JAPAN'S ANSWERS TO THE PANEL'S QUESTIONS AFTER THE FIRST SUBSTANTIVE MEETING

A. MEASURE

1. Both parties: What are the general characteristics for a measure for it to be capable of being challenged "as such" in WTO dispute settlement?

1. In paragraphs 47 – 56 of its First Written Submission, Japan provided the Panel with a detailed statement on the general characteristics of "measures" that can "as such" be the subject of WTO dispute settlement pursuant to Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Japan will not repeat that statement in full.

2. Japan recalls that, under Article 6.2, "any *act* or omission attributable to a WTO Member can be a measure of that Member … ."[1] Acts of the United States Department of Commerce ("USDOC") that administer the conduct of anti-dumping proceedings, such as the standard zeroing procedures in the form of the Standard Zeroing Line as well as the Standard Zeroing Line itself, are certainly "acts" that can constitute "measures" for purposes of WTO dispute settlement.

3. In *US – Corrosion-Resistant Steel*, the Appellate Body observed that, "[i]n the practice under the GATT, most of the measures subject, as such, to dispute settlement, were *legislation*."[2] However, the Appellate Body immediately added that it had "observed in *Guatemala – Cement I* that, in fact, a *broad range of measures* could be submitted, as such, to dispute settlement."[3] The Appellate Body concluded its analysis with the following statement:

> … there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*.[4]

4. Accordingly, there is no *a priori* exclusion on the types of measure that can be challenged "as such" in WTO dispute settlement.

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[1] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 81.
[2] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 85.
[3] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 85.
[4] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 88.

5. The measures at issue in these proceedings are "administrative procedures" under Article 18.4 of the *Anti-Dumping Agreement*. In the passage just cited, after examining that provision, the Appellate Body concluded that nothing in Article 18.4 operates to exclude certain types of measure from the scope of dispute settlement under the *Anti-Dumping Agreement.*

6. Under Article 18.4, the Appellate Body held that the term "administrative procedure":[5]

> 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.[87] If some of these types of measure could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of "conformity" set forth in Article 18.4.
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> [87] We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" *must be determined for 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 would vary from Member to Member depending on each Member's domestic law and practice.

7. Accordingly, for purposes of this dispute, the measure at issue must be an act attributable to the United States and, from the perspective of WTO law, it must form part of the generally applicable rules, norms or standards maintained by the USDOC in connection with the conduct of anti-dumping proceedings. The form and name of the measure is irrelevant, provided that in content and substance it is part of the USDOC's "administrative procedures".

8. As the Appellate Body held in *US – Corrosion-Resistant Steel*, the mandatory or binding character of the act in question cannot alter its status as a measure that can be subject, as such, to dispute settlement.[6]

2. Both parties: Japan argues in its First Submission (paragraph 48) that it is not necessary for a measure to be mandatory or binding in order for that measure to be challengeable "as such". Is there a distinction between a measure that is mandatory and a measure that is binding?

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[5] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 87. Emphasis added.
[6] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras. 88 and 89.

9. No. The words "mandatory" and "binding" have both been used by panels and the Appellate Body in describing the so-called "mandatory/discretionary" distinction.[7] By using these two words, Japan does not believe that the Appellate Body intended to introduce any substantive nuance to the mandatory/discretionary distinction. In any event, Japan notes that these two words are not treaty language and are not to be interpreted in terms of the *Vienna Convention of the Law of the Treaties* ("*Vienna Convention*"). Indeed, far from constituting treaty language, the Appellate Body has explained that the mandatory/discretionary distinction is simply an "analytical tool" that assists panels and the Appellate Body to determine whether a measure violates WTO obligations.[8] Moreover, this "tool" must not be applied mechanistically:

> We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such. As the Panel seemed to acknowledge, we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the "mandatory/discretionary distinction" may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion.[9]

3. Japan: Can Japan confirm that the measures it is challenging "as such" in these proceedings are the standard zeroing procedures, which it characterizes as administrative procedures?

10. Japan confirms that the "administrative procedures" it is challenging "as such" are not only the USDOC's standard zeroing procedures but also the Standard Zeroing Line which is the specific expression of the standard zeroing procedures. The Panel may also find the answer to the following question relevant to this question.

4. Japan: What is the precise subject matter[10] of the standard zeroing procedures? Does the specific measure at issue consist of anything other than that which Japan refers to as the Standard Zeroing Lines?

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[7] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras. 92, 93, 97 and 99.
[8] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 93.
[9] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 93.
[10] In these questions, Japan understands the term "subject-matter" as referring to the substance of the procedures.

11. Japan will answer the two sub-parts of this question separately. The subject-matter of the standard zeroing procedures is the system or method of mechanically excluding the negative intermediate values that are calculated by comparing normal value and export price for sub-groupings of the product, on a W-to-W, W-to-T or a T-to-T, basis in establishing the overall margin of dumping for the product as a whole. The exclusion of these negative values constitutes a generalized, unvarying norm or rule of the USDOC in margin calculations in all anti-dumping proceedings.

12. As regards the second sub-part of this question, the Panel is correct that the specific measures at issue in the "as such" part of the dispute include the Standard Zeroing Line, either "WHERE UMARGIN GT 0" or "WHERE EMARGIN GT 0". The Standard Zeroing Line forms part of the USDOC's "administrative procedures" for calculating margins of dumping.

13. The Standard Zeroing Line is a specific expression of, and an instrument to carry out, the USDOC's standard zeroing procedures. The standard zeroing procedures are the USDOC's system or method of mechanically excluding negative intermediate values from the calculation of margins of dumping.[11] As reflected in the Standard Zeroing Line and the case-specific programs, the standard zeroing procedures constitute a norm or rule, in margin calculations, that is of general and prospective application. In terms of Article 18.4 of the *Anti-Dumping Agreement*, the standard zeroing procedures are, therefore, "administrative procedures".[12] Thus, in addition to challenging the Standard Zeroing Line in itself, Japan challenges the standard zeroing procedures more generally. Accordingly, whatever the formulation of the standard computer program, Article 18.4 requires that the United States bring its standard zeroing procedures into "conformity" with the *Agreement*.

14. Japan recalls that, in *US – Countervailing Duties on Certain EC Products*, a USDOC calculation method, known as the "same person" method, was found to be "as such" inconsistent with the *SCM Agreement*.[13] The measure at issue in that dispute was variously described by the

[11] *See* Japan's First Written Submission, para. 56, for a discussion of the term "administrative procedures".
[12] Japan's First Written Submission, para. 56.
[13] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 151. The word "method" was used in footnote 22.

Appellate Body as a "procedure"[14], an "administrative practice"[15] and a "method".[16] The measure was not formally recorded by the USDOC, other than in a relatively small number of "as applied" decisions. Nonetheless, both the panel and the Appellate Body found the measure to be "as such" WTO-inconsistent.

15. In contrast, the standard zeroing procedures are formally recorded in the form of the Standard Zeroing Line in the standard computer programs, in addition to featuring in numerous case-specific programs. There is also no doubt that they have been applied on a generalized normative basis for some considerable time. Therefore, in view of the finding in *US – Countervailing Duties on Certain EC Products*, the standard zeroing procedures and the Standard Zeroing Line are also to be regarded as "as such" measures.

5. Japan: Would Japan distinguish for the Panel the evidence it relies upon for the existence of the standard zeroing procedures and the precise subject matter of these procedures?

16. Japan has submitted the following four categories of evidence: the Manual, the standard margin calculation programs, examples of case-specific margin calculation programs, and the testimony of Ms. Owenby.

17. In its First Written Submission, Japan stated that the *Manual* demonstrates that the USDOC maintains standard computer programs to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings.[17] Japan also observed that the Manual shows that the standard computer programs execute the dumping margin calculation according to the United States' current calculation methodology.[18] Further, the Manual describes the standard programs as providing "programming procedures".[19] Thus, the Manual is evidence that standard computer programs exist and that these programs reflect the USDOC's current margins calculation procedures.

