AS DELIVERED

BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

WT/DS322

OPENING STATEMENT AT THE SECOND MEETING WITH THE PANEL

JAPAN

15 SEPTEMBER 2005

I. INTRODUCTION

1. Mr. Chairman and members of the Panel, Japan would like to thank you and the Secretariat for your efforts in this dispute. At this stage, we have set forth our position in some depth, and we will not test your patience by repeating our previous arguments. Instead, we would like to focus on a few key points and to respond to arguments presented by the United States in its Second Written Submission (SWS). We also look forward to providing you with answers to your outstanding questions over the course of this meeting.

2. Japan's Opening Statement will address the following four issues:

a) The two zeroing measures at issue;

b) The "as such" violation of the requirement in Article 2.1 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 conduct a "fair comparison"; and

d) The third comparison methodology in Article 2.4.2 of the *Anti-Dumping Agreement*.

II. ZEROING IS A MEASURE THAT MAY BE SUBJECT TO "AS SUCH" CHALLENGE

3. We begin, briefly, with the measures at issue. Japan challenges two measures, the United States' standard zeroing procedures and its Standard Zeroing Line, which we will refer to collectively as "the zeroing measures". Japan has already responded to the United States' arguments at some length in its own SWS, and nothing that in the United States' SWS calls into question our position.[1]

4. The case-law makes clear that "any act" or "instrument" attributable to a Member can be a measure for purposes of WTO dispute settlement.[2] Importantly, no acts or omissions are excluded from the scope of WTO dispute settlement. *A fortiori*, rules or norms with general and

[1] Japan's SWS, paras. 6 – 39.
[2] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81 and 82.

prospective application can be challenged as such.[3] Equally, under Article 18.4 of the *Anti-Dumping Agreement*, "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings" are "administrative procedures" that may also be challenged as such in disputes under the *Anti-Dumping Agreement*.[4]

5. In assessing whether a measure can be challenged as such under the *Anti-Dumping Agreement*, the measure must be examined from the perspective of WTO law, on the basis of its "content and substance", and not in lights of its "form and nomenclature" in domestic law.[5] The domestic "label" given – or not given – to a measure cannot alter its character in WTO law.[6]

6. For the United States, the zeroing measures do not "exist" and cannot impose general rules because they are not manifested in a particular form in domestic law.[7] The United States thereby seeks to undermine the scope of WTO dispute settlement by improperly elevating the form of a measure in domestic law over its substance. The Appellate Body has rightly rejected such formalism because it would allow Members all too easily to evade WTO scrutiny of their acts and omissions. Also, accepting the United States' position would result in the scope of WTO dispute settlement varying from Member to Member, depending on each Member's regulatory transparency.

7. In this dispute, the evidence demonstrates forcefully that the United States maintains two zeroing measures. The "label" which Japan attaches to the first is the standard zeroing procedures. Although the United States criticizes this label as an "invention",[8] labels are not important; as the Appellate Body has said, what counts is substance.[9]

8. The standard zeroing procedures are a dumping margin calculation methodology maintained for use in original investigations and reviews. In substance, the zeroing procedures

[3] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 82 and 87.
[4] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.
[5] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.
[6] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.
[7] *See*, for example, United States' SWS, paras. 8 and 18.
[8] *See* United States' SWS, para. 6.
[9] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.

constitute a general rule whereby the USDOC systematically disregards negative comparison results when it calculates an overall margin of dumping on the basis of multiple comparisons.

9. The United States suggests that the standard zeroing procedures have no functional life of their own because they are applied via the Standard Zeroing Line. By the United States' own admission, this is wrong. The United States admits that, in proceedings in which it did not use the SAS software and, therefore, did not apply the Standard Zeroing Line, it nonetheless applied the standard zeroing procedures.[10] The zeroing procedures, therefore, constitute an overarching rule that is applied on a universal basis, in the execution of the USDOC's dumping margin calculations.

10. The label Japan gives to the second measure is the Standard Zeroing Line. This Line is contained in the USDOC's standard computer programs. As Japan has previously highlighted, the USDOC AD Manual shows that the standard programs are maintained as models or standards for use whenever the USDOC develops a specific computer program in a particular anti-dumping proceeding. By including the Standard Zeroing Line in the standard programs, USDOC makes the Line a general rule, norm or standard that applies, in principle, whenever the USDOC develops a case-specific program in a particular investigation or review.[11] Because the Standard Zeroing Line serves as a model for use in subsequent proceedings, it is not, as the United States suggests, simply an "as applied" measure.[12] Instead, it is a rule, norm or standard that has – and is intended to have – general and prospective application.

