

BEFORE THE WORLD TRADE ORGANIZATION

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

WT/DS322

**REBUTTAL SUBMISSION
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TABLE OF CASES CITED

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<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>Korea - Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>U.S. – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>U.S. – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>U.S. – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>U.S. – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , adopted 19 June 1992, BISD 39S/206
<i>U.S. – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004

Short Title	Full Case Title and Citation
<i>U.S. –OCTG from Argentina</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004

I. INTRODUCTION

1. In its earlier submissions to the Panel, Japan has shown that the United States maintains standard zeroing procedures on which it relies in calculating margins of dumping in every anti-dumping proceeding. Japan has also shown that, in all but a handful of cases, the United States has implemented the zeroing procedures through the Standard Zeroing Line of computer programming. The United States does not deny that the zeroing procedures are an unvarying rule in its margin calculations. Indeed, underscoring that the zeroing procedures are an ever-present feature of its margin calculation procedures, the United States helpfully explains to the Panel the various ways in which it has implemented the procedures.¹ The normative nature of the zeroing procedures as well as the Standard Zeroing Line is further confirmed by the continued use of zeroing by the United States in the implementation of the recommendations and rulings of the DSB with respect to *U.S. – Softwood Lumber V.*² Nonetheless, despite its admissions, the United States seeks to escape WTO scrutiny of its zeroing procedures, arguing that they do not exist in U.S. domestic law. By elevating the form of U.S. domestic law over the substance of WTO obligations, the United States impermissibly seeks to undermine the multilateral disciplines of the WTO, as well as its dispute settlement system. The United States’ argument, if accepted, would frustrate the very objective of the rule-based multilateral trading system under the WTO that is “intended to protect not only existing trade but also the security and predictability needed to conduct future trade”³.

2. Japan has also shown that the United States’ zeroing procedures and the Standard Zeroing Line prevent the USDOC from calculating a margin of dumping for the “product” under investigation – what the Appellate Body calls the “product as a whole”.⁴ The text of Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 each state that “dumping”

¹ United States Answers of 20 July 2005 to the Panel’s Questions in Connection with the First Substantive Meeting (“U.S. July 20 Answers”), paras. 7-12.

² See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22636 (2 May 2005). Exhibit JPN-27. See also Original Investigation Computer Program: URAA Section 129 Proceeding on Softwood Lumber from Canada (Final Determination). Exhibit JPN – 24.

³ Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para 82.

⁴ 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.

determinations are made for the “product” that the investigating authorities choose to investigate. Consistent with the treaty text, there is no partial dumping determination for a sub-grouping of the product. By disregarding negative comparison results, the United States fails to meet these basic requirements.

3. Japan has further demonstrated that the zeroing procedures as well as the Standard Zeroing Line are inconsistent with the requirements of a “fair comparison” in Article 2.4 of the *Anti-Dumping Agreement*. The zeroing procedures and the Standard Zeroing Line interfere with the prices subject to comparison, inflating the amount of dumping and possibly even creating a margin of dumping that exists solely because of the manipulations of the USDOC. The United States does not contest the manifest unfairness of the zeroing procedures and, instead, asserts that the zeroing procedures as well as the Standard Zeroing Line are not subject to Article 2.4. This interpretation would leave the comparison of normal value and export price open to serious abuse, depriving the general obligation of fairness in Article 2.4 of its meaning.

4. Finally, the United States suggests that the standard zeroing procedures and the Standard Zeroing Line do not violate WTO law because the Assistant Secretary has the discretion to provide “offsets” for negative comparison results in any particular investigation.⁵ The United States’ arguments remain entirely in the realm of the hypothetical, ignoring the overwhelming uncontested evidence that the Assistant Secretary has never made any such decision. In any event, according to consistent GATT and WTO case-law “as such” measures are not rendered WTO-consistent simply because a Member’s executive might, one day, decide not to apply them. Such an easy route to circumvention of WTO obligations has appropriately been foreclosed. Instead, the WTO-consistency of general rules must be assessed in light of their substantive content.

5. In this dispute, the issue is whether, absent a change by the Assistant Secretary, the zeroing procedures as well as the Standard Zeroing Line, as they stand, are consistent with the United States’ obligations under the *WTO Agreement*, the *Anti-Dumping Agreement* and the GATT 1994. For the reasons stated fully in Japan’s first submission, they are not. Furthermore,

⁵ U.S. July 20 Answers, para. 11.

the application of these procedures and the Standard Zeroing Line in 14 anti-dumping proceedings is also inconsistent with the United States’ obligations under the *WTO Agreement*, the *Anti-Dumping Agreement* and the GATT 1994.

II. MODEL AND SIMPLE ZEROING PROCEDURES AND STANDARD ZEROING LINE ARE “AS SUCH” MEASURES

6. There does not appear to be any disagreement between the parties that rules, norms or standards with general and prospective application constitute “as such” measures for purposes of WTO dispute settlement.⁶ Moreover, when these measures are maintained in connection with the conduct of anti-dumping proceedings, they constitute “administrative procedures” under Article 18.4 of the *Anti-Dumping Agreement*.⁷

7. The standard model and simple zeroing procedures, as well as the Standard Zeroing Line, meet these conditions. Contrary to the United States’ suggestions, Japan has established that the zeroing procedures predetermine and systematize the conduct of margin calculations by the USDOC. The substance of these procedures is a rule that negative comparison results are systematically excluded from the aggregation of the total amount of dumping in calculating a margin of dumping. These procedures are – and have always been – applied by the USDOC generally and prospectively. Indeed, in explaining that the USDOC has not always used the Standard Zeroing Line, the United States underscores that it has always used the zeroing procedures themselves, irrespective of the way it has implemented them.⁸ The United States has not provided evidence of a single instance in which it did not use its zeroing procedures. The continued use of zeroing procedures in a T-to-T comparison by the USDOC in the implementation of the recommendation and ruling of the DSB in *U.S. – Softwood Lumber V*⁹ further confirms that the zeroing procedures are rules, norms or standards of general and prospective application.

⁶ U.S. July 20 Answers, para. 1; Japan’s Answers of 20 July 2005 to the Panel’s Questions After the First Substantive Meeting (“Japan’s July 20 Answers”), para. 7. See also Japan’s First Written Submission, paras. 47-64.

⁷ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 87; Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

⁸ U.S. July 20 Answers, paras. 7-12.

⁹ See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22636 (2 May 2005). Exhibit JPN-27. See also

8. In addition, the Standard Zeroing Line is an instrument setting forth rules or norms that are intended to have general and prospective application. It also forms a part of the USDOC’s an “administrative procedure”. This Line is comprised of specific computer-coded instructions applying generally and prospectively to the conduct and management of an aspect of the margin calculation. The fact that the United States continued to use the Standard Zeroing Line in the implementation of the recommendation and ruling of the DSB in *U.S. – Softwood Lumber V*¹⁰ further confirms that the Standard Zeroing Line is a rule, norm or standard with general and prospective application.

