CONFIDENTIAL

BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

AB-2006-5

(WT/DS322)

APPELLEE'S SUBMISSION OF JAPAN

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Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico,* WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Mexico – HFCS (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States,* WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
United States – 1916 Act	Appellate Body Reports, *United States – Anti-Dumping Act of 1916,* WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
United States – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* WT/DS213/AB/R and Corr. 1, adopted 19 December 2002, DSR 2002:IX, 3779
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United States – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
United States – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R

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*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
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
USDOJ	United States Department of Justice
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

1. The United States appeals the Panel's finding that the United States' zeroing procedures constitute a rule or norm of general and prospective application that is challengeable in World Trade Organization ("WTO") dispute settlement "as such", as those procedures relate to average-to-transaction ("W-to-T") and transaction-to-transaction ("T-to-T") comparisons in original anti-dumping investigations.[1]

2. Japan asks the Appellate Body to deny the United States' appeal. In reaching its conclusion that the zeroing procedures are a rule or norm challengeable as such, the Panel correctly applied the standard established by the Appellate Body in *United States – Zeroing (EC)*.[2] Moreover, the Panel relied on a rich evidentiary record covering, and indeed extending beyond, the categories of evidence found significant by the Appellate Body in *United States – Zeroing (EC)*.[3]

3. The Panel conducted its assessment of the facts with the rigor required by Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), remaining entirely within the bounds of its discretion as the trier of fact. The Panel had ample evidence to support the conclusion that the zeroing procedures constitute a "single" rule or norm that applies "*whenever* the [U.S. Department of Commerce] calculates margins of dumping or duty assessment rates".[4]

4. In its appeal, the United States essentially contests the evidentiary basis for the Panel's conclusion that the precise content of the rule or norm encompassed the zeroing

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[1] United States Other Appellant's Submission, 26 October 2006 (hereinafter "U.S. Other Appellant's Submission"), para. 2.
[2] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (hereinafter *United States – Zeroing (EC)*).
[3] Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, 20 September 2006 (hereinafter "Panel Report"), paras. 7.34-7.58.
[4] Panel Report, para. 7.50 (emphasis added). *See also* Panel Report, paras. 7.51 ("Thus, it is clear as a factual matter that USDOC always applies zeroing") and 7.53 ("[T]he consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application, which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales and which 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 calculated.").

procedures in the context of W-to-T and T-to-T comparisons in original anti-dumping investigations. According to the United States, the U.S. Department of Commerce ("USDOC") "had never pronounced on how it would conduct such comparisons, including whether it would or would not 'zero' in connection with those comparisons."[5]

5. The United States' argument, however, is belied by the evidence of record regarding the USDOC's longstanding and perfectly uniform practice of applying zeroing in *every* instance in which margins of dumping have been calculated, regardless of procedural context or comparison method. It is also contradicted by the very policy embodied in the zeroing procedures.

6. The zeroing procedures embody a basic policy decision that negative intermediate results of multiple comparisons should be disregarded "whenever"[6] the USDOC determines whether a foreign manufacturer/exporter is "dumping"; the investigating authority considers only the comparisons that give rise to positive values, in determining whether, and to what degree, dumping has occurred. The motivation for, and consistent result of, this policy decision is, of course, to make a finding of dumping more likely and to inflate any margins of dumping artificially beyond those that would obtain if both positive and negative intermediate results were given their full mathematical value. The frequent result is, indeed, to convert negative anti-dumping margins into positive ones.

7. Despite the Panel's finding that "the consistent application of zeroing reflects a deliberate policy",[7] the United States has not explained why the fundamental policy decision underlying the zeroing procedures does not apply to the calculation of margins of dumping in all procedural contexts (investigations and reviews) and under all comparison methods (average-to-average ("W-to-W"), W-to-T, and T-to-T). Given the USDOC's perfectly consistent reliance upon zeroing in all margin calculations for "'at least 20 years',"[8] it is not credible that the United States would simply abandon zeroing in

[5] U.S. Other Appellant's Submission, para. 2.
[6] Panel Report, para. 7.50.
[7] Panel Report, para. 7.52.
[8] Panel Report, para. 7.52, *quoting* U.S. Department of Justice statements in Exhibits JPN-28 to 31.

calculating margins in W-to-T and T-to-T comparisons in original investigations. Nor does the record contain any evidence concerning mechanical or functional differences among the various types of U.S. anti-dumping proceedings and the different comparison methods that would lead the USDOC to apply the zeroing procedures in some but not other of those contexts. In each instance, the mechanics of zeroing are the same – *i.e.*, negative intermediate comparison results would be identified and discarded in the calculation of the overall margin of dumping for the product.

8. Extending the fundamental policy underlying the zeroing procedures to W-to-T and T-to-T comparisons in original investigations does not require a leap of faith. To the contrary, the evidence of record includes a very revealing instance in which the USDOC applied the zeroing procedures in the context of a T-to-T comparison method. Specifically, the USDOC employed the T-to-T method in a Section 129 redetermination implementing the rulings and recommendations of the Dispute Settlement Body in *United States – Softwood Lumber V*. In the original proceedings, the Appellate Body prohibited the use of the U.S. zeroing procedures in the context of a W-to-W comparison.[9] In the Section 129 redetermination, the USDOC turned to the T-to-T methodology in its tireless quest to exploit any remaining opportunities to continue implementing a policy that has been methodically dismantled by the Appellate Body.[10] Despite the Appellate Body's ruling, and despite the USDOC's change in comparison method, a consistent feature of both the USDOC's original dumping determination and its redetermination was the application of zeroing procedures.

9. This belies the United States' implicit suggestion, in its appeal, that there is something different about T-to-T or W-to-T comparisons in original investigations that required the Panel to treat them differently in determining the precise content of the zeroing procedures as a rule or norm challengeable as such. The USDOC applied the

[9] *See* Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (hereinafter *United States – Softwood Lumber V*), para. 108.
[10] *See* Exhibits JPN-9 and JPN-24 (computer program applying zeroing in the T-to-T comparison method used in the Section 129 Redetermination as a result of the recommendations and rulings of the Dispute Settlement Body in *United States – Softwood Lumber V*).

zeroing procedures in the T-to-T comparison in the *United States – Softwood Lumber V* Section 129 redetermination in precisely the same way as in W-to-W comparisons – *i.e.*, through the inclusion of a line of computer programming that automatically excluded negative intermediate results from the calculation of the margin of dumping for each foreign manufacturer/exporter. No mechanical or other difference among the comparison methods affects the manner in which the zeroing procedures are applied. The United States' argument in this appeal is founded on the assertion of a difference where none exists.

10. In Section II of this Appellee's Submission, Japan rebuts the United States' argument that the zeroing procedures as they relate to W-to-T and T-to-T comparisons in original investigations were not properly within the Panel's terms of reference because they were not included in Japan's request for consultations. Japan demonstrates that, according to consistent case law, a panel need not address a failure to consult where the responding party has remained silent on the issue. In that circumstance, the responding party has "relinquished whatever right to consult it may have had", and "consented to the lack of consultations", consistent with Article 6.2 of the DSU.[11] In any event, Japan demonstrates that the premise underlying the United States' argument is incorrect; the very first paragraph of Japan's request for consultations expressly identified the zeroing procedures as a measure subject to consultation, without any limitation of the measure to any particular comparison method or methods in calculating a margin of dumping.

11. In Section III of this Appellee's Submission, Japan demonstrates that the Panel fulfilled its duty, under Article 11 of the DSU, to conduct an objective assessment of the facts before it. Acting within the bounds of its discretion as the trier of fact, the Panel considered that the evidence was sufficient to support a finding that the zeroing procedures constitute a rule or norm challengeable as such, including as they relate to W-to-T and T-to-T comparisons in original investigations. Japan demonstrates that the

[11] *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW (hereinafter *Mexico – HFCS (Article 21.5 – US)*, paras. 62-63.

evidence before the Panel included all of, and indeed extended beyond, the categories of evidence the Appellate Body found to be particularly significant in *United States – Zeroing (EC)*.

12. Importantly, Japan notes that the United States offered *no* evidence to show that there is something different about W-to-T or T-to-T comparisons in original investigations that required the Panel to treat them differently, in determining the precise content of the zeroing procedures as a rule or norm challengeable as such.

13. Japan also responds to the United States' argument that evidence of the repeated application of zeroing in W-to-T or T-to-T comparisons in original investigations is necessary to determine whether a rule or norm challengeable as such exists in those contexts. Japan demonstrates that actual application of a rule or norm is not necessary to allow a Member to challenge it as such. To the extent evidence of actual application is relevant, Japan demonstrates that evidence of the systematic application of the zeroing procedures in all procedural contexts that have arisen to date, over a period of "'at least 20 years',"[12] along with other evidence of record, was sufficient for the Panel to conclude that the precise content of the zeroing procedures encompasses T-to-T and W-to-T comparisons in original investigations. This is particularly so since, in the face of the USDOC's repeated assertion that "'we do not allow' export sales at prices above normal value to offset dumping margins on other export sales",[13] the United States was unable to offer evidence of even one instance in which the zeroing procedures have not been applied.