11. Mr. Chairman, permit us also to say a few words about the evidence before you regarding the existence of the zeroing measures. Contrary to the United States' assertions, the evidence that the two zeroing measures exist is more than sufficient to meet the burden of proof.[13] Japan has presented that evidence, for both measures, in previous submissions and will not rehearse what it has already said.[14] Amongst that evidence are repeated statements by the USDOC and USDOJ, as well as rulings of U.S. courts, describing the standard zeroing procedures in terms of

[10] United States' July 20 Answers, para. 9.
[11] See, for example, Japan's First Written Submission, paras. 26 – 30.
[12] United States' SWS, para. 7.
[13] United States' SWS, para. 15.
[14] *See*, for example, Japan's SWS, paras. 13 – 30 and Japan's 20 July Answers, paras. 16 – 22.

a general rule.[15] Tellingly, the United States' has failed to identify a single instance since the establishment of the WTO in which it did not rely on its standard zeroing procedures in calculating a margin of dumping. Thus, Japan does not "assume" the existence of the zeroing measures.[16] It is the United States that has failed to offer any evidence to support its assertion that there is no zeroing measure.

12. Some of the United States' arguments appear to be an attempt to exclude certain evidence from consideration by the Panel. In particular, the United States appears to assert that it is not appropriate for the Panel to consider the "consistent application" of the zeroing measures without first examining the existence of the measure itself. Under Article 11 of the DSU, however, the Panel must objectively examine all of the evidence before it to determine whether a measure exists. In this dispute, the consistent application of the zeroing calculation methodology constitutes a part of the evidence proving the existence of the measures Japan challenges. There is no reason whatsoever for the Panel not to examine this evidence, together with the other evidence submitted by the Parties.

13. Short of suggesting that the Panel should not examine the "consistent application" of the zeroing measures, the United States offers no new arguments on the mandatory character of the measures at issue. Significantly, although the United States seeks to exclude certain evidence regarding the mandatory character of the measure, it emphasizes the Appellate Body's statement that, in assessing the mandatory character of a measure, "*the nature and extent of the evidence required to satisfy the burden of proof will vary from case to case*."[17]

14. Japan agrees. There are no hard and fast rules of evidence in WTO law. Thus, there are no *a priori* exclusions regarding the types of evidence that may be used to demonstrate the existence and mandatory character of a measure. Accordingly, pursuant to Article 11 of the DSU, the Panel must consider the evidence of the consistent application of the zeroing measures that Japan has presented and that the United States has failed to rebut.

[15] Japan's SWS, paras. 14 – 31.
[16] United States' SWS, para. 15.
[17] Appellate Body Report, *US – Carbon Steel*, para. 156.

15. The United States also continues to assert that because the Assistant-Secretary might decide not to apply the zeroing measures, they are not mandatory.[18] However, as Japan has previously noted, the fact that the Assistant-Secretary might not apply the zeroing procedures in the future does not deprive them of their mandatory character.[19] The substance of the standard zeroing procedures and the Standard Zeroing Line requires that negative comparison results be excluded from the calculation of the overall margin. The possibility that the Assistant-Secretary might not apply this rule, or might even change it, is fictional at best, and does not alter this conclusion. This is particularly so because the evidence demonstrates that the Assistant-Secretary has *never* elected not to apply the standard zeroing procedures. There can, therefore, be no presumption that the Assistant-Secretary will not apply the zeroing procedures because, to the contrary, the procedures have been applied in every margin calculation for at least the last ten years.

III. A DUMPING MARGIN MUST BE CALCULATED FOR THE PRODUCT AS A WHOLE

16. A central element in Japan's claims in this dispute is that the standard zeroing procedures and the Standard Zeroing Line are inconsistent with the duty to determine "dumping" and calculate a "margin of dumping" for a "product" as a whole, pursuant to Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

17. This claim is grounded in the text of Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994, both of which refer to the dumping of "a product" and "products". According to the Appellate Body, "it is clear from the text of these provisions that dumping is defined in relation to a *product as a whole* as defined by the investigating authority."[20] Further, because "dumping" exists only for the product as a whole, "'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."[21]

[18] United States' SWS, para. 18.
[19] Japan's 20 July Answers, para. 36.
[20] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93. See also paras. 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53, following panel report, *EC – Bed Linen*, para. 6.118.
[21] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96.

