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UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Final Report of the Panel

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US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS294/AB/R

I. INTRODUCTION

A. COMPLAINT OF JAPAN

1.1 On 24 November 2004, the Government of Japan ("Japan") requested consultations with the Government of the United States of America ("United States") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.2 of the Agreement on Implementation of Article VI of GATT 1994 (the "*AD Agreement*"), regarding certain laws, methodologies, and/or measures, including so-called zeroing.[1] Consultations were held on 20 December 2004, which allowed a better understanding of the positions of the parties, but failed to achieve a mutually agreed solution of the dispute.

1.2 On 4 February 2005, Japan requested the establishment of a Panel to examine this matter.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its 28 February 2005 meeting, the Dispute Settlement Body ("DSB") established a Panel pursuant to the request by Japan in document WT/DS322/8, in accordance with Article 6 of the DSU.

1.4 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS322/8, the matter referred to the DSB by Japan in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 7 April 2005, Japan requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panellists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 15 April 2005, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. David Unterhalter
Members: Mr. Simon Farbenbloom
Mr. José Antonio Buencamino

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[1] WT/DS322/1
[2] WT/DS322/8

1.7 Argentina; China; the European Communities; Hong Kong, China; India; Korea; Mexico; New Zealand; Norway; and Thailand reserved their third-party rights.

C. PANEL PROCEEDINGS

1.8 The Panel met with the parties on 28-29 June 2005, 15-16 September 2005 and on 12 June 2006.[3] The Panel met with third parties on 29 June 2005.

II. FACTUAL ASPECTS

2.1 At issue in this dispute is the calculation of margins of dumping by the United States Department of Commerce ("USDOC") based on a methodology that disregards the amounts by which export prices for certain transactions are above the normal value in the process of establishing an overall margin of dumping. Japan refers to this aspect of the USDOCs dumping margin methodology as "zeroing procedures"[4] and the "standard zeroing line"[5], and presents claims regarding both *as such* and regarding their *application*, specifically, in an original investigation, periodic reviews, and sunset reviews.

2.2 Japan argues that these zeroing procedures can be challenged as such as a "measure" pursuant to the *AD Agreement* and the DSU. The United States disputes that such a measure exists. The views of the parties regarding the existence of the "zeroing procedures" are described in the Arguments of the Parties.

2.3 Japan also challenges the application of zeroing procedures by the United States in the following anti-dumping proceedings with respect to products from Japan:

Original Investigation

- Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Japan, 64 Fed Reg. 73,215 (29 December 1999) ("CTL Plate").

Periodic Reviews

- Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Anti-dumping Duty Administrative Reviews, 66 Fed Reg. 15,078 (15 March 2001) ("Tapered Roller Bearings and Parts Thereof 1998 - 1999").

- Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Anti-dumping Duty Administrative Reviews, 65 Fed Reg. 11, 767 (6 March 2000) ("Tapered Roller Bearings and Parts Thereof 1997 - 1998").

- Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part, 65 Fed. Reg. 49,219 (11 August 2001) ("Ball Bearings and Parts Thereof 1998-1999").

[3] See para. 6.2.
[4] Japan First Written Submission, paras. 1-2.
[5] Japan Second Written Submission, *passim*.

- Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part, 65 Fed. Reg. 49,219 (11 August 2001) ("Cylindrical Roller Bearings and Parts Thereof 1998-1999").

- Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part, 65 Fed. Reg. 49,219 (11 August 2001) ("Spherical Plain Bearings and Parts Thereof 1998-1999").

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- Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part, 66 Fed. Reg. 36,551 (12 July 2001) ("Cylindrical Roller Bearings and Parts Thereof 1999").

- Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part, 66 Fed. Reg. 36,551 (12 July 2001) ("Spherical Plain Bearings and Parts Thereof 1999").

- Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews, 67 Fed. Reg. 55,780 (30 August 2002), as amended by Ball Bearings And Parts Thereof From Japan; Amended Final Results Of Anti-dumping Duty Administrative Review, 67 Fed. Reg. 63,608 (15 October 2002) ("Ball Bearings and Parts Thereof 2000-2001").

- Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and Singapore: Final Results of Anti-dumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not To Revoke Order in Part, 68 Fed. Reg. 35,623 (16 June 2003) ("Ball Bearings and Parts Thereof 2001-2002").

- Anti-friction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Anti-dumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part, 69 Fed. Reg. 55,574 (15 September 2004) ("Ball Bearings and Parts Thereof 2002-2003").

Sunset Reviews

- Final Results of Expedited Sunset Reviews: Anti-friction Bearings From Japan, 64 Fed. Reg. 60,275 (4 November 1999) ("Expedited Sunset Review of Anti-friction Bearings").

- Corrosion-Resistant Carbon Steel Flat Products From Japan; Final Results of Full Sunset Review of Anti-dumping Duty Order, 65 Fed. Reg. 47,380 (2 August 2000) ("Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products").

III. REQUESTS FOR FINDINGS AND RECOMMENDATIONS

(a) Japan

3.1 Japan requests that the Panel find that the United States' zeroing procedures are "*as such*" inconsistent with[6]:

> (1) Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 because, in any type of anti-dumping proceeding, the determination of dumping, and the calculation of the dumping margin, is not for the product as a whole;
>
> (2) Article 2.4 of the *AD Agreement* because, in any type of anti-dumping proceeding, the zeroing procedures are inherently biased, distort the comparison of normal value and export price and, thus, deprive exporters of a "fair comparison";
>
> (3) Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *AD Agreement* because the injury determination in original investigations is not based on an "objective examination" of "positive evidence" regarding the existence and amount of dumping and dumped imports;
>
> (4) Article 5.8 of the *AD Agreement* because the USDOC does not have "sufficient evidence" of dumping to assess whether it must terminate original investigations;
>
> (5) Articles 9.1, 9.2, 9.3 and 9.5 of the *AD Agreement* because margins calculated in periodic and new shipper reviews are not established consistently with Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and the United States fails to ensure that duties collected do not exceed the proper margin of dumping established on a fair comparison basis for the product as a whole;
>
> (6) Articles 11.1, 11.2 and 11.3 of the *AD Agreement* because changed circumstances and sunset reviews are not conducted on the basis of dumping margins calculated through a fair comparison for the product as a whole, as required by Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement*, and Articles VI:1 and VI:2 of the GATT 1994; and
>
> (7) Article 1 of the *AD Agreement* as they are inconsistent with various provisions of the *AD Agreement* as referred to in (1) – (6) above.
>
> (8) Japan also requests that the Panel find that, by maintaining the model and simple zeroing procedures, the United States acts inconsistently with Article 18.4 of the *AD Agreement* as well as Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade* Organization ("WTO Agreement").

3.2 Japan further requests that Panel find that, through the application of the zeroing procedures, the anti-dumping measures[7]:

> (1) in <u>CTL Plate</u>, 64 Fed Reg. 73,215, an original investigation, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, and 3.5 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994;

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[6] Japan First Written Submission, paras. 194-197.

[7] The full citations to the following anti-dumping proceedings can be found in the Table following para. 2.3 of this Report.

(2) in Tapered Roller Bearings and Parts Thereof 1998 - 1999, 66 Fed Reg. 15,078, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(3) in Tapered Roller Bearings and Parts Thereof 1997 - 1998, 65 Fed Reg. 11, 767, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(4) in Ball Bearings and Parts Thereof 1998-1999, 65 Fed. Reg. 49,219, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(5) in Cylindrical Roller Bearings and Parts Thereof 1998-1999, 65 Fed. Reg. 49,219, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(6) in Spherical Plain Bearings and Parts Thereof 1998-1999, 65 Fed. Reg. 49,219, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(7) in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(8) in Cylindrical Roller Bearings and Parts Thereof 1999, 66 Fed. Reg. 36,551, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(9) in Spherical Plain Bearings and Parts Thereof 1999, 66 Fed. Reg. 36,551, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(10) in Ball Bearings and Parts Thereof 2000-2001, 67 Fed. Reg. 55,780, as amended by, 67 Fed. Reg. 63,608, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(11) in Ball Bearings and Parts Thereof 2001-2002, 68 Fed. Reg. 35,623, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(12) in Ball Bearings and Parts Thereof 2002-2003, 69 Fed. Reg. 55,574, a periodic review, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994;

(13) in Expedited Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994; and

(14) in Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products, 65 Fed. Reg. 47,380, are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994.

3.3 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 *AD Agreement* and the GATT 1994, into conformity with its obligations under those Agreements.

3.4 Japan draws to the Panel's particular attention the urgency of this dispute. While the dispute is pending before the Panel, the United States will seek to determine the final anti-dumping duty liability in the "as applied" periodic reviews, by liquidating these cases one-by-one. Under United States law, following the liquidation of entries, anti-dumping duties paid will not be refunded. In addition, further periodic and sunset reviews for these cases are currently being conducted in reliance upon the standard zeroing procedures. Japan wishes to ensure "prompt" resolution of this dispute, consistent with Article 3.3 of the DSU, to avoid further WTO disputes regarding the over-payment of duties in these cases.

(b) United States

3.5 The United States requests that the Panel reject Japan's claims in their entirety.[8]

IV. ARGUMENTS OF THE PARTIES

4.1 This section of the Report contains a summary of the arguments submitted by the Parties. As noted in paragraph 6.2, *infra*, the Panel invited the Parties, after considering the Parties' specific requests relating to the Interim Report of the Panel, but before issuance of its Final Report, to submit comments on any relevant issues of law relating to the Appellate Body Report in *US – Zeroing (Japan)*[9] - the summary of the comments submitted by the Parties is reflected in paragraph 6.4 *et seq*.

A. BURDEN OF PROOF AND STANDARD OF REVIEW

1. Burden of Proof

(a) United States[10]

4.2 The United States states that, under the WTO, the burden of proving that obligations have not been satisfied is on the complaining party. In *US – Carbon Steel*, the Appellate Body explained that the complaining party bears the burden of proof with respect to an "as such" claim as well as an "as applied" claim.[11] Accordingly, the burden is on Japan to prove that the United States acted in a WTO-inconsistent manner with respect to both its "as applied" and its "as such" claims. The burden is not on the United States as a respondent to prove that it acted in a WTO-consistent manner.

2. Standard of Review

(a) United States[12]

4.3 The United States states that the standard of review of an investigating authority's establishment and evaluation of facts is set forth in Article 17.6(i) of the *AD Agreement*. The applicable standard of review is whether the authority's establishment of facts was proper and whether its evaluation of those facts was objective and unbiased, not whether the panel would have made the same

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[8] US First Written Submission, para. 110.

[9] The Appellate Body Report in *US – Zeroing (EC)* was issued to Members on 18 April 2006, that is, before the Panel could circulate its Final Report in this matter to the Parties.

[10] US First Written Submission, paras. 16-17.

[11] Appellate Body Report, *US – Carbon Steel*, paras. 156-157.

[12] US First Written Submission, paras. 18-24.

establishment and evaluation. The United States cites *US – Steel Plate* which is among a number of panels that have summed up the role of a panel under Article 17.6(i):

> "The standard requires us to assess the facts to determine whether the investigating authorities' own establishment of facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review."[13]

4.4 With regards to Article 17.6(ii), the United States asserts that a panel must consider whether an investigating authority's interpretation of the *AD Agreement* is a permissible interpretation. Article 17.6(ii) acknowledges that there may be provisions of the *AD Agreement* that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[14]

4.5 The United States argues that the negotiators of the *AD Agreement* saw fit to make specific provision for those instances in which the customary rules of treaty interpretation would find a provision of the *AD Agreement* susceptible to more than one permissible reading. That very fact provides context for the interpretation of the *AD Agreement*. It reflects the negotiators' understanding that they had left a number of issues unresolved, and that customary rules of interpretation would not always yield only one permissible reading of a given provision. The negotiators also recognized that they could not possibly foresee every interpretive question in the conduct of highly technical and complex anti-dumping proceedings. They understood that, with regard to many of these complex issues, the established practices of national authorities at the time of the *AD Agreement*'s conclusion differed, and that the *AD Agreement* should allow sufficient flexibility for authorities to continue their different practices.

4.6 The United States states that, in applying Article 17.6(ii) to the present case, the Panel should recall that there may be multiple permissible interpretations of particular provisions in the *AD Agreement*. Accordingly, the Panel should reject Japan's claims where the position of the United States is the result of a permissible interpretation.

B. "AS SUCH" CLAIMS

1. Zeroing Procedures Challenged as Measures

(a) Japan[15]

4.7 Japan argues that zeroing is an integral part of USDOC procedures for calculating margins of dumping.

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[13] Panel Report, *US – Steel Plate*, para. 7.6; see also Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.45 (Under Article 17.6(i), panels "may not engage in *de novo* review"); Panel Report, *Egypt – Steel Rebar*, paras. 7.8 and 7.14 (acknowledging that Article 17.6(i) precludes *de novo* review); Panel Report, *Guatemala – Cement II*, para. 8.19 ("We consider that is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case.").

[14] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341 and n. 223 ("We recall that, in accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is 'permissible', then we are compelled to accept it.").

[15] Japan First Written Submission, para. 11-64; Japan Executive Summary to First Written Submission, paras. 2-10; Japan Second Written Submission, paras. 6-39, 72-82; Japan Executive Summary to Second Written Submission, paras. 5-17.

4.8 Japan argues that 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 *AD Agreement*: the comparison of "a weighted average normal value with a weighted average of prices of all comparable export transactions" ("W-to-W" comparison); 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).

4.9 Japan argues that Zeroing is an integral part of the USDOCs procedures for each of the three methods of comparison. Specifically, the USDOC maintains two different zeroing procedures which Japan labels: "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.[16] 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.

4.10 Japan underlines that its claims regarding the WTO-inconsistency of the model and simple zeroing procedures are not tied to the use of these procedures in any particular type of anti-dumping proceeding, or as part of any particular method of comparison. Japan claims that both of the zeroing procedures are "as such" WTO-inconsistent irrespective of the type of proceeding and also the method used to compare normal value and export price. Japan explains "model zeroing" and "simple zeroing" in turn.

4.11 Japan posits that, in calculating a dumping margin on a W-to-W basis, the United States proceeds in three steps. In the first step, the USDOC sub-divides the product as a whole into a series of "averaging groups"[17] or "models." An averaging group consists of goods that are identical or virtually identical in all physical characteristics.[18] A W-to-W comparison between normal value and export price is made within these models.[19] There are three possible outcomes to these model-based comparisons.[20] Normal value may exceed export price for a particular model, in which case there is a positive price difference for the model (what United States' domestic law calls a "dumping margin"[21]); export price may exceed normal value, in which case the price difference or amount of dumping for the model is negative; or, finally, normal value and export price may be equal, in which case the price difference or margin[22] is zero. The overall margin of dumping for the product is obtained by aggregating the multiple model-based comparisons and expressing the result as a percentage. In the second step of the calculation procedures, the USDOC calculates both the numerator and denominator for the fraction from which the overall percentage is derived. The numerator is the total amount of dumping[23] by model and the denominator is the total value of all comparable export transactions. Under the model zeroing procedures, in summing the comparison results by model to calculate the

[16] As part of its explanation of the US' margin calculation procedures, Japan submits the testimony of Valerie Owenby, an expert in the US' computer programming procedures. Japan First Written Submission, para. 12; Exhibit JPN-1 ("Owenby Statement").

[17] 19 C.F.R. section 351.414(d)(1) (Exhibit JPN-3).

[18] 19 C.F.R. section 351.414(d)(2) (Exhibit JPN-3).

[19] 19 C.F.R. section 351.414(d)(1) (Exhibit JPN-3); USDOC Anti-Dumping Manual, Chapter 7, pages 27-28 (Exhibit JPN-5.B); and Chapter 9, pages 23 and 27 (Exhibit JPN-5.C).

[20] Japan First Written Submission, para. 18; Exhibit JPN-1 ("Owenby Statement").

[21] Title VII of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (1994), Section 771(35)(A) ("Tariff Act") (Exhibit JPN-2).

[22] Initially Japan refers to "price difference" and "price difference or amount of dumping", but subsequently refers to "intermediate comparison result". See Japan Response to Panel Questions, dated 19 October 2005 ("Japan 19 October 2005 Answers"), para. 90, and Japan Comments on US Response to Panel Questions, dated 19 October 2005 ("Japan Comments on US 19 October 2005 Answers"), para. 41.

[23] At first Japan refers to "the total amount of dumping", but subsequently referred to "an aggregation of the comparison result". See Japan 19 October 2005 Answers, para.90, and Japan Comments on US 19 October 2005 Answers, para. 41.

numerator, the USDOC includes solely the results for models with positive differences. All comparisons with negative differences are disregarded in the calculation of the numerator. Thus, for models with negative results, the USDOC purposefully ignores the results of the comparison of normal value and export price. As a result, the sum total amount of dumping in the numerator is inflated by an amount equal to the excluded negative results. In calculating the denominator of the fraction, the USDOC includes the total value of all comparable export transactions for *all* models. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margin of dumping, known in the United States' law as the "weighted average dumping margin".[24]

4.12 Japan states that simple zeroing is very similar to model zeroing. The key difference stems from the differences between the W-to-W comparison, on the one hand, and the T-to-T and W-to-T comparisons, on the other. Whereas the W-to-W comparison is based on a comparison of export transactions grouped by model, the other two methods are based on comparisons with individual export transactions. Thus, instead of zeroing by model, the USDOC zeroes by individual export transaction under the simple zeroing procedures. After identifying comparable export transactions, the USDOC compares export price for these transactions with either a weighted average normal value (W-to-T) or transaction-specific normal value (T-to-T). Thus, the USDOC calculates the price difference (what United States' law calls the "dumping margin") for each comparable export transaction. Again, there are three possible outcomes to these comparisons. Normal value may exceed export price for a particular transaction, in which case the United States considers that there is a positive "dumping margin" or intermediate comparison result for the transaction; export price may exceed normal value, in which case the difference or intermediate comparison result for the transaction is negative; or, finally, normal value and export price may be equal, in which case the difference or intermediate comparison result is zero. As in the W-to-W comparison, in step two, to derive a margin of dumping or an overall "weighted average dumping margin" for the product, the USDOC aggregates the multiple transaction comparisons undertaken and expresses the result as a percentage. Again, the USDOC sums the price differences exclusively for those comparisons for which there was a positive intermediate comparison result. All comparisons with negative differences are disregarded from the calculation of the numerator of the overall margin fraction. Thus, where there is a negative difference, the USDOC purposefully ignores the results of the comparisons of export transactions and normal value. As a result, the sum total of dumping is inflated by an amount equal to the excluded negative differences. As with model zeroing, the USDOC retains the total sales value of *all* comparable export transactions in the denominator. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margin of dumping or "weighted average dumping margin".

4.13 In light of this overview of the United States' procedures for calculating the margins of dumping, Japan turns to the description of the measures at issue.[25] Japan explains that the USDOC relies on computer programmes 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 programmes, which act as a model for use whenever the USDOC develops a specific computer programme in a particular anti-dumping proceeding. The nature and purpose of these standard computer programmes are described in the USDOCs Import Administration Anti-Dumping Manual ("Manual").[26] The Manual demonstrates that the USDOC maintains standard computer programmes to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings. The Manual notes that "consistency is achieved by insuring that the standard programmes conform with current AD calculation methodology".[27] The Manual further states that "calculation consistency occurs when every programme uses the same standard calculation methodology" – presumably the "proper"

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[24] Tariff Act, Section 771(35)(B) (Exhibit JPN-2).
[25] Exhibit JPN-1 – Owenby Statement.
[26] Exhibits JPN-5 to 5.C.
[27] Exhibit JPN-5.C, page 8.

methodology.[28] In other words, Japan argues, every programme that is applied by the United States in a particular proceeding must use "the same standard calculation methodology", and that methodology must "conform" to the Administration's current methodological requirements, which are set out in the standard programmes.[29] The Manual also indicates that one of the standard computer programmes that the USDOC maintains is the AD Margin Calculation Programme.[30] The Manual, therefore, shows that the USDOC maintains standard computer programmes, including the AD Margin Calculation Programme, that apply on a generalized and prospective basis.

4.14 Japan posits that the USDOC maintains standard computer programmes 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.[31] The model and simple zeroing procedures are contained in these programmes.

4.15 The United States' overall "weighted average dumping margin" calculation in original investigations, periodic reviews and new shipper reviews[32], Japan argues, involves a three-step process. In Step 1, the United States executes the procedures necessary to carry out the multiple W-to-W, W-to-T, or T-to-T comparisons on a model- or transaction-specific basis. Under the variables UMARGIN and EMARGIN, the USDOC captures the per-unit (UMARGIN) and total (EMARGIN) difference between normal value and export price for each of the multiple comparisons. In model zeroing, UMARGIN and EMARGIN reflect the per-unit and total intermediate comparison result for each model, and in simple zeroing they reflect the per-unit and total intermediate comparison result for each export transaction. Where normal value exceeds export price, UMARGIN and EMARGIN are positive values. Where export price exceeds normal value, UMARGIN and EMARGIN are negative, and where export price and normal value are equal, UMARGIN and EMARGIN are zero. The United States retains data for export price, normal value, UMARGIN, EMARGIN, and numerous other variables, in a dataset called "MARGIN".

4.16 According to Japan, Steps 2 and 3 of the overall dumping margin calculation are executed pursuant to the procedures in the "Calculate Overall Margin" section of the standard computer programmes. Japan points out that, unlike a number of other sections in the standard programmes, the "Calculate Overall Margin" section does not contain computer-coded "switches" that permit the USDOC to turn the procedures in this section "off" or "on". This is because the procedures for calculating the overall percentage "weighted average dumping margin", including the standard zeroing procedures, are always part of the programming procedures, and are used in every margin calculation. Moreover, since at least 1993, the USDOC has not altered the essence of the procedures for calculating the overall "weighted average dumping margin", including the standard zeroing procedures.

4.17 Japan argues that, in Step 2, the USDOC derives the *denominator* and *numerator* for a fraction that is used to calculate the overall percentage weighted average dumping margin for the product. First, the USDOC derives the *denominator* of the fraction, which is the total value of all comparable export transactions. To do this, the programming procedures extract from the MARGIN dataset, and sum, the sales values of all models or transactions. Next, the USDOC derives the *numerator* of the fraction, which is the total *positive* intermediate comparison result for all models or transactions. This time, the programme extracts from the MARGIN dataset, and sums, the *positive* EMARGIN values, by model or transaction. The programme selects from among all of the multiple model or transaction-specific

[28] Exhibit JPN-5.C, page 8.
[29] Exhibit JPN-5.C, page 8.
[30] Referred to at Exhibit JPN-5.C, pages 9 and 30.
[31] Exhibits JPN-6 and 7.
[32] Japan notes that in both changed circumstances reviews and sunset reviews, the US generally does not determine a new dumping margin, but instead relies on a margin calculated in the original investigation or a previous periodic review.

comparisons those with positive intermediate comparison result. Japan argues that the United States thus disregards all negative intermediate comparison results by inserting into this step a specific line of programming code: WHERE EMARGIN GT 0. This line instructs the SAS application to ignore all negative intermediate comparison results when deriving the numerator. This single line of computer programming represents the zeroing procedure at issue. Japan refers to this as the "standard zeroing line".[33]

4.18 Japan asserts that, using the variables created in Step 2, in Step 3 of the procedure the overall percentage "weighted average dumping margin" is computed. The United States divides the total positive intermediate comparison result (i.e. the numerator) by the total value of all comparable export transactions (i.e. the denominator), and multiplies the result by 100 to express the ratio as a percentage. This final percentage figure is the overall "weighted average dumping margin" for the product.

4.19 In periodic reviews, Japan claims, the United States always calculates two types of margins: an overall "weighted average dumping margin" for each exporter, and importer-specific assessment rates. The overall "weighted average dumping margin" is calculated using the programming procedures described, including the standard simple zeroing procedures. That margin becomes the duty deposit rate that the United States applies to future entries of the product for the purpose of collecting estimated duties, until completion of the next periodic review. The standard computer programme for a periodic review includes an extra section of programming code to calculate the importer-specific assessment rates. The importer-specific assessment rates are used by the United States to collect definitive anti-dumping duties for the review period. The duties are collected from the importers of goods, rather than the exporters. However, as the overall "weighted average dumping margin" is calculated for an exporter, the USDOC must "allocate" an exporter's dumping margin among the importers of that exporter's subject merchandise. In essence, through the importer-specific calculation procedures, the USDOC divides among the importers the total amount of dumping duties due for the product (i.e. the *numerator* in the overall dumping fraction is divided among the different *importers*). This sub-divided figure is the numerator in a new fraction for each importer. The denominator is based on the total entered value of imports, by importer, as declared to United States Customs. The standard computer programme for periodic reviews contains programming procedures to calculate both, and each section of the computer programme includes the standard zeroing line by which all negative dumping amounts are disregarded.

4.20 Japan asserts that the standard programmes serve as models whenever the USDOC develops a case-specific programme for use in anti-dumping proceedings. When a case-specific computer programme is formulated, however, the integrity of the standard programme is retained, and crucially, the standard zeroing line is always included unchanged.

4.21 Japan claims that, in terms of Article 6.2 of the DSU, the standard model and simple zeroing procedures as well as the standard zeroing line 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 *AD 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. Japan points out that the Appellate Body explained three important points for the current dispute.

4.22 First, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that the word "measure" extends to any act or omission by a Member and that "acts setting forth rules or norms that are intended to have general and prospective application" "could constitute a 'measure'". The Appellate

[33] When the USDOC uses the per-unit difference (UMARGIN) instead of the total difference (EMARGIN), a specific line of programming code inserted into this step is "WHERE UMARGIN GT 0".

Body further observed that this view "serves the purpose of preventing future disputes".[34] Second, in *US – Oil Country Tubular Goods Sunset Reviews* and in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body suggested that an alleged "measure" is assessed in WTO law irrespective of its legal character or status in domestic law.[35]

4.23 In other words, claims Japan, the determination in WTO law is based on the "content and substance" of an act and not its "form and nomenclature".[36] Japan points out that 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 US domestic laws and regulations.[37] Japan notes that the United States has advocated the contrary position in *EC – Approval and Marketing of Biotech Products*, in which it has argued that an "unwritten procedure" is a measure for purposes of WTO dispute settlement.[38] The same reasoning applies in the case of the *AD Agreement* as in the case of the *SPS Agreement*, the covered agreement involved in the *EC – Approval and Marketing of Biotech Products* dispute.[39] Japan argues that it would be all too easy for Members to evade their obligations under the *AD Agreement* – and other covered agreements – if unwritten rules and procedures could escape WTO scrutiny.[40]

4.24 Third, the Appellate Body in *Guatemala – Cement I* and *US – Corrosion-Resistant Steel Sunset Review* and the Panel in *Korea – Commercial Vessels* suggested that a "measure" need not be binding or mandatory in domestic law.[41]

4.25 Japan states that it brought the present dispute pursuant to the *AD Agreement*, Article 17 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.[42] Furthermore, under Article 18.4 of the *AD 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".[43] An "as such" dispute under the *AD Agreement* may, therefore, concern "administrative procedures", which are rules, norms or standards of general and prospective application.

4.26 Japan also argues that the ordinary meaning of the word "administrative," in Article 18.4 of the *AD Agreement*, refers to the "conduct or management of affairs"; and a "procedure" is "a system of proceeding; proceeding, in reference to its mode or method".[44] In particular, the meaning of the word

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[34] Japan First Written Submission, para. 49.

[35] Japan First Written Submission, para. 51.

[36] Japan Second Written Submission, para. 9; *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.

[37] Japan Second Written Submission, para. 9; US Response to the Panel's Questions after the First Substantive Meeting of the Panel with the Parties ("US 20 July 2005 Answers"), para. 2.

[38] Japan Second Written Submission, para. 10; Japan Executive Summary to Second Written Submission, para. 8; US First Written Submission, *EC – Approval and Marketing of Biotech Products*, para. 82.

[39] Japan Executive Summary to Second Written Submission, para. 8.

[40] Japan Executive Summary to Second Written Submission, para. 8.

[41] Japan Executive Summary to First Written Submission, para. 7; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-88; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187. See also Panel Report, *Korea – Commercial Vessels*, para. 7.63.

[42] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 86.

[43] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

[44] *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 1, p. 28 ("administrative"); Vol. 2, p. 2363 ("procedure") (Exhibit JPN-4). The *New Shorter Oxford English Dictionary*

"procedure" includes "computers: a set of instructions for performing a specific task".[45] Thus, an "administrative procedure", in Article 18.4, is a system or method, including a set of computer instructions, used by investigating authorities to conduct or manage anti-dumping proceedings.

4.27 Japan argues that the standard model and simple zeroing procedures set forth in the USDOCs standard computer programmes, as well as the standard zeroing line in the programmes, are "administrative procedures" under Article 18.4 of the *AD 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 USDOCs 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.

4.28 Japan argues there is 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 *AD Agreement*. Japan points out that the United States has not provided evidence of a single instance in which it did not use its zeroing procedures. The continued use of zeroing procedures in a T-to-T comparison by the USDOC in the implementation of the recommendation and ruling of the DSB in *US – Softwood Lumber V* [46] further confirms that the zeroing procedures are rules, norms or standards of general and prospective application.

4.29 Among the evidence that Japan uses to show the existence and the substance of the standard zeroing procedures, Japan points to numerous statements by the USDOC, the United States Department of Justice ("USDOJ") and the United States domestic courts, which confirm the existence and the substance of the standard zeroing procedures that Japan challenges as "as such" measures. These official US government statements also explain the operation of the zeroing procedures in a manner that is fully consistent with Japan's description of these measures. Thus, the passages cited by Japan from the United States Government and from the US domestic courts contain unequivocal statements attesting to the long-standing existence and the content of the zeroing procedures as a general and prospective rule in margin calculations.

4.30 Japan also submits that the USDOC Import Administration Anti-Dumping Manual demonstrates that the USDOC has developed and maintains a standard calculation methodology and that this methodology is reflected in the standard programme. Japan asserts that the standard programmes are written in such a way that the zeroing procedure is executed automatically in the margin calculation process. As a part of the standard programmes, the standard zeroing line is found in every margin calculation programme applied by the USDOC in specific anti-dumping proceedings, including the 26 case-specific computer programmes submitted by Japan. The consistent application of zeroing procedures demonstrates the generalized, normative and prospective nature of the application of these procedures. Japan presents testimony from Ms. Valerie Owenby, an expert in the US anti-dumping computer programming procedures, who stated that, since 1993, she is unaware of any

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defines a "method" as "[a] mode of procedure; a (defined or systematic) way of doing anything, *esp.* (w. specifying wd or wds) in accordance with a particular theory or as associated with a particular person".

[45] *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 2, p. 2363 ("procedure") (Exhibit JPN-4).

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

case-specific margin calculation programme in any US anti-dumping proceeding, in which the standard zeroing line did not feature. In short, Japan submits that the totality of the evidence in this dispute demonstrates that the standard zeroing procedures constitute a general rule, norm or standard susceptible of challenge under the *Anti-Dumping Agreement* and the DSU.

4.31 Japan argues that the standard zeroing line is an instrument setting forth rules or norms that are intended to have general and prospective application[47]. As noted, according to its ordinary meaning, the term "administrative procedures" includes "a set of [computer] instructions for performing a specific task". The United States acknowledges that the computer programmes at issue and the specific lines of computer code in them are "a set of computer instructions".[48] 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 USDOCs "administrative procedures" for calculating margins of dumping.

4.32 Japan acknowledges that the United States points out a small, but unspecified, number of cases, in which the USDOC did not use the standard zeroing line because it did not use SAS computer software. Even in the handful of instances when the standard zeroing line was not applied, Japan states that the standard zeroing procedures were *always* used. In particular, the United States admits that, in these instances, negative comparison results were excluded using other software or, even, manually.[49] Japan argues that 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. without exception, in all circumstances.

4.33 Japan observes the United States' argument that the standard computer programme cannot be a measure because, *first*, Japan has "not even identified a 'standard computer programme'" and "there is no single computer programme to be challenged as such for every programme is tailored to each case"; and, *second,* Japan has not shown that the standard programmes in their entirety are generally applicable. In response, Japan argues that, *first*, it had identified and submitted two programmes that the USDOC itself styles as "standard programmes". Japan also demonstrated that the standard zeroing line features in the two standard programmes and is also included in a series of case-specific programmes. *Second*, where the contested measure constitutes a small part of a larger instrument, Japan asserts that it is unnecessary to look beyond the measure and examine other parts of the instrument that are not part of the dispute. *Third*, as explained, the standard zeroing line is a rule, norm or standard of general and prospective application.

4.34 Japan argues that the United States is incorrect in suggesting that Japan has not demonstrated that the zeroing procedures mandate a violation of the United States' WTO obligations.[50] 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. Japan notes that the Appellate Body has not yet opined definitively on the relevance of the mandatory/discretionary doctrine[51], and that the mandatory/discretionary distinction is, at most, an "analytical tool" to assist in deciding if a measure is WTO-consistent, but that this tool must not be applied "mechanistically".[52] In *US – Corrosion-Resistant Steel Sunset Review*, *US – Carbon Steel* and *US – 1916 Act*, the

[47] Appellate Body Report, *US – OCTG from Argentina*, para.187.

[48] US First Written Submission, para. 36.

[49] US 20 July 2005 Answers, para. 9.

[50] See Japan Second Written Submission, paras. 72-82; US 20 July 2005 Answers, paras. 13-16.

[51] Japan Opening Statement, First Substantive Meeting of the Panel with the Parties, paras. 14-18; 24. Japan 20 July 2005 Answers, para. 28-39. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[52] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

Appellate Body found that the mandatory/discretionary distinction must be analyzed in the light of the burden of proof and, therefore, of the evidence as a whole.[53]

4.35 In short, Japan argues, the zeroing procedures and the standard zeroing line preclude the United States from complying with its WTO obligations. The zeroing procedures and the standard zeroing line prevent the United States from calculating a margin of dumping for the "product" as a whole on the basis of a "fair comparison", as required by the *AD Agreement* and the GATT 1994. The evidence of the consistent application of the measures confirms this and also demonstrates that the USDOC treats the zeroing procedures as well as the standard zeroing line as a binding part of its margin calculation procedures.

4.36 Japan notes that, in its 20 July 2005 Answers, the United States argues that a measure does not mandate a violation of WTO law if an executive authority retains discretion to avoid a breach of WTO.[54] The United States goes on to argue that the USDOC Assistant Secretary has the discretion to decide whether to provide "offsets" in any particular investigation.[55] In other words, according to the United States, the zeroing procedures are as such WTO-consistent because the USDOC Assistant Secretary could decide not to apply them in an investigation or could change them. Japan states that the United States is incorrect that executive discretion not to apply or to change a measure necessarily renders the measure WTO-consistent. In *US – 1916 Act*, the measure at issue permitted the US Department of Justice ("USDOJ") to initiate criminal enforcement proceedings on a discretionary basis.[56] The United States argued that the criminal provisions of the measure were not, as such, WTO-inconsistent because violations could be avoided through the USDOJs discretion not to enforce these provisions.[57] The Appellate Body disagreed, finding that the criminal provisions of the measure were WTO-inconsistent, even though they might not be applied by the USDOJ.[58]

4.37 Japan argues that, in reaching this conclusion, the Appellate Body cited approvingly the adopted GATT panel report in *US – Malt Beverages*. In that dispute, an executive authority also enjoyed discretion not to apply the contested measures. Indeed, in contrast to the circumstances of this dispute, one of the measures was not applied at all and the other only "nominally" so.[59] Despite this, the Panel found that the executive discretion not to apply the measures did not render them GATT-consistent.[60]

4.38 Japan asserts that there is, therefore, a distinction between two types of measure: *first*, a measure that, in terms of its substantive content, mandates WTO-inconsistent action as a rule, with the executive enjoying discretion not to apply the measure in any individual case; and, *second*, a measure

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[53] Japan 20 July 2005 Answers, paras. 28 – 39.

[54] US 20 July 2005 Answers, para. 3. The US cited a statement by the Appellate Body in *US – Section 211 Appropriations Act* (para. 259) to support its position that the mere existence of discretion to avoid a WTO violation renders a measure WTO-consistent. However, contrary to the US' assertion, the Appellate Body framed the issue as a matter of a *presumption* of compliance that can be rebutted by evidence relating to the consistent application of the measure. Japan emphasizes that there is no room for such a presumption in this case because the standard zeroing procedures and the Standard Zeroing Line are measures that, in terms of their substantive content, mandate WTO-inconsistent action as a rule. See Japan Second Written Submission, para. 78. It is also worth noting that, in *US – Section 211 Appropriations Act*, the Appellate Body rejected the US' argument that "discretionary regulations, issued under a separate law, cured the discriminatory aspects of the [mandatory] measure at issue." See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* footnote 94.

[55] US 20 July Answers, para. 11.

[56] Appellate Body Report, *US – 1916 Act*, paras. 90 and 91.

[57] Appellate Body Report, *US – 1916 Act*, para. 84.

[58] Appellate Body Report, *US – 1916 Act*, para. 91.

[59] Panel Report, *US – Malt Beverages*, paras. 5.58 and 5.60.

[60] Panel Report, *US – Malt Beverages*, paras. 5.39 and 5.60.

that, by its own terms, does not require (but permits) the executive to take WTO-inconsistent action. The substantive content of the first measure is WTO-inconsistent, whereas the substantive content of the second is not defined in the absence of executive action. According to *US – 1916 Act* and *US – Malt Beverages*, the first measure is WTO-inconsistent, despite the possibility that the executive may or may not apply the measure in certain cases.

4.39 Japan argues that the distinctions established in *US – 1916 Act* and *US – 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 held to be as such WTO-consistent on the grounds that the Member's executive might, one day, decide not to apply them. This is particularly so for "administrative procedures" under the *AD Agreement* that, by their very nature, are often adopted by an executive authority that could easily retain discretion not to apply them.

4.40 Japan argues that this line of GATT and WTO case-law is particularly apposite in the circumstances of the current dispute. The zeroing procedures have been maintained by the USDOC since before the *AD Agreement* entered into force in 1995. Although the United States asserts that the USDOC 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 *US – 1916 Act* and *US – Malt Beverages*, the USDOC discretion not to apply the zeroing procedures in a particular investigation is irrelevant.

4.41 Japan argues that the issue is *not* whether the USDOC Assistant Secretary could decline to apply the zeroing procedures in a particular investigation; nor is the issue whether the USDOC could change the zeroing procedures. All laws, regulations and procedures are subject to change, whether they are mandatory or not. Instead, the issue is whether the zeroing procedures themselves – in terms of their substantive content – mandate a violation of WTO obligations as a rule. As the evidence shows, the answer to this question is plainly, "yes". Under the zeroing procedures, negative comparison results are systematically and mechanically discarded in the calculation of the numerator, representing the apparent total amount of dumping. In terms of the zeroing procedures, there is no other alternative. As the USDOC put it, notwithstanding the USDOC Assistant Secretary's alleged discretion, "*we do not allow*" "offsets" that compensate for negative comparison results.[61] This is also borne out by the uncontested evidence of the consistent application of the zeroing procedures, which shows that the USDOC treats the measure as a binding part of its procedures. There can, therefore, be no presumption that the USDOC Assistant Secretary will not apply the zeroing procedures.

4.42 In response to the Panel's questions regarding how the consistent application of a procedure of zeroing can establish the existence of a measure and whether the measure challenged "as such" can be identified simply by reference to its consistent application, Japan argues that it does not identify the zeroing procedures "simply by reference" to their consistent application.[62] Japan argues that it has relied on several categories of evidence – the USDOC Anti-Dumping Manual; standard zeroing line; statements by the USDOC, USDOJ, and United States courts; the Valerie Owenby Statement; and the consistent application of the zeroing procedures demonstrated in 26 case-specific programmes – which taken together demonstrate that the zeroing procedures constitute a general rule, norm, or standard maintained by the United States for calculating dumping margins. Japan argues that, in a case such as this, where a Member has failed to publish a general measure in written form, a Member can draw evidence from other sources to establish the existence of the measure, and challenge it "as such".

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[61] See *Issues and Decision Memorandum for the Anti-Dumping Duty Administrative Reviews of Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom for the Period of Review 1 May 2002, through 30 April 2003, Comment 1 (at 12-14) (15 Sept. 2004)* (*emphasis added*). Exhibit JPN-21.D.

[62] Japan 19 October 2005 Answers, paras. 2-12.

4.43 Further, where a Member has failed to publish a general rule, a consistent pattern of regulatory behaviour can indicate that the Member adopted, in the past, a general and prospective rule, particularly, for example, when the pattern of behaviour is extremely consistent, over an extended period of time, in a variety of regulatory situations. In answering a question by the Panel whether Japan contends that the zeroing procedure at issue can be challenged as a practice, Japan answers that the Panel should not attach too much significance to the description by the USDOC, the USDOJ, and the United States courts of zeroing as a "practice" as a matter of domestic legal parlance, but should instead focus on the substance and content of the measure at issue. In this connection, Japan also asserts that its request for the establishment of a panel specifically identifies the zeroing procedures as the measure at issue and describes their substantive content. Whether or not the request includes "practice" is irrelevant because Japan is not challenging mere practice.[63] Japan also submits, in response to a question of the Panel, that a "policy" of systematically applying the same methodology in dumping margin calculations can be found to be WTO-inconsistent if the policy is a general rule, norm or standard with prospective application.[64]

(b) United States[65]

4.44 The United States argues that the Panel should reject Japan's "as such" claims, that USDOCs "standard computer programme" is not a measure, and that USDOCs "standard computer programmes" are tailored to each proceeding and do not mandate any action. The United States argues that the "as such" claims set forth in Japan's panel request are limited to one so-called measure – the "computer programme". Identified as "USDOCs AD Margin Calculation computer programme" in section B.1(a) prior to the listing of articles allegedly violated[66], Japan's first submission only addresses what it refers to as the "computer programmes" as the measures subject to dispute settlement.[67] The United States interprets the core of Japan's argument as being limited to the "standard zeroing line" in the "computer programmes".[68]

4.45 The United States discusses whether the "standard computer programme" as alleged by Japan is a "measure" as understood under Article 6.2 of the DSU. The Appellate Body has indicated that an instrument setting out rules or norms of general application could be challenged "as such".[69] *First,* Japan variously refers to "computer programme" and "computer programmes". This distinction is important. In fact, there is no single computer programme to be challenged "as such". USDOC staff do

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[63] Japan 19 October 2005 Answers, paras. 13-17 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87).

[64] Japan 19 October 2005 Answers, para. 18.

[65] US First Written Submission, para. 29-37; US Executive Summary to First Written Submission, paras. 4-9; US Second Written Submission, paras. 5-22; US Executive Summary to Second Written Submission, paras. 2-13.

[66] That section of the panel request vaguely refers to "other related procedures" and states that these are collectively referred to as "zeroing", but Japan never identifies what these "other related procedures" are. Moreover, in specifying the articles violated, Japan refers to "the Zeroing procedure" but does not explain what "the Zeroing procedure" is. Paragraph 2 refers to "United States laws, regulations and administrative procedures *described above* . . . ", yet no laws, regulations, or administrative procedures were described above (except perhaps the computer programme, which is not a law, regulation, or administrative procedure).

[67] Japan First Written Submission, para. 57.

[68] See Japan First Written Submission, paras. 60-61. Moreover, the US argues that Japan has failed to identify any measure to which its claims concerning the issue of offsets when using the transaction-to-transaction methodology apply. The US has not used the transaction-to-transaction methodology in any of the measures Japan challenges "as applied". In addition, none of the computer programmes identified by Japan utilize the transaction-to-transaction comparison methodology.

[69] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

not apply a uniform computer programme to every case; instead, the computer programmes are tailored to each one. Japan implicitly acknowledges as much in its exhibits; if there were only one computer programme, then Japan would not have had to include the computer programme for each determination in its exhibits.[70] Accordingly, Japan has not even identified a "standard computer programme", and it would thus be difficult to conclude that it has identified a measure at all.

4.46 Further, argues the United States, Japan's argument on the "computer programmes" themselves are limited to one line in the programmes, the so-called "standard zeroing line". The United States claims that Japan does not even attempt to argue that the "standard computer programmes" meet the criteria to be measures. For example, Japan argues that the "standard zeroing line" is "generalized and prospective", without addressing the computer programmes in their entirety.[71] For this reason as well, Japan has not met its burden of demonstrating that the computer programmes are measures subject to dispute settlement.

4.47 The United States states that in any event, even in the context of a particular proceeding, whether one looks at an entire computer programme or one line in the computer programme, these are simply convenient tools to allow USDOC officials to calculate dumping margins accurately and efficiently. USDOC officials tell the computer programmes what to do, rather than the opposite. In that regard, it is difficult to see how a computer programme, or one line of a computer programme, is an instrument that sets out rules or norms, nor do they have general or prospective application. They do not have general application because they are tailored for each case. Similarly, they do not have prospective application because they apply only to the particular case and do not apply to future cases.

4.48 The United States argues also that USDOCs "Standard Computer Programmes" are tailored to each proceeding and do not mandate any action. If a particular instrument is challenged as such, then, to be found WTO-inconsistent, it must mandate a breach. The mandatory/discretionary doctrine has been consistently applied in GATT and WTO dispute settlement proceedings. The test reflects the fact that, as the Appellate Body has noted, panels may not presume bad faith on the part of Members.[72] Thus, if a measure provides a Member with the discretion to act in a WTO-consistent manner, it may not be presumed that the Member will exercise that discretion in bad faith.[73] Therefore, even if USDOC computer programmes were considered to be measures, they cannot be found to be inconsistent with the WTO Agreements because they do not mandate any action, and Japan has not argued that they do. These programmes do not preclude the USDOC decision-maker from offsetting negative dumping margins, nor do they require the USDOC decision-maker to ignore negative dumping margins. If the USDOC decision-maker decided to offset negative dumping margins in a particular case, his decision would be implemented simply by using a different set of computer instructions.

4.49 The United States thus argues that Japan has referred to nothing in US law which would support the conclusion that computer programmes are anything but the means by which decision-makers implement their decisions, or that such programmes require decision-makers to act in any particular way.

4.50 Moreover, the United States argues that neither Japan's first submission, its statements before the Panel, nor its answers to Panel questions demonstrate how what it refers to as the "zeroing

[70] The US notes, in this regard, that Ms. Owenby testifies that USDOC may have "anywhere from two to five separate standard programmes to calculate a dumping margin." Owenby Statement, para. 8 (Exhibit JPN-1).

[71] Japan First Written Submission, para. 60.

[72] Appellate Body Report, *Brazil – Aircraft*, para. 114.

[73] The US argues that this does not preclude the possibility that a particular obligation, by its terms, prohibits such discretion.

procedures" and the "standard zeroing line" are measures, let alone whether they mandate a breach.[74] Instead, Japan's submissions gloss over key issues while making a series of unsubstantiated assertions.

4.51 The United States argues that, in its attempt to secure an "as such" finding against the United States, Japan challenges so-called "zeroing procedures" as a measure subject to dispute settlement. However, Japan still has not identified any actual measure of the United States that corresponds to these "zeroing procedures," nor could it. Indeed, Japan in its first submission acknowledged that the very term "zeroing procedures" is Japan's invention[75] – and in that submission Japan failed to explain just how these "procedures" are a measure of the United States, and therefore subject to WTO dispute settlement. Japan's answers to Panel questions further acknowledge that what it terms "zeroing procedures" do not actually exist, except to the extent that they are supposedly "applied" via the so-called "standard zeroing line." In other words even if these "zeroing procedures" exist, they have no "functional life of their own".[76]

4.52 The United States argues that Japan attempts to avoid the obvious conclusion that these procedures do not exist and are not measures at all by inaccurately conflating the discussion of what may constitute a measure for dispute settlement purposes generally with what constitutes a law, regulation, or administrative procedure for purposes of the *AD Agreement*. Japan states that "the measure at issue must be an act attributable to the United States ... and it must form part of the generally applicable rules, norms or standards maintained by USDOC in connection with the conduct of anti-dumping proceedings"[77] Not only does Japan fail to explain how something that doesn't exist is an "act"[78], but Japan also omits one component of the analytical framework on which it relies: Under that approach, an "act" can be a measure subject to dispute settlement, without regard to a particular application of the alleged measure, only if that "act" sets forth rules or norms intended to have generalized and prospective application. Japan has provided no analysis as to how these non-existent procedures set forth rules or norms intended to have generalized and prospective application; Japan simply states that it is so.[79]

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[74] The US notes Japan's statement in its answers to the Panel questions that it "reserves its right" to pursue arguments against several additional "measures:" an alleged "invariable practice," "the Manual," and US legislation and regulations. However, Japan's "reservation" contains several flaws. *First*, "practice" is not an alleged measure within the Panel's terms of reference, and *second*, at this point, Japan may not introduce any evidence with respect to the Anti-Dumping Manual and US legislation and regulations.

With respect to the Panel's terms of reference, Article 6.2 of the *DSU* requires a Member, in its panel request, to "identify the specific measures at issue". Japan did not identify "practice" (or "invariable practice") as a "measure" in its panel request. Therefore, any claim against "practice" would be beyond the terms of reference of this dispute.

With respect to "the Manual", US legislation, or US regulations, Japan did not present any evidence in its first written submission, and paragraph 14 of the Panel's Working Procedures precludes Japan from doing so in the future. Paragraph 14 states that parties shall submit factual evidence *no later than during the first substantive meeting*. In addition, were Japan to present evidence at this late stage of the proceedings, this would deprive the US of a full opportunity to defend its interests.

[75] Japan First Written Submission, para. 1.

[76] See Panel Report, *US – Export Restraints,* para. 8.85.

[77] Japan 20 July 2005 Answers, para. 7.

[78] The US also argues that Japan simply offers the conclusory statement that "the standard zeroing procedures ... are certainly an 'act' that can constitute 'measures' for dispute settlement purposes." Japan 20 July 2005 Answers, para. 2. Not only does Japan fail to substantiate this assertion, but it seems to indicate that there is more than one procedure, more than one act, and more than one measure, all encompassed within the invention "zeroing procedures". This supports the view that the so-called "zeroing procedures" are no more than the repeated response to a particular set of circumstances – the very situation the panel in *US – Steel Plate* considered *not* to be a measure(Para. 7.22.) (*emphasis added*).

[79] Japan 20 July 2005 Answers, para. 26.

4.53 The United States asserts that, because these "zeroing procedures" do not exist, they cannot mandate a breach of any WTO obligation.[80] Nevertheless, Japan attempts to argue to the contrary by misapplying the Appellate Body's analysis of whether a measure mandates a breach. Japan argues that "evidence of the 'consistent application' of the measure" may be relevant for purposes of the mandatory/discretionary analysis.[81] But Japan's answer to Question 11 reveals the flaw in its application of this analysis to the "zeroing procedures": The *starting point* of the analysis is the "'*text of the relevant legislation or legal instruments*'",[82] which "*may be supported*" by other evidence.[83] The Appellate Body later stated that when "a measure is challenged 'as such,' the starting point for an analysis must be the measure on its face".[84] Nothing in the DSU, nor in any Appellate Body report, suggests that "consistent application" can *supplant* the analysis of the measure itself, or obviate the need even to identify the measure which is supposedly being applied, which is what Japan would have the Panel do. The United States points out that a closer review of the Appellate Body's reasoning in *US – Carbon Steel* reinforces the conclusion that Japan is simply distorting the concept of "consistent application" as it may legitimately be used to assist in determining the meaning of a measure. The Appellate Body explained:

> "[s]uch evidence [of the scope and meaning of municipal law] will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[85]

4.54 The United States argues that the Appellate Body's emphasis on the case-by-case nature of the evidence necessary to determine the scope and meaning of a measure reflects both the differences among the municipal legal systems of Members as well as the different types of measures they maintain. For example, the Appellate Body noted that "pronouncements of domestic courts on the meaning of such laws" may be relevant in some cases. In the US municipal legal system, such court decisions are a fundamental interpretive tool.[86] For example, if the US Supreme Court were to interpret the term "black" in a particular statute as including "dark grey", an examination of the text of the statute alone could easily yield an incorrect result, as the US Supreme Court interpretation would be binding on US authorities.

4.55 Likewise, the United States states, an examination of the "consistent application" of a law must be undertaken "as appropriate", and in a manner which reflects the actual manner in which the municipal legal system of a Member operates. For example, if a complaining party were to argue that a statute requires a defending Member's authorities to do X, but the authorities in applying that law had consistently interpreted it as requiring Y, the consistent application could be relevant to disproving the complainant's interpretation. Likewise, if courts had consistently interpreted a statute in the same

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[80] The US asserts that Japan states that whether an act is mandatory is not relevant for purposes of whether the act is a measure. Japan 20 July 2005 Answers, para. 8. It is, however, relevant for purposes of evaluating whether the "act" – if a measure – breaches a Member's WTO obligations.

[81] Japan 20 July 2005 Answers, para. 31.

[82] Japan 20 July 2005 Answers, para. 31 (quoting *US – Carbon Steel*, para. 156).

[83] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 156 (*emphasis added*). Further, the US argues that Japan attempts to apply wholesale the Appellate Body's analysis of the Sunset Policy Bulletin to these "zeroing procedures", including whether USDOC "treats" the unidentified "zeroing procedures" as "mandatory and/or binding". Japan 20 July 2005 Answers, paras. 28 and 31. The US is unable to deduce any logic in the proposition that USDOC would, or could, "treat" non-existent procedures as "mandatory".

[84] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 168.

[85] Appellate Body Report, *US – Carbon Steel*, para. 156 (*emphasis added*).

[86] See, e.g., *Marbury v. Madison,* 5 US 137 (Cranch) (1803).

manner, that would provide a strong indication of the statute's meaning, even if a definitive interpretation had not been issued by a Member's highest-level court. Neither of these approaches, however, is the way in the which Japan is using "consistent application". Japan is simply applying the term "consistent application" to an analysis which consists of nothing more than *assuming* there is a measure, "zeroing procedures", which caused a similar result in past proceedings. Japan is thus simply misappropriating a phrase used by the Appellate Body and applying it to an illegitimate attempt to have the Panel make findings on a non-existent measure.

4.56 The United States argues that Japan resorts to creating a straw man in an attempt to rebut the US position. Japan states that "[e]ssentially, the United States argues that, because the USDOC Assistant Secretary is free to abandon the zeroing procedures, the procedures are not binding. However, the United States confuses the binding character of the existing 'administrative procedures' with the USDOC Assistant Secretary's authority to vary those procedures in the future".[87] The United States first notes that, notwithstanding Japan's insistence that computer programmes are separate measures from "zeroing procedures," and that each is WTO-inconsistent "as such",[88] Japan cites a US discussion about computer programmes in support of its argument about zeroing procedures.[89] More fundamentally, Japan's argument is simply illogical. There is nothing "binding" about something that USDOC is free not to do.

4.57 The United States says that Japan's statement that "at the oral hearing, the United States admitted that ... there is no single instance where the USDOC did not apply the standard zeroing procedures"[90] mischaracterizes the US statement as recognizing the existence of so-called "zeroing procedures", which it did not. Again, however, claims the United States, Japan fundamentally misses the point: there was no measure – "standard zeroing procedures" or otherwise – which caused the USDOC Assistant Secretary to refrain from providing an offset in past investigations. Had the USDOC wished to provide an offset in an individual case, he or she could have, and should the USDOC Assistant Secretary wish to do so in the future, he or she could.[91]

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[87] Japan 20 July 2005 Answers, para. 36.

[88] Japan 20 July 2005 Answers, para. 13 ("in addition to challenging the standard zeroing line itself, Japan challenges the standard zeroing procedures more generally".) The US argues that if the "standard zeroing line" is the expression of the "standard zeroing procedures," then it is unclear how the "standard zeroing procedures" can be challenged "more generally".

[89] The US asserts that in the cited paragraph, the US says that even if "*computer programs* were found to be measures" such programmes cannot be found WTO-inconsistent because they do not mandate action. (*emphasis added*) In that paragraph, the US says nothing about "zeroing procedures". Indeed, the US noted in its First Submission that it considered Japan to have limited its claims to the "computer line" and not some unidentified "zeroing procedures". US First Written Submission, para. 29.

[90] Japan 20 July 2005 Answers, para. 22.

[91] The US also argues that Japan has noted that in *US – Countervailing Measures on Certain EC Products*, a "USDOC calculation method" was found to be "as such" inconsistent with the Subsidies and Countervailing Measures Agreement. Notwithstanding that the "method" in question was not a "calculation method", there was no consideration in that dispute of whether that "method" was a measure for dispute settlement purposes. Neither the parties, the panel, nor the Appellate Body analyzed whether such a method could be a measure, and it is incorrect for Japan to suggest otherwise. Moreover, as the panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted when presented with analogous circumstances, "[w]e do not consider that Members are limited in presenting their arguments in a particular dispute by the arguments made, or not made, in previous disputes, even if those previous disputes involved a related or similar topic". Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular* Goods, para. 7.176.

The US further points out that, to the extent Japan is arguing that the USDOC Assistant Secretary's decisions not to provide offsets in each prior determination transform those individual decisions collectively into a measure that mandates a breach, the panel in *US – Steel Plate* already considered, and dismissed, such an approach, stating that just because "a particular response to a particular set of circumstances has been repeated, and may be

4.58 The United States argues that Japan also asserts that it has submitted "overwhelming evidence" that the "zeroing procedures" and the "standard zeroing line" are "mandatory and/or binding"[92] and that the "United States has not only failed to offer 'persuasive evidence in rebuttal', it has not offered any evidence whatsoever".[93] Not surprisingly, Japan provides no citation to this supposedly overwhelming evidence. Indeed, Japan has offered *no evidence* that the "zeroing procedures" or the "zeroing line" are mandatory.

4.59 The United States posits that Japan's quest for an "as such" finding against the United States also leads it to challenge a so-called "standard zeroing line". In short, Japan has failed to establish that a single line of computer programming sets forth rules or norms that are intended to have generalized and prospective application. Indeed, Japan cannot do so: By its very nature, a computer line is *applied* in a particular determination; it cannot set forth rules or norms intended to have generalized and prospective application.

4.60 The United States asserts that Japan's answers to the Panel's questions only reinforce the analytical flaws in its results-oriented approach, not only with respect to whether the computer line is a measure but also with respect to whether the "measure" mandates a breach. For example, Japan argues that "[o]n the face of the measure, inclusion of negative results is simply not an option ... . The evidence drawn from the terms of the measure, therefore, demonstrates that the measure mandates certain regulatory conduct".[94] This analysis is simply wrong. It ignores the fact that a line in a computer programme, or even a computer programme itself, cannot "mandate" regulatory behaviour. Nothing in the "terms" of the computer line requires USDOC to refrain from providing an offset. Rather, it is USDOC that decides whether the "line" will be applied or not and that decision is made in each and every determination precisely because there is no requirement that is general and prospective in nature.[95]

4.61 In response to the Panel's question asking the United States to identify its law, regulations, and administrative procedures which govern the calculating of dumping margins and any published or publicly available documents that explain these, the United States claims that there are no laws, regulations, or administrative procedures which govern offsets for non-dumped transactions in margin calculations.[96] The United States points out that, while section 771(35) of the Tariff Act of 1930 defines the terms "dumping margin" and "weighted average dumping margin", domestic courts have found this section not to govern this issue and the US Court of Appeals for the Federal Circuit has held that this section neither prohibits nor requires the USDOC to grant offsets.

4.62 In response to a question of the Panel, with respect to "as such" claims, how a Member could establish the existence of a measure that is not written down independently of its repeated application

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predicted to be repeated in the future, does not, in our view transform it into a measure". Panel Report, *US – Steel Plate*, para. 7.22.

[92] Japan 20 July 2005 Answers, paras. 28 and 34.

[93] Japan 20 July 2005 Answers, paras. 34.

[94] Japan 20 July 2005 Answers, para. 35.

[95] The US argues that Japan appears to be attempting to use the Appellate Body's analysis of an actual document, such as the Sunset Policy Bulletin, to justify its argument that the "zeroing line" is a measure. A review of the Appellate Body's analysis of the text of the Sunset Policy Bulletin exposes the flaw in Japan's approach. In *US – Corrosion-Resistant Steel Sunset Review,* the Appellate Body evaluated whether it could "complete the analysis" as to whether the Sunset Policy Bulletin was inconsistent with Article 11.3 of the *AD Agreement*. "At issue is whether the [the Sunset Policy Bulletin] goes further and instructs USDOC to attach decisive or preponderant weight to [certain] factors in *every case* ... ." Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 176 (*emphasis added*). Nothing in the "text" of the "zeroing line" contains an *instruction* to USDOC to refrain from providing offsets in every case.

[96] US 19 October 2005 Answers, paras. 1-3.

and absent an admission of its existence, the United States argues[97] that a Member may present circumstantial evidence to demonstrate the existence of an unwritten measure. Thus, in *EC – Approval and Marketing of Biotech Products*, the United States cited to references and statements by senior EC and member State officials regarding the EC's moratorium on granting approvals to products made with biotechnology to demonstrate the existence of the moratorium. The United States also argues that the Appellate Body acknowledged in *US – Countervailing Duty Investigation On DRAMS* that it was not inappropriate for the US administering authority to look to circumstantial evidence that the Government of Korea had directed Korean banks to provide advantageous loans to the domestic industry.[98] *Second*, the United States argues that, while a party may establish the existence of a measure independently of its repeated application, finding the existence of a measure based on consistent application is an exercise in circular reasoning – to state that a so-called "measure" has been "consistently applied" presupposes the very existence of that "measure". As a result, there must be evidence establishing the existence of a measure that is independent of its "repeated application". *Third*, the United States argues that Japan is confusing the concept of "consistent application" with "consistent results" and is assuming that there is a measure that is causing those results. *Fourth*, the United States claims that Japan is erroneously asking the Panel to rule on a Member's exercise of discretion in a uniform manner by inferring the existence of a measure that does not exist, in order to make findings against the non-existent measure. The United States argues that such a request undermines the credibility of the WTO dispute settlement system.

4.63 In response to a question of the Panel whether a policy systematically applying a particular dumping calculation could be found to be WTO-inconsistent, the United States argues that if the term policy is used to describe the fact that an act has been repeated in a given number of cases, there is in fact no instrument independent of the individual acts and therefore no measure subject to dispute settlement. By contrast, if the term policy is used in the sense of an instrument which exists independently of its application in individual cases and which may cause the act to occur in individual cases, that policy might be a measure and could be examined for its WTO-consistency if found to be a measure. The United States also claims that, with regard to a policy that exists independently of its application, the policy would be WTO-inconsistent only if it required authorities to use a methodology which, when applied, would be WTO-inconsistent.

2. "As such" Claims under Article 2 of the *AD Agreement* with respect to original investigations

4.64 Japan argues that the United States' maintaining of zeroing procedures in original investigations is inconsistent with Article 2 of the *AD Agreement* and Article VI of the GATT 1994. Japan argues that <u>first</u>, dumping and the margin of dumping should be determined for the *product as a whole*; <u>second</u>, a dumping determination must be based on a *fair comparison* of normal value and export price for the product as a whole, and, <u>third</u> that model and simple zeroing are inconsistent with both these obligations, respectively.

4.65 The United States argues that Japan has not identified any textual support for its contention that Article VI of the GATT 1994 and the *AD Agreement* require investigating authorities to offset dumping with export transactions that exceed normal value. Neither Japan's reliance on the "fair comparison" provision of Article 2.4, its references to Article 2.4.2, nor its "product as a whole" arguments (arguments based on prior Appellate Body reports limited to the use of average-to-average comparisons in investigations) support the broad offset obligation Japan argues exists.[99]

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[97] US 19 October 2005 Answers, paras. 6-10.
[98] Appellate Body Report, *US – Countervailing Duty Investigation On DRAMS*, para. 150.
[99] US Second Written Submission, para. 23.

4.66 The arguments of the Parties regarding these issues will be discussed *infra*.

(a) Margin of Dumping for the Product as a Whole

Japan[100]

4.67 Japan argues that Article 2 of the *AD Agreement* sets forth the "agreed disciplines" for determining the existence of dumping and also calculating the margin of dumping.[101] Japan points out that the Appellate Body held that there are "no other provisions in the *AD Agreement* according to which Members may calculate dumping margins".[102] Article 2.1 of the *AD Agreement* states that:

> *For the purpose of this Agreement, a product* is to be considered as being *dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price … for the like product when destined for consumption in the exporting country. (*emphasis added*)

4.68 Japan asserts that this definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994.[103] Japan explains that Article VI:1 sets forth a definition of dumping and, significantly, it defines dumping by reference to "a product". It states that "a product" is dumped "if the [export] price of the product" is less than the comparable domestic price "for the like product", or less than "the cost of production of the product". Each one of these textual indications in Article VI:1 shows that dumping is determined for the product as a whole and that the determination is based on a comparison of prices for the product. There is nothing in the text to suggest that dumping is determined for individual transactions or groups of transactions. The text of Article VI:1 is reflected, of course, in the text of Article 2.1 of the *AD Agreement*, which also refers to the dumping of "a product" and also provides that the determination is based on a comparison of "the export price of the product" and "the comparable price … for the like product".

4.69 The Appellate Body has held that Article 2.1, – which "applies to the entire *AD Agreement*" – makes "clear … that dumping is defined in relation to a product as a whole," and not in relation to "a type, model, or category" of a product.[104] Interpreting the term "margin of dumping," as defined by Article VI:2 of the GATT 1994, the Appellate Body held that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".[105] Because Article 2.1 applies to the "entire" *AD Agreement*, it also applies to Article 2.4.2 and, in consequence, "margins of dumping" in Article 2.4.2 must also be established for the product as a whole.[106]

4.70 Japan argues that, although the margin of dumping must be established for the product as a whole, an investigating authority is entitled to calculate that margin on the basis of "multiple

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[100] Japan First Written Submission, para. 76-80, 92-101; Japan Executive Summary to First Written Submission, paras. 12-13; Japan Second Written Submission, paras. 18-26, 42-55; Japan Executive Summary to Second Written Submission, paras. 40-55.

[101] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[102] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[103] Appellate Body Report, *US – Softwood Lumber V*, para. 92.

[104] Appellate Body Report, *US – Softwood Lumber V*, para. 93; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 126.

[105] Appellate Body Report, *US – Softwood Lumber V*, para. 96, 94. This definition is further supported by Article 9.2 and 6.10.

[106] Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 96.

comparisons" for sub-divisions of the product.[107] However, Japan states that the Appellate Body emphasized that:

> "[T]he results of the multiple comparisons at sub-group level are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority … . Thus, it is only on the basis of aggregating *all* these 'intermediate value' that an investigating authority can establish margins of dumping for the product under investigation as a whole.
>
> ...
> If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."[108]

4.71 Japan argues that the Appellate Body in *US – Softwood Lumber V* held that this interpretation of margins of dumping is confirmed by other provisions of the *AD Agreement*.[109] Article 6.10 expressly states that "an individual margin of dumping" shall be calculated for each known producer or exporter of the "product under investigation". Articles 6.10.2 and 9.5 contain similar language. These provisions demonstrate that a single margin of dumping is calculated for the product and not multiple margins, one for each transaction or for each group of transactions. Additionally, Article 9.2 of the *AD Agreement*, as well as Article VI:2 of the GATT 1994, provide that anti-dumping duties are imposed in respect of a "product". Duties are, therefore, applied to a product, as a whole, in all its forms – and not to a sub-grouping of a product. The Appellate Body concluded its reasoning as follows:

> "Our view that 'dumping' and 'margins of dumping' can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *AD Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole …"[110]

4.72 Japan states that this is a clear statement that the product scope of an anti-dumping action remains constant from the investigation through to the imposition of duties. The "product" subject to dumping and injury determinations is the same as the product subject to duties, and it always refers to product as a whole. Japan claims that the Appellate Body's 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.

4.73 Japan argues that model and simple zeroing as well as the standard zeroing line prevent the USDOC from making a dumping determination for the product as a whole. In an original investigation,

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[107] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[108] Appellate Body Report, *US – Softwood Lumber V*, paras. 97- 98 (emphasis in original).
[109] Appellate Body Report, *US – Softwood Lumber V*, para. 94.
[110] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

the USDOC generally uses a W-to-W comparison, including model zeroing, to compare normal value and export price. Japan submits that model zeroing is "as such" inconsistent with the requirements in Articles 2.1 and 2.4.2 of the *AD Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, because the USDOC fails to determine the existence of dumping, and calculate a margin of dumping, for the product as a whole. Japan argues that this issue was explicitly addressed by the Appellate Body in *US – Softwood Lumber V*, albeit on an "as applied" basis. In that dispute, the Appellate Body examined the United States' use of model zeroing in an original investigation. It held that an investigating authority is entitled to compare normal value and export price through multiple comparisons, by model.[111] However, the Appellate Body underscored that:

> "If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."[112]

The Appellate Body concluded that it was inconsistent with Article 2.4.2 for the USDOC to exclude the results of comparisons for certain models (i.e. those with a negative price difference) in creating an aggregate result for the product.[113] Equally, because the Appellate Body's reasoning derived from the language in Article 2.1[114], the failure to establish the margin of dumping for the product as a whole, as defined in Article 2.1, as well as in Articles VI:1 and VI:2 of the GATT 1994, is inconsistent with those Articles. In reaching its conclusion, the Appellate Body noted that the *AD Agreement* does not "express[ly] … permit[] an investigating authority to disregard the results of *multiple comparisons* at the aggregation stage".[115] It added that, "when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly".[116]

4.74 Japan argues that the same reasoning equally applies to the instant case. Model zeroing is "as such" inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and with Articles VI:1 and VI:2 of the GATT 1994. Through the standard zeroing line, after identifying comparable export transactions and grouping them into models, and after comparing export price for each model with normal value, the USDOC automatically disregards all negative results of comparisons where export price for the model is higher than normal value for that model. In other words, negative comparison results are not included in the calculation of the total amount of dumping. However, the Appellate Body held that, 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.[117] Therefore, by maintaining the model zeroing procedures, the United States does not and cannot determine a margin of dumping for the product as a whole; instead, the United States' zeroing procedures are designed and structured to determine the existence of dumping, and calculate a dumping margin, on a partial basis, taking account of only certain comparison results and not the entirety of the comparison results for the product as a whole.

4.75 Japan argues that the same reasoning also dictates that the simple zeroing procedures, in an original investigation, are "as such" inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and also with Articles VI:1 and VI:2 of the GATT 1994. By way of illustration, Japan provides an example in which the United States used simple zeroing in an original investigation.[118] That was in the re-determination of the dumping margin for imports of softwood lumber from Canada, where normal

[111] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[112] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (*emphasis in original*).
[113] *Ibid,* para. 102.
[114] *Ibid,* para. 93.
[115] *Ibid,* para. 100.
[116] *Ibid,* para. 100.
[117] *Ibid,* paras. 93 and 98.
[118] Exhibit JPN-8.

value and export price were compared on a T-to-T basis.[119] As illustrated in this example, the simple zeroing procedures also operate in circumstances where the USDOC has engaged in "multiple comparisons" of normal value and export price, this time on the basis of individual export transactions and corresponding individual normal values that the USDOC has identified as comparable. Once again, after identifying comparable export transactions and normal values, and comparing export price for these transactions with the relevant normal value, the USDOC maintains a procedural "filter" that automatically discards the results of comparisons from the calculation process where export price exceeds normal value. Thus, for simple zeroing, in calculating the overall margin, the USDOC aggregates the results of only certain of the "multiple comparisons" it undertakes, disregarding others. The overall margin of dumping does not, therefore, reflect *all* of the multiple comparisons undertaken. However, as the Appellate Body held, 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.[120]

4.76 Thus, as with model zeroing, by maintaining the simple zeroing procedures, the United States does not and cannot determine a dumping margin for the product as a whole; instead, the United States' procedures are structured to determine the existence of dumping, and calculate a dumping margin, on a partial basis of only certain comparison results, overlooking the entirety of the comparisons for the product as a whole. In consequence, the model and simple zeroing procedures are "as such" inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

4.77 Japan states that by ignoring the Appellate Body's interpretation of Articles 2.1, 2.4.2, 6.10 and 9.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the United States disingenuously counters that neither the "GATT 1994 [n]or the *AD Agreement* create an obligation to calculate a margin of dumping for the product as a whole".[121] This is plainly wrong and, in effect, invites the Panel to reverse panel and Appellate Body reports adopted by the DSB. According to Japan, on the United States' view, dumping determinations deliberately confined to a sub-grouping of a product – even a single transaction – could justify the imposition of duties on the product as a whole.