9. The United States appears to consider that the standard zeroing procedures and the Standard Zeroing Line cannot be measures if they are not manifested in U.S. domestic laws and regulations.¹¹ It bears repeating, however, that the Appellate Body has previously held that “the label given to a measure under the domestic law of each WTO Member” is irrelevant.¹² It is also irrelevant whether the measure is a “legal instrument” in the responding Member’s domestic law.¹³ The determination in WTO law is based on the “content and substance” of an act and not its “form and nomenclature”.¹⁴ Otherwise, the Appellate Body explained, the obligations in Article 18.4 would vary from Member to Member depending on each Member’s law and practice.¹⁵ The scope of WTO dispute settlement is, therefore, not confined to acts set forth in a Member’s laws and regulations but covers a “broad range of measures.”¹⁶

10. It is, in any event, surprising that the United States should advocate such a formalistic position on the scope of WTO dispute settlement. In *EC – Measures Affecting the Approval and*

Original Investigation Computer Program: URAA Section 129 Proceeding on Softwood Lumber from Canada (Final Determination), Exhibit JPN – 24.

¹⁰ See Original Investigation Computer Program: URAA Section 129 Proceeding on Softwood Lumber from Canada (Final Determination), Exhibit JPN – 24.

¹¹ U.S. July 20 Answers, para. 2.

¹² Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87. See, generally, Japan’s First Written Submission, para. 51.

¹³ Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

¹⁴ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87.

¹⁵ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87.

¹⁶ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 85.

Marketing of Biotech Products, the United States presents the contrary view, asserting that an “unwritten procedure” is a measure for purposes of WTO dispute settlement.¹⁷ It argues that:

If a WTO Member could avoid its SPS obligations by adopting a nontransparent, unwritten SPS measure that has a negative effect on trade, the objects and purposes of the SPS Agreement would not be fully realized.¹⁸

11. The same formalism would be equally misplaced in the context of dispute settlement under the *Anti-Dumping Agreement*. It would be all too easy for Members to evade their obligations under the *Anti-Dumping Agreement* – and other covered agreements – if unwritten rules and procedures escaped WTO scrutiny. To borrow from the Appellate Body’s language in *U.S. – Corrosion-Resistant Steel Sunset Review*, the scope of WTO obligations would vary from Member to Member depending, among others, on the degree of transparency adopted.¹⁹

12. Article X:1 of the GATT 1994 provides contextual guidance confirming that publication of a generally applicable rule is not decisive of its status in WTO law as a measure. That provision requires that “laws, regulations, judicial decisions and administrative rulings of general application” be published promptly. Article X:1, therefore, envisages that these measures might exist but not be published by the Member. The failure to publish a generally applicable rule does not, therefore, deprive the rule of its existence.

a) Standard Zeroing Procedures

13. There is overwhelming evidence that the standard zeroing procedures constitute administrative procedures, i.e. “generally applicable rules, norms or standards adopted” by the USDOC in connection with the calculation of the margin of dumping. The United States does not deny that the USDOC has used the zeroing procedures in every margin calculation undertaken in, at least, the past decade, demonstrating that zeroing is treated as a rule, norm or standard of general and prospective application in the calculation procedures. This is also

¹⁷ United States’ First Written Submission, *EC – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291), para. 82. Available online at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file720_5542.pdf.

¹⁸ United States’ First Written Submission, *EC – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291), para. 84.

confirmed by the evidence of the standard computer program, which includes the Standard Zeroing Line, the 26 case-specific computer programs submitted by Japan, and the testimony of Ms. Owenby. Moreover, even in the handful of instances when the Standard Zeroing Line was not applied, the standard zeroing procedures were *always* used. In particular, the United States admits that, in these instances, negative comparison results were excluded using other software or, even, manually.²⁰ In other words, although there may be a limited exception to the application of the Standard Zeroing Line, the evidence shows no exception, at all, with respect to the application of the standard zeroing procedures.

14. Furthermore, statements by the USDOC, the United States Department of Justice (“USDOJ”) and the United States domestic courts also confirm the existence and the substance of the standard zeroing procedures that Japan challenges as “as such” measures. In addition, these official U.S. government statements explain the operation of the zeroing procedures in a manner that is fully consistent with Japan’s description of these measures. Although not formulated in the precise terminology of the *Anti-Dumping Agreement*, these statements highlight that in “content and substance”,²¹ the United States maintains “procedures” whereby negative comparison results are treated as zero in calculating an overall margin of dumping for a product.

15. For example, in 2001, in the final determination of a periodic review of antifriction bearings – one of Japan’s as applied measures – the USDOC responded to objections regarding the use of zeroing procedures as follows:

*Department's Position: The Bed Linens Panel and Appellate Decisions concerned a dispute between the European Union and India. We have no WTO obligations to act. Therefore, we have continued the practice of using zero where the normal value does not exceed the export price or CEP in our calculations of overall margins for the final results.*²²

¹⁹ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87.

²⁰ U.S. July 20 Answers, para. 9.

²¹ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87.

²² Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom - May 1, 1999, through April 30, 2000, comment 38 (12 July 2001). Emphasis added. Exhibit JPN-16.D.

16. In 2002, in the final determination of a periodic review of stainless steel sheet and strip in coils from Japan, the USDOC responded to objections as follows:

Department’s Position: Sales that did not fall below normal value are included in the weighted-average margin calculation as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow sales that did not fall below normal value to cancel out dumping found on other sales.²³

17. In 2004, in the final determination of a periodic review of antifriction bearings – another of Japan’s as applied measures – the USDOC again rejected objections to the use of zeroing. The USDOC analysis is worth quoting at length:

Department’s Position: We have not changed our methodology with respect to the calculation of the weighted-average dumping margins for the final results. ...

We do not allow U.S. sales that were not priced below normal value, however, to offset dumping margins we find on other U.S. sales. ...

Taken together, the Department applies [the Act] by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds the export price or CEP, and dividing this amount by the value of all sales. ... At no stage in this process is the amount by which the export price or CEP exceeds normal value on sales that did not fall below normal value permitted to cancel the dumping margins found on other sales.

Contrary to the respondents’ assertion, both the [United States Court of Appeals for the Federal Circuit (“CAFC”)] and [the United States Court of International Trade (“CIT”)] have ruled that the Department’s margin-calculation methodology is a reasonable interpretation of the statute. In *Timken*, the CAFC ruled explicitly that the *Department’s “zeroing” practice*, e.g., not allowing U.S. sales not priced below normal value to offset margins found on other U.S. sales, is a reasonable interpretation of section 751(a)(2)(A) of the Act. *Timken*, 354 F.3d at 1345. The CIT, in *Corus Staal*, found that *Congress was aware of the Department’s methodology* when it enacted the URAA, and thus could have prohibited the *Department’s practice* of not allowing non-dumped imports to offset

²³ Issues and Decision Memorandum for the 1999-2000 Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Japan, comment 1 (4 February 2002). Emphasis added. Exhibit JPN-26

margins found on other U.S. sales if it so chose. Instead, Congress enacted a statute that, at least arguably, encourages this practice ...