18. According to the opening words of Article 2.1 of the *Anti-Dumping Agreement*, the definition of "dumping" in that provision applies "to the entire *Agreement*".[22] Consistent with this text, the Appellate Body has held that other provisions of the *Anti-Dumping Agreement* – including Articles 6.10, 9.2 and 11.3 – as well as Article VI:2 of the GATT 1994 confirm that dumping, and margins of dumping, must be calculated for the product as a whole.[23] This finding bears out not only Japan's interpretation of the term "margin of dumping" in Article 2.4.2 for purposes of an original investigation, but also its interpretation of that term in Articles 9 and 11 for purposes of periodic, new shipper, changed circumstances and sunset reviews.

19. It is perhaps worth recalling the Appellate Body's statement in *U.S. – Softwood Lumber V*. After drawing on the text of Articles 2.1, 2.4.2, 6.10 and 9.2 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994, the Appellate Body held that:

> Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia* , the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an antidumping duty can be levied only on a dumped product.[24]

20. Despite these holdings, the United States continues to insist that "nowhere in the definition of 'margin of dumping' does the obligation to calculate a margin of dumping 'for the product as a whole' exist . . .".[25] For the United States, a "margin of dumping" can even be calculated for individual export transactions or groups of transactions.[26] Moreover, the United States argues expressly that the term "margin of dumping" can have different meanings throughout the *Agreement*.[27]

21. These arguments are erroneous. If, as the United States argues, a "margin of dumping" can exist for an individual transaction, then one of two options must be true – *either* the existence of a "margin" is not related to the existence of "dumping", *or* it must likewise be possible to

[22] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93.
[23] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 94; Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Reviews*, paras. 109 and 126.
[24] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.
[25] United States' SWS, paras. 48.
[26] United States' SWS, paras. 48, 50.
[27] United States' SWS, para. 50.

determine "dumping" for individual transactions, rather than for the "product as a whole". The first of these options, however, is logically meaningless because a "margin" is merely the expression of the "magnitude of *dumping*"[28]; it has no existence independent of dumping itself.

22. The second option is likewise incorrect because it would mean that the term "dumping" also has different meanings as it appears in different provisions of the *Agreement*. Sometimes "dumping" would refer to the product as a whole, and sometimes it would refer to individual transactions. The drafters of the *Agreement* and the GATT 1994, however, excluded this possibility because, in Article 2.1, they provided a single definition of "dumping" that applies to the "entire *Anti-Dumping Agreement*".[29] In terms of that definition, "dumping" is for a "product" and not for individual transactions.

23. Strikingly, throughout these proceedings, the United States never even attempts to reconcile its argument that dumping margins can be calculated for individual transactions with the definition of "dumping" in Article 2.1. To do so would require either rewriting Article 2.1 or reversing the Appellate Body's interpretation of that provision.

24. The United States makes a related argument that, in review proceedings, the investigating authorities do not determine the "*existence*" of dumping. According to the United States, "the only stage of an anti-dumping proceeding where the investigating authority is required to determine the 'existence' of dumping" is in an investigation, pursuant to Articles 2.4.2 and 5.1."[30] For the United States, therefore, determining a "margin of dumping" in reviews does not appear to involve determining the existence of "dumping". This is an absurd proposition because an authority cannot determine the amount of dumping without determining that dumping exists. The concepts of "dumping" and "margin of dumping" are inextricably entwined because it is logically impossible to quantify something that does not exist. Thus, margins of dumping calculated for purposes of reviews must respect the definition of "dumping" in Article 2.1 just as much as margins calculated in investigations.

[28] Appellate Body Report, *US – Softwood Lumber V*, para. 96. Emphasis added.
[29] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 109.
[30] United States' SWS, para. 67.

25. The United States asserts that its interpretation is supported by the GATT Note *Ad* Article VI:1, which, it claims, "uses the term 'margin of dumping' in a manner which can only be reasonably interpreted to apply on a transaction basis."[31] This interpretation of *Ad* Article VI:1 is incorrect. *Ad* Article VI:1 does not provide a definition of either dumping or margins of dumping. Nor does it provide that margins are calculated for individual transactions. Rather, it addresses the *price* that may be used for certain export transactions in the process of calculating the margin of dumping. The *Ad* Article does not purport to alter the requirement in Article VI:1 that dumping, and margins of dumping, are determined for a "product". Instead, consistent with Article VI:1, the term "margin of dumping" in the *Ad* Article can, and must, be read to refer to the margin for the "product".