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[14] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, footnote 22
[15] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 86
[16] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, footnote 22.
[17] Japan's First Written Submission, para. 27.
[18] Japan's First Written Submission, para. 27.
[19] Japan's First Written Submission, para. 28.

18. The *standard margin calculation programs* in turn contain the Standard Zeroing Line, which is a measure at issue in this case and a specific expression of the standard zeroing procedures. The standard programs, therefore, provide evidence of both the existence and the subject-matter of the standard zeroing procedures.

19. All of the *case-specific margin calculation programs* contain the Standard Zeroing Line and, therefore, demonstrate the consistent application of that Line, as well as the existence, subject-matter and consistent application of the standard zeroing procedures.

20. *Ms. Owenby* is an expert in the USDOC's margin calculation procedures, in particular the programming procedures it maintains and applies to effect those calculations. As set forth in Ms. Owenby's Statement, she has experience in the USDOC's programming and calculation procedures dating back to her employment by the USDOC in 1993. Ms. Owenby testifies to the nature and effect of the standard zeroing procedures through the inclusion of the Standard Zeroing Line in the standard and case-specific computer programs. She also testifies to the very consistent application of the standard zeroing procedures throughout her career. Ms. Owenby's testimony, therefore, confirms the existence, subject-matter and consistent application of the standard zeroing procedures and the Standard Zeroing Line.

21. The evidence described above, therefore, includes the explicit recognition by the USDOC that it maintains standard programming procedures; the standard programs themselves, that contain the Standard Zeroing Line; 26 examples of the application of the standard zeroing procedures; and expert testimony concerning the nature and effect of those procedures, as well as their consistent application.

22. The United States has not offered any evidence to rebut Japan's *prima facie* case that the United States maintains standard zeroing procedures that it has used in every calculation of a margin of dumping for the past decade. Indeed, at the oral hearing, the United States admitted that, among the numerous margin calculations the USDOC has conducted in the past decade in original investigations, periodic reviews and other reviews, there is no single instance where the USDOC did not apply the standard zeroing procedures.

6. Japan: Japan has also made reference to (1) the USDOC anti-dumping manual, (2) US legislation and regulations and (3) the invariable practice of applying the Standard Zeroing

Lines by the United States. With reference to paragraph 3 of the panel request and paragraph 64 of the First Submission of Japan, can Japan confirm whether any of these are measures at issue challenged "as such" or whether they are simply evidence of such measures?

23. Japan has explained in the answer to the previous question that the Manual constitutes evidence that the USDOC maintains standard computer programs to execute margin calculations according to the USDOC's "proper calculation methodologies"; Japan also explained that the USDOC's "invariable practice" of applying the Standard Zeroing Line is relevant evidence of the existence and the consistent application of the procedures.

24. At this stage, Japan does not request the Panel to examine whether the Manual, US legislation and regulations, or the "invariable practice" is, in itself, inconsistent with the *Anti-Dumping Agreement* or the GATT 1994. However, Japan reserves its right to request such examination at a later stage in this dispute.

7. Japan: With reference to paragraph 10 of Japan's oral statement at the first substantive meeting of the Panel, does Japan contend that USDOC maintains standard zeroing procedures that exist independently of their embodiment in the Standard Zeroing Lines? If so, what do such zeroing procedures consist of? If not, is Japan arguing that the Standard Zeroing Lines constitute the standard zeroing procedures?

25. To some extent, Japan has addressed this question in paragraphs 12 – 15 of these Answers and refers the Panel to these paragraphs.

26. The standard zeroing procedures are the USDOC's system or method of mechanically excluding negative intermediate values from the calculation of margins of dumping. The evidence shows that the procedure of excluding negative intermediate values constitutes a norm or rule in USDOC's margin calculation procedures that is of general and prospective application. Accordingly, in terms of Article 18.4 of the *Anti-Dumping Agreement*, the standard zeroing procedures are "administrative procedures". Japan, therefore, challenges the standard zeroing procedures themselves.

27. As previously noted, the Standard Zeroing Line constitutes a specific expression of, and an instrument to carry out, the standard zeroing procedures. As the evidence shows, that Line forms part of the USDOC's administrative procedures for calculating margins and has done so for the past decade. Japan, therefore, also challenges the Standard Zeroing Line as "as such measure".

Japan makes the same as such claims regarding both the standard zeroing procedures and the Standard Zeroing Line.

8. United States: Can the United States identify the particular lines of computer programming it uses to exclude "negative dumping margins" from the calculation of margins of dumping? Are such lines in any way different to the Standard Zeroing Lines referred to by Japan in these proceedings, and, if so, how?

9. United States: Please indicate whether or not there have been any instances during the last ten years in which the USDOC has not applied these lines of computer programming identified by the United States and used to exclude "negative dumping margins".

10. United States: Is there a discretion enjoyed by the USDOC as to whether or not to apply the lines of computer programming referred to by Japan as Standard Zeroing Lines? If so, please explain (a) who enjoys that discretion, (b) in what circumstances that discretion may be exercised, (c) whether any criteria have been established for the exercise of the discretion, (d) when, if ever, that discretion has in fact been exercised, and (e) if it has been exercised, some particularity of its exercise.

11. Both parties: Are the measures challenged "as such" by Japan in the present case either mandatory or binding?

28. Yes. As set forth below, in this dispute, Japan has submitted overwhelming evidence that the standard zeroing procedures and the Standard Zeroing Line are mandatory and/or binding, and are also treated as such by the USDOC. In reply, the United States has failed to supply *any* evidence whatsoever to the contrary.

29. Before turning to the evidence it has submitted, Japan reviews the case-law on the mandatory/discretionary distinction. As well as stating that the mandatory/discretionary distinction is, at most, an "analytical tool",[20] the Appellate Body has indicated in a series of reports that the mandatory character of a measure must be examined in light of the evidence as a whole. In particular, in *US – Corrosion-Resistant Steel*, *US – Carbon Steel* and *US – 1916 Act*, the Appellate Body found that the mandatory/discretionary distinction should be analyzed in the light of the burden of proof and, therefore, of the evidence as a whole.

30. In *US – Corrosion-Resistant Steel*, the panel held that the measure at issue was not a "mandatory legal instrument containing binding legal obligations."[21] Appellate Body reversed the

[20] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 93. *See* Japan's reply to Question 2.
[21] Panel report, *US – Corrosion-Resistant Steel*, para. 7.118. See also Appellate Body Report, *US –*

panel's finding, among other reasons, because the panel failed to examine whether the USDOC treated the measure as "binding" in light of the "*extensive evidence concerning the application*" of the measure.[22] Thus, the mandatory or binding character of the obligations had to be examined in light of the evidence regarding the application of the measure.

31. In the appeal in *US – Carbon Steel*, the European Communities ("EC") challenged the panel's findings that the measure at issue was discretionary. The Appellate Body began its analysis of the mandatory/discretionary distinction by noting that a Member can challenge a measure as such but that it bears the burden of proving its claim.[23] The Appellate Body noted that the relevant evidence typically includes "the text of the relevant legislation or legal instruments" supported by, among others, evidence of the "*consistent application*" of the measure.[24] Unlike Japan's extensive evidence in this dispute, the EC's evidence of the consistent application of the measure consisted of a single "as applied" example. The Appellate Body found that the EC had not met its burden of proving that the measure at issue mandated a violation of WTO obligations.[25] Again, therefore, the mandatory/discretionary distinction was analyzed through the prism of the evidence as whole, in particular the evidence regarding the consistent application of the measure.

