CONFIDENTIAL

BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

AB-2006-5

(WT/DS322)

APPELLANT'S SUBMISSION OF JAPAN

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TABLE OF ABBREVIATIONS

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
GATT 1994	*General Agreement on Tariffs and Trade 1994*
PNV	Prospective normal value
Panel Report	*United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, circulated 20 September 2006
T-to-T comparison	Transaction-to-transaction comparison
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
W-to-T comparison	Weighted average-to-transaction comparison
W-to-W comparison	Weighted average-to-weighted average comparison
WTO Agreement	*Marrakech Agreement Establishing the World Trade Organization*

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. *Background to this Appeal*

1. The United States' zeroing procedures are among the most contested measures in the history of the World Trade Organization ("WTO"). The Appellate Body has repeatedly found that they are prohibited by the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), most recently in April and August of this year.[1] The Appellate Body's rulings in these earlier disputes leave no room for doubt that the zeroing procedures that Japan challenges are WTO-inconsistent.

2. Yet, in an extraordinary decision, the Panel expressly declined to follow the Appellate Body. Disregarding the Appellate Body's ruling in *US – Zeroing (EC)*, the Panel concluded that zeroing is permitted in all circumstances, except in a weighted average-to-weighted average ("W-to-W") comparison in an original investigation. Thus, for the Panel, the prohibition on zeroing is an exception to a general rule otherwise authorizing zeroing.

3. The Panel's pretexts for refusing to follow the Appellate Body were that the Appellate Body's reasoning was "difficult" to understand and that the Appellate Body had provided only a "limited explanation" for the prohibition on zeroing.[2] Ultimately, it appears that the Panel disagreed with the Appellate Body, and valued its own approach more highly than the "important systemic considerations in favour of following adopted panel and Appellate Body reports".[3]

4. Japan finds the Panel's decision both surprising and disappointing, not least because the Panel prolonged the dispute precisely to enable it to take into account the

[1] Appellate Body Report, *US – Zeroing (EC)*; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*.
[2] Panel Report, *US – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, 20 September 2006 ("Panel Report"), paras. 7.100 and 7.195.
[3] Panel Report, para. 7.99.

Appellate Body's ruling in *US – Zeroing (EC)*, which it then disregarded. The Panel requested two written submissions specifically on the significance of that ruling for this dispute; it held a third meeting with the parties on that issue; it posed questions for written answer; and it invited comments from the parties on the respective answers given.

5. Japan regrets that the resolution of the dispute has been delayed by the Panel's decision to disregard the Appellate Body's ruling. In Japan's view, the requirements in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") for dispute settlement to promote "security and predictability", and the "prompt settlement" of disputes, mean that Appellate Body Reports adopted by WTO Members should be followed by panels when they address exactly the same legal issues.[4] The parties to a dispute should not be compelled to pursue time-consuming appeals that sap the resources of Members and the Appellate Body alike.

6. Furthermore, delaying the resolution of a dispute inevitably has practical, commercial consequences in the "real world" of international trade. As the Panel itself recognized, Japan stressed the "urgency of this dispute" from the very outset because the United States is seeking to determine the final liability for duties in the eleven "as applied" periodic reviews that Japan challenges, by liquidating these cases one-by-one.[5]

B. *The Zeroing Procedures are Prohibited "As Such"*

7. On appeal, Japan claims that the United States' zeroing procedures are "as such" inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 in: (1) original investigations using a transaction-to-transaction ("T-to-T") comparison; (2) periodic reviews; and (3) new shipper reviews. Japan also claims that the application of the zeroing procedures in 11 periodic reviews and two sunset reviews is WTO-inconsistent. The Panel's findings to the contrary must be reversed and replaced.

[4] Japan recalls, in this connection, the Appellate Body's statement that "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". Appellate Body Report, *US – OCTG from Argentina*, para.188.
[5] Panel Report, para. 3.4.

(i) Zeroing Violates Overarching Rules in the *Anti-Dumping Agreement* and the GATT 1994

8. The United States' zeroing procedures violate two fundamental rules that apply throughout the *Anti-Dumping Agreement* to dumping determinations made in all anti-dumping proceedings. *First*, zeroing prevents the United States from making a dumping determination that is consistent with the definition of "dumping". *Second*, zeroing prevents the United States from making a comparison of normal value and export price that is "fair". These two overarching rules are at the heart of Japan's claims.

(a) *Zeroing Prevents a Dumping Determination for the Product as a Whole*

9. Zeroing is inconsistent with the definition of "dumping" and "margins of dumping" in Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Pursuant to these provisions, "dumping" and "margins of dumping" must be defined in relation to the "product" under investigation as a whole.[6] As a result, an authority cannot make a "dumping" determination for a sub-part of the product, particularly if the sub-part included in the determination is the most likely to lead to an affirmative dumping determination or inflated margins of dumping. Instead, if an authority conducts multiple comparisons for individual transactions or for groups of transactions, it must aggregate the results of all these comparisons to establish a margin for the product as a whole.[7] This definition of "dumping" applies throughout the *Anti-Dumping Agreement*.[8] It, therefore, applies when an authority determines "dumping" in an original investigation using a T-to-T comparison, and also in periodic and new shipper reviews.

10. The United States' zeroing procedures involve an incomplete "dumping" determination that is not for the "product" as a whole. As the Appellate Body knows

[6] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 91; Appellate Body Report, *US – Zeroing (EC)*, paras. 126 to 129; Appellate Body Report, *EC – Bed Linen*, para. 53; *and* Appellate Body Report, *US – Softwood Lumber V*, para. 99.
[7] Appellate Body Report, *US – Softwood Lumber V*, paras. 97 and 98; Appellate Body Report, *US – Zeroing (EC)*, para. 132; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 88, 89 and 122.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 125.

very well, whenever the United States determines dumping, under any comparison method, it compares normal value and export prices for all export transactions. However, having conducted comparisons for all export transactions, the United States treats the results of those comparisons highly selectively. If the comparison result is positive – indicating dumping – the United States includes that result in the calculation of the total amount of dumping. If the comparison result is negative – indicating no dumping – the United States disregards that comparison result, treating it as a zero.

11. By disregarding all negative comparison results, the United States' "dumping" determination excludes an entire category of the export transactions that form part of the "product" – namely, those transactions that generate the negative comparison results. In consequence, the United States makes a "dumping" determination solely for a part of the investigated product, not for the product as a whole. This is prohibited by Article 2.1 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.

(b) *Zeroing Prevents a Fair Comparison of Normal Value and Export Price*

12. Zeroing also involves a distorted and biased comparison of normal value and export price that is the very antithesis of the "fair comparison" that is required by Article 2.4 of the *Anti-Dumping Agreement*. In previous disputes, the Appellate Body has identified three different elements to the "inherent bias in a zeroing methodology".[9]

13. *First*, in the case of the disregarded export transactions, "the export prices are treated as if they were less that what they actually are".[10] In short, by regarding the comparison result as a zero, instead of a negative value, the United States treats the export prices as lower than they actually were. *Second*, by disregarding negative comparison results, zeroing can produce a "dumping" determination where, in fact, the

[9] Appellate Body Report, *US – Softwood Lumber V*, para. 101, quoted with approval in Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 139. The three elements of the unfairness of zeroing are set forth in Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 139 to 141.
[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135, quoted with approval in Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 140.

product as a whole is not dumped.[11] 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* 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. The use of zeroing, therefore, makes an affirmative "dumping" determination more likely.[12] *Third*, the exclusion of negative comparison results also "inflates" the total amount of "dumping" by the amount of the excluded negative comparison results.[13]

14. The United States' zeroing procedures, therefore, systematically prejudice the interests of exporters and foreign producers because the negative comparison results that are favorable to them are purposefully set aside by the United States Department of Commerce ("USDOC"). The Appellate Body has, therefore, held that the application of the United States' zeroing procedures violates the requirements of a "fair comparison" under Article 2.4 of the *Anti-Dumping Agreement*.[14]

(ii) The Definition of "Dumping" and the "Fair Comparison" Requirement Apply Throughout the *Anti-Dumping Agreement*

15. The definition of "dumping" in Article 2.1 and the "fair comparison" requirement in Article 2.4 are overarching rules in the *Anti-Dumping Agreement* that an authority must respect when it makes a determination of "dumping" in any anti-dumping proceeding. In particular, they apply to dumping determinations made in original investigations under a T-to-T comparison, as well as to determinations made in periodic and new shipper reviews.

[11] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135, quoted with approval in Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 140.
[12] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.
[13] 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; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.
[14] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

16. Thus, in an original investigation under a T-to-T comparison, the United States must calculate a margin of dumping for the "product" as a whole on the basis of a "fair comparison". Because the zeroing procedures prevent it from so doing, they violate Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body concluded that the application of the zeroing procedures in a T-to-T comparison in an original investigation violated Articles 2.4 and 2.4.2. The Appellate Body emphasized that its finding under Article 2.4.2 was "based" "also on the context found in Article 2.1 of the *Anti-Dumping Agreement*".[15] Unlike Canada in that dispute, Japan also makes claims under Article 2.1, as well as Articles VI:1 and VI:2 of the GATT 1994.

17. Similarly, in periodic reviews under Article 9.3, in ensuring that the total amount of duties collected does not exceed the margin of dumping, as required by that provision, an authority must establish a dumping margin for the exporter or foreign producer consistently with the definition of "dumping" and "margin of dumping" in Article 2.1, and Articles VI:1 and VI:2,[16] and with the "fair comparison" requirement in Article 2.4. An authority must also determine "margins of dumping" in new shipper reviews under Article 9.5 consistently with these requirements. Other than Article 2.1 in the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, there are no provisions that define "dumping" and "margins of dumping" for purposes of these reviews.[17]

18. By maintaining the zeroing procedures for use in these reviews, the United States acts inconsistently with Articles 2.1 and 2.4 (periodic and new shipper reviews), Articles 9.1, 9.2 and 9.3 (periodic reviews), and Article 9.5 (new shipper reviews) of the *Anti-Dumping Agreement*, and also with Articles VI:1 and VI:2 of the GATT 1994 (periodic and new shipper reviews) because the procedures prevent it from complying with these obligations.

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[15] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92, citing *US – Zeroing (EC)*, para. 126.
[16] Appellate Body Report, *US – Zeroing (EC)*, paras. 130 to 133.
[17] *See* Appellate Body Report, *US – Zeroing (EC)*, para. 125, including footnote 220.

19. The Panel's findings that the zeroing procedures are "as such" permitted in these three situations are, therefore, in error, and must be reversed and replaced.

C. *The Zeroing Procedures Are Prohibited "As Applied"*

20. On appeal, Japan also seeks reversal of the Panel's findings that the application of the zeroing procedures in 11 periodic reviews and two sunset reviews is WTO-consistent. With respect to these periodic reviews, Japan's claims and arguments are the same as its "as such" claims and arguments. The application of the zeroing procedures in each periodic review prevented the United States from calculating a margin of dumping for the "product" under investigation as a whole, and deprived the comparison between normal value and export price of fairness. Moreover, in these reviews, the United States failed to ensure that the amount of duties collected did not exceed the margin of dumping for the exporter or foreign producer of the product, as required by Articles 9.1, 9.2 and 9.3, and Article VI. As a result, the United States violated Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2. In *US – Zeroing (EC)*, the Appellate Body has already held that the use of the United States' zeroing procedures in periodic reviews violates Articles 9.3 and VI:2.

21. Finally, Japan challenges two sunset reviews. In these sunset reviews, the Panel found that, in determining that revocation of the anti-dumping order would be likely to result in continuation or recurrence of dumping, the United States had relied on margins calculated in periodic reviews using the zeroing procedures.[18] The Panel found that this was permissible because it also found that zeroing is permissible in periodic reviews. The premise underlying the Panel's ruling is wrong – zeroing is prohibited in periodic reviews. As a result, the sunset reviews in question 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.

II. THE "AS SUCH" MEASURE AT ISSUE – THE ZEROING PROCEDURES

A. *Overview of the United States' Dumping Determination Procedures*

[18] Panel Report, paras. 7.255 and 7.256.

22. Japan provided a comprehensive description of the United States' dumping margin calculation procedures, in general, and the zeroing procedures, in detail, in paragraphs 11 to 64 of its First Written Submission to the Panel.[19] Briefly, those procedures may be explained as follows.

23. In calculating dumping margins in any anti-dumping proceeding, the United States compares normal value and export price using one of the three methods set forth in Article 2.4.2 of the *Anti-Dumping Agreement*: W-to-W comparison; T-to-T comparison; or W-to-T comparison.[20] The USDOC includes the zeroing procedures in its calculation procedures in all anti-dumping proceedings, irrespective of the comparison method used.