26. The United States also wrongly asserts that, because anti-dumping duties are usually assessed by customs authorities on individual entries of a product, this somehow demonstrates that margins of dumping are determined by investigating authorities for individual transactions.[32] In particular, the United States asserts that, in a prospective normal value system, or "PNV", system, Members calculate margins for individual transactions.[33]

27. In making this argument, the United States confuses the distinct concepts of the "*amount* of anti-dumping duty" and the "*margin* of dumping" under Article 9.3 of the *Anti-Dumping Agreement*. In *EC – Bed Linen (Article 21.5)*, the Appellate Body found that "the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made. In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link."[34] The Appellate Body added that "the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties."[35]

[31] United States' SWS, para. 51.
[32] United States' SWS, paras. 50, 53 and 54.
[33] United States' SWS, para. 53.
[34] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123 (underlining added).
[35] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

28. Accordingly, when the customs authorities impose and collect anti-dumping *duties* on individual entries they are *not* calculating *margins of dumping* within the meaning of Article 2. Rather, the margins of dumping have already been determined by the investigating authorities, on the basis of Article 2, in investigations or reviews. In terms of Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*, these margins constitute a ceiling on the amount of duties that can be imposed and collected by the customs authorities.

29. The same misconceptions infect the United States' assertion that in a prospective normal value, or PNV, system, the amount of duties imposed by customs authorities on each entry constitutes a margin of dumping.[36] The definitions of "dumping" and "margins of dumping" in the *Anti-Dumping Agreement* are identical for both prospective and retrospective systems of duty assessment. Thus, the differences between these systems pertain to way *duties* are imposed and collected. The Appellate Body has ruled that these differences have no bearing on the rules regarding the establishment of dumping margins in Article 2, which apply in the same way to both systems.[37]

30. In a PNV system, to assess the amount of duties due, a comparison of prices is undertaken for each *individual* entry and, on the basis of that comparison, a variable duty is imposed on the *individual* export transaction concerned. The calculation and imposition of variable anti-dumping *duties* in this way – although permissible – does not involve the establishment of *margins of dumping* within the meaning of Article 2 of the *Anti-Dumping Agreement*. Instead, the customs authorities mechanically compare import prices with a reference price; they do not undertake – and are not required to undertake – a comparison that respects the detailed procedural and substantive rules set forth in Article 2, for example, in Article 2.4. The United States is, therefore, incorrect in suggesting that "margins of dumping" are determined for individual transactions in a PNV system.

31. As part of its arguments on PNV systems, the United States also misleadingly attempts to portray its retrospective review as "operating" on an "entry-by-entry basis", like a PNV system.[38] This comparison is inapt because the United States' assessment system does not operate on an

[36] United States' SWS, paras. 54, 57.
[37] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.
[38] United States' SWS, para. 59.

entry-by-entry basis. As the standard computer programs demonstrate, in reviews, the USDOC conducts a comparison for *all* U.S. sales, for the exporters concerned, during the review period and, on that basis, it instructs the U.S. customs service to collect duties at fixed rates that apply to *all* entries during the review period. This is not like a PNV system.

32. Moreover, the United States overlooks that, even in a PNV system, the final liability for duties must be assessed in a review under Article 9.3.2. During that review, the authorities must establish the "actual margin of dumping" for the review period consistently with the rules in Article 2. Because this dispute concerns reviews in the United States' system, the appropriate comparison is between reviews in prospective and retrospective systems. In both these systems, the rules in Article 2.1 define the term "dumping" and, therefore the "margin of dumping".

33. In any event, instead of examining the WTO-consistency of PNV systems that are *not* at issue, the Panel must pay close heed to the particular features of the zeroing measures that *are* at issue. Contrary to the United States' contentions, the zeroing measures at issue do *not* provide a calculation methodology for individual transactions. Instead, they set forth rules for the calculation of a single, overall margin of dumping for a large number of export transactions made within a particular period of time.

34. Mr. Chairman, allow us to turn now to the object and purpose of the *Anti-Dumping Agreement* and the GATT 1994. Article VI:1 of the GATT 1994 provides that "dumping … is to be condemned if it causes … material injury" to the domestic industry. In language that focuses emphatically on the "product", Article VI:2 adds that dumping may be "offset" by anti-dumping duties in an amount not exceeding "the margin of dumping *in respect of such product*". The only other provision of the GATT 1994 to refer to anti-dumping duties is Article II:2(b), which provides that the amount of anti-dumping duties may exceed a Member's bound concessions.

