

**BEFORE THE WORLD TRADE ORGANIZATION**

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

**WT/DS322**

**FIRST WRITTEN SUBMISSION**

**JAPAN**

**9 MAY 2005**

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**TABLE OF CASES CITED**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Argentina – Poultry</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India</i> , WT/DS141/AB/R, adopted 12 March 2001
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Tube or Pipe</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil</i> , WT/DS219/R, adopted 18 August 2003
<i>Egypt – Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement From Mexico</i> , WT/DS156/R, adopted 17 November 2000
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>U.S. – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>U.S. – Corrosion-Resistant Steel</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>U.S. – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R adopted 23 August 2001
<i>U.S. – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>U.S. – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R
<i>U.S. – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004
<i>U.S. – OCTG Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004

## **I. INTRODUCTION**

1. This dispute involves a straightforward proposition: the United States fails to respect the basic requirement in the *Anti-Dumping Agreement* for it to determine dumping margins on the basis of a “fair comparison” of export price and normal value for the product as a whole.<sup>1</sup> The United States maintains margin calculation procedures, in particular what Japan calls “zeroing procedures,” that are skewed in favour of an affirmative dumping determination and that manipulate the data to inflate the margin of dumping. As a result, the Appellate Body has explicitly held there is an “inherent bias” and “distort[ion]” in zeroing.<sup>2</sup>

2. The United States’ zeroing procedures work very simply. In order to compare export price and normal value, the United States identifies comparable export transactions; it then compares the export prices of these transactions with normal value; if export prices for these transactions are *higher* than normal value, there is a “negative” difference in prices; *whenever this happens*, the zeroing procedures automatically *disregard* the negative differences, retaining only positive differences in the calculation of the overall amount of dumping. In other words, for certain export transactions that the United States itself deems to be comparable, it ignores the negative price difference, converting it instead into a “zero” price difference.

3. What is the consequence for exporters? By retaining solely positive price differences, the zeroing procedures can generate an affirmative dumping determination for a product that, as a whole, is not dumped. If the margin of dumping were calculated consistently with the *Anti-Dumping Agreement*, without zeroing, the positive price differences might be entirely counterbalanced by the negative ones. Further, the exclusion of the negative differences also means that the overall dumping margin is higher than it would be if the negatives were not ignored. As a result, the zeroing procedures systematically prejudice exporters because negative differences that are favourable to them are purposefully set aside by the United States. Moreover, this prejudice is built into the design and structure of the procedures.

4. The zeroing procedures are, therefore, inconsistent with the United States’ WTO obligations because, among others, Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and

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<sup>1</sup> Article 2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“*Anti-Dumping Agreement*”).

<sup>2</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

Articles VI:1 and VI:2 of the GATT1994<sup>3</sup> require that a dumping margin be determined for the product as a whole, and also because the fairness requirement in Article 2.4 of the *Anti-Dumping Agreement* protects exporters from the “inherent bias” and “distort[ion]” in zeroing.<sup>4</sup> Moreover, as outlined below in paragraph 9, the procedures are also inconsistent with several other obligations in the *Anti-Dumping Agreement* because compliance with these obligations is dependent on compliance with Article 2 of the *Anti-Dumping Agreement*.

5. This Panel is not the first to examine zeroing; nor even the first to examine the United States’ zeroing procedures. Indeed, this is just the latest in a growing line of WTO disputes in which panels and the Appellate Body have consistently held that zeroing procedures are incompatible with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.<sup>5</sup>

6. What sets this dispute apart from others is that Japan’s claims go to the heart of the United States’ zeroing procedures through an “as such” challenge. Unlike any previous dispute, Japan’s challenge encompasses the prohibition on zeroing under any method of comparing normal value and export price. Japan’s claims address zeroing by the United States in: original investigations, administrative or periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews. Moreover, the challenge relates to the two different types of zeroing procedures maintained by the United States – “model” and “simple zeroing.”<sup>6</sup> Through these “as such” claims, Japan seeks to stem the tide of the United States’ WTO-inconsistent action that results from the contested zeroing procedures.

7. Additionally, Japan contests the application of the zeroing procedures in a series of determinations made by the United States, namely in one original investigation, 11 periodic reviews and two sunset reviews.

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<sup>3</sup> General Agreement on Tariffs and Trade 1994 (“GATT 1994”).

<sup>4</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

<sup>5</sup> Appellate Body Report, *EC – Bed Linen*; Appellate Body Report, *U.S. – Corrosion-Resistant Steel*; Appellate Body Report, *U.S. – Softwood Lumber V*; Panel Report, *EC – Tube or Pipe*. See also *United States – Anti-Dumping Measures on Cement from Mexico*, DS281, and *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, DS294, in which the zeroing issue has been raised, but in which the panel reports have not yet been circulated.

<sup>6</sup> The terms “model” and “simple zeroing” are labels used by Japan for purposes of these proceedings; they are not terms of United States’ law.



8. In this submission, Japan will, first, summarize its claims; second, describe in detail the “as such” and “as applied” measures; and, third, provide the legal arguments in support of its claims.

## **II. SUMMARY OF JAPAN’S CLAIMS**

9. Japan claims that the United States’ model and simple zeroing procedures are “*as such*” inconsistent with:

- (1) Article 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 because, in any type of anti-dumping proceeding, the determination of dumping, and the calculation of the dumping margin, is not for the product as a whole;
- (2) Article 2.4 of the *Anti-Dumping Agreement* because, in any type of anti-dumping proceeding, the zeroing procedures are inherently biased, distort the comparison of normal value and export price and, thus, deprive exporters of a “fair comparison;”
- (3) Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *Anti-Dumping Agreement* because the injury determination in original investigations is not based on an “objective examination” of “positive evidence” regarding the existence and amount of dumping and dumped imports;
- (4) Article 5.8 of the *Anti-Dumping Agreement* because the United States Department of Commerce (“USDOC”) does not have “sufficient evidence” of dumping to assess whether it must terminate original investigations;
- (5) Articles 9.1, 9.2, 9.3 and 9.5 of the *Anti-Dumping Agreement* because margins calculated in periodic and new shipper reviews are not established consistently with Articles 2.1, 2.4 and 2.4.2 of the *Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and the United States fails to ensure that duties collected do not exceed the proper margin of dumping established on a fair comparison basis for

the product as a whole;

- (6) Articles 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement* because margins calculated for use in changed circumstances and sunset reviews are not for the product as a whole, as required by Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, and they also do not respect the requirements of a “fair comparison” imposed by Article 2.4 of the *Anti-Dumping Agreement*; and
- (7) Article 1 of the *Anti-Dumping Agreement* as they are inconsistent with various provisions of the *Anti-Dumping Agreement* as referred to (1) – (6) above.
- (8) Japan also claims that, by maintaining the model and simple zeroing procedures, the United States acts inconsistently with Article 18.4 of the *Anti-Dumping Agreement* as well as Article XVI:4 of the *WTO Agreement*.<sup>7</sup>

10. Japan also claims that, through the *application* of the zeroing procedures, the anti-dumping measures:

- (1) in Certain Cut-To-Length Carbon Quality Steel Plate Products from Japan, an original investigation, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (2) in Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan (1 October 1998 through 30 September 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (3) in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan (1 October 1998 through 30 September 1999), a periodic review, are

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<sup>7</sup> Marrakech Agreement Establishing the World Trade Organization (“WTO Agreement”).

inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;

- (4) in Ball Bearings and Parts Thereof From Japan (1 May 1998 through 30 April 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (5) in Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1998 through 30 April 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (6) in Spherical Plain Bearings and Parts Thereof From Japan (1 May 1998 through 30 April 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (7) in Ball Bearings and Parts Thereof From Japan (1 May 1999 through 30 April 2000), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (8) in Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (9) in Spherical Plain Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;

- (10) in Ball Bearings and Parts Thereof From Japan (1 May 2000 through 30 April 2001), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (11) in Ball Bearings and Parts Thereof From Japan (1 May 2001 through 30 April 2002), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (12) in Ball Bearings and Parts Thereof From Japan (1 May 2002 through 30 April 2003), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (13) in the Expedited Sunset Review of Antifriction Bearings (Other Than Tapered Roller Bearings), and Parts Thereof, From Japan are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994; and
- (14) in the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

### **III. MEASURES CHALLENGED ON AN “AS SUCH” BASIS: THE MODEL AND SIMPLE ZEROING PROCEDURES**

11. The measures that Japan challenges “as such” are referred to as the standard model and simple zeroing procedures. These are an integral part of the procedures by which the United States calculates dumping margins. To put the zeroing procedures in their proper regulatory context, Japan begins by outlining the United States’ margin calculation procedures in general. Japan will then turn to the zeroing procedures in detail.

12. As part of its explanation of the United States' margin calculation procedures, Japan submits the testimony of Valerie Owenby, an expert in the United States' computer programming procedures.<sup>8</sup> Ms. Owenby, of Capital Trade Incorporated, was employed by the USDOC as a Senior Import Compliance Specialist from 1993 to 1998.<sup>9</sup> In that capacity, Ms. Owenby was responsible for preparing USDOC computer programs for the calculation of dumping margins, and also for reviewing USDOC computer programs prepared by other USDOC analysts. Ms. Owenby now counsels parties to USDOC anti-dumping proceedings on computer programming issues.

**A. AN OVERVIEW OF THE PROCEDURES THE USDOC USES TO CALCULATE DUMPING MARGINS**

13. In calculating dumping margins in any anti-dumping proceeding, the United States compares normal value and export price using one of the three methods set forth in Article 2.4.2 of the *Anti-Dumping Agreement*. The first method involves a comparison of a “weighted average normal value with a weighted average of prices of all comparable export transactions” (“W-to-W” comparison); the second method involves a comparison of a “normal value and export prices on a transaction-to-transaction basis” (“T-to-T” comparison); and, under the third method, a weighted average normal value is compared to prices of individual export transactions (“W-to-T” comparison). The first and second methods are sometimes referred to as “symmetrical” comparisons because normal value and export price are compared on the same basis; correspondingly, the third method is sometimes described as an “asymmetrical” comparison because of the different bases of comparison.

14. Zeroing is an integral part of the USDOC's procedures for each of these three methods of comparison. Specifically, the United States maintains two different zeroing procedures:

- a. model zeroing, which is a part of the W-to-W comparison; and,
- b. simple zeroing, which is a part of the T-to-T and W-to-T comparisons.

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<sup>8</sup> Exhibit JPN-1 (“Owenby Statement”).

<sup>9</sup> Owenby Statement at para. 4; *see also* Resume of Valerie Owenby (Exhibit JPN-1.A).

15. In an anti-dumping proceeding, when the United States calculates a dumping margin on a W-to-W basis, the model zeroing procedures are a part of the standard calculation procedures; equally, in any proceeding where the United States calculates a dumping margin on a T-to-T or a W-to-T basis, the simple zeroing procedures are a part of the standard calculation procedures.

16. In practice, the United States consistently uses particular comparison methods in particular types of proceeding, always including the standard zeroing procedures:<sup>10</sup>

- a. In original investigations, the USDOC routinely calculates dumping margins using a W-to-W comparison, including model zeroing procedures. Recently, however, the United States recalculated a margin in an original investigation using a T-to-T comparison, including simple zeroing procedures.<sup>11</sup>
- b. In periodic reviews, in order to assess retrospectively the amount of duty due, the United States routinely calculates dumping margins using a W-to-T comparison, including simple zeroing procedures.<sup>12</sup>
- c. In new shipper reviews, it routinely calculates dumping margins using a W-to-T comparison, including simple zeroing procedures.<sup>13</sup>
- d. In both changed circumstances reviews and sunset reviews, the United States generally does not determine a new dumping margin and, instead, relies on a margin calculated in an original investigation or a periodic review. The margin relied upon may, therefore, be calculated using either a W-to-W comparison, including model zeroing procedures, or a W-to-T comparison, including simple zeroing procedures.<sup>14</sup>

17. Japan underlines that its claims regarding the WTO-inconsistency of the model and simple zeroing procedures are not tied to the use of these procedures in any particular type of anti-dumping proceeding, or as part of any particular method of comparison. Japan claims that both of the zeroing procedures are “as such” WTO-inconsistent irrespective of the type of proceeding and also the method used to compare normal value and export price.

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<sup>10</sup> See Owenby Statement, paras. 20-21.

<sup>11</sup> See Owenby Statement, para. 20.

<sup>12</sup> See Owenby Statement, para. 21.

<sup>13</sup> See Owenby Statement, para. 23.

<sup>14</sup> See Owenby Statement, para. 24.

*i. Model Zeroing Explained*

18. In calculating a dumping margin on a W-to-W basis, the United States proceeds in three steps.<sup>15</sup> In the first step, the USDOC sub-divides the product as a whole into a series of “averaging groups”<sup>16</sup> or “models.” An averaging group consists of goods that are identical or virtually identical in all physical characteristics.<sup>17</sup> A W-to-W comparison between normal value and export price is made within these models.<sup>18</sup> There are three possible outcomes to these model-based comparisons. Normal value may exceed export price for a particular model, in which case there is a positive price difference for the model (what the USDOC commonly calls a “dumping margin”<sup>19</sup>); export price may exceed normal value, in which case the price difference or amount of dumping for the model is negative; or, finally, normal value and export price may be equal, in which case the price difference or margin is zero.

19. The overall margin of dumping for the product is obtained by aggregating the multiple model-based comparisons and expressing the result as a percentage. In the second step of the calculation procedures, the USDOC calculates both the numerator and denominator for the fraction from which the overall percentage is derived.<sup>20</sup> The numerator is the total amount of dumping by model and the denominator is the total value of all comparable export transactions. Under the model zeroing procedures, in summing the comparison results by model to calculate the numerator, the USDOC includes solely the results for models with positive differences. All comparisons with negative differences are disregarded in the calculation of the numerator.<sup>21</sup> Thus, for models with negative results, the USDOC purposefully ignores the results of the comparison of normal value and export price. As a result, the sum total amount of dumping in the numerator is inflated by an amount equal to the excluded negative results. In calculating the denominator of the fraction, the USDOC includes the total value of all comparable export

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<sup>15</sup> See Owenby Statement, paras. 30-41.

<sup>16</sup> 19 C.F.R. section 351.414(d)(1) (Exhibit JPN-3).

<sup>17</sup> 19 C.F.R. section 351.414(d)(2) (Exhibit JPN-3).

<sup>18</sup> 19 C.F.R. section 351.414(d)(1) (Exhibit JPN-3); USDOC Antidumping Manual, Chapter 7, pages 27-28 (Exhibit JPN-5.B); and Chapter 9, pages 23 and 27 (Exhibit JPN-5.C).

<sup>19</sup> Title VII of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (1994), Section 771(35)(A) (“Tariff Act”) (Exhibit JPN-2).

<sup>20</sup> See Owenby Statement, paras. 35-37.

<sup>21</sup> See Owenby Statement, para. 35.



transactions for *all* models.<sup>22</sup>

20. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margin of dumping,<sup>23</sup> known in the United States' law as the "weighted average dumping margin."<sup>24</sup>

21. In paragraphs 26 to 46 below, Japan describes in detail the measures that the USDOC maintains to execute the calculation of margins of dumping, in particular the standard zeroing procedures.

### *ii. Simple Zeroing Explained*

22. Simple zeroing is very similar to model zeroing. The key difference stems from the differences between the W-to-W comparison, on the one hand, and the T-to-T and W-to-T comparisons, on the other. Whereas the W-to-W comparison is based on a comparison of export transactions grouped by model, the other two methods are based on comparisons with individual export transactions. Thus, instead of zeroing by model, the USDOC zeroes by individual export transaction under the simple zeroing procedures.<sup>25</sup>

23. After identifying comparable export transactions, the USDOC compares export price for these transactions with either a weighted average normal value (W-to-T) or transaction-specific normal value (T-to-T). Thus, the USDOC calculates the price difference (what it calls the "dumping margin")<sup>26</sup> for each comparable export transaction. Again, there are three possible outcomes to these comparisons. Normal value may exceed export price for a particular transaction, in which case the United States considers that there is a positive "dumping margin" or amount of dumping for the transaction; export price may exceed normal value, in which case the difference or amount of dumping for the transaction is negative; or, finally, normal value and export price may be equal, in which case the difference or amount of dumping is zero.<sup>27</sup>

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<sup>22</sup> See Owenby Statement, paras. 34-35.