32. In *US – 1916 Act*, the panel concluded that "the discretion enjoyed by the US Department of Justice to initiate a case under the 1916 Act should not be interpreted as making the 1916 Act a non-mandatory law."[26] In other words, the application of the measure was subject to discretion on the part of the US Department of Justice. The United States contested the panel's finding on appeal. The Appellate Body examined the appeal from the perspective of the burden of proof. It observed that the panel had found that the complainants, Japan and the EC, had made a *prima facie* case that the measure was, "on its face", WTO-inconsistent.[27] The Appellate Body continued:

> Having so found, the Panel went on to examine the arguments and evidence presented by the United States to rebut this *prima facie* case. One such argument made by the United States was that the 1916 Act is discretionary

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Corrosion-Resistant Steel, para. 92.
[22] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 99.
[23] Appellate Body Report, *US – Carbon Steel*, para. 156.
[24] Appellate Body Report, *US – Carbon Steel*, para. 157.
[25] Appellate Body Report, *US – Carbon Steel*, para. 162.
[26] Panel report, *US – 1916 Act*, para. 6.191.
[27] Appellate Body Report, *US – 1916 Act*, para. 97.

> legislation. The Panel found that *the United States did not supply persuasive evidence in support of this argument*. We are satisfied that, in these cases, the Panel correctly identified and applied the *burden of proof*.[28]

33. As a result, the evidence can show that a measure at issue is "as such" WTO-inconsistent, even though an executive agency has a measure of discretion in deciding whether and when to apply the measure.

34. As noted in paragraph 28, Japan has submitted overwhelming evidence that the standard zeroing procedures and the Standard Zeroing Line are mandatory and/or binding, and are also treated as such by the USDOC. The United States has not only failed to offer "persuasive evidence" in rebuttal, it has not offered any evidence whatsoever.

35. On its face, through the Standard Zeroing Line, the standard zeroing procedures mandate that the USDOC automatically disregard all negative intermediate values. These zeroing procedures, specifically expressed in computer-coded "*instructions*",[29] do not afford any possibility for negative comparison results to be included in the calculation of the total amount of dumping. On the face of the measure, inclusion of negative results is simply not an option. This is confirmed by testimony from Ms. Owenby.[30] The evidence drawn from the terms of the measure, therefore, demonstrates that the measure mandates certain regulatory conduct. That is, indeed, the very purpose of the standard zeroing procedures and the Standard Zeroing Line.

36. The United States counters that the standard programs do not prevent the "Commerce decision-maker" – the Assistant-Secretary – from taking account of negative results nor do they require him to ignore these results.[31] Essentially, the United States argues that, because the 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 Assistant-Secretary's authority to vary those procedures in the future. The fact that "administrative procedures" can be changed at some point in the future does not deprive the procedures of their binding character today. To the contrary, the United States' argument

[28] Appellate Body Report, *US – 1916 Act*, para. 97. Emphasis added.
[29] United States' First Written Submission, para. 36.
[30] Owenby Statement, para. 14.
[31] United States' First Written Submission, para. 36.

confirms that the zeroing procedures are binding and treated as such, unless and until the Assistant- Secretary decides to discard the zeroing procedures.

37. The mandatory character of the zeroing procedures is confirmed by the USDOC's very "consistent application" of the procedures in the last decade, which shows that the USDOC treats the zeroing procedures as mandatory or binding.[32] To recall, Japan has introduced very considerable evidence demonstrating the consistent application of the zeroing procedures. In particular, Japan has submitted 26 case-specific computer programs that all include the zeroing procedures, and it has also submitted Ms. Owenby's expert testimony to the effect that the zeroing procedures have formed part of the USDOC's margin calculation procedures since at least 1993.

38. Japan has, therefore, demonstrated that the zeroing procedures have the character of mandatory norms. Other than asserting that the Assistant-Secretary could, one day, abandon zeroing, the United States has offered no evidence in rebuttal. In particular, the United States has failed to provide a single example of a margin calculation where the USDOC did not use its zeroing procedures. This failure provides very telling confirmation of the consistent application of the zeroing procedures and also of the fact that the USDOC treats the procedures as binding.

39. Finally, in its First Written Submission, the United States argues that, "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."[33] Japan does not ask the Panel to "presume" anything. To the contrary, Japan has submitted considerable, unanswered evidence that the United States has maintained the standard zeroing procedures in their present form for the past decade and that the USDOC has applied these procedures with unfailing consistency. This evidence avoids the need for "presumptions" because it demonstrates that the standard zeroing procedures are treated as mandatory or binding and that they are, as such, WTO-inconsistent.

B. ARTICLE 2.4.2 OF THE *ANTI-DUMPING AGREEMENT*

12. Parties and Third Parties: In interpreting AD Article 2.4.2, what significance should be attached to the language "during the investigation phase"? Is the United States correct in

[32] Appellate Body Report, *US – Corrosion-Resistant Steel*, paras. 97 and 99; Appellate Body Report, *US – Carbon Steel*, para. 157.
[33] United States' First Written Submission, para. 35. Emphasis added.

arguing that this language limits the application of Article 2.4.2 to the investigation phase of a proceeding?

40. Japan emphasizes that its primary claims are that the standard zeroing procedures and the Standard Zeroing Line are inconsistent with the requirements to determine the existence of dumping, and calculate a margin, for the "product" as a whole, as required by Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994, on the basis of a "fair comparison" under Article 2.4 of the *Anti-Dumping Agreement*. Japan's arguments under Article 2.4.2 are that "zeroing" is prohibited by that provision because the term "margin of dumping", in Article 2.4.2, has the same meaning throughout the *Anti-Dumping Agreement*. Accordingly, in terms of Japan's arguments, the meaning of the term "during the investigation phase" has no material significance.

41. However, in response to this question, Japan submits that the phrase does not limit the application of Article 2.4.2 only to *original* investigations. A key element of a dumping determination is the basis of comparison of normal value and export price. The Appellate Body has held that there are "no other provisions [besides Article 2] in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins."[34] Although the text may be ambiguous, there is nothing in the context or object and purpose of the *Agreement* to suggest that the permissible bases of comparison in Article 2.4.2 do not apply to margin calculations under Articles 9 and 11. Indeed, Article 9.3 expressly addresses this question because it states that margin calculations in proceedings under that provision are subject to the disciplines in Article 2, as a whole. There is no exception in Article 9.3 that excludes the application of Article 2.4.2. And it would be curious if there were such an exception because it would mean that the *Agreement* specifies the permissible bases of comparison for some types of anti-dumping proceedings, but not for others.

13. Parties and Third Parties: If AD Article 2.4.2 is limited to the investigation phase of a proceeding, what disciplines apply to the calculation of margins of dumping in proceedings under Article 9 and 11 of the AD Agreement? On what basis do such disciplines exclude zeroing in proceedings other than the investigation phase?

42. Regardless of whether Article 2.4.2 is limited to the investigation phase of a proceeding, zeroing is prohibited in all anti-dumping proceedings by disciplines that derive from two independent textual sources. The first set comprises Article 2.1 of the *Anti-Dumping Agreement*

[34] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

and Article VI of the GATT 1994, which require that an investigating authority determine "dumping" and calculate the "margin of dumping" for the "product" as a whole.[35] This requirement is addressed more fully in reply to Questions 22 to 24, below. The second source of the disciplines is Article 2.4, which requires that every margin of dumping be based on a "fair comparison" of normal value and export price. This requirement is addressed more fully in reply to Questions 27, 28 and 32, below.

14. Parties and Third Parties: Where the third comparison methodology in AD Article 2.4.2 is of application, is an investigating authority permitted to make a comparison based on prices of individual export transactions that are limited to particular purchasers, regions or time periods implicated in the "targeted dumping"? If so, is it possible that the use of the third methodology in this way will yield a margin of dumping different from the margin that would result from the use of an average-to-average comparison?

43. The answer to both questions is, yes. Japan refers the Panel to its Opening Statement at the First Substantive Meeting with the parties in which Japan explored the ordinary meaning of the second sentence of Article 2.4.2 in some detail.

44. The second sentence of Article 2.4.2 authorizes an investigating authority to use the third comparison methodology in very specific circumstances, namely where the authorities find "a pattern of export prices which differ significantly among different purchasers, regions or time periods" and where an explanation is given why such differences "cannot be taken into account appropriately" by either of the first two comparison methodologies (i.e., W-to-W and T-to-T).

