

## **I. INTRODUCTION**

1. This dispute focuses on the United States' failure to respect the requirements in the *Anti-Dumping Agreement* that it determines dumping margins on the basis of a "fair comparison" of export price and normal value for the product as a whole.<sup>1</sup> The United States' margin calculation procedures include what Japan calls "zeroing procedures," which are skewed in favor of an affirmative dumping determination and manipulate the data to artificially and systematically inflate the margin of dumping. As a result, the Appellate Body has held that there is an "inherent bias" and a "distort[ion]" in zeroing.<sup>2</sup>

## **II. MEASURES CHALLENGED ON AN "AS SUCH" BASIS: MODEL AND SIMPLE ZEROING PROCEDURES**

### **A. Overview of the Procedures and the Standard Computer Programs**

2. In calculating dumping margins in any anti-dumping proceeding, the USDOC compares normal value and export price using one of the three methods set forth in Article 2.4.2 of the *Anti-Dumping Agreement*: the comparison of "a weighted average normal value with a weighted average of prices of all comparable export transactions" ("W-to-W"); the comparison of a normal value and export prices on a transaction-to-transaction basis ("T-to-T" comparison), and the comparison of a weighted average normal value to prices of individual export transactions ("W-to-T" comparison).

Zeroing is an integral part of the USDOC's procedures for each of the three methods of comparison. Specifically, the USDOC maintains two different zeroing procedures: "model zeroing", which is part of the W-to-W comparison method, and "simple zeroing", which is part of the T-to-T and W-to-T comparison methods.<sup>3</sup> Zeroing is part of the standard calculation procedures used by the USDOC in calculating dumping margins under all three comparison methods and in all types of anti-dumping proceedings – original investigations, periodic reviews, and new shipper reviews, as well as changed circumstances reviews and sunset reviews, in which the USDOC does not determine new

---

<sup>1</sup> Article 2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

<sup>2</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

<sup>3</sup> The model and simple zeroing procedures are explained in detail in Japan's First Written Submission, paras. 18-25, and in the Owenby Statement, paras. 30-41 (Exh. JPN-1).

dumping margins, but rather relies on margins calculated in an original investigation or periodic review.

3. The measures at issue may be briefly described as follows. The USDOC relies on computer programs to manipulate the large quantity of data that it obtains in anti-dumping proceedings. In order to execute dumping calculations efficiently, it maintains standard computer programs, which act as a model for use whenever the USDOC develops a specific computer program in a particular anti-dumping proceeding. The nature and purpose of these standard computer programs are described in the USDOC's Import Administration Anti-Dumping Manual.<sup>4</sup> The Manual demonstrates that the USDOC maintains standard computer programs to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings. These standard programs execute dumping determinations according to the USDOC's "proper calculation methodologies."<sup>5</sup>

4. The USDOC maintains standard computer programs for both original investigations and periodic reviews, which contain computer code that executes every procedure and/or combination of procedures applicable to an anti-dumping proceeding.<sup>6</sup> The model and simple zeroing procedures are contained in these programs. Specifically, the zeroing procedures are contained in a single line of the standard computer program (the "Standard Zeroing Line"), which is the same for both model and simple zeroing: "WHERE EMARGIN GT 0;". Through this Standard Zeroing Line, the United States includes solely dumping amounts that are greater than zero ("GT 0") in the calculation of the numerator for the overall dumping fraction. Negative amounts are excluded from the calculation of the total amount of dumping.<sup>7</sup>

5. In periodic reviews, the United States always calculates two types of margins: an overall "weighted average dumping margin" for each exporter, and importer-specific assessment rates. The standard computer program for periodic reviews contains programming procedures to calculate both, and each section of the computer program

---

<sup>4</sup> Excerpts attached as Exhibits JPN-5 to 5.C.

<sup>5</sup> Manual, Chapter 9, page 8 (Exh. JPN-5.C).

<sup>6</sup> Copies attached as Exhibits JPN-6 and 7.

