AS DELIVERED

BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

WT/DS322

OPENING STATEMENT AT THE FIRST MEETING WITH THE PANEL

JAPAN

28 JUNE 2005

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, Japan would like to thank you, and the Secretariat, for your efforts in preparing for this meeting. In this opening statement, we will not simply repeat what we have already said in our submission. Instead, we would like to use this opportunity to respond to the United States' First Written Submission ("FWS").

2. Japan's task is made easier in this dispute because the United States has failed to respond to numerous claims and arguments raised by Japan; it has responded to other arguments that Japan never made; and, in the entire thrust of its FWS, the United States overlooks the consistent case-law of panels and the Appellate Body.

3. Strikingly, the United States explicitly recognizes that its arguments are contrary to adopted Appellate Body reports. In particular, it acknowledges that, to succeed in its defense, it must persuade the panel to set aside the Appellate Body report in *US – Softwood Lumber V*. In fact, although the United States does not mention it, for the United States to succeed in its defense, the panel must also set aside rulings in two other Appellate Body reports: *EC – Bed Linen* and *US – Corrosion-Resistant Steel*. This would be a startling turnaround in the accepted interpretation of the *Anti-Dumping Agreement* and would undermine the "security and predictability" of the multilateral trading system, contrary to Article 3.2 of the DSU.[1] This is a route that the Panel should not take.

4. Japan's oral statement will address the following issues:

a) the zeroing procedures at issue;

b) the "as such" violation of the requirement in Article 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 to determine a margin of dumping for the product as a whole;

c) the "as such" violation of the requirement in Article 2.4 of the *Anti-Dumping Agreement* to make a fair comparison;

[1] Appellate Body Report, *US – Softwood Lumber V*, para. 112.

d) the prohibition of zeroing procedures in any determination of a margin of dumping;

e) the third comparison methodology in Article 2.4.2 of the *Anti-Dumping Agreement* ; and,

f) the violation of Article 3 of the *Anti-Dumping Agreement*.

II. THE ZEROING PROCEDURES – FACTUAL BACKGROUND

5. At the outset, Mr. Chairman, it is worth spending a few minutes reviewing the important facts of record in light of the United States' response. A conspicuous feature of the United States' submission is that it has not contested, in the slightest, Japan's description of both the operation and the practical effects of model and simple zeroing, including the Owenby Statement. In particular, the United States has not contested following point:

- the United States maintains "programming procedures for performing AD database analysis and margin calculations on the PC;"[2]
- these "procedures" include standard AD Margin Calculation programs for both original investigations and periodic reviews;[3]
- these two standard AD Margin Calculation programs include the Standard Zeroing Line;[4]
- the Standard Zeroing Line is used for both model and simple zeroing;[5]
- the Standard Zeroing Line features in *every* computer program that USDOC develops for anti-dumping proceedings, including all the "as applied" case-specific computer programs submitted by Japan;[6]

[2] USDOC Import Administration Anti-Dumping Manual, Exhibit JPN-5.C, page 1. Japan's First Written Submission (FWS), para. 28.
[3] Japan's FWS, paras. 28 and 31ff.
[4] Japan's FWS, para. 46.
[5] Japan's FWS, para. 46.
[6] Exhibits JPN-10 to 23.

- Ms. Owenby testifies that the Standard Zeroing Line has featured in *every* USDOC margin calculation program she has seen since at least 1993;[7]

- the United States has failed to offer a single example of a computer program that does not include the Standard Zeroing Line;

- the Standard Zeroing Line automatically and mechanistically selects, from among all the comparisons USDOC undertakes, solely those with positive price differences;[8] and,

- the effect of the exclusion of negative price differences is that the overall dumping margin is inflated through a distortion of the prices being compared.[9]

6. The United States' FWS adds an important element to the description of the zeroing procedures. The United States recognizes that, if the Assistant-Secretary for Import Administration decided to abandon the use of zeroing in a particular anti-dumping proceeding, "his decision would be implemented simply by using a different set of computer instructions."[10] This statement amounts to an admission that, absent a *positive* decision by the Assistant-Secretary to adopt "different" computer procedures, the zeroing procedures will continue to apply as a standard part of the United States' margin calculation procedures. That is the reason Japan has brought an "as such" claim.

III. THE "AS SUCH" MEASURE

7. Japan turns now to the United States' arguments that there is no "as such" measure as zeroing. Nothing that the United States argues calls into question the conclusion that the zeroing procedures in US anti-dumping proceedings are "administrative procedures" under Article 18.4 of the *Anti-Dumping Agreement*. Such procedures are embodied in the Standard Zeroing Line which is contained in the Standard AD Margin Calculation programs as well as in all the case-specific programs.