45. According to the text of Article 2.4.2, the circumstances justifying the use of the third methodology arise where the investigating authorities find that there is "a *pattern*" of "*export prices which differ significantly*" among purchasers, regions or time periods. The focus of the second sentence is, therefore, on prices in *export transactions*, not home market sales. According to its ordinary meaning, a pricing "pattern" exists where, among all export transactions, there is a discernible configuration of prices by purchasers, time periods or regions. A second requirement for recourse to the third methodology is that the significant pricing differences could not be "taken into account appropriately" by use of either of W-to-W or T-to-T comparison methodologies.

[35] Appellate Body Report, *US – Softwood Lumber V*, para. 93. See also paras. 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53, following panel report, *EC – Bed Linen*, para. 6.118.

46. Although Article 2.4.2 does not indicate exactly how the W-to-T comparison is different from the other two methods of comparison, the distinguishing features of the third method must be rooted in the exceptional circumstances that justify its use. In consequence, the third methodology must enable authorities to focus the comparison on the export transactions making up the pricing "pattern". If the authorities do not focus on those transactions, they would fail to take "appropriate account" of the pricing differences discernible in those transactions.

47. To enable the authorities to focus on the transactions in the "pattern", the text supports a methodology that includes the targeted selection of particular export transactions (i.e. those in the "pattern") for comparison with normal value. By selecting certain transactions for comparison, and leaving out others, authorities can focus on the transactions making up the pricing "pattern". This targeted selection of export transactions enables the authorities to combat targeted dumping.

48. Conversely, a methodology that is not directed at the transactions in the pricing pattern would not "take into account appropriately" the significant pricing differences between transactions within and outside that pattern, as required by the text of Article 2.4.2. This would defeat the stated purpose of the third methodology.

49. Thus, the text of the Article permits authorities to make a comparison based on prices of individual export transactions that are limited to particular purchasers, regions or time periods, thereby enabling the authorities to focus on the transactions in the pricing "pattern".

50. When a pricing pattern has been identified, the authorities must conduct a "fair comparison" that takes into account *all* transactions making up the pattern. The existence of an export pricing "pattern" does not mean that there is dumping, targeted or otherwise. Instead, like the other methodologies, the third methodology under second sentence of Article 2.4.2 is intended to enable authorities to determine whether there is dumping, and to calculate the dumping margin. As the Appellate Body said in *EC – Bed Linen (Article 21.5 – India)*, the "result" of the authorities' investigation cannot be "predetermined by the methodology itself."[36]

51. When investigating authorities inquire into the existence of dumping, they must abide by the general obligations to make a "fair comparison" under Article 2.4. Under each of the

[36] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

methodologies in Article 2.4.2, therefore, the comparison must be unbiased, even-handed, and offer the interested parties an equal chance of success.

52. Nothing in the text of Article 2.4.2 suggests that this requirement either does not apply or applies differently to the third methodology. In particular, the duty to conduct a fair comparison is not altered because the third methodology is used in situations where there is a pricing "pattern" that might indicate the existence of targeted dumping. In that regard, neither the *Anti-Dumping Agreement* nor the GATT 1994 use the term "targeted dumping"; they do not indicate that such dumping should be subject to special "condemnation" where it does exist; and, they do not state that the mere possibility of such dumping justifies inflating the dumping margin or interfering with export price or normal value, contrary to the "fair comparison" obligation. To the contrary, as the Appellate Body observed, "Article 2.4 sets forth a general obligation to make a 'fair comparison'" that "informs all of Article 2, but applies, in particular, to Article 2.4.2".[37]

53. Finally, a W-to-T comparison under the second sentence, as interpreted by Japan, will likely never yield a margin of dumping that is identical to the margin generated under a W-to-W methodology because the latter is derived from comparisons involving "all comparable export transactions", not a targeted selection of those sales. Only in extraordinary circumstances would a W-to-T and W-to-W comparison, under Article 2.4.2, produce the same outcome; and, if they did, it would suggest that no "pattern" of prices existed.

15. Parties and Third Parties: What implications does the interpretation posited in paragraph 14 above have for the "nullity" argument relied upon by the United States?

18. Parties and Third Parties: Is the United States correct in arguing that the results of the application of the third methodology in AD Article 2.4.2 are relevant to its correct interpretation?

54. The United States argues that a prohibition against use of the zeroing procedure "would render the targeted dumping exception in [the second sentence of] Article 2.4.2 a complete nullity," because, without zeroing, the W-to-T methodology "mathematically must yield the same result as an average-to-average comparison."[38] The interpretation of the second sentence of Article 2.4.2 in Japan's response to question 14 above, however, demonstrates that the United

[37] Appellate Body Report, *EC – Bed Linen*, para. 59.
[38] United States' First Written Submission, para. 55.

States' argument is incorrect. The response to Question 20 highlights that the United States' argument is also incorrect as a matter of US domestic law.

55. Further, Japan notes that, under Article 31(1) of the *Vienna Convention*: "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 light of its object and purpose." If the application of the rules in Article 31(1) leads to a result that is manifestly absurd or unreasonable, Article 32 allows the treaty interpreter to have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. In these proceedings, consistent with these rules, Japan has given an interpretation of the second sentence of Article 2.4.2 that is consistent with the text, context, and object and purpose, and whose results are not absurd or unreasonable.

16. Parties and Third Parties: If the third methodology in AD Article 2.4.2 may be interpreted as posited in paragraph 14 above, does it follow that a margin of dumping would not be calculated for the product as a whole? If so, does this undermine the cogency of such an interpretation?

56. The question of the cogency of an interpretive approach must be assessed in light of the wording of the treaty and the rules of interpretation in the *Vienna Convention*. The mere fact that an interpretation results in an exception does not, in itself, make that interpretation suspect, provided that the interpretation stems from the wording of the treaty.

57. As regards the interpretation of the third methodology, both parties agree that this methodology is exceptional in character.[39] For the United States, the exceptional character of the third methodology means that zeroing must be permitted so that the authorities can combat targeted dumping. The United States' approach results in two exceptions to the usual rules under the *Anti-Dumping Agreement*. First, the authorities fail to calculate a margin of dumping for the product as a whole because they disregard all negative comparison results. Second, the authorities violate the requirements of a fair comparison because they engage in a biased comparison that distorts prices, thereby systematically inflating the margin and making it more likely that dumping will be found to exist. The United States offers no textual basis to justify these two exceptions. The recourse to the two exceptions, without textual basis, seriously undermines the cogency of the

interpretation advocated by the United States. As the Appellate Body has said, "Article 2.4.2 contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage. … [W]hen the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly."[40]

58. Instead of relying on the treaty text, the United States' entire argument reduces to a single proposition: the third methodology must be interpreted in the way it advocates, otherwise it produces an identical mathematical result as the W-to-W methodology. This proposition is not only bereft of textual basis, it is also mathematically wrong. As explained in response to Question 20 below, under US domestic law, the W-to-W and W-to-T approaches yield different results, whether zeroing is used or not.

59. Japan has two additional comments on the United States' approach. First, a major failing of the United States' approach is that it includes all export transactions in the W-to-T comparison, i.e. both those that are part of the pricing "pattern" and those that are not. As a result, the comparison undertaken, and its results, are entirely divorced from the pricing "pattern" that justifies recourse to the exception. Such a methodology is *not* directed at the transactions in the pricing "pattern" and *cannot* "take into account appropriately" the significant pricing differences in that pattern, as required by the text of Article 2.4.2. In short, the methodology has nothing to do with "pricing patterns".

60. Second, besides offering an interpretation of the third method that has no textual basis, the United States reasons from the wrong perspective. The United States' interpretation begins with the exception in the third methodology in the second sentence of Article 2.4.2 and reasons backwards to the general rules provided in the first sentence. Essentially, the United States assumes that, because zeroing must be permitted under the third method, it must also be permitted under the first sentence. However, the meaning of general rules is *not* determined by the meaning of exceptions to those rules. Indeed, that is the whole point of exceptions. The integrity of a general rule is preserved, and a narrow exception is carved out to deal with extraordinary circumstances.

