BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Measures Relating to Zeroing and Sunset Reviews

(AB-2006-5)

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

October 26, 2006

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WORLD TRADE ORGANIZATION
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(AB-2006-5)

SERVICE LIST

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I. Introduction and Executive Summary

1. In this dispute, the Panel found that the United States maintains unwritten measures – "zeroing procedures" as they relate to investigations in which the transaction-to-transaction and weighted average-to-transaction comparison methods are used – that can be challenged on an as-such basis. The Panel's report acknowledges the high threshold for evidence to establish the existence of such unwritten measures.[1] Yet in the end, the report concluded that these measures existed despite the lack of <u>any</u> evidence to support their existence.

2. Specifically, the Panel found that U.S. "zeroing procedures" existed as a measure that could be challenged "as such" as it related to zeroing when conducting transaction-to-transaction and average-to-transaction comparisons in investigations. The Panel did so despite the fact that there were no such "zeroing procedures" in existence at the time of panel establishment. Indeed, the U.S. Department of Commerce ("Commerce") has never even once used the average-to-transaction comparison in an investigation, let alone used any type of "zeroing procedure" in such an investigation. Similarly, Commerce had not even once used the transaction-to-transaction comparison at the time the Panel was established, and used that comparison only once after panel establishment. Moreover, Commerce had never pronounced on how it would conduct such comparisons, including whether it would or would not "zero" in connection with those comparisons. Further, the Panel made its findings regarding "zeroing procedures" despite the fact that Japan did not identify in its consultation request any "zeroing procedures" as they relate to transaction-to-transaction or transaction-to-average comparisons in investigations among the measures it was challenging. Nevertheless, the Panel's analysis purports to infer the

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[1] Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, circulated 20 September 2006 (hereinafter "Panel Report"), paras. 7.48 and 7.50.

existence of unwritten U.S. measures setting forth a rule or norm of general and prospective application with regard to "zeroing procedures" as they relate to these contexts and then analyzed the consistency of these "measures" with U.S. obligations. The Panel had no basis for doing so.

3. In this proceeding, the United States is not in this proceeding appealing the Panel's finding that there is a measure the Panel refers to as "zeroing procedures" as they relate to investigations in which average-to-average comparisons are used to calculate margins of dumping. The United States has previously expressed its views on whether such a measure exists and as to whether the evidence put forward supports the conclusion that such a measure exists. However, the United States acknowledges that there is at least an evidentiary record in connection with those questions. That is not the case with respect to transaction-to-transaction and average-to-transaction comparisons in investigations. In light of the standard to be applied when determining the existence and content of an unwritten measure, the Appellate Body should reverse the finding that any such U.S. measure exists as they relate to these contexts. In making its finding, the Panel exceeded its terms of reference contrary to Articles 6.2 and 7.1 of the *Understanding Governing the Rules and Procedures for the Settlement of Disputes* ("DSU") and failed to make an objective assessment of the matter before it, as required by DSU Article 11.

II. A Panel's Terms of Reference Can Only Extend to Measures Taken by the Responding Member, Whether Written or Unwritten

4. In concluding that Commerce maintains "zeroing procedures" as they relate to transaction-to-transaction and average-to-transaction comparisons in investigations, the Panel began with the analytical framework set forth by the Appellate Body in *US – Zeroing (EC) (AB)*.

The Panel identified the following criteria in evaluating whether a measure exists that is subject to challenge "as such": whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application.[2] The Panel report explained that the analysis of an "as such" claim regarding the alleged existence of a measure not embodied in a written instrument raises particular evidentiary problems.[3]

5. The particular evidentiary problems that the Panel noted are ones that the Appellate Body emphasized in *US – Zeroing (EC) (AB)*. The Appellate Body explained that

> Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged as such.[4]

6. The Appellate Body further explained in a footnote that its statement "did not mean that a mere abstract principle would qualify as a 'rule or norm' that can be challenged as such."[5] This follows from the fact that the alleged measure must be "attributable to" the responding Member. Article 3.3 and Article 4.2 of the DSU both help to illustrate the required degree of relationship between an alleged measure and a Member in order for that alleged measure to be subject to WTO dispute settlement. Article 3.3 refers to a measure "taken" by a Member and Article 4.2 refers to a measure "taken" within the territory of a Member. Accordingly, "attributable to"

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[2] Panel Report, para. 7.43 (quoting Appellate Body Report, *United States -- Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006 (hereinafter "*US -- Zeroing (EC) (AB)*"), para. 198).

