – Final Lumber AD Determination*, Report of the Appellate Body, paras. 86-87.

[9] *See EC – Bed Linen*, Report of the Appellate Body. para. 55.

> ***In order to effect a fair comparison*** between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.[10] (emphasis added)

16. Because of this structure, there was, arguably, some ambiguity concerning whether the "fair comparison" language of the Tokyo Round Code constituted an independent requirement, or simply an introductory explanation.

17. In the AD Agreement, however, the words are phrased in a different manner. The words "fair comparison … between the export price and the normal value" were taken out of the sentence describing the mechanics of the comparison, and instead set out in an independent new first sentence of Article 2.4. As such, the AD Agreement no longer describes methodologies that must be used "in order to effect a fair comparison". Instead, the AD Agreement contains a separate and explicit command that a "fair comparison shall be made".

18. One could argue that the drafters of the AD Agreement presumably would not have made this change without a particular purpose. Consequently, Korea supports the interpretation that the first sentence of Article 2.4 of the AD Agreement was intended to provide an overarching and independent obligation, that goes beyond the obligations to make "due allowances" described in the other sentences of Article 2.4. The language is unambiguous and clearly establishes an independent obligation.

19. In Korea's view, therefore, not only the historical context of Article 2.4, but also the language of that provision confirms that the fair comparison requirement is an overarching and independent obligation that the investigating authorities must observe *whenever* dumping margins are calculated.

20. Korea submits that, barring targeted dumping, a comparison between normal value and export price that does not fully take into account *all* export transactions cannot and does not result in the calculation of a dumping margin for the product *as a whole*, and is therefore not a fair comparison within the meaning of the first sentence of Article 2.4. "Zeroing" makes the investigating authority methodically fail to take into account *all* export transactions for the product *as a whole*, and therefore inevitably leads to an "unfair comparison". Korea thus submits that the "fair comparison" requirement of Article 2.4 – which applies to all dumping calculations – provides an independent ground for finding "zeroing" to be inconsistent with the AD Agreement.

21. Having said that, to the extent that a dumping margin is effectively calculated, the "fair comparison" obligation must equally apply to administrative reviews. By adopting the zeroing methodology in administrative reviews, and by failing to abide by the fair comparison obligation in those proceedings, the USDOC also violated Article 2.4 of the AD Agreement with respect to its various administrative reviews identified in the EC's first written submission.

22. Likewise, Korea also submits that Article 2.4.2 applies to administrative reviews as well. Korea believes that the term "investigation phase" contained in Article 2.4.2 also incorporates periodic reviews envisioned in Article 9.3.

23. More properly understood, the term "investigation" connotes "activities" of an investigating authority as opposed to contents or scope of its inquiry in the course of carrying out such activities. The ordinary meaning of the word "investigation" indicates a systematic examination or inquiry, or a

[10] Tokyo Round Anti-dumping Code, Article 2.6.

careful study of or research into a particular subject.[11] This is hardly a rare or specialized meaning. Korea points out that the dictionary meaning should be a critical starting point for treaty interpretation.[12]

24. In the *Japanese Steel Sunset Review* case, the Appellate Body explained that reviews under Article 11 "envision a process combining *both* investigatory and adjudicatory aspects".[13] The Appellate Body therefore concluded that the prohibition of zeroing implicit in Article 2.4.2 also applied to dumping calculations in sunset reviews under Article 11.3.[14] The Appellate Body's decision in the *Japanese Steel Sunset Review* case suggests that the term "investigation phase" is properly understood in the context of Article 2.4.2 to mean the portion of the proceeding (original investigation or review) in which the authority "investigates" whether dumping has occurred.

25. Korea submits that the same logic employed in the *Japanese Steel Sunset Review* should be applied to a periodic review for duty assessment under Article 9.3. It is clear from the preceding observations that the obligations and methodologies that apply when a margin of dumping is investigated or relied upon are the same for the entire AD Agreement, including "administrative review" proceedings. The use of zeroing by the United States in the administrative reviews at issue here is thus inconsistent with the AD Agreement in both the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed.

26. Therefore, in a periodic review, where the USDOC chooses to calculate a new dumping margin for the duty assessment and for the future cash deposit rate, the calculation of a new dumping margin must be done without using "zeroing", consistent with the requirements of Articles 2.4 and 2.4.2.

27. Also Article 11.2 of the AD Agreement imposes an obligation on the investigating authority to review the need to continue with a particular anti-dumping duty. As a result, to the extent that the investigating authority conducts its analysis under Article 11.2 based on margins of dumping produced as a result of zeroing, such analysis inevitably violates Article 11.2 because the amount of anti-dumping duty calculated with zeroing would exceed the margin of dumping properly established.

28. Accordingly Korea requests the Panel to find that the use of zeroing in the administrative reviews constitutes a direct violation of Articles 2.4, 2.4.2 9.3 and 11.2 of the AD Agreement.

D. UTILIZATION OF ZEROING IN SUNSET REVIEWS ALSO CONSTITUTES VIOLATION OF ARTICLES 2.4, 2.4.2, 11.1 AND 11.3 OF THE AD AGREEMENT

29. The same rule should also apply to the sunset reviews. In light of the above reasoning, to the extent the USDOC conducts sunset reviews based on margins of dumping calculated in previous proceedings using the zeroing methodology, it inevitably constitutes violations of Articles 2.4, 2.4.2, 11.1 and 11.3 of the AD Agreement.

30. The sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings. Rather, the sunset reviews are simply an extension of previous findings to the extent the

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[11] *See The New Shorter Oxford English Dictionary,* Clarendon House (1993).

[12] *See European Communities – Customs Classifications of Frozen Boneless Chicken Cuts,* WT/DS269,286/AB/R, Report of the Appellate Body, adopted 12 September 2005, para. 238*; Canada – Measures Affecting Automotive Industry*, WT/DS139/R, Report of the Panel, adopted 11 February 2000, para. 10.12.

[13] *See Japanese Steel Sunset Review*, para. 111.

[14] *Id.*, para. 127.

USDOC relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the sunset review's likelihood determination. Therefore, Korea believes that the violation of these provisions is unavoidable.

III. CONCLUSION

31. Korea respectfully submits that in reaching its decision in this important dispute, the Panel should ensure that the provisions of Articles 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the AD Agreement are construed in their proper context. That will give effect to the ordinary meaning of those Articles consistently with the context, object and purpose of the AD Agreement as a whole, and will add clarity, consistency and fairness to the conduct of anti-dumping investigations and reviews by Members.