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[39] United States' First Written Submission, para. 56.
[40] Appellate Body Report, *US – Softwood Lumber V*, para. 100.

61. In contrast to the United States' approach, Japan's interpretation is firmly rooted in, and justified by, the text of the treaty. Japan has set forth its interpretation in its Opening Statement at the First Substantive Meeting with the parties and in reply to Question 14.

62. As explained in reply to Question 14, the text of the second sentence of Article 2.4.2 supports a methodology that includes the targeted selection of particular export transactions (i.e. all of those in the pricing "pattern") for comparison with normal value. By selecting certain transactions for comparison, and leaving out others, authorities can focus on the transactions making up the pricing "pattern". This targeted selection of export transactions enables the authorities to combat targeted dumping. However, by engaging in a targeted selection, the authorities conduct a comparison based on a category of export transactions (i.e. those making up the pattern). In terms of the usual rules, this would entail calculating a margin for less than the product as a whole.[41] Thus, although the second sentence of Article 2.4.2 may give rise to an exception to the requirement to calculate a margin for the product as a whole, the text of the provision explicitly allows the targeted selection of export transactions for comparison.

63. In conclusion, the United States' interpretation and argument lack cogency. Japan, in contrast, has offered an interpretation that is based on the ordinary meaning of the text. Most importantly, Japan has also shown that its interpretations of Article 2.4.2 do not reduce the third method to a nullity just because zeroing is prohibited.

17. Parties and Third Parties: What is the object and purpose of the second sentence of Article 2.4.2?

64. In *EC – Bed Linen*, the Appellate Body explained that Article 2.4.2:

> … allows Members, in structuring their anti-dumping investigations, to address three types of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.[42]

65. Thus, like the other two methodologies in Article 2.4.2, the third methodology under the second sentence of Article 2.4.2 provides rules to determine whether dumping exists and, if so, to

[41] Appellate Body Report, *US – Softwood Lumber V*, paras. 93, 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53. *See* the reply to Questions 22 to 24, below.
[42] Appellate Body Report, *EC – Bed Linen*, para. 62.

calculate the dumping margin. The particular purpose of the second sentence is to allow Members to properly combat targeted dumping that might be indicated through particular pricing patterns. The term "targeted dumping" is not, however, used in the *Anti-Dumping Agreement*. Instead, the second sentence refers to the existence of an export pricing "pattern" among different purchasers, regions or time periods. That pricing "pattern" does not necessarily mean that there is dumping, targeted or otherwise.

19. Parties and Third Parties: What is the relevance, if any, of the existence of the transaction-to-transaction methodology in the first sentence of AD Article 2.4.2 to the argument of the United States that a prohibition of zeroing would render the third methodology redundant?

66. The alleged redundancy of the W-to-T method must be assessed in light of *both* the W-to-W and T-to-T comparison methods permitted under the first sentence of Article 2.4.2. The existence of the T-to-T methodology demonstrates the fallacy of the United States' assertion that prohibiting zeroing would render the third methodology redundant.

67. The redundancy alleged by the United States arises because, it says, the results of the W-to-W (first) methodology would necessarily yield the same results as the W-to-T (third) methodology in the absence of zeroing. Japan submits that this conclusion is flatly incorrect, as described in the response to Question 20 below. However, leaving that aside, the results of a T-to-T (second) comparison methodology will almost certainly never yield the same results as a W-to-T methodology, whether or not zeroing is employed.

68. The reason is that the individual transactions that comprise normal value in a T-to-T comparison will almost certainly differ, in at least some instances, from the weighted average of the transactions that would function as the basis for normal value in the W-to-T methodology. Thus, the overall comparison result will differ depending on whether the normal value is based on individual transactions (T) or a weighted average of transactions (W).

69. The following is a simple example, involving five home market transactions that form the basis of normal value, with three export transactions, and assuming that each transaction involves an equal quantity of merchandise.

Home market transactions	Export transactions

100	95
90	92
110	–
100	102
105	–

70. In a W-to-T comparison, the weighted average normal value of the five home market sales is 101. Comparison of the three export prices to this weighted average normal value leads to intermediate results of 6 + 9 + (-1) for the three individual export transactions. This produces a total margin of dumping of 14 which, divided by the total value of the export sales (289), produces a percentage margin of 4.84%, if zeroing is not used. If zeroing is used, it results in a total margin of dumping of 15 and percentage margin of 5.19%.

71. In a T-to-T methodology, assuming that the appropriate home transactions are listed adjacent to one another in the table above, the outcome is 5 + (-2) + (-2) for the three export transactions. Without zeroing, this results in a total margin of dumping of 1 which, divided by the total value of the export sales (289), produces a percentage margin of 0.35%. With zeroing, the total margin of dumping is 5 and the percentage margin equals 1.73%. As shown in the following table, both of these results, of course, are different from those derived from the W-to-T comparisons.

Comparison Method	Percentage Result
W-to-T without Zeroing	4.84%
W-to-T with Zeroing	5.19%
T-to-T without Zeroing	0.35%
T-to-T with Zeroing	1.73%

72. These different results are to be expected, except in the highly unusual situation in which the individual transactions in the home market used in the T-to-T methodology happen to have the same normal value as the weighted average normal value that is used in the W-to-T methodology.

73. Thus, because the T-to-T and W-to-T methodologies produce different results, neither method is redundant. And this is without consideration of the "pricing pattern" under the second sentence that permits the authorities to focus on the export transactions in the pricing "pattern", as described in the response to Questions 14, 15 and 16, above. The focus upon a specific universe of export transactions in the W-to-T situation (i.e., those in the "pattern") further ensures that the results of the W-to-T comparison are not the same as those of either the W-to-W or T-to-T comparison methodologies.

20. Parties and Third Parties: Is the United States correct in asserting that absent zeroing the first and third methodologies in Article 2.4.2 necessarily yield identical results? [1] ***If the third methodology in Article 2.4.2, absent zeroing, always yields the same results as an application of the first methodology, does this require an interpretation of the third methodology that permits zeroing or does it rather enjoin an interpretation that permits the investigating authority to limit its investigation to export transactions targeted at particular regions, purchasers or time-periods?***

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[1] ***If you consider that the United States is incorrect, please provide a numerical example demonstrating how (1) a comparison of an average of a number of export prices with an average normal value differs from (2) a comparison between all the same export prices considered individually (including all export prices above the average normal value and all export prices below the average normal value) and the same average normal value.***

74. In response to Question 14, above, in light of the ordinary meaning of the second sentence of Article 2.4.2, Japan has explained why, absent zeroing, the first and third methodologies in Article 2.4.2 are most unlikely to yield identical results.

75. However, even leaving aside that interpretation of the second sentence, the United States is incorrect in its assertion that a W-to-W and a W-to-T comparison necessarily yield the same result. This is demonstrated by reference to the United States' own anti-dumping statute. US domestic law authorizes the use of the W-to-W comparison methodology in original investigations, and the W-to-T comparison methodology in periodic reviews (i.e., assessment proceedings under Article 9.3.1). The W-to-T comparison is not used to combat targeted dumping and does not involve any selection of transactions making up a pricing "pattern".

76. Under the statute, the weighted average normal value (i.e., the "W") is to be calculated over different time periods in the W-to-W and W-to-T comparisons and, hence, using different pools of home market transactions. In original investigations, the US statute authorizes the calculation of

weighted average normal values over the *entire period of investigation* (typically a full year); whereas for periodic reviews, the statute provides for the calculation of weighed average normal values over "a period *not exceeding the calendar month* that corresponds most closely to the calendar month of the individual export sale."[43]

77. Because of the calculation of different weighted average normal values, the outcome of the W-to-W and W-to-T comparisons using those different "W's" will necessarily differ, even if the export prices were identical in both cases. This conclusion would always hold, except in the highly unusual situation in which the weighted average normal values in each month happen to equal the weighted average normal value over the entire period of investigation.