[3] Panel Report, para. 7.50.

[4] *US – Zeroing (EC) (AB)*, para. 198 (emphasis in the original).

[5] *US – Zeroing (EC) (AB)*, n. 342.

means "taken" by a Member within its territory.[6] The Appellate Body report in *US – Zeroing (EC) (AB)* supports this point. In that report, the Appellate Body explained that the starting point of its analysis was Article 3.3 of the DSU. The Appellate Body quoted Article 3.3's explanation that the dispute settlement system deals with impairment of benefits under covered agreements "by measures taken by another Member."[7] Were a panel to opine on an "abstract principle," and not a measure taken by the responding party, it would be issuing an advisory opinion, which is not provided for in the DSU.[8]

7. Hence, in carrying out its mandate under its terms of reference to examine the matter referred to the DSB in the complaining Member's panel request[9] – the matter consisting of the measures identified in the request and the claims set forth therein[10] – a panel must in the course of the proceedings determine whether the measure actually exists. As noted by the Panel, the Appellate Body has explained that a panel

> must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act inconsistently

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[6] For purposes of this appeal, it is not necessary to explore the full contours of the term "taken" since, as discussed in this submission, there was no evidence at all that "zeroing procedures" as they relate to the two types of comparisons in investigations could be attributed to the United States in any manner.

[7] *US – Zeroing (EC) (AB)*, para. 187.

[8] By contrast to the DSU, in other WTO agreements, when the drafters sought to confer authority on institutions to provide advisory opinions, they made this intention clear. *See Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") (Articles 24.3 and 24.4 concerning the Permanent Group of Experts); *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, Annex II (paragraphs 2(a) concerning the Technical Committee on Customs Valuation); and *Agreement on Rules of Origin*, Annex I (paragraph 1(a) concerning the Technical Committee on Rules of Origin).

[9] DSU Article 7.1.

[10] DSU Article 6.2.

with its obligations under Article 11 of the DSU to "make an objective assessment of the matter" before it.[11]

8. One could well add that finding such a non-existent measure would exceed a panel's terms of reference under Article 7.1 and Article 6.2. Read in the context of Article 3.3 and Article 4.2, the measure within a panel's terms of reference is one actually taken by a Member; it cannot be an abstraction. This fact is most clearly illustrated by the following example: were a Member simply to include in a panel request a definition of zeroing (for example, "not allowing non-dumped export sales to offset margins on export prices below the normal value") and indicate that it is seeking a finding on whether zeroing – if used in the future by the responding Member – would breach AD Agreement Article 2.4.2, that panel request would not meet the requirements of Article 6.2, because it would fail to identify any measure taken by the responding Member. Similarly, there would be no "measure" that could be part of "the matter" referred to the panel by the DSB under the standard terms of reference in Article 7 of the DSU. A panel that nonetheless issues a finding on this question would exceed its terms of reference.

9. The analysis is no different if a panel makes findings where a complaining Member purports to identify a measure that does not actually exist or where the content of an actual measure is incorrectly determined. The panel would be offering findings on a measure not taken by the responding Member, or on non-existent aspects of a measure, and would therefore be exceeding its terms of reference. The measure or aspect of the measure purportedly identified in the panel request and/or found by the panel would not in fact exist, and the requirements of Articles 6.2 and 7.1 would not be met.

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[11] *US – Zeroing (EC) (AB)*, para. 196.

10. That is the situation in this dispute.

III. The Evidence Must Support the Existence of the Measure

11. The Panel ultimately concluded that Japan was, as such, challenging "zeroing procedures," and the Panel further stated its "understanding" that "by zeroing procedures, Japan means the zeroing methodology *per se* . . . ."[12] The Panel found that "zeroing procedures" constituted a single measure, encompassing both what Japan described as "model zeroing" and "simple zeroing."[13] In a footnote, the Panel explained that it considered "that the terms 'model zeroing' and 'simple zeroing' used by Japan do not correspond to two different rules or norms but simply refer to different manifestations of a single rule or norm – not allowing non-dumped export sales to offset margins on export prices below the normal value."[14] Japan, in its submissions, had argued that it was describing two separate measures, one purportedly used by Commerce in investigations involving average-to-average comparisons (model zeroing) and one used by Commerce in assessment reviews and investigations involving average-to-transaction and transaction-to-transaction comparisons, respectively (simple zeroing). With respect to

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[12] Panel Report, para. 7.47.