24. In practice, the United States uses the following comparison methods in particular types of proceeding:

a. In original investigations, the USDOC routinely determines dumping margins using a W-to-W comparison. However, in implementing the recommendations and rulings of the DSB in *US – Softwood Lumber V*, the USDOC used a T-to-T comparison, which was the subject of very recent proceedings under Article 21.5 of the DSU.

b. In periodic reviews (also called administrative reviews or duty assessment reviews), in order to assess retrospectively the amount of duty due, the USDOC determines dumping margins using a W-to-T comparison. In these reviews, the United States calculates (1) a margin 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 next review, and (2) an importer-specific assessment rate that determines an importer's liability for the review period.

c. In new shipper reviews, the USDOC determines dumping margins using a W-to-T comparison.

d. In both changed circumstances reviews and sunset reviews, the USDOC generally does not determine a new dumping margin and, instead, relies on a dumping margin calculated either in an original proceeding or in a

[19] A detailed description of the operation of the zeroing procedures is given in Exhibit JPN-1 by Valerie Owenby, an expert in the USDOC's margin calculation procedures.
[20] The first and second methods are sometimes referred to as "symmetrical" comparisons because normal value and export price are compared on the same basis; correspondingly, the third method is sometimes described as an "asymmetrical" comparison because of the different bases of comparison.

duty assessment review. The dumping margin relied upon may, therefore, be calculated using either a W-to-W or a W-to-T comparison, in both cases including the zeroing methodology.

25. This appeal concerns zeroing in T-to-T comparisons in original investigations and zeroing in periodic, new shipper and sunset reviews.

B. *Zeroing in T-to-T Comparisons in Original Investigations*

26. In calculating a dumping margin on a T-to-T basis, the United States proceeds in three steps. First, the USDOC matches each export transaction with the most similar domestic market transaction occurring as contemporaneously as possible. A T-to-T comparison is conducted for the matching transactions, and three outcomes are possible. The domestic market price may exceed export price for a particular transaction, in which case there is a positive price difference for that transaction; the domestic market price may be less than export price, in which case the price difference is negative; or, finally, the domestic market and export prices may be equal, in which case there is zero difference.

27. In the second step, the USDOC calculates both the numerator and denominator for the fraction from which an overall percentage margin of dumping is derived. The numerator is the total amount of the positive price differences by transaction, and the denominator is the total value of all export transactions. All negative comparison results are disregarded in the calculation of the numerator, giving them a zero value. Japan sometimes refers to this transaction-based zeroing as "simple" zeroing.[21] As a result of this zeroing, the total value in the numerator – expressing the alleged dumping amount – is inflated by the amount of the excluded negative results.

28. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margin of dumping, known in the United States' law as the "weighted average dumping margin."[22]

[21] *See* paragraph 39 below.
[22] Tariff Act, Section 771(35)(B). Exhibit JPN-2.

29. The Appellate Body recently examined the United States' application of the zeroing procedures in a T-to-T comparison in *US – Softwood Lumber V (Article 21.5 – Canada)*, describing the United States' calculation methodology in similar terms.[23]

C. *Zeroing in Reviews*

30. In reviews, the USDOC generally determines the margin of dumping on the basis of a W-to-T comparison. The mechanics of zeroing in T-to-T and W-to-T comparisons are effectively identical. In W-to-T comparisons, the USDOC calculates a normal value, by "model". Each model may contain anywhere from one to thousands of transactions. Each individual export transaction for the review period is then compared to the weighted average normal value for the "model" to which it corresponds, typically calculated for domestic market transactions that occurred in the same month in which the export transaction occurred.[24] Again, for each of the multiple comparisons, there are three possible outcomes: there may be a positive, negative or zero price difference.

31. As in the T-to-T comparison, in step two, to derive an overall margin of dumping, the USDOC aggregates certain of the multiple comparisons results. Again, the USDOC sums solely the positive comparison results, ignoring all negative results for comparable export transactions. Because this zeroing takes place in connection with comparison results relating to individual transactions, Japan has sometimes referred to it as "simple" zeroing.[25] Through zeroing, the numerator – expressing the alleged dumping amount – is inflated by the amount of the excluded negative values. As with W-to-W and T-to-T comparisons, the USDOC retains the total sales value of all comparable export transactions in the denominator. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage, which is the overall margin of dumping or "weighted average dumping margin".

III. SUMMARY OF THE PANEL'S FINDINGS

A. *Overview of Japan's Claims*

[23] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 82 to 84.
[24] USDOC regulation, Code of Federal Regulations, vol. 19, section 351.414(e)(1). Exhibit JPN-3.
[25] *See* paragraph 39 below.

(i) Japan's "As Such" Claims

32. Before the Panel, Japan claimed that the zeroing procedures are "as such" inconsistent with the *Anti-Dumping Agreement* and the GATT 1994:

a. in original investigations using a W-to-W or a T-to-T comparison (Articles 2.1, 2.4 and 2.4.2, and Articles VI:1 and VI:2);[26]

b. in periodic reviews (Articles 2.1, 2.4, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2);

c. in new shipper reviews (Articles 2.1, 2.4 and 9.5, and Articles VI:1 and VI:2);

d. in changed circumstances reviews (Articles 2.1, 2.4, 2.4.2 and 11.2, and Articles VI:1 and VI:2); and,

e. in sunset reviews (Articles 2.1, 2.4 and 11.3, and Articles VI:1 and VI:2).[27]

33. In sum, the Panel upheld Japan's "as such" claim regarding the zeroing procedures in original proceedings using a W-to-W comparison, but rejected all of Japan's other "as such" claims. The Panel's reasoning is summarized below.

(ii) Japan's "As Applied" Claims

34. Japan also claimed before the Panel that the United States' application of the zeroing procedures is inconsistent with the *Anti-Dumping Agreement* and the GATT 1994. Specifically, Japan challenged the application of the zeroing procedures in:

a. one original investigation using a W-to-W comparison (Articles 2.1, 2.4 and 2.4.2, and Article VI:1);[28]

[26] Japan withdrew its "as such" claim regarding the zeroing procedures in original investigations under a W-to-T comparison (*i.e.* in a targeted dumping situation under the second sentence of Article 2.4.2). *See* Panel Report, paras. 6.17 ff.

[27] Japan's "as such" claims are summarized at Panel Report, para. 3.1. Japan's panel request included a number of other "consequential" "as such" claims made pursuant to: Articles 1, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.8, 11.1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. For the sake of brevity, unless otherwise indicated, Japan does not pursue these claims on appeal. Japan also does not appeal the Panel's findings regarding Japan's "as such" claims on changed circumstances and sunset reviews.

[28] *See* Exhibit JPN-10.

b. eleven periodic reviews using W-to-T comparisons (Articles 2.1, 2.4, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2);[29] and,

c. two sunset reviews in which the authorities relied on margins calculated using zeroing (Articles 2.1, 2.4 and 11.3, and Articles VI:1 and VI:2).[30] [31]

35. A detailed description of the operation of the zeroing procedures in these "as applied" measures is given in Exhibit JPN-1. Further, a table summarizing the operation of the zeroing procedures in the contested measures is given in Exhibit JPN-1-D.

36. The Panel upheld Japan's claim regarding the application of zeroing in an original investigation, but rejected Japan's other "as applied" claims. The Panel's reasoning is summarized below.

B. *Summary of the Panel's Reasoning*

37. The Panel, *first*, found that the zeroing procedures constitute a measure that can be challenged "as such" in WTO dispute settlement; *second*, it considered Japan's "as such" and "as applied" claims regarding the zeroing procedures in original investigations; *third*, it addressed the "as such" and "as applied" claims regarding periodic and new shipper reviews; and, *fourth*, it examined the "as such" and "as applied" claims regarding changed circumstances and sunset reviews.

(i) The Zeroing Procedures Are an "As Such" Rule or Norm

38. Prior to examining the substance of Japan's claims, the Panel concluded that the evidence before it was "sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or assessment rates."[32] The Panel found that this "rule or norm" is "of general and prospective application", and "is applied regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are

[29] *See* Exhibits JPN-11 to JPN-21.
[30] *See* Exhibits JPN-22 and JPN-23.
[31] Japan's "as applied" claims are summarized at Panel Report, paras. 2.3 and 3.2. Japan's panel request included a number of other "consequential" "as applied" claims made pursuant to: Articles 1, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 11.1 and 18.4 of the *Anti-Dumping Agreement*. For the sake of brevity, unless otherwise indicated, Japan does not pursue these claims on appeal.
[32] Panel Report, para. 7.50.

calculated."[33] In other words, irrespective of whether the USDOC conducts a W-to-W, T-to-T or W-to-T comparison, and irrespective of whether dumping is determined in original investigations, periodic reviews or new shipper reviews, the Panel found that the zeroing procedures apply.

39. During the Panel proceedings, Japan had used, for explanatory purposes, the terms "model" and "simple" zeroing, the former referring to model-based zeroing procedures in W-to-W comparisons and the latter to transaction-based zeroing procedures in T-to-T and W-to-T comparisons. The Panel held that these terms "do not correspond to two different rules or norms but simply refer to different manifestations of a single rule or norm".[34] Because the Panel found that there is a single zeroing measure applicable in all anti-dumping proceedings, using all comparison methods, Japan refers simply to the "zeroing procedures".

40. The Panel concluded that the zeroing procedures are a "measure which can be challenged as such".[35] The Panel noted that its finding is consistent with the conclusion of the Appellate Body in *US – Zeroing (EC)*.[36] Japan agrees with this aspect of the Panel's determination.

(ii) Original Investigations – Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994

41. The Panel found that the zeroing procedures are "proscribed" by Article 2.4.2 of the *Anti-Dumping Agreement* in original investigations using W-to-W comparisons.[37] The Panel noted that its conclusion is consistent with the Appellate Body's rulings in, among others, *US – Softwood Lumber V*. For the same reasons, the Panel found that the United States' application of the zeroing procedures in the investigation of Cut-to-Length Carbon Quality Steel Products from Japan was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Japan agrees with this aspect of the Panel's determination.

[33] Panel Report, para. 7.53.
[34] Panel Report, footnote 688.
[35] Panel Report, para. 7.58.
[36] Panel Report, para. 7.55.
[37] Panel Report, paras. 7.82 and 7.86.

42. However, the Panel found that the zeroing procedures are permissible in original investigations using transaction-specific comparisons (*i.e.* T-to-T and W-to-T comparisons).[38] Although Japan withdrew its claim regarding the use of zeroing procedures in W-to-T comparisons in original investigations, the Panel's interpretation that zeroing is permitted under transaction-specific comparison methods relates equally to T-to-T and W-to-T comparisons.[39] Indeed, the Panel's findings on this issue did not change after Japan withdrew its claim under the second sentence of Article 2.4.2 following the interim report.

43. Japan argued that zeroing was prohibited by Article 2.1 of the *Anti-Dumping Agreement*, as well as Article 2.4.2 and Article VI of the GATT 1994, because it prevents the determination of a margin for the product as a whole. The Panel, however, rejected the view that "dumping" is defined in relation to the "product" under Article 2.1.[40] Instead, the Panel held that, in the case of T-to-T comparisons under Article 2.4.2, dumping can be defined for a single export transaction.[41] In reaching this conclusion, the Panel expressly concurred with the findings of the Panel in *US – Softwood Lumber V (Article 21.5 – Canada)* that have been reversed by the Appellate Body.[42]

44. Disturbingly, although "recogniz[ing] the important systemic considerations in favour of following adopted panel and Appellate Body reports, [the Panel] decided not to adopt" the Appellate Body's approach in *US – Zeroing (EC)*.[43] The Panel's refusal to follow the approach adopted by the Appellate Body was based on alleged confusion as to the meaning of the terms "multiple averaging" and "multiple comparisons", as used by the Appellate Body.[44] Japan attempted to dispel the Panel's confusion regarding these terms, but to no avail.[45] However, to the extent that these terms were ever a source of confusion (*quod non*), that confusion has been clarified by the Appellate Body's ruling in

[38] Panel Report, paras. 7.90 to 7.143.
[39] Panel Report, footnotes 635 and 709.
[40] Panel Report, para. 7.102.
[41] Panel Report, para. 7.119.
[42] Panel Report, footnote 758.
[43] Panel Report, para. 7.99.
[44] Panel Report, paras. 7.100-7.101.
[45] *See* Japan's Answer of 15 June 2006 to the Panel's Question After the Third Meeting with the Parties.

US – Softwood Lumber V (Article 21.5 – Canada) that dumping is not defined in relation to single export transactions, even in the case of T-to-T comparisons.[46]

45. The Panel conceded that certain "anomalies" arise if Article 2.4.2 prohibits zeroing only under W-to-W comparisons in original investigations.[47] In fact, the Panel explicitly recognized four separate reasons supporting an interpretation of the *Anti-Dumping Agreement* in terms of which zeroing is prohibited in the case of transaction-specific comparisons. These four reasons are among the reasons that led the Appellate Body to hold that zeroing is prohibited.