[12] Panel Report, para. 7.52, *quoting* U.S. Department of Justice statements in Exhibit JPN-30.
[13] Panel Report, para. 7.52, *quoting* Exhibits JPN-21.D and 26.

II. CONSULTATIONS WERE HELD REGARDING THE UNITED STATES' ZEROING PROCEDURES "AS SUCH"

A. *Scope of U.S. Appeal*

14. The United States asserts that Japan's request for consultations did not include a reference to "any zeroing measure, however described" in the context of W-to-T or T-to-T comparisons in original investigations.[14] The United States acknowledges that it "did not raise this issue in the Panel proceedings," but asserts that "a failure to consult is a jurisdictional matter and, as such, can be raised at any time."[15] As a result, the United States argues that its appeal on this issue is timely, that "Japan's failure to consult on any such measures means that they are not within the terms of reference of this dispute, and the Appellate Body should reverse the Panel's finding as to the existence of such U.S. measures on that basis."[16]

15. Japan asks the Appellate Body to deny the United States' request, for two reasons. *First*, the United States has acknowledged in its Other Appellant's Submission that it "did not raise this issue in the Panel proceedings . . ."[17] The United States' failure to object to the alleged lack of consultations before the Panel means it has relinquished its right to consult, and that the Panel was not required to raise the issue of its own accord. *Second*, Japan demonstrates that its request for consultations in fact identified the zeroing procedures as a "measure" on which it wished to consult, without any limitation to particular comparison methods.

B. *The United States Relinquished Its Right to Consult*

16. The United States expressly acknowledges that it did not object to the alleged lack of consultations on the United States' zeroing procedures in the context of W-to-T and T-

[14] U.S. Other Appellant's Submission, para. 17.
[15] U.S. Other Appellant's Submission, para. 18, note 29, *citing* Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (hereinafter *United States – Carbon Steel*), para. 123.
[16] U.S. Other Appellant's Submission, para. 18.
[17] U.S. Other Appellant's Submission, para. 18 (note 29).

to-T comparisons in original investigations in any of the many submissions it made to the Panel in this dispute.[18] Although, as the Appellate Body has found, "certain issues going to the *jurisdiction* of a panel are so fundamental that they may be considered at any stage in a proceeding,"[19] and although the failure to consult may qualify as one of those issues in some circumstances,[20] the Appellate Body has also found that

> where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had.[21]

17. In such circumstances, where the responding party "neither pursued the potential benefits of consultations nor objected that the [complaining party] had deprived it of such benefits" prior to the appellate phase of a dispute,[22] the Appellate Body found that

> the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter, and that, accordingly, such a defect is not one which a panel must examine even if both parties to the dispute remain silent thereon.[23]

18. The United States' failure to raise the alleged lack of consultations on its zeroing procedures in the context of W-to-T and T-to-T comparisons in original investigations

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[18] U.S. Other Appellant's Submission, para. 18 (note 29) ("The United States did not raise this issue in the Panel proceedings . . .").

[19] Appellate Body Report, *United States – Carbon Steel*, para. 123.

[20] Although the United States argues that "a failure to consult is a jurisdictional matter", implying that a panel must ensure on its own motion that consultations were held, the precedent cited by the United States does not support this conclusion. The Appellate Body Report in *United States – Carbon Steel*, on which the United States relies, in turn cites the Appellate Body Reports in *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (hereinafter *United States – 1916 Act*), and *Mexico – HFCS (Article 21.5 – US)*). The "jurisdictional" issue in question in the appeal in *United States – 1916 Act*, however, was not a failure to consult. Moreover, in *Mexico – HFCS (Article 21.5 – US)*, the Appellate Body did not unconditionally state that the lack of consultations divests a panel of jurisdiction. The Appellate Body noted that "Article 6.2 [of the DSU] also envisages the possibility that a panel may be validly established *without being preceded by consultations*." (Emphasis added.) As a result, the Appellate Body found that "the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB." Appellate Body Report, *Mexico – HFCS (Article 21.5 – US)*, paras. 62-63.

[21] Appellate Body Report, *Mexico – HFCS (Article 21.5 – US)*, para. 63. *See also id.*, para. 50 ("A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.").

[22] Appellate Body Report, *Mexico – HFCS (Article 21.5 – US)*, para. 65.

[23] Appellate Body Report, *Mexico – HFCS (Article 21.5 – US)*, para. 64.

until this appeal means that it "consented to the lack of consultations" on these measures, and "relinquished whatever right to consult it may have had."[24] In those circumstances, the Appellate Body's decision in *Mexico – HFCS (Article 21.5 – US)* makes it clear that the Panel did not err in failing to examine the alleged lack of consultations on this measure of its own accord.

C. *Japan's Request for Consultations Covers the United States' Zeroing Procedures in the Context of W-to-T and T-to-T Comparisons in Original Investigations*

19. Second, in describing the measure subject to its "as such" challenge, Japan's request for consultations does indeed cover the United States' zeroing procedures in the context of W-to-T and T-to-T comparisons in original investigations. Although citing various sub-paragraphs of Japan's request for consultations,[25] the United States neglects to mention the very first paragraph of that request, which provides, in relevant part, as follows:

> Upon instruction from my authorities, I hereby wish to convey the request of the Government of Japan for consultations with the Government of the United States of America . . . regarding certain measures imposed by the United States including: (1) the "zeroing" practice by which the United States Department of Commerce ("USDOC") treats transactions with negative dumping margins as having margins equal to zero in determining weighted average dumping margins in anti-dumping investigations, administrative reviews, and sunset reviews, and also in assessing the final anti-dumping liability on entries upon liquidation . . .[26]

20. In sub-paragraphs 6-8 of the more detailed list of measures subject to consultations, Japan identifies:

> (6) the methodology of the United States for determining dumping margins and material injury in anti-dumping investigations;
>
> (7) the methodology of the United States for determining dumping margins in administrative reviews; and

[24] Appellate Body Report, *Mexico – HFCS (Article 21.5 – US)*, para. 63.
[25] U.S. Other Appellant's Submission, para. 17.
[26] WT/DS322/1 (emphasis added).

(8) the methodology of the United States, in sunset reviews, for determining whether revocation of anti-dumping orders would be likely to lead to continuation or recurrence of dumping, and continuation or recurrence of material injury within a reasonably foreseeable time.[27]

21. Thus, Japan's request broadly identifies, as one of the "measures" subject to consultations, the United States' practice of "zeroing",[28] or the treatment of "transactions with negative dumping margins as having margins equal to zero in determining weighted average dumping margins". The request clarifies that Japan wished to consult with the United States about this measure across all types of U.S. anti-dumping proceedings, including original investigations. In identifying the measure subject to consultations, Japan did not limit its request to the context of any particular comparison method.

22. Accordingly, the zeroing procedures as they relate to W-to-T and T-to-T comparisons in original investigations are covered by Japan's request for consultations, and were properly within the Panel's terms of reference in this dispute.[29] Japan therefore requests that the Appellate Body deny the United States' appeal in this regard.

III. THE PANEL PROPERLY CONCLUDED THAT THE ZEROING PROCEDURES ARE A MEASURE CHALLENGEABLE "AS SUCH", INCLUDING IN THE CONTEXT OF W-TO-T AND T-TO-T COMPARISONS IN ORIGINAL INVESTIGATIONS

23. The United States asks the Appellate Body to reverse the Panel's conclusion that the zeroing procedures are a measure challengeable as such, as related to W-to-T and T-to-T comparisons in original investigations. In its appeal, the United States asserts that

[27] WT/DS322/1.
[28] In its request for consultations, Japan uses the term "'zeroing' practice". As noted by the Appellate Body, however, the determination of the scope of a measure challenged as such is not based on the label attached to it, but on its content or substance. Appellate Body Report, *United States – Corrosion Resistant Steel Sunset Reviews*, para. 87 (note 87). The description of the measure in the consultation request in substance corresponds to the zeroing procedures, by which the USDOC systematically disregards negative comparison results when it calculates an overall margin of dumping on the basis of multiple comparisons. The Panel rightly noted that "Japan has stated that it is not challenging 'mere practice' in this dispute." Panel Report, para. 7.50 (note 676).
[29] The United States does not argue that Japan's request for establishment of a panel covers the zeroing procedures as they relate to W-to-T and T-to-T comparisons in original investigations. Japan notes the Appellate Body's observation that "it is the request for establishment of a panel that governs its terms of reference, unless the parties agree otherwise." Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (hereinafter *United States – Cotton Subsidies*), para. 293 (note omitted).

the Panel erred in failing to assess the evidence regarding the existence of the zeroing procedures on a *context-specific* basis, *i.e.*, as that evidence related to the zeroing procedures in particular types of U.S. anti-dumping proceedings and under particular comparison methods.