<sup>7</sup> The details of the weighted average dumping margin calculation process are described in Japan's First Written Submission, paras. 33-40, and in the Owenby Statement, paras. 30-41 (Exh. JPN-1).

includes simple zeroing procedures (the Standard Zeroing Line) by which all negative dumping amounts are disregarded.

6. When a case-specific computer program is formulated, the integrity of the standard program is retained, and crucially, the Standard Zeroing Line is always included unchanged.

#### **B. Measures That Can Be the Subject of WTO Dispute Settlement**

7. In terms of Article 6.2 of the DSU,<sup>8</sup> the standard model and simple zeroing procedures are the specific “measures” that are challenged “as such” in this dispute. These measures are “administrative procedures” within the meaning of Article 18.4 of the *Anti-Dumping Agreement*. In recent anti-dumping disputes the Appellate Body clarified the interpretation of the word “measure” as used in Article 6.2 of the DSU, in the context of “as such” claims. The Appellate Body explained three important points for the current dispute: the word “measure” extends to any act or omission by a Member; an alleged “measure” is assessed in WTO law irrespective of its legal character in domestic law; and a “measure” need not be binding or mandatory in domestic law.<sup>9</sup>

8. The present dispute is brought pursuant to the *Anti-Dumping Agreement*, Article 17 of which, together with the DSU, sets forth the rules applicable to the settlement of anti-dumping disputes. Nothing in the *Agreement* limits the types of measures that may, as such, be the subject of dispute settlement.<sup>10</sup> Furthermore, under Article 18.4 of the *Agreement*, Members are required to ensure the conformity of their “laws, regulations and administrative procedures” with that *Agreement*. As the Appellate Body explained, the quoted phrase “seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.”<sup>11</sup> An “as such” dispute under the *Anti-Dumping Agreement* may, therefore, concern “administrative procedures,” which are rules, norms or standards of general and prospective application.

---

<sup>8</sup> *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

<sup>9</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras. 81-88; Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 187. See also Panel Report, *Korea – Commercial Vessels*, para. 7.63.

<sup>10</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 86.

<sup>11</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 87.

### **C. Model and Simple Zeroing Procedures are “As Such” Measures**

9. The model and simple zeroing procedures set forth in the USDOC’s standard computer programs are “administrative procedures” under Article 18.4 of the *Anti-Dumping Agreement* that are “as such” measures. In particular, the zeroing procedures are a pre-determined, standardized system or method for mechanistically conducting and managing, on a uniform and predictable basis, an aspect of the USDOC’s margin calculations in all anti-dumping proceedings, irrespective of the method of comparison used. Through standard computer-coded instructions, the procedures automatically select only *positive* price differences between normal value and export price for inclusion in the calculation of the dumping amount in the numerator of the overall dumping margin calculation.

10. The Standard Zeroing Line is applied by the United States on a generalized, normative and prospective basis. The standard programs are written in such a way that the zeroing procedure is executed automatically in the margin calculation process. The Standard Zeroing Line is found in every margin calculation program applied by the USDOC in specific anti-dumping proceedings. The consistent application of zeroing procedures demonstrates the generalized, normative and prospective nature of the application of these procedures. Further, Ms. Valerie Owenby, an expert in the U.S. anti-dumping computer programming procedures, testifies that, since 1993, she is unaware of any case-specific margin calculation program in any U.S. anti-dumping proceeding, in which the Standard Zeroing Line did not feature.<sup>12</sup>

### **III. MEASURES CHALLENGED “AS APPLIED”**

11. Japan challenges the USDOC’s zeroing procedure “as applied” in one original investigation, 11 periodic reviews, and two sunset reviews.<sup>13</sup> In each case, whether it used the W-to-W or W-to-T comparison methodology (or, in the case of the sunset reviews, relied on previous determinations in which those methodologies had been used), the USDOC disregarded all negative results of the multiple comparisons of normal value and export price in aggregating the total dumping amounts, for the purpose of calculating

---

<sup>12</sup> See Owenby Statement, Exh. JPN-1, para. 16.