In *Bowe Passat*, the CIT found that *the Department’s practice* of not allowing U.S. sales not priced below normal value to offset margins on other U.S. sales is reasonable because it combats masked dumping ...²⁴

18. In 2005, the USDOC was called upon to implement the recommendations and rulings regarding the use of zeroing in *U.S. – Softwood Lumber V*. The Canadian interested parties objected to the USDOC’s use of zeroing in a T-to-T comparison in its preliminary implementation determination under Section 129 of the Uruguay Round Agreements Act. In its final determination, the USDOC stated:

*Department’s position: We disagree with the Canadian Parties. Not granting an offset for non-dumped sales has consistently been an integral part of the Department’s weighted-average-to-weighted-average analysis.*²⁵

19. The USDOC’s descriptions of the zeroing procedures are all fully consistent with their having general and prospective application. In particular, the USDOC refers to the procedure in the present tense (“we do not allow”) that describes an on-going action. The long-standing character of the procedure is also evidenced by these statements. The USDOC observes, for example, that “Congress was aware” of the procedure when it adopted legislation, in 1994, implementing the Uruguay Round agreements and it chose to permit the USDOC to maintain the zeroing procedures. Finally, the USDOC relies on the fact that its procedures have been upheld by U.S. domestic courts.

20. The USDOC also provides a statement of the substantive content of the zeroing procedures that is the same as Japan’s description of the content of the procedures. The USDOC acknowledges that it aggregates “all individual dumping margins” (i.e. positive comparison

²⁴ Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom for the Period of Review May 1, 2002, through April 30, 2003, Comment 1 (at 12-14) (15 September 2004). Emphasis added. Exhibit JPN-21.D.

²⁵ Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22636, 22640 (2 May 2005). Emphasis added. Exhibit JPN-27.

results) and divides the result “by the value of all sales”. “At no stage” are negative comparison results (i.e. “export price or CEP exceeds normal value”) “permitted to cancel” positive results.

21. The USDOJ has made similar statements to U.S. domestic courts in defending the USDOC’s use of zeroing. For example, in 2003, in *SNR Roulements v. United States*, the USDOJ asserted to the CIT that:

*The agency [i.e. USDOC] has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the URAA.*²⁶

22. Similarly, also in 2003, in *Timken Co. v. United States*, the USDOJ noted to the CAFC that:

[i]n the present administrative review, *Commerce utilized its long-standing methodology to calculate Koyo's company-specific weighted-average dumping margins.*

...

[h]ow Commerce calculated Koyo's weighted-average dumping margin is shown in the computer program by which Commerce performed the margin calculations. *See* Koyo Br. at 8, note 5. Therefore, in the numerator of the calculation, Commerce aggregated the dumping margins for all the sales where NV exceeded CEP. Commerce did not reduce or offset this amount for any transactions where NV did not exceed CEP. In the denominator of the calculation, Commerce aggregated Koyo's total U.S. sales (regardless of whether the CEP was greater or less than the NV) to derive Koyo's final antidumping rate.²⁷

23. In September 2004, in *Koyo Seiko Co. v. United States*, the USDOJ observed that:

²⁶ *SNR Roulements v. United States* (Consol, Ct. No. 01-00686), Memorandum of the United States in Opposition to the Plaintiff's Motions for Judgment Upon the Agency Record, at 56 (23 January 2003). Emphasis added. Exhibit JPN-28. This litigation involved an appeal of the final determination of the 1999/2000 periodic review of ball bearings, an as applied measure in this dispute.

²⁷ *Timken Co. v. United States* (CAFC Nos. 03-1098, -1238), Brief for Defendant-Appellee United States, at 4 and 5-6 (19 May 2003). Emphasis added. Exhibit JPN-29. This litigation involved an appeal of the final determination of the 1998/1999 periodic review of tapered roller bearings, an as applied measure in this dispute.

Indeed, *the zeroing practice, which has been followed for at least 20 years, has been repeatedly sustained as reasonable by the Court of International Trade ...*²⁸

24. On 15 July 2005, just days before the United States denied the existence of USDOC’s zeroing procedures in its July 20 Answers, the USDOJ formulated the issue for review by the CIT in *NSK Ltd. v. United States* as follows:

Whether *Commerce’s practice, which has been sustained by the court of appeals, of assigning a margin value of zero to negative-margin transactions in the calculation of weighted-average dumping margin, referred to as “zeroing”* is supported by substantial evidence and is otherwise in accordance with law.²⁹

25. In its brief in *NSK Ltd. v. United States*, the USDOJ noted that the CAFC “refused to overturn *Commerce’s zeroing practice* based on any ruling by the WTO or other international body” until the United States Trade Representative has determined to implement the WTO ruling.³⁰ It added that:

*Commerce’s offset methodology predated the passage of the latest major amendment of the antidumping law, the URAA, and nothing in the current statute specifically forbids Commerce’s zeroing practice.*³¹

26. The USDOJ also described the zeroing procedures to the CIT in language indicative of a general rule:

... when Commerce aggregates the dumping margins pursuant to [the Act], it considers only those export transactions where there is dumping, that is where the normal value exceeds the export or constructed export price.³²

²⁸ *Koyo Seiko Co. v. United States* (S.Ct. No. 04-87), Brief for the United States in Opposition to Koyo Seiko’s petition for writ of certiorari, at 17 (September 2004). Emphasis added. Exhibit JPN-30. This litigation involved an appeal of the final determination of the 1998/1999 periodic review of tapered roller bearings, an as applied measure in this dispute.

²⁹ *NSK Ltd. v. United States* (Consol. Ct. No. 04-00519), Defendant’s Response to Plaintiffs’ Motions for Judgment Upon the Agency Record, at 2 (15 July 2005). Emphasis added. Exhibit JPN-31. This litigation involved an appeal of the final determination of the 2002/2003 periodic review of antifriction bearings, an as applied measure in this dispute.

³⁰ *NSK Ltd. v. United States* (Consol. Ct. No. 04-00519), Defendant’s Response to Plaintiffs’ Motions for Judgment Upon the Agency Record, at 11 (15 July 2005). Emphasis added. Exhibit JPN-31.

³¹ *NSK Ltd. v. United States* (Consol. Ct. No. 04-00519), Defendant’s Response to Plaintiffs’ Motions for Judgment Upon the Agency Record, at 13 (15 July 2005). Emphasis added. Exhibit JPN-31.

27. In each of these statements, like the passages quoted from the USDOC, the USDOJ describes the zeroing procedures in terms redolent of a general rule that has been applied to margin calculations for 20 years.

28. Furthermore, the USDOJ confirms the relationship between the computer program containing the Standard Zeroing Lines and the zeroing procedures that Japan has described.³³ In *Timken Co. v. United States*, it states the way that the dumping margin is calculated “is shown in the computer program” and then it immediately explains the substance of the zeroing procedures, noting that the USDOC “did not reduce” the dumping amount by the negative comparison results.³⁴

29. Finally, echoing these statements from the USDOC and the USDOJ, the CIT ruled, in 2003, in *PAM S.p.A. v. U.S. Department of Commerce* that:

*Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.*³⁵

30. In the same year, in a passage that the USDOC has subsequently relied on, the CIT also held in *Corus Staal B.V. v. U.S. Department of Commerce*:

After all, zeroing is not new. Congress was presumably aware of the practice when it enacted the URAA. ... Congress could have prohibited zeroing if it so chose. Instead, Congress enacted a statute that, at least, arguably encourages zeroing³⁶

³² *NSK Ltd. v. United States* (Consol. Ct. No. 04-00519), Defendant’s Response to Plaintiffs’ Motions for Judgment Upon the Agency Record, at 13 (15 July 2005). Emphasis added. Exhibit JPN-31. Japan recalls that, in U.S. domestic law, the results of multiple comparisons are margins of dumping. The Appellate Body ruled that, in WTO law, the results of multiple comparisons are *not* margins of dumping (*see, for example, U.S. – Softwood Lumber V*, paras. 97 - 98).