[7] Japan's FWS, paras 46, 62 and 63.
[8] Japan's FWS, para. 57.
[9] Japan's FWS, para. 104.
[10] United States FWS, para. 36.

8. First, the United States mistakenly suggests that Japan has not identified a standard computer program.[11] In fact, Japan has identified *two* standard AD Margin Calculation computer programs and has submitted a copy of each to the Panel.[12] The first is the standard AD Margin Calculation program for original investigations, and the second is the standard AD Margin Calculation program for periodic reviews. Both these standard programs contain the Standard Zeroing Line.

9. The United States also suggests that, because some parts of the standard programs undergo refinement to meet the needs of particular anti-dumping proceedings, no part of the programs can be an "as such" measure. This is an absurd argument because Members frequently target claims to very specific parts of much larger instruments, and the parts of the instrument that are not challenged are simply not relevant to the dispute. For example, in *US – FSC*, a challenge was made to a very small part of the United States' Internal Revenue Code and only that part of the Code was relevant to that particular dispute. Because this dispute focuses on a very specific part of the standard computer programs, Japan does not explore the significance of the thousands of other lines of computer code that are not relevant to this dispute.

10. The "as such" measures that are at issue in this dispute are USDOC's zeroing procedures, which are embodied in the Standard Zeroing Line, and which are the "administrative procedures" under Article 18.4 of the *Anti-Dumping Agreement*. The uncontested evidence of record demonstrates that the Standard Zeroing Line features in the two standard AD Margin Calculation programs and it is also included in *every* case-specific program. As the Panel will appreciate, Japan submitted the case-specific programs to show the very "consistent application" of the Standard Zeroing Line by USDOC.[13] The United States has not offered any evidence to contest the consistent application of the Standard Zeroing Line. The evidence of record, therefore, shows that USDOC treats both model and simple zeroing as binding rules with generalized and prospective application.[14]

---

[11] United States FWS, para. 31.
[12] Exhibits JPN-6 and JPN-7. Besides zeroing, Japan has not made any claims regarding other aspects of the United States administrative procedures for the calculation of dumping margins, for example, involving the standard Comparison Market program mentioned in the Owenby Statement, para. 9.
[13] Appellate Body Report, *US – Carbon Steel*, para. 157; Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 97. Cf. United States FWS, para. 31.
[14] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 97.

11. Moreover, the United States' own description of the measures at issue confirms the conclusion that the Standard Zeroing Line is a part of USDOC's "administrative procedures". Japan recalls that the ordinary meaning of the word "procedures" encompasses "a set of [computer] *instructions* for performing a specific task".[15] The United States expressly acknowledges that the computer programs at issue meet this definition because it describes them as "a set of computer *instructions*".[16] Further, the United States' own Manual states that the standard computer programs constitute "programming *procedures*".[17]

12. The United States FWS, therefore, confirms the conclusion that the zeroing procedures are a pre-determined, standardized system for mechanistically conducting and managing, on a uniform and predictable basis, an aspect of the margin calculation in all anti-dumping proceedings. The zeroing procedures embodied in the Standard Zeroing Line, therefore, constitute "administrative procedures" within the meaning of Article 18.4 of the *Anti-Dumping Agreement*.

13. The United States further asserts that the zeroing procedures "cannot be found to be inconsistent with the WTO Agreements because they do not mandate any action".[18] Japan disagrees. Japan recalls that the Appellate Body has observed that it has not yet decided on the continuing relevance of the mandatory – discretionary doctrine.[19] However, it has cautioned against applying this "analytical tool" "in a mechanistic fashion".[20] .

14. Even assuming *arguendo* that a measure must be mandatory to be, as such, WTO-inconsistent, the zeroing procedures are mandatory. The Appellate Body also held in *US – Carbon Steel* and *US – Corrosion-Resistant Steel* that evidence of the mandatory character of a measure may be drawn from the measure itself, as well as from "evidence of the consistent application" of the measure.[21]

---

[15] Japan's FWS, para. 56. Japan's submission on the ordinary meaning of the term "administrative procedures" is given in Japan's FWS, para. 56. The United States has not offered any opposing views of the meaning of this term. See also Japan's FWS, paras. 57-64.
[16] United States FWS, para. 36.
[17] Japan's FWS, paras. 27-29.
[18] United States FWS, para. 36.
[19] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 93.
[20] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 93.
[21] Appellate Body Report, *US – Carbon Steel*, para. 157 and Appellate Body Report, *US – Corrosion-Resistant Steel*,