24. Specifically, the United States asserts that the Panel erred in including the zeroing procedures as they relate to W-to-T and T-to-T comparisons in original investigations in the specific content of the "single" rule or norm it found to exist. The United States considers that the Panel's finding lacked sufficient basis in the record, because the record included no evidence concerning the application of the W-to-T comparison in original investigations, and not enough evidence of the application of the T-to-T comparison in original investigations. Instead, for the United States, the record before the Panel only included evidence of the systematic application of the zeroing procedures in W-to-W comparisons in original investigations, and W-to-T comparisons in periodic and new shipper reviews (as well as one example of the application of the T-to-T comparison method in an original investigation, which, the United States notes, arose after the establishment of the Panel). The United States also considers that the Panel's finding lacked sufficient basis in the record because evidence relied on by the Panel, other than the application of the zeroing procedures in particular instances, concerned statements made by various arms of the U.S. government in the context of comparisons and proceedings other than W-to-T and T-to-T in original investigations.

25. For the reasons provided below, Japan asks the Appellate Body to deny the U.S. request, and to uphold the Panel's finding that the zeroing procedures constitute a rule or norm challengeable "as such", as they relate to W-to-T and T-to-T comparisons in original investigations.

A. *Panel Findings and Conclusions*

26. The Panel divided its reasoning into two parts. *First*, the Panel identified the legal standard for determining whether the zeroing procedures constitute a measure that may be challenged "as such" in WTO dispute settlement. In so doing, the Panel reviewed the relevant rulings by the Appellate Body, notably relying on the Appellate Body's report in *United States – Zeroing (EC)*. *Second*, the Panel examined the evidence before it to ascertain whether Japan had proved the existence of an "as such" measure in light of the relevant legal standard. The Panel properly applied the relevant law to the facts, to conclude that the zeroing procedures constitute an "as such" measure.

(i) The Panel Adopted the Correct Legal Standard to Assess Whether the Zeroing Procedures Constitute an "As Such" Measure

27. The Panel began by recalling that it is well-established that a Member may have recourse to dispute settlement under the DSU and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") to challenge a measure "as such", "as distinguished from the application of measures in specific situations."[30] The Panel observed that neither the DSU nor the *Anti-Dumping Agreement* "define[s] criteria for determining when measures can be challenged 'as such'".[31] It, therefore, embarked on a review of "how the notion of measures challenged 'as such' has been interpreted and applied in recent WTO dispute settlement cases."[32]

28. The Panel recalled the basic principle established by the Appellate Body in *United States – Corrosion-Resistant Steel Sunset Review* that:

> any act or omission attributable to a WTO Member can be a "measure" of that Member for purposes of WTO dispute settlement proceedings, and that … the

[30] Panel Report, para. 7.34.
[31] Panel Report, para. 7.36.
[32] Panel Report, para. 7.36.

> concept of a measure within the meaning of the DSU encompasses certain acts or instruments irrespective of their application in specific instances.[33]

29. The Panel explained that the Appellate Body has characterized the acts or instruments that may be challenged "as such" as "'rules or norms that are intended to have general and prospective application' and 'instruments of a Member containing rules or norms'."[34] The Panel reiterated the Appellate Body's systemic concern that failing to permit claims against "instruments setting out rules or norms inconsistent with a Member's obligations would frustrate the objective of protecting the security and predictability to conduct future trade and lead to a multiplicity of litigation."[35]

30. The Panel emphasized that, according to the Appellate Body, "a broad range of measures could be submitted, as such, to dispute settlement".[36] The Panel noted that, according to the Appellate Body,

> … Article 17.3 of the *AD Agreement* contains no threshold requirement that a measure submitted to dispute settlement be of a certain type and . . . the phrase "laws, regulations and administrative procedures" in Article 18.4 of the *AD Agreement* implies that "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings" can be challenged as such.[37]

31. The Panel also noted that a measure can be challenged "as such" even if it is not binding under municipal law and even if an executive agency is free to depart from the measure at any time.[38]

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[33] Panel Report, para. 7.37, *quoting* Appellate Body Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (hereinafter *United States – Corrosion Resistant Steel Sunset Review*), para. 82.

[34] Panel Report, para. 7.37, *quoting* Appellate Body Report, *United States – Corrosion Resistant Steel Sunset Review*, para. 82.

[35] Panel Report, para. 7.37, *citing* Appellate Body Report, *United States – Corrosion Resistant Steel Sunset Review*, para. 82.

[36] Panel Report, para. 7.38.

[37] Panel Report, para. 7.38, *quoting* Appellate Body Report, *United States – Corrosion Resistant Steel Sunset Review*, paras. 86, 87.

[38] Panel Report, para. 7.40 and note 651, *quoting* Appellate Body Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (hereinafter *Guatemala – Cement I*), note 47.

32. After its review of the Appellate Body's decisions, the Panel noted that in its view, "the notion of rules or norms of general and prospective application connotes an essential condition in order for an act to be challenged as such".[39] The Panel concluded that an act or instrument containing "rules or norms of general and prospective application" can be challenged "as such" because it is "possible to analyze the future conduct envisioned by that act or instrument."[40]

33. The Panel also recognized that, in *United States – Zeroing (EC)*, the panel and Appellate Body found that the zeroing methodology is a measure that may be the subject of an "as such" challenge as it relates to a W-to-W comparison in an original investigation. In that dispute, the Appellate Body held, in light of the text of Articles 17.3 and 18.4 of the *AD Agreement* that there is "no basis to conclude that 'rules or norms' can be challenged as such *only* if they have been expressed in the form of a written instrument".[41] The Panel quoted in full the Appellate Body's statement of the criteria that must be met in deciding that a rule or norm exists:

> In our view, when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that [1] the alleged 'rule or norm' is attributable to the responding Member; [2] its precise content; and indeed, that [3] it does have general and prospective application.[42]

34. Having reviewed the case-law, the Panel set forth the legal standard on which it relied in finding that the zeroing procedures constitute a measure that can be challenged "as such". To have "normative value",[43] the Panel found that the alleged measure must meet the following requirements:

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[39] Panel Report, para. 7.41.
[40] Panel Report, para. 7.41, *citing* Appellate Body Report, *United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (hereinafter *United States – Oil Country Tubular Goods Sunset Reviews*), para. 172.
[41] Appellate Body Report, *United States – Zeroing (EC)*, para. 193.
[42] Panel Report, para. 7.43, quoting Appellate Body Report, *United States – Zeroing (EC)*, para. 198 (note omitted).
[43] Panel Report, para. 7.48.

- the "*precise content* of the norm" and "the future conduct to which it will necessarily give rise" must be clear;
- "it must be understood by those to whom it will apply that it will be *applied generally and prospectively*"; and,
- the measure must be "attributable to" the responding Member, although it need not be in the form of legislation or regulation.[44]

35. The Panel also expressly agreed with the Appellate Body that "a rule or norm need not be embodied in a written instrument in order for such a rule or norm to be challenged as such in WTO dispute settlement".[45]

(ii) The Panel Properly Found that the Zeroing Procedures Are a Single Rule or Norm Challengeable "As Such"

36. After identifying the proper legal standard, the Panel turned to a determination whether the facts before it supported the conclusion that the zeroing procedures are a rule or norm challengeable "as such". The United States' appeal is directed against the Panel's assessment of these facts.

37. The Panel recognized that, in cases where an alleged measure is not "embodied" in a written instrument, it may encounter "particular problems with respect to the evidence required to establish that the measure constitutes a rule or norm of general and prospective application".[46] The Panel recalled the Appellate Body's own similar statements:

> We agree with the United States that a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act inconsistently with its obligations under Article 11 of the DSU to "make an objective assessment of the matter" before it.[47]. . . .
>
> Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written

[44] Panel Report, paras. 7.45, 7.48, 7.55.
[45] Panel Report, para. 7.49.
[46] Panel Report, para. 7.50.
[47] Appellate Body Report, *United States – Zeroing (EC)*, para. 196, cited by the Panel at para. 7.43.

> document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[48]

38. The Panel was, therefore, in no doubt that, pursuant to Article 11 of the DSU, it was obliged to conduct a rigorous "assessment" of the facts to determine whether there was sufficient evidence that the zeroing procedures are a rule or norm challengeable "as such". In so doing, the Panel found that:

> . . . in this case 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*.[49]

And it held that:

> . . . *it is clear as a factual matter that USDOC always applies zeroing*.[50]

39. The United States challenges the sufficiency of the Panel's evidentiary basis for its finding, but overlooks the Panel's comprehensive assessment of a broad range of evidence. Indeed, all the categories of evidence that the Appellate Body found to be significant in *United States – Zeroing (EC)* were before the Panel in this dispute, and contributed to its assessment of the matter.[51]

40. *First*, the evidence showed that the United States has a standard margin calculation methodology, reflected in standard computer programs, that invariably includes the zeroing procedures. *Second*, evidence regarding the systematic application of the zeroing procedures in the form of "as applied" determinations in original investigations, and periodic and new shipper reviews, was part of the record before the Panel. *Third*, an expert in the USDOC's margin calculation procedures also explained how the USDOC determines dumping margins and testified that the zeroing procedures are always applied in the determination of dumping. *Fourth* – and beyond the evidence found significant by the Appellate Body in *United States – Zeroing (EC)* – the Panel had

[48] Appellate Body Report, *United States – Zeroing (EC)*, para. 198, cited by the Panel at para. 7.43.
[49] Panel Report, para. 7.50 (emphasis added).
[50] Panel Report, para. 7.51 (emphasis added).
[51] *See* Japan's Written Comments on the Relevant Issues of Law Addressed in the Appellate Body Report in *US – Zeroing (EC) (WT/DS294/AB/R)*, 10 May 2006, paras. 6-9.

before it evidence of statements by U.S. government agencies and courts characterizing the zeroing procedures "in terms of a long-standing policy".[52]

41. In contrast, the United States advanced no evidence to the Panel of any instances in which the USDOC had not applied the zeroing procedures in any type of anti-dumping proceeding, no matter what comparison method was employed.[53] Moreover, the United States offered no evidence suggesting that mechanical or other differences between W-to-T and T-to-T comparisons in original investigations, on the one hand, and other combinations of proceedings and comparison methods, on the other, would affect the application of the zeroing procedures.