35. Against that background, the *Anti-Dumping Agreement* implements Article VI, setting forth rules relating to dumping, and what consequences a Member can draw from dumping margin determinations. For example, first, pursuant to Article 3.1 of the *Anti-Dumping Agreement*, for purposes of a determination of injury, a dumping determination has product-wide implications because it entitles the investigating authorities to conclude that *all* of a producer's

export transactions are dumped.[39] Moreover, under Article 3, an injury determination must address the impact of *all* dumped imports on the domestic industry "as a whole".[40] Thus, under the *Agreement*, it is the *overall* impact of the dumped *product* that is relevant.

36. Second, pursuant to Article 5.8 of the *Anti-Dumping Agreement*, investigations must be terminated if the margin of dumping is *de minimis*. The dumping determination, again, has product-wide consequences relating to all export transactions. Indeed, even the United States accepts that, under Article 5.8, the margin is for the product as a whole.[41]

37. Third, in terms of Articles 9.1 and 9.2, a "margin of dumping" determination is a precondition for imposing anti-dumping duties that apply to *all* export transactions for the "product".[42] Thus, once more, the dumping margin determination has product-wide regulatory implications.

38. Fourth, under Articles 9.1 and 9.3, a dumping margin constitutes the ceiling on the amount of duties that may be imposed, again, on all entries of a "product". In language that echoes the *chapeau* of Article 9.3, Article VI:2 of the GATT 1994 states expressly that duties shall not be "greater" "than the margin of dumping *in respect of such product*." This language speaks unmistakably of a product-wide margin of dumping that – under other provisions we have just outlined – has product-wide consequences.

39. Because dumping margin determinations have a variety of product-wide consequences, the text of the *Anti-Dumping Agreement* and the GATT 1994 requires that the determinations be made on a product-wide basis. This is particularly important because, under Article II:2(b) of the GATT 1994, anti-dumping duties frequently exceed a Member's scheduled concessions. To justify disturbing the negotiated balance among the importing and exporting Members for all entries of a scheduled product, Article 2.1 and Article VI both require that a dumping determination be made on a product-wide basis. From an empirical perspective, this also ensures

[39] Panel Report, *EC – Bed Linen (Article 21.5)*, para. 6.143; Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 128. See also Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.
[40] Article 4.1 of the *Anti-Dumping Agreement*.
[41] United States 20 July Answers, paras. 56 and 60.
[42] *See* Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 94 and 99.

that the authorities' dumping determinations transcend the unique features of an individual transaction that is very unlikely to be representative of the product.

40. All of these considerations, therefore, support the Appellate Body's repeatedly stated conclusion that a dumping margin determination is made for the product as a whole.

IV. THE ZEROING PROCEDURES VIOLATE THE OBLIGATION TO CONDUCT A "FAIR COMPARISON" UNDER ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

41. We will now turn to Article 2.4, which also precludes the United States from disregarding the results of certain of the multiple comparisons undertaken by the USDOC.

42. It appears that Japan and the United States agree that the first sentence of Article 2.4 establishes a "general obligation" on investigating authorities to conduct a fair comparison of export price and normal value.[43] This is not surprising, because the Appellate Body has already reached the same conclusion.[44] Nonetheless, overlooking the significance of that ruling, the United States adds that the scope of the first sentence of Article 2.4 of the *Agreement*, which establishes the "fair comparison" requirement, is "exhaust[ed]" by the remaining sentences of that Article.[45] Those remaining sentences, the United States argues, set out specific adjustments to ensure the comparability of the export price and normal values "*before* margin calculations are undertaken."[46] This assertion is incorrect for at least two reasons.

43. First, the premise of the United States' argument is that Article 2.4 applies only to adjustments made *before* the comparison occurs, but that zeroing applies to the "*results* of comparisons."[47] This description of zeroing is inaccurate. The comparisons results to which the United States refers are, of course, the *intermediate* values that must still be aggregated – even under the United States' own system – to produce a single overall dumping margin. In contrast, under Article 2.4, the final result of the "fair comparison" is not an intermediate value but the

[43] Japan July 20 Answers, para. 106; United States July 20 Answers, para. 70.
[44] Appellate Body Report, *EC – Bed Linen*, para. 59.
[45] United States July 20 Answers, para. 73.
[46] United States SWS, para. 30 (emphasis added).
[47] United States FWS, para. 52 (original emphasis).

dumping margin for the product.[48] As a result, contrary to the United States' arguments, zeroing intervenes *before* the "comparison" in complete, not *after*.

44. In keeping with *Egypt – Rebar*, the generality of the obligation in the first sentence of Article 2.4 applies to the entire comparison process and not just to price adjustments. Thus, Article 2.4 prohibits the many possible ways in which unfairness could taint the comparison of normal value and export price.[49] The way in which the authorities elect to disaggregate and re-aggregate the "product" for purposes of the comparison is an integral part of the comparison process that must be performed fairly.[50] The authorities cannot structure the comparison in an unfair manner that necessarily and deliberately inflates the margin of dumping and that may even generate a margin where none would otherwise exist.