4.78 Japan lays out that 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".[122] This is an absurd argument, claims Japan. 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*. Japan points out that investigating authorities, including the USDOC, routinely aggregate prices for transactions into prices for a product, and, as a result, there is no necessity to determine margins for individual transactions simply because prices can be transaction-specific.

4.79 Japan also claims that 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 for the product. The *Ad* Article does not purport to alter the requirement in Article VI:1 that dumping, and margins of dumping, are determined for a product. Instead, consistent with Article VI, the term "margin of dumping" in the *Ad* Article can, and must, be read to refer to the margin for the "product".

[119] Owenby Statement, para. 20 and Exhibit JPN-8.
[120] Appellate Body Report *US – Softwood Lumber V*, paras. 93 and 98.
[121] US 20 July 2005 Answers, para. 60.
[122] US 20 July 2005 Answers, paras. 46, 47 and 52.

4.80 Japan notes, in that regard, that the definition of "margin of dumping" in Article VI:2 of the GATT 1994 is consistent with the definition of "dumping" in Article 2.1 of the *AD Agreement* and in Article VI:1 of the GATT 1994, namely that the existence and magnitude of dumping are determined for the product as a whole. The second sentence of Article VI:2 states that the margin of dumping is "the price difference" determined in accordance with Article VI:1. Article VI:1 sets forth a definition of dumping and, significantly, it defines dumping by reference to "a product". Also, in language that speaks unmistakably of a product-wide dumping margin, the first sentence of Article VI:2 clarifies that "an anti-dumping duty" levied on "any dumped product" shall not exceed "the margin of dumping in *respect of such product*". These provisions demonstrate that "the price difference" in question is the price difference for the "product", not for individual transactions or for sub-groups of transactions.

4.81 Japan further argues that the requirement to determine a margin of dumping for the product is consistent with the fact that the dumping margin has product-wide consequences, in particular: for the determination of the volume of dumped imports; the pursuit of the investigation; and the imposition and collection of duties.[123] If the United States were correct that the price difference for an individual transaction constitutes a margin, the result would be that product-wide consequences – including the imposition of duties in excess of bound tariff rates – can be derived from the uncertain foundation of the price of a single export transaction. Japan recalls that in *EC – Tube or Pipe Fittings*, the Appellate Body emphasized that, through the duration of the period of investigation, the *Anti-Dumping Agreement* aims to avoid subjecting dumping determinations "to market fluctuations or other vagaries that may distort a proper evaluation."[124] The requirement to determine a margin for the product pursues the same objective because relying on the price difference for an individual transaction, or for an unrepresentative group of transactions, would inevitably subject determinations to the "vagaries" of the marketplace.

4.82 Japan argues that, 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 *AD Agreement* the United States is forced to acknowledge that its interpretation is untenable.[125] Article 5.8 provides that the authorities must terminate an investigation if "the margin of dumping is *de minimis*". Japan points out that, 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.

4.83 Japan observes that the United States argues that this "aggregation" obligation applies only to Article 5.8. However, nothing in the text of the *AD 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.[126] The duty to aggregate comparison results stems from the word "product" in Article 2, not from Article 5.8, and, therefore, applies throughout the *AD Agreement*.

4.84 Japan argues that the United States' proffered justification for the allegedly unique duty in Article 5.8[127] applies with equal – if not greater – force to other aspects of anti-dumping proceedings. Indeed, it is difficult to see any distinction with respect to the suggested justification 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,

[123] Japan's Opening Statement at the Second Substantive Meeting of the Panel with the Parties, paras. 34-39.
[124] Appellate Body Report, *EC – Tube of Pipe Fittings*, para. 80.
[125] See, e.g., US 20 July 2005 Answers, para. 60.
[126] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[127] US 20 July 2005 Answers, para.56.

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

4.85 With respect to the United States arguments that the Appellate Body's interpretation of the term "margins of dumping" in *Softwood Lumber V* is limited to situations involving the W-to-W comparison under the first sentence of Article 2.4.2, Japan counters that nothing in that decision supports this narrow view. To the contrary, Japan explains in detail that the structure of the Appellate Body's analysis involved separate consideration, under separate headings, of the phrase "all comparable export transactions" in Article 2.4.2, and of the terms "dumping" and "margins of dumping". The Appellate Body noted that there was "no basic disagreement among the participants"[128] regarding the phrase "all comparable export transactions" in Article 2.4.2. Under a new heading, it therefore shifted its analysis to the terms "dumping" and "margins of dumping" in Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4.2 of the *AD Agreement*. In that analysis, it relied primarily on the definition of the term "dumping" in Article 2.1 and Article VI that, it held, "applies to the entire"[129] *AD Agreement*. Moreover, in concluding that "dumping" and "margins of dumping" are determined for the product, the Appellate Body never referred to the phrase "all comparable export transactions".[130] Thus, in Japan's view, the United States ignores entirely the detailed structure of the Appellate Body's reasoning in order to reach a conclusion not supported by that reasoning.

United States[131]

4.86 The United States argues that there is no obligation in the *AD Agreement* to calculate one margin of dumping for the "product as a whole". Article 2.4.2 establishes an obligation for the administering authority to determine whether dumping "exists" for purposes of the Article 5 investigation phase based on certain methodological constraints. The text of Article 2.4.2 of the *AD Agreement* does not require Members to calculate a margin for the "product as a whole" and Japan does not establish that such an obligation otherwise exists. Article 2.4.2 provides three methodologies for comparing export prices to normal values in an investigation: (1) weighted-average-to-weighted-average comparisons; (2) transaction-to-transaction comparisons; and, (3) under certain circumstances, weighted-average-to-transaction comparisons. In most circumstances, each of these methodologies will result in multiple comparisons. This is self-evident with respect to the second and third methodologies, as neither one is limited to the extremely rare circumstance of investigations involving only one export transaction. Under these methodologies, each export transaction will result in a separate comparison. Article 2.4.2 simply does not address the issue of aggregating the results of multiple comparisons. While the specified methodologies will, in most cases, lead to multiple comparisons between export transactions and normal values, Article 2.4.2 does not provide any guidance as to how the results of those comparisons are to be aggregated to determine a single overall margin. In fact, Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all. Emblematic of the narrow scope of Article 2.4.2 is the fact that nothing in Article 2.4.2 requires the expression of the margin of dumping as a percentage. Article 5.8 is the only place in the *AD Agreement* where the amount of dumping must somehow be expressed as a percentage margin so that it may be measured against the *de minimis* standard.

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[128] Appellate Body Report, *US – Softwood Lumber V*, para. 90.
[129] *Ibid,* para. 93.
[130] See Japan 19 October 2005 Answers, paras. 60-73.
[131] US First Written Submission, para. 59-71; US Second Written Submission, paras. 51-64, 68-70.

4.87 The United States argues that Japan's argument that offsets are required by the obligation to calculate a margin of dumping for the product as a whole is based on Articles 2.1 and 2.4.2 of the *AD Agreement*, and Article VI of the GATT 1994. However, the text of Article VI of the GATT 1994 and Articles 2.1 and 2.4.2 do not refer to the "product as a whole". Indeed, historically, dumping has been viewed as permitting a transaction-oriented analysis. For example, a group of experts in 1960 considered that the "ideal method" for applying anti-dumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned".[132] The *AD Agreement* implements Article VI and did not amend this definition of the margin of dumping.

4.88 The United States argues that Japan's argument relies exclusively on its assumption that the terms "margin of dumping" and "margins of dumping" must mean the same thing wherever they are mentioned in the GATT 1994 and the *AD Agreement*; namely that a "margin of dumping" can only exist with respect to all of the export transactions of a single producer or exporter. The text of the GATT 1994 and the *AD Agreement*, however, show otherwise. The terms "margin of dumping" and "margins of dumping" may apply differently, depending on the context in which the term is used. Specifically, a margin of dumping can exist when the price of a single export transaction is less than normal value.

4.89 The United States asserts that the terms "margin of dumping" and "margins of dumping" are used at times in the GATT 1994 and the *AD Agreement* to refer to the situation where the price of a single export transaction is less than normal value.[133] By focusing on "price" in Article VI:2, GATT 1994 plainly envisions a margin of dumping being established with respect to individual transactions. This is confirmed by GATT Note Ad Article VI:1, which uses the term "margin of dumping" in a manner which can only be reasonably interpreted to apply on a transaction basis.[134] With respect to the *AD Agreement*, Article 2.4.2 permits the use of three comparison methodologies: (1) average-to-average, (2) transaction-to-transaction, and (3) average-to-transaction. With respect to at least two of these methodologies, there will be multiple comparisons. If the comparisons reflect a price difference where normal value is greater than export price, the price difference will be a margin of dumping within the meaning of Article VI:2.

4.90 The United States argues that the use of the term "margin of dumping" in connection with assessment proceedings further demonstrates that the term may refer to the result of a comparison involving a single export transaction. Article 9.3 concerns "[t]he amount of the anti-dumping duty ... ." A duty is specific to an import transaction, and is often calculated based on the specifics of that transaction. Moreover, some Members utilize a prospective normal value system. In such a system, the investigating authority establishes the normal value in the investigation and may update that normal value as appropriate. The Member compares each export transaction with that normal value, and determines whether and to what extent that normal value exceeds the export price. The amount by which normal value exceeds the export price is the margin of dumping for that transaction.

4.91 The United States further argues that Article 2.4.2 of the *AD Agreement* does not oblige Members to offset positive and negative dumping margins and that Japan offers no textual analysis in support of its claim that offsetting is required by Article 2.4.2. Japan's failure to provide a textual basis for its argument is unavoidable because the scope of the *AD Agreement* and GATT 1994, with respect to the measurement of dumping, is limited by its terms to instances in which there are *positive* differences between normal value and export prices. The United States argues that, in the *AD Agreement*, the word "margin" is modified by the word "dumping", giving it a special meaning. Paragraph 2 of Article VI of

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[132] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/195.

[133] US 20 July 2005 Answers, paras. 46-59.

[134] Notably, Japan dismisses the use of the term "margin of dumping" as used in the Note Ad Article VI without any analysis of the text of the article itself. Japan 20 July 2005 Answers. para. 98.

GATT 1994 provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1". When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an importing country at less than its normal value", i.e. the price difference when the product has been dumped. The United States points out that the provisions of the *AD Agreement* must be read in conjunction with Article VI of GATT 1994.[135] While the *AD Agreement* does not provide a definition of "margin of dumping", it does define "dumping" in a manner consistent with the definition of "margin of dumping" provided in Article VI. Article 2.1 provides:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at *less than* its normal value, if the export price of the product exported from one country to another is *less than* the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (*emphasis added)*

The express terms of GATT 1994 provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT or the *AD Agreement* for the concept of "negative dumping".

4.92 Accordingly, the Appellate Body and panels have never found in the text of the *AD Agreement* an independent obligation to offset margins. The Appellate Body has, however, twice articulated its view that an obligation exists to provide offsets, in *EC – Bed Linen* and *US – Softwood Lumber V*. In both reports, the Appellate Body focused its analysis on the phrase "all comparable export transactions"[136] in Article 2.4.2, which applies only to the use of the average-to-average methodology to determine "the existence of margins of dumping *during the investigation phase.*"[137] In *US – Softwood Lumber V*, the Appellate Body found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology".[138] The

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[135] The US submits that this interpretative principle has been underscored by the Appellate Body. In *Korea - Dairy* the Appellate Body stated that:

> "[T]he GATT 1994 was incorporated into the WTO Agreement as one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the WTO Agreement. … The Agreement on Safeguards is one of the thirteen Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement. It is important to understand that the WTO Agreement is one treaty." *(paragraph 75)*

and in *Argentina – Footwear(EC)* the Appellate Body stated that:

> "Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. … [A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously." (*paragraph 81)*

According to the US this basic principle applies equally to Article VI of the GATT 1994 and the *AD Agreement*. The official title of the *AD Agreement* is "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994." As an agreement whose object is to implement Article VI of GATT 1994, the *AD Agreement* is, by its very title, anchored in Article VI of the GATT 1994.

[136] Appellate Body Report, *US – Softwood Lumber V*, paras. 104, 105, 108; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 55-60.

[137] US Second Written Submission, para. 65, Appellate Body Report, *US – Softwood Lumber V*, para. 108; Appellate Body Report, *EC – Bed Linen (Article 21.5 -- India)*, para. 66.

[138] Appellate Body Report, *US – Softwood Lumber V*, para. 108.

Appellate Body discussed both the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2.[139] While the Appellate Body discussed both, however, the textual basis for the Appellate Body's finding lies in the phrase "all comparable export transactions" used in Article 2.4.2.

4.93 In this regard, argues the United States, the Appellate Body's conclusion that "dumping is defined in relation to a product as a whole", at most, relates only to the determination of whether dumping exists when using the average-to-average methodology under Article 2.4.2.[140] The phrase "all comparable export transactions" does not apply to the transaction-to-transaction methodology or the average-to-transaction methodology. The United States claims that any offsets that occur in this context reflect the use of *averages* of all export prices and normal values. That is, in applying the average-to-average methodology, the Appellate Body found that a Member may make multiple intermediate comparisons.[141] However, in order to establish the weighted average margin of dumping for "all comparable export transactions", the Appellate Body concluded that the Member must aggregate all of the results of those intermediate comparisons including those comparisons which are not dumped. The offsets, therefore, are tied to the use of the average-to-average methodology in an investigation, and do not arise out of any independent obligation to offset prices.

4.94 The United States explains that its argument that offsets do not arise out of any independent obligation is based on the same interpretive reasoning that the United States has identified with respect to the relevance of the "fair comparison" provisions of Article 2.4 discussed below. Specifically, the targeted dumping (weighted average to transaction) methodology provided for in the second sentence of Article 2.4.2 is provided as an exception to the symmetrical comparison methodologies in the first sentence of Article 2.4.2. The targeted dumping methodology is an exceptional basis of comparison to the normal bases of comparison found in the first sentence – nothing more. It is not an exception to the "fair comparison" provisions of Article 2.4.2, nor is it an exception to the "margins of dumping" language contained in the first sentence. Thus, unless the Appellate Body's conclusion was based on the phrase "all comparable export transactions", a phrase which is unique to the weighted-average-to-weighted-average comparison methodology, the Appellate Body would have rendered the targeted dumping provision a nullity as a matter of mathematics.

4.95 The United States argues that Japan's argument that the United States must provide some recognition of so-called "negative results" has no basis in either Article VI of the GATT 1994 or the *AD Agreement*. Nowhere in the text of Article VI or the *AD Agreement* is there any reference to a "negative result", as argued by Japan, or a "negative margin of dumping". Because neither Article VI of the GATT 1994, nor any provisions of the *AD Agreement*, recognize the existence of "negative margins," neither provides any guidance by which a Member would offset its calculations of dumping by "negative margins" for distinct comparisons. This is evident from the manner in which Members with a prospective normal value system assess anti-dumping duties. Members who utilize a prospective normal value system assess anti-dumping duties on each transaction where normal value exceeds export price. In a transaction where export price is equal to, or exceeds, normal value there is no margin of dumping, and thus no anti-dumping duty assessed. Nonetheless, such Members are not required to provide a refund or a credit for any amount by which the export transaction exceeds normal value. The United States points out that Japan argues that in a prospective system a party may obtain a refund of anti-dumping duties pursuant to an Article 9.3.2 assessment proceeding, upon request, and that such a proceeding would reflect the offset of non-dumped transactions.[142] However, Article 9.3.2 specifically provides that a refund will be granted to "an importer of the product subject to the anti-dumping duty" should a request for such refunds be "duly supported by evidence." Such language does not support the

[139] *Ibid,* paras. 86 - 103.
[140] *Ibid,* para. 93, 96.
[141] *Ibid,* para. 97.
[142] Japan 20 July 2005 Answers, para. 104.

conclusion that refund proceedings necessarily cover all importers and require offsets for any non-dumped export transactions of the exporter, as Japan implies in its "product as a whole" argument. Moreover, the United States argues that there is nothing in the *AD Agreement* that suggests that Members operating a retrospective duty assessment system have different and, in fact, greater obligations to recognize non-dumped transactions than Members operating prospective duty assessment systems. There is nothing in Article 9.3 that requires that duty assessment proceedings be conducted over some period of time, rather than on an entry-by-entry basis. The United States' assessment system operates in a manner comparable to a prospective normal value system, examining individual export transactions, albeit using contemporaneous normal values. Japan has identified no textual basis for requiring anything more.

4.96 The United States argues that the scope of the *AD Agreement* and the GATT 1994, with respect to the measurement of dumping, is limited to instances in which there are *positive* differences between normal value and export prices. Because neither Article 2.4.2, nor any other provision of the *AD Agreement* or the GATT 1994, requires a Member to reduce the amount of dumping found based on non-dumped comparisons, Japan's claim should therefore be rejected.

4.97 Finally, the United States argues that the Appellate Body's Report in *US – Softwood Lumber V* is flawed and should not be followed by this Panel.[143] In *US – Softwood Lumber V*, the Appellate Body found that due to the failure of the USDOC to account for non-dumped comparisons in an anti-dumping investigation on softwood lumber from Canada, the United States had acted inconsistently with Article 2.4.2 of the *AD Agreement*.[144] The United States believes that the Appellate Body erred in finding that the *AD Agreement* requires Members, in the investigation phase, to calculate and give credit for weighted average comparisons when the export price exceeds the normal value. The Panel is not obligated to follow the Appellate Body's reasoning.

4.98 The United States argues that the Appellate Body's finding in *US – Softwood Lumber V* was based on a perceived obligation within Article 2.4.2 to provide an offset in an investigation when the investigating authority uses the average-to-average methodology.[145] The Appellate Body's finding, however, is contradicted by the text and negotiating history of the *AD Agreement*. Article 2.4.2 restricts the use of the average-to-transaction method, a method that was commonly used in anti-dumping investigations before the Uruguay Round. Article 2.4.2 was not intended to require an offset for non-dumped sales in an anti-dumping investigation.

4.99 The United States asserts that the negotiating history confirms that Article 2.4.2 does not require an offset for negative dumping. Pursuant to customary principles of treaty interpretation, as reflected in Article 32 of the *Vienna Convention on the Law of Treaties*, the Panel may have recourse to this preparatory material to confirm the meaning arrived at through the application of the rules reflected in Article 31 or to determine the meaning should an Article 31 analysis leave the meaning ambiguous or obscure, or leads to an absurd or unreasonable result. The United States argues that the Appellate Body's analysis would have benefited from a consideration of this negotiating history.

4.100 The United States points out that, prior to the entry into force of the WTO Agreement, many users of the anti-dumping remedy, including the United States and the EC, determined the existence of dumping margins by using the average-to-transaction comparison method.[146] Several delegations

[143] US First Written Submission, paras. 88-94.

[144] Appellate Body Report, *US – Softwood Lumber V*, para. 183(a).

[145] Appellate Body Report, *US – Softwood Lumber V*, para. 104, 105, 108.

[146] *Communication from Japan Concerning the Anti-Dumping Code*, MTN.GNG/NG8/W/81 (9 July 1990), at 2; *Submission of Japan on the Amendments to the Anti-Dumping Code*, MTN.GNG/NG8/W/48 (3 August 1989), at 5; *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/51/Add. 1

sought to negotiate a change in this practice in the Uruguay Round negotiations.[147] The negotiations over this "asymmetry" issue were protracted and difficult.

4.101 The United States explains that Article 2.4.2 of the *AD Agreement* was ultimately agreed upon specifically to address this "asymmetry" issue. Article 2.4.2 established the major new requirement that in anti-dumping investigations, investigating authorities would normally establish the existence of margins of dumping on the basis of either the average-to-average method or the transaction-to-transaction method. Under Article 2.4.2, the use of the average-to-transaction method is limited to "targeted dumping" situations; i.e. situations involving "a pattern of export prices which differ significantly among different purchasers, regions or time periods". [148] If the average-to-transaction method is used in an investigation, Article 2.4.2 provides that Members must explain "why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison".

4.102 The United States argues that, separately, a number of signatories to the Tokyo Round Anti-Dumping Code, including the United States and the EC, calculated the final overall margin of dumping for a company by aggregating the positive dumping amounts for comparisons where normal value exceeded export price and dividing that number by the aggregate of all export prices.[149] So-called "negative margins" (for those comparisons where export price exceeded normal value) were not taken into account in aggregating the overall amount of dumping. This approach was well-known by the Uruguay Round negotiators and was referred to as zeroing. Concurrent with the negotiations, zeroing was reviewed by two dispute settlement panels and was found to be consistent with the Anti-Dumping Code.[150] In the Uruguay Round negotiations, several delegations sought to prohibit zeroing and to require an offset for "negative dumping".[151] The negotiators did not agree to any such requirement. While negotiators reached agreement to address the "asymmetry" issue through, and to the extent provided for in, the language of Article 2.4.2 of the *AD Agreement*, the Agreement ultimately did not address the zeroing issue.

(b) "Fair Comparison" in Article 2 of the *AD Agreement*

Japan[152]

4.103 Japan argues that, in terms of Article 2.1 of the *AD Agreement*, in order to determine whether dumping has occurred, a comparison must be undertaken between "normal value" and "export price." Although Article 2.1 does not state how that comparison should be undertaken, other provisions in

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(22 December 1989), at 4; *Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989), at 8.

[147] *Id*.

[148] *AD Agreement*, Article 2.4.2.

[149] With respect to the term "margins of dumping" as it is used in Article 2.4.2, the US notes that both the GATT 1994 and the *AD Agreement* reflect the drafters' use of the term to refer both to the results of particular comparisons between normal value and export price AND to the overall results of those comparisons. As previously discussed, Article 2.4.2 provides three different comparison methodologies and each will often result in multiple "margins of dumping" as the term is used in Article 2.4.2. It is only with respect to Article 5.8, wherein it is provided that the investigating authority must terminate an investigation if it determines that the margin of dumping is *de minimis*, that the *AD Agreement* requires Members to determine a single percentage-based margin of dumping based on the export price.

[150] See GATT Panel Report, *EEC – Cotton Yarn*, paras. 500-501; GATT Panel Report, *EC – Audio Cassettes*, para. 356.

[151] See *Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989), at 7; *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/46 (3 July 1989), at 7.

[152] Japan First Written Submission, paras. 82-91; Japan Second Written Submission, paras. 56-65; Japan Second Written Submission, paras. 66-71.

Article 2 do. In particular, among the "agreed disciplines" in Article 2 for determining the margin of dumping, the first sentence of Article 2.4 of the *AD Agreement* states that:

> A *fair comparison* shall be made between the export price and the normal value. (e*mphasis added*)

4.104 Japan asserts that a "comparison" is the "action … of observing and estimating similarities, differences, etc." between two or more things.[153] Consistent with this dictionary meaning, and also with the context in Article 2.1 of the *AD Agreement* and Article VI:2 of the GATT 1994, the "comparison" in Article 2.4 refers to the "action" by which the authorities determine, in the words of Article VI:2, "the price difference" between normal value and export price for the product as a whole, i.e. the margin of dumping. Thus, as the Panel in *Egypt – Steel Rebar* found, "Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e. the calculation of the dumping margin … ".[154] This comparison process for calculating the dumping margin begins when the "basic establishment"[155] of normal value and export price is complete, and ends when "the price difference" for the product as whole has been calculated.

4.105 Japan argues that the *AD Agreement* imposes certain obligations on investigating authorities as to how the "comparison" is to be undertaken. For instance, under the third sentence of Article 2.4, the authorities must make "due allowance" in the comparison for any factors that affect "price comparability". Accordingly, normal value and/or export price may need to be adjusted upwards or downwards to render them properly comparable. However, the "comparison" does not end when these adjustments have been made. Rather, these adjustments enable the authorities to conduct the process of comparing the adjusted figures for normal value and export price.

4.106 Japan further points out that Article 2.4.2 offers three methods by which the adjusted normal value and export price can be compared (W-to-W, T-to-T and W-to-T) and the particular method chosen by the authorities is a defining feature of the comparison. Further, in making the comparison under one of these methods, authorities may conduct "multiple comparisons", based on sub-divisions of the product or individual transactions that disaggregate the product as a whole.[156] When the authorities decide to make multiple comparisons, the process by which they sub-divide and then re-aggregate the product as a whole is also a defining feature of the comparison because it is central to the manner in which "the price difference", or the margin of dumping, is established for the product as a whole.

4.107 Japan claims that, throughout the "comparison" of normal value and export price, Article 2.4 imposes a fundamental obligation that limits the discretion of the investigating authorities. That obligation is to ensure a "*fair* comparison". According to the Appellate Body, the requirements of a "fair comparison" involve "a *general* obligation" that "informs *all of Article 2* …".[157] In light of the panel's findings in *Egypt – Steel Rebar*, the fairness obligation applies to the provisions of Article 2 that relate to "the calculation of the dumping margin …".[158] The scope of this general obligation is defined by reference to the word "fair." According to dictionary meanings, a "*fair*" comparison is one that is "*unbiased*" and "*impartial*,," and that "offer[s] an *equal chance of success*" to all parties affected by an investigation.[159] The Panel in *EC – Tube or Pipe Fittings* held, in the context of Article 2.4, that an

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[153] *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 1, page 457 (comparison) (*emphasis added*) (Exhibit JPN-4).

[154] Panel Report, *Egypt – Steel Rebar*, para. 7.333 (u*nderlining added*).

[155] Panel Report, *Egypt – Steel Rebar*, para. 7.333.

[156] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[157] Appellate Body Report, *EC – Bed Linen*, para. 59 (*emphasis added*).

[158] Panel Report, *Egypt – Steel Rebar*, para. 7.333.

[159] *New Shorter Oxford English Dictionary*, 1993 edition (Lesley Brown, ed.), Vol. 1, page 907 (*emphasis added*) (Exhibit JPN-4).

"investigating authority must act in an *unbiased*, *even-handed* manner and must not exercise its discretion in an *arbitrary* manner".[160] This suggests a meaning that is rooted in the basic requirements of good faith and fundamental fairness.[161] The Appellate Body has observed that "fundamental fairness" is known in many jurisdictions "as due process of law or natural justice".[162]

4.108 Japan argues that the context of Article 2.4 supports this reading. Indeed, in the *AD Agreement*, Article 2.4 is far from unique in requiring that an investigating authority act fairly in making its determinations; the context provided by other provisions of the *AD Agreement* offers useful guidance for the proper construction of the "fairness" obligation in Article 2.4. First, other provisions of Article 2 impose similar requirements. For example, in *US – Hot-Rolled Steel*, the Appellate Body stated that Articles 2.1 and 2.2.1 require investigating authorities to assess whether home-market sales are in the ordinary course of trade "in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation".[163] The Appellate Body held that there was a "lack of *even-handedness*" in the USDOC procedures at issue because the "combined application of [the measures] operated systematically to raise normal value", which "disadvantaged exporters".[164]

4.109 *Second*, Japan argues that panels and the Appellate Body have consistently held that, in making "injury" determinations under Article 3.1, investigating authorities must respect "the basic principles of good faith and fundamental fairness".[165] This finding is based on the need for authorities to conduct an "objective examination". In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body ruled that this language requires authorities to reach a result that is "*unbiased, even-handed*, and *fair*".[166] In *US – Hot-Rolled Steel*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

> "[T] to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured."[167]

Japan describes that the Appellate Body also opined, in that appeal, that fairness precludes an investigating authority from "*favouring the interests* of any interested party, or group of interested parties, in the investigation".[168]

4.110 *Third*, Japan argues that through the standard of review in Article 17.6(i), the *AD Agreement* effectively imposes a duty on investigating authorities to evaluate facts in an "*unbiased* and *objective*" manner.[169]

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[160] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178 (*emphasis added*).

[161] The fairness requirement in Article 2.4 is another expression of the principle of good faith, which, the Appellate Body observed, "is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *AD Agreement* …". Appellate Body Report, *US – Hot-Rolled Steel*, para. 101. See also Appellate Body Report, *US – Shrimp*, para. 158 and n. 156.

[162] Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 179.

[163] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 (*underlining added*).

[164] Appellate Body Report, *US – Hot-Rolled Steel*, para. 154. *(underlining added).* See also para. 155 ("the lack of even-handedness … created *prejudice* to exporters.") (*emphasis added*).

[165] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.226; Panel Report, *US - Softwood Lumber VI*, para. 7.28.

[166] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133 (*emphasis in original*).

[167] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196 (*emphasis added*).

[168] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (*emphasis added*).

[169] *Ibid,* para. 56 (*emphasis in original*).

4.111 Therefore, Japan argues that, under Article 2.4 of the *AD Agreement*, 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.

4.112 Turning to the specific measures at issue, Japan argues that model and simple zeroing as well as the standard zeroing line prevent a fair comparison by the USDOC when aggregating multiple comparison results into a single, overall margin. Japan points out that the Appellate Body has already held that the application of model zeroing – which operates in the *same* manner and produces *the same* effects as simple zeroing – is inconsistent with Articles 2.4 of the *AD Agreement*. In *US – Corrosion-Resistant Steel*, the Appellate Body identified two unfair elements in a comparison that includes zeroing:

(1) Zeroing may lead to an affirmative determination that dumping exists in circumstances where no dumping would have been established in the absence of zeroing[170]; and,

(2) Zeroing "inflates" the margin of dumping by always excluding from the aggregation stage the results of negative comparisons that would reduce the overall amount of dumping if they were included.[171]

4.113 Immediately after noting these unfair elements, the Appellate Body found that there is an "inherent bias in a zeroing methodology … of this kind".[172] Unsurprisingly, Japan argues, the Appellate Body took the view that such a comparison "is *not* a 'fair comparison' between export price and normal value, as required by Articles 2.4 and 2.4.2".[173]

4.114 Japan argues that the model and simple zeroing procedures as well as the standard zeroing line at issue involve the same unfair comparison. Under the measures at issue, the United States aggregates multiple comparison results into a single, overall margin. However, by excluding the negative results of any comparisons from the aggregation of total dumping, the zeroing procedures overstate the total amount of dumping by an amount equal to the excluded negative values. As a result, the dumping margin is inflated. Moreover, in situations where the aggregate value of excluded negative results exceeds the aggregate value of the included positive results, the zeroing procedures produce a dumping determination where the product as a whole is not dumped. In consequence, the USDOC conducts its investigation "in such a way that it becomes *more likely* that [it] will determine that" there is dumping.[174] By rendering a dumping determination more likely, and by systematically inflating the dumping margin, the zeroing procedures deprive the comparison of normal value and export price of even-handedness. Instead, the procedures systematically favour the interests of petitioners, and systematically prejudice the interests of exporters.

4.115 Japan states that the Appellate Body has also described the unfairness of zeroing in terms of its distorting effects on export price in the comparison of normal value and export price:

> "Zeroing means, in *effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing,

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[170] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135, quoting the panel report in that dispute, at para. 7.159.

[171] *Ibid,* para. 135.

[172] *Ibid,* para. 135.

[173] *Ibid,* para. 135 (*emphasis in original*). See also Appellate Body Report in *EC – Bed Linen*, para. 55.

[174] Appellate Body Report *US – Hot-Rolled Steel*, para. 196 (*emphasis added*).

therefore, does not take into account the *entirety* of the *prices* of *some* export transactions … ."[175]

4.116 These same price-based distortions result, in the same fashion, from both the model and simple zeroing procedures. By improperly excluding all negative comparison results from the aggregation stage, the USDOC effectively attributes a zero value to the excluded comparisons in question, instead of a negative value. This means that, for the excluded comparisons, the USDOC treats normal value as *equal* to export price, whereas, in fact, export price is *greater* than normal value. Accordingly, as a result of zeroing, the export transactions considered in the excluded comparisons are systematically "treated as if they were less than what they actually are".[176] Another way to express the same price-distortion is that the zeroing procedures systematically treat normal value as if it is *higher* than it actually is.[177] On either view (reduced export price or raised normal value), through the model and simple zeroing procedures, the USDOC distorts the comparison of normal value and export price by interfering with price-based data for home-market or export sales.

4.117 In other words, Japan claims, like the adjustments envisaged in Article 2.4, zeroing has the effect of altering normal value or export price. However, whereas adjustments to be made under Article 2.4 are designed to ensure "price comparability", zeroing ensures price distortion. Although the United States purposefully disregards the negative results of comparisons of normal value and export price, it does *not* provide any compensation in the process of aggregating dumping amounts that counter-balances the exclusion of negative results. Instead, the standard zeroing procedures are designed and structured always to be biased in favour of a particular outcome and particular interests (i.e. existence of dumping and the interests of petitioners), and conversely are *always* biased against exporters' interests.

4.118 Japan argues that, as the zeroing procedures are formulated with an in-built bias that distorts the comparison of normal value and export price, they are inconsistent with the dictates of fundamental fairness. As a result, the model and simple zeroing procedures in original investigations, as well as the standard zeroing line, are "as such" inconsistent with Article 2.4.

4.119 Japan submits that the failure to establish a margin of dumping for the product as a whole, through the standard zeroing procedures, is also inconsistent with the dictates of fundamental fairness as it necessarily results in an unfair comparison, i.e. price distortion and an inflated dumping margin. In other words, by systematically excluding the results of certain comparisons, the United States fails to determine a margin of dumping for the product as a whole and, simultaneously, engages in an unfair comparison, for the reasons stated above. Therefore, the model and simple zeroing procedures entail a failure to establish a margin of dumping for the product as a whole and also violate the fairness requirement in Article 2.4.

4.120 Japan states that it appears that Japan and the United States, in fact, agree that Article 2.4 establishes a "general obligation" on investigating authorities to conduct a fair comparison of export price and normal value.[178] This is not surprising as the Appellate Body has already reached the same conclusion, says Japan.[179] 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

[175] Appellate Body Report *US – Softwood Lumber V*, para. 101 (*underlining added*).
[176] Appellate Body Report *US – Softwood Lumber V*, para. 101.
[177] Appellate Body Report *US – Hot-Rolled Steel*, para. 144.
[178] Japan 20 July 2005 Answers, para. 106; US 20 July 2005Answers, para. 70.
[179] Appellate Body Report, *EC – Bed Linen*, para. 59.

fifth sentences of Article 2.4, and asserts that those requirements cannot be "divorce[d]" from the adjustments required to establish price comparability.[180]

4.121 Japan argues that there are two levels of response to this assertion. First, as an interpretive matter, it is incorrect. As Japan stated in its 20 July 2005 Answers, Article 2.4 prohibits the myriad possibilities for unfairness that could taint the comparison of normal value and export price.[181] In its ordinary meaning, the word "comparison", in Article 2.4, refers to the process or action of discerning the difference between normal value and export price.[182] 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 re-aggregate the "product" for purposes of the comparison is an integral part of the process of comparing prices for the product.[183] 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. Further, confining the first sentence of Article 2.4 to a duty to make price adjustments would render that sentence redundant because the duty to make adjustments is already set forth in the remainder of Article 2.4. The first sentence of the provision would, therefore, add nothing to the rest.

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

4.123 *Second*, Japan argues that, even if the United States is correct (*quod non*) that the requirements of fairness in Article 2.4 cannot be "divorce[d]" from the duty to make price adjustments, Japan prevails.[184] Japan recalls that the zeroing procedures, in substance, involve an adjustment to the prices of excluded export transactions. In the words of the Appellate Body, these transactions are "treated as if they were less than what they actually are."[185] Thus, the zeroing procedures involve an adjustment to the prices being compared. Japan argues that, under the third sentence of Article 2.4, the authorities are required to adjust for differences between export price and normal value to ensure price comparability. The provision also gives a non-exhaustive list of factors that may give rise to an adjustment to ensure price comparability. These adjustments are intended to guarantee a "fair comparison". However, if there are no differences affecting price comparability that compel an adjustment, the authorities are not permitted to interfere with prices because the result of such interference is that the values to be compared cease to be the producer's or exporter's own prices. Japan argues that, 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. Japan asserts that it is absurd, however, to interpret the Article to require the authorities to give with one hand to ensure fairness that which they can simply remove with the other to deny it. Nothing in the text supports so peculiar an interpretation.

4.124 Japan asserts that, as a result, the fair comparison requirement in Article 2.4 does not permit the authorities to interfere with normal value and/or export price to arbitrarily produce desired results. Such adjustments are not made to ensure price comparability and, instead, impermissibly distort prices. Far

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[180] US 20 July 2005 Answers, para. 73.
[181] Japan 20 July 2005 Answers, para. 113.
[182] Japan First Written Submission, para. 82.
[183] See Japan Opening Statement, First Substantive Meeting of the Panel with the Parties, paras. 37 - 38.
[184] US 20 July 2005 Answers, para. 73.
[185] Appellate Body Report, *US – Softwood Lumber V*, para. 101.

from "divorce", Japan's interpretation "marries" the general obligation in Article 2.4 with the specific requirements in the remaining sentences. In particular, the general obligation is interpreted to preclude, among other things, interference by the authorities with prices in a manner that undermines adjustments made to ensure price comparability.

4.125 In response to the United States' arguments that the unfairness of the zeroing procedures cannot be demonstrated merely by the fact that zeroing would result in a higher dumping margin, Japan recalls that the Appellate Body has noted the use of a zeroing methodology "will tend to inflate the margins calculated" and "could, in some instances, turn a negative margin of dumping into a positive margin of dumping". Thus Japan argues that the effect of a given methodology in inflating margins, or generating margins that would not otherwise exist, is indeed a relevant consideration in examining whether the methodology is fair under Article 2.4. In this case, that fact is coupled with the fact that the inflation of the margins is a deliberate, and not merely incidental, consequence of the methodology and it occurs systematically.

4.126 Japan asserts that the United States also incorrectly argues that the Appellate Body has only stated that zeroing is WTO-inconsistent in disputes involving original investigations, but not in the context of reviews under Articles 9 and 11. Japan states that in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body examined a claim that the United States acted inconsistently with Articles 2.4 and 11.3 of the *AD Agreement* by relying, in a sunset review, on dumping margins that were calculated in administrative reviews using zeroing.[186] The Appellate Body stated:

> "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping."[187]

4.127 Japan further argues that the Appellate Body in that case envisaged that, in sunset reviews, Members would violate Articles 2.4 and 11.3 if they were to rely on "legally flawed" dumping margins calculated, in investigations or reviews, using a zeroing methodology.[188] Japan emphasizes that these findings have particular significance for this dispute because the Appellate Body noted in *US – Corrosion-Resistant Steel Sunset Reviews* that the "flawed" dumping margins in question had been calculated in administrative reviews, pursuant to Article 9. Therefore, the Appellate Body also envisaged that Members would violate the *Agreement* by using zeroing to calculate dumping margins in administrative reviews.

4.128 Japan claims that, in light of the Appellate Body's recognition that zeroing would have the same distortive effects, "whether in an investigation or otherwise", i.e. in reviews as well as investigations, it would be strange indeed to conclude that the Appellate Body held that zeroing is WTO-inconsistent when used in investigations, but is permissible when used in reviews. Also the Appellate Body concluded that "in the absence of uncontested facts on the Panel record, it is not possible for [the Appellate Body] to assess whether the methodology in the administrative reviews [in *Corrosion-Resistant Steel*] was *equivalent in effect* to the methodology [used] in *EC – Bed Linen*."[189] Japan argues that these statements show that, if zeroing in investigations and reviews produce "equivalent" distortive effects, Article 2.4 would be violated in both situations.

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[186] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 133.
[187] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135 (*emphasis added*).
[188] Appellate Body Report, *EC – Bed Linen*, para. 127. See also para. 4.194, below.
[189] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 137 (*emphasis added*).

4.129 Japan further urges the Panel to focus on the features of the measures at issue, and not on alternative methodologies that the United States might have adopted to calculate dumping margins. Japan argues that the salient features of the zeroing measures at issue are that the United States makes an initial comparison for *all comparable export transactions*, but in aggregating the initial comparison results into an overall margin, the United States includes solely the positive comparison results, disregarding negative results. The United States thereby distorts the prices for the disregarded export transactions, and it does so precisely because this will generate and inflate the overall dumping margin. Finally, the United States applies the determination resulting from the "partial" comparison of selected transactions to *all* export transactions on a product-wide basis. This is so whether the determination is used for purposes of an injury determination; to terminate or pursue an investigation; to justify the imposition of duties; or to assess the amount of duties due. Japan recalls that, in *US – Softwood Lumber V*, the Appellate Body observed that under the United States' system, the product is consistently treated as a whole at all stages, except for purposes of zeroing.[190] Japan submits that, in light of these features, the "partial" comparison that results from the zeroing measures is "inherently biased" and not fair, whether it is used in "*an original investigation or otherwise*".[191] Japan insists that the fairness of the United States' measures cannot be assessed in light of other methodologies that the United States might have chosen, but did not.

4.130 Japan responds to what it calls the central pillar of the United States' defence that prohibiting zeroing would render the third method of comparison in Article 2.4.2 a nullity. In its Opening Statement during the First Meeting of the Panel with the Parties and in answers to the Panel's questions, Japan has demonstrated the fallacy of this argument.[192] The second sentence of Article 2.4.2 contemplates a different comparison from the symmetrical methods that 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.[193] In the United States' answers to the Panel's questions, it asserts that Japan's interpretation of the second sentence has no textual support. In fact, Japan has provided a careful textual analysis of the words of the provision. Japan relies, for example, on the ordinary meaning of the following words and phrases: "pattern of export prices"; "differ significantly"; "different purchasers, regions or time periods"; and "why such differences cannot be taken into account" under the symmetrical methods. In addition, the absence of the word "all" in the second sentence provides additional textual grounds for Japan's interpretation.

4.131 Japan argues that it is the United States that fails to provide any textual basis for its interpretation. The United States asserts baldly that the second sentence permits a comparison "using the same universe of export transactions as the other two methodologies".[194] It adds that the asymmetrical comparison "by its very nature" addresses targeted dumping.[195] 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. Japan posits that a comparison that uses the entire universe of export transactions cannot, "by its very nature", address pricing patterns, or the possibility of targeted dumping, confined to a certain group of transactions. A comparison that relies on all export transactions necessarily addresses the prices, and any positive comparison results, in all these transactions. The use of zeroing does not alter this fact. For

[190] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[191] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135 (*emphasis added*).

[192] Japan Opening Statement, First Substantive Meeting of the Panel with the Parties, paras. 45-58; Japan 20 July 2005 Answers, paras. 43-53, 56-63 and 66-83.

[193] Japan 20 July 2005 Answers, paras. 69-72 and 78-82.

[194] US 20 July 2005 Answers, para. 25.

[195] US 20 July 2005 Answers, para. 25.

example, an examination of prices across the United States may disclose a pricing pattern among purchasers in Texas. The United States would investigate the possibility of targeted dumping within this pricing pattern in Texas by examining transaction prices in Maine, Oregon, Alaska and, indeed, everywhere else in the United States. By necessity, the resulting determination would have nothing to do with the pricing pattern in Texas. Rather, any dumping determination would be based on positive comparison results from export transactions scattered through the entire universe of transactions. There is no basis in the text of the second sentence of Article 2.4.2 for a comparison that is disconnected in this way from the pricing pattern.

4.132 Thus, contrary to the United States' arguments, the express language of the second sentence of Article 2.4.2 mandates a comparison based on a subset of transactions. That express language identifies the subset in question: those transactions that constitute the pricing "pattern" among "purchasers, regions or time periods". A targeted selection of transactions is permitted to take into account the price differences within this pattern. That targeted selection addresses the possibility that the pattern may be the result of targeted dumping. When the pattern has been identified, and the selection made, the authorities must conduct a fair comparison of all transactions within the pattern. As the Appellate Body held in *US – Softwood Lumber V*, the express language of Article 2.4.2 does not permit authorities to disregard the results of the pricing comparisons undertaken.[196] Accordingly, Japan argues that the United States' argument that a prohibition on zeroing would nullify the third method of comparison is without merit.

4.133 In response to the Panel's question asking why Japan regards it as permissible to exclude export transactions that are not a part of a "pattern" pursuant to the second sentence of Article 2.4.2 from the denominator of the dumping margin calculation, Japan argues that the purpose of the second sentence of Article 2.4.2 is to allow Members to combat targeted dumping that might be indicated through particular pricing patterns among different purchasers, regions, or time periods.[197] Japan states that by explicitly requiring the authorities to explain why a W-to-W or T-to-T comparisons will not take "appropriate account" of the prices differences, the second sentence of Article 2.4.2 presupposes that the third comparison methodology, which uses a pricing pattern to establish the existence of the margin of dumping on the basis of the specific transactions within the pricing pattern, will enable the authorities to take appropriate account of those differences.

4.134 Japan submits that its interpretation is consistent with the USDOCs targeted dumping regulation. This regulation recognizes that, in a situation that may involve "targeted dumping," the W-to-T comparison is confined to the export transactions making up the pricing pattern. Specifically, the Regulations state that where "there is targeted dumping in the form of export prices ... that differ significantly among purchasers, regions, or periods of time" "*the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping ...* ".[198] In other words, Japan claims, the United States appears to agree that the W-to-T method in the second sentence is confined to the export transactions making up the pricing pattern and does not extend to the entire universe of export transactions.

4.135 The United States replies that its Regulations do not support Japan's position because, in addition to applying the W-to-T method to the transactions in the pattern, the USDOC will apply a W-to-W comparison method to the remaining export transactions[199], and argues that, without zeroing, this combination of methodologies would produce the same result as a single W-to-W comparison. In response, Japan argues that for the United States' redundancy argument to be correct as a matter of law,

[196] Appellate Body Report, *US – Softwood Lumber V*, para. 100.
[197] Japan 19 October 2005 Answers, paras. 50-54.
[198] USDOC Anti-dumping regulations, 19 C.F.R. § 351.414(f)(2) (*emphasis added*). Exhibit JPN-03.
[199] Response of the US to Japan's Opening Statement at the Second Substantive Meeting of the Panel with the Parties, para. 3.

a Member must be *required* to conduct a further symmetrical comparison for the remaining transactions (i.e. W-to-W or T-to-T). That is, the *AD Agreement* must compel authorities to conduct a combined comparison using two of the methodologies in Article 2.4.2. Nothing in Article 2.4.2 indicates any such requirement. In terms of Article 2.4.2, each of the methods of comparison constitutes, on its own, a basis for determining "the existence of margins of dumping". Thus, Japan argues that the "individual margin of dumping"[200] established for an exporter or producer under any one of the three comparison methods[201] constitutes a valid and sufficient dumping determination on its own.[202] Japan points out that the United States' argument is contradictory because, while it insists that there is no obligation to calculate a single margin for all export transactions pertaining to the product, to preserve its redundancy argument under the second sentence of Article 2.4.2, the United States also argues that the authorities *are* obliged to conduct a comparison for *all* export transactions pertaining to the product.

4.136 Furthermore, Japan holds the position that the second sentence of Article 2.4.2 constitutes an exception to the requirement to determine the margin of dumping for a product as a whole[203]. Finally, when asked by the Panel whether in a situation where the third method of comparison is used to determine the anti-dumping duty, the *AD Agreement* permits the imposition of duties to be imposed on all imports of the subject product, Japan answers in the affirmative.[204] Japan argues that, according to the Appellate Body "the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties."[205] Japan explains that when a Member makes a determination of a dumping margin under any of the three methodologies under Article 2 and an affirmative injury and causation determination under Article 3, Article 9 permits the imposition of duties on all entries of the product into the territory of the importing Member. Japan adds, however, that the liability for duties imposed on the basis of a dumping determination under the second sentence of Article 2.4.2 would be subject to review under either Article 9.3.1 or 9.3.2. While Japan notes that it has not taken a position with regards to the applicability of Article 2.4.2 to review proceedings, Japan argues that a question may arise whether authorities would be permitted to use such a W-to-T method in its exceptional form in review proceedings(i.e. confined to a limited group of transaction making up a pricing pattern).

4.137 Leaving aside its interpretation of the second sentence of Article 2.4.2, Japan argues that the United States "nullity" argument places a very high burden on the United States. To show that the prohibition of zeroing "nullifies" the second sentence of Article 2.4.2, the United States must demonstrate that, without zeroing, Members are required to calculate margins in a manner that will always result in the same outcome for the two comparison methods. There is no nullity just because the two methods may produce the same outcome in some circumstances. Japan argues that it has shown, however, that without zeroing, the W-to-W and W-to-T methods would produce different results in certain circumstances – for example, when Members base the comparison on a weighted average normal values determined for different time periods. Specifically, Japan provides numeric examples demonstrating that the results differ as between the comparison methodologies authorized by the anti-dumping statute of the United States itself – i.e. a W-to-W comparison methodology in which the weighted average normal value is calculated over the entire period of investigation, and a W-to-T comparison methodology in which the weighted average normal value is calculated on a monthly basis.

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[200] Article 6.10 of the *AD Agreement*.

[201] This assumes that, for the third methodology, the prerequisites in the second sentence of Article 2.4.2 have been satisfied.

[202] Japan considers that, in situations in which the third methodology is used to calculate the margin of dumping on the export sales that comprise the pricing pattern, the *AD Agreement* does not preclude Members from conducting a separate symmetrical comparison (though it does not compel the Member to do so either), as the US says it would for the export transactions that do not form part of the pattern.

[203] Japan Opening Statement, First Substantive Meeting of the Panel with the Parties, para. 54.

[204] Japan 21 September 2005 Answers, paras. 55-57.

[205] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

4.138 The United States responds that "Japan offers no textual analysis to support its theory that the methodologies set on in Article 2.4.2 were crafted on the assumption that Members would be using different bases for calculating the weighted average normal value" in W-to-W and W-to-T comparisons, respectively.[206] Japan argues that this is an incorrect way to present the issue. Japan submits that the text does not suggest an "assumption" that a single "basis for calculating the weighted average normal value" must be used under Article 2.4.2. The significant point is that the text of the Article itself does not *prohibit* a Member from using "different bases" for calculating the weighted average normal value in the two situations. In other words, Article 2.4.2 was crafted on the "assumption" that Members could choose to use different bases for calculating the weighted average normal value in the W-to-W and W-to-T comparisons. So long as Members are not prohibited from using different bases (including different time periods) to calculate the "W" in the W-to-W and W-to-T comparisons, the outcomes of the comparisons will almost inevitably differ because the groups of transactions making up the weighted average normal value will differ.

4.139 Japan points out that the United States does not suggest that the *AD Agreement* compels Members to use the same time bases in the two situations. Indeed, the United States' domestic law itself authorizes the contrary because the USDOC is permitted to use different time "bases" for calculating the "W" in the W-to-W comparison in investigations and in the W-to-T comparison in administrative reviews.[207] Moreover, Japan argues that the United States does not deny that different outcomes will result from the use of different time bases. Japan asserts that the fact that methods overlap in those circumstances does not nullify the third method because a Member *may* also choose to do otherwise, as the United States itself has done.

United States[208]

4.140 The United States argues that Article 2.4 of the *AD Agreement* does not contain obligations with respect to zeroing. The United States argues that the obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets. Article 2.4 addresses only the required adjustments that must be made to export price and normal value in order to account for "differences which affect price comparability". Not only does the text of Article 2.4 itself not provide an obligation with respect to offsets, but to interpret the obligation to make a "fair comparison" – as Japan does – as the basis for a general requirement to provide offsets would render the targeted dumping methodology in Article 2.4.2 superfluous. As such, the United States asserts that Japan's claims based on the obligation to make a "fair comparison" under Article 2.4 should be rejected.

4.141 The United States argues that an analysis of Japan's claims necessarily begins with the text of Article 2.4. From the text, it is clear that Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities. The United States argues that the first sentence of Article 2.4 creates a general obligation to make appropriate adjustments to ensure that export prices and normal values are comparable before margin calculations are undertaken.[209] The remainder of Article 2.4 provides examples of the types of adjustments that the administering authority is obliged to make in pursuit of price comparability. There is no basis for an interpretation of Article 2.4 that divorces the obligation to make a fair comparison

[206] US Second Written Submission, para. 40.

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

[208] US First Written Submission, paras. 44-53; US Second Written Submission, para. 34, 36-37, 26-32¸ US First Written Submission, paras. 54-58; US Second Written Submission, paras. 39-47.

[209] US 20 July 2005 Answers, paras. 70-73.

from the allowances required to establish price comparability. Article 2.4 itself does not specifically address the establishment of the margin of dumping.

4.142 The United States argues that the focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Steel Rebar* explained:

> "... [A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value."[210]

The panel's discussion in *Egypt- Steel Rebar* of the scope of the fair comparison language in Article 2.4 was expressly quoted and supported by the panel in *Argentina – Poultry Anti-Dumping Duties*.[211] Every Appellate Body and panel report that has turned on the question of price comparability has narrowly interpreted Article 2.4 to address pre-comparison price adjustments that affect the comparability of prices between markets.[212] The panel in *US – Softwood Lumber V* summarized the scope of Article 2.4 when it found:

> "An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a difference between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. *Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets* concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, *an adjustment would not be required to be made by that provision.*"[213](*emphasis added*)

4.143 Accordingly, as the Appellate Body stated in *US – Hot-Rolled Steel*, "an examination of whether USDOC acted consistently with Article 2.4 of the *AD Agreement* must focus on . . . whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value".[214] Thus, Japan's proposed interpretation of Article 2.4 to encompass the *results* of comparisons between export price and normal value is erroneous; Article 2.4 does not apply to the *results* of comparisons.

4.144 The United States argues that Japan has not offered any argument as to how an offset to the dumping found on one export transaction as a result of a distinct export transaction having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under Article 2.4. Quite the opposite, Japan itself recognizes a distinction between the adjustments that are required pursuant to Article 2.4 in order to make a "fair comparison", and zeroing.[215] Accordingly, the United States claims, because the "fair comparison" obligation in Article 2.4 refers to the required price

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[210] Panel Report*, Egypt – Steel Rebar*, para. 7.335.

[211] See Panel Report *Argentina – Poultry Anti-Dumping Duties*, paras. 7.264–7.265, Panel Report, *U – Softwood Lumber V*, para. 7.356; Appellate Body Report, *US – Hot-Rolled Steel,* para. 179.

[212] See*,* e.g.*,* Panel Report, *US – Softwood Lumber V*, para. 7.356; Appellate Body Report, *US – Hot-Rolled Steel,* para. 179, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7 265; Panel Report, *Egypt – Steel Rebar*, para. 7.269.

[213] Panel Report, *US – Softwood Lumber V*, para. 7.356.

[214] Appellate Body Report, *US – Hot-Rolled Steel,* para. 179.

[215] Japan First Written Submission, para. 107.

adjustments, it does not create an obligation with respect to how the results of those comparisons are treated.

4.145 The United States notes that Japan appears to be arguing that in addition to the appropriate price adjustments envisioned in Article 2.4, the United States is obligated to provide some form of compensation in the process of aggregating the results of its price comparisons to negate the effect of not allowing an offset for sales that exceed normal value.[216] The focus of Article 2.4, however, is limited to the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. Japan has not shown – and, logically, cannot show – that the result of a comparison between two particular transactions is a difference affecting the price comparability of two completely different transactions.[217] Even as described by Japan, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves.[218] Consequently, it falls outside the scope of Article 2.4.[219]

4.146 Not content with the text of the Article 2.4 as written, argues the United States, Japan now seeks to read into the phrase "fair comparison" the words "good faith" in an attempt to create a new obligation.[220] However, the customary rule of interpretation reflected in *Vienna Convention* Article 31 calls for a "good faith" reading of the actual text of an agreement, in its context and in light of the agreement's object and purpose; substituting or inserting words into the text that are not there – even if those words are "good faith" – is not in fact a good faith reading. The principles of interpretation set forth in Article 31 "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[221] As discussed above, a proper reading of the actual language of the *AD Agreement* yields the conclusion that the phrase "fair comparison" in Article 2.4 simply has nothing to do with offsetting.

4.147 The United States argues that, in *EC – Bed Linen*, the Appellate Body found that the EC had an obligation to provide offsets arising out of the use of an average-to-average comparison methodology in an investigation pursuant to Article 2.4.2.[222] The Appellate Body, however, made no findings with respect to Article 2.4. The Appellate Body focused its analysis on the fact that Article 2.4.2 requires investigating authorities to "compare the weighted average normal value with the weighted average of prices of all comparable export transactions".[223] While the Appellate Body report contains a conclusory sentence regarding the "fair comparison" requirement, the report contains no textual analysis of the "fair comparison" requirement nor any explanation as to how or why the EC's methodology was unfair.[224] The basis for the Appellate Body's finding was limited to the need for an investigating authority to use "all comparable export transactions" in the application of the average-to-average comparison methodology.[225]

4.148 The United States asserts that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that it was "unable to rule" on whether the United States acted inconsistently with

[216] Japan First Written Submission, para. 107.
[217] US Second Written Submission, para. 35.
[218] Japan First Written Submission, para. 2.
[219] The US notes that Japan's "as applied" claims include claims of inconsistency with Article 18.4 of the *AD Agreement* and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"). Assuming for purposes of argument that Japan's positions regarding "symmetry" and offsets for "negative dumping" are valid, Japan fails to explain how the obligations of these provisions relate to determinations made in specific anti-dumping proceedings. Accordingly, the Panel should reject Japan's claims.
[220] Japan First Written Submission, para. 36.
[221] Appellate Body Report, *India – Patents (US)*, para. 45.
[222] Appellate Body Report, *EC – Bed Linen*, para. 66.
[223] *Ibid,* para. 55.
[224] *Ibid*, para. 55.
[225] *Ibid*, paras. 55-60.

Article 2.4 and Article 11.3.[226] While Japan cites to the Appellate Body's language in *US – Corrosion-Resistant Steel Sunset Review* as to the "fair comparison requirement," the statements to which Japan refers were made absent any analysis of the text of the *AD Agreement*, did not provide any reasoning beyond reference to the *EC – Bed Linen* report, and were in the context of a dispute in which the Appellate Body was unable to "complete the analysis." Accordingly, the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* provides no basis to conclude that the fair comparison requirement establishes an independent obligation to provide offsets.

4.149 The United States asserts that, in *US – Softwood Lumber V*, the Appellate Body specifically recognized that the issue before it was whether offsets were required under the average-to-average methodology found in Article 2.4.2.[227] The basis for its finding was the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ."[228] At no point did the Appellate Body in *US – Softwood Lumber V* reference or rely upon Article 2.4 as part of its analysis. Furthermore, even though the parties in that dispute referenced other comparison methodologies found within Article 2.4.2 in their arguments, the Appellate Body declined to address any obligation to provide offsets in any context other than that of the average-to-average comparison methodology before it.[229]

4.150 The United States argues that belying Japan's mischaracterization of the Appellate Body's prior findings as speaking to an offset requirement pursuant to the "fair comparison" language, in *US – Softwood Lumber V* the Appellate Body expressly indicated that the scope of its determination was limited:

> "[I]n this appeal, we are not required to, and do not address, the issue of whether zeroing can, or cannot, be used under the other methodologies prescribed in Article 2.4.2, namely, comparing normal value and export prices on a transaction-to-transaction basis (the "transaction-to-transaction methodology"), or comparing a normal value established on a weighted average basis to prices of individual export transactions (the "weighted-average-to-individual methodology")."[230]

4.151 The Appellate Body also explained the limited scope of its findings in *EC – Bed Linen*:

> "When examining the practice of 'zeroing' in the original dispute, we noted that the requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties."[231]

Thus, Japan's suggestion that the Appellate Body has resolved the issue as to offsets in contexts other than an average-to-average methodology in an investigation is contradicted by the Appellate Body's own statements.

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[226] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 138.

[227] Appellate Body Report, *US – Softwood* Lumber *V*, paras. 104, 105, 108.

[228] *AD Agreement*, Art. 2.4.2 (*emphasis added*). See Appellate Body Report, *US – Softwood Lumber V*, paras. 82, 86, 98.

[229] Appellate Body Report, *US – Softwood Lumber V*, paras. 104 - 105.

[230] Appellate Body Report, *US – Softwood Lumber V*, para. 63.

[231] Appellate Body Report, *EC – Bed Linen (21.5 – India),* para. 124.

4.152 The United States argues that, while the "fair comparison" language refers to adjustments necessary to ensure price comparability, even if the obligation were somehow read to have some meaning beyond this, it would not follow that a "fair comparison" requires an investigating authority to provide an offset to dumping for export transactions that exceed normal value in every anti-dumping proceeding, no matter the method of comparison used and no matter the facts before it.

4.153 The United States argues that customary rules of interpretation of public international law require that an agreement term be interpreted in its context. Any reading of an obligation of "fairness" should thus be informed by the specific rules in the *Agreement* applicable to the calculation of dumping. An approach that conflicts with those rules, or which purports to establish a standard of fairness that in reality is subjective and arbitrary and is not informed by those rules, is not appropriate. Fairness should only be evaluated through an objective, discernable standard of what is appropriate and inappropriate, as found within the four corners of the *Agreement*. Japan argues that because the use of an offset would result in a lower margin, the non-use of the offset must be unfair. This subjective conclusion makes little sense, unless one may presume, based upon a reading of the text of the *AD Agreement*, that in all cases, the objective test of a margin's "fairness" is the level of that margin, with a higher margin being "unfair" when a lower one is possible. Japan has pointed to no language with the *AD Agreement* which would support such a reading of Article 2.4.

4.154 Further, the United States states that Japan's interpretation of the "fair comparison" requirement in Article 2.4 to create a general obligation to offset dumping margins also cannot be reconciled with the remaining text of the *AD Agreement* in a manner consistent with customary rules of treaty interpretation. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In this respect, an offset requirement would render the targeted dumping exception in Article 2.4.2 a complete nullity.

4.155 The United States argues that the express terms of Article 2.4.2 demonstrate that the drafters of the *AD Agreement* did not intend to require that dumped comparisons be offset with non-dumped comparisons in determining an exporter's final overall dumping margin. The "targeted dumping" methodology was drafted as an exception to the obligation to engage in a symmetrical comparison in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods ... ." When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison", it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

4.156 The United States asserts that the targeted dumping methodology is not an exception to the "fair comparison" requirement of Article 2.4. It is only an exception to the symmetrical comparison requirements for investigations set forth in the first sentence of Article 2.4.2. Article 2.4, on the other hand, applies to all those comparison methodologies. Japan asserts that zeroing violates the "fair comparison" obligations of Article 2.4 because it is "inherently biased".[232] However, if Japan is correct, then the "fair comparison" obligation, when applied to the targeted dumping methodology, would require the investigating authority to provide for an offset for transactions that exceed normal value even when using the targeted dumping methodology. If offsetting were required, the overall dumping margin calculated for an exporter must, mathematically, be the same under a symmetrical comparison of weighted averages of normal values and export prices, or an asymmetrical comparison of weighted average normal values and individual export prices. The United States argues the reason for this is that, if offsetting is required, then all non dumped sales (i.e. negative values) will offset the margins on all of the dumped sales (i.e. positive values). It makes no difference mathematically whether the calculation

[232] Japan First Written Submission, para. 9, 194.

of the final overall dumping margin is based on comparing weighted average export prices to weighted average normal values or on comparing transaction specific export prices to weighted average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

4.157 The United States argues that an interpretation of Article 2.4 of the *AD Agreement* that requires such offsets in general would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning. A panel may not interpret a provisions of the *AD Agreement* in such a way that its express provisions are rendered meaningless or superfluous.[233] As the Appellate Body has consistently found, "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[234] An interpretation of Article 2.4 of the *AD Agreement* to require that dumping margins be offset by non-dumped transactions is therefore impermissible and must be rejected.

4.158 The United States points out that Japan disputes that its interpretation of the fair comparison requirement would render the targeted dumping methodology a nullity based on two distinct theories: (1) that the targeted dumping methodology allows Members to disregard export transactions not within the pattern of pricing differences, and (2) that the targeted dumping methodology does not necessitate the same result as the average-to-average comparison methodology.

4.159 With respect to Japan's first theory, the United States has addressed the numerous interpretive problems with that approach in response to several questions from the Panel.[235] Nothing in the text indicates that the investigating authority may compare the weighted-average normal value to only a select subset of export transactions. Japan argues that if the investigating authority could not focus its analysis on just those export transactions that make up the different pricing pattern, the authority "would fail to take 'appropriate account' of the pricing differences discernable in those transactions".[236] Japan misreads the text of Article 2.4.2. Article 2.4.2 does not provide an obligation to take "appropriate account" of the pricing differences discernable in those export transactions. Instead, Article 2.4.2 provides an obligation to explain why a symmetrical methodology does not take appropriate account of such differences. This requirement reinforces that it is the *asymmetry* of the targeted dumping methodology that addresses the pricing differences (i.e. the masked dumping that might otherwise be missed), rather than the selection of a subset of export transactions.

4.160 The United States argues that, moreover, Japan's proposed interpretation of Article 2.4.2 defies Japan's own analysis. When it suits its argument, Japan contends that "when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly".[237] However, Japan admits that "Article 2.4.2 does not indicate exactly how the [average-to-transaction] comparison is

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[233] See Appellate Body Report, *US – Gasoline*, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12; Panel Report, *Egypt – Steel Rebar*, para. 7.277.

[234] Appellate Body Report, *US – Gasoline* at p. 23; See also Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12; Appellate Body Report, *US – Underwear*, p. 16.

[235] US 20 July 2005 Answers, paras. 24-31.

[236] Japan 20 July 2005 Answers, para. 46. The US notes that Japan also argues that an asymmetrical comparison that includes all export transactions is not directed at the pricing pattern transactions, nor can it take into account the pricing differences in the pattern, "as required by Article 2.4.2". Japan 20 July 2005 Answers, para. 59. Article 2.4.2 contains no such requirements. The US submits that Japan confuses the prerequisites for using the asymmetrical methodology (find a pricing pattern, provide an explanation as to why the other methodologies do not take into account the relevant price differences) with the methodology itself, which Article 2.4.2 does not address.

[237] Japan 20 July 2005 Answers, para. 57 (quoting Appellate Body Report, *US – Softwood Lumber V*, para. 100).

different from the other two methods of comparison ...".[238] Therefore, without any explicit textual basis for disregarding certain export transactions pursuant to the targeted dumping methodology, Japan cannot reconcile its proposed interpretation with its analysis.

4.161 The United States asserts that Japan's second theory is no more persuasive. In response to Question 20, Japan reaches the erroneous conclusion that the results of the average-to-average and average-to-transaction comparisons would differ, but it does so based on a faulty comparison. In its effort to establish some difference between the two methodologies, Japan compares how the United States applies the average-to-average methodology in an Article 5.1 investigation with how the United States assesses anti-dumping duties pursuant to Article 9.3.[239] While Article 2.4.2 applies to the former, it does not apply to the latter and Japan does not even assert that the use of monthly average normal values is the appropriate means of applying the targeted dumping methodology.

4.162 The United States argues that Japan offers no textual analysis to support its theory that the methodologies set out in Article 2.4.2 were crafted on the assumption that Members would be using different bases for calculating the weighted average normal value when using the average-to-average comparison than when using the average-to-transaction comparison during the investigation phase. Indeed, the second sentence of Article 2.4.2 merely allows a Member to engage in an asymmetrical comparison under certain conditions. With this context in mind, nothing in the text of Article 2.4.2 suggests that the weighted average normal value in the second sentence is different than the weighted average normal value in the first sentence.

4.163 The United States points out that, in response to Question 20, Japan provided a chart purporting to demonstrate that it was possible, providing offsets, to arrive at a margin of dumping expressed as a percentage of export price of 0.67 per cent using an average to average calculation, while arriving at a different percentage (1.34 per cent) comparing annual average normal values to individual export transactions. Japan's difference, however, is solely the result of an error in its calculation of the 0.67 per cent figure. Japan arrived at that figure by dividing the *per unit* difference between average normal value and average export price by the aggregate of the export prices (1.33/198 - 0.67 per cent). Rather than using the per unit difference as the numerator, Japan should have used the aggregate amount of dumping (the per unit amount multiplied by the number of units (1.33 * 2 = 2.66)) as the numerator. Dividing the proper numerator by the aggregate of the export prices, Japan would have arrived at a percentage margin of 1.34 per cent (2.66/198 = 1.34 per cent). This 1.34 per cent is identical to the figure Japan obtained using the average-to-transaction methodology with normal value averaged over the full period.[240]

4.164 The United States argues that, thus, a textual analysis, tested by even the mathematical examples provided by Japan, demonstrates that if offsets are required, then the results of average-to-average and average-to-transaction comparisons would be the same, rendering the targeted dumping provision a nullity. As the Appellate Body indicated in *US – Gasoline*, such an interpretation

[238] Japan 20 July 2005 Answers, para. 46.

[239] Japan 20 July Answers, paras. 75-77.

[240] The US argues that China had a similar error in its chart that purportedly demonstrated that a different result would be achieved as between average-to-average and average-to-transaction comparisons. See China Answers to Questions from the Panel, Response to Question 20, page 5. On the average-to-average chart, China compares an average normal value of 7 to an average export price of 5, finding a per-unit amount of dumping of 2. Like Japan, China inserted this per-unit margin to calculate what is supposed to be the overall "dumping margin" of 2/15. If that per-unit amount is multiplied by the volume of export transactions (3), as it should be, the "dumping margin" in China's chart would be 6/15 - the identical result arrived at in China's average-to-transaction chart.

would not be an appropriate application of the customary rules of treaty interpretation.[241] Japan's claims based on Article 2.4 should therefore be rejected.

3. "As such" Claims under Article 3 of the *AD Agreement* with respect to Original Investigations

Japan[242]

4.165 Japan argues that maintaining zeroing procedures in original investigations is inconsistent with Article 3 of the *AD Agreement*. Japan argues that, pursuant to Article 3.1 of the *AD Agreement*, a determination of injury must be based on an "objective examination" of "positive evidence" concerning the "volume of the dumped imports," their "effect" on prices of the like domestic product, and the "consequent impact" of dumped imports on domestic producers. According to the Appellate Body, "positive evidence" is evidence "of an affirmative, objective and verifiable character" and "must be credible".[243] An "objective examination" is one that "conform[s] to the dictates of the basic principles of good faith and fundamental fairness."[244] Japan points out that the Appellate Body also found that the general obligation set out in Article 3.1 "'informs the more detailed obligations' in the remainder of Article 3."[245]

4.166 Japan asserts that several of the other paragraphs of Article 3 impose more specific requirements on the investigating authorities' evaluation of dumped imports. In particular, Article 3.2 instructs the investigating authorities to evaluate the rate of increase in dumped imports and their price effects. In defined circumstances, Article 3.3 allows for the cumulative assessment of the "effect" of dumped imports from more than one country. Article 3.4 identifies a number of factors that investigating authorities must examine in evaluating the impact of dumped imports, including the magnitude of the dumping margin. Article 3.5 requires that "the dumped imports, through the effects of dumping", are causing injury. Thus, in each of these provisions, key aspects of the investigating authorities' injury determination are based upon evidence derived from the authorities' dumping determination. In particular, the dumping determination provides the pertinent evidence regarding: the *volume of dumped and non-dumped imports* (evaluated under Articles 3.1, 3.2, 3.3, 3.4 and 3.5); the *rate of increase of dumped imports* (evaluated under Article 3.2 and, possibly, Articles 3.4 and 3.5); the *prices of dumped and non-dumped imports* (evaluated under Articles 3.2, 3.3, 3.4 and 3.5); and, the *magnitude of the margin of dumping* (evaluated under Articles 3.4 and 3.5).