³³ See, e.g., Japan’s July 20 Answers, para. 13.

³⁴ *Timken Co. v. United States* (CAFC Nos. 03-1098, -1238), Brief for Defendant-Appellee United States, at 5-6 (19 May 2003). Emphasis added. Exhibit JPN-29.

³⁵ *PAM, S.p.A. v. U.S. Department of Commerce*, 265 F. Supp. 2d 1362, 1370 (2003). Emphasis added. Exhibit JPN-32. This litigation involved an appeal of the final determination of the 1999 periodic review of pasta from Italy.

³⁶ *Corus Staal BV v. U.S. Department of Commerce*, 259 F. Supp. 2d 1253, 1264-65 (2003). Emphasis added. Exhibit JPN-33. This litigation involved an appeal of the final determination of the investigation of certain hot-rolled carbon steel flat products from the Netherlands.

31. These passages from the United States government and from the U.S. domestic courts contain unequivocal statements attesting to the long-standing existence and the content of the zeroing procedures as a general and prospective rule in margin calculations.

32. There is, therefore, overwhelming and uncontested evidence of record that the United States maintains standard zeroing procedures that are measures for purposes of WTO dispute settlement and that constitute “administrative procedures” within the meaning of Article 18.4 of the *Anti-Dumping Agreement*.

b) Standard Zeroing Line

33. Japan has also challenged the Standard Zeroing Line as an “as such” measure in this case. Japan recalls that measures can be challenged as such, under the DSU and the *Anti-Dumping Agreement*, when they involve rules, norms or standards of general and prospective application.³⁷ The Standard Zeroing Line is an instrument setting forth rules or norms that are intended to have general and prospective application³⁸. Also, according to its ordinary meaning, the term “administrative procedures” includes “a set of [computer] instructions for performing a specific task”. The United States acknowledges that the computer programs at issue and the specific lines of computer code in them are “a set of computer instructions”.³⁹ The Standard Zeroing Line is comprised of computer-coded instructions that expressly direct the execution of the standard zeroing procedures and, therefore, forms a part of the USDOC’s “administrative procedures” for calculating margins of dumping.

34. The United States’ response appears to be that the USDOC has not applied the Standard Zeroing Line on a universal basis. In a small, but unspecified, number of cases, the USDOC has not used the Standard Zeroing Line because it did not use SAS computer software. The United States admits that, in each one of these cases, the USDOC applied its standard zeroing procedures in some alternative way. These other examples of zeroing, therefore, provide supporting evidence of the universality of the USDOC’s standard zeroing procedures.

³⁷ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 87; Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

³⁸ Appellate Body Report, *U.S. – OCTG from Argentina*, para.187

³⁹ U.S. First Written Submission, para. 36.

35. Furthermore, the fact that the Standard Zeroing Line is not used in every investigation does not deprive these computer-coded instructions of their quality as a rule, norm or standard of general application. This is borne out by the USDOC’s own Manual, which explains that “standard programs” are maintained so that antidumping margins are calculated in a manner consistent with the “current AD calculation methodology.”⁴⁰ The Manual states that “calculation consistency occurs when every program uses the same standard calculation methodology”.⁴¹ The Manual demonstrates, therefore, that the Standard Zeroing Line constitutes a part of a standard methodology, or procedure, for calculating margins. In short, the USDOC’s own Manual evinces that the Standard Zeroing Line itself is a rule, norm or standard, and treated by the USDOC as such for the calculation of margins of dumping to be applied on a general and prospective basis.

36. A rule may, by definition, be general in character although not necessarily applied in all circumstances. It is very common for authorities to adopt generally applicable procedures that do not, however, apply universally. Indeed, in law, there are very few immutable rules that do not admit of exception. The existence of an exception does not, however, deprive a rule of its general application. For example, in *EC – Asbestos*, the measure at issue was a general prohibition on the use of asbestos found in Article 1 of a French Decree.⁴² Notwithstanding the generality of the prohibition, Article 2 of the Decree set forth potentially broad circumstances in which the general prohibition did not apply.⁴³ From the perspective of WTO dispute settlement, the prohibition was an “as such” measure even though it applied only generally, and not in every situation.

37. The uncontested evidence from the Manual, together with Ms. Owenby’s testimony, and the case-specific programs submitted by Japan show that the Standard Zeroing Line is generally applicable in anti-dumping proceedings and that it has, in fact, been generally applied. The fact that the Standard Zeroing Line was not used in a small number of cases does not undermine its

⁴⁰ Exhibit JPN-5.C, page 8.

⁴¹ Exhibit JPN-5.C, page 8.

⁴² See Appellate Body Report, *EC – Asbestos*, para. 2.

⁴³ See Appellate Body Report, *EC – Asbestos*, para. 2. The prohibition on the use of asbestos was not applicable in any circumstances where there was no alternative fibre available to perform an equivalent function.

qualities as the instructive rule, norm or standard of general application for performing the zeroing procedures.

38. In its July 20 Answers, the United States also argues that the standard computer program cannot be a measure for the reasons given in its First Written Submission.⁴⁴ Those reasons were, first, that Japan had “not even identified a ‘standard computer program’ and “there is no single computer program to be challenged as such for every program is tailored to each case”⁴⁵; and, second, that Japan had not shown that the standard programs in their entirety are generally applicable. Contrary to the United States’ assertion, Japan fully responded in its Opening Statement at the First Substantive Meeting with the Parties (“Opening Statement”)⁴⁶ that, first, Japan had identified and submitted two programs that the USDOC itself styles as “standard programs”. Japan also demonstrated that the Standard Zeroing Line features in the two standard programs and is also included in a series of case-specific programs. Second, where the contested measure constitutes a small part of a large instrument, it is unnecessary to look beyond the measure to the rest of the instrument. Third, as explained in this submission, the Standard Zeroing Line is a rule, norm or standard of general and prospective application.⁴⁷

39. Japan has, therefore, demonstrated that the Standard Zeroing Line is an instrument setting forth rules, norms or standards that have general and prospective application. The Standard Zeroing Line also form a part of the USDOC’s “administrative procedures” within the meaning of Article 18.4 of the *Anti-Dumping Agreement* and may be challenged as such in WTO dispute settlement.

III. MAINTAINING ZEROING PROCEDURES AND STANDARD ZEROING LINE IS INCONSISTENT WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994

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

40. Japan’s first submission set forth, in detail, its arguments that margins of dumping must be determined for the “product” under investigation as a whole. These arguments were

⁴⁴ U.S. July 20 Answers, para. 2.

⁴⁵ U.S. First Written Submission, para. 32.