45. Second, the zeroing procedures, in substance, involve a distortion of the prices of excluded export transactions. In the words of the Appellate Body, these transactions are "treated as if they were less than what they actually are."[51] The third sentence of Article 2.4 requires the authorities to adjust for differences between export price and normal value to ensure price comparability, and gives a non-exhaustive list of factors that may give rise to an adjustment to ensure price comparability. These adjustments are intended to guarantee a "fair comparison". However, in the absence of differences affecting price comparability that compel an adjustment, the authorities are not permitted to interfere with the producer's or exporter's prices because this involves an "inherent bias".[52]

46. Thus, the position of the United States appears to be that Article 2.4, on the one hand, requires authorities to make adjustments that promote fairness and, on the other hand, permits them to make any other adjustments to prices they see fit. It is absurd, however, to interpret Article 2.4 to require the authorities to give with one hand to ensure fairness that which they can simply remove with the other to deny it. Thus, the fair comparison requirement in Article 2.4 does not permit the authorities to interfere with normal value and/or export price to produce

[48] Panel report, *Egypt – Rebar*, para. 7.333.
[49] Japan July 20 Answers, para. 113.
[50] *See* Japan Opening Statement at the First Meeting of the Panel, paras. 37 - 38.
[51] Appellate Body Report, *US – Softwood Lumber V*, para. 101.
[52] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

desired results. Such adjustments are not made to ensure price comparability and, instead, impermissibly distort prices.

47. The United States argues that the unfairness of the zeroing procedures or – in the United States' parlance – of the failure to provide "offsets" cannot be demonstrated merely by the fact that "the use of an offset would result in a lower margin . . . ."[53] However, the Appellate Body has noted the use of a zeroing methodology "will tend to inflate the margins calculated" and "could, in some instances, turn a negative margin of dumping into a positive margin of dumping". Accordingly, the effect of a given methodology in inflating margins, or generating margins that would not otherwise exist, is indeed a relevant consideration in examining whether the methodology is fair under Article 2.4. In this case, that fact is coupled with the fact that the inflation of the margins is a deliberate, and not merely incidental, consequence of the methodology.

48. The United States also argues that the Appellate Body has only stated that zeroing is WTO-inconsistent in disputes involving original investigations. Specifically, the United States asserts that "[t]he Appellate Body at no time has found that […] an obligation [to provide offsets] exists with respect to other comparison methodologies during investigations, or in the context of Article 9 duty assessment proceedings and new shipper reviews or Article 11 changed circumstance reviews and sunset reviews."[54]

49. This is incorrect. In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body examined a claim that the United States acted inconsistently with Articles 2.4 and 11.3 of the *Anti-Dumping Agreement* by relying, in a sunset review, on dumping margins that were calculated in administrative reviews using zeroing.[55] The Appellate Body stated:

> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, <u>whether in an original investigation or otherwise</u>, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology

[53] United States SWS, para. 33.
[54] US SWS, para. 61.
[55] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 133.

> could, in some instances, turn a negative margin of dumping into a positive margin of dumping.[56]

50. The Appellate Body added that, although a Member need not rely on a dumping margin in a sunset review, if it should decide to do so, "the calculation of these margins must conform to the disciplines of Article 2.4" because there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[57] Accordingly, if the Member relies on margins that "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*."[58]

51. In other words, the Appellate Body envisaged that, in sunset reviews, Members would violate Articles 2.4 and 11.3 if they were to rely on "legally flawed" dumping margins calculated using a zeroing methodology. These findings have particular significance for this dispute because the Appellate Body noted in *US – Corrosion Resistant Steel Sunset Reviews* that the "flawed" dumping margins in question had been calculated in administrative reviews, pursuant to Article 9. Therefore, the Appellate Body also envisaged that Members would violate the *Agreement* by using zeroing to calculate dumping margins in administrative reviews.

52. Further, in concluding that dumping must be determined for the product as a whole, the Appellate Body referred to both Articles 9.2[59] and 11.3 in reaching its conclusion.[60] This confirms that, in reviews conducted under Articles 9 and 11, dumping and margins of dumping must be established on a product-wide basis.

53. In making your findings, Mr. Chairman and members of the Panel, Japan again requests that you focus on the features of the measures at issue, and not on alternative methodologies that the United States might have adopted to calculate dumping margins.