15. In this dispute, Japan has demonstrated that, by their own terms, the zeroing procedures require that USDOC automatically disregard all negative results of intermediate comparisons where export price is higher than normal value. These computer-coded "*instructions*"[22] do not afford any possibility for negative comparison results to be included in the calculation of the total amount of dumping. On the face of the measure, inclusion of negative results is simply not an option. This is confirmed by testimony from Ms. Owenby.[23] The evidence drawn from the terms of the measure, therefore, demonstrates that the measure is mandatory.

16. The United States counters that the standard programs do not prevent the "Commerce decision-maker" – the Assistant-Secretary – from taking account of negative results nor do they require him to ignore these results.[24] Essentially, the United States argues that, because the Assistant-Secretary is free to abandon the zeroing procedures, the procedures are not binding. However, the United States confuses the binding character of the existing "administrative procedures" with the Assistant-Secretary's authority to vary those procedures in the future. The fact that "administrative procedures" can be changed at some point in the future does not deprive the procedures of their binding character today.

17. The mandatory character of the zeroing procedures is confirmed by USDOC's very "consistent application" of the procedures in the last decade, which shows that USDOC treats the zeroing procedures as binding.[25] To recall, Japan has introduced very considerable evidence demonstrating the consistent application of the zeroing procedures. In particular, Japan has submitted a series of case-specific computer programs that all include the zeroing procedures, and it has also submitted Ms. Owenby's expert testimony to the effect that the zeroing procedures have formed part of USDOC's margin calculation procedures since at least 1993.

18. Japan has, therefore, demonstrated that the zeroing procedures have the character of mandatory norms. Other than asserting that the Assistant-Secretary could, one day, abandon zeroing, the United States has offered no evidence in rebuttal. In particular, the United States has failed to provide a single example of a margin calculation where USDOC did not use its

---

paras. 97 and 99.
[22] United States FWS, para. 36.
[23] Owenby Statement, para. 14.
[24] United States FWS, para. 36.
[25] Appellate Body Report, *US – Corrosion-Resistant Steel*, paras. 97 and 99.

zeroing procedures. This failure provides very telling confirmation of the consistent application of the zeroing procedures and also of the fact that USDOC treats the procedures as binding.

IV. ARTICLES 2.1 AND 2.4.2 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI OF THE GATT 1994 REQUIRE A MARGIN TO BE CALCULATED FOR THE PRODUCT AS A WHOLE

19. Japan claims that the model and simple zeroing are inconsistent with the requirements in Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 to determine "dumping", and calculate a "margin of dumping", for the product as a whole.

20. The United States entirely overlooks that Japan's claims and arguments on this issue are based, primarily, on the text of Article 2.1 and Article VI of the GATT 1994. The United States never responds to these claims and arguments. Instead, it provides a response on this issue that deals solely with Article 2.4 and, in particular, Article 2.4.2.[26] Further, in framing its defense, the United States ignores two Appellate Body reports that upheld the arguments that Japan now advances.

21. As a result, the United States wholly mischaracterizes, and fails to respond to, Japan's claims and arguments. The clearest statement of the United States' mischaracterization is in the Introduction of its FWS:

> Japan … *invent[s]* an obligation to calculate a margin of dumping for "the product as a whole," *which it purports to find in Article 2.4.2* of the AD Agreement. However, *no such obligation exists* in either Article 2.4.2 of the AD Agreement or the GATT 1994.[27]

22. Contrary to the United States' statement, Japan does not claim that the duty to calculate a margin for the product as a whole is to be found only in Article 2.4.2. Furthermore, this duty is not an "invention" of Japan's but stems from the text of both Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. Both these provisions refer expressly to the dumping of a "*product*". Relying on this language, the Appellate Body stated explicitly in *US – Softwood Lumber V* that:

> It is clear from the texts of these provisions [i.e. Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994] that dumping is

[26] United States FWS, para. 3 and Section V.B.2, paras. 60ff.
[27] United States' FWS, para. 3. Emphasis added.