<sup>13</sup> The specific actions challenged are described in paragraphs 66 – 74 of Japan’s First Written Submission.

the numerator in the overall weighted average dumping margin calculation. These results were achieved through the use of the standard zeroing procedures, included through the Standard Zeroing Line.

#### **IV. CLAIMS OF WTO INCONSISTENCY REGARDING “AS SUCH” MEASURES**

##### **A. Original Investigations: Inconsistency With Article 2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994**

12. Japan claims that the zeroing procedures maintained by the United States in original investigations are inconsistent with Article 2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. In assessing the WTO-consistency of the United States’ standard zeroing procedures, two relevant legal requirements pertain to the determination of dumping: first, dumping and the margin of dumping must be determined for the *product as a whole*; and second, a dumping determination must be based on a *fair comparison* of normal value and export price for the product as a whole. As to the first requirement, Article 2.1 of the *Agreement* provides the definition of the term “dumping”; “dumping is defined in relation to a product as a whole,” and not in relation to “a type, model, or category” of a product.<sup>14</sup> Interpreted in conjunction with Article VI:2 of the GATT 1994, “‘margins of dumping’ can be found only for the product under investigation as a whole”.<sup>15</sup> Furthermore, because Article 2.1 applies to the entire *Anti-Dumping Agreement*, “margins of dumping” in Article 2.4.2 must also be established for the product as a whole.<sup>16</sup>

13. “[T]he results of the multiple comparisons at sub-group level are . . . not ‘margins of dumping’ within the meaning of Article 2.4.2. . . . [I]t 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.”<sup>17</sup> Accordingly, in determining the existence of dumping, and calculating the margin of dumping for the product as a whole, Articles 2.1 and 2.4.2 of the *Agreement*, together with Articles VI:1

---

<sup>14</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93; Appellate Body report, *U.S. – Corrosion-Resistant Steel*, para. 126.

<sup>15</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 96.

<sup>16</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93, 96.

<sup>17</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 97.

and VI:2 of the GATT 1994, prohibit a Member from disregarding the results of any of the multiple comparisons undertaken by its authorities.

14. As to the second requirement, Article 2.4 of the *Anti-Dumping Agreement* states that “[a] *fair comparison* shall be made between the export price and the normal value” (emphasis added). The Appellate Body found that the requirements of a “fair comparison” involve a “general obligation” that “informs *all of Article 2 . . .*.”<sup>18</sup> According to both the ordinary meaning of the words “fair” and “comparison”, supported by its contexts, and consistent with panel and Appellate Body precedent, Article 2.4 requires that the process by which authorities identify “the price difference” between normal value and export price for the product as a whole must not be biased, lack even-handedness, favour particular interests or outcomes, or otherwise distort the facts, in particular to the detriment of exporters or foreign producers.<sup>19</sup>

15. Applying the first of these two requirements to the instant case, the model zeroing procedure in original investigations is inconsistent with the obligations established by Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, because the USDOC fails to determine the existence of dumping and to calculate a margin of dumping for the product as a whole. The Appellate Body expressly addressed this issue in *U.S. – Softwood Lumber V*, in which it noted that the *Anti-Dumping Agreement* does not “permit[ ] an investigating authority to disregard the results of *multiple comparisons* at the aggregation stage.”<sup>20</sup> To the contrary, if the results of all comparisons are not taken into account, the dumping determination and the margin of dumping are not for the product as a whole.<sup>21</sup>

16. This reasoning applies equally in the instant case. Through the Standard Zeroing Line, the USDOC automatically disregards all negative results of comparisons where export price is higher than normal value. Therefore, as a result of the model zeroing

---

<sup>18</sup> Appellate Body Report, *EC – Bed Linen*, para. 59 (emphasis added).