4.167 Japan argues that the model and simple zeroing procedures as well as the standard zeroing line systematically distort the dumping determination and, therefore, also the alleged evidence of dumping that is derived from this determination and subsequently used to evaluate the injury factors just enumerated. Because this evidence results from a flawed dumping determination, it does not meet the requirements of "positive evidence". *First*, the zeroing procedures fail to produce credible evidence of dumping because there is no evidence of dumping for the product as a whole. In consequence, the alleged evidence on the volume of dumped and non-dumped imports is not positive. For example, the flaws in the calculation procedures may lead to a finding of dumping for a product where there is no dumping. In that event, certain imports are treated as dumped, when they are not. *Second*, for the same reason, the alleged evidence pertaining to the rate of increase of dumped imports is also not positive.

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[241] Appellate Body Report, *US – Gasoline*, p. 23.

[242] Japan First Written Submission, paras. 111-121; Japan Opening Statement, First Substantive Meeting of the Panel with the Parties, paras. 59-61.

[243] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[244] Appellate Body Report, *US – Hot-Rolled Steel,* para. 193.

[245] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192, quoting Appellate Body Report, *Thailand – H-Beams*, para 106.

For example, due to the zeroing procedures, dumped imports may be shown to have increased sharply during the period of investigation, whereas in fact there might have been: no dumping at all; a slight increase in dumped imports; or, even a decline or disappearance of dumped imports. *Third*, the alleged evidence of the price effects of dumped imports is not credible and, therefore, not positive. The maintenance of the zeroing procedures means that the United States International Trade Commission ("USITC") has no credible basis for identifying the portion of imports that are, respectively, dumped and non-dumped. Yet, the precise make-up of these two groups of imports determines the prices attributed to dumped and non-dumped imports. Accordingly, under the zeroing procedures, there is no credible basis for determining the prices, or price effects, of these two categories of imports. *Fourth*, there is also no positive evidence of the magnitude of dumping because, as the Appellate Body has said repeatedly, "zeroing … inflates the margin of dumping for the product as a whole".[246] Because of the maintenance of the zeroing procedures, the USITC has no objective and verifiable basis for evaluating the magnitude of the margin of dumping, if any.

4.168 In other words, Japan argues, the standard zeroing procedures, in original investigations, cannot generate positive evidence of "dumping". As a result, due to the maintenance of the zeroing procedures, the USITC has no objective, verifiable or credible evidence on the basis of which to evaluate the volume, price effects and impact of dumped imports.

4.169 Furthermore, Japan points out that an "examination" of injury that is not based on positive evidence of dumping is not "objective". In *US – Hot-Rolled Steel*, the Appellate Body noted that an "objective examination" is one that meets the requirements of fundamental fairness.[247] Where alleged evidence of dumping is obtained from an unfair comparison of normal value and export price, that unfairness does not disappear through the subsequent examination of the evidence in question under Article 3.1. Instead, the underlying unfairness of the comparison taints equally the examination of the alleged evidence in an injury determination.

4.170 Japan, therefore, submits that, by maintaining the model and simple zeroing procedures as well as the standard zeroing line, the United States acts inconsistently with Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *AD Agreement* because the zeroing procedures deprive the USITC of positive evidence for an objective examination of injury.

4.171 In responding to claims made by the United States, Japan points out that the United States argues that "Japan fails to explain how USDOCs approach necessarily results in a lack of positive evidence in any, let alone *every* injury determination".[248] It adds that "Japan implicitly admits that USDOCs approach does not mandate a breach with respect to the injury determination".[249] Contrary to these assertions, Japan states that it is not required to prove that the zeroing procedures result in a violation of Article 3 in "every injury determination". As the Panel in *US – Export Restraints* held, it suffices that the zeroing procedures result in a violation of Article 3 in certain situations:

> "… [A] measure is inconsistent with WTO rules *if that measure mandates action inconsistent with WTO rules in particular circumstances*, even if in other circumstances the action might not be inconsistent with WTO rules."[250]

4.172 Japan argues that it has demonstrated that the zeroing procedures do result in violations of Article 3 in "particular circumstances", namely whenever there is a single negative comparison result

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[246] See, e.g., Appellate Body Report, *US – Softwood Lumber V*, para. 101.
[247] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[248] US First Written Submission, para. 103.
[249] US First Written Submission, para. 105.
[250] Panel Report, *US – Export Restraints*, para. 8.78, citing Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 62-63.

that is excluded from the calculation of the dumping amount. In its First Written Submission, Japan explained how this could occur.[251] Further, the CTL Plate investigation provides evidence from an anti-dumping proceeding proving that the zeroing procedures do result in injury determinations that are not based on objective, verifiable and credible evidence of dumping.[252] In that investigation, because the zeroing procedures overstated the margin of dumping, the evidence of dumping used in the injury determination was tainted. Such evidence is not "positive".

United States[253]

4.173 The United States points out that, through its arguments, Japan fails to show how the standard computer programme can require USDOC to breach any WTO obligations. But even if Japan has identified an actionable measure regarding USDOCs dumping determination, the United States argues, Japan has failed to explain how USDOCs discretion to not offset dumping based on non-dumped transactions mandates that the USITC breach any WTO obligations.

4.174 The United States argues that, with respect to its "as such" claims concerning the USITCs injury determinations, the crux of Japan's argument is that the evidence upon which the USITC bases its injury determinations is not "positive evidence" because it results from a flawed dumping determination.[254] Japan fails to explain how USDOCs approach necessarily results in a lack of positive evidence in any, let alone every injury determination. Indeed, Japan's explanation of its claim is based on speculation about a series of consequences that may occur because of USDOCs approach. For example, Japan states that "the flaws in the calculation procedures may lead to a finding of dumping for a product where there is no dumping".[255] Similarly, Japan states that the "dumped imports may be shown to have increased sharply during the period of investigation, whereas in fact there might have been: no dumping at all; a slight increase in dumped imports; or, even a decline or disappearance of dumped imports".[256]

4.175 In this regard the United States explains, Japan implicitly admits that USDOCs approach does not mandate a breach with respect to the injury determination. The assertion that the approach "might" lead to one result or another is not evidence that it mandates a breach. The United States thus argues that Japan simply has not met its burden of showing that USDOCs application of the standard computer programme *requires* the USITC to make injury determinations that are not based on positive evidence or that are otherwise inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*.[257]

4. "As such" Claims under Article 5 of the *AD Agreement* with respect to Original Investigations

Japan[258]

4.176 Japan argues that maintaining zeroing procedures in original investigations as well as the standard zeroing line is inconsistent with Article 5.8 of the *AD Agreement.*

4.177 Japan argues that the text of Article 5.8 sets forth circumstances in which investigating authorities are obliged to terminate an investigation. In particular, authorities must terminate promptly

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[251] Japan First Written Submission, paras. 114-120.
[252] Japan First Written Submission, paras. 167ff.
[253] US First Written Submission, paras. 101-104.
[254] Japan First Written Submission, para. 114.
[255] Japan First Written Submission, para. 115.
[256] Japan First Written Submission, para. 116.
[257] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 202.
[258] Japan First Written Submission, paras. 122-130.

when there is "[in]sufficient evidence of … dumping … to justify proceeding"; and they must terminate immediately either (1) where the margin of dumping is *de minimis* or (2) where the volume of dumped imports is negligible. Article 5.8 imposes an *affirmative* obligation *on authorities* because they must be "satisfied", on an on-going basis, that there is "*sufficient evidence*" of dumping to "justify" pursuit of an investigation. 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 at once affirmative, objective, verifiable and credible.[259] In the same vein, the panel in *US – Softwood Lumber V* opined that the sufficiency of evidence, under Articles 5.2 and 5.3 of the *AD Agreement,* is determined, among others, by reference to "the *accuracy and adequacy* of the evidence …".[260]

4.178 In *US – Softwood Lumber V*, the Panel also examined whether, under Articles 5.2 and 5.3, there was sufficient evidence of dumping to initiate an investigation. Like Article 5.8, Articles 5.2 and 5.3 do not define the word "dumping". However, following the approach of the panels in *Guatemala – Cement II* and *Argentina – Poultry*, the panel in *US – Softwood Lumber V* ruled that:

> "Article 2 provides guidance regarding the meaning of that term for the purpose of the *AD Agreement*. We agree … that, in order to determine whether there is sufficient evidence of dumping, an investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Article 2. This does not, of course, mean that an investigating authority must perform a full-blown determination of dumping in order to initiate an investigation. Rather, it means simply that an investigating authority should take into account the general parameters as to what dumping is when inquiring about the sufficiency of the evidence. The requirement is that the 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 … ."[261]

4.179 Japan submits that this reasoning applies also to Article 5.8. In that regard, the model and simple 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 *AD Agreement*.

4.180 Japan argues that it has explained that the zeroing procedures as well as the standard zeroing line are inconsistent with Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, because the USDOC fails to determine the existence of dumping, or calculate a margin of dumping, for the product as a whole, and because the USDOC also fails to engage in a fair comparison of normal value and export price due to the "inherent bias in a zeroing methodology …".[262] As a result, by maintaining the zeroing procedures, the USDOC never has any accurate or adequate evidence of "dumping," much less "sufficient evidence" to justify pursuit of an investigation. Accordingly, by maintaining the zeroing measures as integral parts of the calculation procedures, the USDOC has no adequate basis for knowing, at any point in an investigation, whether it can continue to pursue the investigation or must terminate it. The alleged evidence of dumping upon which the USDOC relies, under Article 5.8, is obtained with utter disregard for the "general parameters of what dumping is" because the zeroing procedures themselves disregard those parameters. Further, as the alleged "evidence" stems from a biased comparison of normal value and export price, it offers no

[259] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[260] Panel Report, *US – Softwood Lumber V*, para. 7.79.

[261] Panel Report, *US – Softwood Lumber V*, para. 7.80 (underlining added). See also Panel Report, *Guatemala – Cement II*, para. 8.35 and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.62.

[262] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

grounds for "an unbiased and objective investigating authority" to conclude that there is sufficient evidence to pursue an investigation.[263]

4.181 Japan notes that, in its arguments on the meaning of the term "margin of dumping", the United States accepts that Article 5.8 requires that the authorities must aggregate multiple comparison results to produce a margin of dumping for the product as a whole.[264] The standard zeroing procedures and the standard zeroing line prevent the United States from complying with the interpretation it itself advances.

United States[265]

4.182 The United States argues that Japan contends that the denial of offsets is "inconsistent with Article 5.8 because [it] deprive[s] the USDOC of accurate, adequate or otherwise credible 'evidence' of 'dumping,' ... ."[266] The United States asserts that his argument is entirely dependent on a finding that the denial of offsets is inconsistent with Articles 2.1, 2.4 or 2.4.2 of the *AD Agreement*.[267] The United States cannot independently act inconsistently with Article 5.8 of the *AD Agreement*, if the denial of offsets is not inconsistent with Articles 2.1, 2.4 and 2.4.2.

4.183 The United States claims that, in addition to being dependent upon a separate violation of Articles 2.1, 2.4 or 2.4.2, Japan's argument with respect to Article 5.8 is also speculative. Even if the Panel were to find that the United States acted inconsistently with Article 2.1, 2.4 or 2.4.2, Japan has not established a factual basis for its allegation with respect to Article 5.8. The United States argues that Article 5.8 only requires termination of an investigation in cases where the authorities determine that the margin of dumping is *de minimis*. Japan has not established that, were it to prevail with respect to its claims that the United States acted in breach of Articles 2.1, 2.4 or 2.4.2, the only margins that could be determined in a WTO-consistent manner must be less than *de minimis*.

5. "As such" Claims under Articles 2 and 9 of the *AD Agreement* with Respect to Periodic and New Shipper Reviews

Japan[268]

4.184 Japan argues that maintaining zeroing procedures in periodic and new shipper reviews as well as the standard zeroing line is inconsistent with Articles 2 and 9 of the *AD* Agreement.

4.185 Japan states that, under Section 751 of the Tariff Act[269], upon request, the USDOC is authorized to conduct "administrative reviews of determinations." Pursuant to that statutory provision, the term "administrative review" encompasses, among others, "periodic"[270] and "new shipper reviews".[271] Japan explains that, in a <u>periodic review</u>, 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, usually 12 months. The USDOC calculates two types of margin in a periodic review. *First*, it calculates the overall weighted average dumping margin, which is the duty deposit rate, for an exporter, for the period under review.

[263] Panel Report, *US – Softwood Lumber V*, para. 7.80. See also Panel Report, *Guatemala – Cement II*, para. 8.35, and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.62.
[264] See paras. 4.81 and 4.82.
[265] US 19 October 2005 Answers, paras. 55-56.
[266] Japan First Written Submission, para. 126.
[267] *Ibid,* para. 127.
[268] *ibid,* paras. 131-151.
[269] Tariff Act, Section 751(Exhibit JPN-2).
[270] Tariff Act, Section 751(a)(1) (Exhibit JPN-2).
[271] Tariff Act, Section 751(a)(2)(B) (Exhibit JPN-2).

The United States applies this rate to future entries for the purpose of collecting estimated duties, until the conclusion of the next review proceeding. *Second*, for importers, it calculates an importer-specific assessment rate. This rate is used by the United States to assess the definitive amount of duties due for the review period. For both types of margin, the USDOC includes simple zeroing in the standard computer programming procedures.

4.186 Japan explains that, in a new shipper review, the USDOC also determines an overall weighted average margin of dumping and importer-specific assessment rates, for any exporters that did not export the "product" during the period of investigation. The period of review in a new shipper review is also usually 12 months. As new shipper reviews are a form of "administrative review", the calculation procedures, and programming code, are the same as for periodic reviews.

4.187 Japan states that, in both periodic and new shipper reviews, the USDOC determines the margins of dumping on a W-to-T basis by comparing normal value and the export price of individual comparable export transactions from the review period. Accordingly, multiple comparisons are made, one for each comparable export transaction. The margins of dumping are, therefore, based on an aggregation of these comparisons. In both periodic and new shipper reviews, the USDOC maintains and always uses the simple zeroing procedures as part of its standard calculation procedures. As a result, through the standard zeroing line, in aggregating the results of the multiple comparisons, the USDOC disregards all negative comparison results.

4.188 Japan argues that dumping is always as defined in Article 2 of the *AD Agreement*. Japan claims that 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.[272] Accordingly, Japan states that there is no dispute that, if the standard zeroing procedures and the standard zeroing line violate Article 2.1, they also violate Article 9.[273]

4.189 Japan understands that the United States conducts periodic and new shipper reviews pursuant to the provisions of Articles 9.3 and 9.5, respectively, of the *AD Agreement*. The *chapeau* of Article 9.3 provides that "the amount of the anti-dumping duty *shall not exceed* the margin of dumping as established under Article 2". Accordingly, this provision establishes "a maximum limit, or ceiling" on the amount of anti-dumping duties that can be collected by a Member.[274] That ceiling is defined by reference to "the margin of dumping as established under Article 2". Japan explains that Article 9.5 of the *AD Agreement* defines circumstances in which investigating authorities may determine "individual margins of dumping" for any exporters that did not export the "product" during the period of investigation (i.e. new shippers). Japan understands that the USDOC calculates dumping margins in new shipper reviews pursuant to this provision.

4.190 Thus, Japan argues that the phrase "margin of dumping" appears in Articles 9.1, 9.3, and 9.5. Although the phrase is not defined in Article 9, the *chapeau* of Article 9.3, as noted above, provides expressly that the "margin of dumping" is "as established under Article 2". Accordingly, although the rules on the collection of anti-dumping duties and on the calculation of the dumping margin are distinct, Article 2 is expressly made relevant in interpreting the term "margins of dumping" in Article 9.[275] This

[272] Japan Second Written Submission, para. 86 (citing US 20 July 2005 Answers, paras. 21 and 81).

[273] Japan Second Written Submission, para. 86.

[274] Appellate Body Report, *US – Hot-Rolled Steel*, para. 116, where the Appellate Body interpreted the words "shall not exceed" in Article 9.3 of the *AD Agreement* as establishing "a maximum limit, or ceiling" for the all others rate.

[275] Japan argues that, although the Appellate Body observed that the rules relating to duty collection set out in Article 9 may not be of relevance in interpreting provisions of Article 2, this finding has no bearing in the reverse context, i.e. the relevance of Article 2 where the term "margins of dumping" is interpreted and applied in Article 9. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.

cross-reference to Article 2 is in keeping with the fact that "Article 2 sets out the agreed disciplines in the *AD Agreement* for calculating dumping margins".[276]

4.191 Japan points out that the importance of Article 2 to the *AD Agreement* as a whole is evident in a series of interpretations by the Appellate Body of core concepts that are defined in Article 2 and that are used elsewhere in the *AD Agreement*. Thus, the Appellate Body has given a uniform meaning, throughout the *AD Agreement*, to the terms "dumping", "margin of dumping", and "product". Consistent with these uniform interpretations, it has also indicated that, whenever investigating authorities calculate "margins of dumping", they must respect the basic requirements of a "fair comparison". Specifically, in addition to holding that Article 2 sets forth the "agreed disciplines" in the *AD Agreement* for calculating dumping margins[277], Japan argues the Appellate Body has held, *inter alia,* that:

(a) "the definition of *dumping* as contained in Article 2.1 applies to the *entire AD Agreement*"[278],

(b) the word "*dumping*" in Article 11.3 (sunset reviews) has the "meaning described in Article 2.1"[279],

(c) the word "*margins*" in Article 9.4 (all others rate) has a meaning that is no "different[]" from its meaning in Article 2.4.2[280],

(d) "*margins*" relied upon under Article 11.3 (sunset reviews) must be calculated through a "fair comparison," as required by Article 2.4[281],

(e) the "*product*" mentioned in Articles 6.10 (sampling of exporters) and 9.2 (imposition of duty) is the same product that is subject to dumping and injury determinations under Articles 2 and 3 and that product must always be "treated as a whole".[282]

The consistent meanings of "dumping", "margin of dumping", and "product", define the contours of "the constituent elements of dumping" and serve to ensure that, in terms of the obligations under Article 18.1, "specific action against *dumping*" is, indeed, only taken "when [those] constituent elements … are present".[283]

4.192 Japan argues that, as a result of these uniform interpretations, the USDOCs 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, respectively, must be consistent with the definitions of those terms in Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement* and with Articles VI:1 and VI:2 of the GATT 1994. Article 2.1 of the *AD Agreement* requires that the existence and margin of dumping be determined for the product as a whole. Accordingly, in the event that the investigating authorities undertake multiple comparisons in determining a margin under Article 9.3, the results of *all* of the multiple comparisons must be taken into account in calculating dumping margins for the product as a

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[276] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[277] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[278] Appellate Body Report, *US – Softwood Lumber V*, para. 93 (*emphasis added*).
[279] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 126 (*emphasis added*).
[280] Appellate Body Report, *US – Hot-Rolled Steel*, para. 118 (*emphasis added*).
[281] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 126 and 127 (*emphasis added*).
[282] Appellate Body Report, *US – Softwood Lumber V*, paras 94 and 99 (*emphasis added*).
[283] Appellate Body Report, *US – 1916 Act*, para. 122.

whole. If the results of some comparisons are disregarded, the margin is not calculated for the product as a whole.[284]

4.193 Japan argues that, in periodic and new shipper reviews, when the USDOC compares normal value and export price on a W-to-T basis, it makes multiple comparisons and aggregates the results. In particular, for each comparable export transaction, a separate comparison is made between the price of an individual export transaction and a weighted average normal value. The USDOC does not, however, sum the results of all the comparisons in calculating the overall weighted average dumping margin or the importer-specific assessment rate. For both types of margin, through the standard simple zeroing procedures and the standard zeroing lines, after identifying comparable export transactions and comparing export price for these transactions with weighted average normal value, the USDOC automatically disregards all negative results of comparisons where export price is higher than normal value. In other words, negative comparison results are not included in the calculation of the total amount of dumping. Accordingly, the standard simple zeroing procedures, maintained by the USDOC in the standard computer programme for use in periodic and new shipper reviews, are inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement,* and also with Articles VI:1 and VI:2 of the GATT 1994, because, as the Appellate Body has affirmed, the existence and the margin of dumping are not determined for the product as a whole when the results of all the multiple comparisons undertaken are not taken into account.[285]

4.194 Japan recalls its argument that a "fair comparison" is one that meets the requirements of fundamental fairness and that is, in particular, unbiased, even-handed, does not favour particular interests or outcomes nor distort the facts. Japan has also already narrated the Appellate Body's previous findings that a comparison that involves model zeroing is unfair. Japan claims that the model and simple zeroing procedures are "as such" inconsistent with Article 2.4 because they are formulated with an in-built "inherent bias" that distorts the comparison of normal value and export price in calculating the margin of dumping for the product as a whole. For precisely the same reasons stated earlier, the simple zeroing procedures maintained by the USDOC for use in comparing normal value and export price in periodic and new shipper reviews are inconsistent with Article 2.4.

4.195 Further, Japan argues that, by maintaining the standard zeroing procedures, the United States has thus violated Articles 9.1, 9.2, 9.3, and 9.5 of the *AD Agreement*. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body was confronted by a claim that, in conducting a sunset review under Article 11.3, the USDOC had relied on dumping margins calculated using zeroing procedures in a periodic review, under Article 9.3.1.[286] The Appellate Body held that:

> "If 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 *AD Agreement*."[287]

Accordingly, the Appellate Body held, *first*, that margins calculated under Article 9.3 are "*legally flawed*" if the margin calculation is inconsistent with Article 2.4; and, *second*, it held that, if those "legally flawed" margins are used in a sunset review under Article 11.3, there is a violation of Article 11.3. This follows from the Appellate Body's ruling, in that appeal, that "Article 2 sets out the agreed disciplines in the *AD Agreement* for calculating dumping margins."[288]

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[284] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[285] Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 98.
[286] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 116.
[287] *Ibid*, para. 127.
[288] *Ibid*, para. 127.

4.196 Japan argues that the same reasoning is equally applicable to duty assessment and collection procedures under Article 9 and also to new shipper reviews under Article 9.5. If the procedures for calculating dumping margins in assessments and reviews are inconsistent with Article 2, including Articles 2.1 and 2.4, then this legal flaw "taints" the duty assessment proceedings as well. As noted, the terms "margin of dumping" and "product" in Articles 9.1, 9.2, 9.3 and 9.5 have common meanings throughout the *Agreement* that stem from Article 2. This is borne out, in particular, by the text of Article 9.3, which expressly refers to "the margin of dumping as established under Article 2". The assessment of anti-dumping duties under Article 9 must, therefore, be premised on a dumping determination, including a fair comparison, for the product as a whole that is consistent with Article 2.

4.197 Further, Japan argues that Article 9.3 specifically requires that "the amount of the anti-dumping duty shall not *exceed* the margin of dumping as established under Article 2"(e*mphasis added*). Therefore, the United States is not allowed to collect anti-dumping duties in excess of the properly calculated margin of dumping. Moreover, in light of this context, an "appropriate amount" of duty, under Article 9.2, cannot exceed the maximum limit of the margin of dumping established under Article 2 as well.[289]

4.198 Japan argues that it has already demonstrated, above, that the USDOC fails to calculate the margins of dumping on the basis of a fair comparison for the product as a whole and, therefore, acts inconsistently with Articles 2.1, 2.4 and 2.4.2. As a margin of dumping calculated in this manner is not properly "established under Article 2", the duty assessment proceedings are also legally flawed. Moreover, as the zeroing procedures inflate and overstate the dumping margin, the anti-dumping duty is assessed and collected in excess of the margins that should have been calculated under Article 2 without zeroing.[290] Consequently, the United States fails to comply with the requirement to ensure that the amount of duties collected remains within the limit of the margin of dumping for the product as a whole.

4.199 Japan argues that, in consequence, because the standard zeroing procedures are inconsistent with Article 2, maintaining these 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 also inconsistent with Article 9.5 for the USDOC to maintain such procedures for determining margins in new shipper reviews. In addition, the United States acts inconsistently with Articles 9.1, 9.2 and 9.3 by failing to ensure that the amount of anti-dumping duties does not exceed the margin of dumping established consistently with Article 2.

4.200 In response to a question of the Panel whether Japan considers that Article 2.4.2 applies to proceedings other than investigations within the meaning of Article 5, Japan states that the claims in this dispute are based primarily on the obligations to determine the margin of dumping for the product under Article 2.1 and Article VI of the GATT 1994, as well as the "fair comparison" requirement under Article 2.4 of the Agreement.[291] Japan claims that it is not disputed in the present proceedings that these provisions apply to margin calculations undertaken both in investigations under Article 5 and in reviews under Articles 9.3, 9.5 and 11.2. Thus, Japan argues, margins of dumping established in any anti-dumping proceedings are subject to the disciplines in those provisions, irrespective of the applicability of Article 2.4.2 to review proceedings. Japan states, however, that the possible application

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[289] Japan argues that, in *Argentina – Poultry Anti-Dumping Duties*, the panel found that "[i]n the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 … would be 'appropriate' within the meaning of Article 9.2." Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.

[290] Japan notes that the USDOC assesses and imposes anti-dumping duties in an amount equal to the full margin of dumping it calculates. See 19 C.F.R. section 351.212 (b).

[291] Japan 19 October 2005 Answers, para. 47.

of Article 2.4.2 to proceedings other than Article 5 investigations is not decisive to the outcome of this dispute.

4.201 Japan points out that the United States wrongly asserts that, because anti-dumping duties are usually assessed by customs authorities on individual entries of a product, this somehow demonstrates that margins of dumping are determined by investigating authorities for individual transactions.[292] In particular, the United States asserts that, in a prospective normal value system("PNV"), system, Members calculate margins for individual transactions.[293] Japan claims that in making this argument, the United States confuses the distinct concepts of the "*amount* of anti-dumping duty" and the "*margin* of dumping" under Article 9.3 of the *AD Agreement*. Japan recalls that in *EC – Bed Linen (Article 21.5)*, the Appellate Body found that "the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made[294] and it added that "the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties."[295] Accordingly, in Japan's view, when the customs authorities impose and collect anti-dumping *duties* on individual entries they are *not* calculating *margins of dumping* within the meaning of Article 2. Rather, the margins of dumping have already been determined by the investigating authorities, on the basis of Article 2, in investigations or reviews. In terms of Articles 9.1 and 9.3 of the *AD Agreement*, these margins constitute a ceiling on the amount of duties that can be imposed and collected by the customs authorities.

4.202 Japan argues that the same misconceptions infect the United States' assertion that in a PNV system, the amount of duties imposed by customs authorities on each entry constitutes a margin of dumping.[296] The definitions of "dumping" and "margins of dumping" in the *AD Agreement* are identical for both prospective and retrospective systems of duty assessment. Thus, the differences between these systems pertain to way *duties* are imposed and collected. Japan notes that the Appellate Body has ruled that these differences have no bearing on the rules regarding the establishment of dumping margins in Article 2, which apply in the same way to both systems.[297]

4.203 Japan asserts that in a prospective normal value ("PNV") system, to assess the amount of duties due, a comparison of prices is undertaken for each *individual* entry and, on the basis of that comparison, a variable duty is imposed on the *individual* export transaction concerned. The calculation and imposition of variable anti-dumping *duties* in this way – although permissible – does not involve the establishment of *margins of dumping* within the meaning of Article 2 of the *AD Agreement*. Instead, the customs authorities mechanically compare import prices with a reference price; they do not and can not undertake a comparison that respects the detailed procedural and substantive rules set forth in Article 2, for example, in Article 2.4. Japan sets out the reasons why the imposition of variable duties in a PNV system does not involve the calculation of a margin of dumping, as follows;

(a) First, Article 2.4 *requires* that a margin be based on a comparison between "sales made at *as nearly as possible the same time*". By definition, a PNV is based on sales made *during the period of investigation*, which ends up to a year *before* duties are even imposed. This stale, historic PNV is then applied in imposing duties throughout the life of the anti-dumping action – that is, for up to five years or more *after* the imposition of anti-dumping duties begins. As a result, in imposing variable duties, customs authorities compare a *historic* home market price with a *contemporaneous* import price. This means that it is impossible for the customs authorities to comply with the requirement to compare

[292] US Second Written Submission, paras. 50, 53 and 54.
[293] US Second Written Submission, para. 53.
[294] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123 (*underlining added*).
[295] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.
[296] US Second Written Submission, paras. 54, 57.
[297] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

contemporaneous sales. As a result, the imposition of variable duties *cannot* involve the determination of a margin of dumping.

(b) Second, Article 2.4 imposes an obligation on the authorities to make price adjustments for any differences that affect price comparability.[298] Fulfilment of this obligation requires a careful and detailed consideration of the comparability of the respective contemporaneous home market and export sales. In imposing variable duties on the basis of a PNV, customs authorities do not undertake any such examination.

(c) Third, the last sentence of Article 2.4 imposes procedural obligations on the authorities: "The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." In imposing variable duties, the customs authorities do not request any information from the parties for the purpose of a fair comparison nor do they receive and weigh evidence in terms of a burden of proof.

4.204 Japan asserts that the United States is, therefore, incorrect in suggesting that "margins of dumping" are determined for individual transactions in a PNV system.

4.205 Japan further argues that the United States overlooks that, even in a PNV system, the final liability for duties must be assessed in a review under Article 9.3.2. During that review, the authorities must establish the "actual margin of dumping" for the review period consistently with the rules in Article 2. Thus, the duties paid on the basis of the original margin must be reviewed in light of "the actual margin" for the review period. Article 9.3.2 *presupposes* that, in the prospective system, the amount of duties imposed and the margin of dumping are not necessarily equal. Indeed, if the price difference for each transaction were "the actual margin" for that transaction, there could be no refund and the refund procedure would, therefore, be redundant. The existence of a refund procedure for the prospective system demonstrates that the amount of variable duties imposed on each entry is *not* the margin of dumping for that entry. Instead, the amount of duties paid on each entry may exceed "the actual margin of dumping" calculated for the product, on the basis of the transactions in the review period, and the excessive payments, if any, must be reimbursed promptly in accordance with Article 9.3.2.

4.206 Japan claims that, as part of its arguments on PNV systems, the United States misleadingly attempts to portray its retrospective review as "operating" on an "entry-by-entry basis", like a PNV system.[299] Japan argues that this comparison is inapt because the United States' assessment system does not operate on an entry-by-entry basis. As the standard computer programmes demonstrate, in reviews, the USDOC conducts a comparison for *all* US sales, for the exporters concerned, during the review period and, on that basis, it instructs the US customs service to collect duties at fixed single rate that apply to *all* entries during the review period. In Japan's view, this is not like a PNV system. Japan claims that, instead of examining the WTO-consistency of PNV systems that are *not* at issue, the Panel must pay close heed to the particular features of the zeroing measures that *are* at issue.

United States[300]

4.207 The United States points out that Japan contends that the Panel should not recognize a distinction between the investigation phase and other phases of an anti-dumping proceeding.[301]

[298] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.
[299] US Second Written Submission, para. 59.
[300] US First Written Submission, paras. 72-87; US Second Written Submission, paras. 65, 68, 71-74, 62-63.
[301] Japan First Written Submission, para. 138, 139, 142, 144.

Regardless of whether the Panel follows the reasoning in *US – Softwood Lumber V*, the text of the *AD Agreement* and prior panel and Appellate Body reports do not support Japan's claims. The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the *AD Agreement* Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, which requires that all the terms of an agreement be given meaning.[302] Japan ignores the plain language of Article 2.4.2 and improperly seeks to expand it to other proceedings.

4.208 The United States argues that other provisions of the *AD Agreement* also expressly limit their application to the investigation phase of an anti-dumping proceeding and do not apply elsewhere. For instance, Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated by or on behalf of a domestic industry." Article 5.1, thus, is the only stage of an anti-dumping proceeding where the investigating authority is required to determine the "existence" of dumping in the *AD Agreement*, other than Article 2.4.2.[303] Similarly, Article 5.7 provides that evidence of dumping and injury must be considered simultaneously "in the decision whether or not to initiate an investigation" and "during the course of the investigation". Panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an anti-dumping proceeding.[304] As the Panel found in *US – Corrosion-Resistant Steel Sunset Review*:

> "[T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews."[305]

4.209 The United States argues that the limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the "investigation phase". Thus, the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase. Indeed, a panel has already recognized that the application of Article 2.4.2 is expressly limited to the investigation phase of an anti-dumping proceeding. As the Panel in *Argentina – Poultry Anti-Dumping Duties* found:

> "Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping 'during the investigation phase'."[306]

Thus, the ordinary meaning of the term "investigation phase", as it is used in the *AD Agreement*, does not include subsequent phases.

4.210 The United States thus argues that Japan's argument that Article 2.4.2 applies in Article 9 assessment proceedings ignores the clear distinctions made in the text of the *AD Agreement* between original investigations and other proceedings, distinctions that Japan itself recognizes. Specifically, Japan acknowledges that the *AD Agreement* distinguishes between the purpose of investigations and assessment proceedings, when it notes that Article 2.4.2 is concerned with establishing the "existence"

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[302] See, e.g., Appellate Body Report, *Japan – Alcoholic Beverages II*, sections G & H (discussing fundamental principle of effectiveness in treaty interpretation); see also *US – 1916 Act*, para. 123.

[303] US Second Written Submission, para. 71.

[304] Panel Report, *US – DRAMS*, para. 521, at footnote 519 ("... investigation" means the investigation phase leading up to the final determination of the investigating authority); Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.114 (Article 5.7 applies to investigations).

[305] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.70.

[306] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.357.

of margins of dumping in the investigation phase of an anti-dumping proceeding[307], whereas Article 9 proceedings are concerned with determining the amount of duty assessed.[308]

4.211 The United States argues that the limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the *AD Agreement*. The Appellate Body has already recognized that investigations and other proceedings under the *AD Agreement* serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[309] Contrary to Japan's contention, the *AD Agreement* does not require Members to examine whether margins of dumping "exist" in the assessment phase. Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping "exists" above a *de minimis* level such that the imposition of anti-dumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an anti-dumping proceeding.[310]

4.212 The United States argues that the express limitation in Article 2.4.2 to the investigation phase is also consistent with the fact that the anti-dumping systems of Members are different for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* assessment. If the requirements of Article 2.4.2 regarding comparison methods applied to the assessment of anti-dumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or transaction-to-transaction method, because such systems compare weighted average normal values to individual export prices to assess dumping duties on individual transactions. Thus, to retain the flexibility in assessment systems reflected in Article 9, it was not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase.

4.213 The United States argues that, for the reasons discussed above, an analysis of the text of Article 2.4.2 demonstrates that Article 2.4.2 does not apply to assessment proceedings. Japan, however, argues that Article 2.4.2 is nonetheless applicable to assessment proceedings by virtue of Article 9.3 of the *AD Agreement*. Japan interprets Article 9.3 to mean that all the provisions of Article 2 – including Article 2.4.2 – are directly applicable in the context of assessment proceedings.[311] But Japan's interpretation is contrary to the express terms of the *AD Agreement*. The general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. Article 2.4.2 by its own terms is explicitly limited to the investigation phase. The text of Article 9.3, therefore, does not support Japan's argument that the requirements of Article 2.4.2 apply in assessment proceedings.

4.214 The United States argues that the reference in Article 9.3 to Article 2 means that the amount of anti-dumping duty assessed may not exceed the amount of anti-dumping duty calculated in accordance with the general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. As the Panel found in *Argentina – Poultry*:

[307] Japan First Written Submission, para. 80.
[308] Japan First Written Submission, para. 149.
[309] See, e.g., Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.
[310] See, e.g., *AD Agreement*, Article 9.1 ("the decision whether the amount of anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the importing country or customs territory"); Article 9.3 ("the amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2").
[311] Japan First Written Submission, paras. 135-141.

> "Article 9.3 does not refer to the margin of dumping established 'under Article 2.4.2', but to the margin of dumping established 'under Article 2'. In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping 'for the purpose of this Agreement ... '. In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4."[312]

4.215 The United States argues that the context of Article 9 also demonstrates that there is no basis in Article 9 to overcome the explicit language in Article 2.4.2, limiting its reach to investigations. As the Panel found in *Argentina – Poultry Anti-Dumping Duties*:

> "[N]othing in the *AD Agreement* explicitly identifies the form that anti-dumping duties must take . . . . As the title of Article 9 of the *AD Agreement* suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected."[313]

4.216 In other words, argues the United States, Article 9 contains certain procedural obligations applicable in assessment reviews. However, Article 9 does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the investigation phase. Instead, Article 9 establishes time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess anti-dumping duties collected by a Member.

4.217 The United States argues that prior Appellate Body reports do not support an offset obligation beyond the use of the average-to-average comparison methodology during the investigation phase. The United States argues that Appellate Body has twice articulated its view that an obligation exists to provide offsets, in *EC – Bed Linen* and *US – Softwood Lumber V*. In both reports, the Appellate Body focused its analysis on the phrase "all comparable export transactions"[314] in Article 2.4.2, which applies only to the use of the average-to-average methodology to determine "the existence of margins of dumping *during the investigation phase.*"[315] The Appellate Body at no time has found that such an obligation exists with respect to other comparison methodologies during investigations, or in the context of Article 9 duty assessment proceedings and new shipper reviews or Article 11 changed circumstance reviews and sunset reviews.[316]

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[312] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.357.

[313] *Ibid,* para. 7.355.

[314] Appellate Body Report, *US – Softwood Lumber*, paras. 104, 105, 108; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 55-60.

[315] Appellate Body Report, *US – Softwood Lumber*, para. 108; Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 66.

[316] See Appellate Body Report, *EC – Bed Linen,* para. 62, n. 30 (confirming that Article 2.4.2 is not concerned with the collection of anti-dumping duties, which is the province of Article 9 of the *AD Agreement*).

4.218 The United States points out, in *US – Softwood Lumber V*, the Appellate Body "emphasize[d] that [the terms "all comparable export transactions" and "margins of dumping"] should be interpreted in an integrated manner."[317] Accordingly, the Appellate Body's conclusion that there was an obligation to provide offsets when using the average-to-average comparison methodology during the investigation phase was the result of its interpretation of "all comparable export transactions" together with "margins of dumping". The United States argues that any offsets that occur in this context reflect the use of *averages* of export prices and normal values. That is, in applying the average-to-average methodology, the Appellate Body found that in order to establish a margin of dumping for "all comparable export transactions", a Member has to aggregate all of the results of the model-specific and level-of-trade-specific comparisons, including those comparisons that were not dumped. The offset obligation, therefore, is tied to the use of the average-to-average methodology and did not arise out of any independent obligation to offset prices.

4.219 The United States argues that therefore the Appellate Body's analysis with respect to an investigation, which pursuant to Article 2.4.2 concerns a determination of the existence of margins of dumping, does not apply to an Article 9.3 assessment proceeding, which concerns the final liability for payment of anti-dumping duties – i.e. particular export transactions. Article 9.3 provides that "[t]he amount of the anti-dumping *duty* shall not exceed the margin of dumping ... "(*emphasis added*). Duties normally are based on the particular characteristics of the import and are often calculated based on the value/price of that particular import. For example, duties are often calculated on an *ad valorem* basis, applying the *ad valorem* rate to the price of the import. They are not calculated using an average-to-average comparison methodology, and there is no obligation contained within Article 9.3 which would require an investigating authority to apply such a calculation in an assessment proceeding. In fact, the only provision in the *AD Agreement* that provides for the use of the average-to-average methodology is Article 2.4.2, and by its very terms, that provision applies only when determining the existence of margins of dumping during the investigation phase.

4.220 The United States asserts that the phrase "during the investigation phase" is unique to Article 2.4.2. The word "phase" is defined as "[a] distinct period or stage in a process or change or development."[318] The use of the definite article "the" with the term "investigation phase" further confirms that Article 2.4.2 is limited to a single, distinct investigation phase. In fact, extending the "investigation phase" would cover all proceedings and erode any meaningful distinction between the "investigation phase" and subsequent phases. Such an interpretation would effectively read the word "phase" out of the text.[319]

4.221 Furthermore, the United States points out that the only stage of an anti-dumping proceeding where the investigating authority is required to determine the "existence" of dumping in the *AD Agreement,* other than Article 2.4.2, is in Article 5.1. This textual relationship between Article 2.4.2 and Article 5 stands in stark contrast to the terminology used in other provisions of the *AD Agreement*. For example, Article 9.5 provides for a "review" of new exporters of subject merchandise, not an "investigation," and Article 11 uses terms such as "review" and "determine" rather than "investigate". Therefore, the use of the phrase "existence of margins of dumping during the investigation phase", both in terms of its text and its context, indicates that these words of limitation, which are unique to Article 2.4.2, limit the application of Article 2.4.2 to Article 5 investigations.

4.222 The United States states that, while Japan argues that this Panel should expand the Appellate Body's findings to all phases of an anti-dumping proceeding, Japan fails to cite to any text within the

[317] Appellate Body Report, *US – Softwood Lumber*, para. 85.
[318] *New Shorter Oxford English Dictionary*, p. 2182.
[319] Appellate Body Report, *US – Gasoline*, p. 23 (noting that a panel may not interpret the Agreement in a manner that would render a provision or language within the Agreement a nullity).

relevant provisions covering those procedures which supports such an interpretation of the Anti-Dumping Agreement. The United States argues that Japan has provided no textual or contextual argument which would provide for an obligation for investigating authorities to provide an offset in any Article 9 or Article 11 proceedings. With respect to Article 9.3, the language of the provision expressly provides that the amount of anti-dumping duties "shall not exceed the margin of dumping as established under Article 2." This general reference to Article 2 must necessarily include any specific limitations contained therein. Therefore, the disciplines established in Article 2 with respect to the calculation of the margin of dumping apply to Article 9.3 assessment proceedings, except where otherwise specified. Additionally, Japan has also provided no substantive or contextual argument arising out of the text of Article 9.5 or Article 11 which would provide for an obligation to provide an offset in the proceedings described in those provisions.

6. "As such" Claims under Article 11 of the *AD Agreement* with respect to Changed Circumstance and Sunset Reviews

Japan[320]

4.223 Japan claims that maintaining zeroing procedures and the standard zeroing lines in changed circumstances and sunset reviews is inconsistent with Articles 2 and 11 of the *AD Agreement*. Japan notes that, in Section 751 of the Tariff Act in addition to periodic and new shipper reviews, the term "administrative review" also includes "changed circumstances"[321] and sunset or "five-year reviews".[322] In changed circumstances reviews, upon request, the USDOC and the USITC are authorized to review an affirmative anti-dumping duty determination, where warranted by changed circumstances, but usually no earlier than two years after the publication of the notice of the determination.[323] In sunset reviews, five years after publication of an anti-dumping duty order, the USDOC and the USITC, respectively, review whether revocation of the order "would be likely to lead to continuation or recurrence of dumping … and of material injury".[324] 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. Accordingly, the USDOC necessarily relies on margins that are calculated using either the model or simple zeroing procedures, one of which is always a feature of the USDOCs margin calculations. Japan argues that dumping margins used for purposes of Article 11 must be consistent with Article 2 of the *AD Agreement*. Japan understands that the United States conducts changed circumstances and sunset reviews pursuant to the provisions of Articles 11.2 and 11.3, respectively, of the *AD Agreement*.

4.224 Japan points out that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body confirmed that there is:

> "[N]o obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4 … . If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give

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[320] Japan First Written Submission, paras. 152-158; Japan 19 October 2005 Answers, para. 104.
[321] Tariff Act, Section 751(b).
[322] *Ibid*, Section 751(c).
[323] *Ibid*, Section 751(b).
[324] *Ibid*, Section 751(c)(1).

rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *AD Agreement.*"[325]

4.225 Japan argues that this reasoning applies equally to reviews under Articles 11.2 and 11.3. Moreover, in both cases, if an authority elects to rely on a dumping margin, that margin must be consistent not only with Article 2.4, but also with the requirements in Articles 2.1 and 2.4.2 for dumping, and dumping margins, to be calculated for the product as a whole. Accordingly, in changed circumstances and sunset reviews, by relying on margins calculated in prior proceedings using model and simple zeroing, the USDOC cannot comply with the obligations in Articles 2.1, 2.4 and 2.4.2, because these margins are not based on a fair comparison and are not calculated for the product as a whole.

4.226 In consequence, Japan argues, the model and simple zeroing procedures are also inconsistent with Articles 11.2 and 11.3 of the *AD Agreement* because, as margins of dumping calculated using these procedures are legally flawed, changed circumstances and sunset reviews that rely upon the dumping margins are equally flawed. Also, because USDOC reviews conducted pursuant to these provisions are flawed, the United States also fails to comply with the obligation in Article 11.1 of the *AD Agreement* to ensure that anti-dumping duties "remain in force only as long as and to the extent necessary to counteract dumping." Japan claims that the United States has not disagreed.[326] Therefore, Japan argues, it is undisputed that, if the standard zeroing procedures and the standard zeroing line violate Article 2, they also violate Article 11.[327]

4.227 Japan points out that the United States asserts in paragraphs 98-101 of its First Written Submission that Japan has failed to demonstrate that the magnitude of dumping cited and relied upon by the USDOC determinations is determinative of its likelihood determinations. However, Japan argues it is disingenuous for the United States to argue that, in its sunset determinations, it does not rely on the dumping margins calculated for respondents in the initial investigations and periodic reviews in light of the fact that the US Congress has expressly mandated that in sunset reviews, the USDOC "*shall* consider ... the weighted average dumping margins determined in the investigation and subsequent reviews ... ".[328] The mandatory nature of this obligation is further demonstrated by: (1) the specific requirement in the USDOCs regulations that respondents report this information in their substantive responses to the USDOCs notice of initiation of sunset reviews[329]; and (2) the consistent citation by the USDOC, in its sunset determinations, to the previous margins in concluding that dumping will recur at the specified margin rates in the event that the anti-dumping order were revoked.[330] Japan claims that it is hard to imagine a clearer instance in which an authority "actually relies" on the specified types of information.

United States[331]

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[325] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[326] Japan Second Written Submission, para. 87.

[327] *Ibid,* para. 87.

[328] Section 752(c)(1) of the Tariff Act of 1930, as added by the Uruguay Round Agreements Act (*emphasis added*).

[329] See 19 C.F.R. § 351.218d(3)(iii)(A). Specifically, the USDOC requires each respondent to report its "individual weighted average dumping margin ... from the investigation and each subsequent completed administrative review ... ". *Id*

[330] See, e.g., Final Results of Expedited Sunset Reviews: Anti-friction Bearings From Japan, 64 Fed. Reg. 60275, 60278 (4 November 1999) (Exhibit JPN-22); Issues and Decision Memorandum for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan; Final Results, issue 2, comment 1(2 August 2000) (Exhibit JPN-23.A).

[331] US First Written Submission, paras. 96-100.

4.228 The United States explains that Japan asserts that its "challenge encompasses the prohibition on zeroing under any method of comparing normal value and export price" including "administrative or periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews".[332] Japan appears to suggest that its "as such" claims concerning investigations and assessment proceedings also apply to the three types of reviews to which it refers. However, the United States argues that Japan does not offer any new arguments concerning these types of reviews.

4.229 The United States argues that it has demonstrated that the Panel should reject Japan's claims insofar as investigations and assessment proceedings are concerned. Specifically, the United States has demonstrated that the "fair comparison" obligation of Article 2.4 cannot be read to require offsets in all proceedings. The United States has demonstrated that the Appellate Body in *US – Softwood Lumber V* only addressed whether Article 2.4.2 requires an offset when the investigating authority uses the average-to-average methodology in the investigation phase and at no time has found that such an obligation exists with respect to other comparison methodologies during investigations, or Article 11 changed circumstance reviews and sunset reviews. Moreover, by its own terms, the obligations of Article 2.4.2 apply only to the investigation phase, and not to any other anti-dumping proceeding. For the same reasons, the United States argues that the Panel should reject Japan's claims with insofar as new shipper, changed circumstances and sunset reviews are concerned.

4.230 The United States notes that, with respect to changed circumstances reviews and sunset reviews, Japan argues that USDOC cannot rely on margins calculated in prior proceedings, because "these margins are not based on a fair comparison and are not calculated for the product as a whole".[333] However, Japan never demonstrates that USDOC *does* rely on such margins. Indeed, neither USDOCs determination of "whether the continued application of anti-dumping duties is necessary to offset dumping" under Article 11.2, nor its likelihood determination in a sunset review under Article 11.3 is dependent on any specific magnitude of dumping.

4.231 The United States claims that Article 11.2 obligates a Member to terminate an anti-dumping duty when the Member determines "that the anti-dumping duty is no longer warranted". Specifically, the Member is charged with determining "whether the continued application of anti-dumping duties is necessary to offset dumping ... ". The Panel in *US – DRAMS* found:

> "The word 'continued' covers a temporal relationship between past and future. ... . Thus, the inclusion of the word 'continued' signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping."[334]

4.232 The United States states that Article 11.3 provides that a definitive anti-dumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury".

4.233 Thus, the United States argues that the focus of a changed circumstances review under Article 11.2 and the focus of a sunset review under Article 11.3 is on future behaviour, i.e. whether the continued application of anti-dumping duty is necessary to offset dumping in the future, and whether dumping and injury are likely to continue or recur in the event of expiry of the duty. Neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is determinative. Indeed, such precision is unattainable in what is inevitably a somewhat speculative projection of future

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[332] Japan First Written Submission, para. 6.
[333] Japan First Written Submission, para. 157.
[334] Panel Report, *US – DRAMS*, para. 6.27.

behaviour.[335] Because neither determination relies on the *magnitude* of the margin of dumping in any of the assessment reviews, Japan has failed to establish a *prima facie* case concerning USDOCs likelihood determination in either a changed circumstances review or a sunset review.

7. "As such" Claims with respect to Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the *WTO Agreement* in Relation to Original Investigations

Japan[336]

4.234 Japan argues that, as a consequence of the model and simple zeroing procedures' inconsistencies with various provisions of Articles 2, 3, 5, 9 and 11 of the *AD Agreement*, the United States also acts inconsistently with Articles 1 and 18.4 of that *Agreement* and Article XVI:4 of the *WTO Agreement*.

4.235 Japan argues that Article 18.4 of the *AD Agreement* states that a Member shall "ensure … the conformity of its laws, regulations and administrative procedures with the provisions of this *Agreement*". The standard model and simple zeroing procedures are "administrative procedures" that do not conform to various provisions of the *AD Agreement*. By maintaining these procedures, therefore, the United States acts inconsistently with its obligations under Article 18.4.

4.236 In *US – 1916 Act*, the Appellate Body held that the first sentence of Article 1 of the *AD Agreement* "states that 'an anti-dumping measure' must be consistent with Article VI of the GATT 1994 and the provisions of the *AD Agreement*".[337] In that appeal, the Appellate Body noted that the term "anti-dumping measures" "seems to encompass all measures taken against dumping".[338] In addition, the word encompasses "laws, regulations and administrative procedures" that set forth standards for the conduct of anti-dumping proceedings because these are "measures" of an "anti-dumping" character. In that respect, the measure at issue in *US – 1916 Act*, i.e. the 1916 Act, is a "law" under Article 18.4 that was also held to fall within the scope of Article 1. Article 1, therefore, applies as much to measures taken against dumping as it does to measures taken to enforce anti-dumping rules. Accordingly, as the standard model and simple zeroing procedures are not consistent with various provisions of the *AD Agreement*, they are also inconsistent with the "principles" set forth in Article 1.

4.237 Japan argues that, similar to Article 18.4 of the *AD Agreement*, Article XVI:4 of the *WTO Agreement* states that a Member shall "ensure … the conformity of its laws, regulations and administrative procedures with its obligations in the annexed Agreements". The annexed Agreements include the *AD Agreement* and the GATT 1994. By maintaining the model and simple zeroing procedures, which are "administrative procedures" not in conformity with various provisions of the *AD Agreement* and the GATT 1994, the United States fails to take all necessary steps to ensure it complies with its WTO obligations. Accordingly, the United States also violates its obligation under Article XVI:4 of the *WTO Agreement*.

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[335] See, e.g., Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 341 (discussing prospective nature of analysis in Article 11.3 reviews). Although there is no requirement to quantify the amount of dumping likely to continue or recur, the US does so under its domestic law. USDOC transmits this information to the USITC.

[336] Japan First Written Submission, paras. 159-164.

[337] Appellate Body Report, *US – 1916 Act*, para. 119.

[338] Appellate Body Report, *US – 1916 Act*, para. 119.

B. "AS APPLIED" CLAIMS[339]

Japan[340]

4.238 Japan challenges the standard model and simple zeroing procedures, "as applied", in the measures identified in Japan's panel request. In total, Japan challenges 14 specific measures concerning three different types of anti-dumping proceeding: one original investigation, 11 periodic reviews and two sunset reviews. Japan states that the United States has, essentially, failed to respond to these "as applied" claims.[341]

1. Claims with respect to an Original Investigation[342]

4.239 Japan challenges the application of the USDOCs procedures of zeroing in one original investigation and claims the investigation was inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, and 3.5 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

4.240 On 13 December 1999, the USDOC imposed anti-dumping duties in CTL Plate, 64 Fed Reg. 73,215.[343] The *ad valorem* rate of anti-dumping duty was 10.78 per cent for Kawasaki Steel Corporation and all others.[344] In calculating the margin of dumping in this investigation, 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 language by which the USDOC eliminated the negative comparison results is the standard zeroing line: "WHERE EMARGIN GT 0". This language is identical to the computer code in the USDOCs standard computer programme. Without the application of the standard zeroing procedures, the margin of dumping and, hence, the respondent's deposit rate would have been lower.

4.241 Japan argues that, for the reasons Japan has already presented model zeroing is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement*, and Articles VI:1 and VI:2 of the GATT 1994, because relying on these procedures, the USDOC fails to determine the existence of dumping, or calculate a dumping margin, for the product as a whole. Indeed, the Appellate Body has already considered the United States' use of its model zeroing procedures in an investigation, and held that, although an investigating authority is entitled to compare normal value and export price through multiple model-based comparisons, the "investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[345] The Appellate Body concluded, therefore, that the USDOCs exclusion of the comparison results for certain models (i.e. those with a negative result) in obtaining the aggregate result for the product as a whole, was inconsistent with Article 2.4.2 of the *AD Agreement*.[346] Equally, because the Appellate Body's reasoning derived from the language contained in Article 2.1[347], the failure to determine the existence of dumping, and to calculate the margin of dumping, for the product as a whole is inconsistent with Article 2.1, as well as with Articles VI:1 and VI:2 of the GATT 1994.

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[339] See Table following para. 2.3 of this Report.
[340] Japan First Written Submission paras. 65-74, 165-193.
[341] Japan Second Written Submission, para. 88.
[342] Japan First Written Submission paras. 66-69, 167-177; Japan Opening Statement, First Substantive Meeting of the Panel with the Parties, paras. 62-64.
[343] Exhibit JPN-10.
[344] Exhibit JPN-10.
[345] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (*emphasis in original*).
[346] Ibid, para. 102.
[347] Ibid, para. 93.

4.242 Japan argues that, for the same reasons, the application of the standard model zeroing procedures in the CTL Plate investigation renders the USDOCs dumping determination inconsistent with Articles 2.1 and 2.4.2. of the *AD Agreement*, and with Articles VI:1 and VI:2 of the GATT 1994. By automatically disregarding the negative results in calculating the overall margin of dumping in CTL Plate, the USDOC did not consider the results of *all* the comparisons for the product, and thus its dumping determination and the margin of dumping are not for the product as a whole.

4.243 Japan also argues that, for the reasons Japan has stated the USDOCs standard model zeroing procedures, as applied in CTL Plate, are inconsistent with the "fair comparison" requirements contained in Article 2.4 of the *AD Agreement*. The Appellate Body has specifically held, in considering a claim against these procedures, that there "is an inherent bias in a zeroing methodology," and that a comparison that inflates the margin of dumping and could even lead to an affirmative dumping determination where no dumping would have been established without zeroing, is not a fair comparison between export price and normal value.[348] Likewise, the USDOCs use of the model zeroing procedures in CTL Plate resulted in an unfair, biased comparison between export price and normal value. By disregarding all model-based comparisons with a negative result, the USDOC calculated a weighted overall dumping margin that was inflated by an amount equal to the excluded negative values. Also, by effectively treating the negative price difference as a zero difference, the USDOC interferes with export price for these models by artificially reducing export price. This price-distortion also renders the comparison of normal value and export price unfair. The USDOCs application of the standard model zeroing procedures in CTL Plate renders the USDOCs dumping determination inconsistent, therefore, with the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.

4.244 Japan argues that the USITCs injury determination in CTL Plate[349] is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, and 3.5 of the *AD Agreement*. Article 3.1 of the *AD Agreement* requires that an injury determination be based on "an objective examination" of "positive evidence" concerning the "volume of the dumped imports", their "effect" on prices of the like domestic product, and the "consequent impact" of dumped imports on domestic producers. The Appellate Body has held that "positive evidence" is evidence "of an affirmative, objective and verifiable character" and "must be credible".[350] An "objective examination" is one that "conform[s] to the dictates of the basic principles of good faith and fundamental fairness".[351]

4.245 Japan argues that several aspects of the USITCs injury determination are based upon the USDOCs dumping determination, including the volume of the dumped imports(pursuant to Articles 3.1, 3.2, 3.3, 3.4 and 3.5), the rate of increase of dumped imports(pursuant to Articles 3.2, and possibly Articles 3.4 and 3.5), the prices of dumped imports(pursuant to Articles 3.2, 3.3, 3.4 and 3.5), and the magnitude of dumping (pursuant to Articles 3.4 and 3.5). As a result of the application of the standard model zeroing procedures, the USDOCs dumping determination is flawed. In consequence, the evidence of dumping produced by that flawed determination does not meet the requirements of "positive evidence" nor permit an "objective examination". In particular, the USITC has no objective, verifiable, credible, or otherwise reliable evidence regarding the volume of dumped and non-dumped imports, the rate of increase of dumped imports, their prices and price effects, and the magnitude of dumping.

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[348] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[349] *Cut-To-Length Carbon Steel Plate from Japan*, Investigation Nos. 701-TA-387-391 and 731-TA-816-821(Final), USITC Pub. No. 3273 (January 2000) (Exhibit JPN-10.B).

[350] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[351] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

4.246 Japan argues that as the USITC is required to do under United States law[352], it relied on the USDOCs dumping determination in CTL Plate to determine the volume of dumped and non-dumped imports, the rate of increase of dumped imports, the prices of dumped imports, and the magnitude of dumping.[353] In so doing, the USITC relied on evidence that stemmed from the incomplete and unfair aggregation of model-based comparisons conducted by the USDOC pursuant to its model zeroing procedure. That evidence is, therefore, not evidence of dumping for the product as a whole nor, because of the biased comparison, is it a reliable indication of the existence or amount of dumping. The USITCs injury determination in CTL Plate was, therefore, not based on an "objective examination" of "positive evidence", as required by Article 3 of the *AD Agreement*.

4.247 In responding to comments by the United States with regards to injury, Japan points out that the United States suggests that Japan's conclusion with respect to CTL Plate is "speculative and unfounded" because "it does not follow that [USDOC] would have reported different margins of dumping to the USITC had it applied a different approach" to the dumping determination.[354] It continues that, "[i]n the absence of such a showing, Japan has failed to meet its burden …".[355] Japan claims that it is the United States' argument that is "speculative". The mere possibility that USDOC would have reported the same margin of dumping to the ITC by applying a different approach, does not cure the tainted injury determination that was not based on "positive evidence."

4.248 As a result, Japan has proved an "as applied" violation of Article 3 in the CTL Plate investigation because the USITC relied on evidence in making its injury determination that was not "positive". Moreover, that "as applied" violation proves that the maintenance of the zeroing procedures necessarily results in violations of Article 3 in "particular circumstances".

4.249 Japan also states that, in *US – 1916 Act*, the Appellate Body held that the first sentence of Article 1 of the *AD Agreement* "states that 'an anti-dumping measure' must be consistent with Article VI of the GATT 1994 and the provisions of the *AD Agreement*".[356] In that appeal, the Appellate Body noted that the term "anti-dumping measures" "seems to encompass all measures taken against dumping".[357] The anti-dumping measure taken in the CTL Plate investigation is subject to Article 1. In light of the fact that the measure is not consistent with various provisions of the *AD Agreement* nor with Articles VI:1 and VI:2 of the GATT 1994, it is also inconsistent with Article 1 of the *AD Agreement*.

2. Claims with respect to Periodic Reviews[358]

4.250 Japan challenges 11 anti-dumping measures that resulted from periodic reviews and claims that each of these is inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.2, and 9.3 of the *AD Agreement*, and with Articles VI:1 and VI:2 of the GATT 1994. Those cases are as follows:

(1) On 15 March 2001, the USDOC calculated anti-dumping duties in Tapered Roller Bearings and Parts Thereof 1998 - 1999, 66 Fed Reg. 15,078.[359] The period of review is 1 October 1998 through 30 September 1999, and the rate of the *ad valorem* anti-dumping duty was 14.86% for Koyo Seiko Co., Ltd.[360] Without zeroing, the

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[352] See Tariff Act, Section 771(35)(C)(ii).

[353] *Cut-To-Length Carbon Steel Plate from Japan*, Investigation Nos. 701-TA-387-391 and 731-TA-816-821, (Final), USITC Pub. No. 3273, at 24 n.143 (January 2000) (Exhibit JPN-10.B).

[354] US First Written Submission, para. 109.

[355] US First Written Submission, para. 109.

[356] Appellate Body Report, *US – 1916 Act*, para. 119.

[357] Appellate Body Report, *US – 1916 Act,* para. 119.

[358] Japan First Written Submission, paras. 70-73, 178-186.

[359] Exhibit JPN-11.

[360] Exhibit JPN-11.

results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.

(2) On 6 March 2000, the USDOC imposed anti-dumping duties in Tapered Roller Bearings and Parts Thereof 1997 - 1998, 65 Fed Reg. 1,767.[361] The period of review is 1 October 1997 through 30 September 1998, and the rate of the *ad valorem* anti-dumping duty was 17.94% for Koyo Seiko Co., Ltd.[362] Without zeroing, the USDOC would have calculated a lower anti-dumping margin.

(3) On 11 August 2000, the USDOC imposed anti-dumping duties in Ball Bearings and Parts Thereof 1998-1999, 65 Fed. Reg. 49,219.[363] The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 6.14% for NTN Corporation.[364] Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.

(4) On 11 August 2000 the USDOC imposed anti-dumping duties in Cylindrical Roller Bearings and Parts Thereof 1998-1999, 65 Fed. Reg. 49,219[365] The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad valorem* anti-dumping duty was 3.49% for NTN Corporation.[366] Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.

(5) On 11 August 2000, the USDOC imposed anti-dumping duties in Spherical Plain Bearings and Parts Thereof 1998-1999, 65 Fed. Reg. 49,219.[367] The period of review is 1 May 1998 through 30 April 1999, and the rate of the *ad* valorem anti-dumping duty was 2.78% for NTN Corporation.[368] Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.

(6) On 12 July 2001, the USDOC imposed anti-dumping duties in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551.[369] The period of review is 1 May 1999 through 30 April 2000, and the rates of the *ad valorem* anti-dumping duty were 10.10% for Koyo Seiko Co., Ltd., 9.16% for NTN Corporation, and 4.22% for NSK Ltd.[370] Without zeroing, the results of the dumping margin calculation by the USDOC for these three respondents would have been negative, and no anti-dumping duty would have been collected.

(7) On 12 July 2001, the USDOC imposed anti-dumping duties in Cylindrical Roller Bearings and Parts Thereof 1999, 66 Fed. Reg. 36,551.[371] The period of review is 1 May 1999 through 31 December 1999, and the rates of the *ad valorem* anti-dumping

[361] Exhibit JPN-12.
[362] Exhibit JPN-12.
[363] Exhibit JPN-13.
[364] Exhibit JPN-13.
[365] Exhibit JPN-14.
[366] Exhibit JPN-14.
[367] Exhibit JPN-15.
[368] Exhibit JPN-15.
[369] Exhibit JPN-16.
[370] Exhibit JPN-16.
[371] Exhibit JPN-17.

duty were 5.28% for Koyo Seiko Co., Ltd. and 16.26% for NTN Corporation.[372] Without zeroing, the results of the dumping margin calculation by the USDOC for both respondents would have been negative, and no anti-dumping duty would have been collected.

(8) On 12 July 2001, the USDOC imposed anti-dumping duties in Spherical Plain Bearings and Parts Thereof 1999, 66 Fed. Reg. 36,551.[373] The period of review is 1 May 1999 through 31 December 1999, and the rate of the *ad valorem* anti-dumping duty was 3.60% for NTN Corporation.[374] Without zeroing, the results of the dumping margin calculation by the USDOC would have been negative, and no anti-dumping duty would have been collected.

(9) On 15 October 2002, the USDOC imposed anti-dumping duties in Ball Bearings and Parts Thereof 2000-2001, 67 Fed. Reg. 55,780, as amended by 67 Fed. Reg. 63,608.[375] The period of review is 1 May 2000 through 30 April 2001, and the rates of the *ad valorem* anti-dumping duty were 6.07% for NSK Ltd., 2.51% for Asahi Seiko Co., Ltd., and 9.34% for NTN Corporation.[376] Without zeroing, the results of the dumping margin calculation by the USDOC for these three respondents would have been negative, and no anti-dumping duty would have been collected.

(10) On 16 June 2003, the USDOC imposed anti-dumping duties in Ball Bearings and Parts Thereof 2001-2002, 68 Fed. Reg. 35,623.[377] The period of review is 1 May 2001 through 30 April 2002, and the rates of the *ad valorem* anti-dumping duty were 4.51% for NTN Corporation and 2.68% for NSK Ltd.[378] Without zeroing, the results of the dumping margin calculation by the USDOC for both respondents would have been negative, and no anti-dumping duty would have been collected.

(11) On 15 September 2004, the USDOC imposed anti-dumping duties in Ball Bearings and Parts Thereof 2002-2003, 69 Fed. Reg. 55,574.[379] The period of review is 1 May 2002 through 30 April 2003, and the rates of the *ad valorem* anti-dumping duty were 5.56% for Koyo Seiko Co., Ltd., 2.74% for NTN Corporation, 2.46% for NSK Ltd., and 3.37% for Nippon Pillow Block Co., Ltd.[380] Without zeroing, the results of the dumping margin calculation by the USDOC for these four respondents would have been negative, and no anti-dumping duty would have been collected.

4.251 Japan focuses on one example of these periodic reviews, Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551, and explains the WTO-inconsistency of that measure as a result of the application of the standard simple zeroing procedures. The other ten measures are, for identical reasons, also WTO-inconsistent. For all 11 measures, Japan submits evidence of the application of the simple zeroing procedures.[381]

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[372] Exhibit JPN-17.
[373] Exhibit JPN-18.
[374] Exhibit JPN-18.
[375] Exhibit JPN-19.
[376] Exhibit JPN-19.
[377] Exhibit JPN-20.
[378] Exhibit JPN-20.
[379] Exhibit JPN-21.
[380] Exhibit JPN-21.
[381] See Exhibits JPN-11 to 21.C.

4.252 Japan notes that, on 12 July 2001, the USDOC imposed anti-dumping duties in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551.[382] To determine the anti-dumping duties to be collected for 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 a W-to-T comparison that included the standard simple zeroing procedures. The USDOC, therefore, made multiple comparisons between a weighted average normal value and export price for a series of comparable individual export transactions. In terms of the USDOCs standard simple zeroing procedures, in aggregating the results of the multiple transaction-based comparisons to obtain the overall weighted average dumping margin, only those comparisons for which there were positive results were taken into account. In other words, the USDOC disregarded any comparisons with a negative value. As a result, the sum total amount of dumping was inflated by an amount equal to the excluded negative values. Without zeroing, the results of those calculations would have been negative for each of these three respondents, and no anti-dumping duties would have been assessed or collected. Japan asserts that the computer language by which the USDOC eliminated the negative comparison results is the standard zeroing line, namely "WHERE EMARGIN GT 0;" or "WHERE UMARGIN GT 0;".[383] This language is identical to the computer code in the USDOCs standard computer programme for periodic reviews.[384]

4.253 Japan argues that, under Article 9.3, "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Consistent with this text, margins of dumping calculated in a periodic review under Article 9.3 must be calculated in accordance with the "agreed disciplines" in Article 2.[385] Among those "disciplines", Articles 2.1 and 2.4.2 of the *AD Agreement*, together with Articles VI:1 and VI:2 of the GATT 1994, require that margins of dumping be determined for the product as a whole. As a result, where the investigating authority undertakes multiple comparisons to determine the margins in a periodic review, it must take account of the results of *all* of the multiple comparisons in the aggregation of comparison results; not merely those with positive values. Japan argues that, in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551, the USDOC calculated the overall margin of dumping (or assessment rate) using only those transaction-based comparisons for which there was a positive result. The USDOCs failure to establish the margins of dumping for the product as a whole by considering *all* of the multiple comparison results, including negative ones, resulted in affirmative dumping determinations in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551 (and the other ten periodic reviews Japan challenges). Accordingly, the application of the standard simple zeroing procedures in this periodic review (and the other ten periodic reviews) is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and also Articles VI:1 and VI:2 of the GATT 1994.

4.254 Japan also argues that the Appellate Body ruled, in *US – Corrosion-Resistant Steel*, that margins of dumping calculated under Article 9.3 must meet the fair comparison requirements of Article 2.4. Japan has already demonstrated that the standard model and simple zeroing procedures are inconsistent "as such" with these requirements. In the same way, the application of the simple zeroing procedures in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551, also resulted in an unfair comparison that is inconsistent with Article 2.4 of the *AD Agreement*. In this periodic review, the elimination of comparisons with negative results generated an overall positive dumping margin for each respondent, whereas the inclusion of *all* comparisons would have resulted in a negative figure for all of them. Such a comparison, for the product as a whole, is manifestly unfair.

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[382] Exhibit JPN-16. This measure is identified as Specific Case No. 8 in Japan's panel request.

[383] See Exhibit JPN-1.D, which indicates that the Standard Zeroing Line may be found on lines 1268 and 1336 of Exhibit JPN-16.A, lines 2622 and 2690 of Exhibit JPN-16.B, and lines 1345 and 1413 of Exhibit JPN-16.C.

[384] Exhibit JPN-7 at 16 and 17.

[385] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 127.

4.255 Japan asserts that the application of zeroing in these reviews at issue is inconsistent with Article 9 of the *AD Agreement*. Two conditions must be met to satisfy the requirements of Article 9: (1) the margin of dumping to be calculated for the purpose of the duty assessment proceedings must be established consistently with Article 2; and (2) the amount of anti-dumping duty to be imposed and collected must not exceed the ceiling set by such margins of dumping. It therefore follows that if the procedures for calculating margins of dumping are inconsistent with Article 2, including Articles 2.1, 2.4 and 2.4.2, the application of those same procedures in a periodic review is also legally flawed. As explained above, the application of simple zeroing in the calculation of the margins of dumping in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551, is inconsistent with Articles 2.1, 2.4 and 2.4.2, and therefore, the USDOC failed to establish the margin of dumping in the review at issue in a manner consistent with Article 2 of the *AD Agreement*. Indeed, the USDOC would have determined that there were no margins of dumping but for its application of the simple zeroing procedures. As a result, the USDOC seeks to collect anti-dumping duties when it is not entitled to collect any, and thus the USDOC acts inconsistently with the second condition identified above. Therefore, the USDOCs application of simple zeroing in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551, to calculate the margins of dumping is also inconsistent with Articles 9.1, 9.2 and 9.3 of the *AD Agreement*.