> defined in relation to a *product as a whole* as defined by the investigating authority. Moreover, we note that the opening phrase of Article 2.1 – "[f]or the purpose of this Agreement" – indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2.[28]
>
> …
>
> As with dumping, "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.[29]

Japan emphasizes that this interpretation expressly builds upon the earlier Appellate Body ruling in *EC – Bed Linen*.[30]

23. Thus, Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 require that "dumping" be determined only for the "product" as a whole. And, in consequence, because Article 2.1 and Article VI of the GATT 1994 apply to the entire *Anti-Dumping Agreement*, Article 2.4.2 imposes the same requirement in connection with "margins of dumping". [31]

24. In other words, contrary to the United States' assertions, the duty to calculate a "margin of dumping" for the product as a whole is not solely based upon the words "all comparable export transactions" in Article 2.4.2.[32] These words were *never* mentioned by the Appellate Body in *US - Softwood Lumber V* in ruling that dumping, and margins of dumping, are determined for the product as a whole. Nor were they mentioned by Japan. The Appellate Body's finding is not tied to the first comparison method in Article 2.4.2. It is tied to the general definition of "dumping" or "margin(s) of dumping" that "applies to the entire Agreement"[33].

25. By focusing on the text of Article 2.4.2, and not Article 2.1, the United States' defense addresses the wrong provision. The United States entirely fails to respond to Japan's claims and arguments under Article 2.1 and Article VI of the GATT 1994. It also ignores the pertinent

---

[28] Appellate Body Report, *US – Softwood Lumber V*, para. 93. (Emphasis added)
[29] Appellate Body Report, *US – Softwood Lumber V*, para. 93. (Emphasis added)
[30] Appellate Body Report, *US – Softwood Lumber V*, para. 96, citing Appellate Body Report, *EC – Bed Linen*, para. 53. See also Appellate Body Report, *EC – Bed Linen*, para. 51.
[31] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[32] United States FWS, paras. 69 and 70.
[33] Appellate Body Report, *US – Softwood Lumber V*, para. 93

findings of the Appellate Body in *US – Softwood Lumber V* and *EC – Bed Linen*. As a result, at this stage, Japan's claims under Article 2.1 and Article VI of the GATT 1994 are simply unanswered.

26. Nonetheless, Japan wishes to respond to certain of the United States' arguments on Article 2.4.2. Amongst those arguments, the United States asserts that Article 2.4.2 "does not require that the results of […] multiple comparisons be aggregated" in calculating an overall margin of dumping.[34] In essence, the United States is suggesting that the investigating authorities can do very much as they please: they can choose to add up the results of all the comparisons they make; or they can simply ignore the results of some and add up only others.

27. In making this argument, the United States is advocating an interpretation that it has already lost in earlier disputes. According to the Appellate Body, because of the definition of "dumping", the results of the multiple comparisons undertaken must *all* be "aggregate[ed]", or added up, to produce a "margin of dumping" for the *product as a whole*.[35] Further, the Appellate Body explicitly rejected the argument that the United States now advances: "we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons."[36]

28. There must, therefore, be "dumping" of a "*product*" and not dumping in *certain export transactions* relating to a product. Accordingly, whenever the authorities systematically discard some of the results of multiple comparisons – as the USDOC does under the zeroing procedures – the margin is just for a "part" or "category" of the whole product.

29. The United States also recycles other arguments that have failed in previous disputes. It asserts that the term "margin of dumping" in Article 2.4.2 refers to both "the results of *particular comparisons* between normal value and export price AND to the *overall results* of those comparisons".[37] This argument was rejected by the Appellate Body in *US – Softwood Lumber V*. The Appellate Body stated that the results of multiple comparisons are "not 'margins of

[34] United States FWS, para. 62.
[35] Appellate Body Report, *US – Softwood Lumber V*, paras. 97 and 98.
[36] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[37] United States FWS, footnote 77.

dumping' within the meaning of Article 2.4.2".[38] They are simply "intermediate values" that must *all* be "aggregate[ed]" in order to establish a "margin of dumping for the product under investigation as a whole".[39]

30. Because the United States incorrectly perceives the comparison results to be "margins of dumping", it believes that prohibiting zeroing would compel authorities to "offset" positive and negative "margins of dumping" against each other.[40] This is wrong. The multiple comparison results are *not* "margins of dumping"; they reflect an intermediate step along the way to determining the margin of dumping for the product as a whole. There is, therefore, simply no question of authorities "offsetting" between different "margins"; instead, the authorities must simply add up all the intermediate values. It is an issue of arithmetic, not offsetting compensation.