<sup>23</sup> See Owenby Statement, paras. 38-41.

<sup>24</sup> Tariff Act, Section 771(35)(B) (Exhibit JPN-2).

<sup>25</sup> See Owenby Statement, paras. 18-19.

<sup>26</sup> See para. 18 above.

<sup>27</sup> See Owenby Statement, paras. 30-34.

24. As in the W-to-W comparison, in step two, to derive a margin of dumping or an overall “weighted average dumping margin” for the product, the USDOC aggregates the multiple transaction comparisons undertaken and expresses the result as a percentage. Again, the USDOC sums the price differences exclusively for those comparisons for which there was a positive dumping margin. All comparisons with negative differences are disregarded from the calculation of the numerator of the overall margin fraction. Thus, where there is a negative difference, the USDOC purposefully ignores the results of the comparisons of export transactions and normal value. As a result, the sum total of dumping is inflated by an amount equal to the excluded negative differences. As with model zeroing, the USDOC retains the total sales value of *all* comparable export transactions in the denominator. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margins of dumping or “weighted average dumping margin”.<sup>28</sup>

25. In paragraphs 26 to 46 below, Japan describes in detail the measures that the USDOC maintains to execute the calculation of the margins of dumping, in particular the standard zeroing procedures.

## **B. STANDARD COMPUTER PROGRAMS**

### *i. USDOC Import Administration Anti-Dumping Manual*

26. In light of this overview of the United States’ procedures for calculating the margins of dumping, Japan turns to the description of the measures at issue. During anti-dumping proceedings, the USDOC obtains large volumes of data and must process that data to calculate margins of dumping. The USDOC relies on computer programs to manipulate the data and execute the required calculations. In order to execute dumping calculations efficiently, and consistently with the United States’ laws and policies, the USDOC maintains standard computer programs. These programs act as a model for use whenever the USDOC develops a specific computer program in a particular anti-dumping proceeding. The nature and purpose of these standard programs are described in the USDOC Import Administration Anti-Dumping Manual (“Manual”), which is publicly available on the Internet.<sup>29</sup>

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<sup>28</sup> See Owenby Statement, paras. 35-37.

<sup>29</sup> Exhibits JPN-5 to 5.C. Exhibit JPN-5 indicates the location of the Antidumping Manual on the USDOC’s website.

27. The Manual demonstrates that the USDOC maintains standard computer programs to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings. The Manual also shows that the standard computer programs execute the dumping margin calculation according to the United States' current calculation methodology.

28. Chapter 9 of the Manual is entitled "Data Submission, Computer Processing, and Calculation Review."<sup>30</sup> The introductory paragraph of the chapter states that "it covers computer-related functions for investigations and administrative reviews," in particular "programming procedures for performing AD database analysis and margin calculations on the PC."<sup>31</sup> These "procedures" are described further in Section III of Chapter 9 of the Manual, headed "Programming Procedures."<sup>32</sup> It states that the "basic elements of the new PC programming procedures for investigations and reviews are validated databases, proper calculation methodologies, the best computer platform, and standard programs."<sup>33</sup> The Manual, therefore, provides expressly 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."

29. The Manual adds that "the purpose of the [programming] procedures is to improve the accuracy and consistency of computer calculations."<sup>34</sup> The Manual also notes that "consistency is achieved by insuring that the standard programs conform with current AD calculation methodology."<sup>35</sup> The Manual further states that "calculation consistency occurs when every program uses the same standard calculation methodology" – presumably the "proper" methodology.<sup>36</sup> In other words, every program that is applied by the United States in a particular proceeding must use "the same standard calculation methodology," and that methodology must "conform" to the Administration's current methodological requirements, which are set out in the standard programs.<sup>37</sup> The Manual also indicates that one of the standard computer programs that

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See <http://ia.ita.doc.gov/admanual/index.html>.

<sup>30</sup> Exhibit JPN-5.C.

<sup>31</sup> Exhibit JPN-5.C, page 1.

<sup>32</sup> Exhibit JPN-5.C, page 8.

<sup>33</sup> Exhibit JPN-5.C, page 8.

<sup>34</sup> Exhibit JPN-5.C, page 8.

<sup>35</sup> Exhibit JPN-5.C, page 8.

<sup>36</sup> Exhibit JPN-5.C, page 8.

<sup>37</sup> Exhibit JPN-5.C, page 8.

the USDOC maintains is the AD Margin Calculation Program.<sup>38</sup>

30. The Manual, therefore, shows that the USDOC maintains standard computer programs, including the AD Margin Calculation Program, that apply on a generalized and prospective basis.

*ii. Standard AD Margin Calculation Program*

31. In Exhibits JPN-6 and 7, Japan submits copies of the USDOC's Standard AD Margin Calculation Program, as at 4 April 2002, for both original investigations and periodic reviews.<sup>39</sup> The model and simple zeroing procedures are contained in these programs. To assist the Panel, the operation of the programs and, in particular, the zeroing procedures, are more fully described by Ms. Owenby in Exhibit JPN-1.

32. The standard computer programs contain computer code that executes every procedure and/or combination of procedures applicable to an anti-dumping proceeding. The computer programs are written in a programming language unique to the "SAS" software application used by the USDOC. The programs are divided into "sections" of programming code, each of which executes a specific aspect of anti-dumping margin calculations. Within each section there are programming steps, arranged in a specific sequence, designed to execute particular calculation procedures. The manner and order in which the United States executes its procedures and calculations in the standard programs is purposeful, and intrinsically linked to its anti-dumping laws and the "current AD calculation methodology."<sup>40</sup>

*iii. Overall Weighted Average Dumping Margin Calculation*

33. The United States calculates an overall "weighted average dumping margin" in: original investigations, periodic reviews and new shipper reviews.<sup>41</sup> The United States' overall "weighted average dumping margin" calculation involves a three-step process. In Step 1, in the hundreds of lines of programming that occur prior to the "Calculate Overall Margin" section of the standard computer programs, the United States executes the procedures necessary to carry

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<sup>38</sup> Referred to at Exhibit JPN-5.C, pages 9 and 30.

<sup>39</sup> The standard programs for investigations and periodic reviews show, respectively, footer reference numbers of "160397.1" and "160610.1."

<sup>40</sup> Exhibit JPN-5.C, page 8.

<sup>41</sup> As explained in paragraph 16.d above, in both changed circumstances reviews and sunset reviews, the United States generally does not determine a new dumping margin, but instead relies on a margin calculated in the original

out the multiple W-to-W, W-to-T, or T-to-T comparisons on a model- or transaction-specific basis. Under the variables “UMARGIN” and “EMARGIN”, the USDOC captures the per-unit (UMARGIN) and total (EMARGIN) difference between normal value and export price for each of the multiple comparisons. In model zeroing, UMARGIN and EMARGIN reflect the per-unit and total amount of dumping for each model, and in simple zeroing they reflect the per-unit and total amount of dumping for each export transaction.<sup>42</sup>

34. Where normal value exceeds export price, UMARGIN and EMARGIN are positive values. Where export price exceeds normal value, UMARGIN and EMARGIN are negative, and where export price and normal value are equal, UMARGIN and EMARGIN are zero. The United States retains data for export price, normal value, UMARGIN, EMARGIN, and numerous other variables, in a dataset called “MARGIN.”<sup>43</sup>

35. Steps 2 and 3 of the overall dumping margin calculation are executed according to the procedures in the “Calculate Overall Margin” section of the standard computer programs.<sup>44</sup> This is one of the last sections of the standard computer programs and, among others, contains the United States’ standard zeroing procedures. The calculations executed in this section of the computer program are the same regardless of the type of comparison (W-to-W, W-to-T, or T-to-T) or the type of zeroing (model or simple).

36. Unlike a number of other sections in the standard programs, the “Calculate Overall Margin” section does not contain computer-coded “switches” that permit the USDOC to turn the procedures in this section “off” or “on.” This is because the procedures for calculating the overall percentage “weighted average dumping margin,” including the standard zeroing procedures, are always part of the programming procedures, and are used in every margin calculation. Ms. Owenby testifies that:

There are a few procedures that are executed in all antidumping margin calculations. The standard computer programs do not provide any options for these procedures. There are no “switches” to “turn off” these portions of the computer programming as they are universal and executed in every margin

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investigation or a previous periodic review.

<sup>42</sup> See Owenby Statement, paras. 30-32.

<sup>43</sup> See Owenby Statement, para. 33.

<sup>44</sup> See Owenby Statement, paras. 34-41.

calculation, regardless of the product, the country, or foreign respondent. One of these universal procedures is the calculation of the overall weighted-average percentage dumping margin.<sup>45</sup>

37. Moreover, since at least 1993, the USDOC has not altered the essence of the procedures for calculating the overall “weighted average dumping margin,” including the standard zeroing procedures:

[T]hroughout my career, the procedure for calculating the overall weighted-average percentage dumping margin has never changed. Every USDOC antidumping calculation program I have examined in the past, and as recently as today, including both standard and case-specific programs, has contained the same overall percentage dumping margin programming language, including the “zeroing” line ...<sup>46</sup>

38. In Step 2, the USDOC derives the *denominator* and *numerator* for a fraction that is used to calculate the overall percentage weighted average dumping margin for the product. First, the USDOC derives the *denominator* of the fraction, which is the total value of all comparable export transactions. To do this, the programming procedures extract from the MARGIN dataset, and sum, the sales values of all models or transactions.<sup>47</sup>

39. Next, the USDOC derives the *numerator* of the fraction, which is the total *positive* amount of dumping for all models or transactions. This time, the program extracts from the MARGIN dataset, and sums, the *positive* EMARGIN values, by model or transaction. In other words, the program selects from among all of the multiple model or transaction-specific comparisons those with positive amounts of dumping. The United States disregards all negative dumping amounts by inserting into this step a specific line of programming code:

WHERE EMARGIN GT 0;

This line instructs the SAS application to ignore all negative dumping amounts when deriving the numerator. This single line of computer programming represents the zeroing procedure at issue (Japan refers to this as the “Standard Zeroing Line”).<sup>48</sup>

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<sup>45</sup> Owenby Statement, para. 14.

<sup>46</sup> Owenby Statement, para. 16.

<sup>47</sup> See Owenby Statement, para. 34.

<sup>48</sup> See Owenby Statement, paras. 35-36.

40. Using the variables created in Step 2, in Step 3 of the procedure the overall percentage “weighted average dumping margin” is computed. The United States divides the total positive amount of dumping (i.e. the numerator) by the total value of all comparable export transactions (i.e. the denominator), and multiplies the result by 100 to express the ratio as a percentage. This final percentage figure is the overall “weighted average dumping margin” for the product.<sup>49</sup>

***iv. Calculation of Importer-Specific Assessment Rates in the Standard Programs***

41. In periodic review proceedings, the United States always calculates two types of margin: an overall “weighted average dumping margin” for each exporter and importer-specific assessment rates. The overall “weighted average dumping margin” is calculated using the programming procedures just described, including the standard simple zeroing procedures. That margin becomes the duty deposit rate that the United States applies to future entries of the product for the purpose of collecting estimated duties, until completion of the next periodic review.<sup>50</sup>

42. The standard computer program for a periodic review includes an extra section of programming code to calculate the importer-specific assessment rates.<sup>51</sup> The importer-specific assessment rates are used by the United States to collect definitive anti-dumping duties for the review period. The duties are collected from the importers of goods, rather than the exporters. However, as the overall “weighted average dumping margin” is calculated for an exporter, the USDOC must “allocate” an exporter’s dumping margin among the importers of that exporter’s subject merchandise. In essence, through the importer-specific calculation procedures, the USDOC divides among the importers the total amount of dumping duties due for the product (i.e. the *numerator* in the overall dumping fraction is divided among the different *importers*). This sub-divided figure is the numerator in a new fraction for each importer. The denominator is based on the total entered value of imports, by importer, as declared to United States Customs.

43. As regards importer-specific assessment rates, the point of importance for these proceedings is that the standard computer program maintains the simple zeroing procedures as

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<sup>49</sup> See Owenby Statement, paras. 38-41.

<sup>50</sup> See Owenby Statement, para. 22.

<sup>51</sup> For a detailed description of this portion of the computer program see Owenby Statement, paras. 42-57.

part of the calculation procedures for the numerator of the importer-specific total dumping amounts. The standard program selects, on an importer-specific basis, from among the multiple (transaction-specific) comparisons, solely those with positive dumping amounts. Again, the United States disregards all negative dumping amounts. And, once again, this is achieved in the standard program through a single line of programming code – in this instance the line “WHERE UMARGIN GT 0;”. Japan also refers to this line of code through the phrase the “Standard Zeroing Line.”

v. *Standard Computer Programs as Models for Case-Specific Programs*

44. As indicated above, the standard programs serve as models whenever the USDOC develops a case-specific program for use in anti-dumping proceedings. Ms. Owenby confirms that, when a case-specific program is formulated, the integrity of the standard program is retained:

In developing a program for a specific case, USDOC case analysts do not alter the established structure of the standard computer program. They do not add new switches or delete existing switches [that turn “off” or “on” particular calculation procedures]; they do not write “new” computer programs for each case. Rather, the USDOC refines the established standard computer programs to meet the factual needs of the case and the respondent’s databases.<sup>52</sup>

45. The crucial fact for these proceedings is that the Standard Zeroing Line is always included unchanged:

Every USDOC antidumping calculation program I have examined in the past, and as recently as today, including both standard and case-specific programs, has contained the same overall percentage dumping margin programming language, including the “zeroing” line ...<sup>53</sup>

46. The Standard Zeroing Line represents the procedure that Japan challenges “as such” in this dispute. That line features in the standard computer program for original investigations<sup>54</sup> and administrative reviews,<sup>55</sup> and it also features in all computer programs developed for particular anti-dumping proceedings.<sup>56</sup> Japan notes that the same Standard Zeroing Line is used

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<sup>52</sup> Owenby Statement, para. 13.

<sup>53</sup> Owenby Statement, para. 16.

<sup>54</sup> Exhibit JPN-6, at 15.

<sup>55</sup> Exhibit JPN-7, at 17.

<sup>56</sup> See Exhibit JPN-1.D, in which Ms. Owenby has identified where, in each of the case-specific programs submitted



to effect both model and simple zeroing.

### C. MEASURES THAT CAN BE THE SUBJECT OF WTO DISPUTE SETTLEMENT

47. In terms of Article 6.2 of the DSU,<sup>57</sup> the standard model and simple zeroing procedures are the specific “measures” challenged “as such” in this dispute. These measures are “administrative procedures” within the meaning of Article 18.4 of the *Anti-Dumping Agreement*.

48. The subject matter of WTO dispute settlement is defined by reference to the word “measure” in Article 6.2 of the DSU. In two recent anti-dumping disputes, the Appellate Body clarified the interpretation of this word in the context of “as such” claims. In sum, as outlined below, the Appellate Body resolved three important points for the current case: the word “measure” extends to any act or omission by a Member; an alleged “measure” will be assessed in WTO law irrespective of its legal character in domestic law; and, a “measure” need not be binding or mandatory in domestic law.

49. In *U.S. – Corrosion-Resistant Steel*, the Appellate Body stated, without qualification, that “any act or omission attributable to a WTO Member can be a measure of that Member ... .”<sup>58</sup> Further, in that dispute, the Appellate Body addressed in particular the types of measure that be challenged “as such”:

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 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. ... 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.<sup>59</sup>

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by Japan, the Standard Zeroing Line appears. See also Owenby Statement, para. 15.

<sup>57</sup> *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

<sup>58</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 81.

<sup>59</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 82 (footnote omitted).

50. Japan's "as such" claims serve precisely the ends envisaged by the Appellate Body. There is an ever-growing number of disputes concerning the United States' use of zeroing procedures and, in a bid to forestall "future disputes," Japan challenges "as such" the United States' zeroing procedures, as set forth in its standard computer programs. These "as such" measures are the root of the WTO-inconsistency.