4.256 Finally, Japan argues that in light of the fact that the "anti-dumping measures" applied in Ball Bearings and Parts Thereof 1999-2000, 66 Fed. Reg. 36,551 (and, for the same reasons, the other ten periodic reviews challenged) are not consistent with various provisions of the *AD Agreement*, they are also inconsistent with Article 1 of the *AD Agreement*.

3. Claims with respect to Sunset Reviews[386]

4.257 Japan claims that anti-dumping measures adopted pursuant to two sunset reviews[387] are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *AD Agreement* and Articles VI:1, and VI:2 of the GATT 1994, because, in these two reviews, the investigating authorities relied on dumping margins calculated using the standard zeroing procedures.

4.258 Japan addresses one of these two measures in detail, Expedited Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, as the other involves precisely the same WTO-inconsistencies. For both measures, Japan submits evidence of the reliance upon margins that were calculated using standard zeroing procedures.[388]

4.259 Japan points out that, on 4 November 1999, the USDOC issued its Final Results in Expedited Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, in which it found that revocation of the anti-dumping order on Ball Bearings from Japan would be likely to lead to continuation or recurrence of dumping.[389] In making this determination, the USDOC specifically relied on the "margins determined in the original investigation and subsequent periodic reviews", and concluded that because "dumping has continued over the life of the orders, the [USDOC] determines that dumping is likely to continue if the orders were revoked".[390] Thus, in Expedited Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, the investigating authorities relied on dumping margins calculated in the original investigation and periodic reviews. In calculating these margins, whether using model or simple zeroing procedures, the USDOC disregarded all comparisons that gave rise to a negative result. Specifically, the

[386] Japan First Written Submission, paras. 74, 187-193.
[387] Exhibits JPN-22 and 23.
[388] Exhibits JPN-22 to 23.D.
[389] Exhibit JPN-22.
[390] Exhibit JPN-22.

programmes in question contain the zeroing language: "IF EMARGIN GT 0".[391] As a result of the USDOCs application of the standard zeroing procedures, the dumping margins were inflated.

4.260 Japan argues that margins used in a sunset review must be consistent with Article 2 of the *AD Agreement*. In a sunset review, investigating authorities are not entitled to rely on dumping margins calculated using standard zeroing procedures. As noted above, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body confirmed that there is:

> "no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4".[392]

4.261 Thus, where investigating authorities elect to rely on dumping margins calculated in an original investigation and/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 *AD Agreement*.

4.262 Japan argues that, in Expedited Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, both the USDOC and the USITC chose to rely on dumping margins calculated in earlier investigations and periodic reviews in reaching their likelihood determinations.[393] However, as described above, the USDOC used its standard zeroing procedures to calculate these margins. According to the Appellate Body's findings in *US Corrosion-Resistant Steel Sunset Review*[394], the reliance on margins in a sunset review that are calculated in a manner inconsistent with Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement* means that the determinations in the sunset reviews are inconsistent with Articles 11.1 and 11.3 of the *AD Agreement*. In essence, the investigating authorities' conclusions in the Anti-friction Bearings Sunset Review, under those provisions, are deprived of legal validity because they are based, in part, on flawed dumping margins. The same is true of the measures adopted pursuant to the second sunset review at issue.[395]

4.263 In addition, Japan argues that, in light of the fact that the "anti-dumping measure" adopted in Expedited Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275 (and the second sunset review challenged) are not consistent with various provisions of the *AD Agreement*, the measure is also inconsistent with Article 1 of the *AD Agreement*.

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[391] See Exhibits JPN-22.A at 2 and JPN-22.B at 3, for the zeroing language in Koyo Seiko and NTN's original investigation computer programmes.

[392] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 (*underlining added*).

[393] Exhibit JPN-22; Determination of the USITC in *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, Investigation Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review), at 20 n.128, and 94 (Exhibit JPN-22.C).

[394] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[395] See USDOC, *Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results* at Comment 1 (2 August 2000) (Exhibit JPN-23.A); Determination of the USITC in *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), at 53 n.369 (Exhibit JPN-23.B).

United States[396]

4.264 With regards to Japan's "as applied" claims, the United States addresses both a claim made by Japan in the original investigation, the CTL Plate, 64 Fed Reg. 73,215, injury determination,[397] and the sunset reviews that Japan challenges.

4.265 With regards to the original investigation in CTL Plate, 64 Fed Reg. 73,215, the United States argues that the speculative nature of Japan's Article 3 challenges is further confirmed by its arguments suggesting that the USITC acted inconsistently with the provisions of that Article in reaching certain injury determinations. The United States explains that Japan contends that USDOCs calculation of dumping margins in CTL Plate, 64 Fed Reg. 73,215, rendered the USITCs corresponding injury determination inconsistent with Articles 3.1, 3.2, 3.3, 3.4, and 3.5 of the *AD Agreement*.[398] Japan argues that the USITC investigation was not objective and its determination was not based on positive evidence because the USITC had "no objective, verifiable, credible, or otherwise reliable evidence regarding dumped import volumes and prices, and the magnitude of dumping".[399]

4.266 The United States argues that the Panel should dismiss Japan's claims concerning the CTL Plate, 64 Fed Reg. 73,215, injury determination, whether or not USDOCs decision not to offset was inconsistent with the *AD Agreement*. *First*, as noted above, the United States disagrees with the Appellate Body's conclusion that offsets are required when using the average-to-average methodology under Article 2.4.2. Therefore, the United States disagrees that USDOCs decision not to "offset" in this investigation was WTO-inconsistent. *Second*, Japan's assertion that the margins calculated pursuant to the average-to-average approach in this investigation caused the USITC to act in a manner inconsistent with Articles 3.1, 3.2, 3.3, 3.4, and 3.5 is speculative and unfounded.

4.267 The United States argues that, even assuming that the margin calculations were inconsistent with the *AD Agreement*, it does not follow that USDOC would have reported different margins of dumping to the USITC had it applied a different approach. Because the *AD Agreement* provides more than one permissible comparison methodology by which dumping margins may be calculated (average-to-average, transaction-to-transaction, or in certain circumstances, average-to-transaction), Japan cannot presume or establish that USDOC necessarily would have calculated different dumping margins in CTL Plate, 64 Fed Reg. 73,215. In the absence of such a showing, the United States argues that Japan has failed to meet its burden to demonstrate that the USITCs injury determination in CTL Plate, 64 Fed Reg. 73,215, is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*.

4.268 The United States rejects Japan's arguments made with respect to the sunset reviews in Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, [400] and Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products, 65 Fed. Reg. 47,380[401]. The United States points out that Japan also asserts that USDOCs calculation of dumping margins resulted in certain sunset determinations by the USITC that were inconsistent with Article 11.3 of the *AD Agreement*. Japan

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[396] US First Written Submission, paras. 105-108.

[397] *Cut-To-Length Carbon Steel Plate from Japan*, Investigation Nos. 701-TA-387-391 and 731-TA-816-821, (Final), USITC Pub. No. 3273 (January 2000) (Exhibit JPN-10.B).

[398] Japan First Written Submission, paras. 69, 173-175.

[399] Japan First Written Submission, para. 174.

[400] *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, Investigation Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review), USITC Pub. No. 3309 (June 2000) (Exhibit JPN-22.C).

[401] *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), USITC Pub. 3364 (Nov. 2000) (Exhibit JPN-23.B).

alleges that the USITCs determinations of the likelihood of continuation or recurrence of injury in Sunset Review of Anti-friction Bearings, 64 Fed. Reg. 60,275, and Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products, 65 Fed. Reg. 47,380, are invalid because the USITC relied on flawed dumping margins.[402] Japan's claims on this issue, like those regarding the CTL Plate, 64 Fed Reg. 73,215, injury determination, are speculative and unfounded.[403]

V. ARGUMENTS OF THE THIRD PARTIES

A. ARGENTINA

1. "As such" Claims

(a) Zeroing Procedures Challenged as Measures[404]

5.1 Argentina points out that Japan contends that the USDOC maintains what it calls standard computer programmes, one of which is the anti-dumping margin calculation programme. These programmes are in and of themselves "measures" for the purposes of the DSU, and henceforth, susceptible of being challenged "as such" before the WTO dispute settlement system. Whether the measure at issue is the programme in its entirety, or a single line of it, is irrelevant for the purpose of the decision to be made by the Panel.

5.2 Argentina argues that whether there is "a" single computer programme or "several" does not seem to be of relevance for the matter the Panel has to resolve provided that all of them contain the line that Japan has came to call "the zeroing line"[405]. That line mandates the programme to execute the zeroing procedures and is what renders the programme, or this part at least, a measure inconsistent with the *AD Agreement*.

5.3 With regards to the argument of the United States that the programme (or the line) is not a measure because it does not set forth rules or norms, of general and prospective application[406], or mandate a breach of any WTO provision[407]. Argentina considers that, throughout its submission, Japan has clearly demonstrated otherwise. It seems clear enough that, as Japan has said, "the USDOC relies on computer programmes to manipulate the data and execute the required calculations".[408] Moreover, that line is –as Japan has clearly demonstrated - built into the programme itself, self-executing, and beyond any possibility of being turned off by the "operator".[409] The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* clarified broadly enough the scope under which the definition of "measure" is construed for the purposes of defining what is challengeable under the DSU, and the standard anti-dumping programme (s) certainly falls into that category.

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[402] Japan First Written Submission, para. 192.

[403] The US further notes its disagreement with Japan's characterization that the USITC relied on the dumping margins reported by USDOC in the cited cases. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body recognized that Article 11.3 does not even require investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of dumping. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127. Likewise, there is nothing in Article 11.3 that creates an obligation for investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of injury.

[404] Argentina Oral Statement at Third Party Session ("Argentina Oral Statement"), paras. 4-9.

[405] Japan First Written Submission, para. 39, and Exhibit JPN-1, at para. 15.

[406] US First Written Ssubmission, para. 34.

[407] US First Written Submission, para. 35

[408] Japan First Written Submission, para. 26

[409] Japan First Written Submission, para. 36 and Exhibit JPN-1, para. 14.

5.4 Argentina argues that it is a well established principle in WTO dispute settlement that the party asserting the affirmative of a claim bears the burden to prove it. Argentina is of the opinion that Japan has satisfied its burden of proof regarding whether the programme, is a measure subject to challenge in the WTO. Japan has submitted enough evidence to raise the presumption that the standard anti-dumping programme(s) is/are "as such" inconsistent with the *AD Agreement*, every time that they contain a line which invariably produces the same effect: the distortion of the margin of dumping by inflating it and, eventually, even inventing dumping where there is none. As the Appellate Body has stated, once a party has made a *prima facie* case, the burden of proof switches onto the responding party[410] and, hence, it is up to the United States to prove what it has sustained, that is, that an operator could depart from executing the zeroing procedure, if he deems it necessary.

5.5 Argentina asks, contrary to the United States' assertion, what is the so called "zeroing line" if not a general rule intended to have general and prospective application. Argentina claims that it is clear that these computer programmes are intended to apply every time the USDOC has to calculate a dumping margin and, consequently, is of general and prospective application.

(b) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations[411]

5.6 Argentina argues that the practice and methodology of zeroing out negative margins is always inconsistent with the *AD Agreement*. Article 1 establishes that only the anti-dumping measures that are in accordance with the provisions of the *AD Agreement* would be considered legitimately and consistently applied. Article 2, read in conjunction with Article VI GATT 1994, defines exactly what can be considered dumping for the purpose of the *AD Agreement*: the introduction of a product into the territory of another Member at less than the normal value, which is according to Article VI.1(a) of GATT 1994 less than the comparable price, in the normal course of trade.

5.7 Argentina argues that Article 2.4 indicates that <u>not any comparison</u> could give rise to a determination of dumping but only a *fair comparison*, providing for all the necessary adjustments to allow a fair comparison of the products to take place, be it on the characteristics of the products themselves, be it on the different items incorporated into their prices that could distort their value affecting the fairness of the process itself. With all the elements, and after making all the comparisons needed, the authority must determine whether: (a) there is any dumping taking place (Article 2.1) and, (b) its magnitude (margin) is in accordance with Article 2.4.2, being obliged to terminate the investigation in case that the latter do not reach the *de minimis* threshold established in Article 5.8.

5.8 Argentina asserts that, in accordance with the terms of Article VI, which only permits the imposition of duties if the existence of injury or threat of injury has been demonstrated, Article 3.1 demands that an injury determination must be based on *positive evidence* involving an *objective examination* (emphasis added) of both, the volume of the dumped imports and its impact on the domestic industry. The margin of dumping determined according to the provisions referred above, is by virtue of Article 3.4, one in a list of many factors that the authority *shall* examine (emphasis added). This list is not exhaustive but indicative, and although some other factors could be included depending on the particularities of each individual case, no single factor of the list should be left without consideration[412]. However, the thorough assessment by the authority on the factors related to the dumped imports must not stop there, the prices and volumes of imports *not sold* at dumping prices are two of the several factors that Article 3.4 indicates must constitute part of the analysis.

[410] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 14.
[411] Argentina Oral Statement, paras. 10-20.
[412] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paragraph 7.314.

5.9 Argentina explains that, only after these two processes have been completed, the authority must decide whether or not anti-dumping duties will be imposed, and, as long as it is practicable, impose a duty less than the full margin that has been determined, pursuant to Article 9.1. However, Argentina argues that under no circumstance can the anti-dumping duty exceed the margin of dumping established in accordance with Article 2, that is, taking into account the considerations mentioned above.

5.10 Given that injurious dumping is a *sine qua non* condition for granting the imposition of duties, and each of the two determinations (dumping and injury) are subject to the conditions outlined:

- how could the deliberate "write-off" of some transactions be consistent with any concept of fairness?
- how could a determination of injury based on an inflated margin of dumping fulfill the requirement of being the result of an objective examination of the positive evidence?
- finally, how could the duty assessed using a dumping margin calculated using a zeroing methodology be consistent with the requirement of not exceeding the margin of dumping?

5.11 Argentina argues that zeroing always produces a dumping margin which is not the actual one, and hence, cannot be considered neither fair nor a positive evidence, all the less so the grounds for any determination which requires to be based on an objective examination of the factors supporting it. Just for the sake of better illustrating the point against zeroing, is enough to say that the effect of zeroing is the same to that of cutting the export prices that enter in the comparison, having none of both a justification under any of the provisions in the *AD Agreement*.

5.12 Argentina argues that, as several panels and the Appellate Body have successively stated, zeroing leads to fatal flaws which render the determinations based on them, inconsistent with the provisions of the *AD Agreement*. The Appellate Body, in *EC-Bed Linen*, established clearly and univocally that the *fair comparison* in Article 2.4 is a general obligation that informs all Article 2, and that applies specifically to the establishment of margins of dumping in accordance with Article 2.4.2. Argentina argues that Article 2.4 is not narrowly confined to the pre-comparison-price-adjustment-stage, as the United States pretends[413]. The scope of the obligation in Article 2.4 has been defined as "a general obligation that informs all Article 2". This general obligation is part of Article 2, which bears the title "Determination of dumping", a determination which according to Articles 2 itself and VI of GATT 1994, cannot be established otherwise than through a comparison between Normal Value and Export Price. Had it been intended that fairness be restricted only to the adjustment stage, the choice of this term *in lieu* of the term "comparison" would have been more appropriate.

5.13 Argentina asserts that the apparent attempt of the United States to reduce the whole argument concerning the fair comparison to the question of whether it fits the requirements of the so called targeted dumping or whether offsetting is required or not is remarkable[414]. However, this case is not about those subjects. The core of the practice under scrutiny in this case is not the offsetting *per se*, but what it implies: not taking into account all the comparable transactions for the calculation of the margin of dumping.

5.14 Argentina points out that the Appellate Body in *US – Softwood Lumber V* clearly stated that: " ... the word 'all' in 'all comparable export transactions' makes it clear that Members cannot exclude from a comparison any transaction that is 'comparable'. Thus, we agree with the Panel that the term 'all

[413] US First Written Submission, para. 48.
[414] US First Written Submission, paras. 54 – 58.

comparable transactions' means that a Member 'may only compare those export transactions which are comparable, but ... it must compare all such transactions'".'[415].

5.15 Moreover, this could not be otherwise, Argentina argues, since according to the very wording of Article 2.1, it is clear that dumping can only be found for a product, and not only for some of the transactions on the product under investigation and not others. This has been recognized by the Appellate Body in *EC – Bed Linen*. Assuming, *arguendo*, that there is no obligation to calculate a margin of dumping for the product "as a whole", and that Article 2.4.2 would not accommodate for that obligation, the United States would still have to explain how a calculation in which some of the transactions are simply put aside on account of the sign accompanying the figure would constitute a *fair comparison* in the terms of Article 2.4.

(c) "As Such" Claims under Article 11 of the *AD Agreement* with respect to Original Investigations.[416]

5.16 Argentina states that, apart from the methodology of zeroing in itself, it has a particular interest in all the aspects concerning the United States' sunset review procedures.[417] Argentina states that, as Japan has correctly pointed out in its submission [418], the Appellate Body stated in *US – Corrosion-Resistant Steel Sunset Review* that, even in proceedings that do not impose the obligation to calculate a margin of dumping, such as in sunset reviews under Article 11.3, the margin chosen to rely on must conform to the fair comparison requirement of Article 2.4 even if calculated at some other stage in the proceeding, like, for example, the original investigation.

B. CHINA

1. "As such" Claims

(a) Zeroing Procedures Challenged as Measures[419]

5.17 China argues that model and simple zeroing procedures are measures that can, as such, be the subject of dispute settlement proceedings. China understands that the Panel shall first examine whether the target of this claim, USDOCs model and simple zeroing procedures, are measures challengeable as such.

5.18 China points out that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that "any act or omission attributable to a WTO Member can be a measure of that Member …"[420] It then further stated that the measure can be challenged "as such" before the DSB if it sets forth rules or norms that are intended to have general and prospective application. With respect to Article 18.4 of *AD Agreement*, the words of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*[421] make China believes that the "measure" under Article 6.2 of the DSU may be an "administrative procedure" which encompasses the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. In sum, China understands that a measure challenged on an "as such" basis under the *AD Agreement* can be an "administrative procedure" which encompasses the entire body of generally applicable rules, norms and

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[415] Appellate Body Report, *US – Softwood Lumber V*, para.86.
[416] Argentina Oral Statement, para. 21.
[417] Argentina Oral Statement, para. 1.
[418] Japan First Written Submission, para. 156.
[419] China Executive Summary of Third Party Submission ("China Exec. Summary"), paras. 2-8.
[420] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 81.
[421] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 87 ("T*he phrase 'laws, regulations and administrative procedures' 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.*").

standards that are intended to have general and prospective application and are adopted by Members in connection with the conduct of anti-dumping proceedings.

5.19 China notes that Japan argues that the USDOCs model and simple zeroing procedure is not developed for one or several certain cases, but is a pre-determined, standardized system or method for mechanistically conducting and managing, on a uniform and predictable basis, an aspect of the USDOCs margin calculation in all anti-dumping proceedings, irrespective of the method of comparison used, it is designed to set forth rules or norms that are intended to have general and prospective application. In this regard, China understands that the model and simple zeroing procedure may be a measure challengeable as such before the Panel. China also notes that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body observed that the issue does not depend on "the label given" to an instrument in domestic law, nor upon its "form or nomenclature", but on the "substance and content of the instrument".[422]

5.20 As a third party, China takes no view on facts, but China understands that to determine whether or not the USDOCs model and simple zeroing procedure (standard computer programmes) is inconsistent with the *AD Agreement*, the Panel should examine the substance and practice/adoption of this computer programme.

(b) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations[423]

5.21 China argues that model and simple zeroing are inconsistent with Article 2.4 and 2.4.2 of the *AD Agreement*.

5.22 China argues that "margins of dumping" referred to in Article 2.4.2 must be established for the product as a whole. Using model zeroing, the investigating authority disregards some of the results of multiple comparisons at the aggregation stage by maintaining model zeroing procedures, which makes China views that such practice is inconsistent with Article 2.4.2 because the investigating authority cannot establish a dumping margin for the product as a whole. By adopting simple zeroing, the investigating authority directly disregards those transactions for which the export sales price is higher than the normal value, which has the same effect as model zeroing.

5.23 In sum, China argues that an investigating authority does not determine a dumping margin for the product as a whole either by model zeroing or by simple zeroing. Therefore, China views that the model and simple zeroing are inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*.

5.24 China argues that the basis of "fair comparison" shall cover all comparable transactions for export. By adopting zeroing, the investigating authorities exclude the relevant export transactions which export prices are higher than normal value. For the excluded comparisons, the investigating authority treats normal value as equal to export price, whereas, in fact, export price is greater than normal value. Moreover, China argues, by adopting zeroing, an investigating authority disregards the negative results of any comparisons from the aggregation of total dumping by zeroing. As a result, the dumping margin is inflated or an affirmative determination that dumping exists may be made in circumstances where no dumping would have been established in the absence of zeroing.[424]

[422] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para.87, n.87.
[423] China Exec. Summary, paras. 13-16, 9-12.
[424] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 135.

5.25 China understands that, as the zeroing is formulated with an inherent bias that distorts the comparison of normal value and export price, it is inconsistent with the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.

(c) "As Such" Claims Under Article 9 of the *AD Agreement*[425]

5.26 China argues that Articles 2.4 and 2.4.2 apply to retrospective assessment (periodic review) based on Article 9 of the *AD Agreement*. China considers that the "retrospective assessment" carried out in the United States must be consistent with the provisions of Article 9, particularly Articles 9.3 and 9.3.1 of the *AD Agreement*.

5.27 China further argues that retrospective assessment is not a review. "Review" is referred to in Articles 11.2 and 11.3 of the *AD Agreement*. According to these articles, the main purpose of "review" is to determine the necessity for the continued imposition of the anti-dumping duty. China understands that the main purpose of retrospective assessment is determining the definitive amount of duties instead of judging the necessity for the continued imposition of the anti-dumping duty.

5.28 China then argues that dumping margins used for purposes of Article 9 must be consistent with Article 2 of the *AD Agreement.* The chapeau of Article 9.3 provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The cross-reference to Article 2 is in keeping with the fact that "Article 2 sets out the agreed disciplines in the *AD Agreement* for calculating dumping margins".[426] Whenever investigating authorities calculate "margins of dumping", they must respect the basic requirements of a "fair comparison". The USDOCs determination of the existence of "dumping", and calculation of "margins of dumping", for purpose of periodic review, under Article 9.3, must be consistent with the definitions of those terms in Articles 2.4 and 2.4.2 of the *AD Agreement*.

5.29 China argues that the term "during the investigation phase" in Article 2.4.2 is not limited to the original or initial investigation. Other investigations which include dumping margin calculation, e.g., duty assessment are also covered by the phrase "investigation phase" under Article 2.4.2. Even if the express terms of Article 2.4.2 limit its application to the original or initial investigation phase, Article 2.4.2 still applies to retrospective assessment because the retrospective assessment is the continuation of investigation phase instead of review phase. China argues that the exercise conducted by the United States in the retrospective assessment corresponds, objectively, to an investigation by an investigating authority. In both cases the procedures are virtually identical: questionnaires are sent out; verification visits take place; and hearings are organized. The main procedural difference between original investigation and retrospective assessment lies in the period of investigation. Furthermore, retrospective assessment is applied to ascertain the dumping duty. China thus considers the retrospective assessment to be a continuation of the investigation phase to make definitive anti-dumping duties payable.

C. EUROPEAN COMMUNITIES

5.30 The European Communities points out to the fact that it has itself been a claiming party in another case against the United States concerning zeroing. In that case, the European Communities also brought challenges against the very same United States measures that are subject to the present proceeding.[427]

[425] China Exec. Summary, paras. 17-26.
[426] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para.127.
[427] European Communities Third Party Submission("EC Submission), para. 1.

1. Burden of Proof[428]

5.31 In the proceeding before this Panel, the European Communities observes that Japan has set out and evidenced the facts, explained which obligations of the WTO Agreements the measures at issue are inconsistent with, and why. The burden of proof and persuasion lies with or has been shifted to the United States.

5.32 In particular, the European Communities observes that the United States relies on the phrase "during in the investigation phase" in Article 2.4.2 of the *AD Agreement* as a key part of its defence, arguing that as a result of that phrase, in connection with Article 5.1 of the *AD Agreement*, the disciplines of Article 2.4.2 are limited to original investigations only, and that Article 9 of the *AD Agreement* does not incorporate the requirements of Article 2.4.2 of the *AD Agreement*. The European Communities submits that in the circumstances of this case, the United States bears the full burden of persuasion in that regard.[429]

2. "As such" Claims

(a) Zeroing Procedures Challenged as Measures[430]

5.33 The European Communities considers that the model and simple zeroing procedures, challenged by Japan, do constitute a measure or a part of a measure, or, at a minimum, an administrative practice within the meaning of Article 18.4 of the *AD Agreement*, in particular because they are referred to in the US Anti-Dumping Manual and other regulatory instruments of the United States and because there is an automatic, predictable and prospective application of these procedures or "practice". In other words, in the view of the European Communities, there can be no doubt that the procedures and computer programmes set out norms. These norms are "set out" in the sense that they are expressed in the particular computer language used by the United States, and recorded both electronically and on paper.[431]

(b) "As Such" Claims under the provisions of Article 2 of the *AD Agreement*

5.34 As a preliminary remark[432], the European Communities submits that the use of misleading premises and vocabulary by the United States should not bring the focus of this Panel away from addressing the root of the dispute. The European Communities describes this dispute as concerning the requirement, embodied in Article 2.4 of the *AD Agreement* to make a fair comparison between normal value and export price; the rule in Article 2.4 that adjustments may only be made for differences that affect price comparability; and the requirement embodied in Article 2.4.2 of the *AD Agreement*, to conduct a weighted average to weighted average comparison that takes account of "all comparable export transactions"; and not to conduct an asymmetrical comparison, unless there is targeted dumping. The legal issue is not therefore whether or not the United States is required to "grant" an "offset", but rather that it is prohibited from making the adjustments it is making; and is not entitled to ignore those export transactions that exceed "normal value" in intermediate calculations of "margins of dumping", but must treat those transactions the same way as the export transactions that are below the "normal value" (unless special circumstances warrant otherwise).

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[428] European Communities Executive Summary of Third Party Submission ("European Communities Exec. Summary"), para. 2.
[429] EC Submission, para. 6.
[430] EC Exec. Summary, para. 23.
[431] EC Submission, paras. 211-214.
[432] *Ibid*, paras. 8-12.

Article 2 applies to the entire *AD Agreement*[433]

5.35 The European Communities is of the view that the terms "dumping" and "margin of dumping" are defined in Article VI of the GATT 1994, which definitions are further implemented and elaborated in Article 2 of the *AD Agreement*, which sets forth disciplines for the determination of dumping that are applicable and have to be respected throughout the *AD Agreement*. This is supported by the text, logic and the overall construction of the *AD Agreement*.

5.36 The European Communities thus considers that Article 2 provides a valuable and persuasive, if not a primary, context for the interpretation of Article 2.4.2, the scope of which is at the root of the present dispute. In particular, Article 2 provides by far a more persuasive context for the interpretation of Article 2.4.2 than, for example, Article 5 of the *AD Agreement*.

"Model" and "simple" zeroing is inconsistent with Article 2.4, first sentence, of the *AD Agreement*[434]

5.37 Within Article 2, Article 2.4, first sentence, of the *AD Agreement* imposes an overarching and independent obligation of fair comparison. This obligation informs all the other provisions of Article 2.4, including Articles 2.4.1 and 2.4.2. The character of this obligation is not exhausted by either the second to fifth sentences of Article 2.4 or by paragraphs 2.4.1 and 2.4.2.

5.38 The European Communities argues that "model" and "simple" zeroing is inconsistent with Article 2.4, first sentence. Fairness, in the context of a comparison between domestic sales and export sales, requires that, under normal circumstances, the same treatment be applied to both domestic and export sales, i.e. that such sales be treated in a symmetrical way. Because zeroing, which consists in an arbitrary and artificial reduction of the price, is only applied to the export sales, there is no symmetrical treatment. The use of an asymmetrical comparison and the "simple" zeroing method without any justification is thus inconsistent with the obligation to make a fair comparison pursuant to Article 2.4 of the *AD Agreement*. There is also ample evidence that the zeroing methods used by the United States have a dramatic effect on the calculation of the dumping margin; an effect that may be far more significant than the effects associated with the due adjustments referred to in Article 2.4 of the *AD Agreement.* A methodology that systematically inflates the margins of dumping is to be considered unfair. This is also confirmed by the existing case law.[435]

5.39 Further, such a methodology also lacks any minimal consistency, essential for any economic analysis, on which the *AD Agreement* necessarily is premised.[436]

Article 2.4, second to fifth sentences of the *AD Agreement*[437]

5.40 The European Communities argues that zeroing constitutes an "undue" adjustment, contrary to Article 2.4, second to fifth sentences of the *AD Agreement*. Article 2.4, particularly the second to fifth sentences thereof, expressly obliges Members to make due allowance or adjustment for "differences which affect price comparability". At the same time, there is an obligation not to make an allowance or adjustment when there is no difference affecting price comparability. When zeroing, the United States makes an "allowance" or "adjustment" literally simply because of a sign (negative) of an intermediate difference between what are considered a "normal value" and an "export price". Such an adjustment is not made for a difference that affects price comparability, rather the difference it is part of the very price

[433] *Ibid*, paras. 13-20.
[434] EC Submission, paras. 21-42.
[435] *Ibid*, paras. 38-42.
[436] *Ibid*, paras. 31-36.
[437] *Ibid*, paras. 43-62.

comparison that the United States is supposed to make. The United States is therefore not making a "due" allowance, and reverses the effects of the allowances or adjustments that indeed affect price comparability, both in violation of its obligations under Article 2.4, second to fifth sentences, of the *AD Agreement*.

5.41 The European Communities does not, however, exclude the possibility that an adjustment or allowance in the context of targeted dumping might be "due", within the meaning of the third sentence of Article 2.4, if it is made under the conditions laid out in the second sentence of Article 2.4.2. Where there is a difference between two distinct export markets (A and B), based on different patterns among different purchasers, regions or time periods, and a comparison with normal value (market C) shows, for instance, dumping in market A, but not market B, an investigating authority might be justified in not "setting-off" the "negative dumping" in market B against the dumping in market A, since such an adjustment would be made for a difference (between markets A and B) that affected price comparability (between markets A and B; and between AB and C).

Article 2.4.2 of the *AD Agreement*

5.42 The European Communities is of the view that Article 2.4.2 of the *AD Agreement* applies to all types of investigations undertaken pursuant to Article VI of the GATT 1994 and the *AD Agreement* in which margins of dumping are calculated or relied upon, including original investigations, periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews, for several distinct reasons.[438]

5.43 First, neither the word "investigation", nor the words "during the investigation phase" limit the scope of the application of Article 2.4.2 to original investigations. Absent a definition or a meaning assigned to it by the Members, these words have to be interpreted in accordance with the *Vienna Convention* and be given their ordinary meaning, having regard to context, object and purpose.

5.44 The European Communities points out that the ordinary meaning of the word "investigation", referring to a dictionary, is the nature of the activity carried out by the investigating authority, not the material scope of what is examined. When assessing the amount of duty to be paid under its system of retrospective assessment, an investigating authority is required to engage in a "systematic examination" or a "careful study". Article 2.4.2 of the *AD Agreement* contains no limiting language in that regard. To read any other limiting language – such as that found in Article 5.1 of the *AD Agreement* – into Article 2.4.2 of the *AD Agreement*, when there is no such language there, would be a legal error. Article 5.1 of the *AD Agreement* is limited to an investigation to determine the existence, degree and effect of any alleged dumping – that is, to an original investigation. It is the presence of the words "to determine the existence, degree and effect of any alleged dumping" that limit the meaning of the word "investigation" in Article 5.1 of the *AD Agreement*. The presence of those words in Article 5.1 does not say anything about the scope of the word "investigation" in Article 2.4.2, however.

5.45 In any event, the European Communities states, it cannot be argued that the word "investigation" in Article 2.4.2 refers to "an investigation to determine the existence, degree and effect of any alleged dumping", as is referred to in Article 5.1. That would mean that the word "investigation" is monolithic, in the sense that it can only ever refer to a careful examination and scrutiny of all of the three matters referred to in Article 5.1 of the *AD Agreement*. That is not supported by the *AD Agreement*. For instance, it is uncontroversial that in referring to the "effect of any alleged dumping", Article 5.1 of the *AD Agreement* refers to injury. Yet, provisions of Article 3 may be applied independently from those of Article 2 – for example in a changed circumstances review, or when implementing a panel report, or even by a separate investigating authority, as in the United States.

[438] EC Submission, para. 63 and paras. 77-80.

5.46 The European Communities argues that the words "during the investigation phase" in Article 2.4.2 of the *AD Agreement* do not limit the scope of Article 2.4.2 of the *AD Agreement* to Article 5.1 of the *AD Agreement*. Rather than Article 5.1, referring to "an investigation to determine the existence, degree and effect of any alleged dumping", it is Articles 2 and 9.3 of the *AD Agreement* that provide a far more convincing context for the interpretation of Article 2.4.2. For instance, the French and Spanish versions of the *AD Agreement* confirm that the retrospective assessment under Article 9 also concerns the existence of dumping, elaborated in Article 2 as a whole.

5.47 In this respect, the European Communities also recalls Article 31(4) of the *Vienna Convention* according to which "[a] special meaning shall be given to a term if it is established that the parties so intended". The European Communities is of the view that it is up to the United States to establish that the words "investigation" or "during the investigation phase" have a limited or defined meaning.

5.48 The European Communities explains that the above deliberations do not mean that the phrase "during the investigation phase" in Article 2.4.2 is without meaning. The European Communities suggests four different alternative, but not necessarily mutually exclusive, interpretations of that phrase. The phrase may mean: during the investigation period; during the period in which the particular type of investigation must be concluded; not during the pre-investigation phase; or the words may be merely descriptive.

5.49 *Second*, in the view of the European Communities, Article 2.4.2 of the *AD Agreement* states what it does apply to, not what it does not apply to. In this regard, unlike the United States municipal law, particularly the Statement of Administrative Action, Article 2.4.2 of the *AD Agreement* does not contain the words "(not reviews)". If the Members had really wanted to achieve a limited interpretation of Article 2.4.2, they would have used a similar express exclusionary language, such as that in Article 2.2.1; Article 2.7; Article 9.4(ii); or Annex II, paragraph 5. The Members did not do that. The European Communities also argues that the negotiating history confirms its own views: there is no mention in the negotiating history suggesting that Article 2.4.2 should have a limited application to the original investigations only. Similarly, the subsequent practice of WTO Members does not support the position of the United States: the European Communities attaches as an exhibit to its submission[439] a review of what it believes to be the complete list of 105 Members that have notified implementing legislation to the WTO, which generally shows that the words "during the investigation phase" are either simply omitted from such implementing legislation or that there are numerous instances where they are rendered as "during the investigation period". The European Communities cites this as "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*; and evidence of the Members' intention within the meaning of Article 31(4).

5.50 In addition, the European Communities argues that the variable duty provisions of Article 9(4)(ii) of the *AD Agreement*, invoked by the United States, are irrelevant to the interpretation of Article 2.4.2. Furthermore, these provisions do not exclude the possibility of refund under Article 9.3.2, where the full disciplines of Article 2.4.2 will apply.

5.51 The European Communities considers that the main purpose of Article 2.4.2 of the *AD Agreement* is to provide for an exception (asymmetrical comparison in the case of targeted dumping) to the normal methods of comparison (symmetrical comparison) in order to ensure a fair comparison within the meaning of Article 2.4 of the *AD Agreement*. An asymmetrical comparison can only be used if the circumstances defined in the second sentence of Article 2.4.2 of the *AD Agreement* are met. To the extent that such circumstances are not available, the United States is under an obligation to use one of the normally applicable methods provided for in the first sentence of Article 2.4.2 of the *AD Agreement*.

[439] Exhibit EC-9.

5.52 The model and simple zeroing methods used by the United States are therefore prohibited by Article 2.4.2. When the United States defines the basic parameters of investigation (such as product and time period), the United States is obliged to ensure that the margin of dumping for that product and that period of review is calculated in conformity with that provision. The United States becomes bound by its own logic (unless the exceptional situation described in the second sentence of Article 2.4.2 of the *AD Agreement* is present).[440] The United States cannot conclude, before the final calculation is complete, that, in relation to some discrete model or type or category of exports, when "export price" exceeds "normal value", there is no or a zero margin of dumping. As found by the Appellate Body, "dumping" for the purposes of the *AD Agreement* can be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product.

5.53 The European Communities claims that this reasoning also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, time, level of trade, region, or any other parameter. In all those cases, the investigating authority becomes bound by its own logic, and must complete its analysis on the basis of the same logic. This is also supported by the second sentence of Article 2.4.2 of the *AD Agreement*, which refers expressly to certain other parameters of the determination, including "time periods". The same is true in respect of any other parameters of the investigation fixed by the investigating authority, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2 of the *AD Agreement*.

5.54 The simple zeroing method used by the United States is, at least potentially, offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In principle, and due account being taken of all necessary adjustments, any transaction during the period of review, at whatever time it is made, is considered by the United States potentially comparable with any other transaction during the period of review, at whatever time *it* was made. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology results in treating each export transaction individually in the same manner as model zeroing results in treating each model separately.

5.55 In conclusion, the European Communities argues that if the United States were correct in respect of both Articles 2.4.2 and Article 2.4 of the *AD Agreement*, then a vast loophole on the fundamental issue of how to calculate a margin of dumping would be opened up in the *AD Agreement*. The results of an original investigation would be made effectively worthless. According to the European Communities, the rationale for retrospective assessment proceedings is not to escape the disciplines of the *AD Agreement*, but to up-date the temporal frame of reference, so that data for normal value, export price and imports are taken from the same period.

(c) "As Such" Claims with Respect to Articles 3, 5, 9, and 11 of the *AD Agreement*

5.56 The European Communities considers that use of the unlawful zeroing methods by the USDOC violates the United States obligations under Article 2 and 2.4.2. It also inevitably means that the United States is in violation of other provisions of the *AD Agreement* which govern the procedures for subsequent determinations dependent on a proper establishment of dumping, namely Article 3.1, 3.2 and 3.5, 5.8, 9.3, 9.5, 11.1, 11.2 and 11.3 as well as Articles 1 and 18.4, and Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement.[441]

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[440] EC Submission, para. 197.
[441] EC Submission, paras. 202-209 and paras. 224-227.

D. KOREA

5.57 In Korea's view, the zeroing procedures of the United States applied in both the initial investigations and the subsequent reviews *per se,* or the manner in which they are applied in a particular case, are inconsistent with the *AD Agreement*.[442] Korea therefore generally supports the arguments raised by Japan in its first submission.[443]

1. "As such" Claims

(a) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations[444]

5.58 Korea points out that the United States claims that as the obligation to make a "fair comparison" under Article 2.4 only requires the appropriate adjustment that must be made for differences that affect prices or price comparability between normal value and export price, there is no independent obligation to offset a "positive" dumping margin and a "negative" dumping margin in any calculation of dumping margin under Article 2.4.[445] In other words, in the absence of the independent obligation to make a "fair comparison" under Article 2.4, zeroing in the calculation of dumping margins is not precluded. To the contrary, Japan argues that there is a fundamental obligation that requires the investigating authority to offset a "positive" dumping margin and a "negative" dumping margin in any calculation of dumping margin in order to ensure a "fair comparison" requirement under Article 2.4.[446]

5.59 Having agreed with Japan's position on the "fair comparison" requirement under Article 2.4, what is more important, in Korea's view, is that such fair comparison requirement must be extended to Article 2.4.2. Specifically, as the first sentence of Article 2.4.2 provides that the methods it describes are "[s]ubject to the provisions governing fair comparisons in paragraph 4", Article 2.4.2 incorporates the "fair comparison" requirement of the chapeau of Article 2.4. With this, Korea is of the view that from the text, it is clearly suggested that there is an obligation for the investigating authority to ensure the "fair comparison" requirement when using any of methods described in Article 2.4.2 for comparing export price and normal value.

5.60 Further support for Korea's view can be found in the past decisions of the Appellate Body. The Appellate Body has consistently held that the practice of zeroing is inconsistent with the "fair comparison" requirement of Article 2.4.2 (as well with the more general fair comparison requirement of the chapeau of Article 2.4.). In *EC-Bed Linen*, the Appellate Body relied on both Article 2.4 and Article 2.4.2 in finding zeroing to be inconsistent with the requirements of the *AD Agreement*. In this case, the Appellate body addressed the requirement of Article 2.4.2 and found that:

> "Under [the weighted average] method, the investigating authorities are required to compare the weighted average normal value with weighted average prices of *all* comparable export transactions … . By 'zeroing' the negative dumping margins, the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping … . Furthermore, we are also of the view that a comparison between export price and

[442] Republic of Korea Third Party Submission ("Korea Submission"), para. 3.
[443] Korea Submission, para. 3.
[444] Korea Submission, paras. 4-14.
[445] US First Written Submission, paras. 44-48.
[446] Japan First Written Submission, para.85.

> normal value that does *not* take into account the prices of *all* comparable export transactions – is *not* a 'fair comparison' between export price and normal value as required by Articles 2.4 and 2.4.2."[447]

The Appellate Body's subsequent decisions in *US-Corrosion-Resistant Steel Sunset Review* and in *US - Softwood Lumber V* reaffirmed that zeroing was inconsistent with both Articles 2.4 and 2.4.2.[448]

5.61 Korea argues that, in the case at hand, as Japan correctly points out, zeroing is the United States' longstanding practice used for calculating dumping margins in all anti-dumping proceedings. As such, by employing zeroing for calculating dumping margins, the United States always and necessarily gives more weight to certain comparisons (those with a "positive" dumping margin) than to other comparisons (those with a "negative" dumping margin). The calculation is, therefore, biased in favour of finding dumping and not "fair". Consequently, zeroing that systemically and automatically disregards "negative" dumping margins cannot ensure the "fair comparison" as required by Articles 2.4 and 2.4.2.

5.62 In light of the meaning of Articles 2.4 and 2.4.2 together with the past decisions of the Appellate Body, Korea submits, therefore, that such consistent use of zeroing by the United States in calculating the overall dumping margin is inconsistent "as such" as well as "as applied" and is inconsistent with the "fair comparison" requirement under Articles 2.4 and 2.4.2.

5.63 Korea also argues that zeroing must be prohibited under all three methods described in Article 2.4.2 for comparing export price and normal value. The United States argues that based on the decision of the Appellate Body in *US - Softwood Lumber V*, where it has found that the weighted average-to-weighted average method incorporating zeroing is inconsistent with Article 2.4.2, zeroing is only prohibited when establishing the margins of dumping under that weighted average-to- weighted average method in Article 2.4.2.[449] Korea disagrees. Korea argues that the Appellate Body in *US - Softwood Lumber V* had no option but to address only the issue of whether zeroing is prohibited under the weighted average-to-weighted average method merely because the issue of whether zeroing is also prohibited under other two methodologies (transaction-to-transaction and weighted average-to-transaction) was not raised.[450] Thus, Korea believes that had that issue been asked to the Appellate Body, it would have reached the same conclusion that zeroing is also prohibited under the other two methodologies.

5.64 Korea submits that zeroing must be prohibited entirely and completely under all three methods described in Article 2.4.2. When the investigating authorities choose to engage in multiple comparisons, they are required to combine the results of those comparisons to determine the overall dumping margins for the product as a whole.[451] The methodology used to combine the individual comparisons must

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[447] Appellate Body Report, *EC-Bed Linen*, para, 55.

[448] Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para. 134. The Appellate Body found that the European Communities' use of this methodology "inflated the results from the calculation of the margin of dumping". Korea also emphasizes that a comparison such as that undertaken by the European Communities in that case is not a "fair comparison" between export price and normal value as required by Articles 2.4 and 2.4.2. See also, *US-Softwood Lumber V*, para. 63. Korea notes that, in *US-Softwood Lumber V*, the Appellate Body's most recent decision concerning zeroing, the Appellate Body based its analysis solely on the language of Article 2.4.2 – and its requirement that the calculation of dumping margins on an weighted average-to-weighted average basis must consider "all comparable export transactions."

[449] US First Written Submission, para. 38.

[450] Appellate Body Report, *US-Softwood Lumber V*, paras. 104-105.

[451] Korea notes that, in *US-Softwood Lumber V*, the Appellate Body held that "[i]t is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not

include all of the individual comparisons.[452] This is true whether the multiple comparisons are made using any of all three methodologies. However, if zeroing is used in combining the results of individual comparisons, as some individual comparisons with a "negative" dumping margin are purposefully and systemically excluded, "all" of the individual comparisons cannot be taken into account in the calculation of dumping margin. As a result, the "fair comparison" that is required under Articles 2.4 and 2.4.2 cannot be achieved.

(b) "As Such" Claims with Respect to Article 11 of the *AD Agreement*: Sunset Reviews[453]

5.65 Korea argues that the term "the investigation phase" in Article 2.4.2 should not be interpreted to limit the applicability of Article 2.4.2 only to the "investigation phase". The United States argues that because of the term "during the investigation phase" referred to in Article 2.4.2, the provisions of Article 2.4.2 are only applicable to the "investigation phrase", but not to subsequent reviews.[454] In Korea's view, the term "investigation" can encompass not only the initial investigation but also subsequent proceedings (reviews). Korea claims that the Appellate Body's decisions clearly support Korea's position. In *US-Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that reviews under Article 11 "envision a process combining both investigatory and adjudicatory aspects"[455], thereby suggesting that prohibition of zeroing implicit in Article 2.4.2 also applied to dumping calculations in sunset reviews under Article 11.3[456] The Appellate Body's decision in this case suggests that the term "investigation phase" is properly understood in the context of Article 2.4.2 to mean the portion of the proceeding (the initial investigation or subsequent reviews) in which the authority "investigates" whether dumping has occurred.

5.66 Furthermore, Korea argues that its position with regard to the interpretation of the term in question is further supported by the general practice of the Members who consistently and equally apply the provisions in Article 2 not only to the initial investigation but also to subsequent review proceedings. The instances where the term "investigation" appears in Article 2 are as follows:

- weighted average per unit costs for the period of investigation (2.2.1)
- the exporter or producer under investigation (2.2.1.1 and 2.2.2)
- the exporter or producer in the course of the investigation (2.2.1.1.)
- costs during the period of investigation (2.2.1.1)
- other exporters or producers subject to investigation (2.2.2(ii))
- in an investigation, the authority shall allow exporters at least 60 days to have adjusted their export prices (2.4.1.)
- movement in exchange rates during the period of investigation (2.4.1)
- the existence of margins of dumping during the investigation phase. (2.4.2)

"margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under consideration as a whole". *US-Softwood Lumber*, para. 97.

[452] Korea notes that the Appellate Body explained that "[t]here is no textual basis under Article 2.4.2 that would justify taking into account the 'result' of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other 'results'. If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2". Appellate Body Report, *US-Softwood Lumber*, para. 98. See also, paras. 99-100.

[453] Korea Submission, paras. 15-21.

[454] US First Written Submission, paras. 76.

[455] Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para. 111.

[456] *Ibid*, para. 127.

5.67 Korea claims that it is a reasonable interpretation that the term "investigation" in these instances includes the subsequent investigations, such as the review investigations, as it is the general practice that the Members usually apply those provisions of Article 2 in the subsequent proceedings following the initial investigation. There is, therefore, no reason to carve out Article 2.4.2 from applying provisions of Article 2 in all proceedings involving the calculation of a dumping margin.

5.68 Furthermore, Korea suggests that apart from the prohibition of zeroing under all three methods described in Article 2.4.2, zeroing must also be prohibited in all anti-dumping proceedings, including both the initial investigation as well as subsequent reviews. If the *AD Agreement* is interpreted otherwise to mean that zeroing is only prohibited in the initial investigation, but is not in subsequent reviews, the result is fundamentally unfair and absurd. For example, if an exporter maintains the same pricing behaviour both in the initial investigation and subsequent reviews, the dumping margin would be in most case higher in subsequent reviews where zeroing is employed. Particularly, in the case of a retrospective duty assessment where zeroing is systemically and automatically employed in determining the final duty liability, the result in the above example will efficiently invalidate the effect of prohibition of zeroing in the initial investigation.

5.69 Therefore, Korea submits that the term "investigation phase" should be interpreted to encompass not only the initial investigation but also subsequent proceedings (reviews).

E. MEXICO

1. "As such" Claims

(a) Zeroing Procedures Challenged as Measures[457]

5.70 Mexico argues that Japan used appropriate terms in its "as such" claims. The "as such" claims in this case concern what Japan refers to as "standard model" and "simple zeroing procedures". Japan terms these measures "administrative procedures" within the meaning of Article 18.4 of the *AD Agreement*. Such procedures obviously include the computer programmes used by the USDOC.

5.71 Mexico argues that the United States would appear to believe that since the computer programmes are subject to the wishes of the official using them, they may not be challenged "as such", because "as such" they do not mandate any action.[458] It should be pointed out that for the purposes of a dispute settlement proceeding, any act or omission attributable to a WTO Member may be deemed a "measure". Moreover, "acts setting forth rules or norms that are intended to have general and prospective application" are measures subject to WTO dispute settlement.[459] Normally, such acts or omissions are attributable to State bodies, including those relating to the Executive. In this case the computer programme or programmes are used by officials of the United States Executive and, according to the United States, are means by which decision-makers implement their decisions.[460] They come under what Japan terms "administrative procedures", i.e. they are part of the measure under challenge. The United States has not argued that USDOC officials are free to disregard information about the calculation of dumping margins that they obtain by using the computer programmes. It would appear, on the contrary, that the United States fully assumes that officials using the programmes are in one way or another required to consider the results they produce. The programmes thus imply a compulsory guideline to be followed by the United States authorities.

[457] Mexico Third Party Submission ("Mexico Submission") paras. 5-6.
[458] US First Written Submission, paras. 35 and 36.
[459] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.
[460] US First Written Submission, para. 37.

(b) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations.[461]

5.72 Mexico argues that, although zeroing has been found in previous cases to be inconsistent with the WTO Agreements, the United States continues to argue that its methodology is permissible in administrative reviews, and even seeks to discredit the reasoning of the panel and the Appellate Body in *US – Softwood Lumber V* which noted specifically that "Article 2.4.2 requires that the existence of margins of dumping has to be established … on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation".[462] In the light of that finding, Mexico agrees with Japan that the United States' zeroing procedures are inconsistent as such with its WTO obligations.

5.73 Mexico argues that Articles 2.4 and 2.4.2 of the *AD Agreement* prohibit zeroing. Article 2.4 of the *AD Agreement* lays down the basic principle that "[a] fair comparison shall be made between the export price and the normal value". This implies a separate obligation to determine the relevant dumping margin by means of a fair method of comparison that takes into account sales of the subject product in all export transactions, which necessarily precludes zeroing "negative margins". This obligation applies equally to original investigations and to reviews, as already confirmed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:[463]

> "When investigating authorities use a zeroing methodology such as that examined in EC – Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing". Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping." (e*mphasis added and footnote omitted)*

5.74 Mexico also refers to Article 2.4.2 of the *AD Agreement*. Thus, in determining the margin of dumping for a product under investigation, the investigating authority must include in the comparison the prices of all comparable export transactions, otherwise it would not be making a "fair comparison", in breach of Article 2.4 and 2.4.2 of the *AD Agreement*. Mexico agrees with Japan that unless the results of all the comparisons are taken into account, the determination of dumping and the margin of dumping cannot be applied to the product as a whole. This would amount to non-fulfilment of obligations under Article 2.1 and 2.4.2 and under 2.4 as regards the fair comparison obligations.

(c) "As Such" Claims with Respect to Article 9 of the *AD Agreement* [464]

5.75 Mexico argues that Article 2.4.2 applies to duty assessment procedures under Article 9. Besides advising against following panel and Appellate Body findings concerning Article 2.4.2 of the *AD Agreement*,[465] Mexico argues that the United States seeks to confine the scope of those findings to original investigations, arguing that a reading of Article 2.4.2 shows that this provision does not apply to administrative reviews because it contains the restrictive phrase "during the investigation phase".

[461] Mexico Submission, paras. 7-10.
[462] Panel Report, *US – Softwood Lumber V* , para. 7.224.
[463] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.
[464] Mexico Submission, paras. 11-13.
[465] US First Written Submission, paras. 89-95.

Mexico asserts that it is clear from Article 9 of the *AD Agreement*, however, that the obligations under Article 2 likewise apply when the amount of a duty is determined in an administrative review, since Article 9.3 prescribes that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article 9 thus refers to Article 2 as a whole and without restrictions. It therefore requires investigating authorities to apply Article 2.4.2 in determining the amount of anti-dumping duties in their reviews. In Mexico's opinion, all the obligations set in Article 2 of the *AD Agreement* are directly applicable in US administrative reviews, since the requirement in Article 9.3 to determine the amount of an anti-dumping duty (if one is imposed) at a level that does not exceed the margin of dumping established under Article 2 applies retrospectively as well as prospectively.

F. NEW ZEALAND

1. "As such" Claims

(a) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations[466]

5.76 New Zealand argues that it is recognised that dumping is to be condemned if it causes or threatens material injury to an established industry. The purpose of the imposition of dumping duties therefore is to provide a remedy to redress the unfair pricing practices of private companies. It is aimed at protecting against unfair competition. The detailed procedures for how Members are to go about determining whether dumping has taken place and whether a remedy may be applied were initially laid out in Article VI of GATT and have been progressively developed through negotiating rounds since that time. The current text set out in the *AD Agreement* is a product of the Uruguay Round negotiations – negotiations which were often fraught with the final text being a "compromise" between opposing positions. New Zealand believes that this negotiating history should be borne in mind by the Panel in assessing the validity of the Japanese arguments in this dispute.

5.77 New Zealand argues that there appears to be a difference of view on what the negotiating history of the *AD Agreement* shows. For New Zealand it is clear that the *AD Agreement* gave some latitude to Members in deciding which methodology to use to calculate dumping margins because the circumstances for different export products can differ. Article 2.4.2 refers to three methodologies – weighted average to weighted average; transaction-to-transaction; and weighted average to transaction. Curbs were placed on the situations in which the third methodology might be used, but these were not applied to the other two methodologies. These methods are used to calculate whether dumping has occurred, in other words whether unfair trade has occurred as a result of pricing practices. New Zealand has a systemic interest in ensuring that the right to use the transaction-to-transaction methodology is preserved as a fair way of making a comparison of the export price and the normal value of the product in the exporting country and establishing a dumping margin.

5.78 New Zealand argues that by concentrating on the calculation of dumping margins under Article 2.4, Japan loses sight of the process as a whole. The text of the *AD Agreement* lays out the elements that must be met to enable a remedy to be applied to address dumping. There must be a determination of whether dumping has occurred. An analysis must be undertaken of whether there is material injury to the domestic industry. If these conditions are met, there must be a causal analysis of the effect of the dumped imports, and the effect of other factors, including un-dumped imports, on the domestic industry. If it is established that the dumped imports are causing material injury or threat thereof to the domestic industry, a remedy may be applied to dumped imports. This process as a whole has relevance when one is assessing the validity of certain actions taken by a Member in applying a remedy to redress dumping. It means that how dumping margins are calculated has implications for the

[466] New Zealand Oral Statement, paras. 2-7.

determination of material injury, the causation analysis, and the remedy that may or may not be applied. In New Zealand's view, a proper interpretation of the *AD Agreement* must take this holistic perspective.

5.79 New Zealand expresses its concerns regarding the attempts of some Members to reinterpret the decisions of the Appellate Body and to give them wider application than is the case. The Appellate Body in *US – Softwood Lumber V* upheld the panel's finding that the United States acted inconsistently with Article 2.4.2 of the *AD Agreement* in "determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing'".[467] The Appellate Body expressly confined the issue in that case to the weighted average to weighted average methodology, not the transaction-to-transaction methodology.[468] Furthermore, the Appellate Body based its reasoning in part on the particular wording of Article 2.4.2 as it relates to the weighted average to weighted average methodology.[469] To make the same analogy in the case of the transaction-to-transaction methodology would be to read words into the *AD Agreement* which are not there. New Zealand is of the view that attempts to misinterpret the decisions of the Appellate Body should be seen for what they are. Such misinterpretation will not assist in the resolution of this dispute.

5.80 In conclusion, New Zealand believes that the negotiating history on the particular matters before the Panel is relevant to the interpretation of the *AD Agreement* on these matters. New Zealand also submits that the Panel should consider carefully the text of the *AD Agreement* as it relates to the different methodologies used to calculate dumping margins and view the calculation of dumping margins as but one element in the process which allows the legitimate application of dumping remedies. In New Zealand's view, the conclusions in respect of one methodology are not necessarily the same for another methodology.

G. NORWAY

1. "As such" Claims

(a) Zeroing Procedures Challenged as Measures[470]

5.81 Norway argues that the reference to measures, and types of measures, that can be challenged before a WTO panel in a case concerning the *AD Agreement* can be found in many provisions.

5.82 Norway points out that the scope of Article 3.3 of the DSU is very broad. It follows from the interpretation of this Article by the Appellate Body in *US-Corrosion-Resistant Steel Sunset Review* that in principle any act or omission attributable to a WTO Member can be assumed to be a measure by that Member for the purposes of dispute settlement proceedings. Norway argues that the wide reach of the notion of "measure" is also evident from Article 18.4 of the *AD Agreement*, which refers not only to laws or regulations, but also to "administrative procedures" as measures subject to the disciplines of the *AD Agreement*. Indeed, Article 17.3 of the *AD Agreement*, which concerns disputes relating to the agreement, only makes reference to the "effects" of any action by another Member, and not to specific types of measures.

5.83 Norway states that the Appellate Body has expressed itself on the reach of the notion "measure" on several occasions with specific relevance to the *AD Agreement*. In *US-Corrosion-Resistant Steel Sunset Review* the Appellate Body held that:

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[467] Appellate Body Report, *US – Softwood Lumber V*, para. 117.
[468] *Ibid*, Appellate Body Report, *US – Softwood Lumber V*, para. 104.
[469] Appellate Body Report, *US – Softwood Lumber V*, paras. 86-90. See also Appellate Body Report, *EC – Bed Linen*, para. 55.
[470] Norway Third Party Statement ("Norway Statement"), paras. 10-31.

> "In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[471] (*emphasis added*)

5.84 Norway argues that the Appellate Body stated in the same ruling that there is no threshold requirement in Article 17.3 of the *AD Agreement* that the measure in question be of a certain type:

> "The provisions of the *AD Agreement* setting forth a legal basis for matters to be referred to consultations and thus to dispute settlement, are also cast broadly. Article 17.3 establishes the principle that when a complaining Member 'considers' that its benefits are being nullified or impaired 'by another Member or Members', it may request consultations. This language underlines that a measure attributable to a Member may be submitted to dispute settlement provided only that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it under the *AD Agreement*. There is no threshold requirement, in Article 17.3, that the measure in question be of a certain type."[472] (*emphasis added*)

5.85 Norway explains that the Appellate Body also held that the provisions of Article 18.4 of the *AD Agreement* have a certain relevance in relation to the question of what type of measure may be submitted to dispute settlement under the agreement. The phrase "laws, regulations and administrative procedures" has been interpreted very broadly to encompass all generally applicable rules, norms and standards adopted by Members in connection with anti-dumping proceedings:

> "The provisions of Article 18.4 of the *AD Agreement* are also relevant to the question of the type of measure that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the *AD Agreement*. Taken as a whole, the phrase 'laws, regulations and administrative procedures' encompasses the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. The scope of each element in this phrase must be determined for the purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4

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[471] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para. 82.
[472] *Ibid*, para. 86.

> would vary from Member to Member depending on each Member's domestic law and practice."[473] (*emphasis added*)

In the same ruling the Appellate Body concluded:

> "This analysis leads us to conclude that there is no basis, either in the practice of GATT and the WTO generally or in the provisions of the *AD Agreement*, for finding that only certain types of measures can as such be challenged in dispute settlement procedures under the *AD Agreement*. Hence, we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'."[474]

5.86 Norway argues that it is quite clear from the Appellate Body's statement that there is no limitation on the type of measure that can "as such" be the subject of dispute settlement under the DSU or the *AD Agreement*. In principle even non-mandatory measures can be challenged "as such". Because in principle any type of measure can "as such" be challenged in dispute settlement procedures under the *AD Agreement*, Norway argues that the question becomes whether the anti-dumping margin computer programme must be considered to be a "measure" within the WTO and for the purpose of anti-dumping proceedings. The ordinary meaning of the word "measure" is an action taken to achieve a purpose. There can be no doubt that the anti-dumping margin programme containing the standard zeroing procedures qualifies as an action taken to achieve a purpose – the purpose of overstating the margin of dumping. The only article in the *AD Agreement* that mentions different types of measures is Article 18.4, which uses the term "laws, regulations and administrative procedures".

5.87 Norway argues that the phrase "laws, regulations and administrative procedures" has been interpreted by the Appellate Body in *US-Carbon Steel* to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.[475] Norway is of the view that the anti-dumping margin programme must be considered a norm or standard adopted by the United States in connection with the conduct of anti-dumping proceedings. In the same ruling the Appellate Body stated that the definition of the scope of each element in the phrase must be based on the content and substance of the instrument, and not merely on its form or nomenclature.[476]

5.88 Norway argues that, therefore, the fact that the zeroing procedures in the anti-dumping margin programme are abstract; that they are not published in the Federal Register; that they do not bear the title "law" or "regulation"; that they are not adopted by the US Congress but by the USDOC; that the Department is entitled to change or withdraw them for the purposes of future determinations; and that they are not relevant in US courts, cannot be decisive for whether these procedures are a "measure" for the purpose of anti-dumping proceedings.

5.89 Norway argues that it must be quite clear that the anti-dumping margin computer program is a norm/standard adopted by Members in connection with the conduct of anti-dumping proceedings, and the content and substance of this instrument make this even clearer. Norway believes that the anti-dumping margin programme and the procedures it contains may be a set of normative rules that apply mechanistically and automatically to a given set of facts without further human intervention. There is no room for administrative or judicial interpretation. The effect of the standard zeroing procedures in future cases is utterly predictable. The standard zeroing procedures in the anti-dumping margin programme provide certainty and security (at least for US industry) for the conduct of future trade. They mandate zeroing in all cases, and continue to do so until changed. Norway has noted the

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[473] Appellate Body Report, US-Corrosion Resistant Steel Sunset Review, para. 87.
[474] Appellate Body Report, US-Corrosion Resistant Steel Sunset Review, para. 88.
[475] *Ibid*, para. 87.
[476] *Ibid*, para. 87.

arguments presented by the United States to the effect that the Assistant Secretary of Commerce for Import Administration may change the Anti-dumping Manual, and the practices set out therein, "without notice", and that the anti-dumping margin programme is "discretionary" as opposed to "mandatory". This argument is false, however, as all types of measures are subject to changes. The important issue here is that they are prescriptive for a certain WTO-inconsistent result until they are changed and for as long as they remain unchanged.

5.90 Norway argues that, allowing the anti-dumping margin programme to be challenged "as such" is thus the only way to eliminate the root of the WTO-inconsistent conduct. In this regards, Norway refers to the reasoning of the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*[477] when it determined that the United States Sunset Policy Bulletin was a measure challengeable under the WTO. For the above reasons, the anti-dumping margin programme containing the standard zeroing procedures is a "challengeable" measure under WTO law "as such".

(b) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations[478]

5.91 While Norway agrees with Japan in its line of argumentation with respect to the inconsistency of zeroing with Article 2 of the *AD Agreement* –that the margin of dumping must be determined for the product as a whole and that a dumping determination must be based on a fair comparison, it is Norway's view that it has already been established by the Appellate Body in a number of cases[479] that the practice of zeroing is inconsistent with the *AD Agreement*. The Appellate Body has clearly stated that there is only one method of calculating dumping margins in the *AD Agreement* and that is in accordance with the provisions of Article 2.4 and 2.4.2 of the Agreement.

(c) "As Such" Claims with Respect to Articles 9 and 11 of the *AD Agreement*[480]

5.92 Norway states that one of the questions in this case is whether Articles 2.1, 2.4 and 2.4.2, of the *AD Agreement* apply not only to original investigations but, also to reviews. The United States argues that this is not the case, essentially on the basis of two arguments: (1) that Article 2.4.2 is the provision that eventually prohibits zeroing, and (2) that Article 2.4.2 is not applicable to "retrospective assessment reviews" or "new shipper reviews", "changed circumstances reviews" and "sunset reviews" as they are not "investigations". Norway states that these arguments are without merit. The Appellate Body has clearly stated that there is only one method of calculating dumping margins in the *AD Agreement* and that is accordance with the provisions of Article 2.4 of the Agreement – which includes Article 2.4.2. This was most recently stated in the US-Corrosion-Resistant Steel Sunset Review in connection with the interpretation of Article 11.3 of the Agreement concerning "sunset reviews":

> "However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provision in the *AD Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a

[477] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.
[478] Norway Statement, para. 7.
[479] See, e.g., Appellate Body Report, *EC – Bed linen*, para. 55; Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 127-135; Appellate Body Report, *US – Softwood Lumber V*, para. 101.
[480] Norway Statement, paras. 32-44.

> 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 *AD Agreement*."[481] (*emphasis added*);

> "It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3. Accordingly, we reverse the Panel's consequential finding, in paragraph 8(1)(d)(iii) of the Panel Report, that the US did not act inconsistently with Article 2.4 of the *AD Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4."[482] (*emphasis added*);

> and

> "As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOCs likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOCs likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3."[483] (*emphasis added*)

5.93 Norway points out that the Appellate Body in *US-Corrosion-Resistant Steel Sunset Review* went on to recall its findings in the *EC-Bed Linen* case, and stated that:

> "When investigating authorities use a zeroing methodology such as that examined in EC-Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognised in the present dispute, 'zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing'. Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[484] (*emphasis added*)

Norway argues that the word "otherwise" makes it particularly clear that the findings of the Appellate Body in this case are just as valid whenever a margin of dumping is calculated, and not just in original investigations.

5.94 Norway argues that, with regard to retrospective assessment reviews, this is furthermore, abundantly clear from the chapeau to paragraph 3 of Article 9, which states that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This creates

[481] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para. 127.
[482] *Ibid*, para. 128.
[483] *Ibid*, para. 130.
[484] *Ibid*, para. 135.

a clear and unambiguous link between the dumping duty imposed, reassessed or collected and the disciplines in Article 2 governing the calculation of dumping margins.

5.95 Norway states that the United States tries to escape the reach of this chapeau by arguing that Article 2.4 applies, but not sub-paragraph 4.2, due to the existence of the word "investigation" in Article 2.4.2, and by arguing that the disciplines on methodologies and the prohibition against zeroing are only based on this sub-paragraph. These arguments are also flawed, claims Norway. First, there is nothing in Article 9.3 that bars the application of Article 2.4.2. To the contrary, there is a clear reference to calculations of dumping margins, an issue squarely within Article 2.4.2. Second, the Appellate Body has interpreted the prohibition of zeroing based not on Article 2.4.2 as such but on the requirement of a "fair comparison" in Article 2.4. Norway refers in this regard to a statement by the Appellate Body in *EC-Bed Linen*.[485] Third, because what the United States is doing in its retrospective assessment reviews, new shipper reviews, changed circumstances reviews and sunset reviews is similar to what it does in original investigations. For all practical purposes it is a new investigation. If the reach of Article 2.4.2 is excluded from all but original investigations there would be no disciplines left to ensure fairly computed dumping margins. This would be contrary not only to the "fair comparison" requirement, but also to the explicit statement by the Appellate Body in *US-Corrosion-Resistant Steel Sunset Review*[486] referred to above.

5.96 In conclusion, Norway argues that it is clear from the above that the prohibition on zeroing also applies to retrospective assessment reviews, new shipper reviews, changed circumstances reviews and sunset reviews as they are not "investigations".

H. THAILAND

1. "As such" Claims

(a) Zeroing Procedures Challenged as Measures[487]

5.97 Thailand agrees with Japan that the United States' zeroing methodology constitutes a "measure" subject to WTO dispute settlement. Thailand generally agrees with Japan's description of the United States' practice of zeroing. However, Thailand does not consider that the distinction made by Japan between so-called "model" zeroing and "simple zeroing" has any practical meaning or relevance to the legal issues in this case. These terms are labels created by Japan itself. In practice, the zeroing methodology is exactly the same regardless of whether the initial comparisons between export price and normal value are done on a transaction-to-transaction, average-to-average, or transaction-to-average basis.

5.98 Thailand recalls that the Appellate Body has stated that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[488] The Appellate Body has also explained that Article 18.4 of the *AD Agreement* is relevant to the determination of what measures may be subject to dispute settlement. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that the sunset policy bulletin at issue in that dispute was a measure with "normative value, as it provides administrative guidance and creates expectations among the public and among private actors". The Appellate Body also emphasised

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[485] Appellate Body Report, *EC-Bed Linen*, para. 55.

[486] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para. 135.

[487] Thailand Executive Summary of the Third Party Submission ("Thailand Exec. Summary"), paras. 3, 6-11.

[488] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

that the sunset policy bulletin constituted a "measure" because it was "intended to have general application, as it is to apply to all the sunset reviews conducted in the United States".

5.99 Thailand argues that these factors apply equally to the zeroing methodology. This measure is not laid out either in the United States' anti-dumping laws or the administrative regulations of the USDOC. However, the manner in which an investigating authority promulgates and implements normative, generally applicable administrative procedures cannot be dispositive of the classification of those procedures for the purposes of the *AD Agreement*. In this case, Japan has shown that the zeroing methodology – reflected in the same computer programming language – has been applied in every determination by the United States since at least 1993. The USDOC has (successfully) defended the methodology before the US courts and the United States has apparently not departed from the practice in any anti-dumping determination. The USDOC thus apparently treats the zeroing methodology as binding. Thus, the zeroing methodology has, like the sunset policy bulletin at issue in *US – Oil Country Tubular Goods Sunset Reviews*, normative value, in that it has both general and prospective application. In these circumstances, the zeroing methodology is clearly one of the "generally applicable rules, norms, and standards adopted by [the United States] in connection with the conduct of anti-dumping proceedings" and therefore a "measure" subject to WTO dispute settlement.

5.100 Thailand states that the zeroing methodology has been applied, explained, and defended in innumerable US anti-dumping determinations, including all of those listed by Japan in its request for the establishment of a panel. Thus, the computer programming language is one aspect of an "administrative procedure" within the meaning of Article 18.4 of the *AD Agreement* that has been adopted by the United States with normative and general application.

5.101 Thailand argues that the fact that the same programming language is used in every computer programme to determine dumping margins by the United States is sufficient to establish that it is one of the United States' "laws, regulations and administrative procedures" within the meaning of Article 18.4 of the *AD Agreement* and a measure that may be challenged as such in dispute settlement proceedings. Also, the fact that other aspects of the computer programmes change from case to case, while the Standard Zeroing Line does not, supports Japan's contention that the zeroing methodology has normative and general application. In addition, the United States has failed to provide any evidence to suggest that the zeroing methodology is not general or prospective in its application – that it is not applied or even that it applies differently in certain instances.