54. The salient features of the zeroing measures at issue are that the United States makes an initial comparison for *all comparable export transactions*, but in aggregating the initial

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[56] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135. Emphasis added.
[57] Appellate Body Report, *EC – Bed Linen*, para. 127.
[58] Appellate Body Report, *EC – Bed Linen*, para. 127.
[59] Appellate Body Report, *US – Softwood Lumber V*, para. 94.
[60] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109.

comparison results into an overall margin, the United States includes solely the positive comparison results, disregarding negative results. The United States thereby distorts the prices for the disregarded export transactions, and it does so precisely because this will generate and inflate the overall dumping margin. Finally, the United States applies the determination resulting from the "partial" comparison of selected transactions to *all* export transactions on a product-wide basis. This is so whether the determination is used for purposes of an injury determination; to terminate or pursue an investigation; to justify the imposition of duties; or to assess the amount of duties due. Indeed, in *U.S. – Softwood Lumber V*, the Appellate Body observed that under the United States' system, the product is consistently treated as a whole at all stages, except for purposes of zeroing.[61] Japan submits that, in light of these features, the "partial" comparison that results from the zeroing measures is "inherently biased" and not fair, whether it is used in "*an original investigation or otherwise*".[62] The fairness of the United States' measures cannot be assessed in light of other methodologies that the United States might have chosen, but did not.

V. JAPAN'S INTERPRETATION OF ARTICLE 2.4 WOULD NOT RENDER THE SECOND SENTENCE OF ARTICLE 2.4.2 A NULLITY

55. The United States continues to argue that prohibiting zeroing would nullify the third method of comparison in Article 2.4.2, that is, the W-to-T comparison method. Japan has already demonstrated the fallacy of this argument.

56. First, as Japan has previously stated, the second sentence of Article 2.4.2 contemplates a comparison that is focused on the export transactions that make up the pricing pattern identified by the authorities. Because this comparison method differs from the W-to-W or T-to-T comparison methods, it will produce a different result from those methods. Second, Japan has provided numerical examples that demonstrate that the second sentence does not necessarily yield the same results as the W-to-W comparison methods of comparison, whether Japan's interpretation of that sentence applies or not.[63]

[61] Appellate Body Report, *US – Softwood Lumber V*, para. 99.
[62] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135. Emphasis added.
[63] Japan July 20 Answers, paras. 69-72, 78-82.

57. Turning to the first point, the United States argues that the W-to-T comparison under the third method in Article 2.4.2 *must* extend to *all* export transactions, including those that occurred within the pattern and those outside it. This reading is absurd. Before the authorities may use the third method under Article 2.4.2, they must demonstrate the existence of a pricing pattern among *a limited subset* of export transactions (namely, those involving specific purchasers, regions, or time periods). Yet, according to the United States, when the authorities have identified a relevant pricing pattern among *certain* export transactions, they would be required to include *all* export transactions in the W-to-T comparison, including those outside the pattern.

58. In addition, before they may use the third method, the authorities must demonstrate that the W-to-W and T-to-T comparisons could not take "appropriate account" of the differences in prices. Nonetheless, according to the United States, in conducting the third comparison, the authorities are *not* obliged to take "appropriate account" of these differences.[64] This position is incorrect because it means that, after demonstrating that the first and second methods do not take "appropriate account" of the pricing differences, authorities may then apply the third method in a manner that likewise fails to take "appropriate account" of these differences. In other words, the United States' interpretation of the second sentence of Article 2.4.2 would permit Members to use an exception (the third method) in a manner that fails to address the very reasons justifying recourse to that exception in the first place. However, the duty to explain why the W-to-W or T-to-T comparisons do not take "appropriate account" of the prices differences presupposes that the third method *does* enable the authorities to take appropriate account of those differences.

59. Further, the United States' rejection of Japan's interpretation of the second sentence of Article 2.4.2 appears to be contradicted by its own regulations. The USDOC's Regulations recognize that, in a situation that may involve "targeted dumping," the W-to-T comparison is confined to the export transactions making up the pricing pattern. Specifically, the Regulations state that where "there is targeted dumping in the form of export prices …. that differ significantly among purchasers, regions, or periods of time" "*the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping . . . .*"[65] In other words, the United States appears to agree that the W-to-T method in

[64] United States SWS, para. 37.
[65] USDOC Anti-dumping regulations, 19 C.F.R. § 351.414(f)(2) (emphasis added). Exhibit JPN-03.

the third sentence is confined to the export transactions making up the pricing pattern and does not extend to the entire universe of export transactions.