⁴⁶ Japan’s Opening Statement, paras. 8-12

⁴⁷ See also Japan’s Opening Statement, paras. 8-12.

summarized in Japan’s July 20 Answers.⁴⁸ Japan will not repeat these arguments in this submission.

41. Japan observed that the word “dumping” is defined in Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. The treaty text in Article 2.1 refers to the dumping of “a product” and, in Article VI:1, it refers to the dumping of “a product” and “products”. According to the Appellate Body, “it is clear from the text of these [two] provisions that dumping is defined in relation to a *product as a whole* as defined by the investigating authority.”⁴⁹ The Appellate Body further stated that “the term ‘margin of dumping’ refers to the magnitude of dumping.” That is, the ordinary meaning of the word “margin” refers to a numerical measurement of the amount or extent of “dumping”. In consequence, 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.”⁵⁰

42. The Appellate Body held that this interpretation is confirmed by other provisions of the *Anti-Dumping Agreement*.⁵¹ Article 6.10 expressly states that margins of dumping shall be calculated for the “product under investigation”. Additionally, Article 9.2 of the *Agreement*, as well as Article VI:2 of the GATT 1994, provide that anti-dumping duties are imposed in respect of a “product”. Duties are, therefore, applied to a product, as a whole, in all its forms – and not to a sub-grouping of a product. The Appellate Body concluded its reasoning as follows:

Our view that “dumping” and “margins of dumping” can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. 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-*

⁴⁸ Japan’s July 20 Answers, paras. 85 *et seq.*

⁴⁹ 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.

⁵⁰ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96.

⁵¹ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 94.

Dumping Agreement, an antidumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole ...⁵²

43. This is a clear statement that the product scope of an anti-dumping action remains constant from the investigation through to the imposition of duties. The “product” subject to dumping and injury determinations is the same as the product subject to duties, and it always refers to product as a whole. 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 Article 9 for purposes of periodic and new shipper reviews. Authorities must always calculate a margin for the “product” under investigation as a whole. Equally, the Appellate Body’s ruling highlights that, in reviews under Articles 11.2 and 11.3, margins relied upon must be calculated for the “product” as a whole.

44. Ignoring the Appellate Body’s interpretation of Articles 2.1, 2.4.2, 6.10 and 9.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the United States disingenuously counters that neither “GATT 1994 [n]or the AD Agreement create an obligation to calculate a margin of dumping for the product as a whole”.⁵³ This is plainly wrong and, in substance, invites the Panel to reverse panel and Appellate Body reports adopted by the DSB. The United States’ argument also seeks to destroy the consistency between the product scope of dumping determinations and the resulting anti-dumping duties. On the United States’ view, dumping determinations deliberately confined to a sub-grouping of a product – even a single transaction⁵⁴ – could justify the imposition of duties on the product as a whole.

45. The United States argues that margins of dumping under Article 2.4.2 and Article VI may be transaction-specific because they involve a comparison of prices which “are established and exist on a transaction-specific basis”.⁵⁵ This is an absurd argument. The fact that prices can be determined in the marketplace on a transaction-specific basis does not mean that the words “product”, “dumping” and “margin of dumping” have a transaction-specific ordinary meaning under the *Vienna Convention*. As the United States knows, investigating authorities, including

⁵² Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.

⁵³ U.S. July 20 Answers, para. 60.

⁵⁴ U.S. July 20 Answers, paras. 47 *et seq.* and 63.

the USDOC routinely aggregate prices for transactions into prices for a product. As a result, there is no necessity to determine margins for individual transactions because prices can be transaction-specific.

46. The United States’ argument also lacks grounding in the text. Article VI:2 defines the margin of dumping as the price difference that must be “determined in accordance with the provisions of paragraph 1”. Article VI:1 provides that [f]or the purpose of this Article, a *product* is to be considered as being [dumped], if the price of the *product* ... is less than the comparable price ... for the like *product* ...” (emphasis added) Just as the term “dumping” is defined in relation to the product as a whole, this Article explicitly states that the relevant price is for the “product”, not a subpart of the product or a single transaction. Therefore, the “price difference” referred to in paragraph 2 is for the “product” under investigation as a whole.

47. The United States’ argument on *Ad Article VI:1* suffers from the same misconception. *Ad Article VI:1* does not indicate that margins of dumping are calculated for sub-groupings of a product; rather, it addresses the *price* that may be used for certain export transactions in calculating the margin of dumping. Specifically, the provision addresses the situation where the import price for certain export transactions is unreliable because of an association between the exporter and the importer; for these transactions, the authorities are permitted to use downstream resale prices, in the importing Member, in calculating the export price. 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”⁵⁶.

48. The rule in *Ad Article VI:1* on sales by associated houses is now reflected in Article 2.3 of the *Anti-Dumping Agreement* and has been incorporated into the *Anti-Dumping Agreement* without disturbing the requirements in Article 2.1 of that *Agreement* and in Article VI of the

⁵⁵ U.S. July 20 Answers, paras 46, 47 and 52.

⁵⁶ The Appellate Body found that “[i]n light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to ‘read *all* applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.’” (emphasis original) Appellate Body Report, *Korea – Dairy*, para. 81.

GATT 1994 that a margin of dumping must be determined for the product under investigation as a whole.⁵⁷

49. Although the United States attempts to ignore the Appellate Body’s rulings on the meaning of the word “product”, in its arguments on Article 5.8 of the *Anti-Dumping Agreement* it is forced, nonetheless, to acknowledge that its interpretation is untenable.⁵⁸ Article 5.8 provides that the authorities must terminate an investigation if “the margin of dumping is *de minimis*”. If the United States were correct that a margin is established for each transaction, the authorities would have to terminate an investigation if any of the multiple margins were *de minimis*. To avoid this consequence, the United States proposes that, for purposes of Article 5.8 alone, the comparison results must be aggregated to produce a margin of dumping for the product as a whole:

Article 5.8 provides for *an obligation to aggregate the results of multiple comparisons* for the specific purpose of determining whether the margin of dumping is *de minimis*. Because the implication of such a finding is that the investigating authority must terminate the antidumping investigation and because investigations occur with respect to exporters’ and producers’ sales of the product and not simply with respect to individual transaction prices, *the United States believes that Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer.*⁵⁹

50. The United States’ words are strikingly reminiscent of the language used by the Appellate Body to condemn zeroing in previous cases: “it is only on the basis of aggregating *all* these ‘intermediate values’ that an investigating authority can establish margins of dumping for the product under investigation as a whole.”⁶⁰

51. The United States argues that this “aggregation” obligation applies only to Article 5.8. However, nothing in the text of the *Agreement* justifies such an obligation in Article 5.8 but not

⁵⁷ 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.

⁵⁸ See, for example, U.S. July 20 Answers, para. 60.

⁵⁹ U.S. July 20 Answers, para. 56. Emphasis added.

⁶⁰ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 97.

in Articles 2, 9 and 11.⁶¹ Article 5.8 sets out a procedural rule requiring that the authorities terminate investigations when certain conditions are met. It does not, however, set forth any substantive disciplines on the way to calculate margins of dumping nor provide for a separate procedure exclusively to determine that the margin of dumping is *de minimis*. Article 2 is the sole provision setting forth “agreed disciplines” for calculating dumping margins “for the purpose of” the *Agreement*.⁶² The duty to aggregate comparison results stems from the word “product” in Article 2, not from Article 5.8, and, therefore, applies throughout the *Agreement*.