5.102 Thailand claims that the United States has not provided any evidence that under the zeroing methodology there is any discretion or flexibility as to how or whether to use the methodology in the determination of dumping margins. In these circumstances, therefore, there is no need to perform the additional qualitative analysis of individual instances of the application of the challenged measure of the kind described by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*. Assuming, *arguendo*, however, that a qualitative analysis is required, Japan has provided sufficient evidence regarding the specific anti-dumping determinations it challenges on an "as applied" basis to enable the Panel to conduct that analysis.

(b) "As Such" Claims under Article 2 of the *AD Agreement* with respect to Original Investigations[489]

5.103 Thailand argues that the zeroing methodology at issue is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. The requirement of a fair comparison in Article 2.4 of the *AD Agreement* imposes a fundamental obligation on investigating authority to avoid biased and inaccurate determinations of dumping margins. The Appellate Body has confirmed that this obligation "informs

[489] Thailand Exec. Summary, paras. 12-19.

all of Article 2".[490] This includes Article 2.4.2, which, in any event, specifically incorporates by reference the fair comparison requirement of Article 2.4 ("subject to the provisions governing fair comparison in paragraph 4 ...").

5.104 Moreover, Thailand claims, the Appellate Body has also stated that "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping".[491] Systematically excluding non-dumped transactions from the calculation of overall dumping margins under the zeroing methodology is the equivalent of treating tall people as being of average height in calculating the average height of a larger group. In both cases, the result is distorted and inaccurate. Article 2.4 of the *AD Agreement* prohibits the use of such an inherently distorted methodology to make a fair comparison between export price and normal value.

5.105 Thailand argues that the United States attempts to portray Japan as seeking an "offset" to a previously-calculated dumping margin to tilt the comparison in favour of the Japanese exporter. However, at one point in the calculation of dumping margins – and it does not matter when this occurs – the United States adjusts at least some of the prices for the export transactions at issue so that the export price is no longer greater than the normal value for those transactions. Rather than Japan seeking an adjustment, therefore, the US practice constitutes an adjustment that is neither permitted under Article 2.4 of the *AD Agreement* nor, by any definition of the term, can be considered fair.

5.106 Thailand expresses that Articles VI and VI:2 of the GATT 1994, and Article 2.1 of the *AD Agreement* all refer to dumping and the determination of dumping margins in terms of a "product" rather than selected transactions in that product. Thus, neither Article VI of the GATT 1994 nor the *AD Agreement* authorises WTO Members to unfairly influence the calculation of dumping for a product by not fully accounting for certain export transactions in that product simply because they may exceed normal value.

5.107 In effect, the United States argues that aspects of the determination of dumping margins are not subject to the rules of Article 2. However, Thailand argues that the United States has not explained what constraints, if any, apply to those aspects of the determination, or how its position is consistent with the requirements of Articles 1 and 18.1 of the *AD Agreement*.

5.108 Thailand also points out that the Appellate Body found in *US – Softwood Lumber V* that the reference to "margins of dumping" in Article 2.4.2 refers to the calculation of overall dumping margins for the product as a whole, rather than transaction- or model-specific comparisons. The Appellate Body's finding did not differentiate between any types of zeroing or otherwise suggest that its finding that zeroing was not permissible was dependent on which methodology the United States used under Article 2.4.2 to make multiple comparisons at the sub-group level.

5.109 Thailand asserts that the targeted dumping provision of Article 2.4.2 does not permit zeroing. A failure to use the zeroing methodology would not render this provision inutile by cancelling out the differences between the different comparison methodologies. Thailand claims that the United States has not explained how it makes any of the necessary findings described in this provision in using the zeroing methodology. The fair comparison requirement applies to all of Article 2.4.2, including the targeted dumping provision. The text of the targeted dumping provision does not authorise an additional zeroing adjustment after the selection of the appropriate comparison methodology and before the calculation of the overall dumping margin for the product under consideration. Thus, Article 2.4.2 contains no textual support for the United States' argument that the zeroing methodology is essential to the operation of that provision.

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[490] Appellate Body Report, *EC – Bed Linen*, para. 59.
[491] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

(c) "As Such" Claims with respect to Articles 1, 2, 9 and 11 of the *AD Agreement* and Article VI of the GATT 1994[492]

5.110 Thailand submits that margins of dumping must be determined in accordance with Article 2 in all circumstances, including both original investigations and subsequent reviews under Article 9. This is consistent with both the definitions of terms of Articles 1 and 2 of the *AD Agreement* and Article VI of the GATT 1994, as discussed above. It is also consistent with the provisions of Article 9.3, which expressly refers to "the margin of dumping established under Article 2.

5.111 Thailand disagrees, therefore, with the United States' argument that Article 9 reviews are concerned with fundamentally different matters than original investigations.[493] The margins calculated by the United States in its Article 9 reviews may affect not just the amount of duties an exporter must ultimately pay (although that itself is an important consideration that requires close adherence to the provisions of the *AD Agreement*) but also decisions whether to terminate anti-dumping measures in reviews under Article 11.2, changed circumstance reviews, or under Article 11.3, sunset reviews.

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 The Panel submitted its interim report to the parties on 8 March 2006. On 22 March 2006, both parties requested that the Panel revise precise aspects of the interim report. Neither party requested an interim meeting. On 5 April 2006, both parties submitted comments on the other party's request for interim review. The Panel has carefully considered the arguments made by the parties in their request for interim review and addresses them in paragraph 6.65 *et seq.*, *infra*, in accordance with Article 15.3 of the DSU.[494]

6.2 On 20 April 2006, the Panel informed the parties that it had completed its review of the comments made by the parties during the interim review process and was now in a position to issue its final report to the parties. The Panel also indicated that it was aware of the findings of the Appellate Body in its report issued on 18 April 2006 in *US – Zeroing (EC)* and that it recognized that these findings had a direct bearing on the contents of the interim report. The Panel therefore requested the parties to convey their views on whether the Panel should proceed to reconsider the findings in the interim report in light of the Appellate Body Report in *US – Zeroing (EC)* and, if so, how the Panel should adjust its timetable and working procedures in order to provide the parties with an opportunity to express views on any relevant issues of law addressed in that Appellate Body Report. In their responses to this communication of the Panel both parties indicated that they wished to have an opportunity to submit comments on the Appellate Body Report in *US – Zeroing (EC).* In light of these responses, the Panel on 26 April 2006 invited the parties to submit their written comments on any relevant issues of law addressed in the Appellate Body Report in *US – Zeroing (EC)* by 10 May 2006 and to submit comments on each other's comments by 17 May 2006. Following a request by the United States on 17 May 2006, the Panel decided to hold a meeting with the parties, which took place on 12 June 2006.

6.3 The comments by the parties on the Appellate Body Report in *US – Zeroing (EC)* are summarized in paragraph 6.4 *et seq.*, *infra*.

[492] Thailand Exec. Summary, paras. 20-21.
[493] US First Written Submission, paras. 79-80.
[494] Section VI of this report, entitled "Interim Review" therefore forms part of the final findings of the panel report, in accordance with Article 15.3 of the DSU.

B. COMMENTS OF THE PARTIES ON ANY RELEVANT ISSUES OF LAW ADDRESSED IN THE APPELLATE BODY REPORT IN *US - ZEROING (EC)*

1. Japan

(a) Whether the Panel should follow the Appellate Body's findings in US – Zeroing (EC) [495]

6.4 Although Japan recognizes that the Panel in the present dispute is not bound to follow the Appellate Body's ruling in *US – Zeroing (EC)*, it argues that the close similarity between the measures in the two disputes means that it would be appropriate for the Panel to do so. Japan asserts that it is the Panel's task, pursuant to Articles 3.2 and 3.3 of the *DSU*, to facilitate the prompt settlement of this dispute in a manner that promotes the security and predictability of the trading system. These ends would not be served by acceding to a request from one party to the dispute in *US – Zeroing (EC)* to disregard the Appellate Body's findings unfavourable to it on the ground that that party considers the findings "not persuasive"[496].

6.5 Japan contends that the Appellate Body Report in *US – Zeroing (EC)* is significant for this dispute in two broad ways. *First*, the Appellate Body upheld the panel's finding that the "zeroing methodology" used by the United States in W-to-W comparisons in original investigations constitutes a rule of general and prospective application that can be challenged "as such" in WTO dispute settlement.[497] *Second*, the Appellate Body held that the United States' application of the zeroing methodology in W-to-T comparisons in certain periodic reviews[498] is inconsistent with Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 because "dumping" and "margins of dumping" must be determined for the "product" as a whole, not individual transactions, and all multiple comparison results must, therefore, be taken fully into account in the dumping determination. Japan argues that these rulings have several important consequences for the present dispute.

(b) the zeroing procedures maintained by the United States for use in W-to-W and T-to-T comparisons in original investigations are as such inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Article VI:1 of the GATT 1994; the anti-dumping investigation of imports of certain cut-to-length carbon quality steel products from Japan is inconsistent with the same provisions

(i) Weighted Average-to-Weighted Average Comparisons - Model Zeroing[499]

6.6 Japan comments that the Appellate Body in *US – Zeroing (EC)* upheld the panel's finding that the "zeroing methodology" used by the United States in weighted average-to-weighted average("W-to-W") comparisons in original investigations constitutes a rule of general and prospective application that can be challenged "as such" in WTO dispute settlement.[500] The Appellate Body held that to establish the existence of a rule or norm that can be challenged as such in WTO dispute settlement, the complainant must prove: (1) that the rule or norm is attributable to the responding

[495] Japan Comments on the relevant issues of law addressed in the Appellate Body Report in *U – Zeroing (EC)* (WT/DS294/AB/R) ("Japan Comments"), paras. 2-3; Japan Response to US Comments on the Appellate Body Report in *US – Zeroing (EC)* ("Japan Response to US Comments"), para. 17.

[496] US Comments on the relevant issues of law addressed in the Appellate Body Report in *US – Zeroing (EC)*(WT/DS294/AB/R)("US Comments"), para. 3.

[497] Appellate Body Report, *US – Zeroing (EC)*, paras. 204 and 205. Japan refers to the "panel" in *US – Zeroing (EC)*, as distinct from the "Panel" in this dispute.

[498] In *US – Zeroing (EC)*, the Appellate Body refers to reviews conducted pursuant to Article 9.3 of the *AD Agreement* as "administrative" or "duty assessment reviews". The Panel refers to these as "periodic reviews".

[499] Japan Comments, paras 4-9, 19-20.

[500] Appellate Body Report, *US – Zeroing (EC)*, paras. 204 and 205.

Member; (2) the precise content of the rule; and (3) that the rule or norm has general and prospective application.[501] The Appellate Body agreed with the parties and third participants that it was not necessary for the alleged rule or norm to be "expressed in the form of a written instrument".[502] The Appellate Body also held that the evidence substantiating the existence of such a rule or norm can include "proof of the systematic application of the challenged 'rule or norm'".[503]

6.7 According to Japan, the Appellate Body's ruling indicates that the Panel in the present dispute correctly found in its interim findings that the model and simple "zeroing procedures" are "as such" measures, particularly because the evidence relied on by the Panel in this dispute is more extensive than the evidence of record in *US – Zeroing (EC)*. In this respect, Japan contends that all the categories of evidence which the Appellate Body considered important in *US – Zeroing (EC)* are also before the Panel in the present dispute and, in addition, the Panel in the present dispute has statements available to it from United States' government agencies and courts that were not in the record of *US – Zeroing (EC)*.[504] In these circumstances, Japan believes that the Panel in this dispute should affirm its interim findings on this issue[505], relying on the categories of evidence to which the Appellate Body referred.

6.8 On the basis of the Appellate Body's reasoning in *US – Zeroing (EC)*, Japan sees no reason for the Panel to reconsider its conclusion that model zeroing is inconsistent with Article 2.4.2 of the *AD Agreement*. Additionally, because the Appellate Body emphasized in *US – Zeroing (EC)* that the prohibition against zeroing stems from Article 2.1, as well as Article 2.4.2[506], Japan submits that the Panel should find that the maintenance of model zeroing in original investigations is inconsistent with both Articles 2.1 and 2.4.2. Furthermore, because the definition of "dumping" derives from Article VI:1 of the GATT 1994 as well as Article 2.1, the Panel should find that the United States acts inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement*, and Article VI:1 of the GATT 1994, by maintaining model zeroing procedures in the context of original investigations. It follows that the Panel should also find that the application of these procedures renders the anti-dumping investigation of imports of certain cut-to-length carbon quality steel products from Japan inconsistent with the same provisions.

(ii) Transaction-to-Transaction Comparisons - Simple Zeroing[507]

6.9 According to Japan, although the Appellate Body in *US – Zeroing (EC)* was not asked to rule upon whether zeroing is prohibited in original investigations when using a T-to-T comparison methodology, the reasoning underlying its findings dictates that the maintenance of simple zeroing procedures in the context of T-to-T comparisons in original investigations is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Article VI:1 of the GATT 1994.

6.10 In *US – Zeroing (EC)*, the Appellate Body emphasized that "the definition of 'dumping' as contained in Article 2.1 applies to the entire Agreement".[508] Relying on this definition, the Appellate Body held that "under the *AD Agreement* and Article VI of the GATT 1994, 'dumping' and 'margins of dumping' must be established for the product under investigation as a whole."[509] The Appellate Body's interpretation is, therefore, that the product-wide definition of "dumping" applies *throughout* the

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[501] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[502] Appellate Body Report, *US – Zeroing (EC)*, paras. 193 - 194.

[503] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[504] Interim Panel Report, para. 6.47 (final report, para. 7.52).

[505] Interim Panel Report, paras. 6.45 – 6.50 (final report, paras. 7.50-7.55).

[506] Appellate Body Report, *US – Zeroing (EC)*, para. 126 ("This finding was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the *AD Agreement*.")

[507] Japan Comments, paras. 21-30; Japan Response to US Comments, paras. 8-9

[508] Appellate Body Report, *US – Zeroing (EC)*, para. 125 (quoting *US – Softwood Lumber V*, para. 93) (footnote omitted).

[509] Appellate Body Report, *US – Zeroing (EC)*, para. 126.

AD Agreement. Moreover, Japan notes that this interpretation of Article 2.1 was applied in the context of the first sentence of Article 2.4.2 in *US – Softwood Lumber V*, which contains both the W-to-W and T-to-T comparison methods.[510]

6.11 Consistent with these statements, the Appellate Body in *US – Zeroing (EC)* applied the definition of "dumping" to determinations made in two different types of anti-dumping proceedings that occur at different stages of an anti-dumping action – original investigations and periodic reviews. The Appellate Body has additionally stated that the same interpretation applies to dumping determinations made for purposes of sunset reviews.[511]

6.12 The Appellate Body's reasoning also contradicts the contention that the W-to-W and T-to-T comparison methods are fundamentally different because the former envisages a weighted average comparison of "all comparable export prices", whereas the latter envisages a comparison with a single export price in an individual export transaction. In *US – Zeroing (EC)*, the periodic review measures at issue involved comparisons made with a single export price for an individual export transaction. Nonetheless, the Appellate Body held:

> "… [I]f the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value. If the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others."[512]

6.13 Thus, according to Japan, the fact that the comparison methodology involves a series of intermediate comparisons made with the prices of individual export transactions does not alter the definition of "dumping" and "margin of dumping", which is derived from Article 2.1 and not Article 2.4.2. Rather, where multiple comparisons are made with the prices of individual export transactions, the authorities must take fully into account all comparison results. It follows that the USDOCs maintenance of the simple zeroing procedure for use in T-to-T comparisons in original investigations is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Article VI:1 of the GATT 1994 because it fails to result in a "margin of dumping" for the "product" as a whole.

6.14 According to Japan, the objections expressed by the United States to this aspect of the Appellate Body's findings in *US – Zeroing (EC)* ignore the fact that the Appellate Body's statements are based on an interpretation of the text of Article 2.1 of the *AD Agreement* and Article VI:1 of GATT 1994, in particular, the word "product(s)". Moreover, the previous reports to which the Appellate Body referred, themselves provided an interpretation of the text and context of the relevant provisions. Specifically, in *US – Softwood Lumber V*, the Appellate Body's interpretation of Article 2.1 and Article VI:1 is based on the text of these two provisions, as well as the context in Articles 2.4.2, 6.10 and 9.2.[513] In Japan's view, it is, therefore, simply incorrect to suggest that the Appellate Body's interpretation does not stem from treaty text.[514]

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[510] Appellate Body Report, *US – Zeroing (EC)*, para. 126.

[511] Appellate Body Report, *US – Zeroing (EC)*, paras. 263(a)(i) (periodic reviews) and (b) (original investigations), and footnote 220 para. 129 (sunset reviews).

[512] Appellate Body Report, *US – Zeroing (EC)*, para. 127 (quoting *US – Softwood Lumber V*, para. 99). See also para. 132.

[513] See Japan Answers to the Second Set of Questions by the Panel of 21 September 2005, paras. 60 to 73.

[514] Japan Response to US Comments, para. 8.

6.15 In addition, according to Japan, the United States' critique of the Appellate Body's reliance on Article 6.10 of the *AD Agreement* subtly alters the text of Article 6.10. Article 6.10 requires the determination of "an individual margin of dumping for each known exporter or producer concerned of the product". The word "individual" qualifies the word "margin", and not "exporter or producer" as the United States suggests. The provision, therefore, envisages that a single margin is determined for a single producer/exporter, for the product. Japan argues that this provides contextual confirmation of the Appellate Body's reading of Articles 2.1 and 9.3. Moreover, in Japan's view, the text of Article 6.10 cannot support the view that "dumping" and the "margin of dumping" can be determined for *each and every* transaction or model. Otherwise, if every transaction- or model-specific comparison constituted a "margin of dumping", there would be multiple margins – one for each transaction or model – and not "an individual margin of dumping" for "the product".[515]

6.16 In response to the United States arguments that the Appellate Body reasoning in *US – Softwood Lumber V* was limited to comparisons relating to "multiple averaging", Japan argues that it was the United States that failed to appreciate the importance in the repeated references by the Appellate Body to "multiple comparisons". The Appellate Body noted that, under a W-to-W comparison, the authorities may conduct "multiple averaging" rather than a single weighted average normal value and export price. When the authorities choose to engage in multiple averaging, they make multiple comparisons, one for each averaging group. The dispute in *US – Softwood Lumber V* concerned the treatment of the results of these multiple comparisons. Based on Article 2.1 and VI:1, the Appellate Body ruled that in determining the margin of dumping for the "product", negative multiple comparison results cannot be disregarded, but must be aggregated together with the positive results.[516] By applying the same interpretation of these provisions in *US – Zeroing (EC)*, the Appellate Body engaged in consistent interpretation of the *AD Agreement* and the GATT 1994, and not in "distortion" of the previous reports.[517] Indeed, contrary to the United States' argument, if the Appellate Body had upheld the panel report, it would have involved a departure from its rulings in *US – Softwood Lumber V* and *EC – Bed Linen*.

(c) Withdrawal of claims relating to zeroing procedures in the context of Weighted Average–to–Transaction comparisons[518]

6.17 Japan's claims in respect of the USDOC simple zeroing procedures initially covered both T-to-T and W-to-T comparison methodologies. However, in Japan's comments to the Appellate Body Report in *US – Zeroing (EC)*, Japan withdrew its claims against simple zeroing procedures in the context of the application of the W-to-T comparison methodology. In doing so, Japan noted that although the Appellate Body's findings did not expressly address the permissibility of zeroing in the exceptional circumstances set forth in the second sentence of Article 2.4.2 of the *AD Agreement*, Japan considered that zeroing is prohibited in the situation contemplated in the second sentence of Article 2.4.2. Nonetheless, given the fact that the USDOC Regulations addressing pricing patterns have never been applied, and also given the uncertainties regarding the United States' rules for dumping comparisons where there is a relevant pricing pattern, Japan considered it appropriate to withdraw its complaint regarding the use of zeroing under the second sentence of Article 2.4.2.

6.18 Japan disagrees with the argument of the United States that the withdrawal of this claim supports its view that the zeroing procedures are not an "as such" measure, particularly in T-to-T comparisons in original investigations. Japan notes that the uncertainty surrounding the United States' "targeted dumping" methodology relates to aspects of the comparison method *other* than the use of zeroing. Japan maintains that the zeroing procedures apply to W-to-T comparisons under the second

[515] Japan Response to US Comments, para. 9.
[516] Appellate Body Report, *US – Softwood Lumber V*, paras. 97, 98 and 99.
[517] US Comments, para. 48.
[518] Japan Comments, paras. 31-32; Japan Opening Statement at the Third Meeting with the Panel, para. 9.

sentence of Article 2.4.2 - the United States' oft-stated and vigorous defence of its right to zero under this sentence suggests that Japan might be correct. Japan also clarifies, for the record, that it did not and does not make any claims regarding the "targeted dumping" regulations of USDOC.

6.19 Japan also explains that the USDOC standard zeroing procedures constitute a single rule of general and prospective application, that mandates the systematic disregard of negative intermediate comparison results determined on a model- or transaction-specific basis in calculating dumping margins under *any* method of comparison and in *any* type of anti-dumping proceeding.[519] Thus referring to the Panel's interim finding that the zeroing procedures do, indeed, constitute "a single rule or norm" maintained for use by the United States[520], Japan clarifies that there is a *single measure* that applies to W-to-W comparisons, T-to-T comparisons and W-to-T comparisons, used in any type of anti-dumping proceeding, rather than a separate zeroing measure applicable to each of these comparison methods, as the United States suggested. With respect to the *single zeroing measure*, Japan makes a *series of claims*, that necessarily differentiate between the different treaty provisions that apply to the different types of comparison and to the different types of anti-dumping proceeding.

6.20 Japan further argues that the fact that the zeroing procedures have been applied only once under a T-to-T comparison does not support the view that the procedures do not constitute a general rule; nor does this fact suggest that the zeroing procedures do not apply to T-to-T comparisons. Indeed, to the contrary, the application of zeroing in a T-to-T comparison in implementing the DSB's recommendations and rulings in *US – Softwood Lumber V* confirms the generality of the United States' zeroing rule. In any event, an "as such" challenge can be made even if a rule has never been applied.[521]

(d) the zeroing procedures maintained by the United States for use in periodic reviews are as such inconsistent with Articles 2.1 and 9.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994; the eleven periodic reviews challenged by Japan are inconsistent with the same provisions[522]

6.21 Japan argues that the methodology applied by the United States in the periodic reviews found to be WTO-inconsistent in *US – Zeroing (EC)* is exactly the same as the simple zeroing procedures that Japan challenges "as such" and "as applied" in the context of periodic reviews in this dispute. The reasons that led the Appellate Body to conclude that the periodic reviews were WTO-inconsistent should, therefore, lead this Panel to the same conclusion with respect to Japan's "as such" and "as applied" challenges in periodic reviews.

6.22 In *US – Zeroing (EC)*, the panel did not examine whether the United States maintains an as such "zeroing" measure for purposes of periodic reviews and instead ruled that, in any event, zeroing is permissible in periodic reviews.[523] The EC appealed this finding. The Appellate Body ruled that, in light of its findings that certain periodic reviews were WTO-inconsistent because of the application of the zeroing methodology,

> "… *we declare moot, and of no legal effect*, the Panel's finding, in paragraph 8.1(g) of the Panel Report, that the zeroing methodology used by the United States in administrative reviews is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1,

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[519] See further Japan Rebuttal Submission of 12 August 2005, Section II.
[520] Interim Panel Report, para. 6.48. See also footnotes 546 and 557.
[521] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 87.
[522] Japan Comments, paras. 33-40; Japan Response to US Comments, paras. 11-16.
[523] Panel Report, *US – Zeroing (EC)*, paras. 7.91 to 7.106.

> 11.2, 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*."[524] *(emphasis added)*

6.23 Thus, according to Japan, the Appellate Body did *not* uphold the Panel's "as such" findings and, instead, declared them null. However, because the panel had made no factual findings that demonstrated the existence of an "as such" zeroing measure in periodic reviews, the Appellate Body was unable to complete the analysis of the EC's "as such" claims on this issue.[525]

6.24 Japan contends that the Panel's interim findings avoid this unsatisfactory failure to resolve the dispute because the Panel found that the zeroing procedures constitute a general rule, regardless of the method of comparison used and regardless of the type of proceeding in which margins are calculated.[526] The Panel held in its interim findings 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."[527]

6.25 Japan considers that the Panel's findings are correct in view of the totality of the evidence of record. As a result, there is a *single measure* that applies to W-to-W comparisons, T-to-T comparisons and W-to-T comparisons, used in any type of anti-dumping proceeding.

6.26 In light of the Appellate Body's findings in *US – Zeroing (EC)*, Japan submits that the Panel should find that the simple zeroing procedures in periodic reviews are "as such" inconsistent with Articles 2.1 and 9.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994. The reasoning that led the Appellate Body to conclude that the *application* of zeroing to periodic reviews leads inescapably to the conclusion that the zeroing procedure itself is "as such" WTO-inconsistent in periodic reviews.

6.27 As regards the eleven periodic review determinations that it has challenged, Japan notes that it has submitted evidence showing that, absent the systematic disregard of negative comparison results, the margin of dumping and, hence, the level of definitive duties in each periodic review would have been lower.[528] Pursuant to *US – Zeroing (EC)*, the Panel should find that these measures are inconsistent with Article 9.3 and Article VI:2. Furthermore, because the violations of these provisions stem from the definition of "dumping" in Article 2.1 and Article VI:1, the Panel should also find a violation of these provisions.

6.28 Japan rejects the United States contention that the Appellate Body failed to "to address and consider important contextual arguments" in relation to this issue, specifically the arguments relating to: targeted dumping; importer-specific assessment; prospective normal value ("PNV") systems; and the construction of normal value.[529] The fact that the Appellate Body did not *address* all of the contextual arguments in the manner that the United States wishes, does not, according to Japan, mean that the arguments were not fully *considered* by the Appellate Body. In Section II of the report, the Appellate Body summarized the "important contextual arguments" that the parties elected to make in writing.[530] There are no grounds for suggesting that the Appellate Body failed to consider arguments it summarized in its report. It is also not tenable to suggest that the Appellate Body heard oral argument

[524] Appellate Body Report, *US – Zeroing (EC)*, para. 227.
[525] Appellate Body Report, *US – Zeroing (EC)*, para. 228.
[526] Interim Panel Report, para. 6.48 (Final Report, para. 7.53)
[527] Interim Panel Report, footnotes 540, 546 and 557 (Final Report, footnotes 688,694 and 708).
[528] Japan First Written Submission, paras. 178 ff.
[529] US Comments, paras. 25, 26, 29, 34, 38, 39 and 48.
[530] See, e.g., Appellate Body Report, *US – Zeroing (EC)*, paras. 38, 44, 45, 71 and 77.

on Article 2.2 but did not consider that argument. In Japan's view, the Appellate Body's findings expressly respond to contextual arguments that were allegedly ignored.[531]

6.29 Specifically, Japan is of the view that the Appellate Body expressly rejected the United States' argument that margins can be determined on an import- or importer-specific basis in periodic reviews.[532] Nonetheless, it ruled that Members are entitled to assess liability for anti-dumping duties on an import- or importer-specific basis.[533] In keeping with this finding, the Appellate Body held that Members are entitled to assess liability for duties on the basis of a PNV.[534] In making these findings, the Appellate Body effectively distinguished between the rules governing the determination of margins and the rules governing the imposition of duties, as it has done before.[535] Therefore, the amount of duty imposed on a particular import does not necessarily equal the margin of dumping. In short, as the Appellate Body has held, the rules on the imposition of duties in Article 9 have *no* bearing on the rules on determination of margins in Article 2.[536] Therefore, the United States' arguments on import- and importer-specific assessment, and PNV systems, are red-herrings.

6.30 However, Japan argues, because of the *chapeau* of Article 9.3, the rules on the determination of margins *do* have a bearing on the imposition of duties. As the Appellate Body held, the total amount of anti-dumping duties cannot exceed the margin of dumping established for all transactions covered by the review period.[537] The *chapeau* of Article 9.3 applies equally to reviews conducted under the prospective and retrospective duty imposition systems. Thus, under both systems, the maximum level of protection afforded by anti-dumping duties is equal to the margin of dumping for the product, for the review period. There is no "disparity" between the two systems of duty imposition.[538]

6.31 With respect to the "contextual arguments" relating to targeted dumping, Japan considers that there was no need for the Appellate Body to expressly address that issue. The second sentence sets forth an exceptional method of comparison that applies solely in the exceptional situation in which the two conditions set forth in that provision are met. Absent fulfilment of these two conditions, the second sentence of Article 2.4.2 is simply irrelevant: an exception cannot justify the maintenance or application of a measure in circumstances where the exception does not apply. This is the conclusion reached by the Appellate Body in *EC – Bed Linen*, in which the EC attempted to justify zeroing in a W-to-W comparison by reference to the second sentence of Article 2.4.2. The Appellate Body dismissed this argument, observing that the second sentence applies solely in limited circumstances that were not applicable in that dispute.[539] In this dispute, the zeroing procedures apply without regard to the existence of the two conditions in the second sentence of Article 2.4.2. Indeed, to Japan's knowledge, the United States has *never* found that these two conditions have been satisfied. In these circumstances, the exceptional comparison methodology under the second sentence of Article 2.4.2 cannot justify the zeroing procedures.

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[531] Japan Response to US Comments, paras. 11-16.
[532] Appellate Body Report, *US – Zeroing (EC)*, para. 128.
[533] Appellate Body Report, *US – Zeroing (EC)*, para. 131.
[534] Appellate Body Report, *US – Zeroing (EC)*, footnote 234.
[535] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.
[536] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.
[537] Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[538] US Comments, para. 33.
[539] Appellate Body Report, *EC – Bed Linen*, para. 62.

(e) the zeroing procedures maintained by the United States for use in new shipper reviews are as such inconsistent with Articles 2.1, 9.3 and 9.5 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994[540]

6.32 According to Japan, the USDOC determines margins of dumping in the same way in new shipper and periodic reviews. For purposes of both proceedings, the USDOC maintains simple zeroing procedures that exclude negative comparison results, thereby preventing the determination of a margin of dumping for the product as a whole.[541] Thus, Japan argues that in the case of new shipper reviews, the legal issue that the Panel in the present dispute must address is whether the term "individual margins of dumping" in Article 9.5 refers to a margin for the "product" as a whole. Following *US – Zeroing (EC)*, Japan believes that it must.

6.33 The Appellate Body in *US – Zeroing (EC)* stated that the product-wide definition of "dumping" and "margin of dumping" applies throughout the *AD Agreement*. It also held that this definition applied to periodic and sunset reviews.[542] In the view of Japan, there is no alternative definition of the term "margin of dumping" suggested in Article 9.5 of the *AD Agreement* and no basis for considering that the *Agreement*-wide definition in Article 2.1 does not apply to Article 9.5.

6.34 Japan argues that the text of Article 9.5 is similar to the text of Article 6.10 because both provisions refer to "individual" margins of dumping established for an exporter or foreign producer. Thus, for each exporter or foreign producer, the *Agreement* expressly contemplates the determination of a *single* margin of dumping *for the product*. In Japan's view, this language underscores that a single, overall dumping determination is made for the product as a whole, even if based on multiple comparisons undertaken at the sub-product level. In contrast, Japan argues that this language cannot support the view that "dumping" and the "margin of dumping" can be determined for *each and every* transaction or model. Otherwise, there would be multiple margins for each exporter or foreign producer – one for each transaction or model – and not "an individual margin of dumping" for "the product".

6.35 In these circumstances, Japan submits that Article 9.5 requires that investigating authorities establish margins of dumping for the "product" as a whole. Thus, if the investigating authorities elect to determine a margin on the basis of multiple comparisons, they must aggregate the results of all comparisons. Under the simple zeroing procedures, the USDOC systematically disregards all negative results of multiple comparisons. In consequence, the simple zeroing procedures mandate that USDOC fails to determine "individual margins of dumping" for exporters or foreign producers for the "product" as a whole. Japan contends that this violates Articles 2.1 and 9.5 of the *AD Agreement* and Article VI:1 of the GATT. Furthermore, by maintaining the simple zeroing procedures in new shipper reviews, the United States also acts inconsistently with Article 9.3 and Article VI:2 of the GATT, because the systematic disregard of negative comparison results necessarily results in an amount of anti-dumping duties that exceeds the margin of dumping for the new shipper for the "product" as a whole.

(f) the two sunset reviews challenged by Japan are inconsistent with Articles 2.1 and 11.3 of the *AD Agreement* and Article VI:1 of the GATT 1994[543]

6.36 Japan challenges two sunset reviews on the grounds that the USDOC relied on margins of dumping determined in original investigations and periodic reviews using the zeroing procedures.[544] Because the margins on which the USDOC relied were "legally flawed" through the use of zeroing, they cannot constitute a proper foundation for a determination in a sunset review. As a result, the

[540] Japan Comments, paras. 41-44.
[541] Japan First Written Submission, paras. 16, 133-134.
[542] Appellate Body Report, *US – Zeroing (EC)*, paras. 127 and footnote 220.
[543] Japan Comments, paras. 45-50.
[544] See Exhibits JPN-22 and JPN-23.

challenged sunset reviews are tainted by the same legal flaws that infect the margins of dumping from earlier proceedings on which the USDOC relied.

6.37 With respect to these two sunset reviews, the Panel found that:

> "[T]here is sufficient evidence before us to conclude that in making its determinations that revocation of anti-dumping order would result in continuation or recurrence of dumping, USDOC did rely on margins of dumping established in prior proceedings."[545]

6.38 The Panel continued:

> "We also note, however, that since in these two sunset reviews USDOC relied upon the continued existence of margins of dumping after the issuance of the anti-dumping order as support for its determination of likelihood of continuation or recurrence of dumping, the margins of dumping relied upon by USDOC were margins calculated during periodic reviews, not margins calculated in the original investigations."[546]

6.39 However, the Panel rejected Japan's claims in its interim findings for the following reason:

> "Since we have found that the *AD Agreement* does not proscribe simple zeroing in periodic reviews within the meaning of Article 9.3, we cannot find that by relying on margins of dumping calculated in periodic reviews on the basis of simple zeroing USDOC acted inconsistently with the *AD Agreement*."[547]

6.40 Thus, the sole reason for rejecting Japan's "as applied" claims was a perception that zeroing is permissible in periodic reviews. The Appellate Body has now held that zeroing "is not allowed" in periodic reviews under Articles 2.1 and 9.3 of the *AD Agreement*, and Article VI:1 of the GATT 1994.[548] Thus, following *US – Zeroing (EC)*, the Panel should find that the two sunset reviews challenged by Japan violate Article 11.3 of the *AD Agreement* because the USDOC improperly relied on margins of dumping calculated in periodic reviews using zeroing. Because the violations of Article 11.3 stems from Article 2.1 and Article VI:1, Japan submits the two challenged sunset reviews also violate these provisions.

2. United States

(a) Whether the Panel should follow the Appellate Body's findings in *US – Zeroing (EC)* [549]

6.41 According to the United States, adopted prior panel and Appellate Body reports create legitimate expectations among WTO Members[550], and it is for that reason that the reasoning and findings in such reports should be taken into account. Although the Appellate Body found in *US – Zeroing (EC)* that the USDOC assessment of anti-dumping duties as applied in certain administrative proceedings challenged by the European Communities was inconsistent with Article 9.3

[545] Interim Panel Report, para. 6.233 (Final Report, para. 7.255).
[546] Interim Panel Report, para. 6.235. (Final Report, para. 7.256).
[547] Interim Panel Report, para. 6.235 (Final Report, para. 7.256).
[548] Appellate Body Report, *US – Zeroing (EC),* para. 127.
[549] US Comments on the Appellate Body Report in *US – Zeroing (EC)* ("US Comments"), paras. 4-9; US Opening Statement at the Third Meeting of the Panel, para. 3.
[550] Appellate Body Report, *Japan – Alcohoic Beverages II*, p. 14.

of the *AD Agreement* and Article VI:2 of the GATT 1994, this Panel is not bound to follow the reasoning of the Appellate Body in that report.[551]

6.42 The United States is of the view that the reasoning of the Appellate Body in *US – Zeroing (EC)* is simply not persuasive. The United States asserts that the Appellate Body findings in *US – Zeroing (EC)* were not based on a reasoned analysis of the text of the applicable agreements, but, rather primarily, on prior Appellate Body reports – and a misapprehension of those reports, at that. According to the United States, the Appellate Body grafted inapposite findings from one set of factual circumstances onto another, and failed to consider contextual arguments demonstrating that such an approach would create severe logical problems of interpretation not only with respect to the *AD Agreement*, but also with respect to the GATT 1994. The United States asserts that, by contrast, in its Interim Report, the Panel in this dispute provided a detailed, reasoned analysis of the text of Article VI of the GATT 1994 and the *AD Agreement*, as have two other panels addressing the USDOCs denial of offsets in various phases of the antidumping proceeding. These reports, drafted by panellists with substantial experience in the administration of antidumping laws, all come to the same conclusion – that the *AD Agreement* does not require offsets in assessment reviews. Thus, in the view of the United States, the Appellate Body in *US – Zeroing (EC)* simply erred and the Panel in this dispute should not adopt either its reasoning or its findings.[552]

(b) The Appellate Body's Conclusion that Authorities Must Provide Offsets Whenever They Conduct Multiple Comparisons is erroneous[553]

6.43 The United States argues that the Appellate Body Report in *US – Zeroing (EC)* fails to address fully the terms of the covered agreements, in light of their context, and in light of the object and purpose of the agreements. Instead, according to the United States, the Appellate Body interprets its own report language, removed from the context of the agreement's provisions to which it related, in order to achieve the result of requiring offsets in all contexts. The United States asserts that the Appellate Body in *US – Zeroing (EC)* based its analysis less on the text of the *AD Agreement* than on its prior reports, particularly *US – Softwood Lumber V*. The United States contends that one example of this is the Appellate Body's heavy reliance on its interpretation of the term "product as a whole", which according to the United States, is a term that is nowhere found in the *AD Agreement* or Article VI of the GATT 1994.

6.44 The United States submits that in *US – Zeroing (EC)*, the Appellate Body divorced the phrase "product as a whole" (a phrase which was the creation of the Appellate Body) from its original context – use of average-to-average comparisons in an investigation. In so doing, the Appellate Body also divorced the creation of that concept from its limited applicability in the context of Article 2.4.2. The Appellate Body simply decided that the applicability of the concept "product as a whole" is not limited to the interpretation of obligations relating to multiple averaging. It did so by asserting that in *US - Softwood Lumber V* the requirement to calculate margins of dumping for the "product as a whole" meant that offsets must be provided not only when aggregating intermediate values in the context of *multiple averaging*, but when undertaking "*multiple comparisons*" more generally.[554] In the view of the

[551] Appellate Body Report, *US – Zeroing (EC)*, para. 263(a)(i).

[552] US Comments on the Appellate Body Report in *US – Zeroing (EC)*, paras. 4-9; US Opening Statement at the Third Substantive Meeting of the Panel with the Parties, paras. 4-16, 21.

[553] US Comments, paras. 10-18; US Comments on Japan's Comments on the Appellate Body Report in *US – Zeroing (EC)*, paras. 1-10.

[554] The Appellate Body in *US – Zeroing (EC)* states that the "Appellate Body specified that, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, 'it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole." Para. 126, citing the Appellate Body Report in *US – Softwood Lumber V*, para. 97. To the contrary, however, in

United States, that statement is simply wrong[555], because the reasoning in *US – Softwood Lumber V* was expressly limited to comparisons in connection with multiple averaging, not all so-called "multiple comparisons" more generally.

6.45 The United States argues that Appellate Body's assumption that the analysis in *US – Softwood Lumber V* is applicable to all instances when there are multiple comparisons, rather than just multiple averaging, is particularly egregious because although the Appellate Body has suggested that Members have a choice as to whether to use "multiple comparisons" in calculating the margin of dumping, the inevitable consequence of the Appellate Body's reasoning would be that Members *must,* in fact, aggregate transactions in order to calculate a margin of dumping. Thus, United States argues that not only is the Appellate Body's assertion that "an investigating authority *may choose* to undertake multiple comparisons"[556] simply wrong, but it means that the Appellate Body, based on a phrase it created and that is not in the text of the *AD Agreement*, has prohibited zeroing in every circumstance in which a Member calculates a margin of dumping.

6.46 The United States recalls that the Panel in this dispute expressly recognized that the reasoning in *US – Softwood Lumber V* is limited to multiple averaging in the context of the first sentence of Article 2.4.2 of the *AD Agreement* and is therefore simply inapplicable in the context of assessment proceedings. Furthermore, the United States argues that in its Interim Report, the Panel correctly found that the expression 'product as a whole' does not appear in Article 2.1 of the *AD Agreement* and Article VI:1 and VI:2 of the GATT 1994, and that these provisions contain no language that explicitly addresses the issue of whether dumping can only be found to exist at an aggregate level.[557] Rather, according to the United States, the Panel noted that, pursuant to the text of Article VI, dumping is essentially a price difference.[558] Pursuant to Article VI:1 and VI:2 of the GATT 1994, a margin of dumping exists when the price of a product is less than its normal value. The Panel found that this definition of the margin of dumping as a price difference could "easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."[559] In this light, the United States submits that the Panel's analysis is based firmly on the text of the *AD Agreement* and the GATT 1994 and should therefore be confirmed.[560]

6.47 The United States also notes that if the Appellate Body's analysis were correct, and zeroing is inconsistent with Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994, then it begs the question: Why did the Appellate Body's analysis in *EC - Bed Linen* and *US - Softwood Lumber V* hinge

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paragraph 97 of that report, the Appellate Body expressly referenced "multiple averaging" and "multiple comparisons *at the sub-group level*." *(emphasis added).*

[555] The Appellate Body now considers zeroing to be prohibited whenever a Member engages in "multiple comparisons" but declined to address whether zeroing is also prohibited in transaction-to-transaction comparisons in investigations. Notwithstanding the logical flaw in that view, to the extent the Appellate Body may consider zeroing to be prohibited only where "multiple comparisons" occur, it is worth recalling that the US has demonstrated that its assessment system results in the same assessment of antidumping duties as a transaction-by-transaction, prospective normal value system, but only if the US. system is permitted to "zero." See US Comments on Japan Answers to 2nd Panel Questions, para. 36. See Interim Report, n. 624. Otherwise, to equalize the two systems, zeroing would have to also be prohibited in transaction-by-transaction assessment systems, which is akin to requiring authorities to compensate an individual for individual importations for which normal value is less than the export price.

[556] Appellate Body Report, *US – Zeroing (EC)*, para. 126 *(emphasis added).*

[557] Interim Panel Report, para. 6.98 (Final Report, para. 7.104).

[558] Interim Panel Report, para. 6.99 (Final Report, para. 7.106)

[559] Interim Panel Report, para. 6.99 *(footnote omitted)* (Final Report, para. 7.105).

[560] This Panel's finding concerning the definition of the "margin of dumping" as a price difference in Articles VI:1 and VI:2 is echoed by a recently circulated panel report concerning Canada's recourse to Article 21.5 of the DSU in the softwood lumber dispute, *US – Softwood Lumber V (Article 21.5)*, para. 5.27.

on Article 2.4.2, and specifically the phrases "margins of dumping" and "all comparable export transactions"? More perplexing still, according to the United States, is the fact that in *Softwood Lumber V*, the Appellate Body declined to consider contextual arguments about the other two comparison methodologies because it would first have to determine whether offsets were required in those comparison methodologies. Similarly, in the *US – Zeroing(EC)* report, the Appellate Body contends that its analysis therein does not necessarily mean that offsets are required in the other two methodologies under Article 2.4.2. Thus, the United States argues that the Appellate Body's careful restraint with respect to the other comparison methodologies in Article 2.4.2 is difficult to reconcile with the broader assertions in *US – Zeroing(EC)* regarding Article 2.1 and Article VI of the GATT 1994.

6.48 In response to Japan's comments on the Appellate Body's findings in *US – Zeroing (EC)*, the United States argues that Japan continues to cite to the Appellate Body Report, without discussing the actual text of the GATT 1994 or the *AD Agreement*. According to the United States, Japan fails to demonstrate how the Appellate Body's reasoning is based on a textual analysis of the agreements and Japan fails to engage in any textual analysis itself. Furthermore, the United States contends that Japan's comments not only show that it misunderstands the Appellate Body Report, but also that zeroing is a permissible interpretation of the *AD Agreement*.

6.49 The United States asserts that Japan and the Appellate Body (and the EC) cannot agree as to why "zeroing" is allegedly prohibited outside of the context of original investigations using the average-to-average comparison methodology, and that this discrepancy exposes the basic fact that those seeking to find a prohibition on zeroing in all contexts have a very difficult time identifying precisely where in the *AD Agreement* that prohibition is found. The United States argues that the logical conclusion of all of the arguments regarding zeroing – including the fact that the complaining parties and the Appellate Body cannot agree as to *how* zeroing is prohibited[561] – indicate that the *AD Agreement* does not prohibit zeroing, and these arguments are simply results-driven. In the United States view, the plain fact is that the *AD Agreement* at the very least permits the interpretation of the United States (and of Members such as the EC, at least in the past) and, as a result, the use of zeroing cannot be found inconsistent with United States obligations.

(c) The Appellate Body's Conclusion that the Margin of Dumping Cannot be Transaction-Specific is erroneous[562]

6.50 The United States submits that the Appellate Body's conclusion that the margin of dumping cannot be transaction-specific because Article 6.10 of the *AD Agreement* requires the margin of dumping to be calculated for each exporter is without basis. According to the United States, the Appellate Body's analysis proceeds on the false premise that a margin of dumping cannot both be exporter-specific *and* transaction-specific. The United States submits that Article 6.10 simply provides that a Member must calculate a margin for each individual exporter or producer – as opposed to one margin for all exporters or producers (or, as it was described in *Mexico – Anti-Dumping Measures on Rice,* "company-specific" versus "country-wide").[563] It says nothing about whether the margin must be based on more than one transaction, and it does not prohibit the calculation of a margin of dumping on a transaction-specific basis. The United States also argues that the Spanish text of Article 6.10 supports its interpretation.

6.51 The United States is of the view that the result of the Appellate Body's assertion that the margin cannot be calculated on a transaction-specific basis is that an investigating authority *must* calculate the

[561] According to the US, Japan does not even agree with itself, as evidenced by its sudden about-face on zeroing in the targeted dumping context in Article 2.4.2.

[562] US Comments, paras. 19-24; US Opening Statement at the Third Meeting of the Panel, paras. 17-20.

[563] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 208, 217.

margin of dumping based on all of the exporter's transactions. However, the United States contends that it is difficult to see how this can be done without requiring the aggregation of multiple comparisons. In this sense, according to the United States, the Appellate Body's interpretation of Article 6.10 as precluding transaction-specific margins of dumping renders hollow its suggestion that authorities undertake multiple comparisons as a matter of choice.[564] Furthermore, the Appellate Body's approach cannot be reconciled with its own assertion that it makes no finding with respect to the other two methodologies under Article 2.4.2.[565] In this regard, the United States notes that the Appellate Body states that Article 6.10 applies in investigations. However, the transaction-to-transaction and targeted dumping methodologies under Article 2.4.2 will, unless there is only one export transaction, always result in multiple comparisons. The United States argues that if, as the Appellate Body contends, Article 6.10 requires not simply the calculation of a margin of dumping for an individual exporter but rather a margin of dumping for an individual exporter based on all of that exporter's transactions, then it is impossible for a Member to calculate a margin of dumping without aggregating multiple comparisons.

6.52 The United States submits that the Appellate Body's reasoning has other perverse consequences for Article 2.4.2. For example, it renders the phrase "all comparable export transactions," as the Appellate Body has understood it, redundant. The United States recalls that the Appellate Body has argued that Article 6.10 requires not just margins of dumping for individual exporters, but margins of dumping based on all of the exporter's transactions. According to the United States, if that is true, then it calls into question the meaning the Appellate Body ascribed to the phrase "all comparable export transactions" in *US – Softwood Lumber V*. If Article 6.10 requires consideration of all export transactions, and Article 2.1 requires offsets when making multiple comparisons of those transactions, then it is unclear why the Appellate Body in *US – Softwood Lumber V* considered the phrase "all comparable export transactions," in conjunction with the phrase "margins of dumping," to require the very same outcome.

6.53 The more logical interpretation of the *AD Agreement*, according to the United States, is the one the Panel followed in this dispute, namely: that the requirement to provide offsets articulated in *US – Softwood Lumber V* is limited to the weighted-average to weighted-average methodology in investigations based on the phrases "margins of dumping" and "all comparable export transactions" in the first sentence of Article 2.4.2; that margins of dumping elsewhere in the Agreement may be calculated on a transaction-specific basis, consistent with Article VI of the GATT 1994 and the common understanding of that Article as expressed by the Group of Experts in 1960; and that Members are not obliged to give refunds on non-dumped transactions.

(d) The Appellate Body Failed to Consider Key Contextual Arguments[566]

6.54 The United States contends that the Appellate Body failed to address contextual arguments demonstrating that the terms "dumping" and "margins of dumping" cannot invariably refer to the product as a whole. Specifically, the United States submits that the Appellate Body failed to address the

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[564] Appellate Body Report in *US – Zeroing (EC)*, para. 127. Further, even on its own terms, the Appellate Body's statement that Members "choose" to engage in "multiple comparisons" is simply incorrect. It will be difficult for authorities to avoid having to undertake multiple comparisons, whether in the form of multiple averaging of sub-groups or transaction-specific calculations. Here again, the Appellate Body is removing from its original context a statement it made in an earlier report and applying that statement more broadly in a manner that makes no sense. Specifically, the Appellate Body's discussion of "choosing" multiple comparisons in the *Lumber* report was related to the choice of multiple averaging i.e. "multiple comparisons *at the subgroup level.*" - paras. 97-98 *(emphasis added)*. However, in the *US – Zeroing (EC)* report, the Appellate Body characterizes its statement regarding "choosing" as applying to multiple comparisons, and not multiple averaging.

[565] Appellate Body Report, *US – Zeroing (EC),* para. 203.

[566] US Comments, paras. 25-39.

nullification of the targeted dumping provision of Article 2.4.2, the argument that margins of dumping may be calculated on a transaction-specific basis, the implications for prospective normal value systems, and the consequences of invariably defining "dumping" and "margins of dumping" in reference to the product as a whole for the third country and constructed normal value provisions of Article 2.2.

6.55 The United States argues that a general obligation to establish margins of dumping for the product as a whole, regardless of the comparison methodology used and regardless of the phase of the antidumping proceeding, would nullify the targeted dumping provision of the second sentence of Article 2.4.2. Whereas the Panel in this dispute[567], and the panels in two other disputes[568], recognized this consequence, and that such an interpretation is inconsistent with the principle of effective treaty interpretation, the Appellate Body in *US – Zeroing (EC)* failed to address the text of the agreements and the logical analysis leading to this conclusion. The Appellate Body thereby ignored customary rules of treaty interpretation.

6.56 In addition, the United States contends that the Appellate Body's finding that the margins of dumping to which Article 9.3 refers must be established on an exporter/producer-specific basis, aggregating all of the exporter's transactions, lacks persuasive reasoning. In particular, the United States argues that the Appellate Body failed to identify an applicable textual basis for its conclusion. Moreover, the Appellate Body failed to address the significant change in duty assessment obligations that its finding would create. Thus, the United States argues that the Appellate Body's ruling cannot serve as a basis to alter the Panel's finding in this dispute that nowhere in the text of Article 9 is there any support for the conclusion that an exporter-oriented procedure, based on aggregated export transactions, is required in a prospective duty assessment system.

6.57 The United States also argues that the Appellate Body's finding cannot be reconciled with prospective normal value systems. In this regard, the United States contends that the implications of the Appellate Body's reasoning extend beyond what appears to have been contemplated. The Appellate Body asserts that its analysis does not mean that Members are prevented from using a prospective normal value system to calculate liability for payment.[569] However, prospective normal value systems, to the extent that they calculate a margin of dumping at all after the imposition of the order, do so on a transaction-by-transaction basis. According to the United States, if the Appellate Body is correct, and margins of dumping must be calculated on the basis of all of the exporter's transactions, then prospective normal value systems have been based on the erroneous premise that updating the normal value is an appropriate substitute for subsequent refund proceedings. Without such a proceeding, there would be no way to calculate the margin of dumping on the basis of all of the exporter's transactions. But *with* such a proceeding, the prospective normal value system would become indistinguishable from the US retrospective assessment system. The only alternative is that prospective normal value systems are somehow exempt from the obligation to calculate a margin of dumping for "all" of the exporter's transactions. But if that is true, then prospective normal value systems are effectively permitted to "zero" – the result of which would be that prospective normal value systems are *permitted* to assess greater duties than other assessment systems are permitted to assess.[570] Nothing in the text of the *AD Agreement* suggests that the Members intended to create such a disparity.

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[567] Interim Panel Report, paras. 6.101, 6.110, 6.124, 6.134, 6.137 (Final Report, paras. 7.108, 7.159, 7.127,7.137 and 7.140).

[568] *US – Softwood Lumber V (Article 21.5)*, para. 5.52; *US – Zeroing (EC)*, para. 7.266.

[569] Appellate Body Report, *US – Zeroing (EC)*, para. 234.

[570] The comparison of transaction-by-transaction assessment and the US assessment system in the US comments on Japan Answers to the Second Set of Panel Questions demonstrates that if zeroing is prohibited with respect to the US system, then greater duties are assessed on a transaction-by-transaction basis. This is simply because in a transaction-by-transaction basis, no refund is given for non-dumped transactions, which is, of course, another way of setting the comparison at zero. It is unclear why setting the comparison at zero would be

6.58 Finally, the United States asserts that the Appellate Body's finding is inconsistent with the manner in which Members use third country transactions and calculate constructed normal value as alternatives to home market sales as the basis for normal value in accordance with Article 2.2 of the *AD Agreement*. In particular, recalling the Article 21.5 panel's finding on this question in *US – Softwood Lumber V*, the United States argues that if the term "margin of dumping" as used in Article 2.2 of the *AD Agreement* referred to a margin established for the product as a whole, this would radically alter the way Members applied Article 2.2. The United States notes that it presented this argument to the Appellate Body in *US – Zeroing (EC)*, and that the Appellate Body failed to address it, or provide any reasoning to refute it.

6.59 Because the Appellate Body in *US – Zeroing (EC)* failed to address the contextual arguments demonstrating that the terms "dumping" and "margins of dumping" cannot invariably refer to the product as a whole, the United States argues that the Appellate Body's report provides no guidance, let alone compelling reasoning, for this Panel to reconsider these issues.

(e) the "as such" finding against zeroing procedures[571]

6.60 The United States recalls that the Appellate Body in *US – Zeroing (EC)* explained that dispute settlement can include not only acts applying a law, but also "'acts setting forth rules or norms that are intended to have general and prospective application.'"[572] Furthermore, according to the United States, the Appellate Body in *US – Zeroing (EC)* noted that "'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement."[573] Thus, the United States contends that the Appellate Body held that a rule or norm must be part of an act or instrument taken by a Member in order to be a measure – even if that act or instrument is unwritten, or is not transparent. According to the United States, the Appellate Body found that it is not sufficient to identify a rule or norm in the descriptive sense, that is to say, that the Member has done something "as a rule" or "normally." The Member must have done something that creates a rule or norm that is *prescriptive,* that is intended to have general and prospective application.

6.61 The United States notes that the Appellate Body in *US – Zeroing (EC)* emphasized that a panel "must not lightly assume" the existence of a measure providing a rule or norm of general application that is not in the form of a written document[574], emphasizing that "particular rigour" is required on the part of a panel to support a conclusion as to the existence of a measure.[575] The Appellate Body explained that the complaining party must meet a "high threshold" in demonstrating such a measure.[576]

6.62 Although the United States finds the standards articulated by the Appellate Body to be correct, it argues that the Appellate Body did not apply them in *US – Zeroing (EC)*. Thus, the United States submits that the Panel in this dispute should not follow the Appellate Body's model of how to apply the analytical approach it described. Nevertheless, the Panel in this dispute should apply the standards articulated by the Appellate Body; and in doing so, the United States contends that the Panel should reject Japan's "as such" claim. According to the United States, Japan identified no act or instrument of the United States, and failed to demonstrate in any way that there is any measure of the United States with general and prospective application that prescribes "zeroing." Thus, the United States requests

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permissible at the time of importation, but not during an assessment proceeding that examines past transactions on an aggregate basis.

[571] US Comment, paras. 40-47; US Comments on Japan's Comments, paras. 11-26; US Opening Statement at the Third Meeting of the Panel, paras. 25-26.

[572] Appellate Body Report, *US – Zeroing(EC)*, para. 188.

[573] *Ibid*, para. 189.

[574] *Ibid,* para. 196.

[575] *Ibid,* para. 198.

[576] *Ibid,* para. 198.

that the Panel reconsider its findings in light of the correct standard articulated in the Appellate Body report.

6.63 In response to Japan's comments on the relevance of the Appellate Body's findings in *US – Zeroing (EC)* to its "as such" claims, the United States argues that Japan’s abandonment of its "as such" claim in relation to the W-to-T comparison methodology fundamentally contradicts, and thereby undermines, its arguments in this dispute, particularly with respect to its “as such” challenge to a so-called “methodology” of “zeroing” in T-to-T calculations in investigations. The United States notes that Japan is purportedly dropping a claim against an actual measure (the USDOC targeted dumping regulation) and instead pursuing a claim against a “methodology” evidenced by its use by USDOC in exactly one instance. Thus, according to the United States, Japan admits that it lacks the evidence to establish a *prima facie* case for its as-such claim against an actual regulatory provision of a Member – an actual, undisputed measure – which has not been applied. In the view of the United States, this only reinforces the lack of a *prima facie* case for Japan’s as-such claim against a supposed T-to-T “methodology” which is not reflected in any act or instrument of the responding Member and for which the sole evidence for its existence is the fact that the United States has used a T-to-T approach once.

6.64 The United States also contends that the Panel in this dispute should dismiss Japan's "as such" claim in relation to simple zeroing in new shipper reviews because as with its other “as such” claims, Japan is seeking an as-such finding against a description, and not a measure. According to the United States, Japan never identifies any act or instrument setting forth a rule or norm of prospective application concerning zeroing in new shipper reviews; it merely says that the USDOC has done this. Moreover, Japan supports this assertion on the basis of a single example of a determination that is not even the subject of this dispute.[577] None of the determinations that Japan has challenged in this dispute was a new shipper review. Furthermore, the United States contends that Japan makes no effort to explain how there is an “as such” measure which caused the single example of zeroing in a new shipper review it cites, let alone any broader use of zeroing in new shipper reviews. Thus, the United States argues that Japan’s request for an as-such finding in new shipper reviews does not meet even the most basic requirements for a *prima facie* case, and it should be rejected.

C. COMMENTS OF THE PARTIES ON THE INTERIM REPORT

1. Comments of Japan

6.65 Japan requests that the Panel amend paragraph 6.22 of the interim report[578] to include a reference to the USDOC Anti-Dumping Manual. Since it is factually correct that Japan has referred to this Manual as additional evidence to support its position on the nature of the zeroing procedures, we have amended this paragraph as requested by Japan.

6.66 Japan requests that the Panel delete the fifth sentence of paragraph 6.41 of the interim report[579] because in Japan's view this sentence can be considered to suggest that the existence of discretion not to apply the standard zeroing line is important to the Panel's finding that the zeroing line is not a measure, which is in contradiction with the Panel's finding in paragraph 6.52 of the interim report[580] that the Assistant-Secretary's discretion to decide not to apply the zeroing procedures in a particular instance has no bearing on the normative character of the zeroing methodology. The United States disagrees with this proposed change.

[577] Japan First Submission, para. 133.
[578] Paragraph 7.22 of the Final Report.
[579] Paragraph 7.46 of the Final Report.
[580] Paragraph 7.57 of the Final Report.

6.67 The point made in paragraph 6.41 of the interim report[581] is that what Japan has termed the standard zeroing line is simply a line of computer code which can only be executed in a particular case if a decision is taken to apply it in that case. By contrast, paragraph 6.52 of the interim report[582] pertains not to the standard zeroing line but to the zeroing methodology which, as explained in paragraph 6.42 of the interim report[583], is distinct from the standard zeroing line. Since paragraphs 6.41 and 6.52 of the interim report thus address different issues, there is no inconsistency between the statement in the fifth sentence of paragraph 6.41 of the interim report and our finding in paragraph 6.52 of the interim report that the existence of discretion does not affect the character of the zeroing methodology as a rule or norm of general and prospective application. We therefore decline to make the change requested by Japan to paragraph 6.41 of the interim report.

6.68 Japan requests that the Panel amend the first sentence in paragraph 6.48 of the interim report[584] because in Japan's view this sentence uses a formulation that suggests that the concept of dumping can be applied in relation to individual transactions. Specifically, Japan proposes that "which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales" be replaced with "i.e. not allowing the negative price differences found on US sales that were priced below normal value to offset the positive price differences found on other US sales..."[585] Japan proposes the same amendment to the text of footnote 540 of the interim report.[586] The United States opposes these changes proposed by Japan.

6.69 In the first sentence of paragraph 6.48 of the interim report[587] the Panel finds that the statements referred to in the preceding paragraph provide evidence of the existence of a norm "which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales". Our characterization of this norm reflects the terminology used in the statements quoted in the preceding paragraph upon which we rely as evidence demonstrating the existence of that norm. Thus, we do not believe it would be appropriate to change this sentence as suggested by Japan. However, in order to accommodate Japan's concern, we have added a footnote to the first sentence of paragraph 6.48 of the interim report to explain the reason for our use of this terminology.

6.70 Japan proposes an amendment to paragraph 6.57 of the interim report[588] to reflect the fact that Japan's argument regarding the need for consistent treatment in terms of the product scope is not limited to the original investigation. Japan suggests that the last part of the paragraph be amended to read "and the need for consistent treatment of a product in an anti-dumping investigation and throughout the life of an anti-dumping action". The United States opposes this suggestion.

6.71 Although the United States is correct that strictly speaking the change proposed by Japan is perhaps unnecessary because this section only addresses the issue of whether zeroing is prohibited in the context of original investigations, it is also true that this proposed change is consistent with the arguments presented by Japan in these proceedings.[589] Since paragraph 6.57 of the interim report is simply intended to provide a brief summary of Japan's arguments, we have accepted the change proposed by Japan.

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[581] Paragraph 7.46 of the Final Report.

[582] Paragraph 7.57 of the Final Report.

[583] Paragraph 7.47 of the Final Report.

[584] Paragraph 7.53 of the Final Report.

[585] There is a manifest error in the suggestion of Japan regarding the first sentence of paragraph 7.48 in that, as noted by the US, "negative price differences found on US sales that were priced <u>below</u> normal value" obviously should read "negative price differences found on US sales that were priced <u>above</u> normal value".

[586] Footnote 688 of the Final Report.

[587] Paragraph 7.53 of the Final Report.

[588] Paragraph 7.62 of the Final Report.

[589] See, e.g., Japan Second Written Submission, para. 43.

6.72 Japan proposes a change to paragraph 6.60 of the interim report[590] to clarify that Japan argues that a review under Article 9.3.2 of the *AD Agreement* involves a determination of a margin of dumping for the 'product'. Japan specifically proposes that the penultimate sentence of the paragraph be changed as follows:

> "In addition, even in a prospective normal value system final liability for payment of anti-dumping duties, must, if requested, be determined in a review under Article 9.3.2 that involves a determination of the margin of dumping for the product, for the review period."

We note that the penultimate sentence of paragraph 6.60 of the interim report is based on paragraph 32 of the oral statement of Japan at the second meeting of the Panel and that the change proposed by Japan is consistent with that paragraph except for the addition of the words "if requested". We have therefore accepted Japan's proposal to change the penultimate sentence of paragraph 6.60 of the interim report except for the words "if requested".

6.73 Japan proposes that in the first sentence of paragraph 6.61 of the interim report[591] and in the second sentence of paragraph 6.70 of the interim report[592] the word "necessarily" be inserted between "comparison" and "produces" to better reflect Japan's argument. We agree that Japan's suggested change would render these sentences more accurate and we have therefore made the change requested by Japan.

6.74 Japan proposes a change to the third sentence of paragraph 6.61 of the interim report[593] to make it clear that Japan refers to the determination of normal value for different time periods merely as an example to demonstrate that without zeroing the average-to-average and average-to-transaction comparisons still produce different results. Japan proposes that this sentence be changed to read: "Thus, an average-to-transaction comparison will produce a result different from that of an average-to-average comparison for example if the average normal values in the two comparisons are calculated on different bases." The United States disagrees with this change.

6.75 We decline to make the change requested by Japan. Paragraph 6.61 of the interim report[594] identifies the two bases advanced by Japan as support for its argument that an average-to-transaction comparison without zeroing does not necessarily yield a result identical to that of an average-to-average comparison: first, the use of a normal value established for a different time period and second, the limitation of the comparison to those export transactions that constitute the pattern of targeted dumping. Since Japan has not described any other scenario in which, without zeroing, the average-to-transaction method would yield a result different from the average-to-average comparison, the addition of the words "for example" would be factually incorrect.

6.76 Regarding paragraph 6.90 of the interim report[595], Japan observes that the primary thrust of Japan's claims stems from the definition of "dumping" and "margin of dumping" in Article 2.1 of the *AD Agreement* and from the "fair comparison" requirement in Article 2.4 and not from Article 2.4.2 of the *AD Agreement*. Japan therefore urges the Panel to address what it characterizes as its main claims. The United States disagrees with this request.

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[590] Paragraph 7.65 of the Final Report.
[591] Paragraph 7.66 of the Final Report.
[592] Paragraph 7.146 of the Final Report.
[593] Paragraph 7.66 of the Final Report.
[594] Paragraph 7.66 of the Final Report.
[595] Paragraphs 7.87 and 7.152 of the Final Report.

6.77 We explain in paragraphs 6.90-6.92 of the interim report[596] our view that, having found that by maintaining model zeroing procedures in the context of original investigations USDOC acts inconsistently with Article 2.4.2 of the *AD Agreement*, it is appropriate to exercise judicial economy with respect to Japan's claims under Articles 2.1 and 2.4 of the *AD Agreement* and Article VI:1 and VI:2 of the GATT 1994. Japan does not advance any argument to demonstrate that this exercise of judicial economy was not within our discretion. In particular, Japan does not explain why additional findings under Articles 2.1 and 2.4 of the *AD Agreement* and Article VI:1 and VI.2 of the GATT 1994 would be necessary to resolve the dispute. We therefore decline to address the claims of Japan under these provisions.

6.78 Japan proposes to change to the first sentence of paragraph 6.125 of the interim report[597] as follows: "Japan does not contest that the average-to-transaction method in the second sentence of Article 2.4.2 would be redundant if <u>the United States demonstrated that</u> it always <u>and necessarily</u> yielded a result identical to that of the average-to-average comparison method in the first sentence of Article 2.4.2." Japan explains that this change is necessary to reflect that it is the United States which has advanced the argument that without zeroing the average-to-transaction method will always produce the same results as the average-to-average comparison. The United States opposes the change requested by Japan.

6.79 We decline to make this suggested change. That it is the United States that makes the argument that without zeroing the average-to-transaction comparison will always yield the same results as the average-to-average comparison is sufficiently clear from the context, particularly the immediately preceding paragraph. Therefore, Japan has not offered a compelling explanation of why the suggested change is necessary.

6.80 Japan requests that the Panel delete the last sentence of paragraph 6.126 of the interim report[598] because in Japan's view this sentence gives a misleading impression of Japan's argument. Japan points out that it has argued that the text of Article 2.4.2 itself does not prohibit a Member from using different bases for calculating the weighted average normal value and that this argument is a legal argument based on text that does not require Japan to adduce evidence. Japan also points out that in stating that Article 2.4.2 that Article 2.4.2 was crafted on the assumption that Members could use different bases for calculating normal values Japan used terminology ("crafted") and ("assumption") used by the United States but was making an argument based on the text of the *AD Agreement*. The United States opposes this proposed change.

6.81 We agree with Japan that the last sentence of paragraph 6.126 of the interim report does not correctly reflect Japan's argument. By stating that Japan failed to adduce "evidence" to substantiate its assertion that the second sentence of Article 2.4.2 was crafted on the assumption that Members could apply the average-to-transaction method by calculating an average normal value on a basis different from the basis used to calculate the average normal value in the average-to-average comparison, the sentence suggests that this assertion of Japan was a factual assertion separate from Japan's interpretation of the text. In light of our review of the relevant paragraphs of Japan's opening statement at the second meeting, we conclude that Japan's statement that "Article 2.4.2 was crafted on the assumption that Members could choose to use different bases for calculating the weighted average in the W-to-W and W-to-T comparisons" is based on its argument that the text of Article 2.4.2 does not prohibit a Member from using different bases for calculating the weighted average normal value in the two situations. To

[596] Paragraphs 7.87-7.88 and 7.152 of the Final Report.
[597] Paragraph 7.128 of the Final Report.
[598] Paragraph 7.129 of the Final Report.

properly reflect the legal character of Japan's argument, we have redrafted the last sentence of paragraph 6.126 of the interim report.[599]

6.82 Japan suggests that the Panel amend the first two sentences of paragraph 6.128 of the interim report[600] to clarify that Japan's statement on the significance of the word "individual" in the second sentence of Article 2.4.2 was made in response to a question of the Panel. Japan is factually correct that it only addressed this issue in response to a question of the Panel. We have therefore made the changes suggested by Japan.

6.83 Japan requests the Panel to delete the first sentence of paragraph 6.130 of the interim report[601] because Japan fails to see why the fact that Japan's interpretation may yield significantly higher margins of dumping renders that interpretation logically inconsistent. The United States disagrees with this proposed change.

6.84 We consider that we have fully explained our view on the various logical inconsistencies in Japan's position in paragraphs 6.130-6.132 of the interim report. Thus, contrary to what Japan asserts, the source of the logical inconsistency is not solely the fact that Japan's interpretation would lead to higher margins. We thus decline to make the change requested by Japan.

6.85 Japan suggests that the third sentence of paragraph 6.136 of the interim report[602] would be clearer if it read:

> "In particular, we see no textual difference between the average-to-transaction method and the transaction-to-transaction method that can sustain the view that zeroing is prohibited under <u>one of these methods of comparison but not the other</u>".

We do not consider that the change proposed by Japan is appropriate. Following the conclusion drawn in the preceding paragraphs that the average-to-transaction method would be *inutile* if zeroing were prohibited, paragraph 6.136 of the interim report raises the question whether there is a basis to argue that zeroing is prohibited under the average-to-average and transaction-to-transaction methods but not under the average-to-transaction method. In this regard, the paragraph discusses in particular the question whether it is possible to argue that zeroing, while not prohibited under the average-to-transaction method, is prohibited under the transaction-to-transaction method. It does not deal with the question of whether it can be argued that zeroing is prohibited under the average-to-transaction method but not under the transaction-to-transaction method. While Japan's proposed change is thus not appropriate, we have made a change to the third sentence of the paragraph to clarify that the question raised in this sentence is whether it is possible to argue that zeroing, while not prohibited under the average-to-transaction method, is prohibited under the transaction-to-transaction method.

6.86 Japan requests us to change paragraph 6.159 of the interim report[603] to better reflect Japan's argument regarding Article 2.4 by changing "... because it inflated the margin of dumping and artificially reduced export prices" to ".. because it results in an unfair, biased comparison between export price and normal value". This change corresponds to paragraph 172 of the First Written Submission of Japan. We have therefore accepted it.