<sup>19</sup> See, e.g., Panel Report, *EC – Tube or Pipe*, para. 7.178 (in the context of Article 2.4, an “investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner”); Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 193 (fairness precludes an investigating authority from “favouring the interests of any interested party, or group of interested parties, in the investigation”).

<sup>20</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, para. 100.

<sup>21</sup> See Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93, 98.

procedures, the margin of dumping cannot be determined for the “product as a whole.” Hence, model zeroing is “as such” inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* and with Articles VI:1 and VI:2 of the GATT 1994. The same reasoning also applies to the simple zeroing procedures, when used in an original investigation.

17. As to the second requirement, the Appellate Body has already held that the model zeroing procedures – which operate in the same manner and produce the same effects as simple zeroing – are inconsistent with Articles 2.4 of the *Anti-Dumping Agreement*. This unfairness is identified in two ways: zeroing may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing; and zeroing “inflates” the margin of dumping by excluding from the aggregation stage the results of negative comparisons that would reduce the overall amount of dumping if they were included.<sup>22</sup> The Appellate Body found that there is an “inherent bias in a zeroing methodology . . . of this kind,” and such a comparison “is *not* a ‘fair comparison’ between export price and normal value, as required by Articles 2.4 and 2.4.2.”<sup>23</sup>

18. Both the model and simple zeroing procedures at issue in the instant case involve the same unfair comparison, i.e. they overstate the total amount of dumping and inflate the dumping margin, and create a dumping determination where the product as a whole is not dumped. Thus the zeroing procedures deprive the comparison of normal value and export price of even-handedness.

19. The Appellate Body has also described the unfairness of zeroing in terms of its distorting effects on the prices. By effectively attributing a zero value to the negative comparison results under the zeroing procedures, the export transactions in excluded comparisons are systematically “treated as if they were less than what they actually are”.<sup>24</sup>

---

<sup>22</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135.

<sup>23</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 135 (emphasis in original). See also Appellate Body Report, *EC – Bed Linen*, para. 55.

<sup>24</sup> See Appellate Body Report, *U.S. – Softwood Lumber V*, para. 101. Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 144.

20. The standard zeroing procedures are designed and structured always to be biased in favour of a particular outcome and particular interests (i.e., the existence of dumping and the interests of petitioners). Because of the inherent bias built into the standard zeroing procedures that distort the price comparison, they are inconsistent with the dictates of fundamental fairness and, in original investigations, are “as such” inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

**B. Original Investigations: Inconsistency With Article 3 of the *Anti-Dumping Agreement***

21. Maintaining the standard zeroing procedures in original investigations is also inconsistent with Article 3 of the *Anti-Dumping Agreement*. Article 3.1 requires that a determination of injury must be based on an “objective examination” of “positive evidence”. The Appellate Body has explained that “positive evidence” is evidence “of an affirmative, objective and verifiable character” and “must be credible.”<sup>25</sup>

22. The remaining paragraphs of Article 3 enumerate several factors that are to be examined in evaluating the impact of the dumped imports in the injury determination, and several key factors in the investigating authorities’ injury determination are based on evidence derived from their dumping determination. As discussed above, the model and simple zeroing procedures systematically distort the dumping determination and, therefore, also the alleged evidence of dumping that is derived from this determination and used to evaluate the injury factors. Because this evidence results from a flawed dumping determination, it does not meet the requirements of “positive evidence”.

23. Japan therefore submits that by maintaining the model and simple zeroing procedures, the United States acts inconsistently with Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *Anti-Dumping Agreement* because the zeroing procedures deprive the USITC of positive evidence for an objective examination of injury.

**C. Original Investigations: Inconsistency With Article 5.8 of the *Anti-Dumping Agreement***

24. Maintaining zeroing procedures in original investigations is also inconsistent with Article 5.8 of the *Anti-Dumping Agreement*. Under this provision, authorities must

---

<sup>25</sup> Appellate Body Report, *U.S. – Hot-Rolled Steel*, paras. 192, 193.

terminate “promptly” when there is “not sufficient evidence of . . . dumping . . . to justify proceeding with the case,” and they must terminate “immediate[ly]” where the dumping margin is *de minimis* or the volume of dumped imports is negligible.