[13] The Panel explained that "model zeroing" means the method by which "USDOC makes average-to-average comparisons of export price and normal value within individual 'averaging' groups . . . and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons . . . . ." Panel Report, para. 7.2. The Panel explained that by "simple zeroing" Japan means the "method whereby USDOC determines a weighted average margin of dumping based on average-to-transaction or transaction-to-transaction comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value . . . ." Panel Report, para. 7.3.

[14] Panel Report, n. 688.

"simple zeroing," Japan ultimately indicated that it was pursuing its claim only with respect to assessment reviews and transaction-to-transaction comparisons in investigations.[15]

12. It is worth noting at this point that Japan did not begin this dispute arguing in these terms concerning the U.S. measures it was challenging "as such." In its consultation request, Japan does not refer to "model zeroing" and "simple zeroing" measures, nor to "zeroing procedures"; rather, it states that it is challenging two U.S. "methodolog[ies] . . . for determining dumping margins" – one in investigations and one in administrative reviews[16] – with the further explanation that it is consulting on zeroing in "weighted-average-to-weighted-average" comparisons in investigations and "weighted-average-to-transaction" comparisons in reviews.[17] The consultation request does not refer to transaction-to-transaction or transaction-to-average comparisons in investigations.[18]

13. By contrast, Japan's request for panel establishment explains that Japan challenges Commerce's "computer program and other related procedures" purportedly used for all types of comparisons in all proceedings.[19] In redefining the alleged measures so as to no longer relate to specific comparisons in specific types of antidumping proceedings, Japan obscured the question of whether any measure actually exists as it relates to any specific context, that is, whether Commerce actually maintains such a measure as it relates to a specific context – and it also obscured the fact that it had not consulted on zeroing as it relates to transaction-to-transaction

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[15] Panel Report, para. 6.17.
[16] Consultation Request, first set of paras. (6) through (8).
[17] Consultation Request, second set of paras. (1) and (3).
[18] As noted below, the United States had not used a transaction-to-transaction comparison at the time of consultations, nor at the time of panel establishment.
[19] Panel Request, para. B(a).

and average-to-transaction comparisons in investigations. For the latter reason alone, Japan's as-such challenges to zeroing as it relates to these comparisons in investigations are outside the terms of reference of this dispute. But they are also beyond those terms of reference because the evidence does not support the existence of these alleged as-such Commerce measures.

14. While Japan in its submissions further shifted to a discussion of "simple zeroing" and "model zeroing" measures, the Panel ultimately adopted a single measure approach, "zeroing procedures." However, it did so without regard to whether the U.S. actually maintained such a measure or measures as they relate to transaction-to-transaction and average-to-transaction comparisons in investigations. The evidence before the Panel, consistent with Japan's argumentation, related primarily to Commerce's use of zeroing when conducting average-to-average comparisons in investigations and average-to-transaction comparisons in assessment reviews. The evidence was similar to that in *US – Zeroing (EC)*, in which the panel finding upheld by the Appellate Body was limited to the specific context to which that evidence related. Specifically, as the Panel recognized, in *US – Zeroing (EC) (AB)*, the Appellate Body upheld the panel's conclusion that "the zeroing methodology of the United States, *as it relates to original investigations in which the average-to-average comparison method is used to calculate margins of dumping*, can be challenged as such . . . ."[20] Indeed, the Appellate Body declined to accept the argument that there was a separate measure – zeroing methodology in assessment reviews – based on the lack of findings or undisputed facts on that issue.[21] In this manner, the Appellate Body confirmed that, particularly when the measure alleged is unwritten, the evidence of the

[20] Para. 7.43 (emphasis added).
[21] *US – Zeroing (EC) (AB)*, para. 228.

existence of a measure must in fact relate to the full scope of the measure claimed, and that there can be no finding of such a measure where such evidence does not exist.[22]

15. The Panel fully appreciated the need to consider the specific context to which evidence relates when the Panel examined whether the United States maintained an unwritten measure in connection with a separate "as such" claim of Japan; namely, Japan's allegation that Commerce "as such" relies in sunset and changed circumstances reviews on dumping margins calculated in prior proceedings (margins calculated using zeroing) to support its determinations in those reviews.[23] For example, in considering the probative value of a Japanese response to a question by the Panel, the Panel noted that the response