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[599] Paragraph 7.129 of the Final Report.
[600] Paragraph 7.131 of the Final Report.
[601] Paragraph 7.133 of the Final Report.
[602] Paragraph 7.139 of the Final Report.
[603] Paragraph 7.180 of the Final Report.

6.87 Japan suggests that, in order to properly reflect Japan's argument, the third sentence of paragraph 6.168 of the interim report[604] be amended to include the words "as a result of the definitions in Article 2.1 and Article VI," before "the terms ...". We have accepted this change since it is consistent with the arguments of Japan before the Panel.

6.88 Japan proposes that the first two sentences of paragraph 6.169 of the interim report[605] be deleted because in Japan's view these sentences do not correctly characterize Japan's arguments. Japan points out that it has repeatedly stated before the Panel that it takes no position on the issue of the applicability of Article 2.4.2 to reviews. The United States opposes this proposal.

6.89 The United States is factually correct when it points out that the first two sentences of paragraph 6.169 of the interim report reflect statements that Japan has actually made in this proceeding. However, we consider that it is appropriate to clarify that Japan made these statements only in response to a Panel Question and to stress that Japan has stated that in its view it is not necessary for the Panel to address the issue of whether Article 2.4.2 of the *AD Agreement* applies only to "original investigations". We have redrafted paragraph 6.169 of the interim report accordingly.

6.90 Japan requests that the Panel delete paragraphs 6.190-6.193 of the interim report[606] because they deal with an issue – whether Article 2.4.2 of the *AD Agreement* applies to proceedings other than investigations - that in Japan's view is not before the Panel and the disposition of which is not necessary for the resolution of this dispute. Alternatively, Japan requests that the Panel clarify that Japan takes no position on this issue because it believes that zeroing is prohibited by Articles 2.1 and 2.4 of the *AD Agreement*. The United States opposes this request.

6.91 Article 2.4.2 of the *AD Agreement* is one of the provisions relied upon by Japan as support for its claim that simple zeroing in the context of periodic reviews and new shipper reviews is inconsistent with the *AD Agreement*. It is true that we consider that zeroing is prohibited only where the average-to-average comparison is used to determine the existence of margins of dumping during the investigation phase and that, as a consequence, whether Article 2.4.2 applies to proceedings other than investigations does not affect our conclusion that simple zeroing is not prohibited in periodic reviews and new shipper reviews. This does not mean, however, that it is inappropriate for us to address the issue of the applicability of Article 2.4.2 on an *arguendo* basis[607] as additional support for our conclusion that Article 2.4.2 does not prohibit simple zeroing in the calculation of margins of dumping in periodic reviews and new shipper reviews. Second, we have stated explicitly in paragraph 6.172 of the interim report[608] that Japan considers that it is not necessary for the Panel to decide whether or not Article 2.4.2 applies to proceedings other than investigations under Article 5. Thus, we have clearly acknowledged Japan's position on this issue. Third, we have already expressed a view on the limited applicability of Article 2.4.2 in our discussion in paragraph 6.119 of the interim report[609] without providing a legal analysis of the basis for taking that view. It is therefore necessary for us to explain the reasons for taking that position. In light of these considerations we have decided to retain paragraphs 6.190-6.193 of the interim report[610], but we have added a footnote to the first sentence of paragraph 7.211 of the final report to respond to Japan's view that it is not necessary for the Panel to consider the issue of the applicability of Article 2.4.2.

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[604] Paragraph 7.189 of the Final Report.
[605] Paragraph 7.190 of the Final Report.
[606] Paragraphs 7.212-7.215 of the Final Report.
[607] See first sentence of paragraph 7.211 of the Final Report.
[608] Paragraph 7.193 of the Final Report.
[609] Paragraph 7.122 of the Final Report.
[610] Paragraphs 7.212-7.215 of the Final Report.

6.92 Japan requests the Panel to amend paragraph 6.204 of the interim report[611] to add the phrase "[i]t is clear as a factual matter that USDOC applied simple zeroing in these 11 periodic reviews. However, for ... ." Japan explains that the Panel has correctly noted in paragraph 6.46 of the interim report that it is clear as a factual matter that USDOC always applies zeroing. Japan proposes a similar change to paragraph 6.235 of the interim report.[612] The United States opposes both these changes.

6.93 It has not been disputed that USDOC has applied simple zeroing in the periodic reviews at issue. The changes proposed by Japan therefore are factually correct. On the other hand, it is not clear why it is necessary for us to state that USDOC has applied simple zeroing in these reviews when we have found that the *AD Agreement* does not proscribe simple zeroing in periodic reviews. We therefore decline to make the changes proposed by Japan to paragraphs 6.204 and 6.235 of the interim report.

6.94 Japan requests that the Panel amend paragraph 6.224 of the interim report[613] to reflect that Japan has claimed that the margin of dumping must be calculated in conformity not only with Article 2.4 but also with Articles 2.1 and 2.4.2. Japan proposes to substitute "Article 2" for "Article 2.4" after "in conformity with" in the fourth line of this paragraph. The United States opposes this suggestion.

6.95 We decline to make this change. As written, paragraph 6.224 of the interim report already refers to Articles 2.1, 2.4 and 2.4.2. Moreover, the paragraph is an accurate summarization of paragraphs 190-191 of the First Submission of Japan.

6.96 Finally, Japan proposes changes to correct the Federal Register reference for one of the periodic reviews mentioned in paragraph 2.3 and to correct the short citation forms of several measures referred to in paragraphs 2.3, 3.2 and 4.249 of the interim report. Japan also proposes that the word "average" be inserted between "weighted" and "normal value" in the third sentence of paragraph 4.251. Japan also suggests a number of corrections to typographical errors in paragraphs 6.229 and 6.231 of the interim report. We have accepted all these suggested corrections.

2. Comments of the United States

6.97 The United States requests that the Panel either delete or amend the last sentence of paragraph 6.12 of the interim report[614] in order to avoid the negative implication that what is provided for in the second sentence of Article 17.6(ii) of the *AD Agreement* is not permitted under the DSU. Japan has not commented on this proposed change.

6.98 In order to address the issue raised by the United States we have redrafted the last sentence of paragraph 6.12 of the interim report.

6.99 The United States raises two issues with respect to paragraphs 6.43-6.45 of the interim report.[615] First, the United States submits that, contrary to what is set forth in the report, the Appellate Body has not equated norms and measures but has found that acts or instruments setting forth rules or norms of prospective application may be measures. The United States refers in this regard to its Other Appellant Submission in *US – Zeroing (EC)*. In this dispute Japan has failed to identify such an act or instrument independent of the specific results which purportedly represent the application of the measure. Second, the United States considers that paragraph 6.44 of the interim report[616] is superfluous since neither party has argued that a rule or norm must be in written form. The United States proposes

[611] Paragraph 7.226 of the Final Report.
[612] Paragraph 7.256 of the Final Report.
[613] Paragraph 7.246 of the Final Report.
[614] Paragraph 7.12 of the Final Report.
[615] Paragraphs 7.48-7.50 of the Final Report.
[616] Paragraph 7.49 of the Final Report.

that the Panel delete paragraph 6.44 of the interim report and add a sentence to paragraph 6.45[617] indicating that Japan and the United States agree that where a measure is not written, circumstantial evidence may be proffered to demonstrate the existence of the measure. Should the Panel decide not to delete paragraph 6.44 of the interim report, the United States requests that a footnote be inserted clarifying that the United States did not argue that a measure had to be in written form.

6.100 Japan requests that the Panel reject the argument of the United States that a rule or norm cannot in and of itself be a measure that can be challenged as such in WTO dispute settlement. Regarding the new sentence proposed by the United States as new first sentence of paragraph 6.45 of the interim report, Japan disagrees that the evidence in this dispute is properly characterized as "circumstantial".

6.101 In our view, the first argument raised by the United States in respect of paragraphs 6.43-6.45 of the interim report[618] in essence repeats the argument advanced by the United States during earlier stages of this proceeding that there is no act or instrument causing USDOC to apply zeroing. While the United States disagrees with our approach to that question, we consider that the purpose of the interim review process is not to provide another opportunity for a party to re-argue issues that have already been discussed in detail in written submissions, oral statement and responses to panel questions. Article 15.2 of the DSU provides that a party may request a panel "to review precise aspects of the interim report.." By contrast, Article 17 of the DSU provides for an appellate review process with respect to "issues of law" and "legal interpretations developed by the panel". We find it significant in this respect that the United States has raised the same question in another dispute currently before the Appellate Body and that it refers us to the arguments contained in a submission which it has made in that proceeding. In light of these considerations, we conclude that the first issue raised by the United States regarding paragraphs 6.43-6.45 of the interim report does not warrant a change to the text of the interim report.

6.102 With regard to the comments made by the United States on paragraph 6.44 of the interim report[619], we have added a footnote to the first sentence of this paragraph to make it clear that the United States has not taken the position in this dispute that a measure must necessarily exist in written form.

6.103 The United States expresses its disagreement with the Panel's discussion in paragraphs 6.46-6.49 of the interim report[620] of the relevance of the use of zeroing over time and refers the Panel in this respect to the argument in its Other Appellant Submission in *US – Zeroing (EC)*. The United States submits that the mere fact that a Member has acted consistently in the past says nothing about whether there is an act or instrument causing that behaviour and that consistent behaviour in the light of identical facts can be expected of a Member which does not act in an arbitrary manner. In this connection, the United States argues that the last sentence of paragraph 6.46 of the interim report would be more correct if it were phrased: "Thus, it is clear as a factual matter that USDOC has always applied zeroing." The United States points out that the fact that discretion may have been exercised in a particular manner in the past does not establish as a factual matter the manner in which it will be exercised in the future, as illustrated by the recent announcement of USDOC that it will no longer use zeroing in investigations involving average-to-average comparisons. Japan considers that the United States repeats an argument which it has advanced at an earlier stage of the proceeding and which the Panel properly rejected in its interim report. Japan also submits that the last sentence of paragraph 6.46 of the interim report is consistent with the statements quoted in paragraph 6.47 of the interim report and that the recent formal announcement by the USDOC that it will abandon the use of zeroing shows

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[617] Paragraph 7.50 of the Final Report.
[618] Paragraphs 7.48-7.50 of the Final Report.
[619] Paragraph 7.49 of the Final Report.
[620] Paragraphs 7.51-7.54 of the Final Report.

that the zeroing procedures constitute a general rule or norm that even the USDOC recognizes must be formally abandoned and replaced with a new procedure.

6.104 In our view, the argument of the United States that consistent behaviour in the past is not sufficient to conclude that a measure exists that can be challenged as such is not different from the argument addressed in paragraph 6.49 of the interim report.[621] As explained in that paragraph, our conclusion that a measure exists that can be challenged as such is not based simply on the fact that USDOC has consistently applied zeroing. In fact, we explicitly point out that to base an "as such" claim solely on consistent practice would raise serious conceptual questions but that these questions do not arise in this case because the evidence before us indicates not only that USDOC invariably applies zeroing but also that it has repeatedly described zeroing in terms of a long-standing policy. Finally, we recall our observation above regarding the limited function of the interim review process as compared to the function of appellate review.

6.105 The United States disagrees with the Panel's discussion in paragraph 6.52 of the interim report[622] of the relevance of the discretion available to the USDOC Assistant Secretary to provide offsets or not. Referring to its Other Appellant Submission in *US – Zeroing (EC)*, the United States submits that the question of whether a Member has discretion to act in a WTO-inconsistent manner is separate from the question of whether there is a measure. Moreover, there is no basis to conclude from past behaviour that future behaviour is predictable or that predictability is the test for identifying a measure. The United States considers that these and other assumptions in the interim report regarding how to identify a measure have alarming implications. Japan has not commented on the issues raised by the United States regarding this paragraph.

6.106 The key point in paragraph 6.52 of the interim report is that the fact that USDOC enjoys discretion with regard to how it treats export prices that are higher than the normal value is not a basis to conclude that the zeroing methodology is not a rule or norm of general and prospective application given that this discretion has been exercised by adopting a policy of systematically applying zeroing. As in the case of the comments of the United States on paragraphs 6.43-6.45 and paragraphs 6.46-6.49 of the interim report, the comments of the United States on this paragraph reflect a fundamental disagreement with the approach that we have taken in identifying the existence of a measure that can be challenged as such. As explained above, we consider that it is not appropriate to reconsider in the interim review process fundamental legal questions that have already been extensively debated by the parties.

6.107 The United States requests that the Panel delete the last two sentences of paragraph 6.122[623] as well as paragraphs 6.123 and 6.135 of the interim report.[624] The United States asserts that whether dumping may be masked by the application of the transaction-to-transaction comparison methodology was not raised by any party in this dispute nor was it the subject of any questions from the panel. The United States considers that there may be circumstances in which the transaction-to-transaction comparison may mask the existence of dumping and that while the Panel appears to have concluded otherwise, such a conclusion is unnecessary to support the Panel's analysis and is without support in the record before the Panel. Japan opposes the changes proposed by the United States.

6.108 We decline to make the changes requested by the United States. First, we consider that it is well established that a panel is not obliged to limit its legal reasoning to arguments presented by the

[621] Paragraph 7.54 of the Final Report.
[622] Paragraph 7.57 of the Final Report.
[623] Paragraph 7.125 of the Final Report.
[624] Paragraphs 7.126 and 7.138 of the Final Report.

parties to a dispute.[625] Second, the report fully explains why we considered it necessary to raise the issue of whether dumping may be masked by a the transaction-to-transaction method. As stated in paragraphs 6.112-6.113 of the interim report[626], an important consideration guiding our analysis of whether simple zeroing is proscribed in investigations is the need to interpret Article 2.4.2 in a manner that reflects the particular interrelationship between the three comparison methods identified in Article 2.4.2 in a logically coherent manner, consistent with the requirement to interpret the terms of a treaty in their context and in light of the principle of effectiveness. One aspect of this issue, which we analyze in paragraph 6.122 [627], is the question whether an interpretation of Article 2.4.2 as prohibiting zeroing only in the context of the average-to-average method is consistent with the nature of the average-to-transaction method in the second sentence of Article 2.4.2 as an exception not only to the average-to-average method but also to the transaction-to-transaction method. It is in this particular context that the question of whether dumping may be masked by the transaction-to-transaction method necessarily arose. While we have concluded, in light of other textual and contextual elements, that this issue is not of decisive importance, we nevertheless consider that our report must provide a comprehensive explanation of our reasoning.

6.109 The United States proposes that the Panel amend paragraph 6.221 of the interim report[628] to make a cross-reference to the Panel's conclusion in paragraph 6.235 of the interim report[629] that reliance on margins calculated in periodic reviews under Article 9.3 on the basis of simple zeroing is not WTO-inconsistent. The United States provides no explanation of why this change is necessary. Thus, although the change may not affect the substance of the Panel's reasoning and findings and Japan has not opposed it, it is not clear that this change is appropriate.

6.110 The United States proposes deletion of paragraph 6.234 of the interim report because it considers that this paragraph does not reflect the arguments of the United States on this issue.

6.111 A review of submissions of the United States shows that although it is possible to interpret certain statements in the manner suggested in paragraph 6.234, there is no statement that expressly and unambiguously makes a distinction between the existence of margins of dumping and the magnitude of margins of dumping. Therefore we have accepted the proposed deletion of paragraph 6.234 of the interim report.

6.112 Finally, the United States has identifies typographical errors in paragraphs 4.61, 4.62, 4.133, 4.141, 4.141-footnotes 210 and 211, 6.28, 6.52 and 6.108 of the interim report. We have accepted all these corrections suggested by the United States.

VII. FINDINGS

A. INTRODUCTION

1. The Terms "Model Zeroing" and "Simple Zeroing" as used by Japan in this Dispute

7.1 The claims of Japan in this dispute pertain to "zeroing", a term used by Japan to refer to the calculation by the United States Department of Commerce ("USDOC") of a weighted average margin

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[625] Appellate Body Report, *EC – Hormones*, para. 156; Appellate Body Report; *US – Certain EC Products*, para. 123; Appellate Body Report, *Chile - Price Band Systems*, paras. 167-168.

[626] Paragraphs 7.115-7.116 of the Final Report.

[627] Paragraph 7.125 of the Final Report.

[628] Paragraph 7.243 of the Final Report.

[629] Paragraph 7.256 of the Final Report.

of dumping[630] for an exporter or producer in a manner that does not fully reflect export prices that are above the normal value. Japan distinguishes between "model zeroing" and "simple zeroing". We note that "model zeroing" and "simple zeroing" are not terms of United States' law but labels used by Japan for purposes of this dispute.[631]

7.2 By "model zeroing" Japan means the method whereby USDOC makes average-to-average comparisons of export price and normal value within individual "averaging groups" established on the basis of physical characteristics ("models"[632]) and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping. Specifically, "model zeroing" means that when USDOC aggregates the results of model-specific, average-to-average comparisons of normal value and export price into a weighted average margin of dumping, the numerator of that margin of dumping only includes the results of models for which the average export price is less than the normal value.

7.3 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 in aggregating the results of these multiple comparisons. Specifically, "simple zeroing" means that when USDOC aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value. [633]

7.4 Japan asserts that USDOC routinely uses model zeroing in original investigations, although USDOC recently has also applied simple zeroing when it calculated a dumping margin in an original investigation using the transaction-to-transaction method, and that in periodic reviews and new shipper reviews USDOC routinely uses average-to-transaction comparisons, including simple zeroing. Japan submits that in changed circumstances reviews and sunset reviews USDOC generally does not calculate a new margin of dumping but relies on margins of dumping calculated in original investigations on the basis of model zeroing or on margins of dumping calculated in periodic reviews on the basis of simple zeroing.

7.5 In addition to the application of zeroing in specific instances, Japan challenges what it describes as "(model and simple) zeroing procedures", which Japan considers to be a measure that can be challenged as such, i.e. independently of the application of zeroing in specific instances.

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[630] We note that with regard to periodic reviews and new shipper reviews, Japan challenges zeroing not only with respect to the calculation of *margins of dumping* but also with respect to the calculation of *assessment rates*.

[631] Japan First Written Submission, para. 6, footnote 6.

[632] USDOC Regulations provide for average-to-average comparisons within "averaging groups" established on the basis of various criteria, particularly physical characteristics and level of trade. In this proceeding, Japan uses the term "model" to refer to averaging groups established on the basis of physical characteristics. Japan First Written Submission, para. 18.

[633] Under both the model zeroing method and the simple zeroing method, the *denominator* of the weighted average overall margin of dumping calculated by USDOC always includes the total value of all export sales, including export sales at prices above the normal value.

2. Findings requested by the Parties

7.6 Japan requests the Panel to make the following findings:[634] [635]

(a) Model and simple zeroing procedures are as such inconsistent with Articles 2.1 and 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("*AD Agreement"* or "*Agreement*") and Articles VI:1 and VI:2 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") because in any type of anti-dumping proceeding the determination of dumping, and the calculation of the dumping margin, is not for the product as a whole.

(b) Model and simple zeroing procedures are as such inconsistent with Article 2.4 of the *AD Agreement* because in any type of anti-dumping proceeding these procedures are inherently biased, distort the comparison of normal value and export price, and thus deprive exporters of a "fair comparison".

(c) Model and simple zeroing procedures are as such inconsistent with Articles 3.1-3.5 of the *AD Agreement* because the injury determination in original investigations is not based on an objective examination of positive evidence regarding the existence and amount of dumping and dumped imports.

(d) Model and simple zeroing procedures are as such inconsistent with Article 5.8 of the *AD Agreement* because USDOC does not have sufficient evidence of dumping to assess whether it must terminate original investigations.

(e) Model and simple zeroing procedures are as such inconsistent with Articles 9.1-9.3 and 9.5 of the *AD Agreement* because margins of dumping established in periodic reviews and new shipper reviews are not established consistently with Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 and the United States fails to ensure that duties collected do not exceed the proper margin of dumping established on the basis of a "fair comparison" for the product as a whole.

(f) Model and simple zeroing procedures are as such inconsistent with Articles 11.1-11.3 of the *AD Agreement* because changed circumstances reviews and sunset reviews are not conducted on the basis of dumping margins calculated through a fair comparison for the product as a whole, as required by Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

(g) As a consequence of the above-mentioned inconsistencies with various provisions of the *AD Agreement*, model and simple zeroing procedures are as such inconsistent with Article 1 of the *AD Agreement*.

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[634] Japan First Written Submission, paras. 9-10 and 194-195. As noted below, in its Second Written Submission Japan has also requested that the Panel find that what Japan terms the "standard zeroing line" is inconsistent with the provisions cited by Japan.

[635] In its written comments submitted on 10 May 2006 on the Appellate Body Report in *US – Zeroing (EC)*, Japan withdrew its claim with respect to simple zeroing procedures maintained for use in average-to-transaction comparisons in original investigations. Japan Written Comments on the Relevant Issues of Law Addressed in the Appellate Body Report in *US – Zeroing (EC)* (WT/DS294/AB/R), paras. 31-32.

(h) By maintaining model and simple zeroing procedures, the United States acts inconsistently with Article 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.

(i) Through the application of the zeroing procedures, the anti-dumping measures in the original investigation in certain cut-to-length carbon quality steel plate products from Japan are inconsistent with Articles 1, 2.1, 2.4.2, 2.4 and 3.1-3.5 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

(j) Through the application of the zeroing procedures, the anti-dumping measures in 11 periodic reviews are inconsistent with Articles 1, 2.1, 2.4, 2.4.2 and 9.1-9.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

(k) Through the application of the zeroing procedures, the anti-dumping measures in the expedited sunset review of anti-friction bearings (other than tapered roller bearings), and parts thereof, from Japan and in the full sunset review of corrosion-resistant carbon steel flat products from Japan are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

7.7 The United States requests the Panel to reject the claims of Japan in their entirety.

3. Relevant Principles regarding Standard of Review, Treaty Interpretation and Burden of Proof

(a) Standard of Review

7.8 Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes("DSU") provides the standard of review for WTO panels in general. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.[636]

7.9 Article 17.6 of the *AD Agreement* sets forth the special standard of review applicable to disputes under the *AD Agreement*:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

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[636] Article 11 of the DSU provides in part: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

Thus, taken together Article 11 of the DSU and Article 17.6 of the *AD Agreement* establish the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute.

(b) Rules of Treaty Interpretation

7.10 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention"*). Article 31(1) of the *Vienna Convention* provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.11 In the context of disputes under the *AD Agreement*, the Appellate Body has stated that:

> "The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *AD Agreement* 'in accordance with customary rules of interpretation of public international law.' Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *AD Agreement*. …
>
> The *second* sentence of Article 17.6(ii) … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *AD Agreement*, which, under that Convention, would both be '*permissible* interpretations.' In that event, a measure is deemed to be in conformity with the *AD Agreement* 'if it rests upon one of those permissible interpretations."[637]

7.12 Thus, under the *AD Agreement*, we are to follow the same rules of treaty interpretation as in any other dispute. The difference is that Article 17.6(ii) provides explicitly that if we find more than one permissible interpretation of a provision of the *AD Agreement*, we may uphold a measure that rests on one of those interpretations.

(c) Burden of Proof

7.13 The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.[638] Japan as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements, which the respondent must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[639] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective

[637] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 57 and 59 (*emphasis in original*).
[638] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.
[639] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.

refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

4. Order of Analysis

7.14 Japan first presents claims regarding the zeroing procedures as such in relation to "original investigations"[640], periodic reviews and new shipper reviews, changed circumstances reviews and sunset reviews, and then submits claims regarding the application of zeroing procedures in one investigation and in a number of periodic reviews and sunset reviews. We do not consider that we are bound by this sequence.[641] We decide to examine first the "as such" and "as applied" claims of Japan relating to original investigations, followed by an examination of the "as such" and "as applied" claims of Japan relating to periodic reviews and new shipper reviews and of the "as such" and "as applied" claims of Japan relating to changed circumstances reviews and sunset reviews.

B. CLAIMS REGARDING ZEROING IN THE CONTEXT OF ORIGINAL INVESTIGATIONS

7.15 Japan claims that model and simple zeroing procedures, in the context of original investigations, are as such inconsistent with (1) Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994; (2) Article 2.4 of the *AD Agreement*; (3) Articles 3.1-3.5 of the *AD Agreement*; (4) Article 5.8 of the *AD Agreement* and (5) Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.[642]

7.16 Japan also claims that the use of model zeroing in an original investigation concerning imports of certain cut-to-length carbon quality steel products from Japan is inconsistent with (1) Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994; (2) Article 2.4 of the *AD Agreement*; (3) Articles 3.1-3.5 of the *AD Agreement*; and (4) Article 1 of the *AD Agreement*.

7.17 The Panel examines first the claims of Japan relating to zeroing procedures as such in the context of original investigations.

1. Claims regarding zeroing procedures as such in the context of original investigations

7.18 The claims of Japan regarding zeroing procedures in the context of original investigations raise two questions. *First*, whether what Japan describes as "zeroing procedures" are as such capable of being challenged as a measure, independently of the application of zeroing in specific instances. *Second*, whether the *AD Agreement* and/or the GATT 1994 proscribe zeroing in the context of original investigations.

7.19 We examine first whether, independently of the application of zeroing in specific cases, zeroing procedures as such can be the subject of dispute settlement under the DSU and the *AD Agreement*.

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[640] Japan uses the term "original investigations" to refer to investigations within the meaning of Article 5 of the *AD Agreement*. Hereinafter, the terms "original investigations", "investigations" and "the investigation phase" are used in the same sense, i.e. investigations within the meaning of Article 5 of the *AD Agreement*.

[641] As stated by the panel in *US – Zeroing (EC)*, "a panel is entitled to structure its analysis in a manner most appropriate to facilitate the analysis of the issues presented to it". Panel Report, *US – Zeroing (EC)*, para. 7.13.

[642] As noted above, Japan has withdrawn its claim regarding simple zeroing procedures in relation to the average-to-transaction method provided for in the second sentence of Article 2.4.2. *Supra*, footnote 635.

(a) Whether zeroing procedures, as such, can be the subject of dispute settlement proceedings under the DSU and the *AD Agreement*

(i) Arguments of the Parties

7.20 **Japan** asserts that the model and simple zeroing procedures are contained in a line of computer programming code in the Anti-dumping Margin Calculation Program[643], one of the standard computer programmes maintained by USDOC.[644] Japan terms this line of computer programming code the "standard zeroing line".[645] Japan asserts that model and simple zeroing procedures are specific "measures" within the meaning of Article 6.2 of the DSU and "administrative procedures" within the meaning of Article 18.4 of the *AD Agreement*. Japan submits that the term "measure" comprises any act or omission by a Member, that the characterization or status of an act in domestic law is not determinative of its character as a measure in WTO law, and that whether or not an act is binding under municipal law is irrelevant to whether it is a measure in WTO law. In addition, Article 17 of the *AD Agreement* contains no limitation regarding the types of measure that may as such be the subject of dispute settlement, and the phrase "laws, regulations and administrative procedures" in Article 18.4 of the *AD Agreement* demonstrates that measures that can be challenged as such under the *AD Agreement* encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.

7.21 Japan submits that an "administrative procedure" within the meaning of Article 18.4 of the *AD Agreement* is a system or method, including a set of computer instructions, used by investigating authorities to conduct or manage anti-dumping proceedings. Model and simple zeroing procedures are administrative procedures because they are a pre-determined, standardized system or method for mechanistically conducting and managing, on a uniform and predictable basis, an aspect of the USDOCs margin calculation in all anti-dumping proceedings, irrespective of the method of comparison used. The standard zeroing line is applied on a generalized, normative and prospective basis because the standard computer programmes are written in such a way that the zeroing procedure is executed automatically in the margin calculation process and the standard zeroing line is found in every margin calculation program applied by the USDOC.

7.22 Japan asserts that the fact that the zeroing procedures are a rule, norm or standard of general and prospective application is evidenced by the consistent use of these procedures by USDOC in every dumping margin calculation undertaken in at least the past decade, the inclusion of the standard zeroing line in the standard computer programme and in the 26-case specific computer programmes submitted by Japan in this dispute, the reference made to the zeroing procedures in the USDOC Import Administration Anti-Dumping Manual, the fact that even in the handful cases in which USDOC did not apply the standard zeroing line USDOC used the zeroing procedures by excluding negative comparison results using other software or even manually, and statements of USDOC, the Department of Justice

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[643] Exhibits JPN-6 and JPN-7 contain copies of this AD Margin Calculation Program, as at 4 April 2002, for both original investigations and periodic reviews.

[644] In the case of the calculation of an overall weighted average dumping margin in original investigations, periodic reviews and new shipper reviews, the relevant line of computer code that executes (model or simple) zeroing is "WHERE EMARGIN GT 0". In the case of the calculation of importer-specific assessment rates in periodic reviews, the line of programming code that executes simple zeroing is "WHERE UMARGIN GT 0". Japan First Written Submission, paras. 39 and 43.

[645] We note that while the First Written Submission of Japan focuses on zeroing procedures as the measure challenged as such, in its Second Submission Japan identifies the measures that it challenges as such as the zeroing procedures *and* the standard zeroing line. At the second meeting of the Panel with the parties, Japan used the notion of "zeroing measures", encompassing both the zeroing procedures and the standard zeroing line.

and United States' domestic courts confirming the existence and content of the zeroing procedures as a general and prospective rule.[646]

7.23 Japan emphasizes, in this regard, that it has presented different categories of evidence that, taken together, demonstrate that the zeroing procedures constitute a general rule, norm or standard maintained by the United States for calculating dumping margins. Whether a Member maintains a general rule, norm or standard that can be challenged as such is a question of fact that a panel must examine in light of all the evidence before it. While such evidence will typically include the text of a measure, if a Member has failed to publish a general rule, a consistent pattern of regulatory behaviour may provide valuable evidence of the existence of an "as such" measure. In the present dispute, the evidence of a perfectly consistent pattern of regulatory behaviour, together with the other evidence of record submitted by Japan, supports the conclusion that USDOC has adopted a general rule, norm or standard.

7.24 Japan asserts that the standard zeroing line[647] is an instrument setting forth rules or norms that are intended to have general and prospective application. Since computer instructions are covered by the ordinary meaning of "administrative procedures", the standard zeroing line forms part of the USDOCs administrative procedures for calculating margins of dumping. That the standard zeroing line has not been used in all cases does not deprive it of its quality as a rule, norm or standard of general application because a rule may be general in character although not necessarily applied in all cases.

7.25 Japan rejects what it characterizes as an argument of the United States that the zeroing procedures and the standard zeroing line cannot be measures if they are not manifested in domestic laws and regulations of the United States. Whether a measure can be challenged in the WTO does not depend upon the label given to a measure under domestic law and whether it is binding. The assertion of the United States that there are no laws, regulations or administrative procedures which govern the calculation of dumping with respect to the issue of whether an offset is required for non-dumped transactions is in contradiction with the totality of the evidence which Japan has provided in this proceeding, which demonstrates that what Japan has termed zeroing procedures constitute a norm or rule of general and prospective application and which are therefore administrative procedures.

7.26 Japan argues that the standard zeroing procedures and the standard zeroing line mandate violations of WTO obligations. Although a measure does not have to be mandatory in order to be as such WTO-inconsistent, the zeroing procedures and standard zeroing line are mandatory in the sense that they preclude USDOC from complying with the WTO obligations of the United States. If a measure mandates WTO-inconsistent conduct as a rule, the existence of discretion not to apply that measure in an individual case does not render the measure WTO-consistent. The issue is not whether the USDOC Assistant Secretary can change, or decide not to apply the zeroing procedures in a particular investigation, but whether the zeroing procedures themselves –in terms of their substantive content – mandate a violation of WTO obligations as a rule.

7.27 Japan argues that the Appellate Body Report in *US – Zeroing (EC)* confirms that the model and simple zeroing procedures are measures that can be challenged as such. Although the European Communities and Japan have used different labels, the zeroing procedures are substantively the same measures that were challenged as such in *US – Zeroing (EC)* and the evidence before this Panel regarding the existence of the zeroing procedures as a measure that can be challenged as such is more extensive than the evidence that was before the panel in *US – Zeroing (EC)*.

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[646] In support of its position that the zeroing procedures are rules, norms or standards of general and prospective application, Japan has also submitted a statement of Ms. Valerie Owenby, an expert in USDOCs computer programming procedures and a former employee of USDOC. Exhibit JPN-1(Owenby Statement).

[647] *Supra*, footnote 644.

7.28 The **United States** argues that there is no "standard computer programme" that is a "measure" within the meaning of Article 6.2 of the DSU because USDOC tailors its computer programmes to each particular investigation. In any event, computer programmes and lines in computer programming are tools to calculate margins of dumping accurately and efficiently rather than instruments setting forth rules or norms that have general and prospective application. Even if the computer programmes were measures, they could not be found to be WTO-inconsistent because they do not mandate any action and do not preclude USDOC from offsetting negative dumping margins or require USDOC to ignore negative dumping margins.

7.29 The United States argues that Japan has not demonstrated how what it refers to as the "zeroing procedures" and the "'standard zeroing line" are measures, let alone whether these "measures" mandate a breach. Japan has not identified any actual measure of the United States that corresponds to the "zeroing procedures". Japan has failed to demonstrate that the "zeroing procedures" are an "act" of the United States and how that "act" sets forth rules or norms intended to have generalized and prospective application. Japan's reference to "consistent application" as evidence of the binding and mandatory nature of the zeroing procedures ignores that, as stated by the Appellate Body, the starting point of the analysis of a measure challenged as such is the text of that measure. Analysis of "consistent application" can supplement, but not supplant, analysis of the measure itself on its face or obviate the need even to identify the measure which is supposedly being applied. Japan has confused the evidence that might demonstrate the scope and meaning of a measure with the very existence of the measure itself. Concluding that a measure exists because of its consistent application is an exercise in circular reasoning. The evidence establishing the existence of a measure must be independent of its repeated application. What Japan refers to as "consistent application" in fact is nothing more than "consistent results" with an assumption that there is a measure that causes those results. The United States argues that the only evidence presented by Japan in its attempt to demonstrate the existence of zeroing procedures is evidence of the consistent application of zeroing.

7.30 The United States asserts that the fact that it has indicated that USDOC has never granted an offset for negative dumping margins does not amount to an acknowledgement of the existence of "zeroing procedures". The United States submits, in this respect, that Japan has not provided any evidence that the zeroing procedures or the zeroing line are mandatory. The United States points out that its position is not that a measure must be written but that Japan has pointed to nothing that substantiates its assertion that there is a measure called zeroing procedures that USDOC acts in accordance with. The United States does not argue that the zeroing procedures cannot be measures if they are not manifested in United States' domestic laws and regulations. The question is whether a measure exists, not whether that measure is embodied in a particular form, such as a law or regulation.

7.31 The United States contends that there are no laws, regulations or administrative procedures which govern the calculation of margin(s) of dumping with respect to the issue of whether an offset is required for non-dumped transactions and that US courts have determined that Section 771(35) of the Tariff Act of 1930 does not govern this issue. The USDOC Assistant Secretary enjoys discretion to provide or not to provide an offset for non-dumped sales, and that discretion is exercised in each investigation.

7.32 The United States submits that in *US – Zeroing (EC)* the Appellate Body articulated the correct legal standard for determining when an unwritten measure exists that can be challenged as such. This standard requires that an act or instrument be found to exist that creates a rule or norm of general and prospective application, i.e. a rule or norm in a prescriptive sense, as distinguished from a rule or norm in a merely descriptive sense. However, the Appellate Body failed to adequately apply this standard when it made its own findings based on evidence that either was not relied upon by the panel or that was disputed by the parties. The United States also submits that the Appellate Body failed to consider legal arguments of the United States regarding the mandatory/discretionary distinction.

(ii) Arguments of Third Parties

7.33 **Argentina**, **China**, the **European Communities**, **Korea**, **Mexico**, **Norway** and **Thailand** agree with Japan that the zeroing procedures can be challenged as such. As support for this view they rely, in particular, on the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Review* regarding measures that can be challenged as such. These third parties consider that the zeroing procedures can be considered to be a rule or norm of general and prospective application. A number of third parties also argue that the zeroing procedures constitute "administrative procedures" within the meaning of Article 18.4 of the *AD Agreement*.

(iii) Evaluation by the Panel

7.34 Neither party contests that, as is well-established in GATT and WTO dispute settlement, it is possible for a Member to have recourse to dispute settlement under the DSU and the *AD Agreement* with respect to certain measures "as such", as distinguished from the application of measures in specific situations. What is disputed is whether Japan has established that its claims with respect to what it terms "zeroing procedures" pertain to a measure of the United States capable of being challenged as such.

7.35 As we understand the position of the United States, the United States does not dispute that USDOC consistently calculates margins of dumping by using a method termed "zeroing" by Japan.[648] Rather, the United States argues that Japan has not demonstrated that the fact that USDOC consistently calculates margins of dumping in this manner is caused by a measure which can be challenged as such, i.e independently of the application of zeroing in specific cases.

7.36 The DSU and the *AD Agreement* do not define criteria for determining when measures can be challenged "as such". Thus, we believe that, as a starting point of our analysis of whether zeroing procedures can be challenged as such, it is instructive to consider how the notion of measures challenged "as such" has been interpreted and applied in recent WTO dispute settlement cases.

7.37 The Appellate Body affirmed in *US – Corrosion-Resistant Steel Sunset Review* that, in principle, any act or omission attributable to a WTO Member can be a "measure" of that Member for purposes of WTO dispute settlement proceedings, and that, in addition to "particular acts applied only to a specific situation", the concept of a measure within the meaning of the DSU encompasses certain acts or instruments irrespective of their application in specific instances. The Appellate Body characterized such acts or instruments as "acts setting forth rules or norms that are intended to have general and prospective application" and "instruments of a Member containing rules or norms". Not allowing claims against instruments setting out rules or norms inconsistent with a Member's obligations would frustrate the objective of protecting the security and predictability to conduct future trade and lead to a multiplicity of litigation.[649] Following these general considerations, the Appellate Body considered whether there are any limitations upon the types of measures that may as such be the subject of dispute settlement under the DSU or the *AD Agreement*.

7.38 The Appellate Body considered, in this respect, that its reasoning for concluding in its report in *US - 1916 Act* that the *AD Agreement* does not preclude a panel from examining legislation as such, which was "based on the GATT *acquis* and the language of the *AD Agreement*, in particular Articles 17.3 and 18.4", would also apply to the case under review "where the relevant measures are specific provisions of an administrative instrument issued by an executive agency pursuant to statutory and regulatory provisions".[650] Although in the practice under the GATT most of the measures subject,

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[648] We note, however, that the US does not use the term "zeroing" and instead uses the concept of "not providing offsets for export transactions that exceed normal value".

[649] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 82.

[650] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 84.

as such, to dispute settlement, were legislation, a broad range of measures could be submitted, as such, to dispute settlement.[651] The Appellate Body also pointed out that Article 17.3 of the *AD Agreement* contains no threshold requirement that a measure submitted to dispute settlement be of a certain type[652] and that the phrase "laws, regulations and administrative procedures" in Article 18.4 of the *AD Agreement* implies that "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings" can be challenged as such.[653]

7.39 The Appellate Body concluded from this analysis that there is no basis for holding that only certain types of measure can be challenged as such in dispute settlement proceedings under the *AD Agreement* and that there is therefore no reason for concluding that, in principle, non-mandatory measures cannot be challenged as such.[654]

7.40 We also note that, in the same case, the Appellate Body treated the USDOC Sunset Policy Bulletin ("SPB") as an instrument that can be challenged as such.[655] Subsequently, in *US - Oil Country Tubular Goods Sunset Reviews*, the Appellate Body stated that the fact that the SPB is not binding under United States' law and that USDOC is free to depart from the SPB at any time is not relevant to the question of whether the SPB is a measure that may be challenged in WTO dispute settlement proceedings. In this connection, the Appellate Body recalled its statement in *US – Corrosion-Resistant Steel Sunset Review* that "acts setting forth rules or norms that are intended to have general and prospective application" are measures subject to WTO dispute settlement. The Appellate Body went on to observe:

> "In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm—once again—that the SPB, as such, is subject to WTO dispute settlement."[656]

7.41 While we realize that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* did not necessarily purport to provide a comprehensive definition of measures that can be challenged as such, we consider that the notion of rules or norms of general and prospective application connotes an essential condition in order for an act to be challengeable as such. The fact that an act or instrument contains rules or norms of general and prospective application makes it possible to analyze the future conduct envisioned by that act or instrument. We note, in this regard, that in *US – Oil Country Tubular Goods Sunset Reviews* the Appellate Body stated that:

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[651] The Appellate Body referred, in this respect, to its statement in *Guatemala - Cement I* that in the practice established under the GATT a "measure" may be any act of a Member, whether or not legally binding and could even include non-binding administrative guidance". Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 85.

[652] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 86.

[653] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

[654] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 88.

[655] Thus, the Appellate Body found that Section II.A.2 of the SPB, as such, is not inconsistent with Articles 6.10 or Article 11.3 of the *AD Agreement* and that, in view of the lack of relevant actual findings by the panel or uncontested facts on the record, it could not rule on Japan's claim that Sections II.A.3 and 4 of the SPB are, as such, inconsistent with Article 11.3 of the *AD Agreement.* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* paras. 157 and 190.

[656] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para.187.

> "[b]y definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct-not only in a particular instance that has occurred *but in future situations as well-will necessarily be inconsistent with that Member's WTO obligations*. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct."[657]

7.42 In *US – Zeroing (EC)*, the Appellate Body upheld the conclusions of the panel in that dispute 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 in WTO dispute settlement and is inconsistent with Article 2.4.2 of the *AD Agreement*.[658]

7.43 The Appellate Body began its analysis by examining the concept of "measure" in Article 3.2 of the DSU in which connection it recalled its findings in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods* regarding the types of measures that can be subject to an "as such" challenge.[659] In examining whether the zeroing methodology constituted such a measure, the Appellate Body considered in light of the text of Articles 17.3 and 18.4 of the *AD Agreement* that there is "no basis to conclude that 'rules or norms' can be challenged as such only if they have been expressed in the form of a written instrument".[660] However, the Appellate Body also opined 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".[661] The Appellate Body observed in this regard:

> "In our view, when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. 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. This evidence may include proof of the systematic application of the challenged 'rule or norm'. 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."[662]

7.44 The Appellate Body then reviewed the evidence before the panel and concluded, notwithstanding that there were shortcomings in the panel's reasoning, that "in the specific circumstances of this case, the evidence before the panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application".[663] It therefore concluded that the zeroing methodology, as it relates to original investigations in which the average-to-average comparison method is used, can be challenged as such in WTO dispute settlement.[664] The Appellate Body rejected an argument of the

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[657] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 172 (*emphasis added*).

[658] Appellate Body Report, *US – Zeroing (EC)*, paras. 205 and 222.

[659] Appellate Body Report, *US – Zeroing (EC)*, paras. 187-189.

[660] *Ibid,* para. 193.

[661] *Ibid,* para. 196.

[662] *Ibid,* para. 198 (*emphasis in original, footnote omitted*).

[663] *Ibid,* para. 204.

[664] *Ibid,* para. 205.

European Communities that the panel had erred by exercising judicial economy with regard to the issue of whether the Anti-Dumping Manual is a measure that is, as such, inconsistent with certain provisions of the *AD Agreement*.[665] The Appellate Body also agreed with the panel's conclusion that what was referred to as "Standard Zeroing Procedures" did not constitute a measure that could be challenged as such.[666] The Appellate Body declined to rule on the conditional appeal of the European Communities regarding the "practice" of zeroing as such.[667]

7.45 In its submissions to the Panel, Japan describes the measures that it challenges as such as zeroing procedures and standard zeroing line.[668] The question we must address is whether it is possible to identify the precise content of the zeroing procedures and the standard zeroing line and whether the zeroing procedures and the standard zeroing line are attributable to the United States and can be considered to be rules or norms intended to have general and prospective application.

7.46 We are not persuaded, in this respect, by Japan's argument that the standard zeroing line constitutes an act setting forth a rule, norm or standard of general application. The standard zeroing line is a particular line of computer code whereby USDOC applies zeroing.[669] By itself, the standard zeroing line only constitutes an instruction in a computer programme on how to perform a particular aspect of the dumping margin calculation.[670] There is nothing in this instruction that indicates that it is of general and prospective application. In order for this line to be applicable to a particular investigation or review, a decision must be made to include the line in the computer programme used in

[665] *Ibid,* para. 225.
[666] *Ibid,* para. 231.
[667] *Ibid,* para. 234.
[668] We consider that these zeroing procedures and standard zeroing line fall within the scope of the measures covered by Japan's request for the establishment of a panel contained in document WT/DS322/8. We note, in particular, that sub-paragraph 1(a) of this request states; *inter alia*:

> "In original investigations, periodic reviews, new shipper reviews, sunset reviews and changed circumstances reviews where the re-determination of margins of dumping occurs, the US Department of Commerce ('USDOC') disregards intermediate negative dumping margins calculated by comparing normal value and export price, including on a weighted-average-to-weighted average basis, weighted-average-to-transaction basis, and transaction-to-transaction basis, through the USDOCs AD Margin Calculation computer program and other related procedures, in the process of establishing the overall dumping margin for the product as a whole (hereinafter collectively referred to as 'Zeroing')…"

Moreover, sub-paragraphs 1(a) (iii)-(vi) and 1(b) (c) and (d) repeatedly refer to the "Zeroing procedure". It is clear, therefore, that in its request Japan uses the term "zeroing" to denote the fact that USDOC "disregards intermediate negative dumping margins … through the USDOCs AD Margin Calculation Computer Programme and other related procedures, in the process of establishing the overall dumping margin for the product as a whole". It is also beyond dispute that the request employs the term "Zeroing procedure".
[669] *Supra*, footnote 644.
[670] As explained in one of the exhibits submitted by Japan: "In SAS, the WHERE statement is equivalent to an 'if'. It is a conditional statement that instructs SAS to execute the procedure only if/where a certain condition is met. The line 'WHERE EMARGIN GT 0' in this programming is the equivalent of saying 'if the EMARGIN value for a given observation in the MARGIN dataset is greater than zero then include that observation in this calculation". Statement of Valerie Owenby, p. 9, footnote 8. Exhibit JPN-1. In the context of the calculation of importer-specific assessment rates, the line "WHERE UMARGIN GT 0" is a "statement that instructs SAS to sort and include in the new dataset POSMARG only those US sales that had positive dumping amounts". Statement of Valerie Owenby, para. 47. Exhibit JPN-1. As noted in the same document: "SAS...is both a software application and a computer programming language. The SAS programming language works only in the SAS software application, and it is the tool by which the programmer communicates the calculations and procedures, he/she wants the SAS application to execute". Statement of Valerie Owenby, para.27. Exhibit JPN-1.

that investigation or review. The line by itself cannot be a measure; rather there must be something else that causes the zeroing line to be applied.[671] We find it significant in this regard that Japan itself has characterized the standard zeroing line as "a specific expression of, and instrument to carry out" the zeroing procedures. Therefore, we conclude that the standard zeroing line is not a measure that can be challenged as such.

7.47 We now turn to the issue of whether what Japan terms "zeroing procedures" can be considered to be a measure that can be challenged as such in light of the criteria enunciated by the Appellate Body, particularly in *US – Zeroing (EC)*. It is our understanding that by "zeroing procedures", Japan means the zeroing methodology *per se,* as distinguished from the standard zeroing line.[672] The concept of zeroing procedures, as used by Japan in this proceeding, does not correspond to a provision of legislation or regulation of the United States or to any other type of written instrument adopted by the United States that explicitly provides for zeroing as a rule or norm of general and prospective application. This raises the question of whether a procedure not to be found in legislation or regulation or in some other form of written instrument may nevertheless constitute a measure challengeable as such in WTO dispute settlement. A closely related question that arises is whether it is of any consequence that the term "zeroing procedures" is not employed in the anti-dumping legislation and practice of the United States but has been created by Japan for the purpose of this dispute settlement proceeding.

7.48 We consider, consistent with the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, that the fact that a norm to act in a given way in a given situation is not contained in legislation or regulation does not entail that such a norm cannot be challenged as such in WTO dispute settlement.[673] In order for a measure to have the "normative value" necessary to render it susceptible of being challenged as such, the measure must meet certain requirements. Its content must be clear and it must be understood by those to whom it will apply that it will be applied generally and prospectively. We also concur with the observation of the panel in *US – Zeroing (EC)* that a finding regarding the WTO-inconsistency of a norm as such must be based on solid evidence enabling a panel to determine the precise content of the norm and the future conduct to which it will necessarily give rise.[674] It stands to reason that a measure can only have these properties if it has a legal basis and that a measure is unlikely to be capable of being challenged as such in WTO dispute settlement if it is not grounded in the

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[671] Our reasoning is similar to that of the panel in *US – Zeroing (EC)*:

> "[W]e consider that to characterize the 'Standard Zeroing Procedures' as an act or instrument that sets forth rules or norms intended to have general and prospective application is somewhat difficult to reconcile with the fact that the "Standard Zeroing Procedures" are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer programme used in that particular proceeding. The need to incorporate these lines of computer code into each individual programme indicates that it is not the "Standard Zeroing Procedures" *per se* that set forth rules or norms of general and prospective application. For this reason, we also question whether these "Standard Zeroing Procedures" are "administrative procedures" within the ordinary meaning of that term as used in Article 18.4 of the *AD Agreement*. The "Standard Zeroing Procedures" by themselves do not create anything and are simply a reflection of something else."

Panel Report, *US - Zeroing (EC)*, para. 7.97. The term "Standard Zeroing Procedures" as used in *US – Zeroing (EC)* refers to what Japan has termed "standard zeroing line" in this proceeding. Panel Report, *US – Zeroing (EC)*, para. 7.70. As noted above, the conclusion of the panel in *US – Zeroing (EC)* that the Standard Zeroing Procedures could not be challenged as such was upheld by the Appellate Body.

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

[673] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 85.

[674] Panel Report, *US – Zeroing (EC)*, paras. 7.102 and 7.104.

relevant domestic legal framework. However, this does not mean that the measure must necessarily be in the nature of legislation or regulation.

7.49 We also do not consider that the fact that there exists no written instrument that explicitly lays down a rule or norm of zeroing is of decisive importance.[675] We can see no logical basis in the GATT and WTO dispute settlement practice for the proposition that an "as such" claim is only possible where a rule or norm of general and prospective application is recorded in a written instrument. As noted above, the Appellate Body has explicitly stated in *US – Zeroing (EC)* that a rule or norm need not be embodied in a written instrument in order for such a rule or norm to be challenged as such in WTO dispute settlement.

7.50 We recognize that an analysis of an "as such" claim regarding a measure not embodied in legislation or regulation or other type of written instrument raises particular problems with respect to the evidence required to establish that the measure constitutes a rule or norm of general and prospective application, especially because, in our view, consistent practice is to be distinguished from the notion of a rule or norm of general and prospective application.[676] [677] However, in this case the evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or duty assessment rates.

7.51 *First*, the evidence before the Panel shows that zeroing (i.e. the exclusion from the numerator of weighted average dumping margins of results of comparisons in which export prices are above the normal value) has been a constant feature of USDOCs practice for a considerable period of time. The line of computer programming code described as the standard zeroing line by Japan[678] has been included in the vast majority of computer programmes used by USDOC to calculate margins of dumping and assessment rates in specific cases, and where the line has not been included, USDOC has used other methods to exclude export prices higher than the normal value from the numerator of the weighted average margin of dumping.[679] The United States has emphasized that the USDOC Assistant Secretary enjoys discretion to decide whether to provide for offsets for non-dumped transactions but has not identified a single case in which a decision was taken to provide such an offset. Thus, it is clear as a factual matter that USDOC always applies zeroing.

7.52 *Second*, the evidence before the Panel also shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases. The manner in which USDOCs use of zeroing has been characterized in statements by USDOC, other United States' agencies and courts in our view confirms that USDOCs consistent application of zeroing reflects a deliberate policy. Thus, for example, USDOC has repeatedly stated that "we do not allow" export sales at prices above

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[675] We note that the US has not argued that a measure has to be in written form.

[676] In *US – Countervailing Measures on Certain EC Products*, the Appellate Body made a finding with respect to an "administrative practice" and "method". Appellate Body Report, *US – Countervailing Measures on Certain EC Products,* para. 162. However, the Appellate Body subsequently indicated in several cases that it has not yet pronounced on the issue of whether "practice" can constitute a "measure" for purposes of WTO dispute settlement. Appellate Body Report, *US – Gambling*, para. 132; Appellate Body Report, *Oil Country Tubular Goods Sunset Reviews*, para. 220. Japan has stated that it is not challenging "mere practice" in this dispute.

[677] In this regard, we have also taken into account the criteria enunciated in paragraph 198 of the Appellate Body Report in *US – Zeroing (EC). Supra*, para. 7.43.

[678] *Supra*, footnote 644.

[679] The US has explained that the lines of computer instruction referred to by Japan in this proceeding have been developed for use in conjunction with SAS © software and that there have been several instances in the past ten years in which USDOC used spreadsheet software instead of the SAS © software to perform margin calculations. In those cases, "the programming which provides that no offset is given for non-dumped sales varied, depending on the programming approach adopted by the Commerce personnel who designed the spreadsheet". US Response to Panel Question 9.

normal value to offset dumping margins on other export sales[680], has referred to its "practice" or "methodology" of not providing for offsets for non-dumped sales[681], has pointed out that the United States Court of Appeals for the Federal Circuit has ruled that the "zeroing practice" *i.e* not allowing US sales not priced below normal value to offset margins found on other US sales, is a reasonable interpretation of the law[682], that the US Congress was aware of USDOCs methodology when it adopted the Uruguay Round Agreements Act[683], and that not granting an offset for non-dumped sales "has consistently been an integral part of the Department's weighted-average-to-weighted-average analysis".[684] We also note that the United States Department of Justice has stated that USDOC "has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the URAA" and has referred to USDOCs "long-standing methodology" and to "the zeroing practice, which has been followed for at least 20 years" and which "predated the passage of the latest major amendment of the Anti-dumping law".[685] Finally, the United States Court of International Trade has stated that "Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice".[686]

7.53 In our view, these statements are significant as evidence showing that the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application, which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales[687] and which is applied regardless of the basis upon which export price and normal value are compared[688] and regardless of the type of proceeding in which margins are calculated. In this connection, we also recall our observation above that while a rule or norm of general and prospective application need not be embodied in legislation or regulation, a measure is unlikely to have the properties necessary to render it susceptible of being challenged as such if it has no basis in the relevant domestic legal framework. In the case of the zeroing practice or methodology applied by USDOC, such a basis in domestic law clearly exists. In this regard, we note that the United States Court of Appeals for the Federal Circuit has ruled that zeroing is permissible under Section 771(35) of the Tariff Act of 1930.[689]

7.54 We consider that the argument of the United States that the evidence of the existence of a measure challenged as such must be independent of its repeated application is not relevant in the circumstances of this case. In our view, this is not a case in which there is no evidence of the existence of a measure challenged as such other than the repeated application of a particular methodology in specific instances. The evidence before us indicates not only that USDOC invariably applies zeroing but also that USDOC has repeatedly described its zeroing methodology in terms of a long-standing policy that it considers to be consistent with its statutory obligations. Therefore, while we believe an "as such" claim based solely on consistent practice raises serious conceptual questions, we consider that it is not necessary for us in the present case to opine on those questions.

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[680] Exhibits JPN-21.D and 26.

[681] Exhibits JPN-16.D and 21-D.

[682] Exhibit JPN-21.D.

[683] Exhibit JPN-21D.

[684] Exhibit JPN-27.

[685] Exhibits JPN-28-31.

[686] Exhibit JPN-32.

[687] The fact that we describe this norm as a norm which provides that "non-dumped export sales are not allowed to offset margins found on dumped export sales" is solely intended to reflect the terminology used in the statements of US agencies cited in the preceding paragraph. By using this terminology here we do not intend to convey a particular view on the question of whether the concept of dumping can apply to individual export transactions. Our views on that question are set forth below, particularly in paragraphs 7.103-7.106.

[688] Therefore, we consider 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.

[689] US Response to Panel Question 37.

7.55 We therefore consider that the evidence before us is sufficient to identify the precise content of what Japan terms "zeroing procedures", that these procedures are attributable to the United States and that they are a rule or norm of general and prospective application. While we acknowledge that to establish a norm in part on the basis of inferential reasoning is highly unusual, we consider that it is justified in the circumstances of this case. In the Panel's view, this norm can be characterized as an "administrative procedure" within the meaning of Article 18.4 of the *AD Agreement*. Our characterization of the zeroing procedures is consistent with the conclusion reached by the Appellate Body in *US – Zeroing (EC)* that the zeroing methodology, as it relates to original investigations in which the average-to-average comparison method is used, can be challenged as such.

7.56 Since we have been able to discern with precision the specific content of a rule or norm with respect to how USDOC treats export prices higher than the normal value in calculating margins of dumping, we do not consider that it is of any relevance that the term "zeroing procedures" is not used in the anti-dumping legislation or practice of the United States.

7.57 We consider that the character of the zeroing methodology as a rule or norm of general and prospective application is not diminished by the fact that the USDOC Assistant Secretary may change this methodology or decide not to apply it in a particular case. While USDOC enjoys discretion with regard to how it treats export prices above normal value when calculating weighted average dumping margins or assessment rates, this discretion has been exercised by adopting a policy of systematically zeroing. We agree with the observation of the panel in *US – Zeroing (EC)* that the argument that, if an agency has discretion to change its methodology there can be no WTO-inconsistency as such, is somewhat artificial, at least where a rule or norm has been applied invariably for a considerable period of time because in such a case WTO-inconsistent conduct is as predictable as when WTO inconsistent conduct is envisaged in legislation or regulation.[690] Moreover, the general characteristics that give a measure normative value may take the form of a discretion because, for example, a guideline to the exercise of a discretion may be of general application and exist independently of the particular exercise in each case of the discretion.

7.58 To conclude, we consider that what Japan terms "zeroing procedures" is a measure which can be challenged as such.

7.59 In light of our conclusion that what Japan describes as "zeroing procedures" are as such capable of being challenged as a measure, independently of the application of zeroing in specific instances, we now proceed to examine whether the *AD Agreement* and/or the GATT 1994 proscribe zeroing in the context of original investigations.

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[690] "In our view, the objective of protecting the security and predictability needed to conduct future trade can just as readily be frustrated if well-established norms that systematically and predictably lead to WTO-inconsistent actions cannot be challenged or if they can be challenged only if they are embodied in a particular type of instrument. Similarly, not allowing 'as such' claims against such norms that are 'the root of WTO-inconsistent behaviour' might well entail a multiplicity of litigation. While an agency probably can in most cases more easily depart from its own established norm than from a law or regulation, the argument that there cannot be WTO-inconsistency as such if an agency has discretion to make a change strikes us as artificial, at the very least in the case of a norm that has been applied invariably for a considerable period of time. In such a case, WTO-inconsistent conduct may be as predictable as when WTO-inconsistent conduct is envisaged in a law or regulation. We also consider that to accord decisive weight to the nature of a particular instrument in which a norm manifests itself creates a risk of addressing symptoms rather than causes." Panel Report, *US – Zeroing (EC)*, para. 7.100.

(b) whether the *AD Agreement* and/or the GATT 1994 proscribe zeroing in the context of original investigations

(i) Articles 2.1 and 2.4.2 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994

Arguments of the Parties

7.60 **Japan** submits that it follows from the definition of "dumping" and "margin of dumping" in Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 in relation to "a product" and "products" that dumping and margins of dumping can be determined only for a product as a whole and not in relation to a product type, model or category. Japan refers in this respect to the analysis of the Appellate Body in *US – Softwood Lumber V*. Because Article 2.1 applies to the entire *AD Agreement*, "margins of dumping" in Article 2.4.2 must also be established for a product as a whole. While a Member is entitled to make multiple comparisons between export price and normal value for sub-divisions of a product, disregarding the results of any such comparisons is inconsistent with the requirement to determine dumping and calculate margins of dumping for a product as a whole. Model zeroing applied by USDOC when making average-to-average comparisons in original investigations automatically disregards negative results of comparisons where the normal value is higher than the export price, which means that the results of all comparisons are not taken into account and that, as a consequence, the determination of dumping and the calculation of the margin of dumping are not for the product as a whole.

7.61 Japan argues that the same reasoning dictates that simple zeroing in the context of original investigations is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.[691] [692] Japan also refers to the Appellate Body Report in *US – Zeroing (EC)* in this regard.

7.62 Japan argues that its view that margins of dumping can only be found to exist for a product under investigation as a whole is supported by the term "product under investigation" in Article 6.10, the fact that Article 9.2 provides for the imposition of anti-dumping duties in respect of a "product", and the need for consistent treatment of a product in an anti-dumping investigation and throughout the life of an anti-dumping action.

7.63 Japan emphasizes that the obligation to determine dumping and margins of dumping for a product as a whole stems from Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 and does not derive from language specific to Article 2.4.2. The fundamental rule that dumping can only be established for a product as a whole governs the interpretation of "margin(s) of dumping" throughout the *AD Agreement*, with the sole exception being the calculation of a margin of dumping under the average-to-transaction method in the second sentence of Article 2.4.2.

7.64 Japan asserts that the word "price" in Article VI of the GATT 1994 and the text of the first paragraph of *Ad* Article VI:1 of the GATT 1994 do not support an interpretation of "margin of dumping" as transaction-specific because they do not alter the requirement that dumping and margins of dumping be found to exist with respect to a product.

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[691] Japan mentions a determination regarding imports of softwood lumber from Canada as an example of the application of simple zeroing in original investigations. *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*. 70 Fed. Reg. 22636 (2 May 2005), Exhibit JPN-27.

[692] As noted above, Japan has withdrawn its claim regarding simple zeroing procedures in relation to the average-to-transaction method provided for in the second sentence of Article 2.4.2. *Supra*, footnote 635.

7.65 Japan submits that the United States is incorrect in arguing that the fact that anti-dumping duties are assessed on individual entries of a product demonstrates that investigating authorities determine margins of dumping for individual transactions. In particular, Japan rejects the argument that a prospective normal value system involves the establishment of margins of dumping on individual transactions. When imposing and collecting duties on individual entries of a product, including in the context of a prospective normal value system, authorities are not calculating margins of dumping on individual transactions. In addition, even in a prospective normal value system final liability for payment of anti-dumping duties must be determined in a review under Article 9.3.2 that involves a determination of the margin of dumping for the product, for the review period. In any event, the United States' system of retrospective duty assessment is not similar to a prospective normal value system.

7.66 Japan submits that a general prohibition of zeroing does not render the average-to-transaction methodology in the second sentence of Article 2.4.2 of the *AD Agreement* redundant. Japan contests that without zeroing the average-to-transaction comparison necessarily produces results identical to the results of the average-to-average comparison. Thus, an average-to-transaction comparison will produce a result different from that of an average-to-average comparison if the average normal value is calculated on a different basis. Moreover, the second sentence of Article 2.4.2 provides for a comparison of an average normal value to only those export transactions that constitute the pattern of targeted dumping. Japan claims that this interpretation of Article 2.4.2 is consistent with the USDOC Regulations, which provide that the application of the average-to-transaction comparison shall be limited to the prices that make up the pattern of targeted dumping.

7.67 The **United States** submits that there is no obligation in the *AD Agreement* to calculate a margin of dumping for the product as a whole. The text of Article 2.4.2 of the *AD Agreement* does not require Members to calculate a margin for the product as a whole. While the methodologies provided for in Article 2.4.2 will generally result in multiple comparisons, Article 2.4.2 does not address the issue of whether, and, if so, how the results of such multiple comparisons are to be aggregated into a single overall margin. The phrase "product as a whole" is not used in Article VI of the GATT 1994 or in Articles 2.1, 2.4 or 2.4.2 of the *AD Agreement*.

7.68 The United States submits that the definition of "margin of dumping" in terms of a price difference and the manner in which the first paragraph of *Ad* Article VI:1 of the GATT 1994 uses the term "margin of dumping" imply that dumping may be found to exist with respect to individual transactions in which export prices are less than the normal value. The *AD Agreement* did not alter the definition of "margin of dumping" provided in GATT Article VI:2 but, as illustrated by Article 2.4.2, the context in which this definition is used in the *AD Agreement* may allow it to be applied in more than one way. In the case of the transaction-to-transaction and average-to-transaction comparison methodologies, the plural "margins of dumping" is used in a manner consistent with the definition of "margin of dumping" in GATT Article VI:2 and refers to the results of multiple, transaction-specific comparisons. Articles 5.8, 3.3 and 9.3 of the *AD Agreement* are other examples of how the meaning of "margin(s) of dumping" depends upon the context within which these terms are used. Whereas Articles 5.8 and 3.3 refer to a single overall margin of dumping for an exporter or producer, the phrase "margin of dumping" in Article 9.3 indicates that the anti-dumping duty for a specific import cannot exceed the extent to which the export price for that transaction falls below normal value. The United States also argues that in a prospective normal value system the amount by which the prospective normal value exceeds the export price of a particular transaction is the margin of dumping for that transaction.

7.69 The United States asserts that there is no textual support for the view that Article 2.4.2 of the *AD Agreement* obligates Members to offset positive and negative dumping margins. Consequently, panels and the Appellate Body have never found in the text of the *AD Agreement* an independent obligation to offset margins. The finding of the Appellate Body in *US – Softwood Lumber V* that zeroing is prohibited when establishing margins of dumping under the average-to-average methodology in investigations is based on the phrase "all comparable export transactions", which is unique to the

average-to-average comparison, and not on the phrase "margins of dumping". If the Appellate Body's conclusion that zeroing is prohibited were based not on the "all comparable export transactions" language but on "margins of dumping", this would have rendered the "targeted dumping" methodology in the second sentence of Article 2.4.2 a nullity because, mathematically, if zeroing is prohibited, the overall dumping margin calculated for an exporter must be the same under an average-to-average comparison as under an average-to-transaction comparison.

7.70 In the latter regard, the United States asserts that there is no textual support for Japan's arguments that the second sentence of Article 2.4.2 provides for a selection of only those export transactions that make up the pricing pattern envisioned by that provision and that Article 2.4.2 was crafted on the assumption that the average normal value in the third methodology in Article 2.4.2 is established on a basis different from the average normal value in the first methodology. The United States also submits that Japan is incorrect in arguing that the USDOC Regulations provide for the application of the third comparison methodology to a subset of export transactions.

7.71 Moreover, the United States argues that the conclusion of the Appellate Body Report in *US – Softwood Lumber V* that Article 2.4.2 of the *AD Agreement* requires negative margins to be offset when the average-to-average comparison is used is in contradiction with the text and the negotiating history of that provision and should not be followed by this Panel. The United States also argues that the reasoning in the Appellate Body Report in *US – Zeroing (EC)* is flawed and should not be followed by this Panel.

7.72 The United States argues that the fact that Article VI of the GATT 1994 and the *AD Agreement* do not recognize the existence of negative margins of dumping is also evident from the fact that Members operating a prospective normal value system are not required to provide a refund or credit for any amount by which an export transaction exceeds normal value. The United States asserts that Japan is incorrect in arguing that the retrospective duty assessment system of the United States does not determine final liability for payment of anti-dumping duties on an entry-by-entry basis.

Arguments of Third Parties

7.73 **Argentina**, **China**, the **European Communities**, **Korea**, **Mexico**, **Norway** and **Thailand** broadly agree with Japan that model and simple zeroing is inconsistent with Article 2.4.2 of the *AD Agreement* because it violates the requirement to make a determination of dumping for the product as a whole and is also inconsistent with the "fair comparison" requirement contained in Article 2.4 of the *AD Agreement* because it inflates the margin of dumping and may even lead to a finding of the existence of dumping where no such finding would have been made in the absence of zeroing.[693] A number of third parties refer, in this respect, to the analysis of the Appellate Body in *EC – Bed Linen*, *US – Corrosion-Resistant Steel Sunset Review* and *US – Softwood Lumber V*. Some third parties emphasize, in this regard, that the reasoning of the Appellate Body in *US – Softwood Lumber V* implies that zeroing is prohibited in any context.

7.74 **New Zealand** submits that it is important to bear in mind the negotiating history of the *AD Agreemen*t in considering the validity of Japan's arguments. While curbs were placed on the situations in which the average-to-transactions method might be used, no such curbs were placed on the other two methods set out in Article 2.4.2. In this respect, New Zealand emphasizes its systemic interest in ensuring that the right to use the transaction-to-transaction methodology is preserved and disagrees with the view that the reasoning of the Appellate Body in *US – Softwood Lumber V* applies to the transaction-to-transaction method. New Zealand also points to the need for a holistic perspective in

[693] The EC also argues that zeroing amounts to an impermissible adjustment for a difference that does not affect price comparability.

which account is taken of the relationship between the method of calculating dumping margins and the determination of the existence of material injury to a domestic industry caused by dumped imports.

Evaluation by the Panel

7.75 Japan requests us to find that maintaining model and simple zeroing procedures in the context of original investigations is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 because these procedures conflict with the requirement to determine dumping, and to calculate a margin of dumping, for the product as a whole.

7.76 Article 2.1 of the *AD Agreement* provides:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

7.77 Article 2.4.2 of the *AD Agreement* provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

7.78 Articles VI:1 and VI:2 of the GATT 1994 provide:

> 1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
>
> (*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
>
> (*b*) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
>
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.
>
> 2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

7.79 We will examine first Japan's claims that maintaining *model zeroing* procedures in the context of original investigations is inconsistent with these provisions.

Model zeroing[694]

7.80 Model zeroing, as that term is used by Japan, involves average-to-average comparisons of export price and normal value within individual averaging groups established on the basis of physical characteristics.[695] We note that the panels in *EC – Bed Linen*, *EC – Tube or Pipe Fittings, US – Softwood Lumber V* and the Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V* have found that in circumstances where an authority establishes the existence of margins of dumping during the investigation phase by making multiple, model-by-model comparisons between average export prices and average normal values and by aggregating the results of those comparisons into an overall margin of dumping, Article 2.4.2 of the *AD Agreement requires* that the results of all those comparisons be fully taken into account in the numerator of the overall margin of dumping.[696] In other words, model zeroing, a method under which the numerator of the overall margin of dumping does not include results of comparisons in which average export prices of specific models of a product are above average normal values for those models, has repeatedly been found to be prohibited by Article 2.4.2 of the *AD Agreement* in recent WTO dispute settlement cases when used to establish the existence of margins of dumping during the investigation phase.

7.81 We note, in this regard, the argument of the United States that the reasoning underlying the conclusion of the Appellate Body in *US - Softwood Lumber V* regarding the inconsistency with Article 2.4.2 of zeroing applied in connection with an average-to-average comparison in the establishment of margins of dumping during the investigation phase is flawed and should not be followed by this Panel. As support for its position, the United States refers in particular to the historical background to the *AD Agreement*.[697]

7.82 We have carefully considered these arguments of the United States, in accordance with the obligation contained in Article 11 of the DSU to "make an objective assessment of the matter".[698] We consider, however, that the language used in the first sentence of Article 2.4.2 of the *AD Agreement* warrants the conclusion that model zeroing is proscribed. This follows in particular from the requirement in the first sentence of Article 2.4.2 that the weighted average normal value be compared with a weighted average export price that reflects the prices of *all comparable export transactions* and from the fact that this sentence does not contain language that indicates that margins of dumping can be determined in respect of individual models of a product. We note, in this regard, the reasoning that has led several panels and the Appellate Body to conclude that the text of the first sentence of Article 2.4.2

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[694] We recall that we have concluded that what Japan terms "model zeroing" and "simple zeroing" are different manifestations of a single rule or norm. *Supra*, footnote 688.

[695] *Supra*, para. 7.2.