V. ARTICLES 2.4 OF THE *ANTI-DUMPING AGREEMENT* REQUIRES A FAIR COMPARISON OF NORMAL VALUE AND EXPORT PRICE

31. Relying on three Appellate Body reports, Japan has explained that the zeroing procedures are inherently biased against foreign producers or exporters and, therefore, do not involve a fair comparison in terms of the "general obligation" in Article 2.4.[41] In short, the zeroing procedures systematically inflate the margin of dumping for the product as a whole; they may yield a determination of dumping where there is none; and, they result in a distortion of prices, either by reducing export prices or raising normal value.

32. For all these reasons, the Appellate Body has ruled explicitly that zeroing does *not* involve "a '*fair comparison*' between export price and normal value, *as required by Articles 2.4* and 2.4.2."[42]

---

[38] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[39] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[40] *See, e.g.*, United States FWS, paras. 4, 26, 38, 40-45, 51, 52, 54-60, 64, 69, and 71; *see also* heading V.B.2.b, before para. 64.
[41] Appellate Body Report, *EC – Bed Linen*, para. 59. *See* Japan's FWS, paras. 102ff, citing Appellate Body Report, *EC – Bed Linen*; Appellate Body Report, *US – Corrosion-Resistant Steel*; Appellate Body Report, *US – Softwood Lumber V*.
[42] Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 134.

33. Somewhat disingenuously, the United States now argues that "the phrase 'fair comparison' in Article 2.4 simply has nothing to do with offsetting [i.e. zeroing]."[43] Yet, again, the United States completely ignores the earlier Appellate Body decisions in which its arguments were rejected. The Panel should follow those decisions and, again, reject the United States' arguments.

34. The reasons that led the Appellate Body to reject the United States' arguments in the past remain fully valid today. The premise of the United States' arguments is that Article 2.4 applies to the comparison itself, whereas zeroing applies to the "*results* of comparisons".[44] Thus, for the United States, Article 2.4 does not apply to the zeroing procedures because they intervene in the calculation process *after* the comparison is complete.

35. This description of zeroing is inaccurate. The "results of comparisons" to which the United States refers are, of course, the *intermediate* values that must still be aggregated to produce a determination of dumping for the product as a whole. In contrast, under Article 2.4, the final result of the "fair comparison" is "the calculation of the *dumping margin*" for the product.[45] As a result, contrary to the United States' arguments, zeroing intervenes *before* the "comparison" is complete, and *not* after.

36. The United States is also wrong in arguing that Article 2.4 applies only to "the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable."[46] Instead, Article 2.4 applies to every step in the process of comparing normal value and export price.[47]

37. For example, under all three methods of comparison in Article 2.4.2, authorities are entitled to conduct multiple comparisons by creating various sub-groupings of the product; however, they must then aggregate the results of all these comparisons to produce a margin for

[43] United States FWS, para. 53.
[44] United States FWS, para. 52. Original emphasis.
[45] Panel report, *Egypt – Rebar*, 7.333. The dictionary meaning of the term "comparison" in Article 2.4 is the "action … of observing and estimating similarity, differences, etc". *New shorter Oxford English Dictionary*. The difference in question is the "price difference" that constitutes the "margin of dumping" for the product.
[46] United States FWS, para. 52.
[47] Appellate Body Report, *EC – Bed Linen*, para. 59.

the product as a whole.[48] The process by which the authorities disaggregate, and re-aggregate, the product is an intrinsic part of the comparison of normal value and export price, and must be done fairly.

38. This may best be illustrated by analogy. Imagine that I have a red apple and a green apple, and that I promise the heavier of the two apples to my son. I tell my son that, to decide which apple is heavier, I will cut both apples into quarters. I will then weigh the apples, quarter against quarter; and I will add up the weight differences, by quarter, to decide which apple is heavier. However, I tell my son that – when a green quarter is heavier than a red quarter – I will count this difference as a zero. My son protests that this is not fair because it makes a mockery of my comparison and he could end up with the lighter of the two apples.

39. Mr. Chairman, members of the panel, my son would be correct: like the zeroing procedures at issue, this is an unfair comparison because the process of disaggregating and re-aggregating it is inherently biased and distorts the values that are being compared.

40. By zeroing, the United States reduces the export price and/or increases normal value. In so doing, zeroing effects an impermissible adjustment to these values. Article 2.4 empowers authorities to make certain adjustments to normal value and export price to ensure "price comparability". Besides these permissible adjustments, authorities are not entitled to interfere with a producer's prices. The authorities must follow the prescribed rules in Article 2 on the determination of normal value and export price. When these values have been determined, the only changes to them that the *Agreement* allows are adjustment under Article 2.4 to ensure price comparability. Any other changes distort the comparison of the producer's pricing behavior in the home and export markets, and seriously undermine the rules on the calculation of normal value and export price.