42. The Panel also had before it the USDOC's Anti-Dumping Manual, which describes the "programming procedures" for performing "margin calculations".[54] The Manual provides that the "basic elements" of the margin calculation "procedures" include the "standard programs" that execute dumping determinations according to the USDOC's "proper calculation methodologies."[55] The Manual adds that "the purpose of the [programming] procedures is to improve the accuracy and consistency of computer calculations."[56] The Manual also notes that "consistency is achieved by insuring that the standard programs conform with *current AD calculation methodology*."[57] The Manual further states that "calculation consistency occurs when every program uses the *same standard calculation methodology*".[58] In other words, according to the Manual, every program that is applied by the United States in a particular proceeding must use "the same standard calculation methodology", which must "conform" to the Administration's current methodological requirements, set out in the standard programs.[59] The Manual

[52] Panel Report, para. 7.54.
[53] The Panel observed that the United States "has not identified a single case in which a decision was taken to provide such as offset" (*i.e.*, not to use zeroing). Panel Report, para. 7.51.
[54] Exhibit JPN-5.C, pg. 1. *See* Japan's First Written Submission, paras. 26-30.
[55] Exhibit JPN-5.C, pg. 8.
[56] Exhibit JPN-5.C, pg. 8.
[57] Exhibit JPN-5.C, pg. 8 (emphasis added).
[58] Exhibit JPN-5.C, pg. 8.
[59] Exhibit JPN-5.C, pg. 8.

demonstrates that the USDOC has a standard margin calculation methodology that is reflected in the USDOC's standard computer programs.[60]

43. The Panel additionally had before it the standard computer programs for calculating margins of dumping in original investigations and periodic reviews.[61] In short, these include a standard zeroing line that, in both situations, mechanically executes the zeroing procedures in the same way, namely by systematically excluding negative comparison results. Along with an example of the application of the T-to-T methodology in an investigation,[62] Japan also provided evidence from 14 "as applied" cases involving 23 company-specific anti-dumping margin calculations, showing the application of the zeroing procedures in different anti-dumping proceedings, using different comparison methods.[63] As the Panel found, in each and every case, the substantive content of the zeroing procedures applied by the USDOC is exactly the same: the USDOC disregards negative results of multiple comparisons where export price exceeds normal value. On the basis of this evidence, the Panel found that the standard zeroing line "has been included in the vast majority of computer programmes used by USDOC to calculate margins of dumping and assessment rates in specific cases".[64]

44. The United States asserted that, in a small but unspecified number of instances, the USDOC had not used the standard computer program. However, as the Panel found, the United States acknowledged that, in those instances, "USDOC has used other methods to exclude export prices higher than the normal value from the numerator of the weighted average margin of dumping."[65] Thus, according to the United States, even where it does not use the standard computer program, it finds ways to zero.

[60] In *United States – Zeroing (EC)*, the Appellate Body also found the Anti-Dumping Manual to be significant, as it demonstrated the normative value of the zeroing methodology. Appellate Body Report, *United States – Zeroing (EC)*, para. 202.
[61] Exhibits JPN-6 and JPN-7. *See* Japan's First Written Submission, paras. 31-46.
[62] Exhibits JPN-8 and JPN-24.
[63] Exhibits JPN-10 to JPN-23.
[64] Panel Report, para. 7.51.
[65] Panel Report, para. 7.51.

45. The Panel additionally had before it testimony from an expert, Ms. Valerie Owenby, explaining, among other points, the significance of the standard computer program and the standard zeroing line.[66] Ms. Owenby explained that, although the USDOC occasionally varied certain lines of the standard computer program in developing case-specific programs, it never varied the standard zeroing line. She also asserted that, to her knowledge, the USDOC had applied the standard computer program, including the standard zeroing line, in every margin calculation with which she was familiar, in all types of anti-dumping proceeding. Her experience extends back to 1993.

46. While the United States argued that the USDOC has a theoretical discretion to decide whether "to provide for offsets for non-dumped transactions" (*i.e.*, not to zero), the Panel found that the United States "has not identified a single case in which a decision was taken to provide such an offset".[67]

47. The Panel also had evidence before it of statements by the USDOC, United States Department of Justice ("USDOJ"), United States Court of International Trade and the United States Court of Appeals for the Federal Circuit confirming, in the words of the Panel, "that USDOC's consistent application of zeroing reflects a deliberate policy."[68] Japan quotes the Panel's summary of this evidence in full:

> Thus, for example, USDOC has repeatedly stated that "we do not allow" export sales at prices above normal value to offset dumping margins on other export sales, has referred to its "practice" or "methodology" of not providing for offsets for non-dumped sales, has pointed out that the United States Court of Appeals for the Federal Circuit has ruled that the "zeroing practice" … is a reasonable interpretation of the law, that the US Congress was aware of USDOC's methodology when it adopted the Uruguay Round Agreements Act, and that not granting an offset for non-dumped sales "has consistently been an integral part of the Department's weighted-average-to-weighted-average analysis". We also note that the United States Department of Justice has stated that USDOC "has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the URAA" and has referred to USDOC's "long-standing methodology" and to "the zeroing practice, which has

[66] Exhibit JPN-1.
[67] Panel Report, para. 7.51.
[68] Panel Report, para. 7.52. *See* Japan's Second Written Submission, paras. 14-31.

> been followed for at least 20 years" and which "predated the passage of the latest major amendment of the Anti-dumping law". Finally, the United States Court of International Trade has stated that "Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice".[69]

48. The Panel concluded that "these statements are significant as evidence showing that the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application", which applies regardless of the comparison method and regardless of the type of proceeding in which margins are calculated.[70]

49. The evidence enabled the Panel to identify the "precise content" of the zeroing procedures: "the exclusion from the numerator of weighted average dumping margins of results of comparisons in which export prices are above the normal value", and "non-dumped sales are not allowed to offset margins found on dumped export sales",[71] in satisfaction of the Appellate Body's requirements in *United States – Zeroing (EC).*

50. Assessing the evidence, the Panel concluded that the zeroing procedures are a "single" rule or norm that applies across all procedural contexts – in all types of U.S. anti-dumping proceedings, and in calculating anti-dumping margins using all comparison methods. Specifically, the Panel found that the zeroing procedures are applied "*whenever USDOC calculates margins of dumping or duty assessment rates*", and that "USDOC *always applies zeroing*".[72] The Panel further found that:

[69] Panel Report, para. 7.52.
[70] Panel Report, para. 7.53.
[71] Panel Report, paras. 7.51, 7.53. The Panel explained that these descriptions of the norm are "solely intended to reflect the terminology used in the statements of US agencies", and "[b]y using this terminology here we do not intend to convey a particular view on the question of whether the concept of dumping can apply to individual export transactions." Panel Report, para. 7.53 (note 687).
[72] Panel Report, para. 7.50 (emphasis added).

> … the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application, which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales and which is applied *regardless of the basis upon which export price and normal value are compared*[688] *and regardless of the type of proceeding in which margins are calculated.*
>
> [688] Therefore, we consider that the terms "model zeroing" and "simple zeroing" used by Japan do not correspond to two different rules or norms but *simply refer to different manifestations of a single rule or norm* – not allowing non-dumped export sales to offset margins on export prices below the normal value.[73]

51. Thus, Panel found that the evidence supports the conclusion that there is a "single" rule or norm at issue, and that that rule or norm applies whenever the USDOC calculates margins of dumping, regardless of the comparison method used and regardless of the type of proceeding in which margins are calculated.

52. No evidence of record before the Panel suggested that a distinction is made in the USDOC's treatment of negative comparison results depending on the comparison method or the type of proceeding. Indeed, it is striking that the United States offered no evidence (and offers none in this appeal) to suggest that there is something different about the use of W-to-T or T-to-T comparisons in original investigations that makes the "'at least 20 years'" of systematic application of the zeroing procedures noted by the U.S. Department of Justice inapplicable to those specific contexts.[74]

53. Thus, under any comparison method, and in any type of anti-dumping proceeding, the Panel found that the USDOC applies the same zeroing rule in the same way: systematic exclusion of the negative results of multiple comparisons from the total amount of dumping in the numerator of the fraction used to calculate the weighted average margin of dumping.