> only addresses the issue of whether USDOC relies on historical dumping margins in *sunset reviews.* It does not address the issue of whether USDOC relies on such margins in *changed circumstances reviews.* With respect to changed circumstances reviews, the only information provided by Japan as factual support for its argument that USDOC relies on historical margins of dumping is the statement by Valerie Owenby in Exhibit JPN-1. In our view, a statement of that nature cannot be a sufficient basis for a finding that a rule or norm of general and prospective application exists.[24]

16. The Panel's analysis of the existence of that alleged U.S. measure took into account both the evidence and the context in which that evidence appeared, and the Panel examined whether

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[22] Just as a single measure may often consist of elements that may themselves be considered measures, the Panel's error may be viewed either as having failed to identify the precise content of a single measure – that is, whether any "zeroing procedures" maintained by Commerce actually relate to transaction-to-transaction and average-to-transaction comparisons in investigations – or as having failed to establish the existence of separate Commerce "zeroing procedures" as they relate to each of these comparisons in investigations. The United States notes that the approach taken by the panel and Appellate Body in *US - Zeroing (EC),* and by Japan in its consultation request, was to consider the existence of separate measures for each context.

[23] Panel Report, paras. 7.236-7.244.

[24] Panel Report, para. 7.241 (emphasis in original).

the "measure" in question was *attributable* to the responding party. Had the Panel done the same with respect to the alleged Commerce "zeroing procedures," the Panel would not have found that any such measure actually exists in the contexts challenged in this submission.

IV. Japan Did Not Consult on the Alleged Measures

17. Before turning to the lack of evidence supporting a finding that Commerce maintains "zeroing procedures" as they relate to transaction-to-transaction and average-to-transaction comparisons in investigations, the United States notes again that Japan failed to consult on any zeroing measure, however described, allegedly maintained by Commerce in these contexts. As noted above, in its consultation request, Japan does not refer to "model zeroing" and "simple zeroing" measures, nor to "zeroing procedures"; rather, it states that it is challenging two U.S. "methodolog[ies] . . . for determining dumping margins" – one in investigations and one in administrative reviews[25] – with the further explanation that it is consulting on zeroing in "weighted-average-to-weighted-average" comparisons in investigations and "weighted-average-to-transaction" comparisons in reviews.[26] The consultation request does not refer to transaction-to-transaction or transaction-to-average comparisons in investigations.[27]

18. DSU Article 4.4 requires that the consultation request identify the measures at issue, and a failure to consult on a measure precludes inclusion of that measure within a panel's terms of reference.[28] Wholly apart from the lack of evidence as to the existence of a "zeroing procedure"

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[25] Consultation Request, first set of paras. (6) through (8).

[26] Consultation Request, second set of paras. (1) and (3).

[27] As noted below, the United States had not used a transaction-to-transaction comparison at the time of consultations, nor at the time of panel establishment.

[28] Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, para. 70; Appellate Body Report, *Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August

measure or measures in the above contexts, Japan's failure to consult on any such measures means that they are not within the terms of reference of this dispute, and the Appellate Body should reverse the Panel's finding as to the existence of such U.S. measures on that basis.[29]

V. The Evidence Does Not Support the Panel's Conclusion as to the Existence of the Alleged Measures

19. The United States recalls again the Appellate Body's admonition that a panel "must not lightly assume" the existence of an unwritten measure embodying a rule or norm of prospective application which can be challenged as such.[30] The complaining party "must clearly establish, through arguments and supporting evidence," that the measure embodying the rule or norm is taken by the responding Member, its precise content, and that it has general and prospective application.[31]

> It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged as such.[32]

20. Based on Japan's argumentation in this dispute, it is difficult to conclude that this "high threshold" was met. As the Panel itself appeared to recognize, deciphering precisely what measure Japan was in fact challenging "as such" was a difficult task.[33] As described above,

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1999, para. 131.

[29] The United States did not raise this issue in the Panel proceedings because it was focusing on the fact that these "measures" do not exist at all. However, a failure to consult is a jurisdictional matter and, as such, can be raised at any time. Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, para. 123.

[30] *US – Zeroing (EC) (AB)*, para. 196.