25. As with the phrase “positive evidence” in Article 3.1, the phrase “sufficient evidence” indicates that the authorities’ justification for pursuing an investigation must be grounded in facts that are affirmative, objective, verifiable and credible. The reasoning of the panel in deciding whether there was sufficient evidence of dumping to initiate an investigation under Articles 5.2 and 5.3 in *U.S. – Softwood Lumber* is instructive in the current context as well. In that case, the panel explained that the sufficiency of evidence is determined by reference to its “accuracy and adequacy” and that “an investigating authority should take into account the general parameters as to what dumping is when inquiring about the sufficiency of the evidence. . . . [T]he evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 . . . .”<sup>26</sup>

26. The zeroing procedures are inconsistent with Article 5.8 because they deprive the USDOC of accurate, adequate or otherwise credible “evidence” of “dumping” within the meaning of Article 2 of the *Agreement*. The alleged evidence of dumping on which the USDOC relies, under Article 5.8, is obtained with complete disregard for the “general parameters of what dumping is”. Furthermore, the alleged “evidence” that stems from a biased comparison of normal value and export price offers no grounds for “an *unbiased* and objective investigating authority” to conclude that there is sufficient evidence to pursue an investigation.<sup>27</sup>

**D. Periodic and New Shipper Reviews: Inconsistency With Articles 2 and 9 of the *Anti-Dumping Agreement***

27. Japan also claims that the United States’ maintenance of zeroing procedures in “periodic” and “new shipper” reviews is inconsistent with Articles 2 and 9 of the *Anti-Dumping Agreement*.

28. In a periodic review, the USDOC determines the amount of anti-dumping duties to be collected on the basis of a retrospective review of dumping in a defined period. The

---

<sup>26</sup> Panel Report, *U.S. – Softwood Lumber V*, para. 7.80.

<sup>27</sup> Panel Report, *U.S. – Softwood Lumber V*, para. 7.80 (emphasis added).

USDOC calculates two types of margins in a periodic review: the overall weighted average dumping margin for an exporter for the period under review, and importer-specific assessment rates. For both types of margin, the USDOC calculates the margins of dumping based on multiple comparisons, by using the simple zeroing as part of its standard computer programming procedures. In a new shipper review, because it is a form of “administrative review,” the USDOC’s calculation procedures and programming code are the same as for periodic reviews.

29. The *chapeau* of Article 9.3 provides expressly that “the margin of dumping” is “as established under Article 2”. Accordingly, Article 2 is expressly made relevant in interpreting the term “margins of dumping” in Article 9. This cross-reference to Article 2 is in keeping with the fact that “Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins.”<sup>28</sup> Furthermore, the Appellate Body has given a uniform meaning, throughout the *Anti-Dumping Agreement*, to the terms “dumping”, “margin of dumping” and “product”.<sup>29</sup> Thus, the determination of the existence of “dumping” and calculation of “margins of dumping” for purposes of periodic and new shipper reviews under Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* must be consistent with the definitions of those terms in Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement* and with Articles VI:1 and VI:2 of the GATT 1994.

30. However, in both periodic and new shipper reviews, through the Standard Zeroing Line, the USDOC automatically disregards all negative comparison results in aggregating the results of the multiple comparisons. Accordingly, the simple zeroing procedures in periodic and new shipper reviews, are inconsistent with Articles 2.1 and 2.4.2 of the *Agreement*, because the existence and the margin of dumping are not determined for “the product as a whole” when the results of all the multiple comparisons are not taken into account.<sup>30</sup>

31. Furthermore, as discussed previously, Japan claims that the simple zeroing procedures are “as such” inconsistent with the “fair comparison” requirement of Article

---

<sup>28</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

<sup>29</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras 126 and 127; Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93, 94 and 99; and Appellate Body Report, *U.S. – Hot-Rolled Steel*, para. 118.