46. *First*, the Panel observed that "Article 2.4.2 does not focus on individual export transactions but contemplates an examination of a universe of export transactions to determine whether dumping 'exists'"; thus, an authority "must have regard to the overall results of the totality of the comparisons."[48]

47. *Second*, it noted:

> … *there is no logical basis to distinguish between the average-to-average comparison method, on the one hand, and the transaction-to-transaction and average-to-transaction comparison methods, on the other. Each of these methods is used as a basis to establish the existence of margins of dumping during the investigation phase*. Since Article 2.4.2 prohibits zeroing when the existence of margins of dumping during the investigation phase is established on the basis of the average-to-average comparison methodology, it could be argued that *it is illogical to interpret Article 2.4.2 as permitting zeroing when the transaction-to-transaction method and the average-to-transaction method are used for precisely the same purpose*.[49]

48. *Third*, it added that, under the first sentence of Article 2.4.2, there is "normative equivalence between the transaction-to-transaction method and the average-to-average

[46] *See, e.g.,* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89, 91. *See also* paragraphs 83 to 84, and 97 to 100 below.
[47] Panel Report, paras. 7.121 to 7.126.
[48] Panel Report, para. 7.122.
[49] Panel Report, para. 7.123. Emphasis added.

method".[50] Arguably, therefore, "it would be illogical if zeroing were prohibited under the average-to-average method but not under the transaction-to-transaction method."[51]

49. *Fourth*, the Panel recalled that the second sentence of Article 2.4.2 provides an exceptional method of comparison to address targeted dumping which may be "masked" under the symmetrical comparison methods.[52] The Panel recognized that:

> … if zeroing is permitted under the transaction-to-transaction method, we find it somewhat difficult to see how the existence of such targeted dumping would be masked when export price and normal value are compared on a transaction-to-transaction basis. Therefore, to interpret Article 2.4.2 as permitting the use of zeroing under the transaction-to-transaction method raises the question under what circumstances it would not be possible to take account of a pattern of export prices described in the second sentence of Article 2.4.2 by using the transaction-to-transaction method.[53]

50. Thus, the Panel saw four reasons based on the text and purpose of Article 2.4.2 that suggested that zeroing is prohibited in transaction-specific comparisons.

51. Tellingly, the Panel also conceded that "the result of our analysis is somewhat imperfect in terms of a logically coherent interpretation of Article 2.4.2 of the *AD Agreement*."[54] It recognized that "ideally a coherent interpretation would yield a single answer to the question whether Article 2.4.2 allows for the use of zeroing under any of the three comparison methods".[55]

52. Nonetheless, the Panel overcame all these misgivings because, it considered, "prohibiting zeroing under all comparison methods is even more problematic from the perspective of a coherent approach to the interpretation of Article 2.4.2."[56]

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[50] Panel Report, para. 7.124.
[51] Panel Report, para. 7.124.
[52] Panel Report, para. 7.125.
[53] Panel Report, para. 7.125.
[54] Panel Report, para. 7.140.
[55] Panel Report, para. 7.140.
[56] Panel Report, para. 7.126. *See also* para. 7.140.

53. However, the only alleged problem identified by the Panel was that, if zeroing were prohibited, the outcome of a W-to-T comparison under the second sentence of Article 2.4.2 "will *necessarily always* yield a result identical to that of [a W-to-W] comparison."[57] This, the Panel said, would undermine a principle of "effective treaty interpretation."[58] Thus, the Panel accepted the United States' mathematical equivalence argument, and rejected several arguments presented by Japan as to why the prohibition on zeroing neither leads to mathematically equivalent outcomes nor renders the second sentence of that provision "inutile" or "redundant".[59]

54. The Panel, therefore, found that the zeroing procedures are consistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, in original investigations under transaction-specific comparisons (i.e. T-to-T and W-to-T comparisons).[60]

(iii) Original Investigations – Article 2.4 of the *Anti-Dumping Agreement*

55. The Panel also rejected Japan's claim that the zeroing procedures are "as such" inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[61] The Panel examined this claim with respect to the use of zeroing in transaction-specific comparisons.[62]

56. The Panel properly found that the "fair comparison" requirement in the first sentence of Article 2.4 is "an independent legal obligation that is not defined exhaustively by the specific requirements set out in the remainder" of that provision.[63] The Panel also acknowledged that "'fairness' is potentially a rich concept", which can be "understood to mean that once an authority has determined the universe of transactions that it will compare it must take account of the results of all the comparisons made in respect of

[57] Panel Report, para. 7.127. Emphasis added.
[58] Panel Report, para. 7.127.
[59] Panel Report, paras. 7.127 to 7.137.
[60] Panel Report, para. 7.143.
[61] Panel Report, para. 7.161.
[62] Panel Report, paras. 7.153 ff. The Panel exercised judicial economy with respect to Japan's claim that the zeroing procedures are "as such" inconsistent with Article 2.4 when used in a W-to-W comparison in original investigations.
[63] Panel Report, para. 7.154.

those transactions and may not limit its analysis to those results that tend to support an affirmative finding of dumping."[64] Japan agrees with these sentiments, which capture the unfairness of zeroing.

57. The Panel then acknowledged that "the Appellate Body itself has made statements that could be interpreted to reflect a view that zeroing is unfair".[65] However, the Panel refused to pursue the Appellate Body's logic, noting instead that "to date the Appellate Body has never actually made a *legal finding* in a specific case that the use of zeroing is inconsistent with Article 2.4 of the *AD Agreement* on its own (i.e. as an independent legal obligation)."[66]

58. The Panel ultimately found that the concept of "fairness" "may not be interpreted in a manner that renders more specific provisions of the *AD Agreement* completely inoperative."[67] Because the Panel had found that zeroing was permitted in transaction-specific comparisons under Articles 2.4.2 and 9, zeroing must also be permitted under Article 2.4.[68] In other words, the Panel found that Article 2.4 is subject to Article 2.4.2, despite the fact that the opening clause of Article 2.4.2 states exactly the reverse, and Article 9.

(iv) Periodic and New Shipper Reviews – Articles 2.1, 2.4, 9.1, 9.2, 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994

59. The Panel held that the zeroing procedures are consistent with, among others, Articles 2.1, 2.4, 9.1, 9.2 and 9.3 in periodic reviews, and Articles 2.1, 2.4 and 9.5 in new shipper reviews, and Articles VI:1 and VI:2 in both cases.[69]

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[64] Panel Report, para. 7.155.
[65] Panel Report, para. 7.156, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 137-138.
[66] Panel Report, para. 7.157. Emphasis in original.
[67] Panel Report, para. 7.158.
[68] Panel Report, para. 7.159.
[69] Panel Report, paras. 7.216, 7.219 and 7.222. (In these findings, the Panel referred to simple zeroing procedures. As Japan explained, simple zeroing refers to the zeroing procedures used in the context of a transaction-specific comparison method. The Panel held that simple zeroing is one of the "different manifestations of a single rule or norm." Panel Report, footnote 688. *See* paragraph 39 above.)

60. The Panel recalled its earlier finding that "dumping" and "margins of dumping" need not be defined in relation to the "product" under Article 2.1 and Article VI.[70] Thus, zeroing is not prohibited by those provisions. The Panel also reiterated that it was unwilling to follow the Appellate Body's holding in *US – Zeroing (EC)* because of the Appellate Body's "limited explanation" of its findings.[71]

61. The Panel recalled its finding that Article 2.4.2 does not prohibit zeroing "outside of the context of the [W-to-W] comparison method" in an original investigation.[72] Moreover, even if Article 2.4.2 did prohibit zeroing under any comparison method in original investigations, the Panel found that Article 2.4.2 does not apply to any other anti-dumping proceedings, such as periodic and new shipper reviews. The Panel concluded, therefore, that Article 2.4.2 cannot prohibit zeroing in reviews.[73]

62. The core of the Panel's interpretation of Article 9.3 of the *Agreement* is that the determination of anti-dumping liability and "the obligation to pay an anti-dumping duty is incurred on an *importer*- and *import*-specific basis."[74] As a result, the Panel rejected Japan's argument that, in reviews, the margin of dumping must be calculated on the basis of an aggregate examination of all export transactions. Like the panel in *US – Zeroing (EC)*, the Panel expressed concern that Japan's approach could lead to the conclusion that duties could not be collected on imports by one importer whose export prices are below normal value on the grounds that the export prices from the same exporter to another importer are above normal value.[75]

63. The Panel considered the "prospective normal value" ("PNV") system referred to in Article 9.4(ii) supported its findings. The Panel noted that, under a PNV system, liability for anti-dumping duties is incurred on a transaction-specific basis "to the extent that prices of individual export transactions are below normal value".[76] The Panel

[70] Panel Report, para. 7.194.
[71] Panel Report, para. 7.195.
[72] Panel Report, para. 7.210.
[73] Panel Report, para. 7.211.
[74] Panel Report, para. 7.198. Emphasis in original.
[75] Panel Report, para. 7.199.
[76] Panel Report, para. 7.205.

concluded from these rules on the imposition of duties that "the concept of dumping can apply on a transaction-specific basis".[77] It deduced that, if the *Agreement* permits the determination of liability on the basis of the prices of individual export transactions under a prospective duty assessment system, there is no reason why the same is not true under the United States' retrospective duty assessment system.[78]

64. Although the Panel explained why, in its view, zeroing is permitted under Article 9.3, the Panel failed to state any reasons why zeroing is permitted under Article 9.5. The terms of Article 9.5 are not even summarized, far less interpreted.

65. For the reasons outlined in paragraphs 55 to 58 above, the Panel also rejected Japan's argument that the zeroing procedures are inconsistent with Article 2.4 when maintained for use in periodic and new shipper reviews. The Panel also rejected Japan's consequential claims based on other articles of the *Anti-Dumping Agreement* and the *Marrakech Agreement Establishing the World Trade Organization* ("*WTO Agreement*").

66. The Panel, therefore, rejected Japan's claims that the zeroing procedures are "as such" inconsistent with, among others, Articles 2.1, 2.4, 9.1, 9.2 and 9.3 in periodic reviews, and Article 2.1, 2.4 and 9.5 in new shipper reviews, as well as Articles VI:1 and VI:2 in both cases.[79] For the same reasons, the Panel rejected Japan's "as applied" claims regarding the USDOC's use of the zeroing procedures in the eleven periodic reviews.[80]

(v) Changed Circumstances and Sunset Reviews – Articles 2.1, 2.4, 11.2 and 11.3 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994

67. In analyzing Japan's "as such" claims regarding changed circumstances and sunset reviews, the Panel noted that Articles 11.2 and 11.3 do not require a determination of dumping in these reviews nor do they require that the authority rely on margins

[77] Panel Report, para. 7.205.
[78] The Panel went on to discuss, at length, the question whether Article 2.4.2 applies to periodic and new shipper reviews under Articles 9.3 and 9.5. The Panel concluded that it does not. Panel Report, paras. 7.210 to 7.215.
[79] Panel Report, paras. 7.216, 7.219 and 7.222.
[80] Panel Report, paras. 7.225 to 7.227.

calculated in earlier proceedings.[81] The Panel quoted the Appellate Body's statement that "'[t]he only way the use of [a WTO-inconsistent methodology for the calculation of dumping margins] would render a sunset review determination inconsistent with Article 11.3 is if the investigating authority *relied upon* that margin to support its likelihood-of-dumping or likelihood-of-injury determination.'"[82]

68. The Panel concluded that Japan had not provided a:

> … sufficient evidentiary basis to conclude that a rule or norm of general and prospective application exists by virtue of which USDOC relies on margins of dumping calculated in prior proceedings *to support* its determinations in changed circumstances reviews and sunset reviews.[83]

69. The Panel asserted that the fact that the municipal legislation (section 752(c)(1) of the Tariff Act) requires the USDOC, in sunset reviews, to "*consider*" the weighted average dumping margins calculated in the original investigation and subsequent periodic reviews "does not automatically mean that the USDOC 'relies on' margins of dumping in making its [sunset] determination . . .," nor that "such margins are part of the rationale of USDOC's determination."[84] Japan has decided not to appeal this finding.

70. Finally, the Panel considered Japan's "as applied" claims regarding two sunset reviews. For those two reviews, Japan challenged both the USDOC's likelihood of dumping determination and the USITC's likelihood of injury determination. The Panel examined the USITC's determination first, concluding that nothing in the USITC's determinations "indicates whether and how the USITC actually relied upon these margins [established using zeroing] as support for its" determination.[85] Therefore, it concluded that Japan had failed to "substantiate its assertion" that, in making its sunset

[81] Panel Report, para. 7.234.
[82] Panel Report, para. 7.235, quoting Appellate Body Report, *US – OCTG from Mexico*, para. 181.
[83] Panel Report, para. 7.240. Italics in original and underlining added.
[84] Panel Report, para. 7.242.
[85] Panel Report, para. 7.252.

determination, the USITC "actually relied upon margins calculated by the USDOC in prior proceedings."[86]

71. By contrast, the Panel concluded that there was sufficient evidence to conclude that the "USDOC did rely on margins of dumping established in prior proceedings" in making the sunset determinations.[87] However, the Panel found that the dumping margins on which the USDOC relied were calculated in periodic reviews, not original investigations. Because the Panel had already concluded that zeroing is permitted in periodic reviews, it held that the USDOC could not be found to have acted inconsistently with the *Anti-Dumping Agreement* in relying on those dumping margins in two sunset reviews.[88] The Panel, therefore, rejected Japan's "as applied" claims regarding sunset reviews.

IV. THE SCOPE OF THE APPEAL

72. On appeal, Japan claims that the Panel erred in rejecting Japan's "as such" claims regarding the zeroing procedures:

(1) in original investigations using a T-to-T comparison (Articles 2.1, 2.4 and 2.4.2, and Articles VI:1 and VI:2);

(2) in periodic reviews (Articles 2.1, 2.4, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2); and,

(3) in new shipper reviews (Articles 2.1, 2.4 and 9.5, and Articles VI:1 and VI:2).