52. In any event, the United States’ proffered justification for the allegedly unique duty in Article 5.8 applies with equal – if not greater – force to other aspects of anti-dumping proceedings. For the United States, there is a two-fold justification. Comparison results must be aggregated because the “implication” of a *de minimis* margin is termination of the “investigation” and “because investigations occur with respect to exporters’ and producers’ sales of the product and not simply with respect to individual transaction prices”.⁶³

53. However, it is difficult to see any distinction with regard to these justifications between a *de minimis* margin and a non-*de minimis* margin. By determining a greater than *de minimis* margin, the authorities establish that dumping exists. As a result, they continue the investigation and, ultimately, may impose duties. These steps also all “occur with respect to exporters’ and producer’s sales of the product and not simply with respect to individual transaction[s]”.

54. There is, therefore, no rational basis for conceding that termination of an investigation under Article 5.8 requires a margin of dumping to be calculated for the product as a whole but that no such requirement is imposed by Articles 2, 9 and 11. To the contrary, the Appellate Body concluded that there must be “consistent treatment” of the “product” as a whole, throughout an anti-dumping action, from initiation to the imposition of duties.⁶⁴

⁶¹ One textual argument seemingly advanced by the United States is that Article 2.4.2 refers to “margins of dumping” in the plural, whereas Article 5.8 uses the singular. See U.S. July 20 Answers, para. 52. However, the Appellate Body expressly rejected this argument in *U.S. – Softwood Lumber V*. At paragraph 115, it held that the term “‘margins of dumping’ is in the plural because a single investigation may involve establishing margins of dumping for a number of exporters or producers, and may relate to more than one country.”

⁶² Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 127.

⁶³ U.S. July 20 Answers, para. 56.

⁶⁴ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.

55. For these reasons, the Panel should find that Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 require that dumping and margins of dumping be determined for the “product” under investigation, as a whole. The standard zeroing procedures and the Standard Zeroing Line do not meet these requirements because negative comparison results are systematically disregarded by the USDOC. The overall margin determined for the product is, therefore, based on a partial determination for a sub-grouping of the product.

B. *A Margin Must Be Based on a Fair Comparison of Export Price and Normal Value*

56. Japan’s first written submission set forth, in detail, its arguments that the United States zeroing procedures are inconsistent with the requirements of a fair comparison under Article 2.4 of the *Anti-Dumping Agreement*. These arguments were summarized in Japan’s July 20 Answers.⁶⁵

57. It appears that Japan and the United States, in fact, agree that Article 2.4 establishes a “general obligation” on investigating authorities to conduct a fair comparison of export price and normal value.⁶⁶ This is not surprising as the Appellate Body has already reached the same conclusion.⁶⁷ Nonetheless, overlooking the significance of that ruling, the United States adds that the content of the general requirements of fairness are “exhaust[ed]” by the second through fifth sentences of Article 2.4, and asserts that those requirements cannot be “divorce[d]” from the adjustments required to establish price comparability.⁶⁸

58. There are two levels of response to this assertion. First, as an interpretive matter, it is incorrect. As Japan stated in its July 20 Answers, Article 2.4 prohibits the myriad possibilities for unfairness that could taint the comparison of normal value and export price.⁶⁹ In its ordinary meaning, the word “comparison”, in Article 2.4, refers to the process or action of discerning the difference between normal value and export price.⁷⁰ The generality of the obligation in the first sentence of Article 2.4 applies, therefore, to the entire comparison process and not just to price

⁶⁵ Japan’s July 20 Answers, paras. 106 *et seq.*

⁶⁶ Japan’s July 20 Answers, para. 106; U.S. July 20 Answers, para. 70.

⁶⁷ Appellate Body Report, *EC – Bed Linen*, para. 59.

⁶⁸ U.S. July 20 Answers, para. 73.

⁶⁹ Japan’s July 20 Answers, para. 113.

adjustments. The way in which the authorities elect to disaggregate and reaggregate the “product” for purposes of the comparison is an integral part of the process of comparing prices for the product.⁷¹ The authorities cannot, therefore, structure the comparison in a manner that necessarily inflates the margin of dumping and may even generate a margin where there would otherwise be none.

59. Further, confining the first sentence of Article 2.4 to a duty to make price adjustments would render that sentence redundant because the duty to make adjustments is already set forth in the remainder of Article 2.4. The first sentence of the provision would, therefore, add nothing to the rest.

60. The United States’ interpretation would also nullify the disciplines in Articles 2.2, 2.3 and 6.6 of the *Agreement* on calculation and verification of normal value and export price. After carefully calculating and confirming these values, authorities would be permitted to structure the comparison process in such a way that, irrespective of the normal value and export price, dumping is found. This is an absurd result that drafters avoided by introducing a general fairness requirement.

61. Second, even if the United States is correct (*quod non*) that the requirements of fairness in Article 2.4 cannot be “divorce[d]” from the duty to make price adjustments, Japan prevails.⁷² Japan recalls that the zeroing procedures, in substance, involve an adjustment to 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.”⁷³ Thus, the zeroing procedures involve an adjustment to the prices being compared.

62. Under the third sentence of Article 2.4, the authorities are required to adjust for differences between export price and normal value to ensure price comparability. The provision also 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, if

⁷⁰ Japan’s First Written Submission, para. 82.

⁷¹ See Japan’s Opening Statement, paras. 37 - 38.

⁷² U.S. July 20 Answers, para. 73.

⁷³ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 101.

there are no differences affecting price comparability that compel an adjustment, the authorities are not permitted to interfere with prices because the result of such interference is that the values to be compared cease to be the producer’s or exporter’s own prices.

63. Taking the contrary position, the United States appears to believe 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 the Article to require the authorities to give with one hand to ensure fairness that which they can simply remove with the other to deny it. Nothing in the text supports so peculiar an interpretation.

64. As a result, the fair comparison requirement in Article 2.4 does not permit the authorities to interfere with normal value and/or export price to arbitrarily produce desired results. Such adjustments are not made to ensure price comparability and, instead, impermissibly distort prices. Far from “divorce”, Japan’s interpretation “marries” the general obligation in Article 2.4 with the specific requirements in the remaining sentences. In particular, the general obligation is interpreted to preclude, among other things, interference by the authorities with prices in a manner that undermines adjustments made to ensure price comparability.

65. In conclusion, therefore, the standard zeroing procedures and the Standard Zeroing Line prevent the USDOC from conducting a fair comparison of normal value and export price because they interfere with the prices being compared; necessarily inflate the margin of dumping; and, make a finding of dumping more likely.