<sup>30</sup> Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 93, 98.

2.4 of the *Agreement*, because they are formulated with an “inherent bias” that distorts the comparison of normal value and export price in calculating the margin of dumping for the product as a whole. This logic applies as well to the simple zeroing procedures maintained by the USDOC for use in comparing normal value and export price in periodic and new shipper reviews.

32. Also, because the standard zeroing procedures are inconsistent with Article 2 of the *Agreement*, this legal flaw taints the duty assessment proceedings and, therefore, maintaining those procedures for determining dumping margins in a periodic review is also inconsistent with Articles 9.1, 9.2 and 9.3. For the same reasons, it is also inconsistent with Article 9.5 for the USDOC to maintain such procedures for determining margins in new shipper reviews. Furthermore, as the zeroing procedures inflate the margins of dumping, the duty is assessed and collected in excess of the margins that should have been calculated under Article 2 without zeroing. Consequently, by failing to ensure that the amount of duties does not exceed the margin of dumping established consistently with Article 2, the United States acts inconsistently with Article 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*.

**E. Changed Circumstances and Sunset Reviews: Inconsistency With Articles 2 and 11 of the *Anti-Dumping Agreement***

33. Japan also submits that the United States’ maintenance of the zeroing procedures in “changed circumstances” and “sunset” reviews is inconsistent with Articles 2 and 11 of the *Anti-Dumping Agreement*.

34. As the Appellate Body explained in *U.S. – Corrosion-Resistant Steel*, “should investigating authorities choose to rely upon dumping margins in making their likelihood determination [in a sunset review], the calculation of these margins must conform to the disciplines of Article 2.4.”<sup>31</sup> It thus made clear that “[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.”<sup>32</sup>

---

<sup>31</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

<sup>32</sup> Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

35. In both changed circumstances and sunset reviews, the USDOC relies on dumping margins calculated in a prior original investigation or a periodic review as the basis for the review determination.<sup>33</sup> By relying necessarily on margins that are calculated using the zeroing procedures, the USDOC cannot comply with the obligations set forth in Article 2.4 of the *Agreement*, as well as Articles 2.1 and 2.4.2, because these margins are not based on a fair comparison and are not calculated for the product as a whole. As the margins of dumping are legally flawed, the changed circumstances and sunset reviews that rely upon those margins are equally flawed and are inconsistent with Article 11.2 and Article 11.3. Also, for the same reasons, the United States thereby fails to comply with the obligation in Article 11.1 of the *Anti-Dumping Agreement* to ensure that anti-dumping duties “remain in force only as long as and to the extent necessary to counteract dumping.”

**F. Inconsistency With Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the *WTO Agreement***

36. As a consequence of zeroing procedures’ inconsistencies with various provisions of Articles 2, 3, 5, 9, and 11 of the *Anti-Dumping Agreement*, the United States also acts inconsistently with its obligations under Article 1 of the *Agreement*. An administrative procedure relating to the enforcement of anti-dumping rules is a “measure” under Article 1 of the *Anti-Dumping Agreement*.

37. Article 18.4 of the *Agreement* states that a Member shall “ensure . . . the conformity of its laws, regulations and administrative procedures with the provisions of this *Agreement*.” Article XVI:4 of the *WTO Agreement* imposes the same obligation with respect to “the annexed Agreements” including the *Anti-Dumping Agreement* and the GATT 1994. As discussed above, the standard zeroing procedures are “administrative procedures” that do not conform to various provisions of the *Anti-Dumping Agreement*. Accordingly, by maintaining the standard zeroing procedures, the United States acts inconsistently with its obligations under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

**V. CLAIMS OF WTO INCONSISTENCY REGARDING “AS APPLIED” MEASURES**

---

<sup>33</sup> See Owenby Statement, para. 24 (Exh. JPN-1).