73. Japan also claims that the Panel erred in rejecting Japan's "as applied" claims regarding the zeroing procedures in:

(1) in eleven periodic reviews, identified in Exhibits JPN-11 to JPN-21, in which the USDOC used W-to-T comparisons (Articles 2.1, 2.4, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2); and

[86] Panel Report, para. 7.254.
[87] Panel Report, para. 7.255.
[88] Panel Report, para. 7.256.

(2) in two sunset reviews, identified in Exhibits JPN-22 and JPN-23, in which the USDOC relied on dumping margins established in prior proceedings (Articles 2.1, 2.4 and 11.3, and Articles VI:1 and VI:2).

74. In its arguments, Japan, *first*, addresses the Panel's erroneous finding that the zeroing procedures are "as such" WTO-consistent in original investigations using a T-to-T comparison. *Second*, Japan examines the WTO-inconsistency of the zeroing procedures "as such" and "as applied" in periodic reviews. *Third*, Japan sets forth its claims on appeal that the zeroing procedures are "as such" WTO-inconsistent in new shipper reviews. *Fourth*, and finally, Japan outlines the Panel's errors with respect to the two "as applied" sunset reviews.

V. THE PANEL ERRED IN FINDING THAT THE ZEROING PROCEDURES ARE "AS SUCH" CONSISTENT WITH THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 IN A T-TO-T COMPARISON IN ORIGINAL INVESTIGATIONS

75. Before turning to the Panel's errors of interpretation, Japan recalls that the Panel found that the zeroing procedures are a general rule or norm that is applied by the United States "regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated."[89] Thus, the Panel found that the zeroing procedures are maintained for use by the United States in a T-to-T comparison in an original investigation.[90] The Panel, therefore, examined whether the zeroing procedures are "as such" WTO-consistent in the context of T-to-T comparisons in original investigations.

A. *The Panel Erred in the Interpretation and Application of Articles 2.1 and 2.4.2 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994*

[89] Panel Report, para. 7.53. In this respect, the Panel's factual findings on the scope of application of the "as such" measure at issue differ significantly from the findings of the panel in *US – Zeroing (EC)*. In that dispute, the panel did not find, as a matter of fact, that the zeroing procedures apply "regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated." As a result, the Appellate Body could not complete the analysis of certain claims made by the EC (*see* Appellate Body Report, *US – Zeroing (EC)*, para. 228). In this dispute, the Panel has found that the zeroing procedures apply equally to all comparison methods and in all forms of anti-dumping proceedings.

[90] *See* Panel Report, footnote 708. *See* paragraphs 38 to 40 above.

(i) Overview of the Interpretation of Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and the Articles VI:1 and VI:2 of the GATT 1994

76. Japan claims that the Panel erred in finding that zeroing is permitted in original investigations using a T-to-T comparison. Japan's claim is not in the least novel. On 15 August 2006, even before the Panel Report was circulated to Members, the Appellate Body held, in *US – Softwood Lumber V (Article 21.5 – Canada)*, that zeroing is prohibited by Article 2.4.2 in original investigations using a T-to-T comparison. This Report builds on the Appellate Body's earlier rulings regarding zeroing. In this appeal, Japan merely requests that the Appellate Body follow its own findings, including the very recent findings in *US – Softwood Lumber V (Article 21.5 – Canada)*.

77. The zeroing disputes have called for the Appellate Body to interpret the word "dumping" to assess whether a "margin of dumping" calculated using the zeroing procedures is compatible with the meaning of that term. The Appellate Body has consistently held that it is not.

78. Article 2 of the *Anti-Dumping Agreement* sets forth the "agreed disciplines" for determining "dumping" and "margins of dumping".[91] Article 2.1 defines "dumping" as follows:

> 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.)

79. This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994.[92] Moreover, Article VI:2 also defines the term "margin of dumping" by reference to the "product". On the basis of the text of Article 2.1 and Article VI, "dumping" and "margins of dumping" must be established for the product under investigation as a

[91] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[92] Appellate Body Report, *US – Softwood Lumber V*, para. 92.

whole.[93] This definition of "dumping" and "margins of dumping" applies throughout the *Anti-Dumping Agreement* for purposes of all anti-dumping proceedings.[94]

80. In *US – Zeroing (EC)*, recalling its earlier rulings in *EC – Bed Linen* and *US – Softwood Lumber V*, the Appellate Body held 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*".[95]

81. On the basis of this interpretation of Article 2.1 and Article VI:1, the Appellate Body found that in that dispute:

> … 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.[96]

82. The requirement in Article 2.1 to aggregate multiple comparison results to produce a margin of dumping for the "product" as a whole applies when an authority conducts: multiple model-specific W-to-W comparisons; multiple transactions-specific W-to-T comparisons; and multiple transaction-specific T-to-T comparisons.[97]

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[93] Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V*, paras. 92 to 93. Emphasis added. *See also* Appellate Body Report, *US – Zeroing (EC)*, paras. 125, 127, 128, 129 and 132.

[94] Appellate Body Report, *US – Zeroing (EC)*, para. 125 ("The Appellate Body stated, in *US – Softwood Lumber V*, that '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'."). The Appellate Body cited Appellate Body Report, *US – Softwood Lumber V*, para. 93 and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 108-109 and 126-127.

[95] Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V*, paras. 92 to 93. Emphasis added. *See also* Appellate Body Report, *US – Zeroing (EC)*, paras. 125, 127, 128, 129 and 132.

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

[97] Appellate Body Report, *US – Softwood Lumber V*, paras. 97 and 98 (W-to-W comparisons in original investigations); Appellate Body Report, *US – Zeroing (EC)*, para. 132 (W-to-T comparisons in periodic reviews); and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 122 (T-to-T comparisons in original investigations). For example, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body held that the extension of the "product as a whole" requirement to T-to-T comparisons under Article 2.4.2 did not involve a "dramatic departure" from its earlier rulings on the product-wide definition of "dumping". The Appellate Body noted it had "referred **generally** to the use of

83. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body found that the product-wide definition of "dumping" and "margins of dumping" in Article 2.1 and Articles VI:1 and VI:2 applies to a T-to-T comparison in an original investigation, which is the subject of this part of Japan's claims. In reaching this conclusion, the Appellate Body emphasized, on the basis of the text and grammatical construction of Article 2.4.2, that the W-to-W and T-to-T comparisons in that provision "fulfil the same function" and that they are normatively "equivalent", with both comparisons providing "alternative means for establishing 'margins of dumping'" and with no "hierarchy between them".[98] Accordingly, the Appellate Body held:

> … *the term "margins 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.[99]

84. Because the "definition of 'dumping' as contained in Article 2.1 applies to the entire Agreement",[100] the "unitary concept" of "dumping" requires that "margins of dumping" be determined for the "product" under investigation as a whole, for purposes of T-to-T comparisons under Article 2.4.2.

85. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body also stated that Article 2.4.2 indicates that transaction-specific comparison results "are *inputs* that are *aggregated* in order to establish the *margin of dumping of the product under investigation* for each exporter or producer."[101] The Appellate Body found support for

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zeroing in relation to the use of 'multiple comparisons' when it stated that, '[i]f an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole". (original emphasis and underlining; bold added) Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 114.

[98] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 93.

[99] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89. Emphasis added.

[100] Appellate Body Report, *US – Zeroing (EC)*, para. 125, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 93.

[101] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87. Emphasis added. *See also* para. 94.

this view in the text of the first sentence of Article 2.4.2.[102] The Appellate Body further held:

> … the reference to "export prices" in the plural, without further qualification, suggests that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping. In addition, the "export prices" and "normal value" to which Article 2.4.2 refers are real values, unless conditions allowing an investigating authority to use other values are met.[103]

86. The Appellate Body also reiterated in its recent Report that, when multiple comparisons are made under a W-to-W or a T-to-T comparison, the investigating authority is obliged "to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole".[104] Thus, it said, "the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'"; rather, "'margins of dumping' established under the transaction-to-transaction comparison methodology provided in Article 2.4.2 result from the aggregation of the transaction-specific comparisons".[105]

87. In reaching this conclusion in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body cited its finding in *US – Zeroing (EC)* that the prohibition on zeroing is "based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the *Anti-Dumping Agreement*."[106] In the passage that the Appellate Body cited from *US – Zeroing (EC)*, it stated:

> In *EC – Bed Linen* and *US – Softwood Lumber V*, the Appellate Body indicated that, under the *Anti-Dumping Agreement* and Article VI of the

[102] Specifically, the Appellate Body found that the reference to "export prices" in the plural and "a comparison" in the singular, and the use of the term "basis" at the end of the first sentence of Article 2.4.2 indicates that the dumping determination under a T-to-T comparison "is a multi-step exercise in which the results of transaction-specific comparisons are inputs that are aggregated …" Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87.
[103] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 88.
[104] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 89 and 114, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 98 (original emphasis). *See also* para. 88.
[105] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87.
[106] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92, citing *US – Zeroing (EC)*, para. 126.

> GATT 1994, "dumping" and "margins of dumping" must be established for the product under investigation as a whole. … The Appellate Body confirmed 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". … [The Appellate Body] stated unambiguously that "the terms 'dumping' and 'margins of dumping' in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole".[107]

88. The Appellate Body also drew on the context provided by Articles 5.8, 6.10 and 9.3 of the *Anti-Dumping Agreement*. The Appellate Body noted that the United States itself recognized – as it has done in this dispute[108] – that a dumping determination "under Article 5.8 requires aggregation" of multiple comparison results to establish a margin for the product as a whole.[109]

89. The Appellate Body considered that the obligation imposed on an authority, under Article 6.10, to establish "an individual margin of dumping" for each exporter or foreign producer, for the product, "reinforce[s] the notion that the 'margins of dumping' are the result of an aggregation".[110]

90. Further, as the Appellate Body observed, the fact that the margin of dumping serves as a ceiling on the total amount of duty under Article 9.3 "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".[111]

91. In sum, therefore, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body held that the product-wide definition of "dumping" in Article 2.1 and Article VI:1 and Article VI:2 applies to the establishment of "margins of dumping" for

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[107] Appellate Body Report, *US – Zeroing (EC)*, para. 126, citing Appellate Body Report, *US – Softwood Lumber V*, paras. 92, 93, 96, 97, 98 and 102.
[108] *See* United States' Answers to the Panel's First Set of Questions of 20 July 2005, paras. 56 and 60. *See also* Japan's Second Written Submission, paras. 49 and 50, where Japan noted that the United States' own "words are *strikingly reminiscent of the language used by the Appellate Body* to condemn zeroing in previous cases" (emphasis added).
[109] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 105.
[110] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 107.
[111] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 108.

purposes of T-to-T comparisons under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The Appellate Body adopted this interpretation on the basis of the text and context provided by Articles 2.1, 2.4.2, 5.8, 6.10 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

92. Accordingly, in the context of a T-to-T comparison in original investigations, the Appellate Body concluded that the United States' zeroing procedures are inconsistent with the requirement to determine an aggregate margin of dumping for the "product" as a whole because they mandate the systematic exclusion of negative comparison results that must be included in the aggregation process.

(ii) The Panel's Errors in Interpreting Articles 2.1 and 2.4.2, and Articles VI:1 and VI:2

93. In this dispute, the Panel erred because it found that the results of transaction-specific comparisons are "margins of dumping" for purposes of a T-to-T comparison.[112] As a result, the Panel found that the United States was permitted to disregard negative comparison results for transaction-specific comparisons in the process of calculating a margin of dumping. The Panel's errors stem from an incorrect interpretation of Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

(a) *The Panel's Errors in Finding that the "Product"-Wide Definition of "Dumping" in Article 2.1 and Article VI Does Not Apply to a T-to-T Comparison in Article 2.4.2*

94. The Panel improperly found that Article 2.1 and Article VI do not establish a "general requirement to determine dumping and margins of dumping for the product as a whole".[113] It also incorrectly found that, for purposes of T-to-T comparisons in original investigations, "dumping" and "margins of dumping" can be defined in relation to an individual export transaction the price of which is below transaction-specific normal value.[114] Thus, it held that, under a T-to-T comparison, there is no obligation on an

[112] Panel Report, para. 7.119.
[113] Panel Report, paras. 7.100-102.
[114] Panel Report, 7.119 ("Thus, in the context of the transaction-to-transaction methodology in the first sentence of Article 2.4.2 the term "margins of dumping" can be understood to mean the total amount by

authority to aggregate all multiple comparison results; instead, a margin of dumping can be established on the basis of the positive comparison results alone.[115]

95. Contrary to the Panel's findings, as set forth in Section V.A(i) above, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body concluded that, for purposes of a T-to-T comparison under Article 2.4.2, "dumping" and "margins of dumping" must be defined in relation to the "product" as a whole and that, in consequence, *all* comparison results must be aggregated to establish a margin for the product.

96. Japan addresses the following errors in the Panel's findings, which provided the basis for its erroneous rejection of the product-wide definition of "dumping" in Article 2.1 and Article VI:1. *First*, the Panel's improper reliance on the phrase "all comparable export transactions" in Article 2.4.2 in rejecting the product-wide definition of "dumping". *Second*, the alleged absence of a textual basis in Article 2.4.2 to support the product-wide definition of "dumping". *Third*, the Panel's failure to follow the interpretation provided by the Appellate Body in *US – Zeroing (EC)*.