32. Korea appreciates the opportunity to participate in these proceedings, and to present its views to the Panel.

ANNEX B-3

THIRD PARTY WRITTEN SUBMISSION OF NORWAY

TABLE OF CONTENTS

Page

I. INTRODUCTION 31

II. THE ROLE OF PRECEDENT 31

III. THE FUNCTION OF THE ADOPTED LEGAL REPORTS IN INTERPRETING THE AGREEMENTS 33

IV. THE PRACTICE OF ZEROING IS CONTRARY TO ARTICLES 2.1 AND 2.4 OF THE AD AGREEMENT 33

4.1 INTRODUCTION 33

4.2 THE EXISTENCE AND AMOUNT OF DUMPING MUST BE DETERMINED FOR THE PRODUCT AS A WHOLE 34

4.3 ZEROING IS CONTRARY TO THE REQUIREMENT THAT THE MARGIN OF DUMPING MUST BE CALCULATED FOR "THE PRODUCT AS A WHOLE" 36

4.4 ZEROING IS CONTRARY TO THE REQUIREMENT OF "FAIR COMPARISON" IN ARTICLE 2.4 OF THE AD AGREEMENT 38

V. ARTICLE 2.4.2 OF THE AD AGREEMENT APPLIES ALSO TO REVIEW PROCEEDINGS 39

5.1 INTRODUCTION 39

5.2 ADMINISTRATIVE REVIEWS MUST COMPLY WITH THE REQUIREMENTS OF ARTICLE 2.4.2 OF THE AD AGREEMENT 39

VI. SUNSET REVIEWS 40

VII. CONCLUSION 41

TABLE OF CASES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, adopted 1 November 1996
United States – OCTG Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Corrosion Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products From Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Shrimp (Article 21.5 – Malaysia	Appellate Body Report, *United States – import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R, adopted 21 November 2001
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, /DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this dispute brought by the European Communities ("EC") regarding whether the continued existence and application of zeroing methodologies by the United States in anti-dumping proceedings is consistent with various provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement"* or the "AD Agreement"), Article VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

2. Norway will not discuss the concrete cases to which the EC refers in this case. Norway understands that the facts surrounding these cases are not in dispute between the EC and the United States, and that the dispute is limited to questions of legal interpretation of the various WTO instruments referred to by the EC.

3. Norway will not in this third party submission address all the legal issues raised by the EC and responded to by the United States. Rather, Norway addresses the following general issues discussed in the First Written Submissions of the EC and the United States:

- whether a Panel may depart from the legal interpretations of the Appellate Body as set out in adopted Appellate Body Reports (Section II);
- the relationship between the obligations of Article XVI:4 of the WTO Agreement and the obligation to comply with adopted reports (Section III);
- whether the practice of zeroing in all forms and in all proceedings under the *AD Agreement* is consistent with Articles 2.1 and 2.4 of that agreement (Section II);
- whether Article 2.4.2 of the *AD Agreement* applies to review proceedings in addition to original investigations (Section III); and
- whether the continuation of anti-dumping measures in a sunset review is inconsistent with the *Anti-Dumping Agreement* in cases where the practice of zeroing has been used either in the original investigation or in a assessment review (Section IV).

II. THE ROLE OF PRECEDENT

4. The Appellate Body has ruled on almost all the issues raised in this case already, and set out the correct legal interpretation to be given to the contested provisions in respect of zeroing. The United States has not advanced any new legal arguments, and all the legal arguments presented by the United States in its First Written Submission have been rejected by the Appellate Body in previous cases.

5. The United States asks the Panel to disregard the legal interpretations of the Appellate Body, claiming that the reasoning of the previous Appellate Body reports is not "persuasive". Norway will address some of these arguments as they relate to specific provisions of the Agreements later in this submission. In this Section, Norway will present certain arguments relating to the precedential value of adopted Appellate Body Reports.

6. Norway is of the opinion that it serves the development of international law and the preservation of workable international relations to build on the rulings in previous reports in subsequent cases. There is no disagreement that the legal doctrine of *stare decisis* is not mandated by WTO law. While the Appellate Body is, thus, not formally bound to follow previous rulings, it is in the interests of legal certainty, foreseeability and equality before the law that the Appellate Body or a Panel should not depart, without good reason, from precedents laid down in previous cases. In this respect, the Appellate Body's practice is entirely in line with the practice of other international tribunals.

7. The question before this Panel is both a legal question, and a practical question. Firstly, whether – and under what conditions – a Panel can depart from the legal interpretation expressed by the Appellate Body and endorsed by the Members of the WTO through the adoption of the report(s). Secondly, whether the facts of this case makes it appropriate for the Panel to exercise its competence (if any) to make such a departure.

8. Addressing the first of these issues, the Panel must bear in mind, as also underscored by the Appellate Body, that adopted reports create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[1] The Appellate Body has even submitted that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where issues are the same".[2] Norway would add that following previous reports also ensures fewer disputes ("the issue is settled") and preserves both the system and the systemic function of the Appellate Body.

9. Additionally, the Panel should remember that the reports in question have all been adopted by the whole Membership through their decisions in the Dispute Settlement Body. This adoption is not just a formality, but makes the rulings and recommendations into binding international obligations. Norway also recalls the central importance given to the security and predictability of the system, as set out in Article 3.2 of the *Dispute Settlement Understanding* (the "DSU").

10. The United States argues that a Panel should free itself from the legal interpretations set out in Appellate Body reports, and only take such legal interpretations into account "to the extent that the reasoning is *persuasive*".[3]

11. Norway disagrees with the standard proposed by the United States, which may be considered lax and confusing. Norway does not argue that it is never possible for a Panel to advance a legal interpretation different from that set out in adopted Appellate Body reports. It is, however, clear from the central function of the reports in the dispute settlement system as well as in the clarifications of the provisions of the covered agreements, that Panels may only do so in extreme cases. More concretely, they may only do so where following the legal interpretation of the challenged provision by the Appellate Body would lead to a manifestly absurd result in a particular case, and where the facts of that case are entirely different from those already addressed in previous reports.

12. Such is not the case here. There is nothing new for the Panel to consider, the factual basis is the same, the methodologies are the same and the contested provisions are the same.

13. Norway further considers that if it were permissible to depart from previous legal interpretations in adopted Appellate Body reports, one enters into an unchartered territory. It also exposes the whole Membership to uncertainty, and is itself creating a precedent where all cases could be perpetually reargued. Such a result would be contrary to the object and purpose of the dispute settlement system, as well as the object and purpose of a rule based multilateral trading system ensuring security and predictability for all economic actors.