[31] *US – Zeroing (EC) (AB)*, para. 198.

[32] *US – Zeroing (EC) (AB)*, para. 198.

[33] *See, e.g.,* n.672 ("We note, however, that our understanding of the distinction Japan makes between the zeroing procedures and the standard zeroing line is based in particular on the arguments of Japan submitted following the first meeting of the Panel with the parties, and that,

Japan's description of the measures underwent frequent change. Initially, in its consultation request, and consistent with the analytical approach in *US – Zeroing (EC)*, Japan identified the "measures" it was challenging based on the comparison methodologies and antidumping proceedings set out in the Antidumping Agreement. It shifted to a general description in its panel request, then in its submissions adopted yet a new approach, introducing nomenclature for two purported types of zeroing – "model zeroing" and "simple zeroing." These terms do not appear in U.S. law (or, as the Panel stated, the terms were "labels used by Japan" rather than "terms of the United States"),[34] nor are they found in the Antidumping Agreement. However, like the "zeroing procedures" measure ultimately decided upon by the Panel, they obscure the differences identified in the Antidumping Agreement regarding the contexts in which an abstract calculation methodology such as "zeroing" might actually be used by a Member; that is, the type of proceeding and the type of comparison.

21. Among Japan's shifting descriptions of the measure it was challenging are arguments and explanations recognizing that the evidence does not support the conclusion that there is one "zeroing procedure" measure covering every type of antidumping proceeding and comparison. The United States has already noted that Japan's consultation request acknowledged that measures may differ based on these distinctions – and that Japan omitted from the challenged measures zeroing in the context of transaction-to-transaction and average-to-transaction comparisons in investigations. Thus, at least when it requested consultations, Japan – like the

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as noted above, this distinction is less clear in the First Submission of Japan.").

[34] Panel Report, para. 7.1.

United States – did not consider that there was *one* measure applicable regardless of comparison or proceeding type.

22. Further, when Japan decided to adopt the terms "model zeroing" and "simple zeroing" in its argumentation, Japan made it clear that it considered these to be two separate measures, rather than aspects of a single measure, as the Panel found. Japan explained:

> The measures that Japan challenges "as such" are referred to as the standard model procedures and simple zeroing procedures.[35]

And:

> [T]he United States maintains *two different* zeroing procedures . . . .[36]

And:

> [T]he standard model and simple zeroing procedures are the specific "measures" challenged "as such" in this dispute.[37]

And:

> "Model and simple zeroing procedures . . . are 'as such' measures . . . ."[38]

23. Finally, Japan's ultimate abandonment of its claim regarding the average-to-transaction comparison in investigations confirms that it appreciated that the evidence did not support the existence of a U.S. unwritten measure as it relates to this comparison in investigations, nor that the U.S. maintains a separate zeroing measure in this context. Japan acknowledged that the fact that Commerce had never used the average-to-transaction comparison in investigations meant

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[35] Japan First Written Submission, para. 11.

[36] Japan First Written Submission, para. 14 (emphasis added).

[37] Japan First Written Submission, para. 47. Adding to the confusion of just what Japan was challenging "as such," Japan argued that the "measure at issue" was model zeroing and simple zeroing as reflected in certain lines of computer programming: "The Standard Zeroing Line represents the measure at issue . . . ." Japan First Written Submission, para. 59.

[38] Japan Second Written Submission, Section II.

that there was a "degree of uncertainty" about how Commerce would perform that dumping calculation.[39] It is difficult to square Japan's acknowledgment of this "degree of uncertainty" with the Panel's conclusion that it had in fact identified "the precise content" of the measure it found in connection with all comparison and proceeding types, without exception, including average-to-transaction comparisons in investigations. It is likewise difficult to conclude that Japan met the "high threshold" for submitting evidence that the United States maintains "zeroing procedures" relating to all types of comparisons and proceedings, or even that Japan tried.

24. Moreover, whatever "degree of uncertainty" Japan acknowledged with respect to how Commerce would conduct average-to-transaction comparisons in investigations was certainly present as well in connection with Commerce's use of the transaction-to-transaction methodology in investigations. Commerce employed such a comparison exactly *once,* and then only after panel establishment, and there is no evidence indicating that Commerce would, as a matter of general and prospective application, zero were such a comparison to be used in the future.