97. *First*, the Panel rejected the product-wide definition of "dumping" in Article 2.1 because it incorrectly considered that the Appellate Body's findings in *US – Softwood Lumber V* were based entirely on the phrase "all comparable export transactions" in Article 2.4.2.[116] The Panel attached great significance to the fact that this term applies solely in the context of a W-to-W comparison (both in the case of a comparison using a single weighted average and using model-based multiple averaging), and not to the multiple comparisons in T-to-T and W-to-T comparisons.[117] For the Panel, this textual difference suggested strongly that the prohibition on zeroing applies solely in the case of W-to-W comparisons.

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which transaction-specific export prices are less than transaction-specific normal values.") *See also* para. 7.141.
[115] Panel Report, paras. 7.106 to 7.108, 7.112, 7.120 and 7.141.
[116] Panel Report, para. 7.92 and footnote 715.
[117] Panel Report, para. 7.94.

98. However, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body explained that the term "all comparable export transactions" is not applied to T-to-T comparisons under Article 2.4.2 because it is not "pertinent" to this comparison method. The reason is that, under a T-to-T comparison, export transactions are not sub-divided into "models", as they generally are in W-to-W comparisons. In light of the nature of the T-to-T comparison – in which each individual export transaction is matched up with an individual domestic market transaction – only *one* export transaction is involved in each individual comparison. The duty to include "*all* comparable" export transactions is, therefore, simply irrelevant. Accordingly, "no inference could be drawn from the fact that this phrase ["all comparable export transactions"] does not appear in relation to the transaction-to-transaction methodology".[118]

99. Furthermore, in both *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body confirmed that the prohibition on zeroing is based on the definition of "dumping" in Article 2.1, as well as the first sentence of Article 2.4.2.[119]

100. Thus, the Panel erred in finding that the wording of the first sentence of Article 2.4.2 ("all comparable export transactions") justifies limiting the product-wide definition of "dumping" to W-to-W comparisons under that provision. Instead, pursuant to Article 2.1, "dumping" is defined in relation to the "product" as a whole throughout the *Anti-Dumping Agreement*, including for purposes of T-to-T comparisons under Article 2.4.2. Thus, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body emphasized that the term "margin of dumping" has the same meaning for purposes of both W-to-W and T-to-T comparisons under that provision.[120]

101. *Second*, besides taking the view that the prohibition on zeroing was based on the phrase "all comparable export transactions", which applies to W-to-W comparisons, the Panel also contended that nothing in the text of Article 2.4.2 supported the view that "dumping" is defined in relation to the "product" as a whole, and requires an aggregation

[118] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.
[119] Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92.
[120] *See, further*, paragraph 83 above.

of all comparison results.[121] To recall, the Appellate Body's contrary interpretation was based on the text and context provided by Articles 2.1, 2.4.2, 5.8, 6.10 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994. In particular, referring to the T-to-T comparison method in Article 2.4.2, the Appellate Body found:

> The reference to "export prices" in the plural suggests that the comparison will generally involve multiple transactions, as was the case in the anti-dumping investigation before us. At the same time, the reference to "a comparison" in the singular suggests an overall calculation exercise involving aggregation of these multiple transactions. The transaction-specific results are mere steps in the comparison process. This tallies with the term "basis" at the end of the sentence, which suggests that these individual transaction comparisons are not the final results of the calculation, but, rather, are inputs for the overall calculation exercise.[122]

102. Thus, there is a textual basis for the product-wide definition of "dumping" and "margins of dumping" in the context of T-to-T comparisons in Article 2.4.2.

103. *Third*, Japan is extremely disappointed that the Panel wilfully disregarded the Appellate Body's product-wide definition of "dumping",[123] compelling Japan to bring this appeal and further delaying the resolution of the dispute. In Japan's view, the Panel failed to attach sufficient importance to the systemic values of security and predictability that Article 3.2 of DSU requires panels to promote.[124] The Panel's reasons for ignoring the Appellate Body's interpretation are surprising and do not withstand scrutiny.

104. The Panel professed "difficulty" in understanding the phrase "multiple comparisons … at an intermediate stage" that was sometimes used by the Appellate Body in the Reports in which it held that zeroing is prohibited.[125] There is nothing, in the least, "difficult" about the meaning of this phrase. Indeed, even the United States used a very

[121] Panel Report, para. 7.119.
[122] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87, *See also* paras. 88 and 89.
[123] Panel Report, 7.99.
[124] Japan recalls, in this connection, the Appellate Body's statement that "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". Appellate Body Report, *US – OCTG from Argentina*, para.188.
[125] Panel Report, 7.100.

similar formulation to describe its own argument regarding the proper interpretation of Article 5.8.[126]

105. The Appellate Body's allegedly "difficult" phrase refers to situations where an authority conducts a number of comparisons between normal value and export price on a transaction-specific or a model-specific basis before aggregating the results of those comparisons to produce a single, overall margin of dumping for the product under investigation.

106. As the Appellate Body noted, the established nature of its phrase is reflected in the *Anti-Dumping Handbook*, prepared by the WTO Secretariat, which indicates that:

> … when there is more than one export transaction subject to the investigation, multiple comparison results under the [T-to-T] comparison methodology are aggregated in order to arrive at "one margin of dumping for the subject product."[127]

107. Japan believes that the *Anti-Dumping Handbook* should be used by panels and the Appellate Body with great caution because it simply reflects the views of the WTO Secretariat. However, the terminology in the *Handbook* demonstrates that it is widely understood that, in a T-to-T comparison, multiple comparisons are made at an intermediate stage, and that the results of those comparisons must be aggregated to produce "an *individual* margin of dumping", as required by Article 6.10 of the *Anti-Dumping Agreement*.

108. The Panel also appeared to believe that the prohibition on zeroing does not apply if a Member adopts a comparison methodology that, viewed in isolation, requires multiple comparisons.[128] This is because, in some Reports, the Appellate Body has referred to situations in which Members "choose" to make multiple comparisons at an

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[126] *See* United States' Answers to the Panel's First Set of Questions of 20 July 2005, para. 56 ("Article 5.8 provides for an *obligation to aggregate the results of multiple comparisons* for the specific purpose of determining whether the margin of dumping is *de minimis*." Emphasis added)
[127] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, footnote 136 (quoting J. Czako, J. Human and J. Miranda, *A Handbook on Anti-Dumping Investigations* (WTO, 2003), pp. 127-130). Emphasis added.
[128] Panel Report, para. 7.100.

intermediate stage and has held that the prohibition on zeroing applies in that event.[129] However, it is absurd to suggest that an investigating authority's unilateral "choice" of comparison method affords Members a convenient vehicle to circumvent the definition of "dumping" and the prohibition on zeroing.

109. Under the first sentence of Article 2.4.2, Members can *always* choose between the W-to-W and T-to-T comparison methods. Further, in *US – Softwood Lumber V*, the Appellate Body recognized that, in undertaking a W-to-W comparison, an investigating authority "may choose to divide the product under investigation into product types or models".[130] Thus, under the first sentence of Article 2.4.2, the authority's choice of comparison methods includes: a *single* W-to-W comparison; *multiple* model-specific W-to-W comparisons; and *multiple* T-to-T comparisons. The Appellate Body's formulation merely recognizes that an authority enjoys a measure of discretion in structuring its comparisons. The fact that Members rarely choose to conduct a single W-to-W comparison, with no multiple comparisons, does not diminish the fact that this option exists.

110. By referring to an authority's right to "choose" the comparison method, the Appellate Body did not mean that Members can choose whether to apply the uniform definition of "dumping" in the *Anti-Dumping Agreement* and the GATT 1994. To the contrary, a Member has no choice but to respect the multilateral definition of "dumping" and "margin of dumping" in the covered agreements.

111. In any event, the Appellate Body has not always used a formulation that could, even arguably, suggest that the prohibition on zeroing is dependent on the authority's "choice" to make multiple comparisons. For example, in the sentence quoted from *US – Zeroing (EC)* in paragraph 81 above, the Appellate Body did not refer to the authority's

[129] *See, for example*, Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[130] Appellate Body Report, *US – Softwood Lumber V*, para. 80.

choice.[131] Instead, it indicated that, *whenever* ("if") multiple model- or transaction-specific comparisons are made, "dumping" and the "margin of dumping" must be established for the "product" as a whole by aggregating the results of all comparisons.

112. Japan submits, for these reasons, that the Panel erred in its interpretation of Article 2.1 and 2.4.2, and Articles VI:1 and VI:2, because it found that "dumping" and "margins of dumping" can be defined in relation to individual export transactions in the context of transaction-specific comparisons. As a result, the Panel improperly found that the zeroing procedures are "as such" consistent with these provisions when maintained for use in a T-to-T comparison in original investigations.

(b) *The Panel's Further Errors Under Article 2.4.2*

113. The Panel also committed other errors in its misinterpretation of Article 2.4.2 of the *Anti-Dumping Agreement*. It set out its basic interpretive goal as being to provide an "internally coherent" and "harmonious" interpretation of Article 2.4.2.[132] In Japan's view, the Panel failed to achieve its goal.

114. The Panel acknowledged that, arguably, "it is illogical" to interpret Article 2.4.2 to prohibit zeroing under a W-to-W comparison, but permit it under a T-to-T comparison.[133] Yet, despite the avowed importance of coherence and harmony, the Panel reached the conclusion that the first sentence of Article 2.4.2 must be interpreted in this "illogical" and incoherent fashion.

115. The need for a "harmonious" interpretation of Article 2.4.2 also animated the reasoning of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*. However, as outlined above, the Appellate Body reached the opposite conclusion from the Panel. It noted that:

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[131] Appellate Body Report, *US – Zeroing (EC)*, para. 127. ("Therefore, *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." Emphasis added.)
[132] Panel Report, paras. 7.115 to 7.117.
[133] Panel Report, para. 7.123. Emphasis added.

> Given that the two [W-to-W and T-to-T] methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, 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.[134]

Thus, under a "coherent" interpretation of Article 2.4.2, zeroing is prohibited under both a W-to-W and a T-to-T comparison in original investigations.

116. The Panel adopted its "illogical" approach because it misinterpreted the second sentence of Article 2.4.2 and because it incorrectly accepted the United States' argument that, "[i]f zeroing is prohibited in the case of the [W-to-T] comparison [under the second sentence of Article 2.4.2], the use of this method will *necessarily always* yield a result identical to that of a[] [W-to-W] comparison" under the first sentence.[135] The Panel refused to accept a number of reasons presented by Japan explaining why the two comparison methods would not "necessarily always" yield the same outcomes in the absence of zeroing.[136]

117. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body decisively rejected the arguments on which the Panel relied in concluding 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."[137] *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 … ."[138]

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[134] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[135] Panel Report, para. 7.127. Emphasis added.
[136] Panel Report, paras. 7.128 – 7.137.
[137] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[138] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.

118. *Third*, the Appellate Body noted that "there is considerable uncertainty regarding how precisely the third methodology 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."[139] As the Appellate Body noted, Japan and others have "suggested that the weighted average-to-transaction methodology could be applied only to the pattern of exports transactions that have prices that differ significantly among different purchasers, regions, or time periods."[140] 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".[141]

119. *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.[142]

120. 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

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[139] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98.
[140] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98. *See, further,* Japan's Third Participant's Submissions in *US – Zeroing (EC)*, paras. 187 to 194, and in *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 52 to 61, which sets forth, in detail, Japan's interpretation of the second sentence of Article 2.4.2. Japan adopts those passages into this submission.
[141] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98.
[142] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

would produce the same results."[143] The Appellate Body, therefore, found that the concerns regarding "mathematical equivalence" were unwarranted.[144]

121. For these reasons, Japan submits that the Panel's reliance on the United States' mathematical equivalence argument is also 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 do not necessarily produce identical outcomes. As the Appellate Body found in *US – Softwood Lumber V (Article 21.5 – Canada)*, the general prohibition of zeroing does not render the second sentence of Article 2.4.2 inutile.

122. Accordingly, because of its improper reliance on the mathematical equivalence argument, the Panel incorrectly interpreted Article 2.4.2 as permitting zeroing in a T-to-T comparison. Instead, as the Appellate Body held in *US – Softwood Lumber V (Article 21.5 – Canada)*, "Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the transaction-to-transaction comparison methodology."[145]

(iii) The Zeroing Procedures are "As Such" Inconsistent with Articles 2.1 and 2.4.2 and Articles VI:1 and VI:2 in a T-to-T Comparison in an Original Investigation

123. The zeroing procedures are a general rule or norm that mandates a violation of the *Anti-Dumping Agreement* and the GATT 1994 in T-to-T comparisons in original investigations. Under the zeroing procedures, the USDOC systematically disregards negative intermediate comparison results in calculating the total dumping amount for purposes of the dumping determination and, thus, fails to determine a margin of dumping for the product as a whole.[146]

[143] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.
[144] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100.
[145] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122.
[146] These are the same procedures that were used by the USDOC in the administrative reviews that were in dispute in *US – Zeroing (EC)*, in which the Appellate Body explained: "If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison." Appellate Body Report, *US – Zeroing (EC)*, para. 133.

