

Questions to the Parties in connection with the second substantive meeting of the Panel with the Parties

33. Can Japan confirm that it is challenging “zeroing procedures” as a measure in and of itself and not as part of a broader measure?

1. Yes. This measure is a methodology for calculating dumping margins that is maintained by the USDOC as a general rule. The measure constitutes a distinct and severable part of the United States’ administrative procedures for conducting anti-dumping proceedings. As Japan explained in paragraph 9 of its Opening Statement at the First Meeting, in WTO dispute settlement, a Member can bring a complaint regarding such a measure.

34. Japan: how does the consistent application of a procedure of zeroing establish the existence of a measure as opposed to its scope and meaning? Can a measure that is challenged as such be identified simply by reference to its consistent application?

2. Japan does *not* identify the zeroing procedures “simply by reference” to their consistent application. Instead, Japan relies on several 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. Japan requests the Panel find the existence of the zeroing procedures on the basis of the totality of this evidence.

3. The evidence of record in this dispute includes:

(a) **USDOC Import Administration Anti-Dumping Manual** (“Manual”). The Manual states that the “basic elements of the new PC programming procedures for investigations and reviews are validated databases, *proper calculation methodologies*, the best computer platform, and standard programs.”¹ It also notes that “consistency is achieved by insuring that the standard programs conform with *current AD calculation methodology*.”² The Manual adds that “calculation consistency occurs when every program uses the same *standard calculation methodology*”.³

The Manual, therefore, demonstrates that the USDOC has developed and maintains a standard calculation methodology and that this methodology is reflected in the standard program.

(b) **The Standard Zeroing Line**. This Line is found in the standard computer program referred to in the Manual. This Line is *both* a measure in its own right *and* also evidence of the existence of the zeroing procedures. As noted above, the Manual states that the “standard calculation methodology” is reflected in the standard program. Thus, the calculation methodology set forth in the Standard Zeroing Line, as part of

¹ Exhibit JPN-5.C, page 8. See Japan First Written Submission, paras. 26-30.

² Exhibit JPN-5.C, page 8.

³ Exhibit JPN-5.C, page 8.

the standard program, is an integrated but distinct element of the USDOC's pre-determined "standard calculation methodology". Because the substance of the methodology in the Line corresponds to the substance of what Japan refers to as the "zeroing procedures", the Line is evidence of the existence of the zeroing procedures.

(c) **Statements by the USDOC, the USDOJ and the United States courts.** Among other things, these statements refer to "Commerce's offset methodology" or "Commerce's zeroing methodology" in terms that show that the "methodology" amounts to a "long-standing" general rule, norm or standard in the calculation of dumping margins. The statements also confirm the substance of this "methodology".⁴

(d) **Valerie Owenby's Statement.** This statement confirms that the zeroing procedures are an "integral element that always forms part of the standard margin calculation program".⁵ This evidence speaks to both the existence and content of the zeroing procedures, showing that the USDOC treats them as a general rule, norm or standard in dumping margin calculation.

(e) Finally, the USDOC's **consistent application** of the zeroing procedures is demonstrated by the 26 case-specific programs that Japan has submitted. Significantly, the United States has failed to identify a single margin calculation in any anti-dumping proceeding conducted since the establishment of the WTO in which it did not zero. Japan elaborates on the relevance and importance of the USDOC's consistent application of the zeroing procedures in reply to the next question.

4. In sum, the **Manual** shows that the United States maintains a standard margin calculation methodology that is reflected in the standard computer programs; the **standard programs** show that this methodology includes, in substance, the zeroing procedures; the **statements by the United States'** executive agencies and courts, as well as by **Ms. Owenby**, confirm the substance of the zeroing procedures and show that the USDOC treats the zeroing methodology or procedures as a general rule, norm or standard in margin calculations; and the **consistent application** of the methodology or procedure further confirms that it is a general rule, norm or standard of prospective application.

5. Consistent with Article 11 of the DSU, the Panel must make an objective assessment of all of this evidence.⁶ Taken together, this evidence demonstrates that the United States maintains – as a general rule, norm or standard – a margin calculation methodology that Japan calls the "zeroing procedures".

35. Japan: does Japan agree that an "as such" claim challenges a measure without regard to its application in specific instances⁷? If so, how does "consistent application" establish the *existence* of a measure that is challenged as such? Does Japan accept that if a measure is challenged as such, the normative force of that measure must be located outside its consistent application?

⁴ Japan Rebuttal Submission, paras. 14-31.

⁵ Exhibit JPN-1, para. 25.

⁶ Japan Opening Statement at the Second Panel Meeting, paras. 12 and 14.

⁷ *E.g.*, Appellate Body report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 165.

6. In *US – OCTG Sunset Reviews*, the Appellate Body recalled the distinction between an “as such” and an “as applied” challenge. The former challenges the operation of a measure “in general”, whereas the latter challenges the application of a measure “in specific instances”.⁸ Japan’s challenge to the zeroing procedures is an “as such” claim that asserts that these procedures are, as a general matter, inconsistent with WTO rules.