41. As a result, Japan submits that the zeroing procedures at issue are inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

VI. THE ZEROING PROCEDURES ARE PROHIBITED IN ANY DETERMINATION OF A MARGIN OF DUMPING

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

42. Nothing in the United States' submission calls into question Japan's conclusion that zeroing is prohibited in periodic and new shipper reviews, under Article 9, and changed circumstances and sunset reviews, under Article 11. Japan argues that this conclusion is compelled by the requirements, in Articles 2.1, 2.4, 2.4.2 and Article VI of the GATT 1994, to calculate a margin of dumping for the *product as a whole* on the basis of a *fair comparison*.[49] The terms "dumping" and "margin of dumping" have uniform meanings throughout the *Agreement*. There is no difference between original investigations and any other anti-dumping proceeding that would justify giving the terms "dumping" and "margin of dumping" a meaning that differs from the meaning in Article 2. It is, therefore, *never* permissible, in any anti-dumping proceeding, for USDOC to disregard the results of intermediate comparisons in calculating a "margin of dumping". In addition, there is no difference among the types of anti-dumping proceedings that would justify an unfair, biased and distorted comparison of normal value and export price in any of them. Moreover, given that the respondent parties and the subject product, generally, remain the same throughout the life of an anti-dumping proceeding, it would seriously undermine the prohibition on zeroing in original investigations if authorities could resort to it in subsequent reviews.

43. The United States fails to respond to these arguments. It never addresses the uniform definitions of "dumping" and "margin of dumping" that apply throughout the *Agreement* and preclude dumping determinations for anything but the product as a whole; it never responds to the uniform requirements of a fair comparison. Instead, it seems to believe that Japan's arguments are based exclusively on Article 2.4.2 and, at some length, explains that "Article 2.4.2 does not apply to assessment proceedings" under Article 9.[50] Further, it says, "Article 9 does not prescribe assessment methodologies for assessment proceedings", like those in Article 2.4.2.[51] It appears that the United States confuses Japan's claims in this dispute with those of the EC in the separate dispute DS294.[52] In contrast to that dispute, this dispute does *not* concern the United States' use of W-to-T comparisons in periodic reviews. Instead, Japan's claim with respect to Article 2.4.2 is that "zeroing" is prohibited by that provision, as repeatedly held by the previous

[49] See Japan's FWS, paras. 136 ff.
[50] United States FWS, para. 82. *See*, generally, paras. 73-88.
[51] United States FWS, para. 87.
[52] *See*, for example, United States FWS, para. 79 ("Japan complains, for example, that in the assessment proceedings at issue here, the United States did not apply the investigation phase comparison methods set out in Article 2.4.2 of

panels and the Appellate Body. In that regard, Japan emphasizes that the term "margin of dumping" in Article 9.3 has the same meaning as it does in Article 2.4.2. The United States has not disputed that.

44. For the sake of clarity, Japan highlights that the primary thrust of its claims stems from the definitions of "dumping" and "margin of dumping" in Articles 2.1 and Article 2.4.2 of the *Anti-Dumping Agreement* and in Article VI of the GATT 1994, as well as from the "fair comparison" requirement in Article 2.4. Japan notes that, in previous cases, zeroing has always been found to be contrary to Article 2.4.2. The same must hold true of zeroing in periodic reviews, new shipper review, changed circumstances reviews and sunset reviews.

VII. THE SECOND SENTENCE OF ARTICLE 2.4.2 IS NOT RENDERED REDUNDANT BY JAPAN'S INTERPRETATIONS OF THE *ANTI-DUMPING AGREEMENT*

45. The United States argues that a general prohibition against zeroing "would render the targeted dumping exception in Article 2.4.2 a complete nullity."[53] According to the United States, "the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison", if zeroing is excluded.[54]

46. The United States wholly fails to substantiate this argument. It offers no evidence, at all, to support its factual assertion that the W-to-W and the W-to-T comparison methods would necessarily produce an identical result, absent zeroing. The United States must bear the consequences of its failure to offer appropriate substantiation. According to settled case-law, "the responding party must prove the case it seeks to make in response" to the complaint.[55] The United States fails to meet its burden of proof.

