I. Zeroing is a Measure that May Be Subject to "As Such" Challenge

1. 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.[1] The domestic "label" given – or not given – to a measure cannot alter its character in WTO law.[2] 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.[3] 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.

2. In this dispute, the evidence demonstrates forcefully that the United States maintains two zeroing measures that Japan challenges. The first measure is the standard zeroing procedures. 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. However, 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.[4] The zeroing procedures, therefore, constitute an overarching rule that is applied on a universal basis.

3. The second measure is the Standard Zeroing Line. 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.[5]

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[1] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.
[2] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.
[3] *See*, for example, United States' SWS, paras. 8 and 18.
[4] United States' July 20 Answers, para. 9.
[5] See, for example, Japan's First Written Submission, paras. 26 – 30.

4. Contrary to the United States' assertions, the evidence that the two zeroing measures exist is more than sufficient to meet the burden of proof.[6] 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.

5. 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.

6. Japan shares the United States' agreement with 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*."[7] There are no hard and fast rules of evidence in WTO law. 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.

7. The fact that the Assistant-Secretary might not apply the zeroing procedures in the future does not deprive them of their mandatory character.[8] The substance of the zeroing measures requires that negative comparison results be excluded from the calculation of the overall margin. There can be no presumption that the Assistant-Secretary will not apply the zeroing procedures because the Assistant-Secretary has *never* elected not to apply the standard zeroing procedures and the procedures have been applied in every margin calculation for at least the last ten years.

II. A Dumping Margin Must be Calculated for the Product as a Whole

8. Japan's claim that a dumping margin must be calculated for the product as a whole 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

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[6] United States' SWS, para. 15.
[7] Appellate Body Report, *US – Carbon Steel*, para. 156.
[8] Japan's 20 July Answers, para. 36.

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."[9] 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*."[10]

9. According to the opening words of Article 2.1, the definition of "dumping" in that provision applies "to the entire *Agreement*".[11] 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.[12] This finding bears out not only Japan's interpretation of the term "margin of dumping" in Articles 2.4.2, 9 and 11.

10. Despite these holdings, the United States continues to insist that a "margin of dumping" can even be calculated for individual export transactions or groups of transactions[13] and that the term "margin of dumping" can have different meanings throughout the *Agreement*.[14]

11. 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*".[15] In terms of that definition, "dumping" is for a "product" and not for individual transactions. The United States never even attempts to reconcile its argument with this definition. To do so would require either rewriting Article 2.1 or reversing the Appellate Body's interpretation of that provision.

12. The United States makes a related argument that, in review proceedings, the investigating authorities do not determine the "*existence*" of dumping.[16] This is an absurd proposition. 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

[9] 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.
[10] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96.
[11] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93.
[12] Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 94 and 99; Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Reviews*, paras. 109 and 126.
[13] United States' SWS, paras. 48, 50.
[14] United States' SWS, para. 50.
[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 109.
[16] United States' SWS, para. 67.

calculated for purposes of reviews must respect the definition of "dumping" in Article 2.1 just as much as margins calculated in investigations.

13. 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.[17]

14. 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*. The Appellate Body found that the imposition and collection of anti-dumping duties under Article 9 is separate and distinct from the determination of dumping margin.[18] 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.

15. The United States asserts 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.[19] However, the differences between the prospective and retrospective 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.[20]

16. In a PNV system, the calculation and imposition of variable anti-dumping *duties* 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 a comparison that respects the detailed procedural and

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[17] United States' SWS, paras. 50, 53 and 54.
[18] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123, 124.
[19] United States' SWS, paras. 54, 57.
[20] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

substantive rules set forth in Article 2. The United States is, therefore, incorrect in suggesting that "margins of dumping" are determined for individual transactions in a PNV system.

17. The United States also misleadingly attempts to portray its retrospective review as "operating" on an "entry-by-entry basis", like a PNV system.[21] This comparison is inapt because, 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.