51. The characterization or status of an act in domestic law is not determinative of its character as a "measure" in WTO law. In *U.S. – OCTG Sunset Reviews*, the Appellate Body stated that the "issue is not whether the [USDOC's Sunset Policy Bulletin ("SPB")] is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system."<sup>60</sup> Similarly, in *U.S. – Corrosion-Resistant Steel*, the Appellate Body observed that the issue does not depend on "the label given" to an instrument in domestic law, nor upon its "form or nomenclature," but on the "substance and content of the instrument."<sup>61</sup> Accordingly, the fact that the measures at issue in the current dispute are in the "form" of a computer program is of no importance to their character in WTO law.

52. Further, the question whether or not an act is binding under municipal law is also irrelevant to its characterization as a "measure" in WTO law. The panel in *U.S. – Corrosion-Resistant Steel* relied on the so-called "mandatory – discretionary" distinction to find that the SPB could not be challenged because it was not a binding legal instrument in U.S. law. The Appellate Body reversed this finding, recalling its statement in *Guatemala – Cement I* that "a 'measure' may be any act of a Member, whether or not legally binding ... ."<sup>62</sup> Recalling the Appellate Body's holding, the panel in *Korea – Commercial Vessels* held that panels need not address the mandatory character of a measure in examining the "jurisdictional" question of whether it can be the subject of dispute settlement.<sup>63</sup>

53. The present dispute is brought pursuant to the *Anti-Dumping Agreement*. Nothing in that *Agreement* limits the types of measure that may, as such, be the subject of dispute settlement. Article 17 of the *Anti-Dumping Agreement* sets forth, together with the DSU, the rules applicable

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<sup>60</sup> Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

<sup>61</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 87, n. 87.

<sup>62</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 85.

to the settlement of anti-dumping disputes. Article 17.3 establishes that a complaining Member may request consultations when it considers that its benefits under the *Anti-Dumping Agreement* are being nullified or impaired. Again according to the Appellate Body, “[t]here is no threshold requirement, in Article 17.3, that the measure in question be of a certain type.”<sup>64</sup> Further, in *U.S. – 1916 Act*, in affirming a panel’s jurisdiction to consider “as such” claims, the Appellate Body held that measures challenged under the *Anti-Dumping Agreement* (i.e. anti-dumping legislation in that case) are no different from measures challenged under other WTO Agreements pursuant to Article 6.2 of the DSU, and can therefore be challenged “as such.”<sup>65</sup>

54. Under Article 18.4 of the *Anti-Dumping Agreement*, Members are required to ensure the conformity of their “laws, regulations and administrative procedures” with that *Agreement*. Interpreting this phrase in *U.S. – Corrosion-Resistant Steel*, the Appellate Body held that “there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*.”<sup>66</sup> It emphasized that “the phrase ‘laws, regulations and administrative procedures’ seems to us to encompass *the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings*.”<sup>67</sup>

55. An “as such” dispute under the *Anti-Dumping Agreement* may, therefore, concern “administrative procedures,” which are rules, norms or standards of general and prospective application.

56. The ordinary meaning of the word “administrative,” in Article 18.4 of the *Anti-Dumping Agreement*, refers to the “conduct or management of affairs”; and a “procedure” is “a system of proceeding; proceeding, in reference to its mode or method.”<sup>68</sup> In particular, the meaning of the

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<sup>63</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.63.

<sup>64</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 86.

<sup>65</sup> Appellate Body Report, *U.S. – 1916 Act*, paras. 75-83; confirmed by the Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras. 83-84.

<sup>66</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 88.

<sup>67</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 87 (emphasis added). See also Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187, a dispute that also concerned “as such” measures covered by Article 18.4 of the *Anti-Dumping Agreement*.

<sup>68</sup> *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 1, p. 28 (“administrative”); Vol. 2, p. 2363 (“procedure”) (Exhibit JPN-4). The *New Shorter Oxford English Dictionary* defines a “method” as “[a]

word “procedure” includes “computers: a set of instructions for performing a specific task.”<sup>69</sup> Thus, an “administrative procedure,” in Article 18.4, is a system or method, including a set of computer instructions, used by investigating authorities to conduct or manage anti-dumping proceedings.

**D. MODEL AND SIMPLE ZEROING PROCEDURES ARE “AS SUCH” MEASURES**

57. The model and simple zeroing procedures set forth in the United States’ standard computer programs are “administrative procedures” under Article 18.4 of the *Anti-Dumping Agreement*. In particular, these procedures are a pre-determined, standardized system or method for mechanistically conducting and managing, on a uniform and predictable basis, an aspect of the USDOC’s margin calculation in all anti-dumping proceedings, irrespective of the method of comparison used. Through computer-coded instructions, the procedures automatically select only *positive* price differences for inclusion in the calculation of the dumping amount in the numerator of the overall dumping fraction.

58. Specifically, as explained above, the zeroing procedures are contained in a single line of the standard computer program (the Standard Zeroing Line), which is the same for both model and simple zeroing:

WHERE EMARGIN GT 0;

59. Through this Standard Zeroing Line, the United States includes solely dumping amounts that are *greater than zero* (“GT 0”) in the calculation of the numerator for the overall dumping fraction. Negative amounts are excluded from the calculation of the total amount of dumping.

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mode of procedure; a (defined or systematic) way of doing anything, *esp.* (w. specifying wd or wds) in accordance with a particular theory or as associated with a particular person.”

<sup>69</sup> *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 2, p. 2363 (“procedure”) (Exhibit JPN-4).

Ms. Owenby's statement highlights that the Standard Zeroing Line represents the measure at issue: if this line were removed from the standard computer programs, zeroing would not occur and negative amounts would be included in the summing of the overall amount of dumping, as required by the *Anti-Dumping Agreement*.<sup>70</sup>

60. The Standard Zeroing Line is applied by the United States on a generalized and prospective basis. The standard programs are written in such a way that the zeroing procedure is executed *automatically* in the margin calculation process.<sup>71</sup> There is no "switch" in the program by which the Standard Zeroing Line can be turned "off," as there is for certain other parts of the calculation procedures; nor is there any need to switch the zeroing procedure "on" – the computer code ensures zeroing occurs automatically.<sup>72</sup>

61. As a part of the standard programs, as indicated in the Manual,<sup>73</sup> the Standard Zeroing Line is found in every margin calculation program applied by the USDOC in specific anti-dumping proceedings. In that regard, Japan submits evidence of the consistent application of the zeroing procedures in specific anti-dumping proceedings that demonstrates the generalized, normative and prospective nature of the application of these procedures. In particular, Japan submits 25 examples of margin calculation programs used in original investigations, periodic reviews, new shipper reviews, changed circumstances reviews, and sunset reviews, each of which contains the Standard Zeroing Line.<sup>74</sup> These examples confirm that the standard zeroing procedures are applied on a generalized, normative and prospective basis.

62. Further, Ms. Owenby testifies that she is unaware of *any* case-specific margin calculation program, in *any* US anti-dumping proceeding, in which the Standard Zeroing Line did not feature.<sup>75</sup> To recall, Ms. Owenby's expertise with the USDOC's programming procedures dates back to the start of her employment with the USDOC in 1993.<sup>76</sup>

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<sup>70</sup> See Owenby Statement, para. 70.

<sup>71</sup> See Owenby Statement, para. 14.

<sup>72</sup> See Owenby Statement, para. 14.

<sup>73</sup> Exhibit JPN-5.C, pages 1 and 8.

<sup>74</sup> See Exhibits JPN-8, 9, and 10.A to 23.C.

<sup>75</sup> See Owenby Statement, para. 16.

<sup>76</sup> See Owenby Statement, para. 4.

63. Japan underlines that, during consultations, the United States failed to respond to Japan’s request for it to identify any anti-dumping proceedings in which the zeroing procedures did not form part of the margin calculation procedures. Japan respectfully requests the Panel to ask the United States to provide any such examples.

64. Accordingly, in light of (1) the standard margin calculation programs, (2) the Manual, (3) examples of case-specific margin calculation programs, and (4) the testimony of Ms. Owenby, Japan submits that the zeroing procedures are “administrative procedures,” under Article 18.4 of the *Anti-Dumping Agreement*. The very purpose of the AD Margin Calculation Program, including the Standard Zeroing Line, is to establish standard “programming procedures” that operate mechanistically to ensure that a particular – “proper” – calculation methodology is applied universally and predictably.<sup>77</sup> The AD Margin Calculation Program provides instructions that predetermine or systematize regulatory conduct in a given set of circumstances. These instructions are – and have always been – applied by the USDOC generally and prospectively.

#### **IV. MEASURES CHALLENGED “AS APPLIED”**

65. Japan challenges the USDOC’s procedure of zeroing “as applied” in one original investigation, 11 periodic reviews, and two sunset reviews. The specific actions challenged are described below.

##### **A. ORIGINAL INVESTIGATION**

66. On 29 December 1999, the USDOC imposed an anti-dumping duty order on Certain Cut-To-Length Carbon Quality Steel Plate Products (“CTL Plate”) from Japan (USDOC Case number A-588-847), 64 Fed. Reg. 73215.<sup>78</sup> The *ad valorem* rate of the anti-dumping duty was 10.78 percent for Kawasaki Steel Corporation and all others.<sup>79</sup>

67. In calculating the dumping margin in this investigation, the USDOC utilized the model zeroing procedures discussed above in paragraphs 18 to 21. Specifically, when the USDOC determined the numerator for the overall margin calculation, it summed solely the positive

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<sup>77</sup> Exhibit JPN-5.C, page 8.

<sup>78</sup> Exhibit JPN-10.

<sup>79</sup> 64 Fed. Reg. at 73234 (Exhibit JPN-10).

results obtained for each model as part of the W-to-W comparison between normal value and export price. In other words, all negative results were disregarded from the calculation of the numerator. The model zeroing procedure applied in this investigation inflated the margin of dumping and, therefore, the *ad valorem* anti-dumping duty.

68. The computer language by which this result was achieved – namely “WHERE EMARGIN GT 0;” – is shown on the third page of Exhibit JPN-10.A.<sup>80</sup> The programming language in this case-specific program is the same as the Standard Zeroing Line found in the standard computer program.

69. The USITC relied on evidence of dumping obtained from the USDOC’s dumping determination in its affirmative injury determination in Cut-To-Length Carbon Steel Plate from Japan, Investigation No. 731-TA-820.<sup>81</sup>

#### **B. PERIODIC REVIEWS**

70. Japan challenges the WTO consistency of the USDOC’s application of simple zeroing, as outlined in paragraphs 22 to 25 above, in eleven separate instances. Those cases are as follows:

- (1) On 15 March 2001, the USDOC calculated anti-dumping duties on Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan (USDOC case number A-588-054), 66 Fed. Reg. 15078.<sup>82</sup> The period of review is 1 October 1998 through 30 September 1999, and the rate of the *ad valorem* anti-dumping duty was 14.86% for Koyo Seiko Co., Ltd.<sup>83</sup> Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.
- (2) On 15 March 2001, the USDOC imposed anti-dumping duties on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan (USDOC case

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<sup>80</sup> As identified by Ms. Owenby in Exhibit JPN-1.D.

<sup>81</sup> Exhibit JPN-10.B.

<sup>82</sup> Exhibit JPN-11.

<sup>83</sup> 66 Fed. Reg. at 15079 (Exhibit JPN-11).

number A-588-604), 66 Fed. Reg. 15078.<sup>84</sup> The period of review is 1 October 1998 through 30 September 1999, and the rate of the *ad valorem* anti-dumping duty was 17.94% for Koyo Seiko Co., Ltd.<sup>85</sup> Without zeroing, the USDOC would have calculated a lower anti-dumping margin.

- (3) On 11 August 2000, the USDOC imposed anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 65 Fed. Reg. 49219.<sup>86</sup> The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 6.14% for NTN Corporation.<sup>87</sup> Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.
- (4) On 11 August 2000 the USDOC imposed anti-dumping duties on Cylindrical Roller Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 65 Fed. Reg. 49219.<sup>88</sup> The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 3.49% for NTN Corporation.<sup>89</sup> Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.
- (5) On 11 August 2000, the USDOC imposed anti-dumping duties on Spherical Plain Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 65 Fed. Reg. 49219.<sup>90</sup> The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 2.78% for NTN Corporation.<sup>91</sup> Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.

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<sup>84</sup> Exhibit JPN-12.

<sup>85</sup> 66 Fed. Reg. at 15079 (Exhibit JPN-12).

<sup>86</sup> Exhibit JPN-13.

<sup>87</sup> 65 Fed. Reg. at 49222 (Exhibit JPN-13).

<sup>88</sup> Exhibit JPN-14.

<sup>89</sup> 65 Fed. Reg. at 49222 (Exhibit JPN-14).

<sup>90</sup> Exhibit JPN-15.

<sup>91</sup> 65 Fed. Reg. at 49222 (Exhibit JPN-15).



- (6) On 12 July 2001, the USDOC imposed anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 66 Fed. Reg. 36551.<sup>92</sup> The period of review is 1 May 1999 through 30 April 2000, and the rates of the *ad valorem* anti-dumping duty were 10.10% for Koyo Seiko Co., Ltd., 9.16% for NTN Corporation, and 4.22% for NSK Ltd.<sup>93</sup> Without zeroing, the results of the dumping margin calculation by the USDOC for these three respondents would have been negative, and no anti-dumping duty would have been collected.
- (7) On 12 July 2001, the USDOC imposed anti-dumping duties on Cylindrical Roller Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 66 Fed. Reg. 36551.<sup>94</sup> The period of review is 1 May 1999 through 31 December 1999, and the rates of the *ad valorem* anti-dumping duty were 5.28% for Koyo Seiko Co., Ltd. and 16.26% for NTN Corporation.<sup>95</sup> Without zeroing, the results of the dumping margin calculation by the USDOC for both respondents would have been negative, and no anti-dumping duty would have been collected.
- (8) On 12 July 2001, the USDOC imposed anti-dumping duties on Spherical Plain Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 66 Fed. Reg. 36551.<sup>96</sup> The period of review is 1 May 1999 through 31 December 1999, and the rate of the *ad valorem* anti-dumping duty was 3.60% for NTN Corporation.<sup>97</sup> Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.
- (9) On 15 October 2002, the USDOC imposed anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 67 Fed. Reg. 55780 (30 August 2002), as amended by 67 Fed. Reg. 63608 (15 October 2002).<sup>98</sup>

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<sup>92</sup> Exhibit JPN-16.

<sup>93</sup> 66 Fed. Reg. at 36553 (Exhibit JPN-16).

<sup>94</sup> Exhibit JPN-17.

<sup>95</sup> 66 Fed. Reg. at 36553 (Exhibit JPN-17).

<sup>96</sup> Exhibit JPN-18.

<sup>97</sup> 66 Fed. Reg. at 36553 (Exhibit JPN-18).

<sup>98</sup> Exhibit JPN-19.

The period of review is 1 May 2000 through 30 April 2001, and the rates of the *ad valorem* anti-dumping duty were 6.07% for NSK Ltd., 2.51% for Asahi Seiko Co., Ltd., and 9.34% for NTN Corporation.<sup>99</sup> Without zeroing, the results of the dumping margin calculation by the USDOC for these three respondents would have been negative, and no anti-dumping duty would have been collected.

- (10) On 16 June 2003, the USDOC imposed anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 68 Fed. Reg. 35623.<sup>100</sup> The period of review is 1 May 2001 through 30 April 2002, and the rates of the *ad valorem* anti-dumping duty were 4.51% for NTN Corporation and 2.68% for NSK Ltd.<sup>101</sup> Without zeroing, the results of the dumping margin calculation by the USDOC for both respondents would have been negative, and no anti-dumping duty would have been collected.
- (11) On 15 September 2004, the USDOC imposed anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 69 Fed. Reg. 55574.<sup>102</sup> The period of review is 1 May 2002 through 30 April 2003, and the rates of the *ad valorem* anti-dumping duty were 5.56% for Koyo Seiko Co., Ltd., 2.74% for NTN Corporation, 2.46% for NSK Ltd., and 3.37% for Nippon Pillow Block Co., Ltd.<sup>103</sup> Without zeroing, the results of the dumping margin calculation by the USDOC for these four respondents would have been negative, and no anti-dumping duty would have been collected.