47. In any event, Japan disputes that, without zeroing, the W-to-W and W-to-T comparisons would produce identical results. The United States' assertion is based on the premise that all other things are treated equally. They are not. Even in US domestic law, there are differences in the ways that the USDOC conducts W-to-W and W-to-T comparisons that ensure that the results of the two comparisons would *not* be the same. For example, the US statute itself prescribes that

---

the AD Agreement.")
[53] United States FWS, para. 55.
[54] United States FWS, para. 55.
[55] Appellate Body Report, *Japan – Apples*, para. 154.

the weighted average normal value is to be calculated using different time periods (and hence different pools of transactions) in W-to-W comparisons in original investigations and in W-to-T comparisons in periodic reviews.[56] As a result, the weighted average normal values will differ in the two situations, and the comparisons of those different normal values with export prices mathematically will *not* collapse into the same outcome.

48. Second, and more importantly, the text of the second sentence of Article 2.4.2 suggests that a W-to-T comparison can be conducted in a way that would not produce the same result as a W-to-W comparison. Article 2.4.2 provides for three methods of comparison. The first two are "symmetrical" methods that compare normal value and export price on the same basis, either on a W-to-W or a T-to-T basis. Article 2.4.2 does not provide restriction or condition for using either symmetrical comparison method.

49. The third method of comparison is the "asymmetrical" W-to-T method of comparison set forth in the second sentence of Article 2.4.2. Unlike symmetrical comparisons, the investigating authorities are entitled to use this method of comparison exclusively in exceptional circumstances. Japan agrees with the United States that the third methodology, therefore, constitutes an exception to the usual rules.[57]

50. According to the text, the circumstances justifying the use of the exception arise where the investigating authorities find that there is "a *pattern*" of "*export prices which differ significantly*" among purchasers, regions or time periods. The focus of the exception is, therefore, on prices in *export transactions*, not home market sales. According to its ordinary meaning, a pricing "pattern" exists where, among all export transactions, there is discernible configuration of prices by purchasers, time periods or regions.

51. A second requirement for recourse to the third methodology is that the significant pricing differences could not be "taken into account appropriately" by use of either of the symmetrical methods of comparison. Thus, although Article 2.4.2 does not indicate exactly how the W-to-T

[56] *Compare* Section 777A(d)(1)(A) of the Act, which, in original investigations, authorizes the calculation of a weighted average of the normal values (impliedly over the entire period investigated) *with* Section 777A(d)(2), which, in periodic reviews, provides for the calculation of weighted average normal value over "a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."
[57] United States FWS, para. 56.

comparison is different from the other two methods of comparison, the distinguishing features of the third method must be rooted in the exceptional circumstances that justify its use. In consequence, the third methodology must enable authorities to focus the comparison on the export transactions making up the pricing "pattern". If the authorities do not focus on those transactions, they would fail to take "appropriate account" of the pricing differences discernible in those transactions.

52. To enable the authorities to focus on the transactions in the "pattern", the text supports a methodology that includes the targeted selection of particular export transactions (i.e. those in the pattern) for comparison with normal value. By selecting certain transactions for comparison, and leaving out others, authorities can focus on the transactions making up the pricing pattern. This targeted selection of export transactions enables the authorities to combat targeted dumping.

53. Conversely, if the comparison under the third methodology were to include *all* export transactions (or a fully representative sample), this would not be possible. Moreover, a methodology that is *not* directed at the transactions in the pricing pattern would *not* "take into account appropriately" the significant pricing differences in that pattern, as required by the text of Article 2.4.2. Instead, in a comparison involving all transactions, any targeted dumping within the pattern could be masked by the inclusion of the other export transactions. This would defeat the stated purpose of the third methodology.

54. The second sentence of Article 2.4.2, therefore, gives rise to an exception to the requirement to calculate a margin for the product as a whole. In order to address a pricing pattern amongst export transactions, the authorities are entitled to focus on the category of export transaction that make up the pattern.

55. However, when a pricing pattern has been identified, the authorities must conduct a fair comparison that takes into account all transactions making up the pattern. The existence of an export pricing "pattern" does not mean that there is dumping, targeted or otherwise. Instead, like the other methodologies, the third methodology under second sentence of Article 2.4.2 is intended to enable authorities to determine whether there is dumping and to calculate the

dumping margin. As the Appellate Body said in *EC – Bed Linen (Article 21.5 – India)*, the "result" of the authorities' investigation cannot be "predetermined by the methodology itself."[58]

56. The duty on investigating authorities to inquire into the existence of dumping is an aspect of the general requirement for authorities to make a "fair comparison" under Article 2.4. Under each of the methodologies in Article 2.4.2, the comparison must be unbiased, even-handed, and offer the interested parties equal chance of success.