38. In addition to the “as such” claims discussed above, Japan challenges the standard model and simple zeroing procedures, “as applied” in the measures identified in Japan’s panel request and listed in paragraph 10 of Japan’s first written submission. Japan challenges 14 specific measures concerning three different types of anti-dumping proceeding: one original investigation, 11 periodic reviews, and two sunset reviews.

39. In the investigation subject to “as applied” challenge, the USDOC used a W-to-W comparison, including its standard model zeroing procedures. Specifically, in aggregating the results of the multiple model-based comparisons, the USDOC disregarded any comparisons with negative results. The computer programming language by which the USDOC did so is the Standard Zeroing Line: “WHERE EMARGIN GT 0;”. Without the application of the standard zeroing procedures, the margin of dumping, and hence the respondent’s deposit rate, would have been lower.

40. For the reasons discussed above, the standard model zeroing procedures are inconsistent with 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. Likewise, the United States’ standard model zeroing procedures as applied in the investigation that is the subject of the current case are inconsistent with the obligations set forth in Articles 2.1, 2.4, and 2.4.2 of the *Agreement*. In consequence, the evidence of dumping used by the USITC in the injury determination in this investigation does not meet the requirements of “positive evidence” nor permit an “objective examination,” as required by Article 3 of the *Agreement*.

41. In the 11 periodic reviews subject to Japan’s “as applied” challenge, to determine the anti-dumping duties to be collected for the entries made during the period of review (i.e., the assessment rate) and to determine the deposit rate for future entries, the USDOC calculated margins of dumping using W-to-T comparisons, including its standard simple zeroing procedures. Specifically, in aggregating the results of the multiple comparisons, the USDOC disregarded any comparisons with negative results. The computer programming language by which the USDOC did so is the Standard Zeroing Line: “WHERE EMARGIN GT 0;” or “WHERE UMARGIN GT 0;”. Without the application of the standard zeroing procedures, the margin of dumping would have been lower or, in many cases (specified in Japan’s first written submission), zero.

42. As described above, the use of the standard simple zeroing procedures violates the obligation in Articles 2.1 and 2.4.2 of the *Agreement* that the margins of dumping be determined for the product as a whole. In addition, the use of the standard simple zeroing procedures is inconsistent with the requirement that margins of dumping calculated under Article 9.3 of the *Agreement* must meet the “fair comparison” obligation of Article 2.4. Because the procedures used to calculate the margins of dumping in the 11 periodic reviews are inconsistent with Article 2 and, as a result, the USDOC seeks to collect duties when it is not entitled to do so, its application of the simple zeroing procedures is also inconsistent with Articles 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement*.

43. Japan also claims that anti-dumping measures adopted pursuant to two sunset reviews are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 because the investigating authorities relied on dumping margins calculated using the standard zeroing procedures. Specifically, the authorities relied on dumping margins calculated in the original investigation or periodic reviews, in which the USDOC, whether using model or simple zeroing procedures, disregarded all comparisons that gave rise to a negative result. The USDOC did so by including in the programs in question the Standard Zeroing Line: “WHERE EMARGIN GT 0;”.

44. In a sunset review, where the investigating authorities elect to rely on dumping margins calculated in an original investigation or subsequent periodic reviews, those margins must be calculated for the “product” as a whole, through a “fair comparison”, as required by Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*. In the two sunset reviews involved in this case, the United States failed to meet these obligations. Accordingly, the determinations in these sunset reviews are inconsistent with Articles 11.1 and 11.3 of the *Anti-Dumping Agreement*.

## **VI. CONCLUSION**

45. Japan requests that the Panel find the United States’ model and simple zeroing procedures are “as such” inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 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*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. Japan also requests that the Panel find the United States’ model and simple zeroing procedures “as

applied” in the measures identified in Japan’s panel request are inconsistent with the same articles of the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*.

46. 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 *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*, into conformity with its obligations under those *Agreements*.