

I. INTRODUCTION

1. 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, but it 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".¹

2. Japan has also shown that the United States' zeroing procedures and the Standard Zeroing Line prevent the United States Department of Commerce ("USDOC") from calculating a margin of dumping for the "product" under investigation – what the Appellate Body calls the "product as a whole".² 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.

3. 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.³ The United States' argument, however, remains entirely in the realm of the hypothetical,

¹ Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para 82.

² 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.

³ U.S. July 20 Answers, para. 11.

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.

4. 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.

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

5. There does not appear to be disagreement between the parties that rules, norms or standards with general and prospective application constitute “as such” measures for purposes of WTO dispute settlement.⁴ 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*.⁵

6. The standard model and simple zeroing procedures, as well as the Standard Zeroing Line, meet these conditions. Japan has established that the zeroing procedures predetermine and systematize the conduct of margin calculations by the USDOC. The substance of the zeroing 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. The United States has not provided evidence of a single instance in which it did not use its zeroing procedures. In addition, the Standard Zeroing Line is an instrument setting forth rules or norms that are intended

⁴ 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.

⁵ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 87; Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

to have general and prospective application. It also forms a part of the USDOC's "administrative procedure".

7. 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.⁶ 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.⁷ It is also irrelevant whether the measure is a "legal instrument" in the responding Member's domestic law.⁸ The determination in WTO law is based on the "content and substance" of an act and not its "form and nomenclature".⁹

8. Moreover, Japan notes that the United States has advocated the contrary position in *EC – Measures Affecting the Approval and Marketing of Biotech Products*, in which it has argued that an "unwritten procedure" is a measure for purposes of WTO dispute settlement.¹⁰ The same reasoning applies in the case of the *Anti-Dumping Agreement* as in the case of the *SPS Agreement*, which was involved in the *Biotech Products* dispute. 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 could escape WTO scrutiny.

A. Standard Zeroing Procedures

9. Overwhelming evidence demonstrates 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

⁶ U.S. July 20 Answers, para. 2.

⁷ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87. See generally Japan's First Written Submission, para. 51.

⁸ Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

⁹ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, footnote 87.

¹⁰ 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.

calculation procedures. This is also 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.

10. Furthermore, numerous 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. These official U.S. government statements also explain the operation of the zeroing procedures in a manner that is fully consistent with Japan’s description of these measures.

11. For example, 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.*¹¹

And 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.¹²

12. In addition, the USDOJ confirms the relationship between the computer program containing the Standard Zeroing Lines and the zeroing procedures that Japan has described.¹³ 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

¹¹ *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.

¹² *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.

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

substance of the zeroing procedures, noting that the USDOC “did not reduce” the dumping amount by the negative comparison results.¹⁴

13. There is, therefore, overwhelming and uncontested record evidence 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

14. 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.¹⁵ The Standard Zeroing Line is an instrument setting forth rules or norms that are intended to have general and prospective application.¹⁶ Also, 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.

15. 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. However, 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. A rule may, by definition, be general in character although not necessarily applied in all circumstances. Indeed, in law, there are very few immutable rules that do not admit of exception. But, as demonstrated by the Appellate Body’s decision in *EC – Asbestos*, the existence of an exception does not deprive a rule of its general application.¹⁷

¹⁴ *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.

¹⁵ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 87; Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187.

¹⁶ Appellate Body Report, *U.S. – OCTG from Argentina*, para.187.

¹⁷ See Appellate Body Report, *EC – Asbestos*, para. 2.

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

17. Japan has also fully responded, in its Opening Statement at the First Substantive Meeting with the Parties ("Opening Statement"),¹⁸ to the arguments presented by the United States in its First Written Submission, 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"¹⁹; and that Japan had not shown that the standard programs in their entirety are generally applicable. In its Opening Statement, Japan responded by noting that it had identified and submitted two programs that the USDOC itself styles as "standard programs"; that 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. Also, as explained, the Standard Zeroing Line is a rule, norm or standard of general and prospective application.²⁰

III. MAINTAINING ZEROING PROCEDURES AND THE 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 a Product as a Whole

18. In its prior submissions, Japan observed that Article 2.1 of the *Anti-Dumping Agreement* refers to the dumping of "a product" and, Article VI:1 of the GATT 1994 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."²¹ Further, because "dumping" exists only for the product as a whole, "'margins of dumping' can be found

¹⁸ Japan's Opening Statement, paras. 8-12.

¹⁹ U.S. First Written Submission, para. 32.

²⁰ See also Japan's Opening Statement, paras. 8-12.

²¹ 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.

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.”²²

19. The Appellate Body has held that this interpretation is confirmed by other provisions of the *Anti-Dumping Agreement*²³ – including Articles 6.10 and 9.2 – as well as Article VI:2 of the GATT 1994. 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. 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.

20. 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”.²⁴ This is plainly wrong and, in effect, invites the Panel to reverse panel and Appellate Body reports adopted by the DSB.