78. The following is a simple example, assuming a three month period of investigation, with two export transactions, and assuming that each transaction involves an equal quantity of merchandise.

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

Month	Home Market Transactions	Export Transactions
1	100	
	101	96
	98	
Month 1 Average	99.67	
2	104	
	104	
	102	
Month 2 Average	103.33	
3	96	102
	98	
	100	
Month 3 Average	98.0	
Overall Average	100.33	99

79. Using the W-to-T comparison methodology, and calculating the "W" as the United States does in investigations (i.e. over the entire period of investigation), the intermediate comparison results for the two individual export transactions are 100.33 – 96, i.e. 4.33, and 100.33 – 102, i.e. (-1.67). Without zeroing, the total margin of dumping is 4.33 + (-1.67), i.e. 2.66, and the percentage margin is 1.34%. If zeroing is used, the total margin of dumping is 4.33 and the percentage margin is 2.18%.

80. Using the W-to-T comparison methodology, and calculating the "W" as the United States does in periodic reviews (i.e. on a monthly basis), the intermediate comparison results for the two individual export transactions are 99.67 – 96, i.e. 3.67, and 98 – 102, i.e. (-4.00). Without zeroing, the final result is 3.67 + (-4.00), i.e. (-0.03), which is negative, and the overall dumping margin is zero. If zeroing is used, the total margin of dumping is 3.67 and the percentage margin is 1.86%.

81. Finally, using the W-to-W comparison methodology, and calculating the "W" as the United States does in original investigations, the total margin of dumping is 100.33 – 99, i.e. 1.33, and the percentage margin is 0.67%.[44]

Comparison Method	Percentage Result
W-to-T (Yearly without Zeroing)	1.34%
W-to-T (Yearly with Zeroing)	2.18%
W-to-T (Monthly without Zeroing)	0
W-to-T (Monthly with Zeroing)	1.68%
W-to-W (Yearly)	0.67%

82. The significant point for the Panel's question is that the outcomes are all different between the two methodologies, whether or not zeroing is used in aggregating the intermediate results to calculate the overall margins of dumping. Thus, the United States' own statutory structure establishes a system of W-to-W and W-to-T comparisons that do not yield identical results (or render the third methodology "inutile," as the United States asserts[45]) in the absence of zeroing. Therefore, applying a W-to-T comparison without regard to a pricing "pattern", the United States is incorrect to assert that a W-to-W and a W-to-T comparison necessarily yield the same results.

83. Finally, in response to the second part of the question, Japan has presented an interpretation of the second sentence, rooted in the text, that avoids the inutility of that sentence and gives purpose to the intent that animates the sentence (see paragraphs 48 to 54 of Japan's Opening Statement at the First Meeting with the Panel and its response to Questions 14, 15 and 16, above).

21. Parties and Third Parties: Is it significant that the first methodology in AD Article 2.4.2 refers to "all comparable export transactions" and that the third methodology refers to "individual export transactions"?

84. Japan believes that the reference to "individual export transactions" in the second sentence is significant. In response to Questions 14 and 16, Japan has explained that the second sentence of Article 2.4.2 supports a comparison involving a targeted selection of export transactions making

[44] Zeroing is irrelevant because, in this instance, there is a single comparison for the product as a whole and no "models" for sub-groupings of the product.

up the pricing "pattern" that justifies recourse to this methodology. In other words, in exceptional circumstances, authorities need not calculate a margin of dumping for "all" export transactions. The absence of the word "all" in the second sentence confirms the textual basis for Japan's interpretation that the comparison involves a selection of export transactions.

C. MARGIN(S) OF DUMPING

22. Parties and third parties: Is there an obligation under the AD Agreement or GATT Art VI to establish an overall margin of dumping either for the product as a whole, for a country or in any other way? If so, what is the textual basis for these obligations?

23. Parties and Third Parties: Is there an obligation under the AD Agreement or GATT Art VI to establish a margin of dumping for individual producers or exporters of the product under investigation? If so, what is the textual basis for this obligation?

24. Parties and Third Parties: The terms "margins of dumping" and "margin of dumping" appear in a number of articles of the AD Agreement. How should these terms be interpreted in each place they are found taking into account, as appropriate, context, object and purpose?

85. Given the overlap between these questions, Japan replies to them together.

86. The terms "margin", "margin of dumping", "margins" and "margins of dumping" appear twenty-four times in the *Anti-Dumping Agreement*. The term "margin" or "margin of dumping" appears in Articles 2.2, 3.3, 3.4, 5.8 (three times), 6.10, 6.10.2, 7.2, 7.4, 8.1 (twice), 9.1 (twice), 9.3, 9.3.2 (twice) and 9.4(i). The term "margins" or "margins of dumping" appears in Articles 2.4.2, 9.4 (twice), 9.5, 12.2.1(iii) and 18.3.1.

87. In giving meaning to the term "margin(s)" or "margin(s) of dumping", the Panel can draw on interpretations given in previous disputes, by both panels and the Appellate Body, that indicate certain common elements regarding this term as it is used throughout the *Anti-Dumping Agreement*. Japan begins with these common elements.

88. There are two operative words in the term "margin(s) of dumping": "margin(s)" and "dumping". Taking the word "margin" first, the Appellate Body has stated that "the term '*margin*

[45] United States' First Written Submission, para. 55.

of dumping' refers to the *magnitude* of dumping."[47] That is, the ordinary meaning of the word "margin" refers to a numerical measurement of the amount or extent of "dumping".

89. The second word, "dumping", is the key to the ordinary meaning of the term "margin(s) of dumping" because it defines what is being measured. The word "dumping" is defined in Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. The treaty text in Article 2.1 refers to the dumping of "a *product*" and, in Article VI:1, it refers to the dumping of "*products*". According to the Appellate Body, "it is clear from the text of these [two] provisions that *dumping is defined in relation to a product as a whole* as defined by the investigating authority."[48]

90. This meaning for the word "*dumping*" dictates that a "margin of *dumping*" must also be established for the "product" as a whole. Put in a slightly different manner, because "dumping" exists only for the "product" as whole, the measurement of the amount of that "dumping" can also be calculated only for the "product" as a whole. In terms of Article 2.1 and Article VI:1, there is no "dumping" of a "type", "model", "category", or other "sub-group" of a product and, therefore, no "margin of dumping" for these sub-groupings.[49]

91. The definition of "dumping" in Article 2.1 "applies to the entire"[50] *Anti-Dumping Agreement* and is, therefore, the governing rule, and context, for interpreting the term "margin(s) of dumping" throughout the *Agreement*. Accordingly, the meaning of each of the twenty-four references to "margin(s) of dumping" must be read in accordance with this fundamental as well as contextual requirement that "dumping" be determined for the "product" as a whole as defined by the investigating authorities. In each case, therefore, the term "margin of dumping" refers to an amount or magnitude of "dumping" that can be measured solely for the product as a whole.

92. According to panels and the Appellate Body, a second common element of the meaning of the term "margin(s) of dumping" is that it refers to margins calculated for *individual producers or exporters*. Most recently, the panel in *Mexico – Rice* held that "in the AD Agreement the term

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[47] Appellate Body Report, *US – Softwood Lumber V*, para. 96. Emphasis added.
[48] Appellate Body Report, *US – Softwood Lumber V*, para. 93. See also paras. 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53, following panel report, *EC – Bed Linen*, para. 6.118.
[49] Appellate Body Report, *US – Softwood Lumber V*, paras. 96 and 102. The sole exception is where the margin of dumping is calculated under the second sentence of Article 2.4.2.
[50] Appellate Body Report, *US – Softwood Lumber V*, para. 93.