25. Notwithstanding the above, in identifying the "zeroing procedures" measure, the Panel concluded that sufficient evidence had been shown to demonstrate that the "consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application . . . which is applied regardless of the basis upon which export price and normal value are compared."[40] The Panel further concluded that the terms "model zeroing" and "simple zeroing" did not reflect

[39] Japan Comments on Appellate Body Report in US –Zeroing (EC) (DS294), para. 31.
[40] Panel Report, para. 7.53.

two different rules or norms, but "simply refer to different manifestations of a single rule or norm . . . ."[41]

26. The Panel Report explains that this conclusion is based on two "facts": First, that zeroing has been a constant feature of Commerce's "practice" for a considerable period of time; and second, that the use of zeroing goes beyond the simple repetition of the application of a methodology to specific cases. However, the evidence relied on in the Panel's analysis does not support the proposition that there are rules or norms taken by the United States concerning the use of zeroing as it relates to transaction-to-transaction and average-to-transaction comparisons in investigations.

27. With respect to the assertion that zeroing has been a "constant feature" of Commerce's "practice," the Panel in its analysis did not examine any specific action the United States has taken with respect to transaction-to-transaction or average-to-transaction comparisons in investigations, nor whether Commerce had ever opined on whether it would use zeroing when conducting such comparisons.[42] Indeed, the Panel's analysis is devoid of any discussion of the different bases for comparison – average-to-average, transaction-to-transaction, and average-to-transaction – or of the types of proceedings in which any of those comparisons may be used – investigations, assessment reviews, changed circumstance reviews, and so on – or whether Commerce has even engaged in *any* of these comparisons in *any* of these types of proceedings. Thus, in this very important respect, the Panel failed to consider whether there was evidence of

[41] Panel Report, n. 688.
[42] Panel Report, para. 7.51.

the "precise content" of the measure it described (zeroing in all circumstances); that is, whether Commerce actually maintains a "zeroing procedure" measure or measure in various contexts.

28. The Panel's failure to distinguish among comparisons and proceedings is particularly striking in view of the fact that, as noted above, the Panel itself later recognized that evidence with respect to *one* proceeding is not evidence with respect to *another* proceeding.[43] In the end, the Panel provided no support for its conclusion that zeroing "is applied regardless of the basis upon which export price and normal value are compared."[44]

29. Similarly, the"evidence" upon which the Panel's analysis relies for the proposition that the issue "goes beyond the simple repetition of the application of a certain methodology to specific cases" consists primarily of quotations from one assessment review.[45] However, the Panel Report offers no evidence that Commerce's comments in that review pertain to any other comparisons or proceedings, such as a transaction-to-transaction comparison in an investigation. Therefore, those statements are simply not evidence of a rule or norm of general and prospective application involving the use of zeroing in transaction-to-transaction or average-to-transaction comparisons in investigations. Indeed, one of the quotations upon which the Panel relies expressly references "the weighted-average to weighted-average analysis."[46]

30. The Panel also relies on several statements made by the Department of Justice and others. In particular, the Panel quotes the Department of Justice as stating that Commerce has "consistently" applied zeroing and that zeroing is a "long-standing methodology" that "predated

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[43] The Panel performed its analysis of Japan's as-such claims relating to sunset and changed circumstances reviews in part on this basis. Panel Report, para. 7.236.

[44] Panel Report, para. 7.53.

[45] Paragraph 7.52 cites the assessment review of antifriction bearings four times.

[46] Panel Report, para. 7.52.

passage of the latest major amendment of the Anti-dumping law."[47] Not only were these statements made in connection with cases that did not involve transaction-to-transaction or average-to-transaction comparisons in investigations, but none of the statements does anything more than describe what Commerce had done in the past – in connection with average-to-average comparisons in investigations and average-to-transaction comparisons in reviews. None of Justice's statements prescribe or any way affect what Commerce must do in future antidumping proceedings. The same applies to the descriptive statements cited by the Panel from the U.S. Congress and the U.S. Court of international Trade.[48] Given that these statements are descriptions about what Commerce had done in the past, they do not speak to what Commerce might do with respect to comparisons not yet undertaken, nor do they bind Commerce in any way when conducting such comparisons. And they likewise relate to situations other than transaction-to-transaction and average-to-transaction comparisons in investigations.