71. In each of the 11 periodic reviews listed above, the USDOC compared the export price for each comparable export transaction to a weighted average normal value, i.e., conducted a W-to-T comparison. In aggregating the total dumping amounts determined for the multiple comparisons, for the purposes of calculating the numerator in the overall weighted average dumping margin calculation, the USDOC included only the positive comparison results. In other words, all comparisons with a negative result were disregarded from the calculation of the

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<sup>99</sup> 67 Fed. Reg. at 55781 (Exhibit JPN-19).

<sup>100</sup> Exhibit JPN-20.

<sup>101</sup> 68 Fed. Reg. at 35625 (Exhibit JPN-20).

<sup>102</sup> Exhibit JPN-21.

<sup>103</sup> 69 Fed. Reg. at 55580 (Exhibit JPN-21).

numerator of the margin calculation. As a result, the sum total of dumping was inflated by an amount equal to the excluded negative values.

72. In each of the 11 periodic reviews, this result was achieved by the inclusion of the Standard Zeroing Line – “WHERE EMARGIN GT 0;” – in each of the case-specific computer programs. This language is identical to the Standard Zeroing Line that appears in the standard computer program.<sup>104</sup>

73. Equally, when the USDOC calculated the importer-specific assessment rates, it first subdivided the total dumping amounts among the importers, i.e., “split the numerator from the overall weighted-average dumping margin calculation into importer specific amounts ... .”<sup>105</sup> In so doing, the USDOC again retained solely the comparisons that had positive results. In other words, all negative results were disregarded from the calculation of the numerator of the importer-specific assessment calculation. As a result, each importer-specific assessment rate was inflated by an amount equal to the excluded negative values. The computer language by which this result was achieved is also the same in each of the eleven importer-specific calculations -- “Where UMARGIN GT 0;”.<sup>106</sup> Again, the language is the same as the Standard Zeroing Line for this aspect of a periodic review.

### **C. SUNSET REVIEWS**

74. Japan further challenges the use by the United States, in five-year or “sunset” reviews, of dumping margins calculated in prior investigations and periodic reviews to determine whether the revocation of an anti-dumping order would be likely to lead to a continuation or recurrence of dumping. Specifically, Japan challenges the USDOC’s and the USITC’s reliance on dumping margins in which the numerator included solely the comparison results for models or transactions which had positive results. The two sunset reviews that Japan challenges on “as applied” basis are as follows:

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<sup>104</sup> See Exhibit JPN-1.D, identifying the specific page and/or line in which this coding exists in each computer program.

<sup>105</sup> Owenby Statement, para. 46.

<sup>106</sup> See Exhibit JPN-1.D, identifying the specific page and/or line in which this coding exists in each computer program.

- (1) On 4 November 1999, the USDOC issued its Final Results in the Expedited Sunset Review of Antifriction Bearings from Japan. It found that revocation of the anti-dumping order on Ball Bearings from Japan would be likely to lead to continuation or recurrence of dumping (USDOC case number A-588-804), 64 Fed. Reg. 60275.<sup>107</sup> In making this determination, the USDOC specifically relied on the “margins determined in the original investigation and subsequent periodic reviews,” and concluded that because “dumping has continued over the life of the orders, the [USDOC] determines that dumping is likely to continue if the orders were revoked.”<sup>108</sup> The margins calculated in the original investigation and subsequent periodic reviews were all calculated using the zeroing procedures.<sup>109</sup> As a result, the USDOC's likelihood determination was based on inflated margins. In turn, the USITC relied on the same inflated margins in determining the “magnitude of dumping” and “volume of dumped imports” in its likelihood determination, and its decision not to revoke the anti-dumping order on Ball Bearings from Japan.<sup>110</sup>
  
- (2) On 2 August 2000, the USDOC issued its Final Results in the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan. It concluded that revocation of the anti-dumping order on Corrosion-Resistant Carbon Steel Flat Products from Japan would be likely to lead to continuation or recurrence of dumping (USDOC case number A-588-826), 65 Fed. Reg. 47380.<sup>111</sup> In making this determination, the USDOC specifically relied on the margins determined in the investigation, and concluded that because “dumping has continued to occur throughout the life of the order,” dumping was likely to continue if the order was revoked.<sup>112</sup> The dumping margins were calculated in the original investigation

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<sup>107</sup> Exhibit JPN-22.

<sup>108</sup> 64 Fed. Reg. at 60278 (Exhibit JPN-22).

<sup>109</sup> See, e.g., Exhibits JPN-22.A, 22.B, and 13.A.

<sup>110</sup> See Determination of the USITC in *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, Investigation Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review), at 20 n.128, and 94 (Exhibit JPN-22.C).

<sup>111</sup> Exhibit JPN-23.

<sup>112</sup> USDOC, *Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results* at Comment 1 (2 August 2000) (Exhibit JPN-23.A).

using the zeroing procedures.<sup>113</sup> As a result, the USDOC’s likelihood determination was based on inflated margins.

In turn, the USITC relied on the same inflated margins in determining the “magnitude of dumping” and “volume of dumped imports” in its likelihood determination, and its decision not to revoke the anti-dumping order on Certain Carbon Steel Products from Japan.<sup>114</sup>

## V. CLAIMS OF WTO INCONSISTENCY REGARDING “AS SUCH” MEASURES

### A. MAINTAINING ZEROING PROCEDURES IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLE 2 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI OF THE *GATT 1994*

75. Before addressing the standard zeroing procedures, Japan sets forth the relevant legal requirements pertaining to the determination of dumping. In sum, these are: first, dumping and the margin of dumping are determined for the *product as a whole*; and, second, a dumping determination must be based on a *fair comparison* of normal value and export price for the product as a whole.

#### i. *A Margin of Dumping Must Be Determined for the Product as a Whole*

76. Article 2 of the *Anti-Dumping Agreement* sets forth the “agreed disciplines” for determining the existence of dumping and also calculating the margin of dumping.<sup>115</sup> The Appellate Body held that there are “no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins.”<sup>116</sup> Article 2.1 of the *Anti-Dumping Agreement* states that,

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

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<sup>113</sup> See Exhibit JPN-23.C.

<sup>114</sup> Determination of the USITC in *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), at 53 n.369 (Exhibit JPN-23.B).

<sup>115</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

<sup>116</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

added.)

77. This definition reiterates the definition of “dumping” in Article VI:1 of the GATT 1994.<sup>117</sup> The Appellate Body has held that Article 2.1, – which “applies to the entire *Anti-Dumping Agreement*” – makes “clear ... that dumping is defined in relation to a product as a whole,” and not in relation to “a type, model, or category” of a product.<sup>118</sup> Interpreting the term “margin of dumping,” as defined by Article VI:2 of the GATT 1994, the Appellate Body held that “‘margins of dumping’ can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product”.<sup>119</sup>

78. Because Article 2.1 applies to the “entire” *Anti-Dumping Agreement*, it also applies to Article 2.4.2 and, in consequence, “margins of dumping” in Article 2.4.2 must also be established for the product as a whole.<sup>120</sup>

79. Although the margin of dumping must be established for the product as a whole, an investigating authority is entitled to calculate that margin on the basis of “multiple comparisons” for sub-divisions of the product.<sup>121</sup> However, the Appellate Body emphasized that:

the results of the multiple comparisons at sub-group level are, however, not “margins of dumping” within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority ... . Thus, it is only on the basis of aggregating *all* these “intermediate value” that an investigating authority can establish margins of dumping for the product under investigation as a whole.

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If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.<sup>122</sup>

80. Accordingly, in determining the existence of dumping, and calculating the margin of

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<sup>117</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 92.

<sup>118</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93; Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 126.

<sup>119</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96. This definition is further supported by Article 9.2 and 6.10. *Ibid*, para. 94.

<sup>120</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93 and 96.

<sup>121</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 97.

<sup>122</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 97- 98. Emphasis in original.

dumping for the product as a whole, Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, together with Articles VI:1 and VI:2 of the GATT 1994, prohibit a Member from disregarding the results of any multiple comparisons undertaken by the authorities. As explained below, as a result of the standard zeroing procedures, the United States fails to comply with these requirements.

*ii. Fair Comparison under Article 2.4 of the Anti-Dumping Agreement*

81. In terms of Article 2.1 of the *Anti-Dumping Agreement*, in order to determine whether dumping has occurred, a comparison must be undertaken between “normal value” and “export price.” Although Article 2.1 does not state how that comparison should be undertaken, other provisions in Article 2 do. In particular, among the “agreed disciplines” in Article 2 for determining the margin of dumping, the first sentence of Article 2.4 of the *Anti-Dumping Agreement* states that:

*A fair comparison shall be made between the export price and the normal value. (Emphasis added.)*

a. Scope of the “comparison” in Article 2.4

82. A “comparison” is the “action ... of observing and estimating similarities, differences, etc.” between two or more things.<sup>123</sup> Consistent with this dictionary meaning, and also with the context in Article 2.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the “comparison” in Article 2.4 refers to the “action” by which the authorities determine, in the words of Article VI:2, “the price difference” between normal value and export price for the product as a whole, i.e., the margin of dumping. Thus, as the panel in *Egypt – Rebar* found, “Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin ...”<sup>124</sup> This comparison process for calculating the dumping margin begins when the “basic establishment”<sup>125</sup> of normal value and export price is complete, and ends when “the price difference” for the product as whole has been calculated.

83. The *Anti-Dumping Agreement* imposes certain obligations on investigating authorities as

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<sup>123</sup> *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 1, page 457 (comparison) (emphasis added) (Exhibit JPN-4).

<sup>124</sup> Panel Report, *Egypt – Rebar*, para. 7.333. Underlining added.

<sup>125</sup> Panel Report, *Egypt – Rebar*, para. 7.333.

to how the “comparison” is to be undertaken. For instance, under the third sentence of Article 2.4, the authorities must make “due allowance” in the comparison for any factors that affect “price comparability.” Accordingly, normal value and/or export price may need to be adjusted upwards or downwards to render them properly comparable. However, the “comparison” does not end when these adjustments have been made. Rather, these adjustments enable the authorities to conduct the process of comparing the adjusted figures for normal value and export price.

84. Article 2.4.2 offers three methods by which the adjusted normal value and export price can be compared (W-to-W, T-to-T and W-to-T) and the particular method chosen by the authorities is a defining feature of the comparison. Further, in making the comparison under one of these methods, authorities may conduct “multiple comparisons,” based on sub-divisions of the product or individual transactions that disaggregate the product as a whole.<sup>126</sup> When the authorities decide to make multiple comparisons, the process by which they sub-divide and then re-aggregate the product as a whole is also a defining feature of the comparison because it is central to the manner in which “the price difference,” or the margin of dumping, is established for the product as a whole.

b. Article 2.4 sets forth a general obligation to make a “fair comparison”

85. Throughout the “comparison” of normal value and export price, Article 2.4 imposes a fundamental obligation that limits the discretion of the investigating authorities. That obligation is to ensure a “fair comparison.” According to the Appellate Body, the requirements of a “fair comparison” involve “a *general* obligation” that “informs *all of Article 2 ...*.”<sup>127</sup> In light of the panel’s findings in *Egypt – Rebar*, noted in paragraph 82, the fairness obligation applies to the provisions of Article 2 that relate to “the calculation of the dumping margin ... .”<sup>128</sup>

86. The scope of this general obligation is defined by reference to the word “fair.” According to dictionary meanings, a “fair” comparison is one that is “*unbiased*” and “*impartial*,”

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<sup>126</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 97.

<sup>127</sup> Appellate Body Report, *EC – Bed Linen*, para. 59. Emphasis added.

<sup>128</sup> Panel Report, *Egypt – Rebar*, para. 7.333.



and that “offer[s] an *equal chance of success*” to all parties affected by an investigation.<sup>129</sup> The panel in *EC – Tube or Pipe* held, in the context of Article 2.4, that an “investigating authority must act in an *unbiased, even-handed* manner and must not exercise its discretion in an *arbitrary* manner.”<sup>130</sup> This suggests a meaning that is rooted in the basic requirements of good faith and fundamental fairness.<sup>131</sup> The Appellate Body has observed that “fundamental fairness” is known in many jurisdictions “as due process of law or natural justice.”<sup>132</sup>

87. The context of Article 2.4 supports this reading. Indeed, in the *Anti-Dumping Agreement*, Article 2.4 is far from unique in requiring that an investigating authority act fairly in making its determinations; the context provided by other provisions of the *Anti-Dumping Agreement* offers useful guidance for the proper construction of the “fairness” obligation in Article 2.4. First, other provisions of Article 2 impose similar requirements. For example, in *U.S. – Hot-Rolled Steel*, the Appellate Body stated that Articles 2.1 and 2.2.1 require investigating authorities to assess whether home-market sales are in the ordinary course of trade “in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation.”<sup>133</sup> The Appellate Body held that there was a “lack of *even-handedness*” in the USDOC procedures at issue because the “combined application of [the measures] operated systematically to raise normal value,” which “disadvantaged exporters.”<sup>134</sup>

88. Second, panels and the Appellate Body have consistently held that, in making “injury” determinations under Article 3.1, investigating authorities must respect “the basic principles of good faith and fundamental fairness.”<sup>135</sup> This finding is based on the need for authorities to conduct an “objective examination.” In *EC – Bed Linen (Article 21.5)*, the Appellate Body ruled

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<sup>129</sup> *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 1, page 907 (emphasis added) (Exhibit JPN-4).

<sup>130</sup> Panel Report, *EC – Tube or Pipe*, para. 7.178. Emphasis added.

<sup>131</sup> The fairness requirement in Article 2.4 is another expression of the principle of good faith, which, the Appellate Body observed, “is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement* ... .” Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 101. See also Appellate Body Report, *U.S. – Shrimp*, para. 158 and n. 156.

<sup>132</sup> Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 179.

<sup>133</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 148. Underlining added.

<sup>134</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 154. Underlining added. See also para. 155 (“the lack of even-handedness ... created *prejudice* to exporters.”). Emphasis added.

<sup>135</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 193; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114; Panel Report, *EC – Tube or Pipe*, para. 7.226; Panel Report, *U.S. – Softwood Lumber VI*, para. 7.28.

that this language requires authorities to reach a result that is “*unbiased, even-handed, and fair.*”<sup>136</sup> In *U.S. – Hot-Rolled Steel*, the Appellate Body found that it would not be “even-handed” for investigating authorities:

to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.<sup>137</sup>

89. The Appellate Body also opined, in that appeal, that fairness precludes an investigating authority from “*favouring the interests* of any interested party, or group of interested parties, in the investigation.”<sup>138</sup>

90. Third, through the standard of review in Article 17.6(i), the *Anti-Dumping Agreement* effectively imposes a duty on investigating authorities to evaluate facts in an “*unbiased and objective*” manner.<sup>139</sup>

91. In sum, therefore, under Article 2.4 of the *Anti-Dumping Agreement*, the process by which authorities identify “the price difference” between normal value and export price for the product as a whole must not be biased, lack even-handedness, favour particular interests or outcomes, or otherwise distort the facts, in particular to the detriment of exporters or foreign producers.

**iii. *Model and Simple Zeroing are Inconsistent with These Obligations***

a. Model and Simple Zeroing Prevent the USDOC From Making a Dumping Determination for the Product as a Whole

92. In an original investigation, the USDOC generally uses a W-to-W comparison, including model zeroing, to compare normal value and export price. Japan submits that model zeroing is

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<sup>136</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.

<sup>137</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 196. Emphasis added.

<sup>138</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 193. Emphasis added.

<sup>139</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 56. Emphasis in original.

“as such” inconsistent with the requirements in Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, because the USDOC fails to determine the existence of dumping, and calculate a margin of dumping, for the product as a whole.