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[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, paras. 107-108 (with regard to adopted panel reports) and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)* (with regard to Appellate Body reports).

[2] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.

[3] United States' First Written Submission para. 33.

III. THE FUNCTION OF THE ADOPTED LEGAL REPORTS IN INTERPRETING THE AGREEMENTS

14. Where laws, regulations or administrative procedures have been found to be inconsistent with the obligations of any of the WTO agreements, this entails a breach of Article XVI:4 of the WTO Agreement, which reads:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

15. The obligations incumbent upon the respondent, having been found to be in non-compliance, does not seem to be in dispute between the parties to this dispute. Where a law, regulation or administrative procedure of a particular Member has been found to be inconsistent with a WTO agreement, that Member has an obligation to remedy that situation.

16. The legal issue before this Panel is whether Article XVI:4 of the WTO-Agreement implies an obligation on the respondent that is different or additional to the obligation to comply with the adopted reports. Norway believes the issue here is not whether adopted reports are binding upon Members not party to the dispute. Clearly the rulings and recommendations are addressed only to the parties to the dispute.

17. In respect of this issue, Norway submits that adopted Appellate Body reports influences the obligations of *all* Members under Article XVI:4 of the WTO – not just the obligations of the parties to the dispute subject to the Appellate Body reports.

18. This is because, in adopting or maintaining domestic laws and regulations in areas covered by the WTO agreements, Members will have to take into account the legal interpretation of the WTO provisions in adopted panel and Appellate Body reports. This obligation is a continuous obligation upon all Members. The obligation does not set in from the adoption of a particular report, contrary to what the EC seems to argue[4], but is there since the entry into force of the WTO Agreement. Being a continuous obligation, Members are required to review their laws, regulations and administrative procedures, when appropriate, to ensure that they are continuously in conformity with their WTO obligations.

19. As such, the obligation in Article XVI:4 is different from the obligation to comply with a particular adopted panel or Appellate Body report. Article XVI:4, therefore, entails obligations that go beyond the individual dispute. A Panel, however, can only address the claims in that particular dispute and between the parties to that particular dispute.

IV. THE PRACTICE OF ZEROING IS CONTRARY TO ARTICLES 2.1 AND 2.4 OF THE AD AGREEMENT

4.1 INTRODUCTION

20. Panels and the Appellate Body has repeatedly found that the use of zeroing when applying a "weighted average-to-weighted average" comparison methodology to calculate the dumping margin in original investigations (so-called model zeroing) is contrary to Article 2.4.2 of the *AD Agreement*.[5]

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[4] EC's First Written Submission, para 131.

[5] See e.g. Appellate Body Report, *EC – Bed Linen*, para. 66 and Appellate Body Report, *US – Lumber V*, para. 117.

The United States acknowledges this, but contests any claims of WTO inconsistency as to Articles 2.1 and 2.4 of the *AD Agreement.*[6]

21. Norway considers that the prohibition of zeroing is not limited to cases of model zeroing under the weighted average-to-weighted average methodology in Article 2.4.2 of the AD Agreement. In line with the Appellate Body's ruling in previous cases, Norway finds that the prohibition of all forms of zeroing in all forms of proceedings under the *AD Agreement* is based on two important considerations: first, that dumping shall be established for the "product as a whole" – which is not the case where zeroing is employed. And second, that zeroing is contrary to the "fair comparison" requirement of Article 2.4 of the *AD Agreement*.

4.2 THE EXISTENCE AND AMOUNT OF DUMPING MUST BE DETERMINED FOR THE PRODUCT AS A WHOLE

22. There is a consistent line of reasoning by the Appellate Body regarding the requirement that the existence and amount of dumping must be determined for the product as whole. However, as the existence of such a requirement is something that is disputed between the Parties, Norway finds it pertinent to repeat the legal reasoning behind it.

23. The point of departure for Norway is that there is but one definition of "dumping" in the Anti-dumping Agreement, and that this definition is applicable to all proceedings under the *AD Agreement*.[7]

24. The definition applicable to all calculations of dumping margins throughout the agreement can be found in Article 2.1 of the *AD Agreement*, which reads:

> "For the purposes of this Agreement, a product is considered as being dumped, i.e. introduced into the commerce of another country at less than normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." (emphasis added)

25. A number of provisions of the *AD Agreement* make reference to "a product"[8], "the product"[9] or "any product"[10], using the singular form of the word, thus making clear that the comparisons between normal value and export price for purposes of calculating the dumping margin is based on the totality of the product under investigation. There is no reference in the Agreement to calculating more than one margin of dumping for sub-categories or individual transactions of the product. As stated by the Appellate Body in *EC – Bed Linen:*

> "[...] Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the product under investigation as a whole. [...]"[11]

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[6] United States' First Written Submission paras. 155-156.

[7] There are five such instances where the authorities calculate dumping margins, those being (i) original proceedings, (ii) "assessment reviews" (ADA Article 9.3), (iii) "new shipper reviews" (ADA Article 9.5), (iv) "changed circumstances reviews" (ADA Article 11.2), and (v) "sunset reviews" (ADA Article 11.3).

[8] E.g. Article 2.6.

[9] E.g. Article 2.2.

[10] E.g. Article 9.2.

[11] Appellate Body Report, *EC – Bed Linen*, para. 53.

26. The Appellate Body in *US – Softwood Lumber V*, restated this, where it held that "dumping is defined in relation to a product".[12] The Appellate Body went on to say that the authorities:

> "... 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. [...]"[13] (emphasis added)

27. In *US – Zeroing (EC)* the Appellate Body, recalling its earlier rulings, stated that:

> "...the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994 … indicate clearly that "dumping is defined in relation to a product as a whole"".[14]

28. The Appellate Body in *US – Softwood Lumber (Article 21.5 – Canada)* reiterated this, and analysed the context provided by Articles 5.8, 6.10 and 9.3 ADA. It was noted that a dumping determination "under Article 5.8 requires aggregation" of multiple comparison results to establish a margin for the product as a whole.[15] Also in *US – Zeroing (Japan)*, the Appellate Body based its reasoning on the concept of "product as a whole".[16]

29. Furthermore, it is evident from the provision of Article 6.10 ADA, which stipulates that there shall be but one "individual margin of dumping for each known exporter or producer concerned of the product under investigation", that the margin of dumping shall be calculated for the product as a whole. In the words of the Appellate Body, this obligation "reinforce[s] the notion that the "margins of dumping" are the result of an aggregation".[17] Norway adds that Article 6.10 applies to original investigations and to reviews pursuant to Article 11 by virtue of Article 11.4.