18. 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. Thus in both prospective and retrospective systems, the rules in Article 2.1 define the term "dumping" and, therefore the "margin of dumping".

19. 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.

20. Japan turns 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*". 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, 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.[22] Moreover, under Article 3, an injury determination must address the overall impact of *all* dumped imports on the domestic industry

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[21] United States' SWS, para. 59.
[22] 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.

"as a whole".[23] Second, pursuant to Article 5.8, investigations must be terminated if the margin of dumping is *de minimis*. Indeed, even the United States accepts that, under Article 5.8, the margin is for the product as a whole.[24] 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".[25] 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*."

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

III. The Zeroing Procedures Violate the Obligation to Conduct a "Fair Comparison" Under Article 2.4 of the *Anti-Dumping Agreement*

22. 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.[26] Nonetheless, the United States adds that the scope of the first sentence of Article 2.4 of the *Agreement* is "exhaust[ed]" by the remaining sentences of that Article[27] that set out specific adjustments to ensure price comparability "*before* margin

[23] Article 4.1 of the *Anti-Dumping Agreement*.
[24] United States 20 July Answers, paras. 56 and 60.
[25] *See* Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 94 and 99.
[26] Japan July 20 Answers, para. 106; United States July 20 Answers, para. 70.
[27] United States July 20 Answers, para. 73.

calculations are undertaken."[28] This assertion is incorrect. 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."[29] However, the comparisons results to which the United States refers are the *intermediate* values that must still be aggregated to produce a single overall dumping margin. As a result, contrary to the United States' arguments, zeroing intervenes *before* the "comparison" in complete, not *after*. Thus, Article 2.4 prohibits the many possible ways in which unfairness could taint the comparison of normal value and export price.[30]

23. 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."[31] The third sentence of Article 2.4 requires the authorities to adjust for differences between export price and normal value 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".[32]

24. Contrary to the United States' argument[33], 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.

25. The United States also argues that the Appellate Body has only stated that zeroing is WTO-inconsistent in disputes involving original investigations.[34] This is incorrect. In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body examined a claim that the United

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[28] United States SWS, para. 30 (emphasis added).
[29] United States FWS, para. 52 (original emphasis).
[30] Japan July 20 Answers, para. 113.
[31] Appellate Body Report, *US – Softwood Lumber V*, para. 101.
[32] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.
[33] United States SWS, para. 33.
[34] US SWS, para. 61.

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.[35] The Appellate Body stated "whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. …[36]

26. The Appellate Body added that "the calculation of these margins must conform to the disciplines of Article 2.4".[37] 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."[38]

27. These findings have particular significance for this dispute because the Appellate Body noted that the "flawed" dumping margins in question had been calculated in administrative reviews, pursuant to Article 9.

28. The Panel must focus on the features of the measures at issue. 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 comparison results into an overall margin, the United States includes solely the positive comparison 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 consistently applies the determination resulting from the "partial" comparison of selected transactions to *all* export transactions on a product-wide basis. Indeed, 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.[39] 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*".[40]

IV. Japan's Interpretation of Article 2.4 Would Not Render the Second Sentence of Article 2.4.2 a Nullity

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[35] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 133.
[36] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135. Emphasis added.
[37] Appellate Body Report, *EC – Bed Linen*, para. 127.
[38] Appellate Body Report, *EC – Bed Linen*, para. 127.
[39] Appellate Body Report, *US – Softwood Lumber V*, para. 99.
[40] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135. Emphasis added.

29. The United States continues to argue that prohibiting zeroing would nullify the third method of comparison in Article 2.4.2. Japan has already demonstrated the fallacy of this argument.

30. 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. However, 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. 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.

31. 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.[41] 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.

32. 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.[42] .

33. The United States has also 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

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

comparisons will lead to the same results. However, 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. Japan has shown 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 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. So long as Members are not prohibited from using different bases 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. 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.[43]

[43] *Compare* Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended, *with* Section 777A(d)(2).