93. This issue was explicitly addressed by the Appellate Body in *U.S. – Softwood Lumber V*, albeit on an “as applied” basis. In that dispute, the Appellate Body examined the United States’ use of model zeroing in an original investigation. It held that an investigating authority is entitled to compare normal value and export price through multiple comparisons, by model.<sup>140</sup> However, the Appellate Body underscored that:

If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.<sup>141</sup>

94. The Appellate Body concluded that it was inconsistent with Article 2.4.2 for the USDOC to exclude the results of comparisons for certain models (i.e., those with a negative price difference) in creating an aggregate result for the product.<sup>142</sup> Equally, because the Appellate Body’s reasoning derived from the language in Article 2.1,<sup>143</sup> the failure to establish the margin of dumping for the product as a whole, as defined in Article 2.1, as well as in Articles VI:1 and VI:2 of the GATT 1994, is inconsistent with those Articles.

95. In reaching its conclusion, the Appellate Body noted that the *Anti-Dumping Agreement* does not “express[ly] ... permit[] an investigating authority to disregard the results of *multiple comparisons* at the aggregation stage.”<sup>144</sup> It added that, “when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.”<sup>145</sup>

96. The same reasoning equally applies to the instant case.<sup>146</sup> Model zeroing is “as such” inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and with Articles VI:1

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<sup>140</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 97.

<sup>141</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 98. Emphasis in original.

<sup>142</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 102.

<sup>143</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93.

<sup>144</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 100.

<sup>145</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 100.

<sup>146</sup> See also paras. 76 to 80 above.

and VI:2 of the GATT 1994. Through the Standard Zeroing Line, after identifying comparable export transactions and grouping them into models, and after comparing export price for each model with normal value, the USDOC automatically disregards all negative results of comparisons where export price is higher than normal value. In other words, negative comparison results are not included in the calculation of the total amount of dumping. However, the Appellate Body held that, if the results of *all* comparisons are not taken into account, the dumping determination and the margin of dumping are *not* for the product as a whole.<sup>147</sup>

97. Therefore, by maintaining the model zeroing procedures, the United States does not and cannot determine a dumping margin for the product as a whole; instead, the United States' zeroing procedures are designed and structured to determine the existence of dumping, and calculate a dumping margin, on a partial basis, taking account of only certain comparison results and not the entirety of the comparison results for the product as a whole.

98. The same reasoning also dictates that the simple zeroing procedures, in an original investigation, are "as such" inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and also with Articles VI:1 and VI:2 of the GATT 1994. By way of illustration, Japan provides an example in which the United States used simple zeroing in an original investigation.<sup>148</sup> That was in the re-determination of the dumping margin for imports of softwood lumber from Canada, where normal value and export price were compared on a T-to-T basis.<sup>149</sup>

99. As illustrated in this example, the simple zeroing procedures also operate in circumstances where the USDOC has engaged in "multiple comparisons" of normal value and export price, this time on the basis of individual export transactions and corresponding individual normal values that the USDOC has identified as comparable. Once again, after identifying comparable export transactions and normal values, and comparing export price for these transactions with the relevant normal value, the USDOC maintains a procedural "filter" that automatically discards the results of comparisons from the calculation process where export price exceeds normal value. Thus, for simple zeroing, in calculating the overall margin, the USDOC

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<sup>147</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93 and 98.

<sup>148</sup> See Exhibit JPN-8.

<sup>149</sup> See Owenby Statement, para. 20 and Exhibit JPN-8.

aggregates the results of only certain of the “multiple comparisons” it undertakes, disregarding others. The overall margin of dumping does not, therefore, reflect *all* of the multiple comparisons undertaken. However, as the Appellate Body held, if the results of *all* comparisons are not taken into account, the dumping determination and the margin of dumping are not for the product as a whole.<sup>150</sup>

100. Thus, as with model zeroing, by maintaining the simple zeroing procedures, the United States does not and cannot determine a dumping margin for the product as a whole; instead, the United States’ procedures are structured to determine the existence of dumping, and calculate a dumping margin, on a partial basis of only certain comparison results, overlooking the entirety of the comparisons for the product as a whole.

101. In consequence, the model and simple zeroing procedures are “as such” inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

b. Model and Simple Zeroing Prevent a Fair Comparison by the USDOC

102. The Appellate Body has already held that the application of model zeroing – which operates in the *same* manner and produces *the same* effects as simple zeroing – is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. In *U.S. – Corrosion-Resistant Steel*, the Appellate Body identified two unfair elements in a comparison that includes zeroing:

- (1) Zeroing may lead to an affirmative determination that dumping exists in circumstances where no dumping would have been established in the absence of zeroing;<sup>151</sup> and,
- (2) Zeroing “inflates” the margin of dumping by always excluding from the aggregation stage the results of negative comparisons that would reduce the overall amount of dumping if they were included.<sup>152</sup>

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<sup>150</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93 and 98.

<sup>151</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135, quoting the panel report in that dispute, at para. 7.159.

<sup>152</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

103. Immediately after noting these unfair elements, the Appellate Body found that there is an “inherent bias in a zeroing methodology ... of this kind”.<sup>153</sup> Unsurprisingly, the Appellate Body took the view that such a comparison “is *not* a ‘fair comparison’ between export price and normal value, as required by Articles 2.4 and 2.4.2 .”<sup>154</sup>

104. The model and simple zeroing procedures at issue involve the same unfair comparison.<sup>155</sup> By excluding the negative results of any comparisons from the aggregation of total dumping, the zeroing procedures overstate the total amount of dumping by an amount equal to the excluded negative values. As a result, the dumping margin is inflated. Moreover, in situations where the aggregate value of excluded negative results exceeds the aggregate value of the included positive results, the zeroing procedures produce a dumping determination where the product as a whole is not dumped. In consequence, the USDOC conducts its investigation “in such a way that it becomes *more likely* that [it] will determine that” there is dumping.<sup>156</sup> By rendering a dumping determination more likely, and by systematically inflating the dumping margin, the zeroing procedures deprive the comparison of normal value and export price of even-handedness. Instead, the procedures systematically favour the interests of petitioners, and systematically prejudice the interests of exporters.

105. The Appellate Body has also described the unfairness of zeroing in terms of its distorting effects on export price in the comparison of normal value and export price:

*Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions ... .*<sup>157</sup>

106. These same price-based distortions result, in the same fashion, from both the model and simple zeroing procedures. By improperly excluding all negative comparison results from the aggregation stage, the USDOC effectively attributes a zero value to the excluded comparisons in

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<sup>153</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

<sup>154</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135 (emphasis in original). *See also* Appellate Body Report, *EC – Bed Linen*, para. 55.

<sup>155</sup> *See* Owenby Statement, paras. 17-19.

<sup>156</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 196. Emphasis added.

<sup>157</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 101. Underlining added.

question, instead of a negative value.<sup>158</sup> This means that, for the excluded comparisons, the USDOC treats normal value as *equal* to export price, whereas, in fact, export price is *greater* than normal value. Accordingly, as a result of zeroing, the export transactions considered in the excluded comparisons are systematically “treated as if they were less than what they actually are.”<sup>159</sup> Another way to express the same price-distortion is that the zeroing procedures systematically treat normal value as if it is *higher* than it actually is.<sup>160</sup> On either view (reduced export price or raised normal value), through the model and simple zeroing procedures, the USDOC distorts the comparison of normal value and export price by interfering with price-based data for home-market or export sales.

107. In other words, like the adjustments envisaged in Article 2.4, zeroing has the effect of altering normal value or export price. However, whereas adjustments to be made under Article 2.4 are designed to ensure “price comparability,” zeroing ensures price distortion.

108. Although the United States purposefully disregards the negative results of comparisons of normal value and export price, it does *not* provide any compensation in the process of aggregating dumping amounts that counter-balances the exclusion of negative results. Instead, the standard zeroing procedures are designed and structured always to be biased in favour of a particular outcome and particular interests (i.e., existence of dumping and the interests of petitioners), and conversely are *always* biased against exporters’ interests.

109. As the zeroing procedures are formulated with an in-built bias that distorts the comparison of normal value and export price, they are inconsistent with the dictates of fundamental fairness. As a result, the model and simple zeroing procedures in original investigations are “as such” inconsistent with Article 2.4.

110. Finally, Japan submits that the failure to establish a margin of dumping for the product as a whole, through the standard zeroing procedures, is also inconsistent with the dictates of fundamental fairness as it necessarily results in an unfair comparison, i.e. price distortion and an inflated dumping margin. In other words, by systematically excluding the results of certain comparisons, the United States fails to determine a margin of dumping for the product as a whole

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<sup>158</sup> See Owenby Statement, para. 37.

<sup>159</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 101.

and, simultaneously, engages in an unfair comparison, for the reasons stated above. Therefore, the model and simple zeroing procedures entail a failure to establish a margin of dumping for the product as a whole and also violate the fairness requirement in Article 2.4.

**B. MAINTAINING ZEROING PROCEDURES IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLE 3 OF THE *ANTI-DUMPING AGREEMENT***

111. Pursuant to Article 3.1 of the *Anti-Dumping Agreement*, a determination of injury must be based on an “objective examination” of “positive evidence” concerning the “volume of the dumped imports,” their “effect” on prices of the like domestic product, and the “consequent impact” of dumped imports on domestic producers. According to the Appellate Body, “positive evidence” is evidence “of an affirmative, objective and verifiable character” and “must be credible.”<sup>161</sup> An “objective examination” is one that “conform[s] to the dictates of the basic principles of good faith and fundamental fairness.”<sup>162</sup> The Appellate Body also found that the general obligation set out in Article 3.1 “‘informs the more detailed obligations’ in the remainder of Article 3.”<sup>163</sup>

112. Several of the other paragraphs of Article 3 impose more specific requirements on the investigating authorities’ evaluation of dumped imports. In particular, Article 3.2 instructs the investigating authorities to evaluate the rate of increase in dumped imports and their price effects. In defined circumstances, Article 3.3 allows for the cumulative assessment of the “effect” of dumped imports from more than one country. Article 3.4 identifies a number of factors that investigating authorities must examine in evaluating the impact of dumped imports, including the magnitude of the dumping margin. Article 3.5 requires that “the dumped imports, through the effects of dumping,” are causing injury.

113. Thus, in each of these provisions, key aspects of the investigating authorities’ injury determination are based upon evidence derived from the authorities’ dumping determination. In particular, the dumping determination provides the pertinent evidence regarding:

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<sup>160</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 144.

<sup>161</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 192.

<sup>162</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 193.

<sup>163</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 192, quoting Appellate Body Report, *Thailand – H-Beams*, para 106.



- (1) the *volume of dumped and non-dumped imports* (evaluated under Articles 3.1, 3.2, 3.3, 3.4 and 3.5);
- (2) the *rate of increase of dumped imports* (evaluated under Article 3.2 and, possibly, Articles 3.4 and 3.5);
- (3) the *prices of dumped and non-dumped imports* (evaluated under Articles 3.2, 3.3, 3.4 and 3.5); and,
- (4) the *magnitude of the margin of dumping* (evaluated under Articles 3.4 and 3.5).

114. As already explained, the model and simple zeroing procedures systematically distort the dumping determination and, therefore, also the alleged evidence of dumping that is derived from this determination and subsequently used to evaluate the injury factors just enumerated. Because this evidence results from a flawed dumping determination, it does not meet the requirements of “positive evidence.”

115. First, the zeroing procedures fail to produce credible evidence of dumping because there is no evidence of dumping for the product as a whole. In consequence, the alleged evidence on the volume of dumped and non-dumped imports is not positive. For example, the flaws in the calculation procedures may lead to a finding of dumping for a product where there is no dumping. In that event, certain imports are treated as dumped, when they are not.

116. Second, for the same reason, the alleged evidence pertaining to the rate of increase of dumped imports is also not positive. For example, due to the zeroing procedures, dumped imports may be shown to have increased sharply during the period of investigation, whereas in fact there might have been: no dumping at all; a slight increase in dumped imports; or, even a decline or disappearance of dumped imports.

117. Third, the alleged evidence of the price effects of dumped imports is not credible and, therefore, not positive. The maintenance of the zeroing procedures means that the USITC has no credible basis for identifying the portion of imports that are, respectively, dumped and non-dumped. Yet, the precise make-up of these two groups of imports determines the prices attributed to dumped and non-dumped imports. Accordingly, under the zeroing procedures, there is no credible basis for determining the prices, or price effects, of these two categories of imports.

118. Fourth, there is also no positive evidence of the magnitude of dumping because, as the Appellate Body has said repeatedly, “zeroing ... inflates the margin of dumping for the product as a whole.”<sup>164</sup> Because of the maintenance of the zeroing procedures, the USITC has no objective and verifiable basis for evaluating the magnitude of the margin of dumping, if any.

119. In other words, the standard zeroing procedures, in original investigations, cannot generate positive evidence of “dumping.” As a result, due to the maintenance of the zeroing procedures, the USITC has no objective, verifiable or credible evidence on the basis of which to evaluate the volume, price effects and impact of dumped imports.

120. Furthermore, an “examination” of injury that is not based on positive evidence of dumping is not “objective.” In *U.S. – Hot-Rolled Steel*, the Appellate Body noted that an “objective examination” is one that meets the requirements of fundamental fairness.<sup>165</sup> Where alleged evidence of dumping is obtained from an unfair comparison of normal value and export price, that unfairness does not disappear through the subsequent examination of the evidence in question under Article 3.1. Instead, the underlying unfairness of the comparison taints equally the examination of the alleged evidence in an injury determination.

121. Japan, therefore, submits that, by maintaining the model and simple zeroing procedures, the United States acts inconsistently with Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *Anti-Dumping Agreement* because the zeroing procedures deprive the USITC of positive evidence for an objective examination of injury.

**C. MAINTAINING ZEROING PROCEDURES IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLE 5.8 OF THE ANTI-DUMPING AGREEMENT**

122. Article 5.8 of the *Anti-Dumping Agreement* provides that:

an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. (Underlining added.)

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<sup>164</sup> See, e.g., Appellate Body Report, *U.S. – Softwood Lumber V*, para. 101.

<sup>165</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 193. Emphasis added.

123. The text of this provision sets forth circumstances in which investigating authorities are obliged to terminate an investigation. In particular, authorities must terminate promptly when there is “[in]sufficient evidence of ... dumping ... to justify proceeding”; and they must terminate immediately either (1) where the dumping margin is *de minimis* or (2) where the volume of dumped imports is negligible.<sup>166</sup>

124. Article 5.8 imposes an *affirmative obligation on authorities* because they must be “satisfied,” on an on-going basis, that there is “*sufficient evidence*” of dumping to “justify” pursuit of an investigation. As with the phrase “positive evidence” in Article 3.1, the phrase “sufficient evidence” indicates that the authorities’ justification for pursuing an investigation must be grounded in facts that are at once affirmative, objective, verifiable and credible.<sup>167</sup> In the same vein, the panel in *US – Softwood Lumber V* opined that the sufficiency of evidence, under Articles 5.2 and 5.3 of the *Anti-Dumping Agreement*, is determined, among others, by reference to “the *accuracy and adequacy* of the evidence ... .”<sup>168</sup>

125. In *U.S. – Softwood Lumber V*, the panel also examined whether, under Articles 5.2 and 5.3, there was sufficient evidence of dumping to initiate an investigation. Like Article 5.8, Articles 5.2 and 5.3 do not define the word “dumping.” However, following the approach of the panels in *Guatemala – Cement II* and *Argentina – Poultry*, the panel in *U.S. – Softwood Lumber V* ruled that:

Article 2 provides guidance regarding the meaning of that term for the purpose of the *AD Agreement*. We agree ... that, in order to determine whether there is sufficient evidence of dumping, an investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Article 2. This does not, of course, mean that an investigating authority must perform a full-blown determination of dumping in order to initiate an investigation. Rather, it means simply that

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<sup>166</sup> The remainder of Article 5.8 establishes more precise thresholds for determining when margins are *de minimis* and when volumes are negligible.

<sup>167</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 192.