30. In Article 9.3 it is stated that "The amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Norway holds that it is evident from this text that the Agreement foresees one single dumping margin for "the product" for each individual exporter. The Appellate Body noted that Article 9.3 ADA "suggests that the margin of dumping is the result of an overall aggregation and does not refer to the results of the transaction-specific comparisons".[18]

31. For "new shipper reviews" Article 9.5 equally foresees individual margins of dumping for each exporter for "the product".

32. Norway also refers to the provisions of GATT Article VI, which is the basis for the Anti-Dumping Agreement, and which is still the basis for permitting the imposition of anti-dumping duties – which barring this provision would have been contrary to the MFN provision of GATT Article I and the prohibition on levying of duties in excess of the scheduled bound duty under GATT Article II. The provision of GATT Article VI:2 states that:

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[12] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 99.
[14] Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V* paras. 92-93. See also Appellate Body Report *US – Zeroing (EC)*, paras. 125, 127-129 and 132.
[15] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 105.
[16] Appellate Body Report, *US – Zeroing (Japan)*, para. 129.
[17] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 107.
[18] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 108.

> "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." (emphasis added)

33. It follows from this provision firstly that the duty cannot be greater than the margin of dumping; secondly that the margin of dumping is in respect of "such product" encompassing the totality of the product; and thirdly that the margin has to be calculated in accordance with the specific provisions of paragraph 1 of GATT Article VI (Paragraph 1 of GATT Article VI is similar to Article 2.1 ADA in respect of the calculation of the dumping margin). Nothing in GATT Article VI permits the calculation of more than one margin of dumping per product under investigation (from each exporter) and nothing permits the imposition of duties based on a multitude of margins of dumping for each and every transaction.

34. Based on the above it is clear that the margin of dumping must be calculated for the product as a whole in all proceedings under the *AD Agreement*.

4.3 ZEROING IS CONTRARY TO THE REQUIREMENT THAT THE MARGIN OF DUMPING MUST BE CALCULATED FOR "THE PRODUCT AS A WHOLE"

35. The Appellate Body has in several rulings pointed out that the use of zeroing distorts the process of establishing dumping margins and inflates the dumping margin for the product as a whole. The United States acknowledges this as regards the use of zeroing in original investigations where comparisons are made using the weighted average-to-weighted average methodology.[19] The United States does not however acknowledges this for any other type of proceeding or comparison methodology, and Norway sees therefore the need to reiterate the legal arguments made by the Appellate Body in this respect.

36. The Appellate Body in *US – Corrosion Resistant Steel Sunset Review*, recalling its findings in the *EC – Bed Linen* case, stated that:

> "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognised in the present dispute, "zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing". Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[20] (emphasis added)

37. The importance of calculating the dumping margin for the product as a whole – and not zeroing out the instances where the export price exceeds the normal value – has been reaffirmed by the Appellate Body in *US – Softwood Lumber V*, where it stated that:

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[19] See EC's First Written Submission para. 145, with references to relevant decisions in footnote 107. See also United States' First Written Submission para. 155.

[20] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 135.

> "We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types."[21]

38. The cases referred to above dealt with instances of zeroing procedures in original investigations using the weighted average-to-weighted average methodology. The principle, however, applies equally to other forms of zeroing and to other forms of proceedings. The Appellate Body has confirmed this in recent rulings.

39. First of all, in regard to zeroing procedures in periodic reviews, the Appellate Body stated in *US – Zeroing (EC)*:

> "We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole".[22]

40. The Appellate Body then went on to say that:

> "… if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value."[23]

41. The requirement in Article 2.1 *AD Agreement* to aggregate multiple comparison results to produce a margin of dumping for the product as a whole applies equally when an authority conducts: weighted average-to-weighed average comparisons, weighted average-to-transaction comparisons and transaction-to-transaction comparisons.

42. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body concluded that the definition of "dumping" and "margin of dumping" in Article 2.1 (and Articles VI:1 and VI:2 of GATT 1994) applies to zeroing procedures using transaction-to-transaction comparison in an original investigation. The Appellate Body underlined that in relation to Article 2.4.2 ADA, the weighted average-to-weighted average and transaction-to-transaction comparisons provide "alternative means for establishing "margins of dumping" and that they "fulfil the same function" with no "hierarchy between them". In light of this, the Appellate Body stated:

> "… the term "margin of dumping" has the same meaning regardless of which of the two methodologies in the first sentence of Article 2.4.2 is used to establish them. In other words, it is a unitary concept and the two methodologies provided in the first sentence of Article 2.4.2 are alternative means to capture it."[24]

43. Based on these premises, the Appellate Body held that:

> "…it would be illogical to interpret the ["T to T"] comparison methodology in a manner that would lead to results that are systematically different from those obtained under the ["W to W"] methodology."[25]

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[21] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis in the original).
[22] Appellate Body Report, *US – Zeroing (EC)*, para. 127.
[23] Appellate Body Report, *US – Zeroing (EC)*, para. 127.
[24] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89.
[25] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para 93.

44. In *US – Zeroing (Japan)*, the Appellate Body reiterates this line of reasoning, and thus carrying out a consistent interpretation of the various provisions involved.[26]

45. Regarding sunset reviews, Norway holds that it would not be logically consistent to interpret the *AD Agreement* in a manner that will allow the investigating authorities to apply a duty where the requirements of the AD Agreement would have made it illegal to impose the duty in the first place.

46. Based on the above, Norway holds that zeroing procedures in all forms and in all proceedings under the AD Agreement is contrary to the principle that the margin of dumping must be established for the product as a whole.

4.4 ZEROING IS CONTRARY TO THE REQUIREMENT OF "FAIR COMPARISON" IN ARTICLE 2.4 OF THE AD AGREEMENT

47. The EC contends in its First Written Submission that the requirement of "fair comparison" in Article 2.4 of the *AD Agreement* is an independent and overarching obligation, which in addition to applying to original investigations, also is applicable to proceedings governed by Article 9.3. The EC further argues that the zeroing methodologies used by the United States both in original investigations and in later reviews are inconsistent with the "fair comparison" requirement.[27] The United States, on the other hand, submits that zeroing is not contrary to the "fair comparison" requirement.