54. In its findings on the measure, the Panel, therefore, followed the guidelines set out by the Appellate Body, carefully examining a wide variety of evidentiary sources to

[73] Panel Report, para. 7.53 (note 687 omitted) (emphasis added).
[74] Panel Report, para. 7.52.

establish that the zeroing procedures are a rule or norm challengeable "as such" in WTO dispute settlement. The Panel concluded as follows:

> We therefore consider that the evidence before us is sufficient to identify the precise content of what Japan terms "zeroing procedures", that these procedures are attributable to the United States and that they are a rule or norm of general and prospective application. While we acknowledge that to establish a norm in part on the basis of inferential reasoning is highly unusual, we consider that it is justified in the circumstances of this case. In the Panel's view, this norm can be characterized as an "administrative procedure" within the meaning of Article 18.4 of the *AD Agreement*.[75]

B. *Scope of U.S. Appeal*

55. The United States appeals the Panel's finding that the zeroing procedures are a rule or norm challengeable as such, as they relate to W-to-T and T-to-T comparisons in original investigations.

56. Japan notes that the scope of the United States' appeal does not include the Panel's finding on the existence of a measure challengeable as such: (i) as related to the W-to-W comparison method in original investigations; or, (ii) as related to periodic and new shipper reviews.

C. *The Evidence Supports the Panel's Finding that the Zeroing Procedures Are a Single Norm Challengeable As Such that Extends to W-to-T and T-to-T Comparisons in Original Investigations*

57. The United States argues that the evidence was insufficient for the Panel to find that the zeroing procedures constitute a rule or norm challengeable as such, as they relate to W-to-T and T-to-T comparisons in original investigations. Specifically, the United States argues that the Panel erred in making this finding in the absence of any evidence related to W-to-T comparisons in original investigations, and inadequate evidence related

[75] Panel Report, para. 7.55.

to T-to-T comparisons in original investigations.[76] The United States makes essentially three inter-related arguments in support of its appeal.

58. *First*, as an overarching point, the United States argues that to identify the "precise content" of the rule or norm, the Panel was required to assess *context-specific evidence*, *i.e.*, evidence specific to W-to-T and T-to-T comparisons in original investigations, to determine that the norm existed in that context. With this argument, the United States is essentially asserting that the types of proceedings and comparison methods are determinative in defining the scope of the rule or norm.

59. *Second*, the United States argues that, in conducting this context-specific assessment, *evidence of some application* of the zeroing procedures in W-to-T comparisons in original investigations, and *evidence of more application* of T-to-T comparisons in original investigations, was necessary for the Panel to find that a rule or norm existed in those contexts. According to the United States, the evidence regarding the application of the zeroing procedures in T-to-T comparisons in original investigations was too sparse, and evidence regarding the systematic application of the zeroing procedures in other types of U.S. anti-dumping proceedings and/or comparison methods was not relevant to W-to-T and T-to-T comparisons in original investigations.

60. *Third*, the United States argues that, again in conducting this context-specific assessment, the Panel should not have relied on *other evidence of record*, such as statements about the prevalence and longevity of the zeroing procedures made by U.S. government agencies and courts, because those statements were not made with specific reference to W-to-T and T-to-T comparisons in original investigations.

[76] U.S. Other Appellant's Submission, para. 14 ("The evidence before the Panel, consistent with Japan's argumentation, related primarily to Commerce's use of zeroing when conducting average-to-average comparisons in investigations and average-to-transaction comparisons in assessment reviews."), and note 22 ("[T]he Panel's error may be viewed either as having failed to identify the precise content of a single measure – that is, whether any 'zeroing procedures' maintained by Commerce actually relate to transaction-to-transaction and average-to-transaction comparisons in investigations – or as having failed to establish the existence of separate Commerce 'zeroing procedures' as they relate to each of these comparisons in investigations.").

61. Before addressing these inter-related arguments in turn, Japan makes two preliminary observations.

62. *First*, the United States seeks to isolate the evidence relied upon by the Panel into its individual component parts (*e.g.*, evidence of the application of the zeroing procedures in specific cases, and evidence other than actual application). However, the Panel properly weighed the evidence and appreciated its meaning overall, finding that it was of sufficient quantum and character to support a finding that the zeroing procedures constitute a rule or norm that applies "whenever" USDOC determines margins of dumping and that can be challenged as such, across all types of U.S. anti-dumping proceedings employing all types of comparison methods.[77]

63. *Second*, Japan notes that the United States essentially challenges the Panel's *assessment of the facts*. Specifically, the United States argues that the Panel's findings of fact *were not relevant to* W-to-T and T-to-T comparisons in original investigations, because they related to other types of proceedings and/or comparison methods. Japan does not agree with this characterization of the significance and probity of the evidence relied on by the Panel, as discussed below. However, before addressing the U.S. arguments on the merits, Japan recalls the nature of a panel's duty to make an "objective assessment" of the facts under Article 11 of the DSU. In *Dominican Republic – Cigarettes*, the Appellate Body characterized that duty as follows:

> 77. In *EC – Hormones*, the first appeal presenting an Article 11 challenge to a Panel's fact-finding, the Appellate Body identified the "duty to make an objective assessment of the facts [as], among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence." The Appellate Body also observed in that appeal that the:

[77] Panel Report, para. 7.50. As in *United States – Zeroing (EC)*, the array of evidence before the Panel in the current case "consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract." Appellate Body Report, *United States – Zeroing (EC)*, para. 204.

> [d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.

> 78. The Appellate Body has consistently emphasized, since *EC – Hormones*, that, within the bounds of their obligation under Article 11 to make an objective assessment of the facts of the case, panels enjoy a "margin of discretion" as triers of fact. Panels are thus "not required to accord to factual evidence of the parties the same meaning and weight as do the parties" and may properly "determine that certain elements of evidence should be accorded more weight than other elements".
>
> 79. Consistent with this margin of discretion, the Appellate Body has recognized that "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts." When considering claims under Article 11 of the DSU, the Appellate Body does not "second-guess the Panel in appreciating either the evidentiary value of … studies or the consequences, if any, of alleged defects in [the evidence]". Indeed:
>
>> [i]n assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.
>
> Where participants challenging a panel's fact-finding under Article 11 have failed to establish that a panel exceeded the bounds of its discretion as the trier of facts, the Appellate Body has not interfered with the findings of the panel.[78]

64. Although the United States may disagree with the Panel's appreciation of the evidence, the Panel acted within the bounds of its discretion, as the trier of fact, in concluding that the evidence, even if drawn in part from contexts other than W-to-T and T-to-T comparisons in original investigations, demonstrated the existence of a rule or norm *across all contexts* that applies "whenever" the USDOC determines a margin of

[78] Appellate Body Report, *Dominican Republic – Cigarettes*, paras. 77-79 (notes omitted).

dumping.[79] Moreover, the Panel acted within the bounds of its discretion, as the trier of fact, in concluding that the *quantum* of evidence was "sufficient" to support this finding.[80] The United States' burden in this appeal is great; to succeed, it must show that in assessing the relevance of the evidence, the Panel exceeded the bounds of its discretion as the trier of fact.

65. Japan now turns to a rebuttal of the United States' argument on the merits.

(i) The Record Contains No Evidence Regarding Differences Between the Various Types of Proceedings and Comparison Methods that Would Have Required the Panel to Undertake a Context-Specific Assessment

66. At the core of the United States' appeal is its contention that the Panel should have assessed the evidence regarding the existence of the rule or norm on a proceeding- and comparison method-specific basis.

67. However, proceeding- and comparison method-specific evidence is required only if there is something relevant in the distinctions among the various types of proceedings and comparison methods that *requires* an independent assessment whether a "rule or norm" exists for each setting. Conversely, if there is nothing relevant to these distinctions that compels a separate assessment, then there is no need for the Panel to have parsed the evidence as to each specific comparison method and procedural situation (*e.g.*, W-to-T and T-to-T in investigations) in its determination that there exists a single norm challengeable as such.

68. The issue is, therefore, whether the differences between comparison methods and anti-dumping proceedings imply any difference in the operation or application of the zeroing procedures that requires an independent assessment whether a rule or norm exists for each setting. The answer is that they do not.

[79] Panel Report, para. 7.50.
[80] Panel Report, paras. 7.50, 7.55.

69. The United States insists on a proceeding and comparison method-specific assessment. Yet, it has conspicuously failed to offer any evidence or argument to demonstrate that some element of the W-to-T and T-to-T comparison methods in investigations means that zeroing in these contexts differs from zeroing in other contexts, compelling an independent assessment in W-to-T and T-to-T comparisons, as asserted by the United States. The United States also fails to explain why its long-standing and perfectly consistent policy of applying zeroing "whenever USDOC calculates margins of dumping"[81] is not relevant in the context of W-to-T and T-to-T comparisons.

70. Thus, no evidence or argument advanced by the United States suggests that the USDOC cannot or would not apply the zeroing procedures in the context of W-to-T and T-to-T comparisons in original investigations, just as it does in all other contexts. In fact, as Japan has explained, the evidence of record shows that the United States resorted to a T-to-T comparison in the Section 129 Determination *precisely to enable the continued application of the zeroing procedures*.