<sup>168</sup> Panel Report, *U.S. – Softwood Lumber V*, para. 7.79.

an investigating authority should take into account the general parameters as to what dumping is when inquiring about the sufficiency of the evidence. The requirement is that the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 ...<sup>169</sup>

126. Japan submits that this reasoning applies also to Article 5.8. In that regard, the model and simple zeroing procedures are inconsistent with Article 5.8 because they deprive the USDOC of accurate, adequate or otherwise credible “evidence” of “dumping,” within the meaning of Article 2 of the *Anti-Dumping Agreement*.

127. Japan has already explained that the zeroing procedures are inconsistent with Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, because the USDOC fails to determine the existence of dumping, or calculate a margin of dumping, for the product as a whole, and because the USDOC also fails to engage in a fair comparison of normal value and export price due to the “inherent bias in a zeroing methodology ...”<sup>170</sup> As a result, by maintaining the zeroing procedures, the USDOC *never* has *any* accurate or adequate evidence of “dumping,” much less “sufficient evidence” to justify pursuit of an investigation.

128. Accordingly, by maintaining the zeroing measures as integral parts of the calculation procedures, the USDOC has no adequate basis for knowing, at any point in an investigation, whether it can continue to pursue the investigation or must terminate it. The alleged evidence of dumping upon which the USDOC relies, under Article 5.8, is obtained with utter disregard for the “general parameters of what dumping is” because the zeroing procedures themselves disregard those parameters. Further, as the alleged “evidence” stems from a *biased* comparison of normal value and export price, it offers no grounds for “an *unbiased* and objective investigating authority” to conclude that there is sufficient evidence to pursue an investigation.<sup>171</sup>

129. By way of example, as a result of the zeroing procedures, the USDOC fails to terminate an investigation in circumstances where it is required to do so “immediately” under Article 5.8 of

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<sup>169</sup> Panel Report, *U.S. – Softwood Lumber V*, para. 7.80 (underlining added). See also Panel Report, *Guatemala – Cement II*, para. 8.35 and Panel Report, *Argentina – Poultry*, 7.62.

<sup>170</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135. See paras. 75-110 above.

<sup>171</sup> Panel Report, *U.S. – Softwood Lumber V*, para. 7.80. See also Panel Report, *Guatemala – Cement II*, para. 8.35, and Panel Report, *Argentina – Poultry*, 7.62.

the *Anti-Dumping Agreement* because the zeroing procedures mask the fact that the volume of dumped imports is negligible or that the dumping margin is *de minimis*.

130. The model and simple zeroing procedures are, therefore, inconsistent with Article 5.8 of the *Anti-Dumping Agreement* because they deprive the USDOC of an adequate and credible basis for determining whether there is sufficient evidence of dumping to justify proceeding with an investigation.

**D. MAINTAINING ZEROING PROCEDURES IN PERIODIC AND NEW SHIPPER REVIEWS IS INCONSISTENT WITH ARTICLES 2 AND 9 OF THE ANTI-DUMPING AGREEMENT**

*i. Periodic and New Shipper Reviews in the United States' law*

131. Under Section 751 of the Tariff Act,<sup>172</sup> upon request, the USDOC is authorized to conduct “administrative reviews of determinations.” Pursuant to that statutory provision, the term “administrative review” encompasses, among others, “periodic”<sup>173</sup> and “new shipper reviews.”<sup>174</sup>

132. In a periodic review, the USDOC determines the amount of anti-dumping duties to be collected on the basis of a retrospective review of dumping in a defined period, usually 12 months. The USDOC calculates two types of margin in a periodic review.<sup>175</sup> First, it calculates the overall weighted average dumping margin, which is the duty deposit rate, for an exporter, for the period under review. The United States applies this rate to future entries for the purpose of collecting estimated duties, until the conclusion of the next review proceeding. Second, for importers, it calculates an importer-specific assessment rate. This rate is used by the United States to assess the definitive amount of duties due for the review period. For both types of margin, the USDOC includes simple zeroing in the standard computer programming procedures.

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<sup>172</sup> Tariff Act, Section 751(Exhibit JPN-2).

<sup>173</sup> Tariff Act, Section 751(a)(1) (Exhibit JPN-2).

<sup>174</sup> Tariff Act, Section 751(a)(2)(B) (Exhibit JPN-2).

<sup>175</sup> The margin calculation procedures for duty deposit rates and importer-specific assessment rates, including the simple zeroing procedures, are explained further in paragraphs 41-43 above. *See also* Owenby Statement, paras. 42-57.

133. In a new shipper review, the USDOC also determines an overall weighted average margin of dumping and importer-specific assessment rates, for any exporters that did not export the “product” during the period of investigation. The period of review in a new shipper review is also usually 12 months. As new shipper reviews are a form of “administrative review,” the calculation procedures, and programming code, are the same as for periodic reviews.<sup>176</sup>

134. In both periodic and new shipper reviews, the USDOC determines the margins of dumping on a W-to-T basis by comparing normal value and the export price of individual comparable export transactions from the review period. Accordingly, multiple comparisons are made, one for each comparable export transaction. The margins of dumping are, therefore, based on an aggregation of these comparisons. As noted in paragraph 16, above, in both periodic and new shipper reviews, the USDOC maintains and always uses the simple zeroing procedures as part of its standard calculation procedures. As a result, through the Standard Zeroing Line, in aggregating the results of the multiple comparisons, the USDOC disregards all negative comparison results.

**ii. *Dumping is Always as Defined in Article 2 of the Anti-Dumping Agreement***

135. Japan understands that the United States conducts periodic and new shipper reviews pursuant to the provisions of Articles 9.3 and 9.5, respectively, of the *Anti-Dumping Agreement*.

136. The *chapeau* of Article 9.3 provides that “the amount of the anti-dumping duty *shall not exceed* the margin of dumping as established under Article 2.” (Emphasis added.) Accordingly, this provision establishes “a maximum limit, or ceiling” on the amount of anti-dumping duties that can be collected by a Member.<sup>177</sup> That ceiling is defined by reference to “the margin of dumping as established under Article 2.” Consistent with this text, Article 9.1 confers discretion on Members to impose anti-dumping duties in an amount “less” than the “full margin of

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<sup>176</sup> An example of the computer program used in a new shipper review concerning Structural Beams from Japan, which includes the Standard Zeroing Line, is attached as Exhibit JPN-9.

<sup>177</sup> See Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 116, where the Appellate Body interpreted the words “shall not exceed” in Article 9.4 of the *Anti-Dumping Agreement* as establishing “a maximum limit, or ceiling” for the all others rate.

dumping.” Japan understands that, in periodic reviews under Article 9.3, the USDOC calculates “margins of dumping” in periodic reviews to determine the “maximum limit, or ceiling” for anti-dumping duties collected by the United States.

137. Article 9.5 of the *Anti-Dumping Agreement* defines circumstances in which investigating authorities may determine “individual margins of dumping” for any exporters that did not export the “product” during the period of investigation (i.e., new shippers). Japan understands that the USDOC calculates dumping margins in new shipper reviews pursuant to this provision.

138. Thus, the phrase “margin of dumping” appears in Articles 9.1, 9.3, and 9.5. Although the phrase is not defined in Article 9, the *chapeau* of Article 9.3, as noted above, provides expressly that the “margin of dumping” is “as established under Article 2.” Accordingly, although the rules on the collection of anti-dumping duties and on the calculation of the dumping margin are distinct, Article 2 is expressly made relevant in interpreting the term “margins of dumping” in Article 9.<sup>178</sup> This cross-reference to Article 2 is in keeping with the fact that “Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins.”<sup>179</sup>

139. The importance of Article 2 to the *Anti-Dumping Agreement* as a whole is evident in a series of interpretations by the Appellate Body of core concepts that are defined in Article 2 and that are used elsewhere in the *Anti-Dumping Agreement*. Thus, the Appellate Body has given a uniform meaning, throughout the *Anti-Dumping Agreement*, to the terms “dumping,” “margin of dumping,” and “product.” Consistent with these uniform interpretations, it has also indicated that, whenever investigating authorities calculate “margins of dumping,” they must respect the basic requirements of a “fair comparison.” Specifically, in addition to holding that Article 2 sets forth the “agreed disciplines” in the *Anti-Dumping Agreement* for calculating dumping margins,<sup>180</sup> the Appellate Body has held, *inter alia*, that:

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<sup>178</sup> Although the Appellate Body observed that the rules relating to duty collection set out in Article 9 may not be of relevance in interpreting provisions of Article 2, this finding has no bearing in the reverse context, i.e., the relevance of Article 2 where the term “margins of dumping” is interpreted and applied in Article 9. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.

<sup>179</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127. Underlining added.

<sup>180</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

- “the definition of *dumping* as contained in Article 2.1 applies to the *entire Anti-Dumping Agreement*,”<sup>181</sup>
- the word “*dumping*” in Article 11.3 (sunset reviews) has the “meaning described in Article 2.1,”<sup>182</sup>
- the word “*margins*” in Article 9.4 (all others rate) has a meaning that is no “different[.]” from its meaning in Article 2.4.2;<sup>183</sup>
- “*margins*” relied upon under Article 11.3 (sunset reviews) must be calculated through a “fair comparison,” as required by Article 2.4;<sup>184</sup>
- the “*product*” mentioned in Articles 6.10 (sampling of exporters) and 9.2 (imposition of duty) is the same product that is subject to dumping and injury determinations under Articles 2 and 3 and that product must always be “treated as a whole”.<sup>185</sup>

140. The consistent meanings of “dumping,” “margin of dumping,” and “product,” define the contours of “the constituent elements of dumping” and serve to ensure that, in terms of the obligations under Article 18.1, “specific action against *dumping*” is, indeed, only taken “when [those] constituent elements ... are present.”<sup>186</sup>

141. As a result of these uniform interpretations, the USDOC’s determination of the existence of “dumping,” and calculation of “margins of dumping,” for purposes of periodic and new shipper reviews, under Articles 9.3 and 9.5, respectively, must be consistent with the definitions of those terms in Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and with Articles VI:1 and VI:2 of the GATT 1994.

***iii. A Margin of Dumping Must Be Determined for the Product as a Whole***

142. In paragraphs 76 to 80, above, Japan explains that Article 2.1 of the *Anti-Dumping Agreement* requires that the existence and margin of dumping be determined for the product as a whole. Accordingly, in the event that the investigating authorities undertake multiple

<sup>181</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93. Emphasis added.

<sup>182</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 126. Emphasis added.

<sup>183</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 118. Emphasis added.

<sup>184</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras. 126 and 127. Emphasis added.

<sup>185</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras 94 and 99. Emphasis added.

<sup>186</sup> Appellate Body Report, *U.S. – 1916 Act*, para. 122.



comparisons in determining a margin under Article 9.3, the results of *all* of the multiple comparisons must be taken into account in calculating dumping margins for the product as a whole. If the results of some comparisons are disregarded, the margin is not calculated for the product as a whole.<sup>187</sup>

143. In periodic and new shipper reviews, when the USDOC compares normal value and export price on a W-to-T basis, it makes multiple comparisons. In particular, for each comparable export transaction, a separate comparison is made between the price of an individual export transaction and a weighted average normal value. The USDOC does not, however, sum the results of all the comparisons in calculating the overall weighted average dumping margin or the importer-specific assessment rate. For both types of margin, through the Standard Zeroing Lines, after identifying comparable export transactions and comparing export price for these transactions with weighted average normal value, the USDOC automatically disregards all negative results of comparisons where export price is higher than normal value. In other words, negative comparison results are not included in the calculation of the total amount of dumping.

144. Accordingly, the standard simple zeroing procedures, maintained by the USDOC in the standard computer program for use in periodic and new shipper reviews, are inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, and also with Articles VI:1 and VI:2 of the GATT 1994, because, as the Appellate Body has affirmed, the existence and the margin of dumping are not determined for the product as a whole when the results of all the multiple comparisons undertaken are not taken into account.<sup>188</sup>

*iv. Fair Comparison under Article 2.4 of the Anti-Dumping Agreement*

145. In paragraphs 81 to 91, above, Japan explains that a “fair comparison” is one that meets the requirements of fundamental fairness and that is, in particular, unbiased, even-handed, does not favour particular interests or outcomes nor distort the facts. Japan has also already narrated the Appellate Body’s previous findings that a comparison that involves model zeroing is unfair.<sup>189</sup> Japan claims that the model and simple zeroing procedures are “as such” inconsistent with Article 2.4 because they are formulated with an in-built “inherent bias” that distorts the

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<sup>187</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 98.

<sup>188</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93 and 98.

<sup>189</sup> See paragraphs 85-91 and 102-110 above.

comparison of normal value and export price in calculating the margin of dumping for the product as a whole.<sup>190</sup> For precisely the same reasons stated earlier, the simple zeroing procedures maintained by the USDOC for use in comparing normal value and export price in periodic and new shipper reviews are inconsistent with Article 2.4.

**v. *Violations of Articles 9.1, 9.2, 9.3 and 9.5 of the Anti-Dumping Agreement***

146. In *U.S. – Corrosion-Resistant Steel*, the Appellate Body was confronted by a claim that, in conducting a sunset review under Article 11.3, the USDOC had relied on dumping margins calculated using zeroing procedures in a periodic review, under Article 9.3.1.<sup>191</sup> The Appellate Body held that:

If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.<sup>192</sup>

147. Accordingly, the Appellate Body held, first, that margins calculated under Article 9.3 are “legally flawed” if the margin calculation is inconsistent with Article 2.4; and, second, it held that, if those “legally flawed” margins are used in a sunset review under Article 11.3, there is a violation of Article 11.3. This follows from the Appellate Body’s ruling, in that appeal, that “Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins.”<sup>193</sup>

148. The same reasoning is equally applicable to duty assessment and collection procedures under Article 9 and also to new shipper reviews under Article 9.5. If the procedures for calculating dumping margins in assessments and reviews are inconsistent with Article 2, including Articles 2.1 and 2.4, then this legal flaw “taints” the duty assessment proceedings as well. As noted, the terms “margin of dumping” and “product” in Articles 9.1, 9.2, 9.3 and 9.5 have common meanings throughout the *Agreement* that stem from Article 2. This is borne out, in particular, by the text of Article 9.3, which expressly refers to “the margin of dumping as

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<sup>190</sup> See paragraphs 102-110 above.

<sup>191</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 116.

<sup>192</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

<sup>193</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

established under Article 2.” The assessment of anti-dumping duties under Article 9 must, therefore, be premised on a dumping determination, including a fair comparison, for the product as a whole that is consistent with Article 2.

149. Further, Article 9.3 specifically requires that “the amount of the anti-dumping duty shall not *exceed* the margin of dumping as established under Article 2.” (Emphasis added) Therefore, the United States is not allowed to collect anti-dumping duties in excess of the properly calculated margin of dumping. Moreover, in light of this context, an “appropriate amount” of duty, under Article 9.2, cannot exceed the maximum limit of the margin of dumping established under Article 2 as well.<sup>194</sup>

150. Japan has already demonstrated, above, that the USDOC fails to calculate the margins of dumping on the basis of a fair comparison for the product as a whole and, therefore, acts inconsistently with Articles 2.1, 2.4 and 2.4.2. As a margin of dumping calculated in this manner is not properly “established under Article 2”, the duty assessment proceedings are also legally flawed. Moreover, as the zeroing procedures inflate and overstate the dumping margin, the anti-dumping duty is assessed and collected in excess of the margins that should have been calculated under Article 2 without zeroing.<sup>195</sup> Consequently, the United States fails to comply with the requirement to ensure that the amount of duties collected remains within the limit of the margin of dumping for the product as a whole.

151. In consequence, because the standard zeroing procedures are inconsistent with Article 2, maintaining these procedures for determining dumping margins in a periodic review is also inconsistent with Articles 9.1, 9.2 and 9.3. For the same reasons, it is also inconsistent with Article 9.5 for the USDOC to maintain such procedures for determining margins in new shipper reviews. In addition, the United States acts inconsistently with Articles 9.1, 9.2 and 9.3 by failing to ensure that the amount of anti-dumping duties does not exceed the margin of dumping established consistently with Article 2.