124. Therefore, the zeroing procedures are "as such" inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when maintained for use in T-to-T comparisons in original investigations. In that regard, the reasoning that led the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* to conclude that the *application* of the zeroing procedures in this situation is WTO-inconsistent leads inescapably to the conclusion that the zeroing procedures themselves are "as such" WTO-inconsistent. There is no rational basis for considering otherwise. The Panel erred in reaching the opposite conclusion.

(iv) Conclusion on Articles 2.1 and 2.4.2 and Articles VI:1 and VI:2

125. For the foregoing reasons, Japan submits that the Panel erred in concluding that the zeroing procedures are "as such" consistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when maintained for use in T-to-T comparisons in original investigations. Japan requests that the Appellate Body reverse the Panel's findings and find, instead, that the United States acted inconsistently with these provisions by maintaining the zeroing procedures for use in T-to-T comparisons in an original investigation.

B. *The Panel Erred in the Interpretation and Application of Article 2.4 of the Anti-Dumping Agreement*

126. The Panel also found that the zeroing procedures are "as such" consistent with Article 2.4 of the *Anti-Dumping Agreement* when maintained for use in an original investigation under a T-to-T comparison. As outlined in paragraphs 55 to 58 above, the basis for the Panel's finding was that "the somewhat indeterminate standard of fairness underlying the 'fair comparison' requirement [of Article 2.4] may not be interpreted in a manner that renders more specific provisions of the *AD Agreement* completely inoperative."[147]

127. Because the Panel had found that zeroing was generally permitted under Article 2.4.2 (except under a W-to-W comparison), and also under Article 9, the Panel found that

[147] Panel Report, para. 7.158.

zeroing must also be permitted under Article 2.4.[148] Thus, the Panel interpreted the general requirement of fairness in Article 2.4 as being subject to the "more specific provisions" of Articles 2.4.2 and 9. Moreover, the Panel's findings under Article 2.4 are premised on the Panel's erroneous view that zeroing is permitted in transaction-specific comparisons under Articles 2.4.2 and 9.

128. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body addressed the fairness of the United States' zeroing procedures under Article 2.4. The zeroing procedures at issue in that dispute are the same as those at issue in the current dispute. Indeed, Japan relied on the Section 129 Determination in *US – Softwood Lumber V (Article 21.5 – Canada)* as evidence of the existence and use of the zeroing procedures.[149]

129. Like the Panel in this dispute, the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* ruled that zeroing was "fair" under Article 2.4 because it was permitted under the "more specific provisions of Article 2.4.2".[150] The Appellate Body disagreed, stating:

> Apparently, the Panel considered Article 2.4.2 as *lex specialis*. This, however, is not a correct representation of the relationship between the two provisions. Rather, the introductory clause to Article 2.4.2 expressly makes it "[s]ubject to the provisions governing fair comparison" in Article 2.4.[151]

130. Thus, like the panel in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Panel in this dispute misinterpreted the relationship between Articles 2.4 and 2.4.2. Both panels turned the analysis on its head by finding that the "fair comparison" requirement in Article 2.4 is governed by Article 2.4.2. The Panel should have commenced its analysis under Article 2.4, not under Article 2.4.2.

[148] Panel Report, para. 7.159.
[149] Exhibit JPN-24.
[150] Panel report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.75.
[151] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 136.

131. The Panel also considered that zeroing must be permitted under Article 2.4 because it is permitted in periodic reviews under Article 9.[152] By way of reasoning, the Panel referred to its findings on the permissibility of zeroing in those reviews. As explained more fully in Section VI.A, the Panel's findings on that issue are wrong. As the Appellate Body found in *US – Zeroing (EC)*, zeroing is not permitted in periodic reviews. As the *chapeau* of Article 9.3 states, margins of dumping must be established consistently with Article 2, including Article 2.4. Thus, the Panel erred in finding that Article 2.4 is subject to Article 9.

132. Turning to the fairness of zeroing under Article 2.4, the Appellate Body noted, in *US – Softwood Lumber V (Article 21.5 – Canada)*, that "[t]he term 'fair" is generally understood to connote impartiality, even-handedness, or lack of bias."[153] It then identified three grounds on which the use of the zeroing procedures in T-to-T comparisons "is difficult to reconcile" with the requirements of fairness.[154] These were:

- *First*, the use of zeroing "distorts the prices of certain transactions because export transactions made at prices above normal value are not considered at their real value. The prices of these export transactions are artificially reduced . . . ."[155]

- *Second*, the use of zeroing in T-to-T comparisons, as already found in W-to-W comparisons, "tends to result in higher margins of dumping." The Appellate Body went on to quote its decision in *US – Corrosion-Resistant Steel Sunset Review*, which stated that "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."[156]

- *Third*, the Appellate Body noted the argument raised by Japan and others that zeroing in T-to-T (and also W-to-T) comparisons is even more pernicious than in W-to-W comparisons. This is because, under a W-to-W comparison, the comparison result for a given model reflects the averaging of export prices that are both *above and below* normal value. Thus, the total dumping amount is "moderated" by the inclusion in the model concerned of export transactions that

[152] Panel Report, para. 7.159.
[153] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.
[154] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.
[155] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 139.
[156] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 140, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

> are higher priced than normal value.[157] "In contrast, the application of zeroing under the [T-to-T or W-to-T] comparison methodology excludes *ab initio* the results of all the comparisons in which the export prices are above normal value."[158] Thus, the dumping determination does not reflect *any* of the export transactions that are higher priced than normal value.

133. In conclusion, the Appellate Body found that:

> … the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased.[159]

The Appellate Body, therefore, held that the United States had violated Article 2.4 by using the zeroing procedures in a T-to-T comparison in an original investigation.

134. Japan finds further support for the Appellate Body's conclusion that zeroing is unfair in the salient features of the zeroing procedures. Under the zeroing procedures, the United States makes an initial comparison for all comparable export transactions, but in aggregating the comparison results into an overall margin, it includes solely the positive comparison results, disregarding negative results. However, the dumping determination resulting from this "partial" comparison of selected transactions is then applied to all export transactions on a product-wide basis for purposes of: an injury determination; deciding whether to terminate or pursue an investigation; justifying the imposition of duties; and assessing the amount of duties due.[160] In light of these features, the "partial" comparison that occurs pursuant to the zeroing procedures is "inherently biased" and not "fair".

135. For all these reasons, the maintenance of the zeroing procedures is "as such" inconsistent with Article 2.4. The Panel's finding to the contrary must be reversed, and the Appellate Body should find, instead, that the United States acts inconsistently with

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[157] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 141.
[158] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 141.
[159] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 142 and 146.
[160] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

Article 2.4 by maintaining the zeroing procedures for use in original investigations under a T-to-T comparison.

C. *Conclusion on the Zeroing Procedures "As Such" in T-to-T Comparisons in Original Investigations*

136. For the reasons set forth in this Section, the Appellate Body should reverse the Panel's findings that the zeroing procedures are "as such" consistent with Articles 2.1, 2.4, 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when maintained for use in T-to-T comparisons in original investigations,[161] and find, instead, that the United States violates these provisions by maintaining the zeroing procedures for use in those circumstances.[162]

VI. THE PANEL ERRED IN FINDING THAT THE ZEROING PROCEDURES ARE "AS SUCH" CONSISTENT WITH THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 IN PERIODIC REVIEWS

137. Japan recalls that the Panel found that "the evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or duty assessment rates."[163] Thus, in light of the evidence, the Panel concluded that the zeroing procedures are a rule or norm applied by the United States "regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated."[164] The Panel, therefore, found that the zeroing procedures are maintained for use by the

[161] Panel Report, para. 7.259(a).
[162] On appeal, Japan does not pursue its claims on this issue regarding Articles 1, 3.1, 3.2, 3.3, 3.4, 3.5, 5.8 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.
[163] Panel Report, para. 7.50.
[164] Panel Report, para. 7.53. In this respect, the Panel's factual findings on the scope of application of the "as such" measure at issue differ significantly from the findings of the panel in *US – Zeroing (EC)*. In that dispute, the panel did not find, as a matter of fact, that the zeroing procedures apply "regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated." As a result, the Appellate Body could not complete the analysis of certain claims made by the EC (*see* Appellate Body Report, *US – Zeroing (EC)*, para. 228). In this dispute, the Panel has found that the zeroing procedures apply equally to all comparison methods and in all forms of anti-dumping proceedings.

United States in a W-to-T comparison in periodic reviews. However, the Panel found that the zeroing procedures are "as such" WTO-consistent in that situation.[165]

A. *The Panel Erred in the Interpretation and Application of Articles 2.1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994*

(i) Overview of the Interpretation of Articles 2.1, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and the Articles VI:1 and VI:2 of the GATT 1994

138. Japan claims that the Panel erred in interpreting and applying Articles 2.1, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 by finding that the zeroing procedures are permitted in periodic reviews. Again, Japan's claim is not novel because, in *US – Zeroing (EC)*, the Appellate Body held that zeroing is prohibited in this situation by Article 9.3 and Article VI:2.[166]

139. The *chapeau* of Article 9.3 of the *Anti-Dumping Agreement*, which governs periodic reviews, 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 equal to or less than the margin of dumping. Further, under Article 9.2, anti-dumping duties are collected in "appropriate" amounts when the amount does not exceed the margin of dumping.

140. As a result of these provisions, 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

[165] Panel Report, paras.7.216, 7.219, 7.222 and 7.259 (b). (In these findings, the Panel referred to simple zeroing procedures. As Japan explained, simple zeroing refers to the zeroing procedures used in the context of a transaction-specific comparison method. The Panel held that simple zeroing is one of the "different manifestations of a single rule or norm." Panel Report, footnote 688. *See* paragraph 39 above.)
[166] Appellate Body Report, *US – Zeroing (EC)*, para. 263(a)(i).

> be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.[167]

The Appellate Body, therefore, recognizes that the "margin of dumping" and the amount of anti-dumping duty imposed are independent concepts, with the magnitude of the former serving as a constraint on the total amount of the latter.

141. The express reference to Article 2 in the chapeau of Article 9.3 includes, among others, Article 2.1. As noted above, Article 2.1 defines "dumping" for purposes of the entire *Anti-Dumping Agreement* in relation to the "product" under investigation as a whole. In *US – Zeroing (EC)*, the Appellate Body made an explicit interpretive connection between the "product as a whole" requirement of Article 2.1 and dumping determinations 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*'.[168]

142. Accordingly, the Appellate Body continued, "[i]f the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others".[169] Thus, for purposes of periodic reviews, the investigating authority must aggregate all multiple comparison results to establish a margin of dumping for the "product" under investigation as a whole. The Appellate Body further held that it is required to compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign

[167] Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[168] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99. Emphasis added.
[169] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99. *See also* para. 132 in the context of the United States' W-to-T comparisons in periodic reviews, where the Appellate Body said the same thing.

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.[170]

143. The Appellate Body rejected the United States' argument that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer- or an import-specific basis.[171] In so doing, the Appellate Body relied on Article 6.10 of the *Anti-Dumping Agreement* as context. That provision requires an authority to calculate "*an individual margin of dumping* for each known *exporter or producer* concerned of the product under investigation." Article 6.10, therefore, precludes the calculation of a margin of dumping for each individual import; and it also requires that margins be calculated for exporters and foreign producers, not importers.[172]

144. 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 (EC)*,

> 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.[173]

145. However, the Appellate Body also recognized that neither the *Anti-Dumping Agreement* nor the GATT 1994 prevents Members from *assessing* duties on an import- or importer-specific basis, provided that the total amount of duties levied does not exceed the margin of dumping for the "product", for the exporter or foreign producer.[174]

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[170] Appellate Body Report, *US – Zeroing (EC)*, para. 132.
[171] Appellate Body Report, *US – Zeroing (EC)*, para. 128. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body also concluded that "the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'" (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87).
[172] Appellate Body Report, *US – Zeroing (EC)*, para. 128.
[173] Appellate Body Report, *US – Zeroing (EC)*, para. 129.
[174] Appellate Body Report, *US – Zeroing (EC)*, para. 130.

146. As noted above, in periodic reviews, the United States calculates: (1) a margin 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 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. In both cases, the United States applies the zeroing procedures as part of its dumping determination.

147. In light of its interpretation of Article 9.3 and Article VI:2, in conjunction with other relevant provisions including Article 2.1 and Articles 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".[175] Accordingly, the Appellate Body concluded that "the zeroing methodology … is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994."[176]

(ii) The Panel's Errors in Interpreting Articles 2.1, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2

148. Regrettably, the Panel declined to follow the Appellate Body's reasoning and findings in *US – Zeroing (EC)*,[177] even though that dispute involved exactly the same legal issue that confronted the Panel with respect to zeroing in periodic reviews. The Panel concluded that the United States' zeroing procedures are WTO-consistent, when the Appellate Body had already found that they were not. Japan has already addressed the Panel's erroneous reasons for disregarding an adopted Appellate Body Report.[178]

[175] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[176] Appellate Body Report, *US – Zeroing (EC)*, para. 133. In that dispute, the EC did not pursue claims under Article 2.1 and Article VI:1.
[177] Panel Report, para. 7.195.
[178] *See* paragraphs 102 to 107 above.

149. Leaving aside that failure to follow the Appellate Body, the Panel erred in interpreting Article 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 to mean that zeroing is permissible in periodic reviews.