71. Instead of offering positive evidence and argument of this sort to the Panel (or, indeed, to the Appellate Body), the United States draws on statements by the Appellate Body, the Panel and Japan as support for its assertion that the Panel should have assessed the evidence regarding the existence of the rule or norm on a proceeding- and comparison method-specific basis.

72. First, the United States argues that the Appellate Body recognized the context-specific nature of the zeroing measure in *US – Zeroing (EC)*.[82] In Japan's view, this is a misstatement of the Appellate Body's determination in that dispute. The Appellate Body did *not* conclude that the zeroing procedures did not comprise a single measure. Rather, the panel's findings of fact in that proceeding, in response to the EC's as such claims, were confined solely to the existence of the zeroing methodology and its consistency in relation to the W-to-W comparison method in original investigations. Given the limited

[81] Panel Report, para. 7.51.
[82] U.S. Other Appellant's Submission, para. 14, *citing* Appellate Body Report, *US – Zeroing (EC)*, para. 228.

factual findings with which it had to work, as well as the absence of undisputed facts of record, the Appellate Body concluded that it was "unable to complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, as such" with the *Agreement*.[83] This ruling does not address the question whether a panel can infer from the evidence as a whole that a Member applies zeroing "whenever" it calculates margins,[84] even if the evidence of application of the measures in all procedural contexts is not identical.

73. The United States then turns to the Panel's analysis, asserting that the Panel "appreciated the need to consider the specific context to which evidence relates" when it examined Japan's "as such" claim in the context of sunset and changed circumstances reviews.[85] Specifically, the United States notes the Panel's explanation that the evidence presented by Japan only addressed the USDOC's use of historical dumping margins in sunset reviews, but did not address whether the USDOC relied on historical margins in changed circumstances reviews.[86]

74. Contrary to the United States' arguments, the Panel's approach to the existence of an "as such" measure in changed circumstances and sunset reviews was dictated by the evidence of record, and not by any differences between these two procedural contexts that would affect zeroing. The USDOC does not calculate anti-dumping margins in changed circumstances and sunset reviews. Thus, Japan's as such claim regarding the zeroing procedures in changed circumstances and sunset reviews was based on its assertion that in these reviews, the USDOC *relies on* margins calculated using the zeroing procedures in original investigations, periodic reviews or new shipper reviews.

75. Consistent with its mandate under Article 11 of the DSU, the Panel properly put Japan to its burden to prove, as a preliminary matter, that in changed circumstances and

[83] Appellate Body Report, *US – Zeroing (EC)*, para. 228.
[84] Panel Report, para. 7.50.
[85] U.S. Other Appellant's Submission, para. 15. *See also id.*, para. 28.
[86] U.S. Other Appellant's Submission, para. 15, *quoting* Panel Report, para. 7.241.

sunset reviews, the USDOC *relies*, as a general rule, on margins calculated using the zeroing procedures in original investigations, periodic reviews or new shipper reviews.[87]

76. The Panel concluded that the evidence offered by Japan to establish this fact was insufficient. According to the Panel, Japan provided no evidence to establish that the authority relies on historical dumping margins in changed circumstances reviews, and insufficient evidence that the authority relies on historical dumping margins in sunset reviews.[88] The Panel did not, as the United States suggests,[89] assess whether two separate rules or norms existed – one as related to changed circumstances reviews and a second as related to sunset reviews. Instead, the Panel simply concluded that Japan had failed to clear a preliminary evidentiary hurdle – namely, to establish that in changed circumstances and sunset reviews, the USDOC *relies*, as a general rule, on margins calculated in earlier proceedings.

77. The United States attempts to further buttress its argument by asserting that "at least when it requested consultations, Japan – like the United States – did not consider that there was *one* measure applicable regardless of comparison or proceeding type."[90] This is incorrect. Whatever may have been the United States' understanding at the time of consultations, as noted above, the very first paragraph of Japan's request identified the "'zeroing' practice" as a "measure" on which consultations were requested across all types of proceedings, and without any limitation as to comparison method.[91]

78. The United States also points to the fact that Japan abandoned its claim regarding the W-to-T comparison method in investigations. The United States asserts that the recognition by Japan and the Panel that a "degree of uncertainty" surrounds that comparison method undermines "the Panel's conclusion that it had in fact identified 'the

[87] Panel Report, paras. 7.240-7.242.
[88] Panel Report, paras. 7.240-7.242.
[89] U.S. Other Appellant's Submission, paras. 15, 28.
[90] U.S. Other Appellant's Submission, para. 20.
[91] WT/DS322/1.

precise content' of the measure it found in connection with all comparison and proceedings types . . . ."[92]

79. This argument, however, is based on a misinterpretation of the reasoning underlying Japan's withdrawal of its claim regarding W-to-T comparisons in investigations, and the Panel's recognition of Japan's reasoning. Neither Japan nor the Panel described the withdrawal of the claim as based on the ground that there was "uncertainty" as to whether the zeroing procedures encompass W-to-T comparisons in investigations, or whether the USDOC would employ the zeroing procedures in that situation.

80. Before the Panel, the United States similarly asserted that Japan's withdrawal of this claim demonstrated a recognition by Japan that there is no single "as such" zeroing measure. In response, Japan explained that the "uncertainty" had nothing to do with the application of zeroing in this situation; to the contrary, the Panel notes Japan's explanation that "the uncertainty surrounding the United States' 'targeted dumping' methodology relates to aspects of the comparison method *other* than the use of zeroing."[93]

81. The Panel continued, observing that Japan "maintains that the zeroing procedures apply to W-to-T comparisons under the second sentence of Article 2.4.2,"[94] and that "Japan . . . explains that the USDOC standard zeroing procedures <u>constitute a single rule</u> of general and prospective application, that mandates the systematic disregard of negative intermediate comparison results on a model- or transaction-specific basis in calculating dumping margins under *any* method of comparison and in *any* type of anti-dumping

[92] U.S. Other Appellant's Submission, para. 23.
[93] Panel Report, para. 6.18 (emphasis in original). This "uncertainty" was also recognized by the Appellate Body: "We also note that there is considerable uncertainty regarding how precisely the third methodology should be applied." Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (hereinafter *United States – Softwood Lumber V (Article 21.5 – Canada)*), para. 98.
[94] Panel Report, para. 6.18.

proceeding."[95] Thus, contrary to the United States' argument before the Appellate Body, Japan consistently identified the zeroing procedures as a single rule or norm that may be challenged as such, and the Panel recognized Japan's position on this issue. Japan's withdrawal of its claims regarding the second sentence of Article 2.4.2 was not related to uncertainties regarding the application of the zeroing procedures in a W-to-T comparison under that provision.

82. The United States also quotes some phrases out of context from Japan's First and Second Written Submissions as support for its assertion that Japan itself envisions the existence of two separate measures – "model" and "simple" zeroing.[96] By themselves, however, these phrases cannot be interpreted as defining Japan's understanding of the "as such" zeroing measure that is the subject of this dispute; nor can the terms or labels used in Japan's submissions undermine the Panel's assessment of the evidence before it in determining the scope and content of the measure that may be challenged as such.

83. The Panel properly recognized that Japan was using the terms "model" and "simple" zeroing to describe two manifestations of a single measure; as the Panel explained, "we consider that the terms 'model zeroing' and 'simple zeroing' used by Japan do not correspond to two different rules or norms but simply refer to different manifestations of a single rule or norm . . . ."[97] The Panel's conclusion is consistent with the Appellate Body's general statement that the evaluation of an "instrument" "must be

[95] Panel Report, para. 6.19, *citing* Japan Rebuttal Submission of 12 August 2005, Section II (underlining added).
[96] U.S. Other Appellant's Submission, para. 22.
[97] Panel Report, note 688.

based on the content and substance of the instrument, and not merely on its form or nomenclature."[98]

84. The United States ignores other passages from Japan's submissions to the Panel that point to its identification of the precise content of the rule or norm as encompassing all types of proceedings and comparison methods. For example, in responses to questions from the Panel, Japan stated that

> The subject-matter of the standard zeroing procedures is the system or method of mechanically excluding the negative intermediate values that are calculated by comparing normal value and export price for sub-groupings of the product, on a W-to-W, W-to-T or a T-to-T, basis in establishing the overall margin of dumping for the product as a whole. The exclusion of these negative values constitutes a generalized, unvarying norm or rule of the USDOC in margin calculations in all anti-dumping proceedings.[99]

85. The United States also ignores that Japan's panel request identified a single "zeroing" measure that was expressly alleged to apply to all comparison methods in an original investigation.[100]

86. In sum, as noted above, the only reason to require proceeding- and comparison method-specific evidence is if there is something relevant in the distinctions among the various types of proceedings and comparison methods that requires an independent assessment whether a norm exists for each setting. The United States has offered no evidence or argument demonstrating such a distinction. Instead, the United States

[98] Appellate Body Report, *United States – Corrosion-Resistant Steel Sunset Review*, para. 87 (note 87). Moreover, despite its focus on Japan's use of the terms "model" and "simple" zeroing, the United States has entirely failed to explain how the "simple" zeroing "measures" as to which it has appealed (*i.e.*, simple zeroing in W-to-T and T-to-T comparisons in investigations) differ in any way from the "simple" zeroing "measure" that it has *not* appealed (*i.e.*, simple zeroing in W-to-T comparisons in periodic and new shipper reviews). Thus, the United States has failed to explain why the Panel erred in failing to perform a situation-specific assessment of the former, but not the latter, in light of its view that they comprise separate measures, as to which separate assessments are required. This also reveals the failure of the United States to show that there is something unique in the W-to-T and T-to-T comparison methods in investigations that requires a separate assessment of evidence specific to these contexts. The United States' argument is tantamount to an assertion that because the actual application of these comparison methods in investigations has been infrequent, the "single" rule or norm can not encompass these contexts.
[99] Japan's Answers to the Panel's Questions after the First Substantive Meeting, 20 July 2005, para. 11.
[100] *See* WT/DS322/8, para. 1.

attempts to deflect attention from its own failure by relying on erroneous characterizations of statements by the Appellate Body, the Panel and Japan. As demonstrated above, none of those statements reveals either the imposition of a requirement to assess evidence regarding the existence of a rule or norm on a proceeding- or comparison method-specific basis, or an understanding by Japan that such a requirement was part of its burden in this dispute.