48. The Appellate Body has in several cases found that zeroing is contrary to a "fair comparison" between the export value and normal value.[28] It has been found that "the use of zeroing (…) artificially inflates the magnitude of dumping resulting in higher margins of dumping and making a positive determination of dumping more likely", and further that "this way of calculating cannot be described as impartial, even-handed, or unbiased".[29]

49. In the latest case – *US – Zeroing (Japan)* – the Appellate Body referred to its earlier rulings in its interpretation of Article 2.4[30], and expressed the following when addressing the application of the requirement of "fair comparison" to assessment reviews:

> 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 meaning of the first sentence of Article 2.4. 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.[31]

50. The Appellate has had the opportunity to consider the "fairness" of the practice of zeroing with regard to all three comparison methodologies, and with regard to both original investigations and assessment reviews. The message from the Appellate Body in these cases has been clear: there is an inherent bias in zeroing methodology and zeroing is not a "fair comparison". Zeroing thus implies a

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[26] Appellate Body Report, *US – Zeroing (Japan)*, paras. 119-129.
[27] EC's First Written Submission para. 159, 176 and paras. 198-199.
[28] Appellate Body Report, *EC – Bed Linen*, para. 55, Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135, Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 42 and Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[29] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142.
[30] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[31] Appellate Body Report, *US – Zeroing (Japan)*, para. 168.

breach of Article 2.4 of the *AD Agreement.* Nothing in this case gives any cause to disturb the consistent Appellate Body findings in this respect.

51. In light of the clear case law referred to above, Norway does not see any need to go any further into the details of the interpretation of Article 2.4 of the *AD Agreement*.

V. ARTICLE 2.4.2 OF THE AD AGREEMENT APPLIES ALSO TO REVIEW PROCEEDINGS

5.1 INTRODUCTION

52. The EC submits that Article 2.4.2 of the *AD Agreement* applies not only in the context of original investigations, but also in the context of review proceedings, including administrative reviews.[32] The United States argues otherwise, contending that the express terms of Article 2.4.2 limit the application to original investigations.[33]

53. Norway is of the firm view that the methodologies provided for in Article 2.4.2 are the only permissible methodologies also for assessment reviews. Article 9.3.1 does not prescribe or permit a method for margin calculation different from those set out in Article 2.4.2 of the *AD Agreement*.

5.2 ADMINISTRATIVE REVIEWS MUST COMPLY WITH THE REQUIREMENTS OF ARTICLE 2.4.2 OF THE AD AGREEMENT

54. Article 9.3.1 does not speak to the question of the method for margin calculation in assessment reviews. The provision is silent in this regard, and thus cannot be said to imply a permission or a prohibition of any specific methodology.

55. Article 9.3 (the "chapeau") does, however, provide that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to Article 2 must be read as a reference to the whole of that Article, without exceptions. On this basis, Norway submits that the establishment of a margin of dumping in the context of Article 9.3 must adhere to the disciplines of Article 2, including Article 2.4.2.

56. As mentioned above, the United States understands Article 2.4.2 to be limited to original investigations. It is argued that the term "the existence of margins of dumping during the investigation phase..." implies that the provision is not applicable to assessment reviews according to Article 9.3.1.[34]

57. Norway believes that a proper interpretation of the terms of Article 2.4.2, read in context and in light of the object and purpose of the treaty, leads to a different result. First of all the ordinary meaning of the word "investigation" comprises more than just the type of examination that takes place in an original investigation (…). The EC refers in its First Written Submission to how the word is defined in The New Shorter Oxford English Dictionary: "the action or process of investigating; a systematic inquiry; a careful study of a particular subject".[35] Norway submits that there are different kinds of examinations that are undertaken during the proceedings in accordance with the AD Agreement that fits this definition, including the assessment into the amount of anti-dumping duty addressed in Article 9.3.1.

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[32] EC's First Written Submission paras. 212 and 223.
[33] United States' First Written Submission para. 99.
[34] United States' First Written Submission para. 99.
[35] EC's First Written Submission para. 213 and footnote 152.

58. Norway contends that also the context and the object and purpose of the treaty indicate that Article 2.4.2 is not limited to original investigations. Article 2 is the sole provision in the Agreement dealing with the "determination of dumping", and Article 2.4.2 is the sole provision in the Agreement dealing with how to calculate dumping margins.[36] If one were to interpret Article 2.4.2 in such a way as to limit its application to original investigations, one would implicitly say that there are no specifics as to the methodologies to be applied in determining dumping margins in reviews and thus no "security or predictability" in the system. This would effectively abolish also the "due process rights" for the exporter. Such a result would – in Norway's view - be manifestly absurd and contrary to the object and purpose of the treaty. One cannot come to the conclusion that it is for each and every Member to chose how to calculate dumping margins. This could lead to 151 different methodologies with 151 different results.

59. It is a general tenet of public international law that where a treaty may give rise to two different interpretations, the one enabling the treaty to have appropriate effects should be adopted. In the words of the International Law Commission:

> "When a treaty is open to two interpretations, on of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[37]

60. In Norway's view this requires us to adopt an interpretation of "investigation phase" in Article 2.4.2 that ensures that there are agreed methodologies applicable also to reviews, and not an interpretation that permits "a free for all" making the choice of methodology into a "black hole". Norway again refers to the object and purpose of the WTO Agreement, which *inter alia* is to establish a rules-based multilateral trading system ensuring security and predictability for Members in their trading relations.[38] Without such an interpretation, margins calculated based on the same sales may change wildly from Member to Member, leaving no security and predictability for the exporters.

61. While not entering into a detailed critique of all the interpretative arguments put forward by the United States, Norway believes that the above principle of "effectiveness" and the object and purpose of the *WTO Agreement*, the *GATT 1994* and the *AD Agreement all* imply that Article 2.4.2 must be interpreted to apply to all investigations – including those carried out for purposes of establishing dumping margins in reviews.

VI. SUNSET REVIEWS

62. The Appellate Body has previously held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are calculated using a methodology that is inconsistent with Article 2.4, then this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3.[39] "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"."[40]

63. Norway notes that the Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews: In *US – Zeroing (Japan)* the Appellate Body ruled that since it was found that zeroing was

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[36] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.
[37] YBILC 1966-II, page 219.
[38] See DSU Article 3.2, first sentence.
[39] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 127 and 130.
[40] Appellate Body Report, *US – Zeroing (Japan)*, para. 183, referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 130.

inconsistent, as such, with Article 2.4 and Article 9.3, and the likelihood-of-dumping determinations in the sunset reviews at issue in the case relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they were inconsistent with Article 11.3 of that Agreement.

64. A margin calculated with zeroing can, therefore, never be the foundation for an authority's determination regarding the likelihood of continuation or recurrence of dumping.