'margin of dumping' refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping."[51] The panel stated that it had "examined the rest of the AD Agreement to see whether there is anything in the Agreement that contradicts this conclusion that the term margin of dumping in the AD Agreement is company-specific rather than country-wide", but it found nothing.[52]

93. The panel in *EC – Bed Linen* reached the same conclusion with respect to the term "margins of dumping" in Article 2.4.2. The Appellate Body expressly followed this panel in *US – Hot-Rolled Steel* in interpreting the term "margins" in Article 9.4 and, in *US – Softwood Lumber V*, it recalled that:

> 'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.[53]

94. The textual basis for this conclusion is, in large part, Article 6.10 of the *Anti-Dumping Agreement*, which provides that:

> The authorities shall, as a rule, determine an individual margin of dumping for *each known exporter or producer* concerned of the product under investigation (emphasis added).

Thus, margins of dumping are calculated for a given producer or exporter.

95. Japan believes that the interpretation of the term "margin of dumping" as referring to margins for individual exporters or producers is unlikely to prove controversial because the United States takes the same position in the on-going dispute in *Mexico – Rice*.[54]

96. Nonetheless, Japan observes that the wording of Article 3.3 may suggest that, in certain circumstances, authorities have to calculate a country-wide margin of dumping. Article 3.3 permits authorities, in an injury determination, to assess cumulatively the effects of dumped

[51] Panel report, *Mexico – Rice*, para. 7.137.
[52] Panel report, *Mexico – Rice*, para. 7.138.
[53] Appellate Body Report, *US – Hot-Rolled Steel*, para. 118, quoting panel report, *EC – Bed Linen*, para. 6.118; Appellate Body Report, *US – Softwood Lumber V*, footnote 158.
[54] Panel report, *Mexico – Rice*, para. 7.133.

imports from more than one country. The provision is, therefore, concerned primarily with how an injury determination is conducted and not with dumping margin determinations.

97. According to Article 3.3, the cumulative assessment of the effect of dumped imports is permissible only when certain conditions are satisfied. The first of these conditions is that "the *margin of dumping established in relation to the imports from each country* is more than *de minimis* as defined in paragraph 8 of Article 5" (emphasis added). This wording could be read as requiring authorities to calculate a country-wide margin as a pre-condition for cumulating the effects of dumped imports. However, whether or not margins must be calculated on a country-wide basis to permit a cumulative assessment under Article 3.3, the "margin of dumping" referred to in that provision must be calculated for the product as a whole on the basis of a fair comparison, as required by Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

98. Japan also offers specific comments on the phrase "margin(s) of dumping" in certain other provisions of the *Agreement*:

- **Article 9.4 (i):** This provision provides a ceiling on the amount of duty to be imposed on non-examined producers or exporters of the product. The maximum amount of duties cannot exceed "the weighted average margin of dumping" of producers and exporters selected for individual examination, pursuant to the second sentence of Article 6.10.[55] However, in calculating the weighted average, authorities must disregard zero and de minimis margins. The "margin of dumping" referred to in Article 9.4(i) is, therefore, a composite or "average" of the individual margins calculated for each of the examined producers and exporters. The "margin" reflects, therefore, the individual margins, each of which is established for the product as a whole on the basis of a fair comparison.

- **Articles 9.1 and 9.3:** The term "margin of dumping" in Article 9.3 is qualified by the phrase "as established under Article 2". This confirms that, for the purposes of the duty assessment and collection proceedings, the margin of dumping - which is the maximum amount of the duties imposed - must be calculated in accordance with the disciplines in Article 2, including Article 2.1. This is further affirmed by the Appellate Body, which held that there was no reason, in terms of the duty imposition/collection under Article 9, "to interpret the word `margins` differently from the meaning it has in Article 2.4.2".[56] Likewise, Article 9.1 simply provides that the authority has the power to impose anti-dumping duties in an amount hat does not exceed the maximum limit of the margin of dumping. Consistent with Article 2.1, the margin of dumping is calculated for the product

[55] Appellate Body Report, *EC – Bed Linen (21.5)*, footnote 158.
[56] Appellate Body Report, *US – Hot-Rolled Steel*, para 118

as a whole.

- ***Ad* Article VI of the GATT 1994:** This provision simply allows the authority to calculate the margin of dumping using, in the particular circumstances, the prices of downstream sales by the importer, instead of the sales price from the exporters to their affiliate. Nothing in this provision exempts the authority from calculating individual margins of dumping for the product as a whole.

99. The answers to Questions 26 and 29 touch upon related issues.

25. Parties and Third Parties: Are there any methodologies other than those set out in AD Article 2.4.2 which may be used for the determination of a) "margins of dumping" or b) "a margin of dumping" wherever those terms are used in the AD Agreement?

100. Japan submits that no methodologies other than those set out in Article 2.4.2 may be used to compare normal values and export prices in determining either the "margins of dumping" or a "margin of dumping" under the *Anti-Dumping Agreement*. Japan notes, though, the theoretical possibility of a fourth type of comparison that is not addressed in Article 2.4.2, namely a comparison of normal value in individual home market transactions with a weighted average export price (i.e. a "T-to-W" comparison).

26. Japan and Third Parties: Is the United States correct in arguing that a prohibition of zeroing cannot be reconciled with the fact that the AD Agreement explicitly recognizes the existence of different kinds of duty assessment systems?

29. Parties and Third Parties: What discipline does the first sentence of Article 9.3 impose upon the remaining part of Article 9.3?

101. The United States' argument in this dispute is similar to an argument made by the EC in *EC – Bed Linen*. In that dispute, the Appellate Body rejected the EC's argument, ruling that the prohibition on zeroing under Article 2.4.2 has no bearing on the prospective and retrospective systems for collecting anti-dumping duties.[57] The Appellate Body confirmed this interpretation in *EC – Bed Linen (Article 21.5)*, where it opined 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."[58]

[57] Appellate Body Report, *EC – Bed Linen*, footnote 30.
[58] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

102. However, there is an important link between the "determination" and "imposition" phases. Articles 9.1 and 9.3 both state that the amount of the duties imposed and collected cannot exceed the margin of dumping. In particular, Article 9.1 states that authorities may decide that the amount of duties "shall be the full margin of dumping or less" and Article 9.3 provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." In *EC – Bed Linen (Article 21.5)*, the Appellate Body stated that Article 9.3 means that "the amount of the anti-dumping duty collected from the individually-examined producer will *correspond* to the individually-calculated dumping margin" which is determined for each producer or exporter; under Article 9.1, the amount applied may, though, be "*less* than the margin of dumping".[59] These rules condition the imposition and collection of duties under both the prospective and retrospective systems.

103. Thus, as the Appellate Body observed, "WTO Members are free to structure their anti-dumping systems as they choose, provided that those systems do not conflict with the provisions of the Anti-Dumping Agreement" that include, *inter alia*, "the rule in Article 9.3 that the 'amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2'".[60]

104. Articles 9.3.1, 9.3.2 and 9.3.3 concern the assessment of the final liability for anti-dumping duties and possible refunds. Articles 9.3.1 and 9.3.2 provide rules that apply, respectively, when duties are assessed on a retrospective or a prospective basis. Under both systems, Articles 9.1 and 9.3 dictate that the final liability for duties must be in an amount that does not exceed the margin of dumping. The final liability and the amount of any refund are based on margins of dumping calculated during duty assessment or refund proceedings in which a margin of dumping is calculated for a particular period. The references in Article 9.3.2 to a "margin of dumping" are references to the margin calculated in the refund proceedings. Under that provision, therefore, the duty collected in the prospective assessment system shall be promptly refunded, upon request, to the extent it exceeds the actual margin of dumping, which must be established pursuant to the disciples of Article 2 and must be calculated for the product as a whole.

[59] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, footnote 156.
[60] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para.158.

105. Article 9.3 states explicitly that margins of dumping calculated pursuant to proceedings under Article 9.3.1 or 9.3.2 must be established consistently with Article 2. In other words, the rules on the calculation of normal value and export price, and the requirement to determine dumping, and calculate the margin of dumping, for the product as a whole on the basis of a fair comparison of these values, apply to proceedings under Article 9.3. The Appellate Body has also confirmed, more generally, that there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins."[61]

D. FAIR COMPARISON

27. Parties and Third Parties: Is the methodology set out in the second sentence of Article 2.4.2 of the AD Agreement subject to the "fair comparison" requirement specified in Article 2.4? In other words, does the introductory phrase in Article 2.4.2 also apply to the second sentence?