21. The United States also 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”.²⁵ 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*.

22. 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. The *Ad Article* does not

²² Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96.

²³ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 94.

²⁴ U.S. July 20 Answers, para. 60.

²⁵ U.S. July 20 Answers, paras. 46, 47 and 52.

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”.

23. 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 to acknowledge that its interpretation is untenable.²⁶ 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.

24. 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 in Articles 2, 9 and 11. Article 2 is the sole provision setting forth “agreed disciplines” for calculating dumping margins “for the purpose of” the *Agreement*.²⁷ 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*.

25. In any event, the United States’ proffered justification for the allegedly unique duty in Article 5.8²⁸ applies with equal – if not greater – force to other aspects of anti-dumping proceedings. Indeed, it is difficult to see any distinction 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 of which they continue the investigation and, ultimately, may impose duties. 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

²⁶ See, for example, U.S. July 20 Answers, para. 60.

²⁷ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 127.

²⁸ U.S. July 20 Answers, para 56.

there must be “consistent treatment” of the “product” as a whole, throughout an anti-dumping action, from initiation to the imposition of duties.²⁹

26. 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.

B. A Margin Must Be Based on a Fair Comparison

27. It appears that Japan and the United States agree that Article 2.4 establishes a “general obligation” on investigating authorities to conduct a fair comparison of export price and normal value.³⁰ This is not surprising as the Appellate Body has already reached the same conclusion.³¹ 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.³²

28. This assertion is incorrect for at least two reasons. First, as an interpretive matter, 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.³³ 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 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.³⁴ 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.

²⁹ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.

³⁰ Japan’s July 20 Answers, para. 106; U.S. July 20 Answers, para. 70.

³¹ Appellate Body Report, *EC – Bed Linen*, para. 59.

³² U.S. July 20 Answers, para. 73.

³³ Japan’s July 20 Answers, para. 113.

³⁴ See Japan’s Opening Statement, paras. 37 - 38.

29. The United States' interpretation of Article 2.4 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 verifying 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.

30. Second, 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."³⁵ The third sentence of Article 2.4 requires the authorities to adjust for differences between export price and normal value to ensure price comparability, and gives a non-exhaustive list of factors that may give rise to an adjustment to ensure price comparability. These adjustments are intended to guarantee a "fair comparison". However, if there are no differences affecting price comparability that compel an adjustment, the authorities are not permitted to interfere with the producer's or exporter's prices.

31. 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 they can simply remove with the other to deny it. Thus, the fair comparison requirement in Article 2.4 does not permit the authorities to interfere with normal value and/or export price to arbitrarily produce desired results. Such adjustments are not made to ensure price comparability and, instead, impermissibly distort prices.

32. 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 ADA

³⁵ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 101.

33. 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. Japan has demonstrated the fallacy of this argument. The second sentence of Article 2.4.2 contemplates a different comparison from the symmetrical methods, which is focused on the export 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.³⁶

34. The United States 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".³⁷ It adds that the asymmetrical comparison "by its very nature" addresses targeted dumping.³⁸ 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.

35. A comparison that uses the entire universe of export transactions, such as that proposed by the United States, *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.

36. 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. However, once the pattern has been identified, and the selection made,

³⁶ Japan's July 20 Answers, paras. 69-72, 78-82.

³⁷ U.S. July 20 Answers, para. 25.

³⁸ U.S. July 20 Answers, para. 25.

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.³⁹

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

37. The United States suggests that Japan has not demonstrated that the zeroing procedures mandate a violation of the United States' WTO obligations.⁴⁰ 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. 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.

38. 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.⁴¹ It goes on to argue that the Assistant Secretary has the discretion to decide whether to provide “offsets” in any particular investigation.⁴² The United States is incorrect that executive discretion not to apply or to change a measure necessarily renders the measure WTO-consistent. There is 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. 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.

³⁹ Appellate Body Report, *U.S. – Softwood Lumber V*, para. 100.

⁴⁰ U.S. July 20 Answers, paras. 13-16.

⁴¹ U.S. July 20 Answers, para. 3.

⁴² U.S. July 20 Answers, para. 11.

39. 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.

40. 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 at least 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. 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.

41. 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.⁴³ 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*.

E. Japan’s Other “As Such” Claims

⁴³ 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, 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.

42. 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*.

43. 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.

44. 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”.

45. The United States also agrees that margin calculations under Article 9 are subject to the disciplines of Article 2, with the exception of Article 2.4.2.⁴⁴ 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.

46. 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, the review violates both Articles 2 and 11.⁴⁵ 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

47. 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. At this stage, Japan has nothing further to add on its as applied claims, other than to note that it stands by them.

⁴⁴ U.S. July 20 Answers, paras. 21, 81.

⁴⁵ Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 127.

V. CONCLUSION

48. 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.

49. 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*.