31. The evidence put forward by Japan in this proceeding simply does not support the Panel's finding that Commerce maintains an unwritten zeroing measure regardless of the basis of the dumping comparison and in all antidumping proceedings. The Panel made no effort to "carefully examine the concrete instrumentalities that evidence the existence of the purported

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[47] Panel Report, para. 7.52.

[48] Panel Report, para. 7.52. In the same paragraph, the Panel also refers to a statement by the U.S. Court of Appeals for the Federal Circuit that Commerce's "zeroing practice" is a reasonable interpretation of U.S. law. However, once again, this "practice" did not extend to transaction-to-transaction and average-to-average comparisons in investigations. Further, the fact that Commerce was permitted by statute to zero says nothing about what Commerce will do in the future. Were it otherwise, Japan would not need to bring its as-such challenge against an unwritten measure; it could instead have challenged the statute.

'rule or norm'"[49] relating to Commerce's use of zeroing in the context of transaction-to-transaction and average-to-transaction comparisons in investigations, because there are no such instrumentalities. In connection with these types of comparisons provided for in the Antidumping Agreement, Commerce has simply not spoken, and has in only one case acted. As Japan itself recognized for at least one of these comparisons, there is a "degree of uncertainty" as to how Commerce will act on a general and prospective basis, and it is simply not possible to infer from these circumstances the United States maintains an unwritten measure or measures embodying rules or norms of general and prospective application in connection with these comparisons. Because the Panel did so, the Panel "failed to make an objective assessment of the matter" pursuant to DSU Article 11. Likewise, the Panel exceeded its terms of reference by including within the scope of the dispute measures not taken by the United States. The Appellate Body should reverse the Panel's finding that the United States maintains "zeroing procedures" applicable in the context of transaction-to-transaction and average-to-transaction comparisons in investigations.

VI. Based on its Erroneous Finding With Respect to the Scope of the Measure, the Panel Erroneously Examined the Question of Whether the U.S. Measure "As-Such" Breached U.S. WTO Obligations in the Context of the Transaction-to-Transaction Comparisons in Investigations

32. As consequence of its erroneous finding that Commerce maintains "zeroing procedures" as they relate to transaction-to-transaction and average-to-transaction comparisons in investigations, the Panel undertook an examination of whether these measures as such breached various obligations, including Articles 1, 2.1, 2.4.2, 2.4, 3.1-3.5, 5.8 and 18.4 of the

[49] *US – Zeroing (EC) (AB)*, para. 198.

Antidumping Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement.[50]

33. While the United States agrees with the Panel's legal analysis of whether the Antidumping Agreement, in the abstract, prohibits zeroing in various contexts, the Panel's findings could not, within its terms of reference, have applied to unwritten measures whose existence and content had not been established. Because Japan abandoned its as-such claim with respect to average-to-transaction comparisons in investigations, the Panel's findings did not cover this alleged "aspect" of the "zeroing procedures" measure.[51] That fact alone highlights the inconsistency between the Panel's finding on the scope of the measure at issue and the fact that certain "aspects" of that measure simply have never been taken by the United States. However, the Panel's findings did purport to apply to transaction-to-transaction comparisons in investigations. Therefore, apart from the fact that the Panel exceeded its terms of reference in simply finding that the United States maintains "zeroing procedures" measures in the context of transaction-to-transaction and average-to-transaction comparisons in investigations, the Panel also exceeded its terms of reference by making findings as to the WTO-consistency of one of those measures. For this reason, the Panel's findings with respect to the WTO consistency of "zeroing procedures" in transaction-to-transaction comparisons in investigations should be declared moot.

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[50] *See* Panel Report, paras. 7.90, 7.143, 7.161, 7.166, 7.170, 7.175, and 7.259(a).
[51] *See* Panel Report, n.765.

VII. Conclusion

34. For the reasons set forth in this submission, the United States requests that the Appellate Body:

(a) reverse the Panel's finding that the United States maintains a measure referred to as "zeroing procedures" in transaction-to-transaction and average-to-transaction comparisons in the context of investigations;

(b) declare moot the Panel's findings with respect to Articles 1, 2.1, 2.4.2, 2.4, 3.1-3.5, 5.8 an 18.4 of the Antidumping Agreement, Articles VI:1 and VI:4 of the GATT 1994 and Article XVI:4 of the WTO Agreement, to the extent they purport to apply to "zeroing procedures" in transaction-to-transaction comparisons in investigations.