(ii) The Evidence Was Sufficient for the Panel to Conclude that the Rule or Norm Covers W-to-T and T-to-T Comparisons in Original Investigations

87. The United States argues that the Panel had insufficient evidence to find that the zeroing procedures are a rule or norm challengeable as such, as they relate to W-to-T and T-to-T comparisons in original investigations. The United States divides this argument into two parts; Japan's rebuttal is similarly divided into two parts.

88. *First*, the United States argues that the record contained: (i) no evidence of the application of the zeroing procedures in W-to-T comparisons in original investigations; (ii) insufficient evidence of the application of the zeroing procedures in T-to-T comparisons in original investigations; and, (iii) primarily evidence regarding the systematic application of the zeroing procedures either in W-to-W comparisons in original investigations, or W-to-T comparisons in periodic and new shipper reviews.

89. *Second*, the United States argues that the other evidence relied on by the Panel, encompassing statements by U.S. government agencies and courts regarding the normative nature, prevalence and longevity of the zeroing procedures, were irrelevant to W-to-T and T-to-T comparisons in original investigations, as they were not made in those specific contexts.

90. However, before discussing these two issues, Japan wishes to emphasize again that the appropriate way for the Panel to determine whether the evidence demonstrated that the zeroing procedures exist as a rule or norm of general and prospective application was to assess the evidence of record as a whole. Although evidence of the application of

the zeroing procedures is important, it cannot be viewed in isolation. Rather, the Panel correctly assessed the significance of this evidence in light of the other evidence, including statement by United States' government agencies and courts. The Panel was well within its discretion in finding that the evidence as a whole showed that the United States applies the zeroing procedures "whenever" it calculates dumping margins.[101]

(a) Evidence of Actual Application

91. The United States' appeal concerns the Panel's finding that the zeroing procedures constitute a single rule or norm that extends to W-to-T and T-to-T comparisons in original investigations: (i) in the absence of any evidence of the application of the procedures in W-to-T comparisons in original investigations; and, (ii) in the absence of a sufficient quantum of evidence of the application of the procedures in T-to-T comparisons in original applications.[102]

92. Although the Appellate Body has noted the role that "systematic application" of a rule or norm may have in determining whether it exists and is challengeable as such,[103] long-standing GATT and WTO jurisprudence holds that actual application of the rule or norm is not required:

> In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could

[101] Panel Report, para. 7.50.

[102] The United States' argument that proof of actual application is required carries a certain irony. The United States has frequently argued that evidence regarding repeated application of a practice did not constitute evidence that the practice constituted a rule or norm challengeable as such. *See*, *e.g.*, Other Appellant Submission of the United States, *United States – Zeroing (EC)*, para. 25 ("What the Panel calls 'application' is nothing more than consistent results. However, the fact that a Member has acted consistently over a period of time has nothing to do with whether there is some separate binding or non-binding act or instrument – a measure – that is causing, or contributing to, the consistent behavior. Absent some separate act or instrument, the only thing proven by consistent results is the fact of consistent results."), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file991_7156.pdf .

[103] Appellate Body Report, *United States – Zeroing (EC)*, para. 198.

> constitute a "measure", *irrespective of how or whether those rules or norms are applied in a particular instance*. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.[104]

93. In any event, this is not a dispute in which the Appellate Body needs to test the degree to which a rule or norm challengeable as such can exist in the absence of evidence regarding the systematic application of that rule or norm. The Panel had before it considerable evidence of the actual and, indeed, systematic application of the U.S. zeroing procedures in numerous cases, across all procedural contexts that have arisen thus far.

94. Specifically, Japan submitted to the Panel evidence demonstrating that the USDOC included the zeroing procedures in the dumping margin determination: (i) in an investigation involving W-to-W comparison method;[105] (ii) in an investigation involving the T-to-T comparison method (specifically, the United States' Section 129 redetermination proceedings after the Appellate Body found the application of zeroing

[104] Appellate Body Report, *United States – Corrosion-Resistant Steel Sunset Review*, para. 82 (emphasis added). *See also* GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R (hereinafter *United States – Malt Beverages*), paras. 5.58, 5.60, 5.39, *cited* approvingly by the Appellate Body in *United States – 1916 Act*, para. 91 (note 50). In that dispute, the GATT panel assessed the GATT-consistency of one measure that had not been applied at all, and another only "nominally" so.
[105] Exhibit JPN-10.A.

inconsistent with the *Agreement* in the *United States – Softwood Lumber V* dispute);[106] (iii) for 19 individual foreign manufacturers/exporters in 11 periodic reviews involving the W-to-T comparison method;[107] (iv) in a new shipper review also involving the W-to-T comparison method;[108] and (v) for three individual foreign manufacturers/exporters in the original investigations involving the W-to-W comparison method, to which the USDOC referred in two sunset reviews.[109]

95. In each case, the substantive content of the zeroing procedures applied by the USDOC is identical: the USDOC disregarded negative comparison results where export price exceeds normal value.

96. This evidence of the systematic application of the zeroing procedures is supported by the expert testimony submitted by Japan to the Panel. Specifically, Ms. Valerie Owenby testified that in her twelve years of experience, the USDOC had applied the zeroing procedures in every anti-dumping proceeding of which she was aware. Ms. Owenby stated, "throughout my career, the procedure for calculating the overall weighted-average percentage dumping margin has never changed. Every USDOC anti-dumping calculation program I have examined in the past, and as recently as today, has contained the same overall percentage dumping margin programming language, including the 'zeroing' line . . . ."[110]

97. On the basis of this and other evidence, which is discussed by Japan below, the Panel correctly found that the "general and prospective" nature of the zeroing procedures

[106] Exhibits JPN-8 and JPN-24. The United States repeatedly observes that the determination resulting from this proceeding was made "after panel establishment" in the current case. *See* U.S. Other Appellant's Submission, para. 2, note 18 and para. 24. Had Japan been challenging this particular instance of zeroing as applied, the fact that the determination was made after panel establishment would presumably be significant. Japan was not doing so, however. Rather, Japan was simply using this determination as evidence of the existence of the zeroing procedures, and the status of those procedures as a rule or norm challengeable as such. The determination only had to exist at the time Japan cited it in its submissions to the Panel, for it to be relevant evidence and contribute to the Panel's objective assessment of the matter.
[107] Exhibits JPN-11 to 21.
[108] Exhibit JPN-9.
[109] Exhibits JPN-22.A, 22.B and 23.C.
[110] Exhibit JPN-1, para. 16.

was supported by the fact that zeroing has been "a constant feature" of the U.S. anti-dumping proceedings "for a considerable period of time".[111] The Panel considered that the evidence established that "USDOC always applies zeroing . . ." across all contexts.[112]

98. Japan recalls that evidence of application or repetition is not necessary to demonstrate the existence of a measure and a complaining Member's entitlement to challenge it "as such". Nonetheless, evidence of "systematic application"[113] can be useful in determining whether a rule or norm challengeable as such exists. In fact, Japan offered voluminous evidence regarding the systematic application of the zeroing procedures in all procedural contexts that have arisen to date in U.S. anti-dumping proceedings.

99. In contrast, the United States has not pointed to a single instance in which the USDOC has declined to apply the zeroing procedures.[114] Nor has it offered any evidence suggesting that particular characteristics of W-to-T and T-to-T comparisons in original investigations would lead to a departure from the rule that the Panel observed in all other procedural contexts over an extended period. The United States has also offered no reasons why the perfectly consistent application of zeroing would be abandoned in the context of the comparison methods subject to its appeal.

100. In fact, when put to the test, the United States has proven that it will indeed exploit the very type of loophole it is encouraging the Appellate Body to preserve in this appeal; in its Section 129 redetermination following the Appellate Body's ruling in *United States – Softwood Lumber V*, which prohibited the use of the zeroing procedures in W-to-W comparisons in original investigations, the USDOC switched to the T-to-T comparison method, and once again applied the zeroing procedures.[115] While the comparison method changed, the zeroing procedures did not.