60. As to the second point, leaving aside Japan's interpretation of the second sentence of Article 2.4.2, the United States has argued that the prohibition of zeroing would render the second sentence "superfluous" or a "nullity" because, without zeroing, the W-to-W and W-to-T comparisons will lead to the same results. This argument places a very high burden on the United States. To show that Japan's interpretation "nullifies" the second sentence of Article 2.4.2, the United States must demonstrate that Japan's interpretation requires Members to calculate margins in a manner that will *always* result in the same outcome for the two comparison methods. There is no nullity just because the two methods *may* produce the same outcome in some circumstances.

61. Japan has shown, however, that without zeroing, the W-to-W and W-to-T methods would produce different results in certain circumstances – for example, when Members base the comparison on a weighted average normal values determined for different time periods. The United States responds that "Japan offers no textual analysis to support its theory that the methodologies set on in Article 2.4.2 were crafted on the assumption that Members would be using different bases for calculating the weighted average normal value" in W-to-W and W-to-T comparisons, respectively.[66]

62. This is an incorrect way to present the issue. The text does not suggest an "assumption" that a single "basis for calculating the weighted average normal value" must be used under Article 2.4.2. The significant point is that the text of the Article itself does not *prohibit* a Member from using "different bases" for calculating the weighted average normal value in the two situations. In other words, Article 2.4.2 was crafted on the "assumption" that Members could choose to use different bases for calculating the weighted average in the W-to-W and W-to-T comparisons. So long as Members are not prohibited from using different bases (including different time periods) to calculate the "W" in the W-to-W and W-to-T comparisons, the outcomes of the comparisons will almost inevitably differ because the groups of transactions making up the weighted average normal value will differ.

[66] United States SWS, para. 40.

63. The United States does not suggest that the *Anti-Dumping Agreement* compels Members to use the same time bases in the two situations. Indeed, the United States' domestic law itself authorizes the contrary because the USDOC is permitted to use different time "bases" for calculating the "W" in the W-to-W comparison in investigations and in the W-to-T comparison in administrative reviews.[67] Moreover, the United States does not deny that different outcomes will result from the use of different time bases.

64. It is possible, of course, that a Member *may* choose to use the same time bases to calculate the "W" in the two comparisons, in which case the same outcome might well arise. But the fact that methods overlap in those circumstances does not nullify the third method because a Member *may* also choose to do otherwise, as the United States itself has done.

65. Accordingly, the United States must fail in its argument that Japan's interpretation of the *Agreement* renders the second sentence of Article 2.4.2 a nullity.

66. The United States notes that there is an error in one of the calculations in the chart submitted by Japan in its response to Question 20 from the Panel, regarding the margins that would be calculated using the W-to-W and W-to-T methodologies without zeroing, where the universe of transactions used to calculate the weighted average normal value is the same in both cases.[68] The United States is correct that the percentage figure shown for the W-to-W margin in Japan's chart is erroneous, and Japan apologizes to the Panel for any confusion this error may have caused. However, contrary to the United States' assertion, this error does not undermine Japan's general argument that eliminating zeroing will not nullify the W-to-T methodology authorized in the second sentence of Article 2.4.2, because Japan's chart included other examples of margin calculations that would result in different outcomes. The United States has found no error in Japan's calculation of different dumping margins in these other situations.

67. Japan has, therefore, shown that the first and third methods do not always produce identical outcomes if zeroing is prohibited. Accordingly, the second sentence of Article 2.4.2 is not rendered a nullity or superfluous absent zeroing.

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[67] *Compare* Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended, *with* Section 777A(d)(2).
[68] United States SWS, para. 41 (citing Japan July 20 Answers, para. 81).

68. Japan also emphasizes that the mathematical distinction in the outcomes between the two comparison methods is independent of the textual interpretation of the second sentence of Article 2.4.2, which we have already discussed. Japan submits that, properly interpreted, the second sentence of Article 2.4.2 involves a W-to-T comparison confined to the export transactions making up the pricing pattern. The calculation of margins over a different (smaller) universe of export transactions, of course, would also result in a different outcome from that which would arise from the use of the W-to-W methodology over the entire universe of export transactions in the typical situation not involving targeted dumping.

VI. CONCLUSION

69. Mr. Chairman, members of the Panel, staff of the Secretariat, Japan thanks you again for your attention and patience during the meetings, and the care with which you have addressed the issues raised in this dispute. Japan stands by the claims and the conclusions set forth in its written submissions, and we are happy to answer any questions you may have on them.