57. Nothing in the text of Article 2.4.2 suggests that this requirement applies differently to the third methodology. In particular, the duty to conduct a fair comparison is not altered because the third methodology is used in situations where there is a pricing "pattern" that might indicate targeted dumping situation. In that regard, neither the *Anti-Dumping Agreement* nor the GATT 1994 use the term "targeted dumping"; they do not indicate that such dumping should be subject to special "condemnation" where it does exist; and, they do not state that the mere possibility of such dumping justifies inflating the dumping margin or interfering with export price or normal value, contrary to the "fair comparison" obligation. To the contrary, as the Appellate Body observes, "Article 2.4 sets forth a general obligation to make a 'fair comparison'" that "informs all of Article 2, but applies, in particular, to Article 2.4.2".[59]

58. There is, therefore, no basis for the United States concerns that a prohibition on zeroing would nullify the W-to-T comparison in the second sentence of Article 2.4.2.

VIII. MAINTAINING ZEROING PROCEDURES IS INCONSISTENT WITH ARTICLE 3 OF THE *ANTI-DUMPING AGREEMENT*

59. Mr. Chairman. The United States also argues that "Japan fails to explain how Commerce's approach necessarily results in a lack of positive evidence in any, let alone *every* injury determination."[60] It adds that "Japan implicitly admits that Commerce's approach does not mandate a breach with respect to the injury determination."[61]

[58] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.
[59] Appellate Body Report, EC – Bed Linen, para.59.
[60] United States FWS, para. 103.
[61] United States FWS, para. 105.

60. Contrary to these assertions, Japan is not required to prove that the zeroing procedures result in a violation of Article 3 in "every injury determination". As the panel in *US – Export Restraints* held, it suffices that the zeroing procedures result in a violation of Article 3 in certain situations:

> … a measure is inconsistent with WTO rules *if that measure mandates action inconsistent with WTO rules in particular circumstances*, even if in other circumstances the action might not be inconsistent with WTO rules.[62]

61. Japan has demonstrated that the zeroing procedures *do* result in violations of Article 3 in "particular circumstances", namely whenever there is a single negative comparison result that is excluded from the calculation of the dumping amount. In its First Written Submission, Japan explained how this could occur.[63] Further, the CTL Plate investigation provides evidence from an anti-dumping proceeding proving that the zeroing procedures do result in injury determinations that are not based on objective, verifiable and credible evidence of dumping.[64] In that investigation, because the zeroing procedures overstated the margin of dumping, the evidence of dumping used in the injury determination was tainted. Such evidence is not "positive".

62. The United States suggests that the conclusion with respect to the CTL Plate investigation is "speculative and unfounded" because "it does not follow that Commerce would have reported different margins of dumping to the ITC had it applied a different approach" to the dumping determination.[65] It continues that, "[i]n the absence of such a showing, Japan has failed to meet its burden …".[66]

63. Mr. Chairman, it is the United States' argument that is "speculative". The mere possibility that USDOC would have reported the same margin of dumping to the ITC by applying a different approach, does not cure the tainted injury determination that was not based on "positive evidence."

---

[62] Panel report, *US – Export Restraints*, para. 8.78, citing Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 62-63.
[63] Japan's FWS, paras. 114-120.
[64] Japan FWS, paras. 167ff.
[65] United States FWS, para. 109.
[66] United States FWS, para. 109.

64. As a result, Japan has proved an "as applied" violation of Article 3 in the CTL Plate investigation because the ITC relied on evidence in making its injury determination that was not "positive". Moreover, that "as applied" violation proves that the maintenance of the zeroing procedures necessarily results in violations of Article 3 in "particular circumstances".

IX. CONCLUSION

65. Mr. Chairman, members of the Panel, staff of the Secretariat, Japan thanks you for your attention. Japan stands by its claims and the conclusions regarding those claims set forth fully in its First Written Submission.

66. The United States' reply amounts to little more than a rehash of arguments it made – and lost – in several earlier disputes. The United States is apparently disinclined to accept the results of those earlier disputes and, instead, asks for the Panel to set them aside. This is an undisguised attempt to have the Panel rewrite the obligations in the *Anti-Dumping Agreement*. The Panel should reject the United States' revisionist demands and rule that the zeroing procedures at the root of the earlier violations are "as such" inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.