[696] Panel Report, *EC – Bed Linen*, paras. 6.110-6.119; Appellate Body Report, *EC – Bed Linen*, paras. 46-66; Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.213-7.219; Panel Report, *US – Softwood Lumber V*, paras. 7.196-7.226; Appellate Body Report, *US – Softwood Lumber V*, paras. 76-117.

[697] US First Written Submission, paras. 89-94.

[698] *Supra*, footnote 636.

prohibits the use of model zeroing.[699] We also note that the arguments presented by the United States[700] are similar to arguments of the United States that were rejected by the Appellate Body in *US – Softwood Lumber V*.[701]

7.83 Thus, we consider that model zeroing in the context of an average-to-average comparison when the existence of margins of dumping is established during the investigation phase is inconsistent with Article 2.4.2 of the *AD Agreement*.

7.84 We recall our conclusion that a measure exists that requires the use of zeroing and that model zeroing is one aspect of this measure.[702] In light of our interpretation that model zeroing in the establishment of the existence of margins of dumping during the investigation phase is inconsistent with Article 2.4.2 of the *AD Agreement*, we find that this measure produces WTO-inconsistent conduct.[703]

7.85 In light of the foregoing, we conclude that model zeroing procedures in the context of original investigations are, as such, inconsistent with Article 2.4.2 of the *AD Agreement*.

7.86 The Panel therefore **finds** that by maintaining model zeroing procedures in the context of original investigations USDOC acts inconsistently with Article 2.4.2 of the *AD Agreement.*

7.87 We exercise judicial economy with respect to Japan's claims that the model zeroing procedures in the context of original investigations are inconsistent as such with Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994. In this respect, we have taken into account the considerations articulated by the Appellate Body with respect to the exercise of judicial economy. Thus, we note the statement of the Appellate Body Report in *Canada - Wheat Exports and Grain Imports* that:

> "The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint. At the same time, if a panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law."[704] *(emphasis in original; footnotes omitted)*

7.88 The Appellate Body has also stated in *Australia – Salmon* that a panel is under a duty "to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."[705] In *US – Zeroing (EC)*, the Appellate Body upheld the exercise of judicial economy by the panel in that dispute with regard to claims of the European Communities under Articles 2.4 and 9.3 of the *AD Agreement* on the grounds that findings on those claims were not

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[699] As discussed below, this reasoning led to the development of the concept of "product as a whole"; *infra*, paras. 7.92-7.99.

[700] US First Written Submission, paras. 89-94.

[701] Appellate Body Report, *US – Softwood Lumber V*, paras. 16 and 107-108.

[702] *Supra*, para. 7.58 and footnote 688.

[703] We note that in *US – Zeroing (EC)*, the Appellate Body rejected an argument of the US that the panel in that case had acted inconsistently with Article 11 of the DSU by not applying the mandatory/discretionary distinction in finding that the zeroing methodology was inconsistent with Article 2.4.2.

[704] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[705] Appellate Body Report, *Australia – Salmon*, para. 223.

necessary to secure a "positive solution" to the dispute or a "satisfactory settlement of the matter" within the meaning of, respectively, Articles 3.7 and 3.4 of the DSU.[706]

7.89 The issue in respect of which Japan requests us to make findings under Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 is exactly the same issue on which we have already made a finding of inconsistency with Article 2.4.2 of the *AD Agreement*. We therefore consider that our finding that maintaining model zeroing procedures is inconsistent with Article 2.4.2 of the *AD Agreement* will enable the DSB to make "sufficiently precise recommendations and rulings" and that in order to secure a "positive solution" to the dispute or a "satisfactory settlement of the matter" it is not necessary to make additional findings on the same issue under Article 2.1 of the *AD Agreement* and Article VI:1 and VI:2 of the GATT 1994.[707]

Simple zeroing[708]

7.90 We now turn to an examination of Japan's claims that maintaining *simple zeroing* procedures in the context of original investigations is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.[709]

7.91 With respect to Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, Japan argues that the reasoning of the Appellate Body in *US – Softwood Lumber V* regarding model zeroing necessarily implies that simple zeroing[710] in original investigations is also inconsistent with these provisions because, like model zeroing, simple zeroing amounts to a failure to determine dumping, and to calculate a margin of dumping, for the product as a whole. Japan also argues that, although the Appellate Body Report in *US – Zeroing (EC)* did not address the issue of whether zeroing is prohibited if a transaction-to-transaction comparison is used in an original investigation, the reasoning of the Appellate Body in that report dictates that conclusion in that it confirms that the requirement to determine dumping and margins of dumping for the product under investigation as a whole applies throughout the *AD Agreement*.

7.92 In considering whether, as argued by Japan, the "product as a whole" concept as used by the Appellate Body in *US – Softwood Lumber V* necessarily supports Japan's claim regarding simple zeroing, it is important to recall that the issue before the Appellate Body in that dispute was whether Article 2.4.2 of the *AD Agreement* proscribes zeroing in the context of "multiple averaging".[711] The term "multiple averaging" refers to a method whereby an authority divides a product under

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[706] Appellate Body Report, *US – Zeroing (EC)*, para. 250.

[707] Japan has reiterated its request for findings under Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 regarding model zeroing procedures in original investigations in its written comments of 10 May 2006 on the Appellate Body Report in *US – Zeroing (EC)*. Japan submits that because the Appellate Body has emphasized in that report that the prohibition of zeroing stems from Article 2.1 as well as Article 2.4.2 of the *AD Agreement* the Panel should find that model zeroing procedures in original investigations, as such and as applied, are inconsistent with both Articles 2.1 and 2.4.2. The Panel should also find that because the definition of dumping derives from Article VI of the GATT 1994, the US acts inconsistently with that provision. Japan Written Comments on the Relevant Issues of Law Addressed in the Appellate Body Report in *US – Zeroing (EC)* (WT/DS294/AB/R), para. 20. We consider that these arguments of Japan are insufficient reason to change our conclusion that additional findings on the claims of Japan under Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 are not necessary.

[708] We recall that we have concluded that what Japan terms "model zeroing" and "simple zeroing" are different manifestations of a single rule or norm. *Supra*, footnote 688.

[709] As noted above, Japan has withdrawn its claim regarding simple zeroing procedures in relation to the average-to- transaction method provided for in the second sentence of Article 2.4.2. *Supra*, footnote 635.

[710] The meaning of the term "simple zeroing" as used by Japan in this dispute is explained in para. 7.3.

[711] We note that in a written communication circulated in document WT/DS294/18 the US has essentially incorporated the text of this paragraph in the version in which it appeared in the Panel's Interim Report.

investigation into product types or models, calculates a weighted average normal value and a weighted average export price for each product type or model and then aggregates the results of these comparisons to derive an overall margin of dumping.[712] The Appellate Body agreed with the participants that Article 2.4.2 of the *AD Agreement* permits such multiple averaging and noted that the participants disagreed on the proper interpretation of the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2. The Appellate Body noted that the participants disagreed on whether the requirement to take into account "all comparable export transactions" can be satisfied at a sub-group level or whether this requirement extends to the aggregation stage.[713] With respect to the interpretation of the term "margins of dumping", the Appellate Body stated that the "disagreement turns on the question of whether that term applies to the *product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken*".[714] [715] In its analysis of this question, the Appellate Body consistently characterized the issue before it in terms of whether the terms "dumping" and "margins of dumping" apply at the product or "sub-group" or "sub-product" level[716] and concluded, in light of, *inter alia*, Article 2.1 of the *AD Agreement* and Article VI:2 of the GATT 1994, that dumping and margins of dumping can be found to exist only for a product as a whole and not for "a type, model or category of that product".[717] In other words, the Appellate Body used the notion of "the product [under investigation] as a whole" to make a distinction between the product as a whole, on the one hand, and

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[712] Appellate Body Report, *US – Softwood Lumber V*, para. 80. The Appellate Body observed that, as noted by the panel, multiple averaging is not necessarily based on product types or models and can be based on other factors, such as level of trade.

[713] Appellate Body Report, *US – Softwood Lumber V*, paras. 82-83.

[714] Appellate Body Report, *US – Softwood Lumber V*, para. 84 *(emphasis added).*

[715] The Appellate Body stated that the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2 "should be interpreted in an integrated manner". Appellate Body Report, *US – Softwood Lumber V*, para. 85. After describing the differing views of the participants on the meaning of the term "all comparable export transactions", the Appellate Body observed that their disagreement "centres on how the results of multiple comparisons are interpreted and aggregated when all comparable export transactions have admittedly been taken into account at the sub-group level" and that "this disagreement flows, in essence, from the participants" respective interpretations of the terms 'dumping' and 'margins of dumping' in the Anti-Dumping Agreement – whether these terms apply at the product or sub-product level. We therefore turn now to an analysis of these terms as used in Article 2.4.2 of the *AD Agreement*". Appellate Body Report, *US – Softwood Lumber V*, para. 90. Our view on the relationship between "margins of dumping" and "all comparable export transactions" in the Appellate Body's reasoning in *US – Softwood Lumber V* is consistent with the analysis of the Panel in *US – Softwood Lumber V (Article 21.5)*. We concur with that Panel's view that "it [is] not appropriate to focus on the Appellate Body's interpretation of the term 'margins of dumping', in isolation from the phrase 'all comparable export transactions'". Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), para. 5.21.

[716] Appellate Body Report, *US – Softwood Lumber V,* paras. 90-91, 97, 99, 101 to 103, and 115.

[717] Appellate Body Report, *US – Softwood Lumber V,* paras. 93 and 96.

"sub-group", "sub-product", "type", "model" or "category" on the other.[718] The terminology used by the Appellate Body in this respect is intimately linked to the multiple averaging method.[719]

7.93 Thus, in *US – Softwood Lumber V* the Appellate Body used the phrase "product as a whole" in its analysis of whether the term "margins of dumping", as used in Article 2.4.2 of the *AD Agreement,* "applies to the product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken". The Appellate Body considered that since margins of dumping can be found only for the product under investigation as a whole, it follows that, while "an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation ...the results of the multiple comparisons at the sub-group level are... not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation".[720] We see nothing in the relevant paragraphs in the Appellate Body Report in *US – Softwood Lumber V* to indicate that the Appellate Body considered that its reasoning regarding the requirement to determine dumping and margins of dumping for the product as a whole has implications going beyond the question of whether, in the context of a multiple averaging methodology, the terms "dumping" and "margins of dumping" must be understood to apply at a product or sub-product or sub-group level.

7.94 In this respect, we note that the Appellate Body Report in *US – Softwood Lumber V* nowhere discusses the issue of whether or not the terms "dumping" and "margins of dumping" can apply to transactions. Moreover, the Appellate Body stated several times that it was not addressing the issue of whether zeroing can be used under other methodologies provided for in Article 2.4.2.[721] In rejecting an argument of the United States that these other methodologies were important as context for the consideration of whether zeroing is permitted under the average-to-average methodology, the Appellate Body stated that it "fail[ed]to see how [it] could find that the transaction-to-transaction and average-to-individual methodologies could provide contextual support for the United States' interpretation of Article 2.4.2 *without examining first whether zeroing is permitted under those methodologies*".[722] We concur, in this regard, with the view of the panel in *US – Softwood Lumber V (Article 21.5)* that "[t]he fact that the Appellate Body declined to extend its interpretation of 'margins of dumping' from the context of the W-W methodology to the T-T methodology suggests strongly that that

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[718] The Appellate Body Report in *US – Softwood Lumber V* refers to the statement in paragraph 53 of the Appellate Body Report in *EC – Bed Linen* that "whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole". (original emphasis) The context of this statement clearly indicates that the Appellate Body was drawing a distinction between "the product as a whole", on the one hand, and "types or models of the product under investigation", on the other. Appellate Body Report, *EC – Bed Linen*, paras. 49, 53, 55 and 57. The Panel in *US – Softwood Lumber V (Article 21.5)* stated, with respect to the "product as a whole" concept as used by the Appellate Body in *US – Softwood Lumber V*, that "[i]n light of the Appellate Body's own description of "the product as a whole", we believe that the Appellate Body simply used the phrase "product as a whole" to emphasise the difference between establishing a margin of dumping for a <u>single</u> model of the product under investigation on the one hand, and establishing a margin of dumping for the product under investigation writ large, in all its types, models or categories". Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), footnote 33. We agree with the Panel's observation.

[719] It is significant, in this regard, that the term "sub-group" is used in *US – Softwood Lumber V* in the sense of "sub-groups in which the weighted average normal value is less than the weighted average export price". Appellate Body Report, *US – Softwood Lumber V*, paras. 99 and 101. Similarly, the "comparisons" the results of which may not be excluded in calculating a margin of dumping for the product under investigation as a whole are "comparisons for which the weighted average normal value is less than the weighted average export price". Appellate Body Report, *US – Softwood Lumber V*, paras. 102-103.

[720] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[721] Appellate Body Report, *US – Softwood Lumber V*, paras. 63, 77 and 104-105.

[722] Appellate Body Report, *US – Softwood Lumber* V, para. 105 (*emphasis added*).

interpretation was indeed limited to the situation where the term 'margins of dumping' is used in conjunction with the phrase 'all comparable export transactions'."[723]

7.95 We note, however, that in *US – Zeroing (EC)* the Appellate Body used the concept of "the product as a whole" in a manner that suggests that the relevance of that concept is not limited to the establishment of the existence of margins of dumping under the average-to-average method provided for in the first sentence of Article 2.4.2 of the *AD Agreement*. In that dispute, the Appellate Body found that the United States had acted inconsistently with Articles 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the administrative reviews at issue.[724] This ruling appears to be based on the following reasoning.

7.96 *First*, the Appellate Body interpreted the term "margin of dumping" in Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 in light of a requirement, derived from Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994, to establish dumping and margins of dumping for the product under investigation as a whole, as discussed in the Appellate Body Reports in *EC – Bed Linen* and *US - Softwood Lumber V*.[725] The Appellate Body considered that since Article 9.3 of the *AD Agreement* refers to Article 2, "under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping 'as established' for the product as a whole' ".[726] As a consequence,

> "...if the investigating authority establishes the margin of dumping *on the basis of multiple comparisons made at an intermediate stage*, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value. If the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others."[727]

7.97 *Second*, the Appellate Body rejected the view of the United States that in duty assessment proceedings the term "margins of dumping" can be interpreted as applying on a transaction-specific basis. The Appellate Body considered that it follows from the meaning of the term "margin of dumping" in Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994, interpreted in light of Article 6.10 of the *AD Agreement,* that "margins of dumping for a product must be established for exporters or foreign producers".[728] [729] Therefore, under Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 "investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from given exporter shall not exceed the margin of dumping established for that exporter".[730]

7.98 Based on these two considerations i.e. the requirement to determine dumping and margins of dumping for the product as a whole and the notion that in the *AD Agreement* the term "margin of

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[723] Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), para. 5.20.

[724] Appellate Body Report, *US – Zeroing (EC)*, para. 135.

[725] Appellate Body Report, *US – Zeroing (EC)*, paras. 124-126.

[726] Appellate Body Report, *US – Zeroing (EC)*, para. 127.

[727] Appellate Body Report, *US – Zeroing (EC)*, para. 127 (*emphasis added*).

[728] Appellate Body Report, *US – Zeroing (EC)*, para. 128.

[729] In support of the view that "the term 'margin of dumping' in the *Anti-Dumping Agreement* in general refers to the margins of dumping for exporters or foreign producers" the Appellate Body also referred to the Appellate Body Reports in *Mexico – Anti- Dumping Measures on Rice*, *US – Hot-Rolled Steel* and *US – Corrosion-Resistant Steel Sunset Review*. The Appellate Body also found support for this view in "the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour". Appellate Body Report, *US – Zeroing (EC)*, para. 129.

[730] Appellate Body Report, *US – Zeroing (EC)*, para. 130.

dumping" in general refers to margins of dumping of exporters or foreign producers, the Appellate Body reasoned that, in order to determine whether the use of zeroing in administrative reviews is inconsistent with Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994, "the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer" must be compared with "that exporter's or foreign producer's margin of dumping for the product as a whole" and that, "if a margin of a dumping is calculated on the basis of multiple comparisons made at an intermediate stage", the anti-dumping duties assessed must be compared with margins of dumping of exporters or foreign producers "that reflect the results of all of the multiple comparisons carried out at an intermediate stage of the calculation".[731] The Appellate Body then found that because in the administrative reviews at issue USDOC employed a methodology that systematically disregarded the results of individual comparisons in which export price exceed normal value, the amounts of anti-dumping duties assessed exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994.[732]

7.99 We have carefully considered the arguments of Japan in favour of a broader application of the "product as a whole" concept in a manner consistent with the reasoning of the Appellate Body in *US – Zeroing (EC)*. However, while we recognize the important systemic considerations in favour of following adopted panel and Appellate Body reports, we have decided not to adopt that approach for the reasons outlined below.[733]

7.100 *First*, we consider that there are difficulties in discerning the precise meaning and scope of application of the phrase "multiple comparisons...at an intermediate stage" as used in the Appellate Body Report in *US – Zeroing (EC)*.[734] The Appellate Body did not elaborate upon the meaning of that phrase and did not explain in any detail what particular aspect of the methodology employed by USDOC in the administrative reviews at issue in *US – Zeroing (EC)* involved "multiple comparisons...at an intermediate stage". It is possible that, as used by the Appellate Body in *US – Zeroing (EC)*, the phrase "multiple comparisons at an intermediate stage" should be interpreted to mean that whenever there are "multiple comparisons" there is by definition an "intermediate stage". It is also possible, however, to interpret this phrase to refer only to those multiple comparisons that involve a particular "intermediate stage". In the context of the dispute before the Appellate Body, the concept of an "intermediate stage" could perhaps be related to the manner in which USDOC divides the universe of transactions under consideration for the purpose of determining margins of dumping in duty assessment proceedings. Thus, we cannot exclude the possibility of a reading of the Appellate Body

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[731] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[732] Appellate Body Report, *US – Zeroing (EC)*, para. 133.

[733] It is well established that panel and Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties to the dispute, but that such reports create "legitimate expectations" among WTO Members and should therefore be taken into account where they are relevant to any dispute. Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112; Appellate Body Report, *Japan Alcoholic Beverages II*, pp. 12-15; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para.109. The Appellate Body has stated that "...following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same". Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188. This notion of an "expectation" that panels will follow Appellate Body reports (as well as panel reports) is supported by important systemic considerations, including the objective, referred to in Article 3.2 of the DSU, of providing security and predictability to the multilateral trading system. At the same time, a panel is under an obligation under Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements..." Moreover, Article 3.2 of the DSU requires a panel "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" and provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements".

[734] Appellate Body Report, *US – Zeroing (EC)*, paras. 126-127 and 132.

reasoning as applicable only to certain kinds of multiple comparisons. It is perhaps significant, in this regard, that the Appellate Body recalled, in paragraph 127 of its report in *US – Zeroing (EC),* that in *US – Softwood Lumber V* it had not addressed "the issue of zeroing in the context of the other methodologies set out in Article 2.4.2" and that it stated in paragraph 203 that it was "not making any finding here with respect to the consistency of the zeroing methodology, as such, with the second or third methodology set forth in Article 2.4.2 for establishing the existence of margins of dumping". We also note that, although the Appellate Body Report in *US – Zeroing (EC)* states that a Member "may choose" to undertake "multiple comparisons...at an intermediate stage"[735], it is unclear from the Report what is the basis for and the extent of the discretion enjoyed in this regard by Members. For example, it is difficult to see how a Member can *choose* not to make multiple comparisons between export price and normal value if it uses the transaction-to-transaction method or the average-to-transaction method provided for in Article 2.4.2 of the *AD Agreement* since these two methods by definition almost always involve multiple comparisons of some kind. Similarly, if a Member compares normal value and export price on an average-to-average basis, as provided for in the first sentence of Article 2.4.2, it may well be *obligated*, depending upon the facts of particular case, to use multiple averaging and thus to make multiple comparisons in order to take into account differences affecting price comparability, as required by the introductory clause to Article 2.4.2.

7.101 *Second*, as discussed above[736], the Appellate Body Report in *US – Softwood Lumber V* uses the phrase "product as a whole" as part of an analysis under the first sentence of Article 2.4.2 of the *AD Agreement* of whether zeroing is permitted in the context of **"multiple averaging"** and does not address the issue of whether zeroing is permitted in the context of **"multiple comparisons"** generally.[737] In this respect, the Appellate Body relied on the terms "product" and "products" in GATT Article VI and in Article 2.1 of the *AD Agreement* to interpret the term "margins of dumping" in the first sentence of Article 2.4.2, which, it observed, should be interpreted in an integrated manner with the phrase "all comparable export transactions". In *US – Zeroing (EC),* by contrast, the Appellate Body appeared to embrace the interpretation that the reference to "product" and "products" in Article VI of the GATT 1994 and in Article 2.1 and other provisions of the *AD Agreement* by itself suffices to conclude that zeroing is prohibited whenever "multiple comparisons at an intermediate stage are made". The Appellate Body Report in *US – Zeroing (EC)* provides no explanation of this shift from the use of the "product as a whole" concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the *AD Agreement* in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms "dumping" and "margins of dumping" cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.

7.102 *Third*, as explained below, we consider that it is permissible to interpret Articles 2.1 and 2.4.2 of the *AD Agreement* and Article VI of the GATT 1994 to mean that there is no general requirement to

[735] Appellate Body Report, *US – Zeroing (EC),* para. 126.

[736] *Supra*, paras. 7.92-7.94.

[737] Thus, with respect to the statement in paragraph 126 of the Appellate Body Report in *US – Zeroing (EC)* that "an investigating authority may choose to undertake *multiple comparisons or multiple averaging at an intermediate stage* to establish margins of dumping" (*emphasis added*), we note that the first two sentences in paragraph 97 of the Appellate Body Report in *US – Softwood Lumber V* refer to "multiple averaging" and "multiple comparisons at the sub-group level" but no to "multiple comparisons at an intermediate stage". Similarly, with respect to the penultimate sentence of paragraph 126 of the Appellate Body Report in *US – Zeroing (EC)*, we note that paragraph 102 of the Appellate Body Report in *US – Softwood Lumber V* states that "the terms 'dumping' and 'margins of dumping' in Article VI of the GATT 1994 and the Anti-Dumping Agreement apply to the product under investigation as a whole *and do not apply to sub-group levels*". (*emphasis added*)

determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers[738], entails a prohibition of zeroing other than in the context of the average-to-average comparison method in the first sentence of Article 2.4.2 of the *AD Agreement*. This view is based on an analysis of the words "product" and products" as used in Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 and of the text of Article 2.4.2 of the *AD Agreement*. In addition, as discussed below in connection with Japan's claims regarding periodic reviews, we also consider that such a general prohibition is not supported by the provisions of Article 9 of the *AD Agreement*.

The words" product" and "products" as used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994

7.103 The textual basis of the argument of Japan that Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 must be interpreted as proscribing zeroing in general is the fact that these provisions define the terms "dumping" and "margins of dumping" in relation to "product(s)".[739] According to Japan, "product" in these provisions must be understood as "product as a whole" and thereby excludes the possibility of applying the terms "dumping" and "margins of dumping" to models, types, categories, sub-groups and transactions. In the context of Japan's claim regarding simple zeroing, it is in particular the claim that these terms cannot apply to *transactions* that must be examined.

7.104 We note that the expression "product as a whole" does not appear in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Japan's argument that, by virtue of a requirement to determine dumping, and to calculate a margin of dumping, for the product as a whole, Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 prohibit zeroing under any comparison method, is based upon the proposition that the mere use of the word "product" means that the concept of dumping, by definition, cannot apply to individual transactions and inherently entails the need to examine export transactions at an aggregate level and to accord the same weight to export prices that are above normal value as to export prices that are below normal value.[740] We disagree with that interpretation. In our view, Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994, interpreted in accordance with the rules of the *Vienna Convention,* do not compel the conclusion that the words "product" and "products" mean that these provisions necessarily require such an examination of export transactions at an aggregate level.

7.105 Thus, Japan has not explained how such a requirement to examine export transactions at an aggregate level flows naturally from the **ordinary meaning** of the words "product" and "products" in

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[738] As discussed above, in *US – Zeroing (EC)* the Appellate Body based its finding that the use of zeroing in certain administrative reviews was inconsistent with Article 9.3 of the *AD Agreement* both on the notion that dumping and margins of dumping must be determined for the product as a whole and on the notion that the term "margin of dumping" in the *AD Agreement* in general refers to the margin of dumping for exporters or foreign producers, which it derived from Article 6.10 of the *AD Agreement*. We discuss the question whether Article 6.10 is of relevance to the issue of zeroing below in paras. 7.109-7.111.

[739] Japan has also referred to provisions such as Article 6.10 and 9.2 of the *AD Agreement* as support for its position.

[740] Thus, Japan asserts with respect to Article VI of the GATT 1994 that "[j]ust as the term 'dumping' is defined in relation to the product as a whole, this Article explicitly states that the relevant price is for the 'product', not a subpart of the product or a single transaction." Japan Second Written Submission, para. 46. Japan observes that in terms of the definition in Article 2.1 of the *AD Agreement* " 'dumping' is for a product and not for individual transactions". Japan Opening Statement at the Second Substantive Meeting of the Panel with the Parties, para. 22. Japan argues that Articles VI:1 and VI:2 of the GATT 1994 "demonstrate that the 'price difference' in question is the price difference for the 'product', not for individual transactions". Japan Response to Panel Question 44, para. 36. Similarly, Japan states that "Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 define 'dumping' and 'margins of dumping' in relation to a product. As a result, dumping margins must be determined for the product, not for particular transactions". Japan Response to Panel Question 53, para. 53.

Article 2.1 of the *AD Agreement* and Article VI:1 and VI:2 of the GATT 1994. In this regard, we agree with the view of the Panel in *US – Softwood Lumber V (Article 21.5)* that "there is nothing inherent in the word 'product[]' (as used in Article VI:1 of the *GATT 1994* and Article 2.1 of the *AD Agreement*) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis, although this should not imply that a margin of dumping established with respect to a particular transaction is sufficient to impose an anti-dumping measure on all subsequent imports of the product".[741]

7.106 The Panel has also not been presented with compelling arguments as to why the **context** in which the words "product" and "products" are used in Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 supports the interpretation proffered by Japan. The fact that dumping is defined in the GATT 1994 and in the *AD Agreement* as occurring when a product is introduced into the commerce of another country at less than its normal value, i.e. when the *price* of a product is *less* than its normal value in our view undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions. We fail to see why the notion that "a product is introduced into the commerce of another country" cannot apply to a particular export sale and would necessarily require an examination of different export sales at an aggregate level. Similarly, the notion of a margin of dumping as the *price difference* that exists when one price is *less* than another price (or constructed value) can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level.[742] The terms "export price of a product exported from one country to another" in Article 2.1 of the *AD Agreement* and "the price of the product exported from one country to another" in Article VI:1 of the GATT 1994 can reasonably be interpreted to mean the price of the product in a particular export transaction.

7.107 Therefore, the ordinary meaning of the words "product" and "products", read in the context of the definition of "dumping" and "margin of dumping" in which they are used in Article 2.1 of the *AD Agreement* and Article VI of the GATT, provides no support for the view that these words give rise to a general prohibition of zeroing by requiring an examination of export transactions at an aggregate level. We note, in this respect, that the record of past discussions in the framework of the GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions.[743]

7.108 Apart from the particular context in which the words "product" and "products" are used in the definition of the terms "dumping" and "margins of dumping" in Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994, it is also necessary to consider the use of these words elsewhere in the GATT 1994 and the *AD Agreement* as relevant context. Japan has failed to explain how its

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[741] Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), footnote 32.

[742] Japan argues that the fact that prices can be established in the marketplace on a transaction-specific basis does not mean that the words "product", "dumping" and "margin of dumping" in the GATT 1994 and in the *AD Agreement* have a transaction-specific meaning. Japan asserts that "investigating authorities routinely aggregate prices for transactions into prices for a product" and concludes from this that the fact that prices can be transaction-specific does not necessarily mean that margins of dumping are determined for individual transactions. Second Written Submission of Japan, para. 45. The question before the Panel, however, is whether the term "price difference" indicates that dumping and margins of dumping may be found to exist with respect to particular transactions. While it may be true that it is possible to "aggregate" prices for some particular purposes, the words "price" and "price difference" clearly do not *require* an examination of export transactions at an aggregate level.

[743] The Second Report of the Group of Experts on *Anti-Dumping and Countervailing Duties*, adopted on 27 May 1960, notes that "the ideal method of fulfilling [the principles that the imposition of an anti-dumping is only justified if a product is found to be dumped and to cause or threaten material injury] was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned". BISD 9S/194, para. 7. See also Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), para. 5.63.

interpretation of the words "product" and "products" as precluding the application of a provision to individual transactions is consistent with the meaning of these words when used elsewhere in Article VI of the GATT 1994, other provisions of the GATT 1994 and the *AD Agreement*. We see no basis for the view that when other provisions of Article VI, of the GATT 1994 or of the *AD Agreement* use the words "product" or "products", this necessarily precludes the application of such provisions to individual transactions. Thus, for example, the phrase "importation of any product" used in Article VI:6 and other provisions of the GATT 1994 does not mean that these provisions inherently cannot apply to an individual import transaction.[744] Similarly, when Article VII:3 of the GATT 1994 refers to "the value for customs purposes of any imported product", the mere use of the word "product" cannot reasonably be interpreted to preclude the possibility to apply this term to the value of a product in a particular import transaction. If the word "product" in Article VII:3 does not necessarily require an examination of transactions at an aggregate level, we cannot see why such an examination is nevertheless required by the use of that word in Articles VI:1 and VI:2.[745]

7.109 Japan relies on Article 6.10 of the *AD Agreement* as contextual support for the proposition that dumping and margins of dumping must be determined for the product as a whole.[746]

7.110 The issue before us is whether the *AD Agreement* must be interpreted to mean that in determining dumping and margins of dumping authorities must necessarily carry out an aggregate analysis of export transactions in which export prices above normal value are accorded the same significance as export prices below normal value. In our view, Article 6.10 of the *AD Agreement* does not support such an interpretation.

7.111 Article 6 of the *AD Agreement* contains provisions designed to ensure transparency and due process in the conduct of anti-dumping investigations. In that context, Article 6.10 provides that, as a rule, authorities must determine an individual margin of dumping for each known exporter or producer of the product under investigation but also lays down certain rules that must be observed when it is not possible to determine such an individual margin of dumping. Neither the phrase "product under investigation" nor the reference to an individual margin of dumping for an exporter or producer in our view provides any guidance with respect to the precise methodology to be used for the purpose of calculating that margin of dumping. As in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the use of the word "product" in Article 6.10 does not exclude the possibility of applying the concept of dumping to individual transactions. Even assuming *arguendo* that the notion of an "individual margin of dumping for each known exporter or producer"[747] implies an obligation to determine a single margin of dumping for each known exporter or producer based on an analysis of the totality of the export transactions under consideration, it does not necessarily follow that in deriving

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[744] Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending) para. 5.23. As stated there, "[a] review of the use of these terms [in Article VI of the GATT 1994] does not support the proposition that 'product' must always mean the entire universe of exported product subject to an anti-dumping investigation".

[745] Our view that it is not possible to infer from the words "product" and "products" that the concept of dumping cannot apply to individual export transactions does *not* imply that we consider that a Member may on the basis of a finding that some export sales under consideration are dumped (and are causing injury) impose a duty on all subsequent imports of that product without in any way taking into account the relative significance of those dumped sales compared to other, non-dumped sales under consideration.

[746] Japan points out that in *US – Softwood Lumber V* the Appellate Body used the phrase "*product* under investigation" in Article 6.10 to confirm its view that dumping and margins of dumping can only be found for the product as a whole. Japan also argues that in *US – Zeroing (EC)*, the Appellate Body has held that Article 6.10 confirms that Article 2.1 of the *AD Agreement* requires that margins of dumping be determined for foreign producers and exporters, for the product as a whole.

[747] In our view, an "individual" margin of dumping of an exporter or foreign producer within the meaning of Article 6.10 is a margin of dumping based on an examination of data pertaining to that particular exporter or foreign producer. In this sense, the individual character of the margin carries no particular implications regarding the methodology for determining the margin.

such a single margin an authority must accord the same weight to transactions in which the export price is above the normal value as to transactions in which the export price is below the normal value. Nothing in the text of Article 6.10 indicates that such a margin may not be calculated as an overall weighted average margin of dumping in which the numerator consists of the sum of the amounts by which export prices are less than normal value and the denominator reflects the total value of all export transactions.[748] Nor do we see on what basis it could be argued that such an approach to the calculation of margins of dumping is inconsistent with the fact that Article 9.2 of the *AD Agreement* provides for the imposition of an anti-dumping duty on a "product" or with "the need for consistent treatment of a product during an anti-dumping investigation and throughout the life on an anti-dumping action".[749]

7.112 We conclude from our analysis that the fact that the terms "dumping" and "margin of dumping" in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 are defined in relation to "product" and "products" does not warrant the conclusion that these terms, by definition, cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level in which the same weight is accorded to export prices that are above normal value as to export prices that are below normal value.

Article 2.4.2 of the AD Agreement

7.113 In addition to these considerations relating to the use of the words "product" and "products" in Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994, we consider that Japan's argument that the concept of a "product as a whole", as discussed in *US – Softwood Lumber V*, provides a sufficient basis for a general prohibition of zeroing cannot be reconciled with a coherent interpretation of Article 2.4.2 of the *AD Agreement*.

7.114 Our analysis of Article 2.4.2 is structured as follows. *First*, we articulate a key consideration guiding our analysis, namely the need for an internally coherent interpretation. *Second*, we explain the lack of a textual foundation of a general prohibition of zeroing in the text of this provision. *Third*, we identify some considerations that could be advanced in favour of an interpretation of this provision as prohibiting zeroing more broadly than only in the context of the average-to-average method. *Fourth*, we analyze the logical impossibility of reconciling a general prohibition of zeroing with the express provision for the use of an average-to-transaction method in the second sentence of Article 2.4.2.

Need for an internally coherent interpretation of Article 2.4.2

7.115 A fundamental consideration in our analysis of whether Article 2.4.2 of the *AD Agreement* supports the existence of a general prohibition of zeroing is that this provision defines three specific methodologies regarding the establishment of the existence of margins of dumping during the investigation phase. The specification of these methodologies is of considerable interpretive significance. In our view, an understanding as to whether or not there exists a general prohibition of zeroing must engage with these specific methodologies explicitly provided for in Article 2.4.2 as part of a single provision. The first sentence of Article 2.4.2 defines the average-to-average method and the transaction-to-transaction method as the two methods that Members shall normally use for this purpose. The second sentence of Article 2.4.2 provides that an average-to-transaction comparison may be used if a particular pattern of export prices exists and if an explanation is provided of why that pattern cannot be taken into account appropriately by using one of the two normal methods. In other words, the second sentence lays down the conditions under which an average-to-transaction method may be used as an exception to the use of one of the two normal methods set out in the first sentence. Our assessment of

[748] We concur with the reasoning in paragraph 5.25 of the Panel Report in *US – Softwood Lumber V (Article 21.5)* (appeal pending).

[749] *Supra*, para. 7.62.

whether or not the use of zeroing under a particular comparison method is inconsistent with Article 2.4.2 cannot be based on an analysis of that method in isolation but must be the result of an interpretation that reflects the particular interrelationship between these three methods in a logically coherent manner.

7.116 We recall in this respect that Article 31 of the *Vienna Convention* provides that the context in which terms are used in a treaty must be taken into account as one element in their interpretation. We also recall that the Appellate Body has consistently referred to the *principle of effectiveness,* which it has characterized as "[o]ne of the corollaries of 'the general rule of interpretation' in the *Vienna Convention*"[750] and "[a] fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31".[751] According to this principle of effectiveness, or *effet utile*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[752] and "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously".[753]

7.117 As discussed above, zeroing has already been found to be inconsistent with Article 2.4.2 if applied in the context of the average-to-average transaction method when establishing the existence of margins of dumping during the investigation phase. In determining whether zeroing is also inconsistent with Article 2.4.2 if used in connection with other comparison methods, we must adopt an interpretation that gives full effect, on the one hand, to the nature of the transaction-to-transaction method as one of the two normal comparison methods which is used for the same purpose and which is subject to the same conditions as the average-to-average method. On the other hand, we must give full effect to the average-to-transaction method as an exception to the normal methods provided for in the first sentence.

Lack of support in the text of Article 2.4.2 for a general prohibition of zeroing

7.118 We note that the text of Article 2.4.2 of the *AD Agreement* does not expressly address the question whether a Member may apply the zeroing method when establishing the existence of margins of dumping during the investigation phase on the basis of the transaction-to-transaction method or the average-to-transaction method of comparing export price and normal value.

7.119 The first sentence of Article 2.4.2 indicates that one of the two normal methods of establishing the existence of margins of dumping during the investigation phase is "by a comparison of normal value and export prices on a transaction-to-transaction basis". The natural meaning of "a comparison ..on a *transaction-to-transaction* basis" is a comparison between a normal value in a particular transaction and an export price in a particular transaction.[754] When compared to the other two methods provided for in Article 2.4.2 - the average-to-average method, on the one hand, and the average-to-transaction method, on the other - the distinguishing feature of the transaction-to-transaction method is its focus on individual transactions, with respect to both normal value and export price. While Article 2.4.2 thus provides that the existence of margins of dumping may be established by making comparisons of normal value and export prices in individual transactions, it does not expressly address the question of the nature of the precise methodology that an investigating authority must use to convert the results of

[750] Appellate Body Report, *US – Gasoline*, p.23.

[751] Appellate Body Report, *Japan – Alcoholic Beverages*, p. 12.

[752] Appellate Body Report, *US – Gasoline*, p.23.

[753] Appellate Body Report, *Argentina – Footwear*, para. 81.

[754] Thus, the existence of the transaction-to-transaction method contradicts Japan's argument that by definition normal value cannot be based on the price of a single transaction but must necessarily be based on "multiple transactions for the like product as a whole". Japan Comments on the US Answers to the Panel's Questions Following the Third Substantive Meeting with the Parties, paras. 6-7.

transaction-specific comparisons into "margins of dumping".[755] Even assuming that the term "margins of dumping" in Article 2.4.2 cannot apply to the results of individual transaction-to-transaction comparisons and must necessarily be understood to require aggregation of the results of multiple comparisons[756], the fact remains that Article 2.4.2 provides no guidance on the specific methodology to be used in such an aggregation of results of multiple comparisons. Because "dumping" occurs when the export price of a product is less than its normal value, the fact that Article 2.4.2 expressly permits the use of a transaction-to-transaction comparison in our view logically means that a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal value.[757] Thus, in the context of the transaction-to-transaction methodology in the first sentence of Article 2.4.2 the term "margins of dumping" can be understood to mean the total amount by which transaction-specific export prices are less than transaction-specific normal values.[758] Therefore, we can see no language in Article 2.4.2 from which it is possible to derive a requirement that, if an authority uses a method whereby a weighted average margin of dumping is expressed as a fraction, the denominator of which consists of the total value of export sales[759], the numerator of that fraction must include both amounts by which export prices of individual transactions are below the normal value and amounts by which export prices of other transactions exceed normal value.

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[755] See also the observations of the Panel in *US – Softwood Lumber V (Article 21.5)* (appeal pending) paras. 5.17 and 5.18.

[756] We realize of course that, in the context of its analysis of zeroing in connection with multiple averaging, the Appellate Body has stated in *US – Softwood Lumber V* that results of multiple comparisons at the sub-group level are "intermediate values" and are not "margins of dumping" within the meaning of Article 2.4.2. Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[757] Japan asserts that the transaction-to-transaction method involves a "comparison of normal value and export *prices* on a transaction-to-transaction basis" and that the use of the plural word "prices" shows that the margin of dumping cannot be based on the price of a single export transaction. More generally, Japan asserts, in this regard, that each of the comparison methods provided for in Article 2.4.2 requires that a comparison be made with the "prices" of multiple "export transactions", not the price of single transaction. Japan Comments on the US Answers to the Panel's Questions Following the Third Substantive Meeting with the Parties, paras. 8-13. Assuming, however, that the use of the plural "prices" and "export transactions" must necessarily be interpreted to mean that margins of dumping can only be established under Article 2.4.2 on the basis of a consideration of "multiple export transactions", it does not logically follow that a Member may not treat a transaction in which the export price is below the normal value differently from another transaction in which the export price is above the normal value.

[758] In this regard, we concur with the view of the Panel in *US – Softwood Lumber V (Article 21.5):* "In the absence of any definition of the phrase 'margins of dumping' in Article 2.4.2, and in the absence of any obligation under the T-T methodology to ensure that 'all comparable export transactions' are represented in a weighted average export price, we see no reason why a Member may not, when applying the transaction-to-transaction comparison methodology, establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices are <u>less</u> than the transaction-specific normal values. In such cases, the margin of <u>dumping</u> clearly would reflect the price difference for <u>dumped</u>, rather than <u>non-dumped</u>, exports of the product by a particular exporter. In our view, this would be a permissible interpretation of the relevant part of the first sentence of Article 2.4.2, even though it does not reflect the full results of all comparisons. In other words, when establishing the amount of dumping for the purpose of calculating a margin of dumping under the T-T comparison methodology, an investigating authority need not include in its calculations the results of comparisons where export price exceeds normal value." *(emphasis in original)* Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending*)*, para. 5.28 (*emphasis in origina;, footnote omitted*).

[759] Under the zeroing methodology at issue in this dispute USDOC includes the value of all export prices in the denominator of a weighted average margin of dumping. Therefore, *the issue before us is not whether Article 2.4.2 is to be interpreted as allowing an authority to disregard completely the results of comparisons in which export price is above the normal value.* Rather, the issue is whether Article 2.4.2 requires that Members accord the same importance to export prices above normal value as to export prices below normal value by including both negative and positive differences between export price and normal value in the numerator of a weighted average margin of dumping.

7.120 These arguments regarding the apparent lack of a clear textual foundation to interpret Article 2.4.2 as prohibiting zeroing in relation to the transaction-to-transaction method in our view also apply to the average-to-transaction method. Read together with the first sentence, the second sentence of Article 2.4.2 provides that the existence of margins of dumping during the investigation phase may be established on the basis of a comparison of an average normal value to prices of individual export transactions. As in the case of the transaction–to-transaction method, Article 2.4.2 provides no guidance regarding the manner in which results of multiple, average-to-transaction comparisons must be converted into margins of dumping and contains no language from which it is possible to conclude that, in the process of aggregating results of such multiple comparisons into margins of dumping, comparisons in which the export price is above normal value must necessarily be taken into account in exactly the same manner as comparisons in which the export price is below normal value.

Possible considerations in favour of an interpretation of Article 2.4.2 in light of a general prohibition of zeroing

7.121 A conclusion that the text of a particular provision does not explicitly address an issue does not end the process of interpretation. The rules of treaty interpretation in the *Vienna Convention* direct us to consider the potential relevance of other elements.

7.122 Article 2.4.2 of the *AD Agreement* sets forth rules on comparisons of export price and normal value for the purpose of establishing "the existence of margins of dumping during the investigation phase". We concur with the analysis by the panel in *US – Zeroing (EC)* that the applicability of Article 2.4.2 is limited to investigations within the meaning of Article 5 of the *AD Agreement.*[760] In that specific context, a determination of the existence of dumping is one of the necessary conditions to justify the application of an anti-dumping measure, which frequently takes the form of a duty applied to all future entries of the product subject to investigation. The establishment of the existence of margins of dumping in Article 2.4.2 thus serves a purpose fundamentally different from the purpose of other types of proceedings, such as duty assessment proceedings within the meaning of Article 9.3 of the *AD Agreement*. It could be argued that since Article 2.4.2 does not focus on individual export transactions but contemplates an examination of a universe of export transactions to determine whether dumping "exists" such as to warrant the introduction of an anti-dumping measure applicable to all subsequent imports of the product (if it is also found that dumped imports cause material injury to a domestic industry), an investigating authority must have regard to the overall results of the totality of the comparisons.

7.123 With regard to this fundamental purpose of Article 2.4.2, there is no logical basis to distinguish between the average-to-average comparison method, on the one hand, and the transaction-to-transaction and average-to-transaction comparison methods, on the other. Each of these methods is used as a basis to establish the existence of margins of dumping during the investigation phase. Since Article 2.4.2 prohibits zeroing when the existence of margins of dumping during the investigation phase is established on the basis of the average-to-average comparison methodology, it could be argued that it is illogical to interpret Article 2.4.2 as permitting zeroing when the transaction-to-transaction method and the average-to-transaction method are used for precisely the same purpose.

7.124 In addition, the average-to-average method and the transaction-to-transaction method have the same normative status in that in normal circumstances Members are required to use either of these methods. The choice of the transaction-to-transaction method is not subject to any special considerations compared to the average-to-average method. In light of this normative equivalence between the transaction-to-transaction method and the average-to-average method, it could be argued

[760] *Infra*, paras.7.211-7.215.

that it would be illogical if zeroing were prohibited under the average-to-average method but not under the transaction-to-transaction method.

7.125 Moreover, to interpret Article 2.4.2 as prohibiting zeroing only in the context of the average-to-average method also raises a question regarding the useful effect of the average-to-transaction method. The second sentence of Article 2.4.2 envisions use of an average-to-transaction method as an exception to the methods in the first sentence in situations in which a particular configuration of export prices exists, i.e. "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The logical premise of the second sentence is that in certain circumstances it is impossible to take this pattern of export prices appropriately into account by using one of the two methods described in the first sentence. In this regard, we note the observation made by the panel in *US – Zeroing (EC)* that the second sentence of Article 2.4.2 addresses the issue of "targeted dumping" and that this sentence acknowledges that use of the symmetrical comparison methodologies in the first sentence "may mask the existence of targeted dumping with respect to specific purchasers, regions or time periods."[761] However, if zeroing is permitted under the transaction-to-transaction method, we find it somewhat difficult to see how the existence of such targeted dumping would be masked when export price and normal value are compared on a transaction-to-transaction basis. Therefore, to interpret Article 2.4.2 as permitting the use of zeroing under the transaction-to-transaction method raises the question under what circumstances it would not be possible to take account of a pattern of export prices described in the second sentence of Article 2.4.2 by using the transaction-to-transaction method.

7.126 However, while we realize that certain anomalies arise if Article 2.4.2 is interpreted as only prohibiting the use of zeroing in connection with the average-to-average comparison method, we consider that an interpretation of Article 2.4.2 as prohibiting zeroing under all comparison methods is even more problematic from the perspective of a coherent approach to the interpretation of Article 2.4.2.[762]

<u>The implications of a general prohibition of zeroing for the average-to-transaction method provided for in the second sentence of Article 2.4.2 of the *AD Agreement*</u>

7.127 We consider, in particular, that, as argued by the United States, such a general prohibition of zeroing cannot be reconciled with the average-to-transaction comparison method provided for in the second sentence of Article 2.4.2. If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison.[763] Given that the average-to-transaction methodology by its express terms is available to Members as a means to address a particular pattern of export prices that cannot be taken into account appropriately by the two normal methods set forth in the first sentence of Article 2.4.2, an interpretation which means that the average-to-transaction method will always produce the same results as the average-to-average method is fundamentally inconsistent with the very rationale of the average-to-transaction method.[764] The principle of effective treaty interpretation means that we may not interpret the second sentence of Article 2.4.2 as providing for a comparison method that always

[761] Panel Report, *US – Zeroing (EC)*, para. 7.266.

[762] *Supra*, paras. 7.115-7.117.

[763] Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amounts by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value.

[764] Panel Report, *US – Zeroing (EC)*, para. 7.266; Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), para. 5.52.

yields the same outcome as one of the two methods in the first sentence to which it provides an exception.[765]

7.128 Japan does not contest that the average-to-transaction method in the second sentence of Article 2.4.2 would be redundant if it always yielded a result identical to that of the average-to-average comparison method in the first sentence of Article 2.4.2. Japan asserts, however, that to interpret Article 2.4.2 as prohibiting zeroing under all comparison methods does *not* render the average-to-transaction method redundant because an average-to-transaction comparison *will* produce a result different from that of an average-to-average comparison, even if zeroing is prohibited. Japan argues that a different outcome will result if the average normal value under the average-to-transaction comparison is calculated on a different basis from the average normal value under the average-to-average method[766], or if, as explicitly provided for in the second sentence of Article 2.4.2, the average-to-transaction method is applied by comparing an average normal value to a subset of the universe of export transactions, namely those export transactions that constitute the pattern of targeted dumping, and which is thus a smaller universe of export transactions than used under the average-to-average method.

7.129 Regarding Japan's argument that, if zeroing is prohibited, an average-to-transaction comparison will produce a result different from that of an average-to-average comparison if the average normal value is established on a different basis, we see nothing in the text of Article 2.4.2 that suggests any distinction between the bases upon which the normal value is established under the average-to-average method, on the one hand, and under the average-to-transaction method, on the other. There exists no substantive difference between "a weighted average normal value" in the first sentence of Article 2.4.2 and "a normal value established on a weighted average basis" in the second sentence of that provision. Moreover, the average-to-transaction method provided for in the second sentence is manifestly designed to address a problem arising from a particular pattern of *export prices,* not domestic prices. Thus, Japan's interpretation of the second sentence as contemplating an average normal value established on a basis different from the average normal value referred to in the first sentence of Article 2.4.2 is without support in the text of Article 2.4.2 and has no logical relationship to the purpose of the average-to-transaction method. In this respect, we see no merit in Japan's argument that Article 2.4.2 does not prohibit a Member from using different bases for calculating the average normal values in the average-to-average comparison and the average-to-transaction comparison and that Article 2.4.2 was thus crafted on the assumption that Members could choose to use different bases for calculating the average normal value under these two methods. [767]

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[765] As noted above, in Japan's written comments of 10 May 2006 on the Appellate Body Report in *US – Zeroing (EC)* Japan withdrew its claim with respect to simple zeroing under the average-to-transaction method provided for in the second sentence of Article 2.4.2. In our view, the fact that there is no longer a claim before us regarding simple zeroing under the average-to-transaction method under the second sentence of Article 2.4.2 does not in any way detract from the significance of this sentence as an important contextual element that must necessarily be taken into account in any analysis of the issue of zeroing. The "product as a whole" analysis, as articulated by Japan in this proceeding, posits a general principle applicable throughout the *AD Agreement*: differences between export price and normal value, positive or negative, must be equally taken into account. The result of the application of this general principle to the average-to-transaction method in the second sentence of Article 2.4.2 is that that method always yields the same outcome as the average-to-average method in the first sentence, thereby depriving the average-to-transaction method of its effectiveness as an exception to the two methods in the first sentence. That a prohibition of zeroing based on the "product as whole" reasoning negates the effectiveness of an entire clause in Article 2.4.2, a provision that explicitly deals with a key aspect of the methodology for establishing margins of dumping, shows that the "product as a whole" argument is seriously flawed from a perspective of a coherent approach to treaty interpretation.

[766] As an example, Japan points out that USDOC calculates average normal values on an annual basis in original investigations but on a monthly basis in periodic reviews.

[767] Japan Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 62.

7.130 Japan's argument that the second sentence of Article 2.4.2 authorizes Members to restrict their inquiry to a subset of export transactions, namely those export transactions that constitute the "pattern of export prices", in our view is also unsupported by the text of that sentence. The first part of the second sentence of Article 2.4.2 makes it unambiguously clear that what is authorized by that sentence is a comparison of a normal value established on a weighted average basis to prices of individual export transactions, as a departure from the requirement to use one of the two symmetrical methods defined in the first sentence of Article 2.4.2. The average-to-transaction method is different from the two methods defined in the first sentence only in that it is "asymmetrical". In particular, the second sentence of Article 2.4.2 contains no words that express the idea that an authority may restrict the universe of export transactions which are compared to the average normal value. The sentence simply refers to "prices of individual export transactions" without any indication that "transactions" in this connection refers to a smaller universe of transactions than in the case of the average-to-average and transaction-to-transaction comparison methods.

7.131 In response to a question from the Panel, Japan states that the word "individual" in" individual export transactions" in the second sentence of Article 2.4.2, when contrasted with "all" in the first sentence, provides support for its interpretation that the average-to-transaction method provides for a comparison of an average normal value to export prices of the transactions that make up a pattern of export prices. In our view, Japan's response is not consistent with the context within which the word "individual" is used in the second sentence of Article 2.4.2. The difference between the average-to-average and average-to-transaction methods is a difference between a comparison of "a weighted average normal value with a weighted average of prices of all comparable export transactions", on the one hand, and a comparison of a "normal value established on a weighted average basis" with "prices of individual export transactions" on the other. When viewed in the context of the average-to-transaction method as an exception to the average-to-average and the transaction-to-transaction methods, the expression "prices of individual export transactions" in the second sentence simply refers to prices established on the basis of individual transactions, as distinguished from an average of all prices. Therefore, the expression "individual export transactions" describes the basis upon which export prices are compared to an average normal value and does not confine the range of export transactions covered by the comparison. Moreover, under Japan's approach the term "individual export transactions" is deprived of its effectiveness because the prohibition of zeroing means that the numerator of the average margin of dumping must reflect any differences, positive and negative, between export prices of the transactions that constitute the pattern of targeted dumping. This means, in effect, that under Japan's interpretation of the average-to-transaction method an average normal value must be compared to the average export price of the transactions that constitute the pattern of targeted dumping. Under Japan's interpretation, the notion of the methodology provided for in the second sentence of Article 2.4.2 as an average-to-*transaction* method completely looses its meaning.

7.132 With respect to Japan's argument that its position that an authority may make a targeted selection of export transactions finds support in the "taken into account appropriately" language in the second sentence of Article 2.4.2, we consider that Japan misinterprets the role of this language. This language has no role other than in the context of the requirement to explain why the pattern of export prices cannot be addressed through the use of the average-to-average method or the transaction-to-transaction method. The second sentence of Article 2.4.2 does not contain an independent requirement or authorization to design a comparison methodology in such a way as to take appropriate account of a particular pattern of export prices. We also consider that Japan is incorrect in arguing that a pattern of targeted dumping can only be taken into account appropriately through the selection of a subset of the export transactions. If an asymmetrical comparison is made, a pattern of targeted dumping will automatically manifest itself in the results of that comparison, if zeroing is permitted.

7.133 Japan's interpretation of the second sentence of Article 2.4.2 as permitting an investigating authority to confine a comparison to those export transactions that constitute targeted dumping also suffers from logical inconsistencies. In particular, Japan argues that in a situation envisioned by the second sentence of Article 2.4.2, the "fair comparison" requirement prohibits zeroing with regard to those export transactions that constitute targeted dumping but that export prices of export transactions that fall outside the "pattern of export prices" may be excluded not only from the numerator but also from the *denominator* of a weighted average margin of dumping.[768] Thus, Japan interprets this method in a manner that, by enabling an investigating authority to confine its analysis to a subset of the export transactions and to completely disregard export prices that are outside the "pattern of export prices" may well yield an overall margin of dumping significantly higher than a comparison in which all export transactions are included in the denominator and in which zeroing is applied to compute the numerator of the average margin of dumping.

7.134 In the latter regard, we note that Japan takes the view that if an authority has limited its inquiry to particular regions, purchasers or time-periods, it may nevertheless impose under Article 9 of the *AD Agreement* anti-dumping duties on all entries of the product into the territory of the importing Member.[769] We consider that this position is fundamentally inconsistent with the general approach of the *AD Agreement* regarding the scope of application of anti-dumping duties. Article 4 of the *AD Agreement* very carefully defines the circumstances in which it is permissible to impose anti-dumping duties on all imports into a Member's customs territory on the basis of the effect of dumped imports in a part of that territory. There is no basis in the *AD Agreement* for the view that, absent the circumstances described in Article 4, a determination of dumping based on the effect of dumped imports in a part of a Member's territory can justify the imposition of anti-dumping duties on all imports of the product into that entire territory. Specifically, nothing in Article 2.4.2 indicates that the second sentence provides authority for such an application of anti-dumping duties. Nor can we a see legal basis in Article 2.4.2 or in other provisions of the *AD Agreement* for the view that a Member may impose an anti-dumping duty on all imports of a product on the basis of a determination of dumping which is limited to particular customers or time-periods and completely disregards any other export sales.

7.135 We also see a contradiction between Japan's argument that an authority may restrict its analysis to a sub-set of the export transactions and Japan's general position that dumping must be determined for a product as a whole. By its express terms, the second sentence of Article 2.4.2 is only a departure from the first sentence of Article 2.4.2. Thus, if there is an obligation flowing from the definition of dumping to determine dumping for the product as a whole, there is no textual basis to conclude that such an obligation does not apply to the second sentence of Article 2.4.2. While Japan asserts that the second sentence of Article 2.4.2 is an exception to the requirement to determine a margin of dumping for a product as a whole, it has failed to indicate the precise textual basis for that view.

7.136 Finally, Japan has not submitted any material relating to the negotiating history of Article 2.4.2 to support its view that the second sentence of Article 2.4.2 provides for a comparison of an average normal value with a more limited universe of export transactions than under the average-to-average method.

7.137 To conclude, we consider that the arguments of Japan to support its position that, even without zeroing, an average-to-transaction comparison will produce a result that is different from the result of an average-to-average comparison are not compelling. Thus, Japan has not effectively rebutted the argument of the United States that, without zeroing, the average-to-transaction method always yields results that are identical to those of the average-to-average method and that, as a consequence, if zeroing is always prohibited, the second sentence of Article 2.4.2 is deprived of its effectiveness. Therefore, we

[768] Japan Response to Panel Question 49.
[769] Japan Response to Panel Question 50.

conclude that Article 2.4.2 cannot be interpreted to mean that zeroing is prohibited under the average-to-transaction method and that the second sentence of Article 2.4.2 thus contradicts the existence of a general prohibition of zeroing.[770]

Summary of the Panel's analysis of Article 2.4.2 of the *AD Agreement*

7.138 Our analysis shows, *first*, that the text of Article 2.4.2 of the *AD Agreement* does not expressly address the issue of whether a Member may apply zeroing when it establishes the existence of margins of dumping during the investigation phase on the basis of the transaction-to-transaction method or the average-to-transaction method. *Second*, whether Article 2.4.2 is interpreted as prohibiting zeroing only under the average-to-average method or under all three comparison methods, both interpretations pose problems in terms of a logically coherent approach to the interpretation of this provision that takes into account the interrelationship between the three methods in a manner that is consistent with the principle of effective treaty interpretation. On the one hand, if Article 2.4.2 is interpreted to mean that zeroing is prohibited only in connection with the average-to-average comparison method, certain anomalies arise. Thus, for instance, absent a prohibition of zeroing, there is a question as to why it would not be possible for a Member confronted with a "pattern of export prices" within the meaning of the second sentence of Article 2.4.2 to address such a pattern by using the transaction-to-transaction method. On the other hand, to interpret Article 2.4.2 as prohibiting zeroing under all three methods, including the transaction-to-transaction method and the average-to-transaction method, also gives rise to serious anomalies. In particular, such an interpretation would completely deprive the average-to-transaction method of its effectiveness as an exception to the use of the two normal comparison methods set out in the first sentence of Article 2.4.2. In effect, an interpretation that zeroing is prohibited under all comparison methods effectively means that the average-to-transaction method becomes indistinguishable in its results from the average-to-average comparison method.

7.139 We realize that it could be argued that Article 2.4.2 must be interpreted to mean that zeroing is prohibited under the average-to-average and transaction-to-transaction methods but not in the average-to-transaction method. However, we see no textual support for such an interpretation. In particular, we see no textual difference between the average-to-transaction method and the transaction-to-transaction method that can sustain the view that zeroing, while not prohibited under the average-to-transaction method is prohibited under the transaction-to-transaction method. While these methods obviously differ with respect to the basis upon which the normal value is established, they do not differ with respect to the establishment of export prices. A transaction-to-transaction comparison is a comparison between prices of individual transactions in the domestic market, on the one hand, and prices of individual transactions in the export market, on the other. Thus, the export prices in the transaction-to-transaction method are "prices of individual export transactions" as is the case under the average-to-transaction method. Therefore, the expression "prices of individual export transactions" in the second sentence of Article 2.4.2 does not distinguish the average-to-transaction method from the transaction-to-transaction method. We see no textual basis in Article 2.4.2 for the view that such "prices of individual export transactions" must be taken into account under the transaction-to-transaction method in a different manner than under the average-to-transaction method.

7.140 We are compelled to conclude that the result of our analysis is somewhat imperfect in terms of a logically coherent interpretation of Article 2.4.2 of the *AD Agreement*. While ideally a coherent interpretation would yield a single answer to the question of whether Article 2.4.2 allows for the use of zeroing under any of the three comparison methods, we have found that such a single answer may not be possible. We have identified some possible considerations in favour of the view that a prohibition of

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[770] Our view that the second sentence of Article 2.4.2 would be deprived of effectiveness if interpreted in light of a general prohibition of zeroing is consistent with the analysis of the Panel in *US – Softwood Lumber V (Article 21.5)*. Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), para. 5.52.

zeroing under the average-to-average method must also apply to the other two comparison methods, notably the transaction-to-transaction method. However, our analysis has also ineluctably led to the very serious difficulties posed by an approach that interprets Article 2.4.2 to mean that zeroing is prohibited under all comparison methods set out in that provision. In the latter regard, it is our view that, on balance, the interpretation that zeroing is prohibited under all circumstances is more anomalous and in conflict with the requirement of effective treaty interpretation than the interpretation that zeroing is prohibited only under the first comparison method. To interpret Article 2.4.2 as prohibiting zeroing under all methods means that the average-to-transaction method collapses into the average-to-average comparison method set forth in the first sentence. This would completely defeat the objective of providing an exceptional method that enables Members to address certain patterns of export prices that cannot be effectively dealt with through the average-to-average or transaction-to-transaction comparison. Such an interpretation can be considered to be manifestly absurd and unreasonable because it means that the average-to-transaction method will in effect be the same as one of the two methods to which it is an exception.

7.141 We have found that (1) the fact that the terms "dumping" and "margin of dumping" in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 are defined in relation to "product" and "products" does not warrant the conclusion that these terms, by definition, cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level in which the same weight is accorded to export prices that are above normal value as to export prices that are below normal value;[771] and (2) the text of Article 2.4.2 of the *AD Agreement* does not support the view that the *AD Agreement* and GATT Article VI must be interpreted to mean that there exists a general prohibition of zeroing.[772] [773]

7.142 Thus, we conclude that it is permissible within the meaning of Article 17.6(ii) of the *AD Agreement* to interpret Article VI of the GATT 1994 and relevant provisions of the *AD Agreement* to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing.

7.143 In light of all the foregoing considerations, the Panel **finds** that by maintaining simple zeroing procedures in the context of original investigations USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement* and Article VI:1 and VI:2 of the GATT 1994.

(ii) Article 2.4 of the AD Agreement

Arguments of the Parties

7.144 **Japan** claims that model and simple zeroing are as such inconsistent with Article 2.4 of the *AD Agreement* mainly because they violate the obligation to make a fair comparison expressed in the first sentence of that provision. Japan asserts that the word "comparison" as used in the first sentence of Article 2.4 means the action by which an investigating authority determines the price difference between normal value and export price for the product as a whole, i.e. the margin of dumping. This "comparison" does not end when authorities have made due allowance for factors affecting price comparability. The "fair comparison" requirement, which is a general obligation that informs all of Article 2 and which also applies to the calculation of the margin of dumping, means that the process by which authorities identify "the price difference" between normal value and export price for the product

[771] *Supra*, paras. 7.103-7.112.
[772] *Supra*, paras. 7.113-7.140.
[773] In addition, as discussed in connection with Japan's claims regarding periodic reviews, we also consider that such a general prohibition is not supported by the provisions on duty assessment in Article 9 of the *AD Agreement.*

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.

7.145 Japan submits that model and simple zeroing prevent USDOC from making a fair comparison as required by Article 2.4. The Appellate Body has already held that zeroing is unfair within the meaning of Article 2.4 of the *AD Agreement* because it may lead to a finding of dumping where no dumping would be found in the absence of zeroing and because it inflates the margin of dumping by excluding results of negative comparisons that would reduce the overall amount of dumping if they were included. The model and simple zeroing procedures at issue in this case deprive the comparison of normal value and export prices of even-handedness because they overstate the amount of dumping and render a dumping determination more likely and thereby systematically favour the interests of petitioners and prejudice the interests of exporters. They also distort the comparison by effectively treating export prices as less than what they actually are and fail to determine a margin of dumping for the product as a whole.

7.146 Japan submits that a general prohibition of zeroing does not render the average-to-transaction methodology in the second sentence of Article 2.4.2 redundant. Japan contests that without zeroing the average-to-transaction comparison necessarily produces results identical to the results of the average-to-average comparison. Thus, an average-to-transaction comparison will produce a result different from that of an average-to-average comparison if the average normal value is calculated on a different basis. Moreover, the second sentence of Article 2.4.2 provides for a comparison of an average normal value to only those export transactions that constitute the pattern of targeted dumping. Japan claims that this interpretation of Article 2.4.2 is consistent with the USDOC Regulations, which provide that the application of the average-to-transaction comparison shall be limited to the prices that make up the pattern of targeted dumping.

7.147 The **United States** argues that Article 2.4 of the *AD Agreement* does not contain obligations with respect to zeroing. *First*, the "fair comparison" obligation in Article 2.4 refers to the adjustments necessary to account for differences between export price and normal value that affect price comparability. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences affecting price comparability. Thus, Article 2.4 applies to the required price adjustments and not to how the results of those comparisons are treated. Japan's attempt to read a "good faith" obligation into Article 2.4 is inconsistent with customary rules of treaty interpretation. *Second*, Japan's interpretation of the "fair comparison" requirement in Article 2.4 to create a general obligation to offset dumping margins cannot be reconciled with the remaining text of the *AD Agreement* in a manner consistent with customary rules of treaty interpretation. To interpret Article 2.4 to require offsets for negative dumping margins renders the distinction between the average-to-average comparison and the average-to-transaction comparison meaningless.

7.148 In the latter regard, the United States asserts that there is no textual support for Japan's arguments that the second sentence of Article 2.4.2 provides for a selection of only those export transactions that make up the pricing pattern envisioned by that provision and that Article 2.4.2 was crafted on the assumption that the average normal value in the third methodology in Article 2.4.2 is established on a basis different from the average normal value in the first methodology. The United States also submits that Japan is incorrect in arguing that the USDOC Regulations provide for the application of the third comparison methodology to a subset of export transactions.

7.149 The United States argues that the Appellate Body Reports in *EC – Bed Linen*, *US – Corrosion-Resistant Steel Sunset Review* and *US – Softwood Lumber V* do not provide a basis to conclude that the "fair comparison" requirement in Article 2.4 creates an independent obligation to provide offsets for export transactions that exceed normal value. In any event, even if the "fair comparison" requirement were not limited in scope to allowances to reflect differences in price comparability, it would not follow that not to provide offsets for export prices above normal value is

unfair. Fairness should only be evaluated through an objective, discernable standard of what is appropriate and inappropriate, as found within the four corners of the *AD Agreement*. Thus, the simple fact that the non-use of offsets leads to a higher margin of dumping does not suffice to conclude that it is unfair.

Evaluation by the Panel

7.150 Japan requests us to find that maintaining model and simple zeroing procedures in the context of original investigations is inconsistent with Article 2.4 of the *AD Agreement* because these procedures are inherently biased, distort the comparison of normal value and export price, and thus deprive exporters of a fair comparison.

7.151 Article 2.4 of the *AD Agreement* provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (*footnote omitted*)

Model zeroing

7.152 We have found that maintaining model zeroing procedures in the context of original investigations is inconsistent with Article 2.4.2 of the *AD Agreement*.[774] We do not consider it necessary to make a finding on whether maintaining model zeroing procedures in the context of original investigations is also inconsistent with Article 2.4 of the *AD Agreement*. Our finding that model zeroing is inconsistent with Article 2.4.2 of the *AD Agreement* pertains to the fact that when USDOC calculates the weighted average margin of dumping for an exporter or producer, it does not include in the numerator of that margin of dumping any amounts by which average export prices for particular models are higher than the average normal values for those models. Exactly the same issue – the non-inclusion in the numerator of the weighted average margin of dumping of differences between average export prices and average normal values if average export prices are higher than average normal values-is challenged by Japan under Article 2.4 of the *AD Agreement*. We refer in this respect to the general considerations guiding our exercise of judicial economy that we have set out above.[775] We note that the panels in *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V* and *US – Zeroing (EC)* also declined to make findings on claims that zeroing is inconsistent with Article 2.4 of the *AD Agreement* after finding that model zeroing is inconsistent with Article 2.4.2.[776]

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[774] *Supra*, para. 7.86

[775] *Supra*, paras.7.87-7.88.

[776] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.219; Panel Report, *US – Softwood Lumber V*, para. 7.226; Panel Report, *US – Zeroing (EC),* paras. 7.33 and 7.108. We note that in *US – Zeroing (EC)*, the Appellate Body found that the panel in that dispute had not committed an error of law in exercising judicial economy with regard to a claim of the EC that the application of zeroing in an original investigation is inconsistent

Simple zeroing

7.153 Japan's main argument in support of this claim is that zeroing is inconsistent with the requirement expressed in the first sentence of Article 2.4 that a *fair comparison* be made between the export price and the normal value. The parties have expressed divergent interpretations of the scope of application and substantive meaning of this "fair comparison" comparison requirement and on whether an interpretation of this requirement as the basis for a general prohibition of zeroing is compatible with other provisions of the *AD Agreement*, particularly the average-to-transaction method provided for in the second sentence of Article 2.4.2.

7.154 We consider that the requirement of a fair comparison set out in the first sentence of Article 2.4 is an independent legal obligation that is not defined exhaustively by the specific requirements set out in the remainder of Article 2.4 and is not limited in scope to the issue of adjustments to ensure price comparability. In this regard, we agree with the analysis of the panel in *US – Zeroing (EC)* regarding the scope of the "fair comparison" obligation. *First*, as stated by that panel, not to give independent meaning to the "fair comparison" requirement would render this provision inutile. *Second*, the structure of Article 2.4 suggests that the chapeau of Article 2.4 and its sub-paragraphs must be interpreted as a whole. *Third*, the "comparison" referred to in Articles 2.4.1 and 2.4.2 of the *AD Agreement* is the "comparison" in Article 2.4. *Fourth*, the "fair comparison" requirement explicitly applies also to the subject matter of Article 2.4.2 by virtue of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2.[777] We also note that the Appellate Body has stated that the "fair comparison" requirement in Article 2.4 of the *AD Agreement* constitutes a "general obligation" which "informs all of Article 2" but which "applies in particular to Article 2.4.2".[778]

7.155 While the "fair comparison" requirement constitutes an independent legal obligation, its precise meaning must be understood in light of the nature of the activity at issue. The concept of "fairness" is potentially a rich concept with different meanings in different contexts. One meaning of "fairness" is that "like" must be compared with "like". This is the requirement that comparisons should not be arbitrary. Fairness can also be understood to mean that once an authority has determined the universe of transactions that it will compare it must take account of the results of all the comparisons made in respect of those transactions and may not limit its analysis to those results that tend to support an affirmative finding of dumping.

7.156 Moreover, it could be argued that if, as stated by the Appellate Body, zeroing is unfair when used in conjunction with the first methodology in Article 2.4.2[779], it stands to reason that zeroing is also unfair if applied in the context of the other comparison methodologies. We note that the Appellate Body itself has made statements that could be interpreted to reflect a view that zeroing is unfair because of its effect on the magnitude of the margin of dumping, a view that would not seem to limit the unfairness of this method only to zeroing used in connection with the average-to-average comparison method to establish the existence of margins of dumping during the investigation phase. In particular, we note the statement that:

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with Article 2.4 of the *AD Agreement* after the panel had found that zeroing was inconsistent with Article 2.4.2. Appellate Body Report, *US – Zeroing (EC)*, para. 250.