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<sup>194</sup> In this connection, in *Argentina – Poultry*, the panel found that “[i]n the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 ... would be ‘appropriate’ within the meaning of Article 9.2.” Panel Report, *Argentina – Poultry*, para. 7.365.

<sup>195</sup> Japan notes that the USDOC assesses and imposes anti-dumping duties in an amount equal to the full margin of dumping it calculates. See 19 C.F.R. section 351.212 (b).

**E. MAINTAINING ZEROING PROCEDURES IN CHANGED CIRCUMSTANCES AND SUNSET REVIEWS IS INCONSISTENT WITH ARTICLES 2 AND 11 OF THE ANTI-DUMPING AGREEMENT**

*i. Changed Circumstances and Sunset Reviews in the United States' Law*

152. As noted in paragraph 131, Section 751 of the Tariff Act authorizes the USDOC to conduct “administrative reviews of determinations.” In addition to periodic and new shipper reviews, the term “administrative review” also includes “changed circumstances”<sup>196</sup> and sunset or “five-year reviews.”<sup>197</sup>

153. In changed circumstances reviews, upon request, the USDOC and the USITC are authorized to review an affirmative anti-dumping duty determination, where warranted by changed circumstances, but usually no earlier than two years after the publication of the notice of the determination.<sup>198</sup> In sunset reviews, five years after publication of an anti-dumping duty order, the USDOC and the USITC, respectively, review whether revocation of the order “would be likely to lead to continuation or recurrence of dumping ... and of material injury.”<sup>199</sup>

154. In both changed circumstances and sunset reviews, the USDOC relies on dumping margins calculated in a prior original investigation or a periodic review as the basis for the review determination.<sup>200</sup> Accordingly, the USDOC necessarily relies on margins that are calculated using either the model or simple zeroing procedures, one of which is always a feature of the USDOC’s margin calculations.

*ii. Dumping Margins Used for Purposes of Article 11 Must be Consistent with Article 2 of the Anti-Dumping Agreement*

155. Japan understands that the United States conducts changed circumstances and sunset reviews pursuant to the provisions of Articles 11.2 and 11.3, respectively, of the *Anti-Dumping Agreement*.

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<sup>196</sup> Tariff Act, Section 751(b).

<sup>197</sup> Tariff Act, Section 751(c).

<sup>198</sup> Tariff Act, Section 751(b).

<sup>199</sup> Tariff Act, Section 751(c)(1).

<sup>200</sup> See Owenby Statement, para. 24.

156. In *U.S. – Corrosion-Resistant Steel*, the Appellate Body confirmed that there is:

no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. ... If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*<sup>201</sup>

157. This reasoning applies equally to reviews under Articles 11.2 and 11.3. Moreover, in both cases, if an authority elects to rely on a dumping margin, that margin must be consistent not only with Article 2.4, but also with the requirements in Articles 2.1 and 2.4.2 for dumping, and dumping margins, to be calculated for the product as a whole. Accordingly, in changed circumstances and sunset reviews, by relying on margins calculated in prior proceedings using model and simple zeroing, the USDOC cannot comply with the obligations in Articles 2.1, 2.4 and 2.4.2, because, for the reasons already stated in paragraphs 75 to 110 above, these margins are not based on a fair comparison and are not calculated for the product as a whole.

158. In consequence, the model and simple zeroing procedures are also inconsistent with Articles 11.2 and 11.3 of the *Anti-Dumping Agreement* because, as margins of dumping calculated using these procedures are legally flawed, changed circumstances and sunset reviews that rely upon the dumping margins are equally flawed. Also, because USDOC reviews conducted pursuant to these provisions are flawed, the United States also fails to comply with the obligation in Article 11.1 of the *Anti-Dumping Agreement* to ensure that anti-dumping duties “remain in force only as long as and to the extent necessary to counteract dumping.”

**F. UNITED STATES ACTS INCONSISTENTLY WITH ARTICLES 1 AND 18.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE XVI :4 OF THE WTO AGREEMENT**

159. As a consequence of the model and simple zeroing procedures’ inconsistencies with various provisions of Articles 2, 3, 5, 9 and 11 of the *Anti-Dumping Agreement*, the United

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<sup>201</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

States also acts inconsistently with Articles 1 and 18.4 of that *Agreement* and Article XVI:4 of the *WTO Agreement*.

*i. Article 18.4 of the Anti-Dumping Agreement*

160. Article 18.4 of the *Anti-Dumping Agreement* states that a Member shall “ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of this *Agreement*.” The standard model and simple zeroing procedures are “administrative procedures” that do not conform to various provisions of the *Anti-Dumping Agreement*. By maintaining these procedures, therefore, the United States acts inconsistently with its obligations under Article 18.4.

*ii. Article 1 of the Anti-Dumping Agreement*

161. Under the heading “*Principles*,” the first sentence of Article 1 of the *Anti-Dumping Agreement* provides that:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.

162. In *U.S. – 1916 Act*, the Appellate Body held that this sentence “states that ‘an anti-dumping measure’ must be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*.”<sup>202</sup> In that appeal, the Appellate Body noted that the term “anti-dumping measures” “seems to encompass all measures taken against dumping.”<sup>203</sup> In addition, the word encompasses “laws, regulations and administrative procedures” that set forth standards for the conduct of anti-dumping proceedings because these are “measures” of an “anti-dumping” character. In that respect, the measure at issue in *U.S. – 1916 Act*, i.e., the 1916 Act, is a “law” under Article 18.4 that was also held to fall within the scope of Article 1.

163. Article 1, therefore, applies as much to measures taken against dumping as it does to measures taken to enforce anti-dumping rules. Accordingly, as the standard model and simple zeroing procedures are not consistent with various provisions of the *Anti-Dumping Agreement*, they are also inconsistent with the “principles” set forth in Article 1.

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<sup>202</sup> Appellate Body Report, *U.S. – 1916 Act*, para. 119.

<sup>203</sup> Appellate Body Report, *U.S. – 1916 Act*, para. 119.

*iii. Article XVI:4 of the WTO Agreement*

164. Similar to Article 18.4 of the *Anti-Dumping Agreement*, Article XVI:4 of the *WTO Agreement* states that a Member shall “ensure ... the conformity of its laws, regulations and administrative procedures with its obligations in the annexed Agreements.” The annexed Agreements include the *Anti-Dumping Agreement* and the GATT 1994. By maintaining the model and simple zeroing procedures, which are “administrative procedures” not in conformity with various provisions of the *Anti-Dumping Agreement* and the GATT 1994, the United States fails to take all necessary steps to ensure it complies with its WTO obligations. Accordingly, the United States also violates its obligation under Article XVI:4 of the *WTO Agreement*.

**VI. CLAIMS OF INCONSISTENCY REGARDING “AS APPLIED” MEASURES**

165. In addition to the “as such” claims just examined, Japan challenges the standard model and simple zeroing procedures, “as applied,” in the measures identified in Japan’s panel request. These measures, and the claims made with respect to them, are listed in paragraph 10 above. In total, Japan challenges 14 specific measures concerning three different types of anti-dumping proceeding: one original investigation, 11 periodic reviews and two sunset reviews.

166. In light of the identity of the zeroing procedures applied in each type of proceeding, Japan will not address the details of each and every measure. Instead, to avoid repetition, Japan describes the application of the zeroing procedures in one example of each type of proceeding, namely an original investigation, a periodic review, and a sunset review – and then explains how the standard zeroing procedures render the measure, for each type of proceeding, inconsistent with the *Anti-Dumping Agreement* and the GATT 1994. Nonetheless, Japan submits a copy of the relevant excerpts from the computer programs for every measure challenged on as applied basis. These are attached as Exhibits JPN-10.A to 23.C of this submission. Further, in an attachment to her statement, Ms. Owenby identifies the relevant part of each individual program where the standard zeroing procedures are found.<sup>204</sup> Of course, Japan stands ready to provide additional

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<sup>204</sup> See Exhibit JPN-1.D.

information or argumentation on any of the measures challenged as applied. Japan also notes that its legal arguments in this section draw heavily on the arguments made earlier in this submission.

**A. MEASURE RESULTING FROM AN ORIGINAL INVESTIGATION USING MODEL ZEROING PROCEDURES IS WTO-INCONSISTENT (CERTAIN CUT-TO-LENGTH CARBON-QUALITY STEEL PLATE PRODUCTS)**

167. On 13 December 1999, the USDOC imposed anti-dumping duties on Certain Cut-To-Length Carbon Quality Steel Products (“CTL Plate”) from Japan (USDOC Case Number A-588-847).<sup>205</sup> The *ad valorem* rate of anti-dumping duty was 10.78 percent for Kawasaki Steel Corporation and all others.<sup>206</sup>

168. In calculating the margin of dumping in this investigation, the USDOC used a W-to-W comparison, including its standard model zeroing procedures. Specifically, in aggregating the results of the multiple model-based comparisons, the USDOC disregarded any comparisons with negative results. As indicated in the chart to the Owenby Statement<sup>207</sup>, the computer language by which the USDOC eliminated the negative comparison results is the Standard Zeroing Line: “WHERE EMARGIN GT 0;”.<sup>208</sup> This language is identical to the computer code in the USDOC’s standard computer program. Without the application of the standard zeroing procedures, the margin of dumping and, hence, the respondent’s deposit rate would have been lower.

*i. A Margin of Dumping Must be Determined for the Product as a Whole*

169. For the reasons discussed more fully in paragraphs 76 to 80 and 92 to 101, above, model zeroing is inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT, because relying on these procedures, the USDOC fails to determine the existence of dumping, or calculate a dumping margin, for the product as a whole. Indeed, the Appellate Body has already considered the United States’ use of its model zeroing procedures in

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<sup>205</sup> 64 Fed. Reg. at 73215 (Exhibit JPN-10).

<sup>206</sup> 64 Fed. Reg. at 73234 (Exhibit JPN-10).

<sup>207</sup> Exhibit JPN-1.D.

<sup>208</sup> This line can be found on page 3 of the attached excerpt (Exhibit JPN-10.A) from the USDOC’s computer program.



an investigation, and held that, although an investigating authority is entitled to compare normal value and export price through multiple model-based comparisons, the “investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.”<sup>209</sup> The Appellate Body concluded, therefore, that the USDOC’s exclusion of the comparison results for certain models (i.e., those with a negative result) in obtaining the aggregate result for the product as a whole, was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>210</sup> Equally, because the Appellate Body’s reasoning derived from the language contained in Article 2.1,<sup>211</sup> the failure to determine the existence of dumping, and to calculate the margin of dumping, for the product as a whole is inconsistent with Article 2.1, as well as with Articles VI:1 and VI:2 of the GATT 1994.

170. For the same reasons, the application of the standard model zeroing procedures in the CTL Plate investigation renders the USDOC’s dumping determination inconsistent with Articles 2.1 and 2.4.2. of the *Anti-Dumping Agreement*, and with Articles VI:1 and VI:2 of the GATT 1994. By automatically disregarding the negative results in calculating the overall margin of dumping in the CTL Plate investigation, the USDOC did not consider the results of *all* the comparisons for the product, and thus its dumping determination and the margin of dumping are not for the product as a whole.

**ii. Fair Comparison under Article 2.4 of the Anti-Dumping Agreement**

171. Further, for the reasons stated more fully in paragraphs 81 to 91 and 102 to 110, above, the USDOC’s standard model zeroing procedures, as applied in the CTL Plate investigation, are inconsistent with the “fair comparison” requirements contained in Article 2.4 of the *Anti-Dumping Agreement*. The Appellate Body has specifically held, in considering a claim against these procedures, that there “is an inherent bias in a zeroing methodology,” and that a comparison that inflates the margin of dumping and could even lead to an affirmative dumping determination where no dumping would have been established without zeroing, is not a fair comparison between export price and normal value.<sup>212</sup>

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<sup>209</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para 98 (emphasis in original).

<sup>210</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para 102.

<sup>211</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para 93.

<sup>212</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

172. Likewise, the USDOC's use of the model zeroing procedures in the CTL Plate investigation resulted in an unfair, biased comparison between export price and normal value. By disregarding all model-based comparisons with a negative result, the USDOC calculated a weighted overall dumping margin that was inflated by an amount equal to the excluded negative values. Also, by effectively treating the negative price difference as a zero difference, the USDOC interferes with export price for these models by artificially reducing export price. This price-distortion also renders the comparison of normal value and export price unfair. The USDOC's application of the standard model zeroing procedures in the CTL plate investigation renders the USDOC's dumping determination inconsistent, therefore, with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*.

**iii. *Evaluation of Injury Must be Based on an Objective Examination of Positive Evidence***

173. In addition, as discussed more fully in paragraphs 111 to 121, above, Article 3.1 of the *Anti-Dumping Agreement* requires that an injury determination be based on "an objective examination" of "positive evidence" concerning the "volume of the dumped imports", their "effect" on prices of the like domestic product, and the "consequent impact" of dumped imports on domestic producers. The Appellate Body has held that "positive evidence" is evidence "of an affirmative, objective and verifiable character" and "must be credible."<sup>213</sup> An "objective examination" is one that "conform[s] to the dictates of the basic principles of good faith and fundamental fairness."<sup>214</sup>

174. Several aspects of the USITC's dumping determination are based upon the USDOC's dumping determination, including the "volume of the dumped imports," (pursuant to Articles 3.1, 3.2, 3.3, 3.4 and 3.5), the rate of increase of dumped imports (under Articles 3.2, and possibly Articles 3.4 and 3.5), the prices of dumped imports (pursuant to Articles 3.2, 3.3, 3.4 and 3.5), and the magnitude of dumping (under Articles 3.4 and 3.5). As a result of the application of the standard model zeroing procedures, the USDOC's dumping determination is flawed. In consequence, the evidence of dumping produced by that flawed determination does not meet the requirements of "positive evidence" nor permit an "objective examination." In particular, the

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<sup>213</sup> Appellate Body Report, *U.S. – Hot Rolled Steel*, para. 192.

<sup>214</sup> Appellate Body Report, *U.S. – Hot Rolled Steel*, para. 193.

USITC has no objective, verifiable, credible, or otherwise reliable evidence regarding the volume of dumped and non-dumped imports, the rate of increase of dumped imports, their prices and price effects, and the magnitude of dumping.<sup>215</sup>

175. In consequence, the USITC's injury determination in the CTL plate investigation<sup>216</sup> is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, and 3.5 of the *Anti-Dumping Agreement*. As the USITC is required to do under United States law,<sup>217</sup> it relied on the USDOC's dumping determination in the CTL Plate investigation to determine the volume of dumped and non-dumped imports, the rate of increase of dumped imports, the prices of dumped imports, and the magnitude of dumping.<sup>218</sup> In so doing, the USITC relied on evidence that stemmed from the incomplete and unfair aggregation of model-based comparisons conducted by the USDOC pursuant to its model zeroing procedure. That evidence is, therefore, not evidence of dumping for the product as a whole nor, because of the biased comparison, is it a reliable indication of the existence or amount of dumping. The USITC's injury determination in the CTL Plate investigation was, therefore, not based on an "objective examination" of "positive evidence," as required by Article 3 of the *Anti-Dumping Agreement*.

**iv. Article 1 of the Anti-Dumping Agreement**

176. As noted above,<sup>219</sup> the first sentence of Article 1 of the *Anti-Dumping Agreement* provides that:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.

177. In *U.S. – 1916 Act*, the Appellate Body held that this sentence "states that 'an anti-dumping measure' must be consistent with Article VI of the GATT 1994 and the provisions of

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<sup>215</sup> See also paragraphs 111 – 121 above.

<sup>216</sup> *Cut-To-Length Carbon Steel Plate from Japan*, Investigation Nos. 701-TA-387-391 and 731-TA-816-821, (Final), USITC Pub. No. 3273 (January 2000) (Exhibit JPN-10.B).

<sup>217</sup> See Tariff Act, Section 771(35)(C)(ii).

<sup>218</sup> *Cut-To-Length Carbon Steel Plate from Japan*, Investigation Nos. 701-TA-387-391 and 731-TA-816-821, (Final), USITC Pub. No. 3273, at 24 n.143 (January 2000) (Exhibit JPN-10.B).