C. *Prohibiting Zeroing Does Not Reduce to a Nullity the Third Method of Comparison in Article 2.4.2 of the Anti-Dumping Agreement*

66. A central pillar of the United States’ defence is its argument that prohibiting zeroing would render the third method of comparison in Article 2.4.2 a nullity. In its Opening Statement and in answers to the Panel’s questions, Japan has demonstrated the fallacy of this argument.⁷⁴ Japan will not rehearse the arguments it has already made. The second sentence of Article 2.4.2 contemplates a different comparison from the symmetrical methods that is focused on the export

⁷⁴ Japan’s Opening Statement, paras. 45-58; Japan’s July 20 Answers, paras. 43-53, 56-63 and 66-83.

transactions making up the pricing pattern that justifies recourse to this method. Japan has also provided numerical examples that demonstrate that the second sentence does not necessarily yield the same results as the symmetrical methods of comparison, whether Japan’s interpretation of that sentence applies or not.⁷⁵

67. In United States’ answers to the Panel’s questions, it asserts that Japan’s interpretation of the second sentence has no textual support. In fact, Japan has provided a careful textual analysis of the words of the provision. Without wishing to repeat that analysis, Japan relies, for example, on the ordinary meaning of the following words and phrases: “pattern of export prices”; “differ significantly”; “different purchasers, regions or time periods”; and “why such differences cannot be taken into account” under the symmetrical methods. In addition, the absence of the word “all” in the second sentence provides additional textual grounds for Japan’s interpretation.

68. It is the United States that fails to provide any textual basis for its interpretation. It asserts baldly that the second sentence permits a comparison “using the same universe of export transactions as the other two methodologies”.⁷⁶ It adds that the asymmetrical comparison “by its very nature” addresses targeted dumping.⁷⁷ Beyond this, there is nothing to indicate what the United States considers the “nature” of the third method to be nor how it believes that this method addresses pricing patterns based on purchasers, regions or time periods.

69. A comparison that uses the entire universe of export transactions *cannot*, “by its very nature”, address pricing patterns, or the possibility of targeted dumping, confined to a certain group of transactions. A comparison that relies on all export transactions necessarily addresses the prices, and any positive comparison results, in all these transactions. The use of zeroing does not alter this fact. For example, an examination of prices across the United States may disclose a pricing pattern among purchasers in Texas. The United States would investigate the possibility of targeted dumping within this pricing pattern in Texas by examining transaction prices in Maine, Oregon, Alaska and, indeed, everywhere else in the United States. By necessity, the resulting determination would have nothing to do with the pricing pattern in Texas. Rather, any

⁷⁵ Japan’s July 20 Answers, paras. 69-72 and 78-82.

⁷⁶ U.S. July 20 Answers, para. 25.

⁷⁷ U.S. July 20 Answers, para. 25.

dumping determination would be based on positive comparison results from export transactions scattered through the entire universe of transactions. There is no basis in the text of the second sentence of Article 2.4.2 for a comparison that is disconnected in this way from the pricing pattern.

70. Thus, contrary to the United States’ arguments, the express language of the second sentence of Article 2.4.2 mandates a comparison based on a subset of transactions. That express language identifies the subset in question: those transactions that constitute the pricing “pattern” among “purchasers, regions or time periods”. A targeted selection of transactions is permitted to take into account the price differences within this pattern. That targeted selection addresses the possibility that the pattern may be the result of targeted dumping. When the pattern has been identified, and the selection made, the authorities must conduct a fair comparison of all transactions within the pattern. As the Appellate Body held in *U.S. – Softwood Lumber V*, the express language of Article 2.4.2 does not permit authorities to disregard the results of the pricing comparisons undertaken.⁷⁸

71. Accordingly, the United States’ argument that a prohibition on zeroing would nullify the third method of comparison is without merit.

D. *The Standard Zeroing Procedures and the Standard Zeroing Line Mandate Violations of WTO Obligations*

72. The United States suggests that Japan has not demonstrated that the zeroing procedures mandate a violation of the United States’ WTO obligations.⁷⁹ This is incorrect. Although Japan firmly believes that a measure does not have to be mandatory to be inconsistent as such with WTO law, Japan has submitted overwhelming and uncontested evidence that the standard zeroing procedures and the Standard Zeroing Line mandate a violation of WTO obligations.

73. In its Opening Statement and in its July 20 Answers, Japan noted that the Appellate Body has not yet opined definitively on the relevance of the mandatory/discretionary doctrine.⁸⁰ Japan

⁷⁸ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 100.

⁷⁹ U.S. July 20 Answers, paras. 13-16.

⁸⁰ Japan’s Opening Statement, paras. 14-18; Japan’s July 20 Answers, para. 28-39. Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 93.

also explained that the mandatory/discretionary distinction is, at most, an “analytical tool” to assist in deciding if a measure is WTO-consistent but that this tool must not be applied “mechanistically”.⁸¹ In *U.S. – Corrosion-Resistant Steel Sunset Review*, *U.S. – Carbon Steel* and *U.S. – 1916 Act*, the Appellate Body found that the mandatory/discretionary distinction must be analyzed in the light of the burden of proof and, therefore, of the evidence as a whole.⁸² Japan will not repeat its arguments from those submissions.

74. In short, the zeroing procedures and the Standard Zeroing Line preclude the United States from complying with its WTO obligations. As outlined above, the zeroing procedures and the Standard Zeroing Line prevent the United States from calculating a margin of dumping for the “product” as a whole on the basis of a “fair comparison”, as required by the *Anti-Dumping Agreement* and the GATT 1994. The evidence of the consistent application of the measures confirms this and also demonstrates that the USDOC treats the zeroing procedures as well as the Standard Zeroing Line as a binding part of its margin calculation procedures.

75. In its July 20 Answers, the United States argues that a measure does not mandate a violation of WTO law if an executive authority retains discretion to avoid a breach of WTO.⁸³ It goes on to argue that the Assistant Secretary has the discretion to decide whether to provide “offsets” in any particular investigation.⁸⁴ In other words, according to the United States, the zeroing procedures are as such WTO-consistent because the Assistant Secretary could decide not to apply them in an investigation or could change them.

76. The United States is incorrect that executive discretion not to apply or to change a measure necessarily renders the measure WTO-consistent. In *U.S. – 1916 Act*, the measure at

⁸¹ Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 93.

⁸² Japan’s July 20 Answers, paras. 28 – 39.

⁸³ U.S. July 20 Answers, para. 3. The United States cited a statement by the Appellate Body in *U.S. – Section 211* (para. 259) to support its position that the mere existence of discretion to avoid a WTO violation renders a measure WTO-consistent. However, contrary to the United States’ assertion, the Appellate Body framed the issue as a matter of a *presumption* of compliance that can be rebutted by e.g. evidence relating to the consistent application of the measure. . . Japan emphasizes that there is no room for such a presumption in this case because the standard zeroing procedures and the Standard Zeroing Line are measures that, in terms of their substantive content, mandate WTO-inconsistent action as a rule. . . See para. 78 below. It is also worth noting that, in *U.S. – Section 211*, the Appellate Body rejected the United States’ argument that “discretionary regulations, issued under a separate law, cured the discriminatory aspects of the [mandatory] measure at issue.” See Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, footnote 94.

issue permitted the USDOJ to initiate criminal enforcement proceedings on a discretionary basis.⁸⁵ The United States argued that the criminal provisions of the measure were not, as such, WTO-inconsistent because violations could be avoided through the USDOJ’s discretion not to enforce these provisions.⁸⁶ The Appellate Body disagreed, finding that the criminal provisions of the measure were WTO-inconsistent, even though they might not be applied by the USDOJ.⁸⁷