150. The essence of the Panel's mistake was, again, its finding that these provisions do not require an authority "to determine dumping and margins of dumping for the product as a whole".[179] In support of its erroneous interpretation, the Panel recalled its incorrect interpretation that Article 2.1, and Articles VI:1 and VI:2, permit "dumping" to be defined in relation solely to those export transactions for which export price is below normal value, to the exclusion of those that are priced higher than normal value.[180] In Section V.A(ii), Japan explained the Panel's errors in interpreting these provisions.

151. The Panel also offered two reasons "specific to Article 9" for its interpretation of that provision.[181] *First*, the Panel concluded that, under Article 9, "the obligation to pay an anti-dumping duty is incurred on an *importer*- and *import*-specific basis."[182] The Panel concluded that the importer- and import-specific character of duty imposition and collection must be taken into account in interpreting the term "margin of dumping".[183] This is incorrect.

152. On the Panel's approach, the rules governing the determination of margins of dumping are made to depend upon the rules on the imposition of duties: because *duties* are imposed on importers and specific imports, *margins of dumping* can be determined on the same basis.

153. Like the panels in *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)*, this Panel thereby misunderstands the distinction between the margin of dumping and the amount of duties imposed on importation. As noted in paragraph 140 above, these are independent concepts, with the former serving as a "ceiling" for the

[179] Panel Report, para. 7.196.
[180] Panel Report, 7.194.
[181] Panel Report, para. 7.196.
[182] Panel Report, para. 7.198. Emphasis in original.
[183] Panel Report, para. 7.199.

maximum amount of the latter. The rules governing the "determination of dumping" in Article 2 are, therefore, separate and distinct from the rules on the "imposition and collection" of duties in Article 9.[184]

154. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body explained 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.[185] However, the manner in which a Member chooses to impose and collect duties under Article 9 does not alter the uniform definition of "dumping" in Article 2.1 and Article VI:1.

155. Although duties may be imposed on and collected from *importers*, margins of dumping are determined for *foreign exporters or producers*. Under Article VI:2 and Article 11.1, anti-dumping duties may be imposed "to counteract *dumping*", which arises because of a "foreign producer's or exporter's pricing behaviour", and not that of an importer.[186] Thus, contrary to the Panel's findings, "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."[187] The Panel, therefore, erred in finding that margins of dumping, under Article 9.3, are determined on an importer- or import-specific basis.

156. *Second*, the Panel improperly considered that the PNV system referred to in Article 9.4(ii) of the *Anti-Dumping Agreement* provided "important contextual support"

[184] *See* the respective titles of Articles 2 and 9 of the *Anti-Dumping Agreement*. *See also* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 123 and 124.
[185] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.
[186] Appellate Body Report, *US – Zeroing (EC)*, para. 129. *See also* para. 144 above.
[187] Appellate Body Report, *US – Zeroing (EC)*, para. 129.

for its view that Article 9.3 does not require "an aggregate examination of export prices".[188] It found that:

> [u]nder such a system, the amount of liability for payment of anti-dumping duties is determined at the time of importation on the basis of a comparison between the prices of *individual* export transactions and the [PNV]. Under this system, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payment of anti-dumping duties.[189]

157. Again, the Panel took the view that the rules in Article 9 on the imposition and collection of duties govern the rules in Article 2 on the determination of dumping. Specifically, it held that:

> Nothing in the text of Articles 9.3 and 9.4 indicates that, as implied by Japan's interpretation, if an anti-dumping duty has been collected on a particular transaction in which the export price is below the prospective normal value, authorities must subsequently re-assess the amount of that duty by calculating a margin of dumping that reflects prices of other export transactions, including prices of export transactions that are higher than the normal value.[190]

158. This line of reasoning, again, conflates the distinct concepts of the "*amount* of anti-dumping *duty*" and the "*margin* of *dumping*".[191] As the Appellate Body observed in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Panel "confuses duty collection at the time of importation with the determination of the final margin of dumping and assessment of final duties in administrative reviews."[192] The Panel's findings also contradict the views expressed by the Appellate Body in *US – Zeroing (EC)* that, under Article 9.3, an authority must:

> … compare the anti-dumping *duties collected on all entries* of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's *margin of dumping for the product as a whole*.[193]

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[188] Panel Report, para. 7.200.
[189] Panel Report, para. 7.201. Emphasis added.
[190] Panel Report, para. 7.203.
[191] *See* paras. 153 to 155 above.
[192] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.
[193] Appellate Body Report, *US – Zeroing (EC)*, para. 132. Emphasis added.

159. The Appellate Body added that, when multiple comparisons are made in a periodic review in a retrospective assessment system, the results of all comparisons must be aggregated to establish the margin of dumping for the product as a whole.[194] The Appellate Body reached a similar conclusion in *US – Softwood Lumber V (Article 21.5 – Canada)* regarding the refund of duties under a prospective assessment system.[195]

160. Thus, under any system of duty imposition, the amount of duties imposed on entries of a product is *not* a "margin of dumping" for those entries, and vice versa. Rather, as the Appellate Body held in *US – Zeroing (EC)*, the "margin of dumping" determined for the product operates as an independent "ceiling" on the total amount of anti-dumping duties that can be levied on the entries of the product from a given exporter or foreign producer.[196]

161. The Panel, therefore, erred in finding that the imposition of duties on individual import transactions constitutes the determination of a margin of dumping for those transactions, and it incorrectly examined the broader contextual implications of Article 9 of the *Anti-Dumping Agreement* in the context of a PNV system.[197]

(iii) The Zeroing Procedures are "As Such" Inconsistent with Articles 2.1, 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2 in a Periodic Review

162. Unlike the panel in *US – Zeroing (EC)*, the Panel in this dispute found that the evidence before it demonstrated that the zeroing procedures apply "whenever USDOC calculates margins of dumping or duty assessment rates."[198] As a result, the Panel found that the zeroing procedures "are as such capable of being challenged as a measure,

[194] Appellate Body Report, *US – Zeroing (EC)*, para. 132.
[195] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112. In footnote 182 of that Report, the Appellate Body recalled that "*the aggregation of the results of multiple comparisons*" might result in a negative value for a given importer. However, authorities would not be required to compensate the importer "for the amount of that negative value". This reasoning "is equally applicable" to retrospective and prospective duty assessment systems.
[196] Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[197] The Panel also discussed in some detail the question whether Article 2.4.2 applied to periodic reviews, and reached the conclusion that it does not. Panel Report, paras. 7.211 – 7.215. Japan did not take any position on the issue of the applicability of Article 2.4.2 to periodic review during the Panel proceedings. Because the issue does not affect the outcome of this dispute, Japan does not appeal the Panel's findings.
[198] Panel Report, paras. 7.50 and 7.53.

independently of the application of zeroing in specific instances."[199] Thus, although the Appellate Body could not complete the analysis in *US – Zeroing (EC)*, in this dispute it can.[200] Japan requests that, in the interests of prompt resolution of the dispute, the Appellate Body should do so.[201]

163. The reasoning that led the Appellate Body in *US – Zeroing (EC)* to conclude that the *application* of the zeroing procedures in periodic reviews was inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 leads inescapably to the conclusion that the procedures are themselves "as such" WTO-inconsistent when maintained for use in periodic reviews. There is no rational basis for considering otherwise and the Panel erred in reaching the opposite conclusion.

164. To recall, in *US – Zeroing (EC)*, the Appellate Body held that, under Article 9.3,

> … investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter.[202]

165. To ensure that this rule is respected, "it is necessary to compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole", aggregating the results of all model- or transaction-specific comparisons that are made.[203] The Appellate Body emphasized that:

> … if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that *an investigating authority* can establish margins of dumping for the product as a whole. Therefore,

[199] Panel Report, paras.7.59.
[200] *See, in contrast*, Appellate Body Report, *US – Zeroing (EC)*, para. 228.
[201] Japan notes that, on 2 October 2006, the EC sought consultations with the United States in yet another zeroing dispute (WT/DS350/1). Because the Appellate Body could not, in DS294, complete the analysis of the EC's "as such" claims on the permissibility of the zeroing procedures in periodic reviews, the EC claims, among others, that the United States' maintenance of the zeroing procedures for use in periodic reviews is WTO-inconsistent.
[202] Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[203] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

> the margin of dumping with which the assessed anti-dumping duties *have to be compared* under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are *foreign producers' or exporters' margins of dumping that reflect the results of all of the multiple comparisons carried out at an intermediate stage of the calculation*.[204]

166. Thus, in a duty assessment review under Article 9.3, to meet these requirements, an authority must: (1) calculate a "margin of dumping" for the "product" as a whole for a given foreign exporter or producer; and (2) ensure that the total amount of duties imposed does not exceed the margin of dumping calculated under (1).

167. The United States violates these requirements because of the zeroing procedures. *First*, although the United States purports to determine an exporter-specific dumping margin, it fails to do so for the "product" as a whole because of the zeroing procedures. As is very well known, under these procedures, in aggregating the results of multiple W-to-T comparisons to produce an overall margin, all negative results are systematically disregarded. In consequence, the total amount of dumping is overstated by the amount of excluded negative values.

168. Thus, in periodic reviews, the United States never determines a "margin of dumping" for exporters and foreign producers consistently with the definition of "dumping" in Article 2.1 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994. In consequence, the United States fails to establish the proper "ceiling" for the total amount of duties that may be imposed under Articles 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2.

169. The United States also violates the *second* requirement identified in paragraph 166 because it fails to compare the total amount of duties collected with the foreign exporter's or producer's margin of dumping for the "product" as a whole. The United States assesses definitive duties on an *importer-specific* basis. As the Appellate Body noted in *US – Zeroing (EC)*, the USDOC proceeds as follows:

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

> … for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison.[205]

170. In consequence, in *US – Zeroing (EC)*, the Appellate Body found that:

> … 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 under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

171. As the Appellate Body held, because the excluded negative comparison results would reduce the level of the margin, the zeroing procedures result in the USDOC collecting more definitive anti-dumping duties than it would absent zeroing.[206]

172. Thus, the United States fails to ensure that the total amount of duties imposed on all entries of a product from a given exporter or foreign producer, for all importers concerned, does not exceed the margin of dumping for the product as a whole for the exporter or producer. Consequently, the United States does not respect for the limitations in Articles 9.1, 9.2 and 9.3, and Articles VI:1 and VI:2, on the total amount of duties that may be imposed.

(iv) Conclusion on Articles 2.1, 9.1, 9.2 and 9.3 and Articles VI:1 and VI:2

173. For the foregoing reasons, Japan submits that the Panel erred in concluding that the zeroing procedures are "as such" consistent with Articles 2.1, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when

[205] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[206] Appellate Body Report, *US – Zeroing (EC)*, para. 133.

maintained for use in periodic reviews. Japan requests that the Appellate Body reverse the Panel's findings and find, instead, that the United States acted inconsistently with these provisions by maintaining the zeroing procedures for use in periodic reviews.

B. *The Panel Erred in the Interpretation and Application of Article 2.4 of the Anti-Dumping Agreement*

174. The Panel also found that the zeroing procedures are "as such" consistent with Article 2.4 of the *Anti-Dumping Agreement* when maintained for use in periodic reviews. In reaching this conclusion, the Panel referred to the reasons it gave in finding that zeroing procedures do not violate Article 2.4 in a T-to-T comparison in the context of an original investigation.[207]

175. In Section V.B, Japan explained that the Panel erred in its interpretation and application of Article 2.4 in examining Japan's claims regarding T-to-T comparisons in original investigations. Japan submits that these same errors, as described in that Section, taint the Panel's findings regarding Article 2.4 in the context of periodic reviews. Accordingly, Japan requests that the Appellate Body reverse the Panel's findings that the zeroing procedures are "as such" consistent with Article 2.4 of the *Anti-Dumping Agreement* and, instead, find that the United States acted inconsistently with this provision by maintaining these procedure for use in periodic reviews.

C. *Conclusion on the Zeroing Procedures "As Such" in Periodic Reviews*

176. For the reasons set forth in this Section, the Appellate Body should reverse the Panel's findings that the zeroing procedures are "as such" consistent with Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 when maintained for use in periodic reviews,[208] and find, instead, that the

[207] Panel Report, para. 7.218.
[208] Panel Report, para. 7.259(b).

United States violates these provisions by maintaining the zeroing procedures for use in those circumstances.[209]

VII. THE PANEL ERRED IN FINDING THAT THE ZEROING PROCEDURES AS APPLIED IN ELEVEN PERIODIC REVIEWS ARE CONSISTENT WITH THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994

177. Japan also challenges the application of the zeroing procedures in the eleven periodic reviews identified in Exhibits JPN-11 to JPN-21.[210] The Panel found that the USDOC's application of the zeroing procedures in these periodic reviews was WTO-consistent.[211] In support of its findings, the Panel merely referred to "the reasons explained in the previous section" in which it found that the zeroing procedures were "as such" consistent with WTO law in periodic reviews.[212] In Section VI, Japan explained that the Panel's findings on this issue are vitiated by legal error.