106. Yes. In *EC – Bed Linen*, the Appellate Body held that

> Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]".[62]

107. Nothing in the text of Article 2.4.2 suggests that this requirement applies differently to the third methodology. To the contrary, the opening clause of Article 2.4.2 expressly renders Article 2.4 applicable to Article 2.4.2. This clause forms part of the context for interpreting the remainder of Article 2.4.2. In light of this context, absent an express statement in the second sentence that Article 2.4 does not apply, it would be absurd to conclude that the *general* requirement of a "fair comparison" in Article 2.4 does not apply to a sub-part of the very same provision. Thus, the context strongly suggests that this requirement applies to the second sentence.

108. As explained in paragraph 50 -52 above, the duty to conduct a fair comparison is not altered because the third methodology is used in situations where there is a pricing "pattern" that *might* indicate a targeted dumping situation. Under the third method, the authorities must compare normal value and export price to determine whether "dumping" exists and to calculate the "margin

[61] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.
[62] Appellate Body Report, *EC – Bed Linen*, para. 59.

of dumping". Consistent with this justification, dumping determinations must be based on the investigated *producer's or exporter's own prices*, and not on the authorities' unfair manipulation and distortion of the pricing comparison. To secure these ends, the *Agreement* requires that the pricing comparison be fair.

109. The absurdity of the contrary interpretation can easily be illustrated. Under Articles 2.2, 2.3 and 6.6 of the *Anti-Dumping Agreement*, the authorities are required to calculate normal value and export price using detailed rules, relying on actual data that is checked during an on-site verification. Absent a "fair comparison" requirement, in comparing the resulting normal value and export price, the authorities could simply distort normal value and export price in a manner that inflates, or even "creates", the margin of dumping.

110. Accordingly, each method of comparison in Article 2.4.2 must, therefore, be subject to the general duty of fairness.

28. Parties and Third Parties: Is the content of the first sentence in Article. 2.4 exhausted by the remaining sentences in Article 2.4? If not, what independent content should be attributed to the first sentence in Article 2.4?

111. According to the Appellate Body, the requirements of a "fair comparison" involve "a *general* obligation" that "informs all of Article 2 … ."[64] In the same passage, the Appellate Body noted that Article 2.4 also "sets forth *specific* obligations", which it described. Accordingly, the Appellate Body drew a distinction between the "*general* obligation" in the first sentence of Article 2.4 and the "*specific* obligations" in the remainder of Article 2.4. Given this choice of language, it seems rather unlikely that the "general obligation", which "informs *all* of Article 2", is exhausted by the "specific obligations" in the remainder of Article 2.4.

112. The immediate context supports the Appellate Body's interpretation that the remainder of Article 2.4 does not exhaust the obligations in the first sentence. Article 2.1 indicates that a dumping determination is the result of a price-based comparison of normal value and export price. Given that Article 2 as a whole is concerned with the rules that regulate this comparison, the overarching requirement of "fairness" in Article 2.4 conditions all aspects of the comparison.

[64] Appellate Body Report, *EC – Bed Linen*, para. 59. Emphasis added.

113. There is an almost infinite number of ways in which the authorities could unfairly compare normal value and export price. Article 2.4 does not seek to identify, specifically, the myriad possibilities for unfairness. The provision imposes a *general* requirement of fairness that guides all aspects of the comparison from beginning to end, coupled with certain specific expressions of that obligation in Article 2.4.

114. Japan explained the substantive content of the "fair comparison" requirement in paragraphs 86 to 91 of its First Written Submission. In sum, the ordinary meaning of the word "fair" connotes a comparison that: is unbiased, impartial and free from distortion of the facts; and offers an equal chance of success to all parties affected by an investigation, in particular to exporters or foreign producers. The Appellate Body has observed that "fundamental fairness" is known in many jurisdictions "as due process of law or natural justice."[65]

30. Parties and Third Parties: Do the disciplines contained in the provisions of AD Article 2 and in particular AD Article 2.4 apply to (a) "margin(s) of dumping' and (b) "a margin of dumping" where these terms are referred to in the AD Agreement?

115. Yes. Article 2 of the *Anti-Dumping Agreement* sets forth the "agreed disciplines" for determining the existence of dumping and also calculating the margin of dumping.[67] Naturally, Article 2 includes Article 2.4. The Appellate Body has held that there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins."[68]

116. As noted in reply to Questions 22 to 24, the definition of "dumping" in Article 2.1 forms part of the context for interpreting the term "margin(s) of dumping" throughout the *Agreement*. Accordingly, the "margin of dumping" always expresses the amount by which "normal value" exceeds "export price". That amount is always based on a comparison between "normal value and "export price". The general rules governing the comparison of these two values are contained in Article 2.4. Thus, Article 2.4 does apply to the calculation of any "margin of dumping" under the *Agreement.*

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[65] Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 179.
[67] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.
[68] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.

31. Parties and Third Parties: What interpretive significance, if any, should be attributed to the explicit reference to AD Article 2 in the first sentence of Article 9.3 where no other express reference to Article 2 is made elsewhere in Article 9 and Article 11?

117. There is no interpretive significance to be attached to the absence of the words "as established under Article 2" after every single one of the other twenty-four references to "margin(s) of dumping" in the *Anti-Dumping Agreement.*

118. The definition of "dumping" in Article 2.1 expressly applies "for purposes of this Agreement". Article 2 contains the only rules in the *Agreement* governing the calculation and comparison of "normal value" and "export price". As noted in Japan's reply to the previous question, the Appellate Body has expressly affirmed that there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins."[69] Absent any other rules, the treaty references to "margin(s) of dumping" must always be interpreted in the context of Article 2.

119. The explicit reference to Article 2 in the first sentence of Article 9.3 confirms that Article 9.3 establishes the fundamental rule for purposes of duty assessment / collection that the margin of dumping, calculated only in accordance with Article 2, sets the ceiling on the duty to be imposed. This discipline informs all of Article 9, in particular the rules on duty assessment and refund mechanism in the remaining part of Article 9.3.

32. Parties and Third Parties: If there is a general principle of fair comparison deriving from the first sentence of Article 2.4 that is of application to proceedings under Article 9 and Article 11, is the practice of zeroing prohibited by this principle and, if so, why?

120. Japan has outlined the ordinary meaning of the word fair in paragraph 114. In paragraphs 104 and 106 of its First Written Submission, Japan explained why zeroing involves an unfair comparison. In sum, zeroing renders a dumping determination more likely and also systematically inflates the dumping margin. Furthermore, by excluding all negative multiple comparison result from the aggregation stage, the United States effectively attributes a zero value to the excluded comparisons, meaning that, for the excluded comparison, export transactions are systematically "treated as if they were less than what they actually are".[70] Thus, zeroing distorts the price

[69] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 127.
[70] Appellate Body Report, *US – Softwood Lumber V*, para 101.

comparison. As a result, the zeroing procedures deprive the comparison of normal value and export price of even-handedness. They also systematically favor the interests of petitioners, and prejudice the interests of exporters; they are formulated with an in-built "inherent bias"[71] that distorts the comparison between normal value and export price.

121. In paragraphs 146 to 157 of its First Written Submission, Japan has explained why zeroing is prohibited by Article 2.4 in relation to Article 9 and 11 proceedings. In proceedings under Article 9.3, the calculation of a margin of dumping determines the maximum extent of dumping duties to be imposed. In proceedings under Articles 9.5, 11.2 and 11.3, the authorities determine whether to impose or to continue imposing anti-dumping duties. In making such determinations Members must ensure that their decisions derive from the producer's or exporter's prices and not their authorities' unfair distortion of the comparison of normal value and export price.

122. Because the United States' standard zeroing procedures and Standard Zeroing Line do not meet the basic requirements of fairness, they are "as such" inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

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