65. The United States argues that the Panel should reject the claim by the EC because the EC has not demonstrated that a calculation without zeroing would result in zero or *de minimis* margins.[41]

66. This is an incorrect understanding of the obligation incumbent upon the investigating authority by virtue of Article 11.3 of the *Anti-Dumping Agreement.* Article 11.3 requires of the investigating authority that it makes a reasoned determination. As the Appellate Body has set out, a determination of the likelihood of continuation or recurrence of dumping based on a finding of dumping, where the dumping margin has been calculated employing zeroing, cannot be considered a reasoned determination. It is sufficient to constitute a breach of Article 11.3 for the EC to present a prima facie case that the determination is flawed. It is not necessary for the EC, nor for this Panel, to make the correct determination for the United States. The Panel's role is to review the determinations actually made by the United States. A panel's role is not to redo the investigation and make its own determinations.

VII. CONCLUSION

67. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the *AD Agreement*.

[41] United States, First Written Submission para. 154.

ANNEX B-4

THIRD PARTY WRITTEN SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

TABLE OF CONTENTS

Page

INTRODUCTION **43**

ARGUMENTS **43**

The definition of "dumping" contained in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* applies throughout the *Agreement.* **43**

The existence of dumping and margins of dumping must be determined with respect to the product as a whole **44**

The term "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations". **44**

Article 2.4 imposes a general obligation requiring Members to ensure a "fair comparison". **45**

The assessment of anti-dumping duties shall be based on the margin of dumping established in accordance with Article 2 of the *Agreement.* **45**

The application of the zeroing methodology is WTO-inconsistent in all anti-dumping proceedings. **46**

CONCLUSION **46**

INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as "TPKM"), as a third party in this proceeding, thanks the Panel for this opportunity to present its views on the issue of zeroing.

2. The question before the Panel in this dispute is whether the application of zeroing in the 52 anti-dumping proceedings with respect to the 18 specific products cited by the European Communities is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement,* and Articles VI:1, VI:2 and XVI:4 of the GATT 1944.

3. In its first written submission, the European Communities has clearly described how the United States incorporates the zeroing methodology into its determinations in original investigations, administrative reviews and sunset reviews. The fundamental issue in these proceedings with respect to all of these determinations, therefore, is whether the use of the zeroing methodology impermissibly distorts the calculation of the dumping margin upon which the existence of dumping is determined and the subsequent duty assessments are based.

4. TPKM will focus its submission on why the zeroing methodology as applied in anti-dumping proceedings is inconsistent with the *Anti-Dumping Agreement* and relevant WTO provisions. This submission will address the following:

(1) The definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1 applies throughout the *Anti-Dumping Agreement*.
(2) 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 with respect to the product under investigation as a whole.
(3) The term "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations" conducted under Article 5 of the *Anti-Dumping Agreement*.
(4) Article 2.4 of the *Anti-Dumping Agreement* requires Members to ensure a "fair comparison" when making a determination of dumping in any anti-dumping proceeding.
(5) The assessment of dumping duties shall not exceed the margin of dumping established in accordance with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement.*
(6) The use of the zeroing methodology distorts the margins of dumping and renders *any* determination of dumping based on that methodology inconsistent with WTO rules.

ARGUMENTS

The definition of "dumping" contained in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* applies throughout the *Agreement.*

5. Article 2.1 of the *Anti-Dumping Agreement* reiterates the definition of "dumping" provided in Article VI:1 of GATT 1994 and specifies that this definition applies "for the purpose of this Agreement". TPKM is of the view, therefore, that in any determination of "dumping", in any anti-dumping proceeding, it is not permissible to establish a margin of dumping without reference to the various requirements of Article 2.

6. For example, the Appellate Body has stated in *US – Zeroing (EC)* and *US – Zeroing (Japan)* that "the margin of dumping established for an exporter or foreign producer operates as a ceiling for

the total amount of anti-dumping duties".[1] This means that the requirements of Article 2 must be respected in establishing the margin of dumping in an assessment review. TPKM notes that Article 9.3 provides expressly that the amount of duties shall not exceed a margin of dumping established in accordance with the rules of Article 2.

The existence of dumping and margins of dumping must be determined with respect to the product as a whole.

7. Both Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* define dumping by reference to "a product". Article 2.1 specifies that the determination of dumping is based on a comparison of "the export price of the product" and "the comparable price ... for the like product". Thus, these texts expressly require that the existence of dumping and margins of dumping be determined for the product as a whole.

8. The Appellate Body has found that "Dumping, within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product".[2] The Appellate Body has consistently found that the use of zeroing in a manner that does not fully take into account the actual prices of all export transactions is inconsistent with the *Anti-Dumping Agreement*.[3]

The term "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations".

9. Contrary to the United States' interpretation, TPKM's view, as expressed in its third party submission in *US – Zeroing (EC)* WT/DS294, is that the term "investigation" as used in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations" conducted in accordance with Article 5 of the *Anti-Dumping Agreement*.

10. It should be noted that the *Anti-Dumping Agreement* does not contain any definition of the term "investigation", although the term "investigation" is used in many different provisions of the *Agreement*. However, the term does not have the same meaning in all the instances in which it appears in the *Agreement*. While in certain provisions it must be interpreted narrowly, referring only to "original investigations", in other instances the term has a broader meaning, covering original investigations as well as assessment and review proceedings.

11. For example, Article 6.8, which relates to the use of facts available, refers to the term "investigation". However, it is accepted that the use of facts available is not limited to "original investigations". Indeed, as far as Article 6 is concerned, Article 11.4 of the *Agreement* expressly provides that the provisions of Article 6 regarding evidence and procedure shall apply to any "review" carried out under this Article, i.e. under Article 11. The existence of this cross-reference supports the view that the term "investigation" is capable of referring to proceedings additional to "original investigations". Any interpretation to the contrary would lead to the absurd result, for example, that Article 6.8 would not be applicable to duty assessment proceedings under Article 9.

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[1] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, para. 130, WT/DS294/AB/R*;* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, para. 155, WT/DS322/AB/R.

[2] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, para. 93, WT/DS264/AB/R.

[3] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, para. 55, WT/DS141/AB/R. See also, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R; Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R*;* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R.

12. TPKM believes that the word "investigation" must be interpreted in light of its specific context. Even if they have different purposes, all types of anti-dumping proceedings involve the same kind of investigation of prices and costs in order to determine and measure dumping. In this respect, the purpose of Article 2 would be frustrated if, together with Articles 2.4 and 2.4.2, it were not generally applicable to assessment and sunset reviews. Therefore, TPKM considers the provisions of Article 2 are applicable not only to original investigations but also to duty assessment and other reviews.

Article 2.4 imposes a general obligation requiring Members to ensure a "fair comparison".