[777] Panel Report, *US – Zeroing (EC)*, paras. 7.252-7.258.

[778] Appellate Body Report, *EC – Bed Linen*, para. 59.

[779] Appellate Body Report, *EC – Bed Linen*, para. 55: "... we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of zeroing at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and Article 2.4.2" (*emphasis in original*).

> "In *EC – Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *AD Agreement* by using a 'zeroing' methodology in the anti-dumping investigation at issue in that case. We held that the European Communities' use of this methodology 'inflated the result from the calculation of the margin of dumping.' We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a 'fair comparison' between export price and normal value as required by Articles 2.4 and 2.4.2.
>
> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, 'zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.' Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[780]

7.157 We also note, however, that to date the Appellate Body has never actually made a *legal finding* in a specific case that the use of zeroing is inconsistent with Article 2.4 of the *AD Agreement* on its own (i.e. as an independent legal obligation). We do not consider, in this regard, that the Appellate Body Reports in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* provide a sufficiently detailed legal analysis of the "fair comparison" requirement in general and its applicability to the issue of zeroing in particular, to warrant the conclusion that this requirement must be interpreted to mean that zeroing is prohibited in all circumstances. We find it highly significant in this regard that, as discussed above, in *US – Softwood Lumber V* the Appellate Body declined to answer the question of whether zeroing is permitted under the transaction-to-transaction and the average-to-transaction comparison methods.[781] In our view, the present dispute has raised fundamental questions regarding the interpretation of the "fair comparison" requirement in relation to zeroing that were not considered in the Appellate Body reports in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review.* In particular, we do not see in those reports any analysis of the question of whether an interpretation that the "fair comparison" requirement proscribes zeroing whenever margins of dumping are calculated can be reconciled with other provisions of the *AD Agreement* in accordance with the principle of effective treaty interpretation.

7.158 In our view, the somewhat indeterminate standard of fairness underlying the "fair comparison" requirement may not be interpreted in a manner that renders more specific provisions of the *AD Agreement* completely inoperative. We agree, in the latter regard, with the view expressed by the panel in *US – Zeroing (EC)* that the "fair comparison" requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgement of what fairness means in the abstract and in complete isolation from the substantive context.[782] In the present case, the relevant "substantive context" in our view indicates that the "fair comparison" requirement cannot be interpreted to create a general prohibition of zeroing.

7.159 As explained above, such a general prohibition would be inconsistent with the principle of effective treaty interpretation, especially because it would render the average-to-transaction method provided for in Article 2.4.2 of the *AD Agreement* indistinguishable from the average-to-average method and thereby deprive the average-to-transaction method of its effectiveness as an exception to

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[780] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 134-135.

[781] Appellate Body Report, *US – Softwood Lumber V*, para. 105.

[782] Panel Report, *US – Zeroing (EC)*, para. 7.261.

the normal methods set out in the first sentence of Article 2.4.2.[783] Similarly, a general prohibition of zeroing would undermine the effectiveness of provisions in Article 9 that in our view clearly permit Members to assess anti-dumping duties on a transaction-specific basis.[784] There is nothing in the second sentence of Article 2.4.2 or in Article 9 that indicates that these provisions establish exceptions to the "fair comparison" requirement of Article 2.4. Therefore, if the "fair comparison" requirement operates to prohibit zeroing, it necessarily also applies in the context of these provisions. Consequently, it is impossible, in our view, to reconcile the proposition that the "fair comparison" requirement must be interpreted to create a general prohibition of zeroing with the second sentence of Article 2.4.2 and the provisions on duty assessment in Article 9 in a manner consistent with the requirement of effective treaty interpretation.[785]

7.160 Finally, while we realize that Article 2.4.2 must be interpreted in light of the "fair comparison" requirement contained in Article 2.4 of the *AD Agreement*, we cannot interpret this requirement in a manner that would undermine the effectiveness of Article 2.4.2.

7.161 In light of these considerations, the Panel **finds** that by maintaining simple zeroing procedures in the context of original investigations USDOC does not act inconsistently with Article 2.4 of the *AD Agreement*.

(iii) Articles 3.1 to 3.5 of the AD Agreement

Arguments of the Parties

7.162 **Japan** claims that maintaining zeroing procedures in original investigations is inconsistent with Articles 3.1 to 3.5 of the *AD Agreement* because, as a consequence of the systematic distortion of the margin of dumping resulting from the zeroing procedures, injury determinations are not objective in that they are not based on positive evidence as required by Article 3.1 on the volume of dumped and non-dumped imports, the rate of increase of dumped imports, the prices of dumped and non-dumped imports and the magnitude of the margin of dumping.

7.163 The **United States** argues that Japan's "as such" and "as applied" claims are speculative and unfounded. Japan fails to explain how the USDOCs approach necessarily results in a lack of positive evidence in any, let alone every injury determination. Japan's explanation of its claims is based on a speculation about consequences that may occur.

Evaluation by the Panel

7.164 Japan requests us to make a finding that the model zeroing procedures that we have found to be inconsistent with Article 2.4.2 of the *AD Agreement* in the context of original investigations are also inconsistent with Articles 3.1-5 of the *AD Agreement*. A panel may exercise judicial economy where it

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[783] *Supra*, paras. 7.127-7.137.

[784] *Infra*, paras. 7.196-7.209.

[785] Our reasoning also applies to the argument of Japan that even under a narrow interpretation of the scope of the "fair comparison" requirement zeroing is inconsistent with that requirement because zeroing amounts to an allowance for a difference that does not affect price comparability. Japan Second Written Submission, paras. 61-64. The second sentence of Article 2.4.2 is not an exception to the obligation in Article 2.4 to make due allowance for differences affecting price comparability. Consequently, if zeroing is prohibited by Article 2.4 as an allowance for a difference that does not affect price comparability, that prohibition also applies in the context of the average-to-transaction method provided for in the second sentence of Article 2.4.2. We also note that in *US – Zeroing (EC)* the Appellate Body upheld the finding of the panel in that dispute "that zeroing is not an impermissible allowance or adjustment under Article 2.4, third to fifth sentences". Appellate Body Report, *US – Zeroing (EC)*, para. 159.

is claimed that the same measure is inconsistent with more than one provision if it considers that multiple findings under various provisions are not necessary to resolve the dispute.[786] We realize that panels that have found that determinations of dumping were inconsistent with Article 2 of the *AD Agreement* or that determinations of the existence and amount of subsidies were inconsistent with relevant provisions of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"), have not refrained from addressing claims regarding determinations of injury under Article 3 of the *AD Agreement* or Article 15 of the *SCM Agreement*. We also note, however, that in those cases the claims submitted with respect to injury determinations had an independent basis in Article 3 of the *AD Agreement* or Article 15 of the *SCM Agreement* and were not premised upon the existence of an inconsistency of the determination of dumping with the *AD Agreement* or an inconsistency of the determination of the existence and amount of a subsidy with the *SCM Agreement*.[787]

7.165 In the present case, however, Japan's claims under Article 3 of the *AD Agreement* with respect to model zeroing procedures as such are entirely dependent upon the inconsistency of this measure with Article 2 of the *AD Agreement*. Japan asserts that the inconsistency of the model zeroing procedures with Article 2 results in an inconsistency with Article 3 in that a distorted finding of dumping necessarily prevents an authority from making an objective examination based on positive evidence. Japan submits no grounds to support this claim that do not depend upon a finding of inconsistency of model zeroing procedures with Article 2 of the *AD Agreement*. Absent such independent grounds, we consider that it is not necessary to make a finding on Japan's claims under Article 3 of the *AD Agreement* with respect to model zeroing procedures in the context of original investigations.

7.166 Since we have found that by maintaining simple zeroing procedures in the context of original investigations, USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article 2.4 of the *AD Agreement*, we also **find** that USDOC does not act inconsistently with Articles 3.1-3.5 of the *AD Agreement* in this respect.

(iv) Article 5.8 of the AD Agreement

Arguments of the Parties

7.167 **Japan** claims that maintaining zeroing procedures in original investigations is inconsistent with Article 5.8 of the *AD Agreement* because the zeroing procedures deprive USDOC of an adequate and credible basis for determining whether there is sufficient evidence of dumping to justify proceeding with an investigation.

7.168 The **United States** argues that, apart from being dependent upon a separate violation of Articles 2.1, 2.4 or 2.4.2 of the *AD Agreement*, Japan's argument with respect to Article 5.8 is also speculative. Japan has not established that, were it to prevail with respect to its claims that the United States acted in breach of Articles 2.1, 2.4 or 2.4.2, the only margins that could be determined in a WTO-consistent manner must be less than *de minimis*.

Evaluation by the Panel

7.169 Japan requests us to make a finding that the model zeroing procedures that we have found to be inconsistent with Article 2.4.2 of the *AD Agreement* in the context of original investigations are also inconsistent with Article 5.8 of the *AD Agreement*. A panel may exercise judicial economy where it is claimed that the same measure is inconsistent with more than one provision if it considers that multiple

[786] *Supra*, paras.7.87-7.88.

[787] E.g., Panel Report, *EC –Bed Linen*; Panel Report, *EC – Tube or Pipe Fittings*; Panel Report, *US – Countervailing Duty Investigation on DRAMs*; Panel Report, *EC – Countervailing Measures on DRAM Chips*.

findings under various provisions are not necessary to resolve the dispute.[788] Japan's claim under Article 5.8 of the *AD Agreement* with respect to model zeroing procedures as such is entirely dependent upon the inconsistency of this measure with Article 2 of the *AD Agreement*. Japan asserts that the inconsistency of the model zeroing procedures with Article 2 results in an inconsistency with Article 5.8 because the model zeroing procedures deprive USDOC of an adequate and credible basis for determining whether there is sufficient evidence of dumping to justify proceeding with an investigation. Japan submits no grounds to support this claim that do not depend upon a finding of inconsistency of zeroing procedures with Article 2 of the *AD Agreement*. Absent such independent grounds, we consider that it is not necessary to make a finding on Japan's claim under Article 5.8 of the *AD Agreement* with respect to model zeroing procedures in the context of original investigations.

7.170 Since we have found that by maintaining simple zeroing procedures in the context of original investigations USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article 2.4 of the *AD Agreement*, we also **find** that USDOC does not act inconsistently with Article 5.8 of the *AD Agreement* in this respect.

(v) Articles 1 and 18. 4 of the AD Agreement and Article XVI:4 of the WTO Agreement

7.171 We do not make findings on the claims of Japan that by maintaining model zeroing procedures in the context of original investigations USDOC acts inconsistently with Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement. When presented with claims under Articles 1 and 18 of the *AD Agreement* and XVI:4 of the WTO Agreement based on alleged violations of other provisions of the *AD Agreement* panels have either dismissed, or refrained from making findings on, such dependent or consequential claims where the claims upon which these claims were dependant were unfounded or have considered it unnecessary to decide such dependent claims where the claims upon which they were dependant were well founded.

7.172 For instance, the panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* rejected an argument of Mexico that any finding that the United States acted inconsistently with any provision of the *AD Agreement* necessitated a consequential finding that the United States also acted inconsistently with Articles 1, 18.1 and 18.4 of the *AD Agreement*, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement:

> "Mexico's claims under Articles 1, 18.1 and 18.4 of the *AD Agreement*, Article XVI:4 of the WTO Agreement, and Article VI of the GATT 1994 are, as Mexico acknowledges, consequential claims. That is, any finding of violation under these claims would rest entirely on the basis of a finding of violation of one or another of the asserted specific provisions of the *AD Agreement*. There are no independent bases for these claims. Thus, addressing these consequential claims would provide neither the parties nor other Members with additional guidance in terms of understanding the obligations established by the *AD Agreement*. Nor would it aid in implementation of any DSB recommendation where a violation of one of those obligations has been found to exist. We therefore do not consider it either necessary or appropriate to address these claims, and in the exercise of judicial economy make no findings with respect to them."[789]

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[788] *Supra*, paras.7.87-7.88.

[789] Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods,* para. 7.189. In the same dispute, the Appellate Body found that the Panel had not committed an error of law when in light of its finding that a determination by the USDOC was inconsistent with Article 11.3, it decided to exercise judicial economy with regard to a claim under Article 2. According to the Appellate Body, Mexico had failed to explain why an

7.173 The panel in *US – Zeroing (EC)* considered that, having found that zeroing in original investigations was inconsistent with Article 2.4.2 of the *AD Agreement*, it was not necessary to make findings on dependent claims, including claims under Articles 1 and 18 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.[790] [791]

7.174 We concur with the reasoning of the panels in the above-mentioned cases regarding the disposition of consequential claims. Addressing the claims of Japan regarding model zeroing procedures under Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement would neither provide additional guidance with respect to steps to be taken to implement the Panel's recommendation regarding the violation on which that recommendation is dependant nor provide guidance in terms of understanding the obligations of the *AD Agreement*. [792]

7.175 Since we have found that simple zeroing procedures in the context of original investigations are not inconsistent with Articles 2.1, 2.4.2 and 2.4 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 we **find** that by maintaining simple zeroing procedures in the context of original investigations USDOC does not act inconsistently with Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.

2. Model zeroing as applied in the original investigation concerning certain cut-to-length carbon quality steel products from Japan

(a) Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994

(i) Arguments of the Parties

7.176 **Japan** claims that by using model zeroing in the anti-dumping investigation of imports of certain cut-to-length carbon quality steel products from Japan[793], USDOC acted inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement* and with Articles VI:1 and VI:2 of the GATT 1994 in that it failed to determine the existence of dumping, and to calculate a margin of dumping, for the product as a whole by not taking into account the results of all the comparisons for the product.

7.177 The **United States** does not submit arguments specifically relating to the use of zeroing in this investigation. In connection with Japan's "as such" claims, the United States denies that there exists a requirement to determine dumping for the product as a whole which prohibits zeroing and also argues

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additional finding under Article 2 was necessary to resolve the dispute. In that connection, the Appellate Body also observed that it did not find it necessary to consider Mexico's arguments concerning Articles 1 and 18.3 of the *AD Agreement*. Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods,* para. 178 and footnote 274.

[790] "The Panel also perceives no need to pronounce on the dependent claims raised by the EC under Articles 1; 3.1, 3.2 and 3.5; 5.8; 9.3; and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI: 4 of the WTO Agreement. Deciding such dependent claims would provide no additional guidance as to the steps to be undertaken by the US in order to implement our recommendation regarding the violation on which it is dependent." Panel Report, *US – Zeroing (EC),* para. 7.34 (*footnote omitted*).

[791] *Cf.* Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.369-7.370 and Panel Report, *US – Softwood Lumber V*, paras. 7.377-7.378.

[792] We also note that in *US – Zeroing (EC)* the Appellate Body did not consider it necessary to make findings under Articles 1 and 18.4 of the *AD Agreement* and Article XVI.4 of the WTO Agreement after finding that the zeroing methodology, as applied by USDOC in the administrative reviews at issue, was inconsistent with Articles 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994. Appellate Body Report, *US – Zeroing (EC)*, para. 172.

[793] *Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate from Japan*, 64 Fed. Reg. 73215 (29 December 1999), Exhibit JPN-10.

that the reasoning of the Appellate Body in *US – Softwood Lumber V* is flawed and should not be followed by this Panel.

(ii) Evaluation by the Panel

7.178 We recall that in our analysis above of model zeroing procedures, as such, we have endorsed the findings of previous panel and Appellate Body reports that zeroing is inconsistent with Article 2.4.2 of the *AD Agreement* when applied in the context of average-to-average comparisons when establishing margins of dumping during the investigation phase.[794] In that context, we have also explained why we consider that the arguments of the United States regarding the reasoning of the Appellate Body's analysis in *US – Softwood Lumber V* are insufficient to warrant reconsideration of that finding.

7.179 In light of the foregoing, we **find** that by using model zeroing in the anti-dumping investigation of imports of certain cut-to-length carbon quality steel products from Japan, USDOC acted inconsistently with Article 2.4.2 of the *AD Agreement.*

(b) Article 2.4 of the *AD Agreement*

(i) Arguments of the Parties

7.180 Japan submits that the use of model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan was inconsistent with the fair comparison requirement of Article 2.4 of the *AD Agreement* because it resulted in an unfair, biased comparison between export price and normal value.

7.181 The United States argues that Article 2.4 of the *AD Agreement* contains no obligations with respect to zeroing.

(ii) Evaluation by the Panel

7.182 We exercise judicial economy with respect to this claim of Japan.[795]

(c) Articles 3.1-3.5 of the *AD Agreement*

(i) Arguments of the Parties

7.183 **Japan** submits that the use of model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan was inconsistent with Articles 3.1-3.5 of the *AD Agreement* because it distorted the determination of dumping and thus led to an injury determination not based on an objective examination of positive evidence.

7.184 The **United States** rejects the argument that the USITCs injury determination was not based on positive evidence regarding the volume of dumped imports and the magnitude of dumping because, firstly, the decision not to offset negative margins was WTO-consistent and, secondly, Japan's argument is speculative because it cannot be presumed that a different methodology would have resulted in different margins of dumping.

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[794] *Supra*, paras. 7.75-7.86.
[795] *Supra*, paras. 7.87-7.88 and 7.152.

(ii) Evaluation by the Panel

7.185 Japan requests us to make a finding that the measure that we have found to be inconsistent with Article 2.4.2 of the *AD Agreement* is also inconsistent with Articles 3.1-5 of the *AD Agreement*. A panel may exercise judicial economy where it is claimed that the same measure is inconsistent with more than one provision if it considers that multiple findings under various provisions are not necessary to resolve the dispute.[796] We recall our reasoning above in connection with Japan's claims under Article 3 in relation to the model zeroing procedures as such in the context of original investigations. As in the case of Japan's claims under Articles 3.1-3.5 with respect to the model zeroing procedures as such, Japan's claims under Article 3.1-3.5 with respect to the application of zeroing in the investigation of imports of certain cut-to-length carbon quality steel products from Japan are entirely dependent upon the inconsistency of this measure with Article 2 of the *AD Agreement*. Absent any independent grounds to support the claims of Japan under Article 3 of the *AD Agreement* we do not consider it necessary to make findings on these claims.

(d) Article 1 of the *AD Agreement*

7.186 We do not consider it necessary to make a finding on the claim of Japan that the use of model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan was inconsistent with Article 1 of the *AD Agreement* as a consequence of the inconsistency with various provisions of the *AD Agreement* and Article VI of the GATT1994.[797]

C. CLAIMS REGARDING ZEROING IN THE CONTEXT OF PERIODIC REVIEWS AND NEW SHIPPER REVIEWS

7.187 Japan claims that maintaining simple zeroing procedures in the context of periodic reviews[798] and new shipper reviews[799] is inconsistent with (1) Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994; (2) Article 2.4 of the *AD Agreement*; (3) Articles 9.1-9.3 and 9.5 of the *AD Agreement;* and (4) Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.

7.188 Japan also claims that, as a consequence of simple zeroing, anti-dumping measures resulting from 11 periodic reviews[800] are inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and

[796] *Supra*, paras. 7.87-7.88.

[797] *Supra*, paras.7.171-7.174.

[798] By "periodic review" Japan means the "periodic review of the amount of Anti-dumping duty" pursuant to Section 751(a)(1) of the Tariff Act, which requires the administering authority to review and determine the amount of any anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order if a request for such a review has been received.

[799] The term "new shipper review", as used by Japan, means a review conducted pursuant to Section 751(a)(2)(B) of the Tariff Act, which provides for a review to determine an individual weighted average margin of dumping for an exporter or producer of merchandise subject to an anti-dumping duty order if the administering authority receives a request from an exporter or producer establishing that such exporter or producer did not export the merchandise during the period of investigation and that the exporter or producer is not affiliated with any exporter or producer who exported the subject merchandise during that period.

[800] *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Anti-dumping Duty Administrative Reviews*, 66 Fed. Reg. 15078 (15 March 2001); *Anti-friction Bearings (other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part*, 65 Fed. Reg. 49219 (11 August 2000); *Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 Fed. Reg. 36551

Articles VI:1 and VI:2 of the GATT 1994; (2) Article 2.4 of the *AD Agreement*; (3) Articles 9.1-9.3 of the *AD Agreement;* and (4) Article 1 of the *AD Agreement.*

1. Claims regarding zeroing procedures as such in the context of periodic reviews and new shipper reviews

(a) Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994

(i) Arguments of the Parties[801]

7.189 **Japan** asserts that in conducting periodic reviews pursuant to Article 9.3 of the *AD Agreement* and new shipper reviews pursuant to Article 9.5 of the *AD Agreement* USDOC determines weighted average dumping margins for exporters and assessment rates for individual importers by using simple zeroing procedures. Because the first sentence of Article 9.3 refers to "the margin of dumping as established under Article 2" the term "margin of dumping" in Article 9 must be interpreted in light of Article 2 of the *AD Agreement*. Moreover, as a result of the definitions in Article 2.1 and Article VI, the terms "dumping", "margins of dumping" and "product" have a uniform meaning throughout the *AD Agreement*. It follows that the simple zeroing procedures maintained by USDOC in relation to periodic reviews and new shipper reviews are inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and with Articles VI:1 and VI:2 of the GATT 1994 because they fail to provide for a determination of dumping, and calculation of a margin of dumping, for the product as a whole. Japan submits that the Appellate Body has already found in *US – Zeroing (EC)* that the zeroing methodology at issue in this dispute in the context of periodic reviews is WTO-inconsistent.

7.190 In response to Panel Question 12, Japan submits that the phrase "during the investigation phase" in Article 2.4.2 of the *AD Agreement* does not limit the application of that provision to original investigations and that there is nothing in the context or object and purpose of the *AD Agreement* to suggest that the permissible bases of comparison between export price and normal value provided for in Article 2.4.2 do not apply to Articles 9 and 11. Article 9.3 expressly states that the calculation of margins of dumping under that provision is subject to Article 2 as a whole and does not exclude Article 2.4.2. However, Japan argues that in any event, whether or not Article 2.4.2 applies to proceedings other than investigations under Article 5 is not decisive to the outcome of this dispute because the obligation to determine dumping, and to calculate a margin of dumping, for the product as a whole applies to the entire *AD Agreement*. In the latter regard, Japan indicates that it takes no position on the issue of whether Article 2.4.2 applies to anti-dumping proceedings other than investigations and considers that the Panel does not need to decide this issue.

7.191 The **United States** submits that there is no obligation in the *AD Agreement* to establish one margin of dumping for the product as a whole. The Unites States considers that the reasoning of the Appellate Body in *US – Zeroing (EC)* is unpersuasive. The United States also submits that since the text of Article 2.4.2 expressly limits its applicability to "the investigation phase", Article 2.4.2 only applies to investigations within the meaning of Article 5 of the *AD Agreement*. The limited application

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(12 July 2001); *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Anti-dumping Duty Administrative Reviews*, 67 Fed. Reg. 55780 (30 August 2002); *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and Singapore: Final Results of Anti-dumping Duty Administrative Reviews, Rescission of Administrative Review in Part and Determination Not to Revoke Order in Part*, 68 Fed. Reg. 35623 (16 June 2003); *Anti-friction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Anti-dumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part*, 69 Fed. Reg. 55574 (15 September 2004).

[801] See *supra*, paras. 7.20-7.32 for the arguments of the parties on whether zeroing procedures, as such, are measures that can be challenged in WTO dispute settlement.

of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the *AD Agreement* and with the existence of various types of duty assessment systems. The United States submits that Article 9 of the *AD Agreement* does not incorporate the requirements of Article 2.4.2. The general reference in Article 9.3 to Article 2 necessarily includes any limitation found in the text of Article 2.4.2. Since Article 2.4.2 is by its own terms limited to the investigation phase, Article 9.3 cannot incorporate the requirements of Article 2.4.2.

(ii) Arguments of Third Parties

7.192 **China**, the **European Communities, Korea**, **Mexico, Norway** and **Thailand** argue that maintaining simple zeroing procedures in the context of periodic reviews to assess the amount of anti-dumping duties is inconsistent with Article 2.4.2 of the *AD Agreement*. Article 2.4.2 applies to such reviews because Article 9.3 requires that the amount of the anti-dumping duty not exceed "the margin of dumping as established under Article 2". The phrase "during the investigation phase" in Article 2.4.2 does not limit the applicability of Article 2.4.2 to investigations within the meaning of Article 5 of the *AD Agreement*. In the latter regard, the European Communities argues that in the absence of a definition of "investigation" in Article 2.4.2, this word must be interpreted in light of its ordinary meaning of "a systematic examination or inquiry or a careful study of or research into a particular subject". In this sense, the word "investigation" also applies to Articles 9 and 11. The European Communities also argues that the context of the word "investigation" in Article 2.4.2 demonstrates that it is not limited to investigations within the meaning of Article 5.1, that it is possible to give meaning to the phrase "during the investigation phase" without interpreting it as limiting the scope of application of Article 2.4.2 and that the negotiating history of the *AD Agreement* and "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention* support the view that "during the investigation phase" does not limit the applicability of Article 2.4.2 to investigations under Article 5.1.

(iii) Evaluation by the Panel

7.193 Japan claims that by maintaining simple zeroing procedures to calculate margins of dumping and importer-specific assessment rates in periodic reviews and new shipper reviews USDOC violates Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994. In support of this claim, Japan submits that Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 require that dumping be determined to exist, and that a margin of dumping be calculated, for the product as whole, a requirement that applies throughout the *AD Agreement* and which prohibits zeroing in any proceeding. Thus, Japan's claim that simple zeroing in the context of periodic reviews and new shipper reviews is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement* and Article VI:1 and VI:2 of the GATT 1994 is based on exactly the same reasoning as Japan's claims relating to model and simple zeroing in the context of original investigations.[802]

7.194 In this respect, we recall that in our analysis of the claims of Japan in respect of zeroing in relation to investigations within the meaning of Article 5 of the *AD Agreement* we have concluded that it is permissible within the meaning of Article 17.6(ii) of the *AD Agreement* to interpret Article VI of the GATT 1994 and relevant provisions of the *AD Agreement* to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing.[803] Specifically, in light of the ordinary meaning and context of the use of the words "product" and "products", we have concluded that the mere fact that "dumping" and

[802] While Japan contests that Article 2.4.2 of the *AD Agreement* only applies to investigations within the meaning of Article 5, Japan has expressly stated that it considers that it is not necessary for the Panel to decide whether or not Article 2.4.2 applies to proceedings other than investigations under Article 5.

[803] *Supra*, para.7.142.

"margins of dumping" are defined in relation to "product" and "products" does not warrant the conclusion that under Article 2.1 of the *AD Agreement* and Article VI of the GATT 1994 the existence of dumping and margins of dumping can only be established on the basis of an aggregate examination of export transactions in which export prices that are higher than the normal value are accorded the same significance as export prices that are less than the normal value.[804] We have also concluded that the text of Article 2.4.2 of the *AD Agreement* does not support the view that the *AD Agreement* and Article VI of the GATT 1994 must be interpreted to mean that there exists a general prohibition of zeroing.[805] In the latter regard, we have explained our view that to interpret Article 2.4.2 of the *AD Agreement* in light of a general prohibition of zeroing under any comparison method would deprive the average-to-transaction method provided for in the second sentence of Article 2.4.2 of its effectiveness and would thus be inconsistent with the principle of effective treaty interpretation.[806]

7.195 Moreover, while we note that Japan finds support for its claims with respect to simple zeroing in periodic reviews and new shipper reviews in the findings and reasoning of the Appellate Body in *US – Zeroing (EC),* we recall in that regard that we have pointed to the difficulties of interpretation of the meaning and scope of application of the phrase "multiple comparisons ...at an intermediate stage" as used in the Appellate Body Report in *US – Zeroing (EC)*[807] and to the limited explanation in that Appellate Body Report as to why the "product as a whole" concept is applicable more broadly than in the specific context of "multiple averaging" in which it is used in the Appellate Body Report in *US - Softwood Lumber V*.[808]

7.196 We find that there are important considerations specific to Article 9 of the *AD Agreement* that lend further support to the view that it is permissible within the meaning of Article 17.6(ii) of the *AD Agreement* to interpret Article VI of the GATT 1994 and relevant provisions of the *AD Agreement* to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing.

7.197 Article 9.3 of the *AD Agreement* provides:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
>
> > 9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.
> >
> > 9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than

[804] *Supra*, para. 7.112.
[805] *Supra*, para. 7.141.
[806] *Supra*, paras. 7.127-7.137.
[807] *Supra*, para. 7.100.
[808] *Supra*, para. 7.101.

> 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.
>
> 9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided. (footnote omitted)

7.198 Article 9.3 requires that *the amount of the anti-dumping duty* not exceed the margin of dumping as established under Article 2. Articles 9.3.1 and 9.3.2 specify certain rules to implement this requirement when *the amount of the anti-dumping duty* is assessed on a retrospective basis (Article 9.3.1) or on a prospective basis (Article 9.3.2). In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*- and *import*-specific basis.

7.199 Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing[809] the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of "margin of dumping". In our view, the interpretation advanced by Japan, according to which a margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value, is inconsistent with the importer- and import-specific character of the obligation to pay an anti-dumping duty. The implication of such an interpretation is that, if a Member applies a retrospective duty assessment system, a Member may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value. We find it significant, in this respect, that Article 9.3 contains no language requiring such an aggregate examination of export transactions in determining final liability for payment of anti-dumping duties under Article 9.3.1 or in determining the amount, if any, of refund due under Article 9.3.2.[810]

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[809] Under Article 9.3 an anti-dumping is assessed either on a retrospective basis or on a prospective basis. It follows from this context that the word "assess(ed)" in Article 9.3 refers to the timing of the determination of the amount of the anti-dumping duty, (more particularly, the timing of that determination relative to the importation of the product).

[810] Article 9.3.2 also does not require that "the actual margin of dumping" be determined in respect of a particular period of time. Japan asserts that in an assessment proceeding the margin of dumping must be determined in relation to a "review period". Response of Japan to Panel Question 55(c). However, the concept of a "review period" does not appear in Article 9.3.2. As a consequence, there is no textual basis to read into Article 9.3.2 a requirement to conduct an examination at an aggregate level by linking the phrase "actual margin" to "review period".

7.200 We consider, in this respect, that Article 9.4(ii) of the *AD Agreement* is important contextual support for the view that the term "margin of dumping" as used in Article 9.3 does not require a Member to carry out an aggregate examination of export prices in which the same weight is accorded to export prices that exceed the normal value as to export prices that are less than the normal value.

7.201 Article 9.4(ii) expressly refers to the calculation of the liability for payment of anti-dumping duties on the basis of a prospective normal value.[811] Under such a system, the amount of liability for payment of anti-dumping duties is determined at the time of importation on the basis of a comparison between the prices of individual export transactions and the prospective normal value.[812] Under this system, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payment of anti-dumping duties. There is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance in this respect.[813]

7.202 Japan argues that the argument of the United States that in a prospective normal value system margins of dumping are determined with respect to individual transactions confuses the distinct concepts of the "amount of the anti-dumping duty", on the one hand, and the "margin of dumping", on the other.[814] Japan argues, in this regard, that "when the customs authorities impose and collect anti-dumping duties on individual entries they are not calculating margins of dumping within the meaning of Article 2".[815] Japan considers that the collection of a variable duty on an entry-by-entry basis in a prospective normal system does not involve the establishment of margins of dumping in respect of individual export transactions because the actual margin of dumping in such a system is only determined in a review under Article 9.3.2.[816] Thus, Japan asserts that in a prospective normal value system "... the final liability for duties must be assessed in a review under Article 9.3.2".[817]

7.203 In our view, to deny the relevance of the relationship that exists in Article 9.3 between "margin of dumping" and the payment of an anti-dumping duty is illogical and contrary to the text and purpose of Article 9. Article 9.3 expressly establishes a relationship between the amount of anti-dumping duty and the margin of dumping by providing that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Although "amount of anti-dumping duty" and "margin of dumping" may be "distinct concepts", that does not mean that the fact that Article 9.4(ii) expressly refers to a prospective normal value system is without relevance to the interpretation of the concept of "margin of dumping" as used in Article 9.[818] Nothing in the text of Articles 9.3 and 9.4

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[811] Article 9.4(ii) provides that an anti-dumping duty applied to imports of exporters or producers not examined individually shall not exceed, "where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined."

[812] See also Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending) para. 5.53 ("Under a prospective normal value duty system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value.")

[813] See also Panel Report, *US – Softwood Lumber V (Article 21.5)*, (appeal pending) paras. 5.53-5.57.

[814] Japan Opening Statement at the Second Substantive Meeting of the Panel with the Parties, para. 27.

[815] *Ibid,* para. 28.

[816] *Ibid,* 30 and 32.

[817] *Ibid,* para. 32.

[818] Japan argues that its position is supported by the distinction drawn by the Appellate Body in paragraphs 123-124 of its report in *EC – Bed Linen (Article 21.5 – India)* between the determination of the margin of dumping, on the one hand, and the imposition and collection of anti-dumping duties, on the other. However, read in light of footnote 155, it is clear that paragraphs 123-124 of this report discuss the distinction between the determination of the existence of margins of dumping under Article 2.4.2, on the one hand, and the imposition and collection of anti-dumping duties under Article 9, on the other. These paragraphs contain no discussion of the relationship between "amount of anti-dumping duty" and "margin of dumping" in the specific context of Article 9.

indicates that, as implied by Japan's interpretation, if an anti-dumping duty has been collected on a particular transaction in which the export price is below the prospective normal value, authorities must subsequently re-assess the amount of that duty by calculating a margin of dumping that reflects prices of other export transactions, including prices of export transactions that are higher than the normal value.[819]

7.204 In this regard, we consider that Japan's argument that in a prospective normal value system final liability for payment of anti-dumping duties must be determined through a review procedure under Article 9.3.2 is inconsistent with the *prospective* nature of such a system. It is clear from the text of Article 9.4(ii) of the *AD Agreement* that in a prospective normal system "*liability for payment of anti-dumping duties* is calculated on the basis of a prospective normal value". Although Article 9.3.2. provides for a refund procedure when the amount of anti-dumping duties is assessed on a prospective basis, a requirement that arguably also applies to prospective normal value systems referred to in Article 9.4(ii), a refund procedure in a prospective duty assessment system is not a *determination of final liability for payment of anti-dumping duties*. The phrase "determination of the final liability for payment of anti-dumping duties" is used in Article 9.3.1 in connection with retrospective duty assessment procedures but does not figure in Article 9.3.2.

7.205 We therefore consider that, notwithstanding the possibility of a refund, liability for payment of anti-dumping duties is final in a prospective normal value system at the time of importation of a product. Because in such a system liability for payment of anti-dumping duties is incurred only to the extent that prices of individual export transactions are below normal value, we consider that the fact that express provision is made in the *AD Agreement* for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value and that the *AD Agreement* does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value.

7.206 If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value, we see no reason why liability for payment of anti-dumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective duty assessment system applied by the United States that is the subject of Japan's "as such" and "as applied" claims in this dispute.

7.207 We note, in this regard, that Japan has criticized a statement made by the United States in its Second Submission that "[t]he US assessment system operates in a manner comparable to a prospective normal value system, examining individual export transactions, albeit using contemporaneous normal values".[820] Japan asserts that this statement is misleading because in review proceedings USDOC does not assess duties on each entry of a product but undertakes multiple comparisons to determine a single overall margin of dumping for all transactions in the review period and a single overall importer-specific assessment rate for each importer that will apply to future entries of the product. Japan asserts that "whereas an entry-by-entry comparison would arrive at multiple entry-specific

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Thus, we fail to see how this report supports Japan's position that the basis upon which liability for payment of an anti-dumping duty is incurred is without relevance to the interpretation of the concept of margin of dumping in Article 9.3.

[819] We note, in this respect, the observation in the panel report in *US – Softwood Lumber V (Article 21.5)* (appeal pending) that "...in the context of a prospective normal value duty assessment system, the 'margin of dumping' referred to in Article 9.3 is the transaction-specific margin of dumping established in respect of the specific import transaction being assessed". Panel Report, *US – Softwood Lumber V (Article 21.5)* (appeal pending), para. 5.53.

[820] US Second Written Submission, para. 63.

conclusions that would each have regulatory consequences for a single entry, the United States' assessment system arrives at a single conclusion purportedly for all transactions, and that conclusion has product-wide consequences."[821]

7.208 The issue before us is whether the *AD Agreement* must be interpreted to mean that in determining whether dumping exists and in calculating margins of dumping Members are obligated to accord the same weight to export prices above the normal value as to export prices below the normal value. The express reference in Article 9.4(ii) to a prospective normal value system in our view is an important reason why the answer to this question must be negative because it demonstrates that liability for payment of anti-dumping duties may be based on a comparison of a prospective normal value and prices of individual export transactions below the normal value.[822] We note, in this regard, that the United States has simply suggested that its duty assessment system is "comparable" to a prospective normal value system in that it determines liability for individual export transactions. That USDOC does not examine and assess a duty on each transaction individually at the time the transaction takes place but examines a number of transactions on a retrospective basis and calculates a single margin of dumping and a single assessment rate for importers does not mean that the system cannot be said to be "comparable" to a prospective normal value system in that the amount of liability for payment of anti-dumping duties is determined by the extent to which prices of particular import transactions are below the normal value. As stated by the United States, "the total amount of anti-dumping duties collected [in the US duty assessment] system is the same as if duties were collected on each import transaction".[823] We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transactions that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal system.

7.209 We conclude that Article 9.3 of the *AD Agreement*, especially when interpreted in light of the express reference to a prospective normal value system in Article 9.4(ii), lends further support to the view that it is permissible within the meaning of Article 17.6(ii) of the *AD Agreement* to interpret Article VI of the GATT 1994 and relevant provisions of the *AD Agreement* to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing.

7.210 With respect to Article 2.4.2 of the *AD Agreement*, one of the provisions invoked by Japan in support of its claim regarding simple zeroing procedures in relation to periodic reviews and new shipper reviews, we recall our finding that Article 2.4.2 does not support the view that zeroing is prohibited outside the context of the average-to-average comparison method when establishing the existence of margins of dumping during the investigation phase.[824] Therefore, whether or not Article 2.4.2 applies

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[821] Japan Response to Panel Question 43, para. 34.

[822] We note that in paragraph 131 and accompanying footnote 234 of its Report in *US – Zeroing (EC)* the Appellate Body explains that the text of Article 9.3 of the *AD Agreement* does not suggest that final anti-dumping liability cannot be assessed on a transaction- or importer-specific basis and that the possibility that aggregation of results of multiple comparisons might result in a negative value does not mean that authorities would be required to compensate an importer for the amount of that negative value or that liability for payment of anti-dumping duties may not be based on a prospective normal value. It is not entirely clear precisely how we should understand these statements, given that the Appellate Body has also explained that Article 9.3 requires that the total amount of anti-dumping duties collected on all entries of the subject product be compared with an exporter's or foreign producer's margin of dumping for the product as a whole.

[823] US Comments on Japan's Answers to the Panel's questions in connection with the Second Substantive Meeting of the Panel with the Parties, para. 36.

[824] *Supra*, paras. 7.113-7.140

to proceedings under Article 9 of the *AD Agreement* does not affect our conclusion that the use of simple zeroing in such proceedings is not prohibited.

7.211 Even assuming, *arguendo*, that Article 2.4.2 were to be construed as prohibiting zeroing under any comparison method, we would not uphold Japan's claim because we do not consider that Article 2.4.2 can be interpreted to be applicable to reviews under Articles 9.3 and 9.5 of the *AD Agreement*.[825] Bearing in mind Article 17.6(ii) of the *AD Agreement*, we find that it is permissible to interpret Article 2.4.2 as being applicable only to investigations within the meaning of Article 5 of the *AD Agreement*. In this respect, we consider that the fact that Article 9.3 of the *AD Agreement* provides that the amount of the anti-dumping duty must not exceed the margin of dumping "as established under Article 2" and does not specifically exclude Article 2.4.2 is not sufficient to conclude that Article 2.4.2 applies to reviews under Article 9. The reference made in Article 9.3 to "Article 2" in general cannot override the limitation on the applicability of Article 2.4.2 expressed in the text of that provision.[826]

7.212 The question of the applicability of Article 2.4.2 has been the subject of detailed argumentation and analysis in the recent panel report in *US – Zeroing (EC).* We agree with the reasoning and conclusion of the majority of that panel regarding the limited applicability of Article 2.4.2. We find the following points particularly pertinent in this regard.

7.213 *First*, Article 2.4.2 of the *AD Agreement* applies to the establishment of "the existence of margins of dumping during the investigation phase".[827] Thus, the phrase "during the investigation phase" defines when Article 2.4.2 is applicable. Interpreting "during the investigation phase" to apply to any activity of an investigating authority that involves the calculation of an anti-dumping margin would deprive that phrase of its useful effect because it would essentially apply whenever an authority determines a margin of dumping. By contrast, interpreting "during the investigation phase" in light of Article 5, the provision of the *AD Agreement* that is the most specific with regard to the concept of investigation, makes it possible to make a meaningful distinction between the investigation phase and other phases.[828] *Second*, whereas there is textual similarity between Articles 2.4.2 and Article 5.1 of the *AD Agreement*, the *AD Agreement* does not describe the purpose of proceedings under Articles 9 and 11 in terms of establishing "the existence of margins of dumping during the investigation phase" but uses rather different terminology in these provisions.[829]

7.214 *Third*, while the *AD Agreement* does not define the word "investigation," it does not follow that "investigation" in Article 2.4.2 must necessarily be interpreted in accordance with a generic dictionary

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[825] We recall that Japan has expressly stated that it considers that it is not necessary for the Panel to decide whether or not Article 2.4.2 applies to proceedings other than investigations under Article 5. Nevertheless, we consider it appropriate to address this issue as additional support for our view that simple zeroing is not prohibited in the context of periodic reviews and new shipper reviews. We also note that in our analysis of whether Article 2.4.2 contains a general prohibition of zeroing, we have already indicated that we agree with the view that Article 2.4.2 is limited in its application to investigations within the meaning of Article 5. (*supra*, paragraph 6.119). We consider that we must state the reasons for that position.

[826] As stated by the panel in *US – Zeroing (EC)*:

> "If Article 2 *itself* provides that Article 2.4.2 does not apply in the case of reviews under Article 9.3, that is not overridden by the fact that 'Article 2' is specifically referred to in Article 9.3. Absent anything explicitly to the contrary, that reference to 'Article 2' in Article 9.3 must be read as *including* any limitation that is expressed in Article 2 itself." Panel Report, *US – Zeroing(EC)*, para. 7.146 (*emphasis in original*).

[827] In *US – Softwood Lumber V*, the Appellate Body stated that "Article 2.4.2 of the *AD Agreement* permits the use of three methodologies, *applicable during the investigation phase*, for establishing the existence of margins of dumping". Appellate Body Report, *US – Softwood Lumber V*, para. 76 (*emphasis added*).

[828] *Cf.* Panel Report, *US – Zeroing (EC)*, paras. 7.153-7.155.

[829] Panel Report, *US – Zeroing (EC*), paras. 7.156-7.157.

definition of that word. The concept of "investigation" in the *AD Agreement* in most cases refers to the particular *phase* of the *proceeding* in which the authorities determine whether conditions exist justifying the imposition of an anti-dumping measure.[830] That "investigation" has a specific meaning is also apparent from the fact that Articles 11.4 and 12.3 provide that certain rules contained in Article 6 applicable to "investigations" shall also apply to "reviews" and from the distinction made in Article 18 between "investigations" and reviews.[831] *Fourth*, reports of panels and the Appellate Body provide ample support for the view that investigations are phases or stages that are distinct from other phases or stages of anti-dumping and countervailing duty proceedings, that there is a difference between the purpose of investigations and the purpose of other phases of anti-dumping or countervailing duty proceedings, and that provisions that apply to investigations do not *ipso facto* apply to other stages or phases of anti-dumping and countervailing duty proceedings, such as sunset reviews under Article 11 of the *AD Agreement* or Article 21 of the *SCM Agreement*.[832] [833]

7.215 Finally, we agree with the majority of the panel in *US – Zeroing (EC)* that the arguments of the European Communities concerning possible alternative interpretations of "during the investigation phase", subsequent practice, negotiating history and object and purpose of Article 9.3 and the *AD Agreement* do not support its position that Article 2.4.2 is not limited in its application.[834]

7.216 In light of the foregoing, the Panel **finds** that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

(b) Article 2.4 of the *AD Agreement*

7.217 The arguments of Japan and the United States on whether Article 2.4 of the *AD Agreement* proscribes the use of simple zeroing in periodic reviews and new shipper reviews are identical to their arguments on whether Article 2.4 proscribes zeroing in the context of investigations within the meaning of Article 5 of the *AD Agreement*.[835]

7.218 In respect of investigations, we have found that simple zeroing is not inconsistent with Article 2.4 of the *AD Agreement*.[836] That finding was based on our conclusion that to interpret the "fair comparison" requirement of Article 2.4 as creating a general prohibition of zeroing would undermine the effectiveness of other provisions of the *AD Agreement.* We have also explained why we consider that an interpretation that zeroing is prohibited under any comparison method and in any type of proceeding is not supported by the provisions in Article 9 on the assessment of the amount of anti-dumping duties.

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[830] *Ibid*, paras. 7.158-7.167.

[831] *Ibid*, paras. 7.168-7.169.

[832] Panel Report, *US – Zeroing (EC*), paras. 7.771-7.188. We also note, in this respect, the recent Appellate Body Report in *US – Anti-Dumping Measures on Oil Country Tubular Goods,* which confirmed that, because of the expression "anti-dumping investigations", Article 3.3 of the *AD Agreement* does not apply to sunset reviews under Article 11. Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 170.

[833] With regard to the distinction between the purpose of investigations and proceedings under Article 9.3 of the *AD Agreement*, we recall our analysis above that the argument that in duty assessment proceedings under Article 9.3 export transactions must be considered on an aggregate basis is inconsistent with the text and purpose of that provision.

[834] Panel Report, *US – Zeroing (EC)*, paras. 7.189-7.220.

[835] This also applies to arguments submitted by China, the European Communities, Norway and Thailand in support of their view that maintaining simple zeroing procedures in the context of reviews under Article 9 is inconsistent with Article 2.4 of the *AD Agreement.*

[836] *Supra*, paras. 7.153-7.161.

7.219 In light of the foregoing, the Panel **finds** that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews, USDOC does not act inconsistently with Article 2.4 of the *AD Agreement*.

(c) Articles 9.1-9.3 and 9.5 of the *AD Agreement*

7.220 **Japan** argues that the inconsistency of simple zeroing procedures, as such, with Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement* necessarily gives rise to violations of Articles 9.1-9.3 and 9.5 of the *AD Agreement*.

7.221 We have found that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Articles 2.1 and 2.4.2 of the *AD Agreement,* Articles VI:1 and VI:2 of the GATT 1994 and Article 2.4 of the *AD Agreement*. Therefore, we reject Japan's consequential claims under Articles 9.1-9.3 and 9.5 of the *AD Agreement*.

7.222 The Panel **finds** that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Articles 9.1-9.3 and 9.5 of the *AD Agreement*.

(d) Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement

7.223 We have found that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Article 2.1 and 2.4.2 of the *AD Agreement,* Articles VI:1 and VI:2 of the GATT 1994 and Article 2.4 of the *AD Agreement*. Therefore, we reject Japan's consequential claims under Articles 1 and 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.

7.224 The Panel **finds** that by maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Articles 1 and 18.4 of the *AD Agreement* and with Article XVI:4 of the WTO Agreement.

2. Claims regarding simple zeroing as applied in the context of certain periodic reviews

7.225 Japan submits that in 11 periodic reviews[837] USDOC acted inconsistently with Articles 1, 2.1, 2.4.2, 2.4 and 9.1 to 9.3 of the *AD Agreement* and with Articles VI:1 and VI:2 of the GATT 1994 by using simple zeroing. The arguments of Japan in support of these claims are the same as in the case of Japan's "as such "claims relating to periodic reviews and new shipper reviews.

7.226 For the reasons explained in the previous section, we reject the claims of Japan that simple zeroing as applied in these periodic reviews is inconsistent with Articles 2.1 and 2.4.2 of the *AD Agreement,* Articles VI:1 and VI:2 of the GATT 1994 and Article 2.4 of the *AD Agreement.* Therefore, we also reject Japan's consequential claims that the application of simple zeroing in these reviews is inconsistent with Articles 1 and 9.1-9.3 of the *AD Agreement*.

7.227 The Panel **finds** that by applying simple zeroing in 11 periodic reviews USDOC did not act inconsistently with Articles 1, 2.1, 2.4.2, 2.4 and 9.1-9.3 of the *AD Agreement* and with Articles VI:1 and VI:2 of the GATT 1994.

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[837] *Supra*, footnote 800.

D. CLAIMS REGARDING ZEROING PROCEDURES IN THE CONTEXT OF CHANGED CIRCUMSTANCES REVIEWS AND SUNSET REVIEWS

7.228 **Japan** claims that maintaining zeroing procedures in the context of "changed circumstances" reviews[838] and "sunset" reviews[839] is inconsistent as such with Articles 2 and 11 of the *AD Agreement*.

7.229 Japan also claims that USDOC acted inconsistently with Articles 2 and 11 of the *AD Agreement* in two specific sunset review proceedings.

1. Zeroing Procedures As Such In the Context of Changed Circumstances Reviews And Sunset Reviews

(a) Arguments of the Parties

7.230 **Japan** argues that in conducting changed circumstances reviews and sunset reviews USDOC relies on margins of dumping that have been calculated in prior original investigations or periodic reviews using either model zeroing or simple zeroing. It follows from the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* that if in a changed circumstances review under Article 11.2 of the *AD Agreement* or a sunset review under Article 11.3 of the *AD Agreement* an authority elects to rely on a dumping margin, that margin must be consistent not only with Article 2.4 of the *AD Agreement* but also with the requirements contained in Articles 2.1 and 2.4.2 to determine dumping and dumping margins for the product as a whole. By relying on margins of dumping calculated in prior proceedings on the basis of model zeroing or simple zeroing, USDOC thus violates Articles 2.1, 2.4.2 and 2.4 of the *AD Agreement*. As a consequence, USDOC fails to comply with Articles 11.2 and 11.3 of the *AD Agreement* and with the obligation in Article 11.1 to ensure that anti-dumping duties remain in force only as long as, and to the extent necessary, to counteract dumping.

7.231 The **United States** submits that the Panel should reject Japan's "as such" claims regarding changed circumstances reviews and sunset reviews because the "fair comparison" requirement in Article 2.4 of the *AD Agreement* cannot be read to require offsets in all proceedings and the Appellate Body in *US – Softwood Lumber V* only addressed the issue of the use of offsets in the context of the average-to-average methodology under Article 2.4.2, which by its own terms is only applicable to investigations. The United States also argues that Japan has never demonstrated that in changed circumstances reviews and sunset reviews USDOC does rely on margins of dumping calculated in prior proceedings. Because of the prospective nature of the determinations made by the USDOC in such reviews, these determinations are not dependent upon any specific magnitude of dumping. Thus, Japan has failed to establish a *prima facie* case with respect to the USDOCs likelihood determination in either a changed circumstances review or a sunset review.

(b) Arguments of Third Parties

7.232 The **European Communities**, **Korea** and **Norway** argue that since Article 2.4.2 of the *AD Agreement* applies to reviews under Article 11, maintaining zeroing procedures in the context of such reviews is inconsistent with Article 2.4.2. **Argentina** and **Norway** also submit that maintaining zeroing procedures in the context of reviews under Article 11 is inconsistent with Article 2.4, and refer to the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review* as support for this position.

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[838] By "changed circumstances" review, Japan means a "review based on changed circumstances" provided for in Section 751(b) of the Tariff Act.

[839] By "sunset" review, Japan means a five-year review provided for in Section 751(c) of the Tariff Act.

(c) Evaluation by the Panel

7.233 Japan's claims concern changed circumstances reviews and sunset reviews, which are subject to, respectively, Articles 11.2 and 11.3 of the *AD Agreement*:

> 11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.
>
> 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review. (*footnotes omitted)*

7.234 Articles 11.2 and 11.3 are silent on the issue of whether in reviews contemplated by these provisions authorities are required to calculate margins of dumping. In this regard, the Appellate Body's Report in *US – Corrosion-Resistant Steel Sunset Review* states the following on the relationship of Article 2 to Article 11.3 of the *AD Agreement*:

> "Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If 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*."[840]

7.235 In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Appellate Body noted:

> "As a separate matter, we refer to Mexico's characterization of the finding in paragraph 127 of the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*. According to Mexico, the Appellate Body clarified in that appeal that, when an investigating authority 'uses a specific methodology that the Anti-Dumping

[840] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 *(footnote omitted)*

> Agreement does not require, the authority must not apply that methodology in a manner that otherwise conflicts with the Agreement.' In fact, the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review* that, 'should investigating authorities *choose to rely upon* dumping margins [in the context of a sunset review determination], the calculation of these margins must conform to the disciplines of Article 2.4.' Thus, the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* does not stand for the proposition that a WTO-inconsistent methodology used for the calculation of a dumping margin will, in and of itself, taint a sunset review determination under Article 11.3. The only way the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 is if the investigating authority *relied upon* that margin of dumping to support its likelihood-of-dumping or likelihood-of-injury determination."[841]

7.236 While Japan asserts that in changed circumstances reviews and sunset reviews "USDOC relies on dumping margins calculated in a prior original investigation or a periodic review as the basis for the review determination"[842], the United States asserts that Japan has not demonstrated that USDOC in fact relies on such margins in making its determinations in these proceedings. We recall that this claim of Japan is a claim with respect to the zeroing procedures as such. Specifically, what Japan challenges as such is USDOCs reliance, in changed circumstances reviews and sunset reviews, upon margins of dumping calculated in prior proceedings in a WTO-inconsistent manner. In light of our view on the conditions necessary for a measure to be capable of being challenged as such, i.e. independently of its application in specific instances, and assuming that the reasoning of the Appellate Body on reliance of margins of dumping in the context of Article 11.3 is equally applicable to Article 11.2, a key factual question before the Panel is whether a rule or norm of general and prospective application exists by virtue of which USDOC relies on margins of dumping calculated in prior proceedings to support its determinations in changed circumstances reviews and sunset reviews.

7.237 In its First Written Submission, Japan refers to the Owenby Statement as factual support for its assertion that USDOC relies on these dumping margins in the context of changed circumstances reviews and sunset reviews.

> "I am unaware of a single changed circumstance or sunset review proceeding where the USDOC calculated a margin. Where applicable, the USDOC relies on the margins it calculated in earlier stages of the case as the basis for these determinations. Thus, changed circumstance and sunset determinations reflect the model or simple zeroing procedure used in the 'earlier' margin calculations upon which the determinations are based." [843]

7.238 We also note that Japan rejects as follows the argument of the United States that it has not demonstrated that USDOC relies on margins of dumping in changed circumstances reviews and sunset reviews:

> "The United States asserts in paragraphs 98-101 of its First Written Submission that Japan has failed to demonstrate that the magnitude of dumping cited and relied upon by the USDOC determinations is determinative of its likelihood determinations. However, it is disingenuous for the United States to argue that, in its sunset determinations, it does not rely on the dumping margins calculated for respondents in the initial investigations and periodic reviews in light of the fact that the US Congress has

[841] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods,* para. 181.
[842] Japan First Written Submission, para. 154.
[843] Exhibit JPN-1, para. 24; Japan First Written Submission, footnote 200.

expressly mandated that in sunset reviews, the USDOC "*shall* consider ... the weighted average dumping margins determined in the investigation and subsequent reviews ... ." The mandatory nature of this obligation is further demonstrated by: (1) the specific requirement in the USDOCs regulations that respondents report this information in their substantive responses to the USDOCs notice of initiation of sunset reviews; and (2) the consistent citation by the USDOC, in its sunset determinations, to the previous margins in concluding that dumping will recur at the specified margin rates in the event that the anti-dumping order were revoked. It is hard to imagine a clearer instance in which an authority "actually relies" on the specified types of information."[844]

7.239 Japan cites to the *Final Results of Expedited Sunset Reviews: Anti-friction Bearings from Japan*[845] and to the *Issues and Decision Memorandum for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan*[846] to support its assertion that USDOC consistently cites to "the previous margins in concluding that dumping will recur at the specified margin rates in the event that the anti-dumping order were revoked".

7.240 In our view, these arguments of Japan do not constitute a sufficient evidentiary basis to conclude that a rule or norm of general and prospective application exists by virtue of which USDOC relies on margins of dumping calculated in prior proceedings *to support* its determinations in changed circumstances reviews and sunset reviews.

7.241 *First*, Japan's response to Panel Question 60 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.

7.242 *Second*, with regard to sunset reviews, we consider that the fact that Section 752(c)(1) of the Tariff Act[847] requires the USDOC to *consider* "the weighted average dumping margins determined in

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[844] Japan Response to Panel Question 60, para. 104 (*footnotes omitted*).
[845] Exhibit JPN-22.
[846] Exhibit JPN-23.A
[847] Section 752(c)(1) of the Tariff Act provides:

"(c) DETERMINATION OF LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING.

(1) IN GENERAL. - In a review conducted under Section 751(c), the administering authority shall determine whether revocation of an anti-dumping duty order or termination of a suspended investigation under Section 734 would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider -

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or acceptance of the suspension agreement.

(2) CONSIDERATION OF OTHER FACTORS. - If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.

(3) MAGNITUDE OF THE MARGIN OF DUMPING. - The administering authority shall provide to the Commission the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the

the investigation and subsequent reviews" and that, as provided for in Section 752 (c)(3) of the Tariff Act, USDOC provides to the USITC "the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation is terminated" does not automatically mean that USDOC "relies on" margins of dumping in making its determination as to whether "revocation of an anti-dumping duty order or termination of a suspended investigation would be likely to lead to continuation of or recurrence of sales of the subject merchandise at less than fair value". As explained by the Appellate Body, USDOC relies on margins of dumping calculated in prior proceedings when such margins form part of the basis *to support* a determination of likelihood of recurrence or continuation of dumping.[848] That USDOC *considers* dumping margins determined in the investigation and subsequent reviews and *reports* to the USITC the margins likely to prevail in the event of revocation of an anti-dumping duty does not mean that such margins are part of the rationale of USDOCs determinations regarding likelihood of continuation or recurrence of dumping.[849] Therefore, Japan uses the term "rely on" in a sense that is different from the manner in which it has been used by the Appellate Body. Japan thus has failed to provide factual support for its position that USDOC relies on historical margins of dumping in the sense in which the Appellate Body used that term.

7.243 We conclude that Japan has failed to adduce evidence necessary to establish that a rule, norm or standard of general and prospective application exists by virtue of which USDOC relies on margins of dumping calculated in prior proceedings *to support* its determinations in changed circumstances reviews and sunset reviews. We emphasize that we do not make a factual finding that USDOC does *not* rely on such margins in this context. Rather, we consider that based upon the evidence presented by Japan we cannot find that USDOC relies on such margins. We are mindful that we may not make a case for a party.

7.244 In light of the foregoing, the Panel **finds** that Japan has failed to make a *prima facie* case that by maintaining zeroing procedures in the context of changed circumstances reviews and sunset reviews USDOC acts inconsistently with Articles 2 and 11 of the *AD Agreement*.

2. "As applied" claims regarding two sunset reviews

(a) Arguments of the Parties

7.245 **Japan** claims that anti-dumping measures adopted pursuant to two sunset reviews are inconsistent with the *AD Agreement* and GATT 1994 because in these reviews the investigating authorities relied on dumping margins calculated using the standard zeroing procedures. This "as applied" claim of Japan concerns the *Final Results of Expedited Sunset Reviews: Anti-friction Bearings*

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suspended investigation is terminated. The administering authority shall normally choose a margin that was determined under Section 735 or under subsection (a) or (b)(1) of Section 751."

[848] *Supra*, para. 7.235.

[849] Our view that the issue of the reporting by USDOC of a margin of dumping to the USITC is distinct from the issue of whether USDOC relies on previously calculated margins of dumping to support a determination in a sunset review is consistent with the analysis of the panel in *US – Anti-Dumping Measures on Oil Country Tubular Good.* That panel observed that "we can find no provision of the *AD Agreement*, and Mexico has cited none, that requires such 'reporting' of a margin likely to prevail – this appears to be an element of US law that is not derived from an element of the *AD Agreement*". Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.83. Thus, while we note that in the two cases referred to by Japan (the sunset reviews of anti-friction bearings from Japan and of corrosion-resistant carbon steel flat products from Japan) USDOC applied what it described as its normal policy of reporting to the USITC a margin of dumping from the original investigation, this does not constitute evidence of the existence of a normal policy with respect to the issue of whether USDOCs relies on margins of dumping calculated in prior proceedings *to support* its determinations in sunset reviews.

From Japan[850] and the *Final Results of Full Sunset Review: Corrosion-Resistant Carbon Steel Flat Products From Japan*.[851]

7.246 In support of this claim, Japan asserts that, as confirmed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, if an investigating authority, in making a determination under Article 11.3 of the *AD Agreement* of the likelihood of continuation or recurrence of dumping, relies upon dumping margins, those margins must be calculated in conformity with Article 2.4 of the *AD Agreement* and that where the authority relies upon dumping margins calculated in an original investigation and/or subsequent periodic reviews, those margins must thus be calculated for the product as whole through a fair comparison, as required by Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement*.

7.247 Japan argues that in the two sunset reviews at issue both the USDOC and the USITC relied upon on dumping margins calculated in earlier investigations and periodic reviews in reaching their likelihood determination. As a consequence of the reliance on dumping margins calculated inconsistently with Articles 2.1, 2.4 and 2.4.2 of the *AD Agreement*, the determinations made in these sunset reviews are inconsistent with Articles 11.1 and 11.3 of the *AD Agreement*. Because the measures adopted pursuant to these two sunset reviews are inconsistent with various provisions of the *AD Agreement*, they are also in violation of Article 1 of the *AD Agreement*.

7.248 The **United States** rejects the claims of Japan regarding these two sunset reviews, insofar as they concern the determinations made by the USITC, as speculative and unfounded because, assuming that the dumping margins reported to the USITC were calculated in a manner inconsistent with the *AD Agreement*, it does not follow that the USDOC would have reported different margins if it had used a different methodology. The United States also disagrees with Japan's assertion that in these two sunset reviews the USITC relied on the dumping margins reported by the USDOC. The United States argues that the Appellate Body has recognized that Article 11.3 does not require investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of dumping and that, likewise, Article 11.3 does not create an obligation for investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of injury.

(b) Evaluation by the Panel

7.249 We examine first the factual evidence adduced by Japan as support for its assertion that in the two sunset reviews at issue the USITC and USDOC relied upon historical margins of dumping.

7.250 As factual support for its assertion that the USITC relied on dumping margins calculated by the USDOC in previous proceedings, Japan has submitted excerpts from the USITC *Determinations and Views* in the sunset reviews of certain bearings and of carbon steel products.

7.251 With respect to both cases, Japan specifically refers to statements in footnotes that refer to the dumping margins determined by USDOC:

> "... Section 752 of the Act states that 'the Commission may consider the magnitude of the margin of dumping' in making its determination in a five-year review investigation ... . The statute defines the 'magnitude of the margin of dumping' to be used by the Commission in five-year review investigations as 'the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.' ... Commerce found the following dumping margins: TRBs – China, 0 to 29.40 percent; Hungary 7.42 percent; Japan, 0.71 to 20.56 percent (TRBs four inches and

[850] 64 Fed. Reg. 60275 (4 November 1999). Exhibit JPN-22.
[851] 65 Fed. Reg. 47380 (2 August 2000). Exhibit JPN-23.

> under), 36.21 to 36.52 percent (TRBs over four inches), 36.53 percent for all TRBs from NTN Bearing; and Romania 8.70 percent; BBs – France, 56.50 to 66.42 percent; Germany, 31.29 to 132.25 percent; Italy, 68.29 to 155.57 percent; Japan, 2.55 to 106.61 percent; Romania, 39.61 percent; Singapore, 25.08 percent; Sweden, 105.92 percent; and United Kingdom, 44.02 to 54.27 percent; CRBs – France, 11.03 to 18.37 percent; Germany, 52.43 to 76.27 percent; Italy, 212.45 percent; Japan, 4.00 to 51.21 percent; Sweden, 13.69 to 27.38 percent; and United Kingdom, 43.36 to 72.65 percent; SPVBs – France; 39 percent; Germany; 74.88 to 118.98 percent; and Japan, 84.26 to 92.00 per cent ... .";[852] and

> "...Section 752(a)(6) of the Act states that 'the Commission may consider the magnitude of the margin of dumping' in making its determination in a five-year review investigation.. ... The statute defines the magnitude of dumping to be used by the Commission in the five year review investigations as 'the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title'. ... Commerce expedited its review of the anti-dumping order on corrosion-resistant from all subject countries. It assigned sunset margins as follows: Australia; 24.96 percent; Canada, 11.71 to 22.70 percent; France, 29.41 percent; Germany, 10.02 percent; Japan, 36.41 percent; and Korea, 17.70 ...."[853]

7.252 These statements demonstrate that the USITC recalled that the Tariff Act provides that the USITC may consider the magnitude of the margin of dumping in a five-year review and that, in this connection, the USITC noted the specific margins of dumping determined by the USDOC. Nothing in these statements indicates whether and how the USITC actually relied upon these margins as support for its conclusion that revocation of the anti-dumping duty orders was likely to lead to the continuation or recurrence of material injury within a reasonably foreseeable time.

7.253 Regarding the sunset review of certain bearings, Japan also refers to page 94 of the *Determinations and Views of the Commission*. Although Japan has not identified the particular passage which it considers to be significant, we note that this page contains a comment, as part of a separate and dissenting opinion of one Commissioner, to the effect that USDOCs findings that duties had been absorbed on subject imports of ball bearings from France, Germany, Italy, Japan, Singapore and the United Kingdom, are reflected in the dumping margins that USDOC had determined would likely prevail if the anti-dumping duty orders were revoked.[854] However, there is no information before the Panel as to whether other USITC Commissioners also considered that this factor supported an

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[852] *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, Investigations Nos. AA-1921-143, 731-TA-341, 343-345, 391-397, and 399 (Review); Excerpts from Volume I: Determinations and Views of the Commission*, USITC Publication No. 3309, (June 2000), p.20, footnote 128. Exhibit JPN-22.C.

[853] *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan and United Kingdom, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review); Determinations and Views of the Commission*, USITC Publication No. 3364 (November 2000), p.53, footnote 369. Exhibit JPN-23.B. *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, Investigations Nos. AA-1921-143, 731-TA-341, 343-345, 391-397, and 399 (Review); Excerpts from Volume I: Determinations and Views of the Commission*, USITC Publication No. 3309, (June 2000), p.20, footnote 128. Exhibit JPN-22.C.

[854] *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, Investigations Nos. AA-1921-143, 731-TA-341, 343-345, 391-397, and 399 (Review); Excerpts from Volume I: Determinations and Views of the Commission*, USITC Publication No. 3309, (June 2000), p. 94. Exhibit JPN-22.C.

affirmative determination of likelihood of recurrence of material injury. In the absence of such information, the mere reference to a comment made by one individual Commissioner is not sufficient to conclude that the USITC actually relied upon dumping margins calculated in prior proceedings as support for its finding that revocation of the anti-dumping order on imports of ball bearings from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

7.254 In light of the foregoing, we conclude that Japan has not substantiated the assertion that, in determining that revocation of the anti-dumping orders on imports of ball bearings from Japan and on imports of certain carbon steel products from Japan would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, the USITC actually relied upon dumping margins calculated by USDOC in prior proceedings.

7.255 By contrast, there is sufficient evidence before us to conclude that in making its determinations that revocation of anti-dumping order would result in continuation or recurrence of dumping, USDOC did rely on margins of dumping established in prior proceedings. In the sunset review of corrosion-resistant carbon steel from Japan, USDOC considered that "the existence of dumping margins after the issuance of the order is highly probative of the likelihood of continuation or recurrence of dumping".[855] Similarly, in the sunset review of anti-friction bearings from Japan, USDOC considered that:

> "In the instant proceedings, dumping margins above *de minimis* continue to exist with respect to each of the orders. Therefore, given that dumping has continued over the life of the orders, the Department determines that dumping is likely to continue if the orders were revoked. Because we have based this determination on the fact that dumping continued at levels above *de minimis*, we have not addressed the comments submitted by Torrington and MPB with respect to 'good cause', nor have we addressed the arguments of other interested parties regarding the condition of the US market".[856]

7.256 We also note, however, that since in these two sunset reviews USDOC relied upon the continued existence of margins of dumping after the issuance of the anti-dumping order as support for its determination of likelihood of continuation or recurrence of dumping, the margins of dumping relied upon by USDOC were margins calculated during periodic reviews, not margins calculated in the original investigations. Since we have found that the *AD Agreement* does not proscribe simple zeroing in periodic reviews within the meaning of Article 9.3, we cannot find that by relying on margins of dumping calculated in periodic reviews on the basis of simple zeroing USDOC acted inconsistently with the *AD Agreement*.

7.257 In light of the foregoing, the Panel **finds** that USITC and USDOC did not act inconsistently with Articles 2 and 11 of the *AD Agreement* by relying on dumping margins calculated in previous proceedings in the sunset reviews of corrosion-resistant carbon steel from Japan and of anti-friction bearings from Japan.

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[855] *Issues and Decisions Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results*, 2 August 2000, p.6

[856] *Final Results of Expedited Sunset Reviews: Anti-friction Bearings from Japan*, 64 Fed. Reg. (4 November 1999), p. 60275 at 60278.

E. CONCLUSIONS AND RECOMMENDATION

7.258 In light of our findings above, we conclude that:

(a) By maintaining *model zeroing* procedures in the context of original investigations USDOC acts inconsistently with Article 2.4.2 of the *AD Agreement*.

(b) By using model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan USDOC acted inconsistently with Article 2.4.2 of the *AD Agreement*.

7.259 We also conclude that:

(a) By maintaining simple zeroing procedures in the context of original investigations USDOC does not act inconsistently with Articles 1, 2.1, 2.4.2, 2.4, 3.1-3.5, 5.8 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

(b) By maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews USDOC does not act inconsistently with Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3, 9.5 and 18.4 of the *AD Agreement,* Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

(c) By applying simple zeroing in 11 periodic reviews USDOC did not act inconsistently with Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

(d) Japan has failed to make a *prima facie* case that by maintaining zeroing procedures in the context of changed circumstances reviews and sunset reviews USDOC acts inconsistently with Articles 2 and 11 of the *AD Agreement*.

(e) By relying on dumping margins calculated in previous proceedings in the sunset reviews of corrosion-resistant carbon steel from Japan and of anti-friction bearings from Japan USITC and USDOC did not act inconsistently with Articles 2 and 11 of the *AD Agreement*.

7.260 We have also concluded, on grounds of judicial economy, that it is not necessary for the Panel to make findings on:

(a) the claims of Japan that maintaining model zeroing procedures in the context of original investigations is inconsistent with Articles 1, 2.1, 2.4, 3.1-3.5, 5.8 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement; and

(b) the claims of Japan that the use of model zeroing in the anti-dumping investigation of imports of cut-to-length carbon quality steel products from Japan was inconsistent with Articles 1, 2.4 and 3.1-3.5 of the *AD Agreement*.

7.261 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to Japan under the *AD Agreement*.

7.262 We therefore recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the *AD Agreement*.

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