<sup>219</sup> See paragraphs 161-163 above.

the *Anti-Dumping Agreement*.”<sup>220</sup> In that appeal, the Appellate Body noted that the term “anti-dumping measures” “seems to encompass all measures taken against dumping.”<sup>221</sup> The anti-dumping measure taken in the CTL Plate investigation is subject to Article 1. In light of the fact that the measure is not consistent with various provisions of the *Anti-Dumping Agreement* nor with Articles VI:1 and VI:2 of the GATT 1994, it is also inconsistent with Article 1 of the *Anti-Dumping Agreement*.

**B. MEASURES RESULTING FROM PERIODIC REVIEWS USING SIMPLE ZEROING PROCEDURES ARE WTO-INCONSISTENT (ANTI-FRICTION BEARINGS)**

178. Japan challenges 11 anti-dumping measures that resulted from periodic reviews and claims that each of these is inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement*, and with Articles VI:1 and VI:2 of the GATT 1994.<sup>222</sup> As noted above, in this submission Japan focuses on one example of these periodic reviews, and explains the WTO-inconsistency of that measure as a result of the application of the standard simple zeroing procedures. The other ten measures are, for identical reasons, also WTO-inconsistent. For all 11 measures, Japan submits evidence of the application of the simple zeroing procedures.<sup>223</sup>

179. On 12 July 2001, the USDOC imposed anti-dumping duties on Ball Bearings and Parts Thereof From Japan (USDOC case number A-588-804), 66 Fed. Reg. 36551 (“1999/2000 BB Periodic Review”).<sup>224</sup> The period of review is 1 May 1999 through 30 April 2000, and the *ad valorem* rates of the anti-dumping duty were 10.10% for Koyo Seiko Co., Ltd. (“Koyo”), 9.16% for NTN Corporation (“NTN”), and 4.22% for NSK Ltd. (“NSK”).<sup>225</sup>

180. To determine the anti-dumping duties to be collected for entries made during the period of review (i.e., the assessment rate), and to determine the deposit rate for future entries, the USDOC calculated margins of dumping using a W-to-T comparison that included the standard simple zeroing procedures. The USDOC, therefore, made multiple comparisons between a weighted normal value and export price for a series of comparable individual export transactions. In terms of the USDOC’s standard simple zeroing procedures, in aggregating the results of the

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<sup>220</sup> Appellate Body Report, *U.S. – 1916 Act*, para. 119.

<sup>221</sup> Appellate Body Report, *U.S. – 1916 Act*, para. 119

<sup>222</sup> See paragraph 10 above.

<sup>223</sup> See Exhibits JPN-11 to 21.C.

<sup>224</sup> Exhibit JPN-16. This measure is identified as Specific Case No. 8 in Japan’s panel request.

multiple transaction-based comparisons to obtain the overall weighted average dumping margin, only those comparisons for which there were positive results were taken into account. In other words, the USDOC disregarded any comparisons with a negative value. As a result, the sum total amount of dumping was inflated by an amount equal to the excluded negative values. Without zeroing, the results of those calculations would have been negative for each of these three respondents, and no anti-dumping duties would have been assessed or collected.

181. As indicated in the chart to Ms. Owenby's Statement, the computer language by which the USDOC eliminated the negative comparison results is the Standard Zeroing Line, namely "WHERE EMARGIN GT 0;" or "WHERE UMARGIN GT 0;".<sup>226</sup> This language is identical to the computer code in the USDOC's standard computer program for periodic reviews.<sup>227</sup>

*i. A Margin of Dumping Must be Determined for the Product as a Whole*

182. Under Article 9.3, "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Consistent with this text, margins of dumping calculated in a periodic review under Article 9.3 must be calculated in accordance with the "agreed disciplines" in Article 2.<sup>228</sup> Among those "disciplines," Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, together with Articles VI:1 and VI:2 of the GATT 1994, require that margins of dumping be determined for the product as a whole. As a result, where the investigating authority undertakes multiple comparisons to determine the margins in a periodic review, it must take account of the results of *all* of the multiple comparisons in the aggregation of comparison results; not merely those with positive values.

183. In the 1999/2000 BB Periodic Review the USDOC calculated the overall margin of dumping (or assessment rate) using only those transaction-based comparisons for which there was a positive result. The USDOC's failure to establish the margins of dumping for the product as a whole by considering *all* of the multiple comparison results, including negative ones, resulted in affirmative dumping determinations in the 1999/2000 BB Periodic Review (and the other ten periodic reviews Japan challenges). Accordingly, the application of the standard

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<sup>225</sup> 66 Fed. Reg. at 36553 (Exhibit JPN-16).

<sup>226</sup> See Exhibit JPN-1.D, which indicates that the Standard Zeroing Line may be found on lines 1268 and 1336 of Exhibit JPN-16.A, lines 2622 and 2690 of Exhibit JPN-16.B, and lines 1345 and 1413 of Exhibit JPN-16.C.

<sup>227</sup> Exhibit JPN-7 at 16 and 17.

simple zeroing procedures in this periodic review (and the other ten periodic reviews) is inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping-Agreement* and also Articles VI:1 and VI:2 of the GATT 1994.

**ii. Fair Comparison under Article 2.4 of the Anti-Dumping Agreement**

184. Japan has noted that the Appellate Body ruled, in *U.S. – Corrosion-Resistant Steel*, that margins of dumping calculated under Article 9.3 must meet the fair comparison requirements of Article 2.4.<sup>229</sup> Japan has already demonstrated that the standard model and simple zeroing procedures are inconsistent “as such” with these requirements.<sup>230</sup> In the same way, the application of the simple zeroing procedures in the 1999/2000 BB Periodic Review also resulted in an unfair comparison that is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. In this periodic review, the elimination of comparisons with negative results generated an overall positive dumping margin for each respondent, whereas the inclusion of *all* comparisons would have resulted in a negative figure for all of them. Such a comparison, for the product as a whole, is manifestly unfair.

**iii. Violations of Article 9 of the Anti-Dumping Agreement**

185. Two conditions must be met to satisfy the requirements of Article 9: (1) the margin of dumping to be calculated for the purpose of the duty assessment proceedings must be established consistently with Article 2; and (2) the amount of anti-dumping duty to be imposed and collected must not exceed the ceiling set by such margins of dumping. It therefore follows that if the procedures for calculating margins of dumping are inconsistent with Article 2, including Articles 2.1, 2.4 and 2.4.2, the application of those same procedures in a periodic review is also legally flawed. As explained above, the application of simple zeroing in the calculation of the margins of dumping in the 1999/2000 BB Periodic Review is inconsistent with Articles 2.1, 2.4 and 2.4.2,

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<sup>228</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para 127.

<sup>229</sup> See further paragraphs 81-91 above.

<sup>230</sup> See, for example, paragraphs 146-151 above.

and therefore, the USDOC failed to establish the margin of dumping in the review at issue in a manner consistent with Article 2 of the *Anti-Dumping Agreement*. Indeed, the USDOC would have determined that there were no margins of dumping but for its application of the simple zeroing procedures. As a result, the USDOC seeks to collect anti-dumping duties when it is not entitled to collect any, and thus the USDOC acts inconsistently with the second condition identified above. Therefore, the USDOC's application of simple zeroing in the 1999/2000 BB Periodic Review to calculate the margins of dumping is also inconsistent with Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*.

*iv. Article 1 of the Anti-Dumping Agreement*

186. Moreover, in light of the fact that the “anti-dumping measures” applied pursuant to the 1999/2000 BB Periodic Review (and the other ten periodic reviews challenged) are not consistent with various provisions of the *Anti-Dumping Agreement*, they are also inconsistent with Article 1 of the *Anti-Dumping Agreement*.

**C. MEASURES RESULTING FROM SUNSET REVIEWS THAT RELIED ON ZEROED DUMPING MARGINS ARE WTO-INCONSISTENT (ANTI-FRICTION BEARINGS)**

187. Japan claims that anti-dumping measures adopted pursuant to two sunset reviews are also inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 because, in these two reviews, the investigating authorities relied on dumping margins calculated using the standard zeroing procedures.<sup>231</sup> As noted above, Japan addresses one of these two measures in detail, as the other involves precisely the same WTO-inconsistencies. For both measures, Japan submits evidence of the reliance upon margins that were calculated using standard zeroing procedures.<sup>232</sup> Japan claims that these two measures are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.

188. On 4 November 1999, the USDOC issued its Final Results in the Expedited Sunset Review of Antifriction Bearings from Japan (AFB Sunset Review), in which it found that revocation of the anti-dumping order on Ball Bearings from Japan would be likely to lead to continuation or recurrence of dumping (USDOC case number A-588-804).<sup>233</sup> In making this

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<sup>231</sup> See Exhibits JPN-22 and 23.

<sup>232</sup> See Exhibits JPN-22 to 23.D.

<sup>233</sup> 64 Fed. Reg. at 60275 et seq. (Exhibit JPN-22).

determination, the USDOC specifically relied on the “margins determined in the original investigation and subsequent periodic reviews,” and concluded that because “dumping has continued over the life of the orders, the [USDOC] determines that dumping is likely to continue if the orders were revoked.”<sup>234</sup>

189. Thus, in the AFB Sunset Review, the investigating authorities relied on dumping margins calculated in the original investigation and periodic reviews. In calculating these margins, whether using model or simple zeroing procedures, the USDOC disregarded all comparisons that gave rise to a negative result. Specifically, the programs in question contain the zeroing language: “IF EMARGIN GT 0;”.<sup>235</sup> As a result of the USDOC’s application of the standard zeroing procedures, the dumping margins were inflated.

*i. Margins Used in a Sunset Review Must be Consistent with Article 2 of the Anti-Dumping Agreement*

190. In a sunset review, investigating authorities are not entitled to rely on dumping margins calculated using standard zeroing procedures. As noted above, in *U.S. – Corrosion-Resistant Steel*, the Appellate Body confirmed that there is:

no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4.<sup>236</sup>

191. Thus, where investigating authorities elect to rely on dumping margins calculated in an original investigation and/or subsequent periodic reviews, those margins must be calculated for the “product” as a whole, through a “fair comparison,” as required by Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

192. In the AFB Sunset Review, both the USDOC and the USITC chose to rely on dumping margins calculated in earlier investigations and periodic reviews in reaching their likelihood

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<sup>234</sup> 64 Fed. Reg. at 60278 (Exhibit JPN-22).

<sup>235</sup> See Exhibits JPN-22.A at 2 and JPN-22.B at 3, for the zeroing language in Koyo Seiko and NTN’s original investigation computer programs.

<sup>236</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127 (underlining added). See, further, paras. 155-158, above.



determinations.<sup>237</sup> However, as described above, the USDOC used its standard zeroing procedures to calculate these margins. According to the Appellate Body’s findings in *U.S. Corrosion-Resistant Steel*,<sup>238</sup> the reliance on margins in a sunset review that are calculated in a manner inconsistent with Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* means that the determinations in the sunset reviews are inconsistent with Articles 11.1 and 11.3 of the *Anti-Dumping Agreement*. In essence, the investigating authorities’ conclusions in the AFB Sunset Review, under those provisions, are deprived of legal validity because they are based, in part, on flawed dumping margins. The same is true of the measures adopted pursuant to the second sunset review at issue.<sup>239</sup>

**ii. Article 1 of the Anti-Dumping Agreement**

193. Moreover, in light of the fact that the “anti-dumping measure” adopted pursuant to the AFB Sunset Review (and the second sunset review challenged) are not consistent with various provisions of the *Anti-Dumping Agreement*, the measure is also inconsistent with Article 1 of the *Anti-Dumping Agreement*.

**VII. CONCLUSION**

194. Japan requests that the Panel find the United States’ model and simple zeroing procedures are “*as such*” inconsistent with:

- (1) Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 because, in any type of anti-dumping proceeding, the determination of dumping, and the calculation of the dumping margin, is not for the product as a whole;

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<sup>237</sup> 64 Fed. Reg. at 60278 (Exhibit JPN-22); Determination of the USITC in *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, Investigation Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review), at 20 n.128, and 94 (Exhibit JPN-22.C).

<sup>238</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

<sup>239</sup> See USDOC, *Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results* at Comment 1 (2 August 2000) (Exhibit JPN-23.A); Determination of the USITC in *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), at 53 n.369 (Exhibit JPN-23.B).

- (2) Article 2.4 of the *Anti-Dumping Agreement* because, in any type of anti-dumping proceeding, the zeroing procedures are inherently biased, distort the comparison of normal value and export price and, thus, deprive exporters of a “fair comparison;”
- (3) Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *Anti-Dumping Agreement* because the injury determination in original investigations is not based on an “objective examination” of “positive evidence” regarding the existence and amount of dumping and dumped imports;
- (4) Article 5.8 of the *Anti-Dumping Agreement* because the USDOC does not have “sufficient evidence” of dumping to assess whether it must terminate original investigations;
- (5) Articles 9.1, 9.2, 9.3 and 9.5 of the *Anti-Dumping Agreement* because margins calculated in periodic and new shipper reviews are not established consistently with Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and the United States fails to ensure that duties collected do not exceed the proper margin of dumping established on a fair comparison basis for the product as a whole;
- (6) Articles 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement* because changed circumstances and sunset reviews are not conducted on the basis of dumping margins calculated through a fair comparison for the product as a whole, as required by Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994; and
- (7) Article 1 of the *Anti-Dumping Agreement* as they are inconsistent with various provisions of the *Anti-Dumping Agreement* as referred to (1) – (6) above.
- (8) Japan also requests that the Panel find that, by maintaining the model and simple zeroing procedures, the United States acts inconsistently with Article 18.4 of the *Anti-Dumping Agreement* as well as Article XVI:4 of the *WTO Agreement*.

195. Japan further requests that Panel find that, through the application of the zeroing procedures, the anti-dumping measures:

- (1) in Certain Cut-To-Length Carbon Quality Steel Plate Products from Japan, an original investigation, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994;
- (2) in Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, (1 October 1998 through 30 September 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (3) in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, (1 October 1998 through 30 September 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (4) in Ball Bearings and Parts Thereof From Japan, (1 May 1998 through 30 April 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (5) in Cylindrical Roller Bearings and Parts Thereof From Japan, (1 May 1998 through 30 April 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (6) in Spherical Plain Bearings and Parts Thereof From Japan, (1 May 1998 through 30 April 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

- (7) in Ball Bearings and Parts Thereof From Japan, (1 May 1999 through 30 April 2000), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (8) in Cylindrical Roller Bearings and Parts Thereof From Japan, (1 May 1999 through 31 December 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (9) in Spherical Plain Bearings and Parts Thereof From Japan, (1 May 1999 through 31 December 1999), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (10) in Ball Bearings and Parts Thereof From Japan, (1 May 2000 through 30 April 2001), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (11) in Ball Bearings and Parts Thereof From Japan, (1 May 2001 through 30 April 2002), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (12) in Ball Bearings and Parts Thereof From Japan, (1 May 2002 through 30 April 2003), a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994;
- (13) in the Expedited Sunset Review of Antifriction Bearings From Japan, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994; and

- (14) in the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1, and VI:2 of the GATT 1994.

196. Pursuant to Article 19.1 of the DSU, Japan requests that the Panel recommend that the United States bring its measures, found to be inconsistent with the *WTO Agreement*, the *Anti-Dumping Agreement* and the GATT 1994, into conformity with its obligations under those *Agreements*.

197. Finally, Japan would like to draw to the Panel's particular attention the urgency of this dispute. While the dispute is pending before the Panel, the United States will seek to determine the final anti-dumping duty liability in the "as applied" periodic reviews, by liquidating these cases one-by-one. Under United States law, following the liquidation of entries, anti-dumping duties paid will not be refunded. In addition, further periodic and sunset reviews for these cases are currently being conducted in reliance upon the standard zeroing procedures. Japan wishes to ensure "prompt" resolution of this dispute, consistent with Article 3.3 of the DSU, to avoid further WTO disputes regarding the over-payment of duties in these cases.