77. In reaching this conclusion, the Appellate Body cited approvingly the adopted GATT panel report in *U.S. – Malt Beverages*. In that dispute, an executive authority also enjoyed discretion not to apply the contested measures. Indeed, in contrast to the circumstances of this dispute, one of the measures was not applied at all and the other only “nominally” so.⁸⁸ Despite this, the panel found that the executive discretion not to apply the measures did not render them GATT-consistent.⁸⁹

78. There is, therefore, a distinction between two types of measure: *first*, a measure that, in terms of its substantive content, mandates WTO-inconsistent action as a rule, with the executive enjoying discretion not to apply the measure in any individual case; and, *second*, a measure that, by its own terms, does not require (but permits) the executive to take WTO-inconsistent action. The substantive content of the first measure is WTO-inconsistent, whereas the substantive content of the second is not defined in the absence of executive action. According to *U.S. – 1916 Act* and *U.S. – Malt Beverages*, the first measure is WTO-inconsistent, despite the possibility that the executive may or may not apply the measure in certain cases.

79. The distinctions established in *U.S. – 1916 Act* and *U.S. – Malt Beverages* serve a valuable anti-circumvention purpose. Members could very simply and indefinitely evade their WTO obligations, maintaining and consistently applying WTO-inconsistent general rules, if these rules were as such WTO-consistent just because the Member’s executive might, one day, decide not to apply them. This is particularly so for “administrative procedures” under the *Anti-*

⁸⁴ U.S. July 20 Answers, para. 11.

⁸⁵ Appellate Body Report, *U.S. – 1916 Act*, paras. 90 and 91.

⁸⁶ Appellate Body Report, *U.S. – 1916 Act*, para. 84.

⁸⁷ Appellate Body Report, *U.S. – 1916 Act*, para. 91.

⁸⁸ GATT panel report, *U.S. – Malt Beverages*, paras. 5.58 and 5.60.

⁸⁹ GATT panel report, *U.S. – Malt Beverages*, paras. 5.39 and 5.60.

Dumping Agreement that, by their very nature, are often adopted by an executive authority that could easily retain discretion not to apply them.

80. This line of GATT and WTO case-law is particularly apposite in the circumstances of the current dispute. The zeroing procedures have been maintained by the USDOC since the *Anti-Dumping Agreement* entered into force in 1995. Although the United States asserts that the Assistant Secretary has discretion not to apply the procedures in a particular investigation, it has failed to show a single instance where this happened. The alleged discretion is, therefore, more theoretical than real. In any event, following *U.S. – 1916 Act* and *U.S. – Malt Beverages*, the Assistant Secretary’s discretion not to apply the zeroing procedures in a particular investigation is irrelevant.

81. The issue is *not* whether the Assistant Secretary could decline to apply the zeroing procedures in a particular investigation; nor is the issue whether the Assistant Secretary could change the zeroing procedures. All laws, regulations and procedures are subject to change, whether they are mandatory or not. Instead, the issue is whether the zeroing procedures themselves – in terms of their substantive content – mandate a violation of WTO obligations as a rule. As the evidence shows, the answer to this question is plainly, yes. Under the zeroing procedures, negative comparison results are systematically and mechanically discarded in the calculation of the total amount of dumping. In terms of the procedures, there is no other alternative. As the USDOC put it, notwithstanding the Assistant Secretary’s alleged discretion, “*we do not allow*” “offsets” that compensate for negative comparison results.⁹⁰ This is also borne out by the uncontested evidence of the consistent application of the zeroing procedures, which shows that the USDOC treats the measure as a binding part of its procedures.

82. In consequence, the zeroing procedures prevent a margin calculation for the “product” as a whole, as required by Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. They also prevent the United States from complying with its duty to conduct a “fair comparison” under Article 2.4 of the *Anti-Dumping Agreement*. Under the

⁹⁰ See Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore,

zeroing procedures, it is simply not possible for the United States to comply with these obligations. As a result, the standard zeroing procedures and the Standard Zeroing Line mandate violations of these obligations.

E. *Japan’s Other “As Such” Claims Regarding the Standard Zeroing Procedures and the Standard Zeroing Line*

83. As set forth in paragraph 194 of Japan’s First Written Submission, in addition to its claims under Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, Japan claims that the standard zeroing procedures and the Standard Zeroing Line mandate violations of Articles 1, 3.1, 3.2, 3.3, 3.4, 3.5, 5.8, 9.1, 9.2, 9.3, 9.5, 11.1, 11.2, 11.3 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. In this submission, Japan will not repeat its arguments on these claims. Japan would be happy to answer any questions that the Panel has on these claims.

84. Japan has already replied to the United States’ limited arguments on the claims under Article 3 of the *Anti-Dumping Agreement* at paragraphs 59 – 64 of its Opening Statement and, at this stage, Japan has nothing further to add.

85. As set forth above, by the logic of its own arguments, the United States agrees with Japan’s claims that, under Article 5.8 of the *Anti-Dumping Agreement*, the investigating authorities must aggregate all comparison results to produce a margin for the “product”.⁹¹

86. The United States also agrees that margin calculations under Article 9 are subject to the disciplines of Article 2, with the exception of Article 2.4.2.⁹² Accordingly, there is no dispute that, if the standard zeroing procedures and the Standard Zeroing Line violate Article 2.1, they also violate Article 9.

87. Further, as the Appellate Body held, if a Member relies on margin calculations in reviews under Article 11.2 or 11.3, those margin calculations must be consistent with Article 2; otherwise,

and the United Kingdom for the Period of Review May 1, 2002, through April 30, 2003, Comment 1 (at 12-14) (Sept. 15, 2004). Emphasis added. Exhibit JPN-21.D.

⁹¹ See, above, sections III.A.49 to III.A.54.

⁹² U.S. July 20 Answers, paras. 21 and 81.

the review violates both Articles 2 and 11.⁹³ The United States has not disagreed. Again, therefore, it is undisputed that, if the standard zeroing procedures and the Standard Zeroing Line violate Article 2, they also violate Article 11.

IV. JAPAN’S AS APPLIED CLAIMS

88. In addition to its claims that the standard zeroing measures and the Standard Zeroing Line are as such WTO-inconsistent, Japan claims that 14 anti-dumping measures adopted by the United States using these procedures are also WTO-inconsistent. The United States has, essentially, failed to respond to these claims. The sole response made was in connection with claims regarding Article 3 of the *Anti-Dumping Agreement*. Japan replied to the United States’ arguments on this issue at paragraphs 59 – 64 of its Opening Statement and, at this stage, has nothing further to add on these or any other of its as applied claims. Needless to say, Japan stands by all of its as applied claims.

V. CONCLUSION

89. As set forth in detail in paragraphs 194 and 195 of its First Written Submission, Japan requests that the Panel find that the United States’ standard zeroing procedures, its Standard Zeroing Line, and its 14 as applied anti-dumping measures, are inconsistent with its obligations under the *WTO Agreement*, the *Anti-Dumping Agreement* and the GATT 1994.

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

⁹³ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 127.