178. For the same reasons, Japan submits that the Panel erred in finding that the United States acted consistently with Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 in applying the zeroing procedures in the eleven periodic reviews that Japan challenges. Japan requests that the Appellate Body reverse these findings and find, instead, that the United States violated these obligations.[213]

VIII. THE PANEL ERRED IN FINDING THAT THE ZEROING PROCEDURES ARE "AS SUCH" CONSISTENT WITH THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 IN NEW SHIPPER REVIEWS

179. Japan claims that the zeroing procedures are "as such" WTO-inconsistent when maintained for use in new shipper reviews. As noted, the Panel found that, "regardless of the type of proceeding in which margins are calculated", the United States maintains

[209] On appeal, Japan does not pursue its claims on this issue regarding Articles 1, 2.4.2 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.
[210] *See* Exhibits JPN-1 and JPN-1-D for a description of the operation of the zeroing procedures in these measures.
[211] Panel Report, paras. 7.277 and 7.259(c).
[212] Panel Report, paras. 7.226 and 7.227.
[213] On appeal, Japan does not pursue its claims on this issue regarding Articles 1, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*.

zeroing procedures that exclude negative comparison results.[214] The Panel, therefore, examined whether the United States violated Articles 2.1, 2.4 and 9.5 of the *Anti-Dumping Agreement*, and Article VI:1 and VI:2 of the GATT 1994, by maintaining the zeroing procedures for use in new shipper reviews.

180. The Panel rejected Japan's claim that the zeroing procedures are "as such" inconsistent with these provisions.[215] The Panel addressed the permissibility of zeroing in new shipper reviews as part of its examination of zeroing in periodic reviews. Thus, the reasons that led the Panel to conclude that zeroing was permitted in periodic reviews also led the Panel to conclude that zeroing is permitted in new shipper reviews. Accordingly, the Panel found that zeroing is permitted in new shipper reviews under Article 9.5 because of the Panel's erroneous interpretation of the rules in Article 9.3 governing periodic reviews.[216] The Panel gave no separate interpretive consideration to Article 9.5. By reaching a conclusion regarding the meaning of Article 9.5 without even examining the provision, the Panel adopted a flawed interpretive approach.

A. *The Panel's Errors Under Articles 2.1 and 9.5 and Articles VI:1 and VI:2*

181. Under Article 9.5 of the *Anti-Dumping Agreement*, investigating authorities must determine "individual margins of dumping" for producers or exporters that did not ship the investigated product during the period of investigation ("new shippers"). The Panel found that, when the margin of dumping for new shippers is determined using a W-to-T

[214] Panel Report, paras. 7.50 and 7.53. In this respect, the Panel's factual findings on the scope of application of the "as such" measure at issue differ significantly from the findings of the panel in *US – Zeroing (EC)*. In that dispute, the panel did not find, as a matter of fact, that the zeroing procedures apply "regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated." As a result, the Appellate Body could not complete the analysis of certain claims made by the EC (*see* Appellate Body Report, *US – Zeroing (EC)*, para. 228). In this dispute, the Panel has found that the zeroing procedures apply equally to all comparison methods and in all forms of anti-dumping proceedings.
[215] Panel Report, paras. 7.216, 7.219, 7.222, 7.224 and 7.259(b). (In these findings, the Panel referred to simple zeroing procedures. As Japan explained, simple zeroing refers to the zeroing procedures used in the context of a transaction-specific comparison method. The Panel held that simple zeroing is one of the "different manifestations of a single rule or norm." Panel Report, footnote 688. *See* paragraph 39 above.) Japan provided an example of the use of the zeroing procedures in a new shipper review. *See* Exhibit JPN-9, together with Exhibits JPN-1 and JPN-1-D.
[216] *See* Panel Report, paras. 7.196 to 7.209.

comparison, "there is no general requirement to determine dumping and margins of dumping for the product as a whole".[217] As Japan has already explained, this finding is wrong.

182. As set forth in Section V.A(i) above, the Appellate Body has held that "'the terms "dumping" and "margins of dumping" in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole'".[218] As a result, when an authority makes multiple comparisons in the course of a dumping determination, "it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value".[219] The Appellate Body reached this conclusion in the context of W-to-W and T-to-T comparisons in original investigations, and W-to-T comparisons in periodic reviews.[220] The Appellate Body emphasized that its interpretation was based "on the context found in Article 2.1 of the *Anti-Dumping Agreement*."[221] The interpretation was also based on the definition of "dumping" in Article VI:1 of the GATT 1994 and of "margin of dumping" in Article VI:2.

183. The Appellate Body has also insisted that "'the definition of "dumping" as contained in Article 2.1 applies to the entire *Agreement*'".[222] It held, therefore, that this definition applies in the context of original investigations, periodic reviews and sunset reviews.[223] There is no alternative definition of the term "margin of dumping" suggested in Article 9.5, and no basis whatsoever for considering that the *Agreement*-wide definition in Article 2.1 and Article VI does not apply to Article 9.5.

184. The text of Article 9.5 is also reminiscent of the text of Article 6.10 because both provisions refer to "individual" margins of dumping established for an exporter or foreign

[217] Panel Report, para. 7.194.
[218] Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V*, paras. 92, 93, 96, 97, 98 and 102.
[219] Appellate Body Report, *US – Zeroing (EC)*, para. 127. *See also* Appellate Body Report, *US – Softwood Lumber V*, para. 98; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 88, 89 and 114.
[220] *See* paras. 82 ff.
[221] Appellate Body Report, *US – Zeroing (EC)*, para. 126.
[222] Appellate Body Report, *US – Zeroing (EC)*, para. 125 (quoting *US – Softwood Lumber V*, para. 93) (footnote omitted).
[223] Appellate Body Report, *US – Zeroing (EC)*, para. 127 and footnote 220.

producer. Thus, for each exporter or foreign producer, the *Agreement* expressly contemplates the determination of a *single* margin of dumping *for the product*. This language underscores that a single, overall dumping determination is made for the product as a whole, for a given exporter or foreign producer, even if based on multiple comparisons 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. Otherwise, there would be multiple margins for each exporter or foreign producer – one for each transaction or model – and not "an individual margin of dumping" for "the product".

185. In these circumstances, Japan submits that Articles 2.1 and 9.5, and Article VI:1 and VI:2, require that investigating authorities establish margins of dumping for new shippers for the "product" as a whole. Thus, if the investigating authorities elect to determine a margin on the basis of multiple transaction-specific comparisons, "*all* of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping."[224]

186. In contrast, under the zeroing procedures, the USDOC systematically disregards all negative results of multiple comparisons. In consequence, the zeroing procedures mandate that USDOC fails to determine "individual margins of dumping" for exporters or foreign producers for the "product" as a whole. This violates Articles 2.1 and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

187. As a result, the Panel erred in finding that the zeroing procedures are "as such" consistent with these provisions when maintained for use in new shipper reviews. Japan requests that the Appellate Body reverse the Panel's findings and, instead, find that the United States acted inconsistently with these provisions.

B. *The Panel's Errors in Interpreting Article 2.4*

[224] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 88. Emphasis added. *See also* Appellate Body Report, *US – Zeroing (EC)*, para. 132, for a similar statement in the context of multiple W-to-T comparisons.

188. The Panel also found that the zeroing procedures are "as such" consistent with Article 2.4 of the *Anti-Dumping Agreement* when maintained for use in new shipper reviews. In reaching this conclusion, the Panel referred to the reasons it gave in finding that zeroing procedures do not violate Article 2.4 in a T-to-T comparison in the context of an original investigation.[225]

189. In Section V.B, Japan explained that the Panel erred in its interpretation and application of Article 2.4 in examining Japan's claims regarding T-to-T comparisons in original investigations. Japan submits that these same errors taint the Panel's findings regarding Article 2.4 in the context of new shipper reviews. Accordingly, Japan requests that the Appellate Body reverse the Panel's findings that the zeroing procedures are "as such" consistent with Article 2.4 of the *Anti-Dumping Agreement* and, instead, find that the United States acted inconsistently with this provision by maintaining these procedures for use in new shipper reviews.

C. *Conclusion on the Zeroing Procedures "As Such" in New Shipper Reviews*

190. For the reasons set forth in this Section, the Appellate Body should reverse the Panel's findings that the zeroing procedures are "as such" consistent with Articles 2.1, 2.4 and 9.5 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, when maintained for use in new shipper reviews,[226] and find, instead, that the United States violates these provisions by maintaining the zeroing procedures for use in those circumstances.[227]

IX. THE PANEL ERRED IN FINDING THAT THE UNITED STATES ACTED CONSISTENTLY WITH THE *ANTI-DUMPING AGREEMENT* IN TWO SUNSET REVIEWS BY RELYING ON MARGINS OF DUMPING CALCULATED IN PREVIOUS PERIODIC REVIEWS USING THE ZEROING PROCEDURES

[225] Panel Report, para. 7.218.
[226] Panel Report, para. 7.259(b).
[227] On appeal, Japan does not pursue its claims on this issue regarding Articles 1, 2.4.2, and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

191. Japan challenges the two sunset reviews identified in Exhibits JPN-22 and JPN-23 on the grounds that, in these reviews, the USDOC relied on margins of dumping determined in original investigations and periodic reviews using the zeroing procedures. Japan maintains that because the margins on which the USDOC relied were "legally flawed" through the use of zeroing, they 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 infect 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*, and Articles VI:1 and VI:2 of the GATT 1994.

192. In *US – Zeroing (EC)*, the Appellate Body recalled its previous finding that "the word 'dumping', as used in Article 11.3 of the *Anti-Dumping Agreement* (a provision regarding sunset reviews), has the meaning described in Article 2.1."[228] Further, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated,

> … should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. 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 periodic 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*.
>
> …
>
> If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3.[229]

[228] Appellate Body Report, *US – Zeroing (EC)*, footnote 220.
[229] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 127 and 130.

193. In this dispute, Japan claims that the two challenged sunset reviews are without "proper foundation" because the USDOC relied on "legally flawed" margins from periodic reviews calculated using zeroing. The Panel found that:

> … there is sufficient evidence before us to conclude that in making its determinations that revocation of anti-dumping order [sic] would result in continuation or recurrence of dumping, USDOC did rely on margins of dumping established in prior proceedings.[230]

194. The Panel continued,

> We also note, however, that since in these two sunset reviews USDOC relied upon the continued existence of margins of dumping after the issuance of the anti-dumping order as support for its determination of likelihood of continuation or recurrence of dumping, *the margins of dumping relied upon by USDOC were margins calculated during periodic reviews*, not margins calculated in the original investigations.[231]

195. In light of this finding, the Panel rejected Japan's claims regarding these two sunset reviews:

> Since we have found that the *AD Agreement* does not proscribe simple zeroing in periodic reviews within the meaning of Article 9.3, we cannot find that by relying on margins of dumping calculated in periodic reviews on the basis of simple zeroing USDOC acted inconsistently with the *AD Agreement*.[232]

196. Thus, the Panel's *sole reason* for rejecting Japan's "as applied" sunset review claims was an incorrect finding that zeroing is permissible in periodic reviews under Article 9.3. However, the Panel erred in reaching this conclusion. As described in Section VI above, zeroing is prohibited in periodic reviews under Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.

197. Japan, therefore, requests that the Appellate Body reverse the Panel's finding that, in the sunset reviews in Exhibits JPN-22 and JPN-23, the United States was entitled to

[230] Panel Report, para. 7.255.
[231] Panel Report, para. 7.256. Emphasis added.
[232] Panel Report, para. 7.256.

rely on margins of dumping calculated in periodic reviews using zeroing. Further, Japan requests that the Appellate Body find, instead, that in relying on these margins the United States violated Article 11.3 of the *Anti-Dumping Agreement*. Because the violations of Article 11.3 stem from the reliance upon margins of dumping calculated using the zeroing procedures that violated Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, Japan submits the two challenged sunset reviews also violate these provisions.[233]

X. CONCLUSION

198. Japan requests that the Appellate Body:

(i) reverse the Panel's finding, in paragraph 7.259(a) of the Panel Report, that the United States acts consistently with Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, by maintaining the zeroing procedures for use in original investigations in T-to-T comparisons, and find that the United States violates these provisions;

(ii) reverse the Panel's finding, in paragraph 7.259(b) of the Panel Report, that the United States acts consistently with Articles 2.1, 2.4, 9.1, 9.2, 9.3 and 9.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, by maintaining the zeroing procedures for use in periodic reviews and new shipper reviews, and find that the United States violates these provisions;

(iii) reverse the Panel's finding, in paragraph 7.259(c) of the Panel Report, that the United States acted consistently with Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, by using the zeroing procedures in the eleven periodic reviews identified in Exhibits JPN-11 to JPN-21, and find that the United States violated these provisions in the contested periodic reviews; and,

(iv) reverse the Panel's finding, in paragraphs 7.259(e) of the Panel Report, that the United States acted consistently with Articles 2 and 11 of the *Anti-Dumping Agreement*, by relying on margins of dumping calculated in previous proceedings in the sunset reviews of corrosion-resistant carbon steel from Japan and of anti-friction bearings from Japan, identified in Exhibits JPN-22 and JPN-23, and find that the United States violated

[233] On appeal, Japan does not pursue its claims on this issue regarding Articles 1, 2.4.2, 9.1, 9.2, 9.3, 11.1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

Articles 2.1, 2.4 and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 in the contested sunset reviews.

199. In addition, Japan requests that the Appellate Body recommend that the United States bring its measures found to be WTO-inconsistent into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.