13. Article 2.4 of the *Anti-Dumping Agreement* establishes the fundamental obligation that "A fair comparison shall be made between the export price and the normal value".[4] This fair comparison is the only permissible means of determining or measuring the existence of dumping under the *Anti-Dumping Agreement*.

14. Furthermore, the fair comparison requirement in Article 2.4 does not only apply to certain types of intermediate comparisons used to determine margins of dumping; instead, it applies whenever dumping margins are calculated, no matter how the comparisons are made. As the Appellate Body stated in *US – Corrosion- Resistant Steel*, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[5]

15. To comply with the obligation to make a "fair comparison" between export prices and normal value, the investigating authority must take fully into account the prices of all relevant export transactions. A "fair comparison" under Article 2.4 of *Anti-Dumping Agreement* requires that the comparison be conducted in an objectively "fair" manner, in the sense of being equitable and balanced. The comparison cannot prejudge the outcome and cannot contain a tendency to produce one outcome rather than another. For this reason, Article 2.4 entails an independent obligation to determine the relevant dumping margin by a fair method of comparison that takes fully into account the entirety of the actual prices of all sales of the products under investigation. The investigating authority cannot simply disregard or adjust the prices of some transactions in its calculation of the overall margin of dumping.

The assessment of anti-dumping duties shall be based on the margin of dumping established in accordance with Article 2 of the *Agreement.*

16. Article 9.3 of the *Anti-Dumping Agreement*, which determines the applicable rules for duty assessment proceedings, stipulates "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The Appellate Body has reiterated this stipulation by stating "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties".[6] This creates an unambiguous link between the dumping duty imposed, reassessed or collected and the disciplines in Article 2 governing the calculation of dumping margins. Article 9.3 thus expressly refers to Article 2 and requires the application of Article 2 to duty assessment proceedings. It follows that when calculating dumping margins in these proceedings, investigating authorities must do so in accordance with the rules of

[4] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, para. 59, WT/DS141/AB/R.

[5] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan*, para.127, WT/DS244/AB/R.

[6] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, para.130, WT/DS294/AB/R; Appellate Body Report, *United States – Measures Relating and Sunset Reviews*, para.155, WT/DS322/AB/R.

Article 2, including, naturally, Article 2.4 and Article 2.4.2.[7] In other words, any determination of margins of dumping in a duty assessment review must fully comply with the requirements of Articles 2.4 and 2.4.2.

The application of the zeroing methodology is WTO-inconsistent in all anti-dumping proceedings.

17. Under the zeroing methodology, the prices of certain export transactions are not fully taken into account in determining the overall margin of dumping for the product as a whole. In these circumstances, the margin ceases to accurately reflect the margin of dumping as a whole and, instead, is improperly based on the prices of a particular part or category of that product. The result is the systematic inflation of the dumping margins. Such a comparison does not provide a "fair" basis for determining the existence of dumping or measuring dumping margins for the product as a whole as required by Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1944.

18. In the United States' practice at dispute, the USDOC determined the existence of dumping in the original investigations using the zeroing methodology (so-called "model" zeroing). In subsequent administrative reviews, the margin of dumping was also determined by the use of zeroing in aggregating the results of transaction-to-average comparisons. In sunset review proceedings, the USDOC relied on either the dumping margins calculated in the original investigation or a subsequent assessment review, both of which used zeroing, to determine whether the dumping was likely to continue or recur. The potential consequences of this approach include the improper finding of the very existence of dumping, as well as the excessive imposition and collection of anti-dumping duties, and the improper continuation of anti-dumping measures in sunset reviews.

19. The Appellate Body in *US – Corrosion Steel* noted that "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated".[8] The Appellate Body also stated that there is an "inherent bias in a zeroing methodology". Such bias "could, in some instances, turn a negative margin into a positive margin of dumping" and may "distort not only the magnitude of a dumping margin, but also result in a finding of the very existence of dumping".[9] Thus, it is clear that the use of the zeroing methodology is inconsistent with the requirements of Article 2.4 and Article 2.4.2, not only in original investigations but also in other proceedings such as administrative reviews and sunset reviews.

20. Accordingly, any determination in an original investigation, assessment review, or sunset review that relies on dumping margins that incorporate the zeroing methodology may be contrary not only to Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1944, but also Articles 2.1, 9.3, 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement*.

CONCLUSION

21. For the reasons discussed above, TPKM considers that, in line with the findings of previous Panels and the Appellate Body in similar cases that have found the zeroing methodology "as such"

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[7] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan*, para.135, WT/DS244/AB/R.

[8] As noted and confirmed by the Appellate Body, "the opening phrase of Article 2.1—"[f]or the purpose of this Agreement"—indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2." Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, para.93, WT/DS264/AB/R.

[9] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan*, para.135, WT/DS244/AB/R.

and "as applied" inconsistent with the *Anti-dumping Agreement*, the United States' application of the zeroing methodology in all phases of its investigations and reviews of anti-dumping measures, including the determinations cited by the European Communities, are inconsistent with the *Anti-Dumping Agreement* in light of Articles 2.1, 2.4 and 2.4.2, and 9.3, 11.1, 11.2 and 11.3, as well as Articles VI:1 and VI:2 of the GATT 1944.

22. In the interests of ensuring security and predictability in the multilateral trading system, TPKM encourages the Panel to find that, consistent with the previous findings of the Appellate Body, the use of zeroing, whether in investigations or reviews, and regardless of the type of comparison employed, is inconsistent with the *Anti-Dumping Agreement* and WTO provisions, and should be eliminated once and for all from all types of anti-dumping proceedings.

ANNEX B-5

THIRD PARTY WRITTEN SUBMISSION OF THAILAND

1. Thailand appreciates the opportunity to participate in this proceeding and to present its views to the Panel in this written submission.

2. Thailand reserved its right to participate as a third party in this proceeding under Article 10.2 of the *Dispute Settlement Understanding* due to its concern about the continued use of "zeroing" by the United States in the types of assessment and sunset review proceedings at issue before this Panel. In Thailand's view, the use of zeroing in *any* circumstance is inconsistent with both the spirit and the substance of Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. In effect, the use of zeroing either artificially creates margins of dumping where none would otherwise have been found or, at a minimum, artificially inflates margins of dumping in both original anti-dumping investigations and periodic reviews of dumping margins.

3. Thailand generally supports the arguments made by the European Communities in its first written submission in this dispute regarding the inconsistency of the use of zeroing in the challenged measures with the *Anti-Dumping Agreement*. Thailand will not repeat those arguments. Instead, Thailand would simply remind the Panel that the Appellate Body's rulings to date on the issue of zeroing have coherently and consistently addressed the numerous different arguments put before it in each dispute, ranging from *EC – Bed Linen* to the latest *US – Zeroing (Japan)*. To summarize, 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, transaction-by-transaction 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.