[111] Panel Report, para. 7.51.
[112] Panel Report, para. 7.51.
[113] Appellate Body Report, *United States – Zeroing (EC)*, para. 198.
[114] Panel Report, para. 7.51 ("The United States . . . has not identified a single case in which a decision was taken to provide such an offset [for non-dumped transactions].").
[115] Panel Report, paras. 4.28, 6.20.

101. In these circumstances, the Panel's reliance on the "systematic application"[116] of the zeroing procedures in every procedural context that has arisen to date was objective and well within the bounds of its discretion. Against a backdrop of the systemic application of the zeroing procedures in every single U.S. anti-dumping determination published to date, no matter which type of proceeding involved or which comparison method employed, the United States' observation that the USDOC has not yet zeroed in procedural settings that have not yet arisen proves nothing, other than that those procedural settings have not yet arisen.

102. Finally, Japan notes that the United States itself has repeatedly recognized in these proceedings that the zeroing procedures apply in W-to-T comparisons in investigations under the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The United States made various statements to the Panel that reveal its understanding that zeroing is not only permitted, *but necessary*, when an investigating authority undertakes a targeted dumping analysis under the second sentence of Article 2.4.2. In those arguments – repeated in *United States – Zeroing (EC)*[117] and *United States – Softwood Lumber V (Article 21.5 – Canada)*[118] – the United States discloses its unfounded fear that, without zeroing, the outcomes of a W-to-T comparison and a W-to-W comparison would collapse into mathematical identity.

103. For example, in its First Written Submission to the Panel in this dispute, the United States stated:

> An interpretation of Article 2.4 of the AD Agreement that requires such offsets in general [*i.e.*, that prohibits zeroing] would render the distinctions between the average-to-average and average-to-transaction methodologies in Article 2.4.2 without meaning.[119]

Similarly, in its answers to questions from the Panel, the United States asserted:

[116] Appellate Body Report, *United States – Zeroing (EC)*, para. 198.
[117] Appellate Body Report, *United States – Zeroing (EC)*, para. 44.
[118] Appellate Body Report, *United States – Softwood Lumber V (Article 21.5 – Canada)*, paras. 36 and 96.
[119] United States' First Written Submission of 14 June 2005, para. 59.

> If there is an obligation to provide offsets that applies to both the average-to-average and average-to-transaction methodologies, then the results of the comparisons will be the same. The United States has demonstrated this mathematically through Exhibit US-5. This would render the average-to-transaction methodology a nullity. Therefore, to the extent that the AD Agreement contains any obligation to provide offsets [*i.e.*, prohibits zeroing], *that obligation must be grounded in a textual provision that does not apply to the average-to-transaction methodology*.[120]

104. In other words, the United States repeatedly argued that zeroing could not be prohibited under a W-to-T comparison under the second sentence of Article 2.4.2 because, if it were prohibited under a W-to-W comparison and also a W-to-T comparison, the results of these comparisons would be identical. To a large extent, the United States premised its overall defense of zeroing on the necessity for zeroing in a W-to-T comparison in original investigations. The Panel recorded and accepted the United States' argument in paragraph 7.127 of the Panel Report.

105. Japan has vigorously challenged the assumptions on which the United States' "mathematical equivalence" argument was based,[121] and the Appellate Body explicitly rejected the United States' argument in *US – Softwood Lumber V (Article 21.5 – Canada)*.[122] The important point for current purposes, however, is not the validity *vel non* of the "mathematical equivalence" argument, but the fact that, in presenting that argument, the United States reveals its conclusion that the zeroing procedures apply in the W-to-T comparison method when used in investigations under Article 2.4.2. Thus, the United States' suggestion in this appeal that it might deviate from its policy of applying the zeroing procedures when it comes to investigations involving targeted dumping, is belied by its own arguments that zeroing is a necessity in a W-to-T comparison under the second sentence of Article 2.4.2 to distinguish that comparison method from a W-to-W comparison under the first sentence of that provision.

[120] Answers of the United States to the Panel's Questions to the Parties in Connection with the First Substantive Meeting, 20 July 2005, para. 41.
[121] *See* Panel Report, para. 7.66 (describing Japan's position on the "mathematical equivalence" argument); Japan's Appellant Submission, paras. 117-122.
[122] Appellate Body Report, *United States – Softwood Lumber V (Article 21.5 – Canada)*, paras. 97-100.

(b) Other Evidence

106. The United States also challenges the Panel's assessment of statements by U.S. government agencies and courts concerning the normative nature, prevalence and longevity of the zeroing procedures. The United States objects to the Panel's reference to this evidence because the statements involved did not arise in connection with cases involving T-to-T or W-to-T comparisons in investigations; the United States sees them as solely indicative of "what Commerce had done in the past," and do not "prescribe or in any way affect what Commerce must do in future anti-dumping proceedings".[123]

107. Although the United States argues that this evidence is derived from contexts other than W-to-T and T-to-T comparisons in original investigations, and cannot be relevant to W-to-T and T-to-T comparisons in original investigations, the Panel acted within the bounds of its discretion to conclude that this evidence speaks to the existence of the zeroing procedures as a single rule or norm of general and prospective application that applies "whenever USDOC calculates margins of dumping", including in W-to-T and T-to-T comparisons in original investigations.[124]

108. Without restating this evidence, which is described in detail in Section III.A. above, Japan notes that it includes statements by U.S. government agencies and courts to the effect that the zeroing procedures are *always* an element in U.S. anti-dumping proceedings, no matter what the procedural context or comparison method employed.[125] The USDOC went so far as to say that "*we do not allow*" the "offset" of export sales at prices above normal value against the "dumping margins" on export sales whose prices are below normal value.[126] On the basis of this evidence, the Panel properly concluded that the consistent application of the zeroing procedures is not the result of a mere coincidence, but rather "reflects a deliberate policy".[127] Again, while USDOC unequivocally stated that "we do not allow" "offsets", the United States offered no

[123] U.S. Other Appellant's Submission, para. 30.
[124] Panel Report, para. 7.50.
[125] Panel Report, para. 7.52, *citing* Exhibits JPN-16.D, 21.D, 27, 28, 29, 30, 31, 32.
[126] Panel Report, para. 7.52, quoting Exhibits JPN-21.D and 26.
[127] Panel Report, para. 7.52.

evidence that it does, in fact, "allow" "offsets" in the context of T-to-T and W-to-T comparisons in original investigations.

109. The evidence of record collectively demonstrates that the zeroing procedures are not some fleeting administrative phenomenon, but as the Panel noted, embody a "deliberate policy" discernable from decades of unyielding application. As noted in the introduction to this Appellee's Submission, the zeroing procedures reflect a basic policy decision that negative intermediate values of multiple comparisons should be disregarded in determining whether a foreign manufacturer/exporter is "dumping"; the investigating authority should consider only the comparisons that give rise to positive values. The policy is in place to make an affirmative dumping determination more likely and to inflate the margins of dumping artificially beyond those that would obtain if both positive and negative intermediate results were given their full mathematical value. The frequent result is, indeed, to convert negative anti-dumping margins into positive ones. The United States has offered no evidence explaining why this same policy would not attach in W-to-T and T-to-T comparisons in investigations.

110. Instead, when it had the opportunity to set the T-to-T methodology in original investigations apart and test its suggestion that the policy embodied in the zeroing procedures cannot or will not apply in that situation, the United States in fact applied its zeroing procedures.[128]

111. Thus, this is not a situation in which there is some ambiguity or conflict in the evidence that the United States believes the Panel failed objectively to assess. The mass of evidence before the Panel pointed in one direction – simply put, the USDOC applies zeroing "*whenever* it calculations margins of dumping or duty assessment rates," regardless of the procedural context.[129] As a result, the Panel was within the bounds of its discretion to determine, based on the sum of the evidence before it, that the zeroing procedures and the "deliberate policy"[130] underlying those procedures will apply across

[128] *See* Exhibit JPN-8.
[129] Panel Report, para. 7.50 (emphasis added).
[130] Panel Report, para. 7.52.

all types of proceedings and comparison methods, including W-to-T and T-to-T comparisons in original investigations.

IV. CONCLUSION

112. For the foregoing reasons, Japan requests that the Appellate Body reject the United States' appeal in its entirety and uphold the Panel's finding that the U.S. zeroing procedures constitute a measure challengeable as such.

113. Finally, the United States asks that the Appellate Body declare moot the Panel's findings with respect to the WTO-consistency of the zeroing procedures in T-to-T comparisons in investigations.[131] In its own Appellant's Submission, Japan has requested that the Appellate Body not declare *moot*, but instead *reverse*, the Panel's finding that the zeroing procedures, as related to T-to-T comparisons in original investigations, are not inconsistent with the *Agreement*.[132] Accordingly, Japan asks that the Appellate Body deny the United States' request to declare the Panel's findings moot in this respect.

[131] U.S. Other Appellant's Submission, paras. 32-33.
[132] *See* Japan Appellant's Submission, paras. 93-112.