4. Thailand considers this principle to have been fully and correctly reasoned by the Appellate Body and to apply equally and fully to the issues that are before the Panel in this case. Thailand notes that the dispute settlement system is intended to provide security and predictability to the multilateral trading system. Any departure by the Panel from the principles enunciated by the Appellate Body in its previous reports runs the risk of undermining the security and predictability of the multilateral trading system and, specifically, the dispute settlement system.[1]

5. In its first written submission, the United States has failed to provide any convincing legal ground for the Panel to depart from the reasoning of the Appellate Body in its previous decisions on the issue of zeroing. Thailand will address briefly some of the points made by the United States.

A. TRANSACTION-SPECIFIC DUMPING

6. First, the United States is incorrect to suggest that dumping – within the meaning of the GATT 1994 or the *Anti-Dumping Agreement* "may occur in a single transaction".[2] The United States

[1] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188 ("following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same").

[2] See First Written Submission of the United States of America, 12 September 2007, para. 84 *et seq*. ("US Submission").

relies on the 1960 Report of the Group of Experts to support this proposition. However, the United States fails to note that the Group of Experts emphasised that a determination of *both dumping and injury* should be made for each importation.[3] 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". However, the Group of Experts noted that this was "clearly impracticable, particularly as regards to injury, and instead envisaged that these determinations would be made on the broader basis of a "pre-selected" product. Accordingly, the United States' reliance on the Group of Experts' Report as supporting the use of zeroing is misplaced.

7. In addition, anti-dumping measures may be imposed only against dumped goods that are found to cause or to threaten to cause injury to the domestic industry. Measures cannot be imposed, therefore, unless there is symmetry between the universe of goods found to be dumped and the universe of goods found to be causing injury. The United States' interpretation would permit dumping to be addressed on a transaction-specific basis, without requiring the injury determination to be determined on the same basis. Even at the stage of review proceedings, this would undermine the basic principle of Article VI of the GATT 1994 that dumping is to be condemned only if it causes or threatens to cause material injury.

B. PROSPECTIVE NORMAL VALUE SYSTEMS

8. Thailand also disagrees with the United States' argument that the European Communities' interpretation of Article 9.3 as requiring a determination of margins for the product as a whole is inconsistent with the existence of prospective normal value systems of assessment. Thailand sees no difference between prospective normal value (PNV) and retrospective systems of assessment that has any bearing on the question of whether zeroing is consistent with the *Anti-Dumping Agreement*.

9. Under a PNV system of assessment, following an investigation, in which the use of zeroing is not permitted, the authority uses the margin of dumping established in the investigation to set up a PNV. Importers must pay a duty equal to the difference between the export price and the PNV on all subsequent transactions priced below the PNV. Importers need not pay anything on imports priced above the PNV. Under this system, the amount, if any, paid at the time of entry is based on the authority's margin determination in the original investigation, and does not reflect an actual margin of dumping on a particular transaction. The United States (and in the panel in *US – Zeroing (Japan)*, which it quotes) is incorrect to say that in a PNV system, liability is final at the time of importation.[4] In fact, in a PNV system, the amount of the liability may not be final until the conclusion of any refund review conducted in accordance with Article 9.3.2 of the *Anti-Dumping Agreement*.[5]

10. Under a retrospective system, such as the United States', the investigating authority uses the margin of dumping established in the investigation, again in which zeroing is not permitted, to establish an *ad valorem* rate that will be applied to all imports to collect estimated duties at the time of

[3] See US Submission, para. 86, citing *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, 27 May 1960, L/1141, BISD 9S/194, para. 7 ("Group of Experts").

[4] US Submission, para. 140.

[5] The availability of a review under Article 9.3.2 to determine whether a refund is due with respect to imports already made means that, contrary to the United States' views, PNC systems already include a "retrospective" component. In practice, reviews occur less frequently in PNV systems than in retrospective systems, because (i) importers are less likely to request reviews in PNV systems where there was already a cap on their liability at the time of entry and, perhaps more importantly, (ii) at least under the US retrospective system, the domestic industry may also request reviews in the hope that the importer's liability may be increased. These various features of the two systems, however, have no direct bearing on whether zeroing may be used in determining margins of dumping in any proceeding subject to the disciplines of Article 2 of the *Anti-Dumping Agreement*.

entry. As with PNV systems, the amount paid at the time of entry is based on the authority's margin determination in the original investigation, and does not reflect an actual margin of dumping on a particular transaction. Also similar to PNV systems, the amount of the final liability may not be determined until the completion of a review, in this case conducted in accordance with Article 9.3.1 of the *Anti-Dumping Agreement*.

11. The only substantive difference between PNV and retrospective systems, therefore, is that under PNV systems, the liability for anti-dumping duties at the time of entry is limited to the amount by which the price falls below the target PNV and that the final liability is capped at that amount. Under the retrospective system, the importer must pay estimated duties at the time of import even for sales for which the export price might exceed the normal value and, moreover, the importer's liability is not capped at that amount but might later be increased in a review under Article 9.3.1.

12. There are two fundamental problems with the United States' arguments based on PNV systems to support its position that zeroing is permissible in reviews under its retrospective system. First, the United States incorrectly compares what happens *in its reviews* under Article 9.3.1 with what happens *at the time of entry* in PNV systems. The appropriate comparison, however, would be between reviews conducted under Article 9.3.1 in retrospective systems with reviews conducted under Article 9.3.2 in PNV systems. Both kinds of reviews must be conducted in accordance with Article 2 and must, therefore, determine a margin of dumping for the "product" rather than individual transactions and must be based on a fair comparison within the meaning of Article 2.4. In other words, the use of zeroing is not permitted in either kind of review.

13. Second, Thailand fails to understand how, as a matter either of textual interpretation or logic, the existence of a cap on the amount that an importer must pay at the time of entry in PNV systems supports the United States' position that it is allowed to use zeroing – which increases the liability for duties – in reviews conducted in a retrospective system, in which there is no cap on the potential liability for duties.

14. For these reasons, Thailand urges this Panel to follow the reasoning and findings of the Appellate Body, and rule that as submitted by the European Communities, the use of zeroing by the United States in original investigations and periodic reviews - regardless of the comparison methodology used - is inconsistent with its obligations under Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*.

15. Thailand looks forward to providing some additional views to the Panel during the course of the Panel's meeting with the parties and third parties.