7. The Panel’s question focuses primarily on how a complaining Member proves the existence of a measure in WTO dispute settlement proceedings. The Appellate Body has held that, in dispute settlement, questions of municipal law are questions of fact. The Appellate Body expressly approved the following statement by the Permanent Court of International Justice:

From the standpoint of International Law and of the Court which is its organ, *municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures.*⁹

8. From the perspective of WTO law, the question whether a Member maintains a general rule, norm or standard – that is, an “as such” measure – is, therefore, a question of fact that must be proved with evidence. In terms of Article 11 of the DSU, the Panel is required to examine objectively “all the evidence before it” to ascertain whether such a fact exists.¹⁰

9. In the case of an “as such” measure, the evidence will typically include the text of the measure itself. However, where a Member has failed to publish a measure in written form, the evidence can be drawn from other sources. To hold otherwise would permit a Member to benefit from its own failure to comply with the obligation in Article X of the GATT 1994 to publish generally applicable norms.

10. Where a Member has failed to publish a general rule, a *consistent pattern of regulatory behavior* on the part of the Member’s authorities may provide valuable evidence of the existence of an “as such” measure. In particular, where the evidence shows that the regulator has consistently applied the substance of an alleged “as such” measure, the regulator’s pattern of behavior can indicate that the Member adopted, in the past, a general and prospective rule. This would be particularly so where, for example, the pattern of behavior is extremely consistent, over an extended period of time, in a variety of regulatory situations.

11. Of course, in any given dispute, the conclusions to be drawn from a consistent pattern of regulatory behavior depend on the nature and character of the evidence as a whole. Under Article 11 of the DSU, panels must base their factual conclusions on the totality of the evidence adduced by the parties to the dispute.

12. In this dispute, the evidence proves that the USDOC has a perfectly consistent pattern of regulatory behavior, over a long period of time, in all types of anti-dumping proceedings,

⁸ Appellate Body Report, *US – 1916 Act*, para. 60.

⁹ Appellate Body Report, *India – Patent*, para. 65, quoting the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19. Emphasis added.

¹⁰ Appellate Body Report, *Korea – Dairy*, para. 137.

whereby it applies an “offset methodology”¹¹ or “zeroing methodology”¹² that Japan has labelled the “zeroing procedures”. Taken together with the other evidence of record submitted by Japan in this proceeding, this pattern of behavior supports the conclusion that the USDOC has adopted a general rule, norm or standard. Put differently, it is simply not credible to conclude, on the basis of the evidence before the Panel, that USDOC decides afresh, in each and every anti-dumping proceeding, whether or not to grant “offsets” (i.e., to apply the zeroing procedures).

36. To Japan: does Japan contend that the zeroing procedure that it challenges constitutes a practice, and, if so, (1) is a practice susceptible of challenge? and (2) where in the request for the establishment of a panel is such a challenge made?

13. Japan understands that the origins of this question lie in Japan’s reliance upon statements by the USDOC, the USDOJ and US courts that refer to USDOC’s zeroing as a “practice”. Japan notes that, in addition, the US Government and courts have also referred to zeroing as “Commerce’s offset methodology” and “Commerce’s zeroing methodology”.¹³

14. The Appellate Body has held that the “label” assigned to a challenged measure is not important for the purpose of WTO law; rather, the panel must look beyond the label to its substance and content.¹⁴ In light of this case-law, the Panel should not attach importance to the particular label or labels that the US Government and courts ascribe to the zeroing procedures, nor the significance that these labels have (or do not have) in US domestic law. Instead, the significance of the statements by the US Government and courts lies in the fact that they indicate that the zeroing “procedures”, “methodology” or “practice” constitute a general rule, norm or standard. For example, in one statement, the USDOC asserted in general terms that “we do not, however, allow sales that did not fall below normal value to cancel out dumping found on other sales.”¹⁵ This statement describes the zeroing procedures in normative terms that strongly indicate the existence of a general rule. Moreover, the US Government’s description of the substance of “Commerce’s zeroing methodology”¹⁶ is consistent with Japan’s own description.¹⁷

15. As explained in paragraphs 2 – 5 above, the totality of the evidence in this dispute demonstrates that the “zeroing procedures” constitute a general rule, norm or standard susceptible of challenge under the *Anti-Dumping Agreement* and the DSU, irrespective of the label given to the procedures by the United States or Japan.

16. Japan notes that it expressly identified the “zeroing procedures” in its request for the establishment of a panel. For example, in paragraph B.1(a), Japan stated that it is challenging zeroing that occurs “through the USDOC’s AD Margin Calculation computer program and other related *procedures*, in the process of establishing the overall dumping margin for the product as a whole . . .” (emphasis added). Japan’s panel request repeatedly uses the term

¹¹ *NSK Ltd. v. United States* (Consol. Ct. No. 04-00519), USDOJ’s Response to Plaintiffs’ Motions for Judgment Upon the Agency Record, at 13 (15 July 2005). Emphasis added. Exhibit JPN-31.

¹² *PAM, S.p.A. v. U.S. Department of Commerce*, 265 F. Supp. 2d 1362, 1370 (2003).

¹³ See the citations in Japan’s Second Written Submission, paras. 17, 22, 25 and 29.

¹⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, footnote 87.

¹⁵ See the citations in Japan’s Second Written Submission, paras. 16 and 17.

¹⁶ See the citation in Japan’s Second Written Submission, para. 29.

¹⁷ See, for example, the citations in Japan’s Second Written Submission, paras. 17 and 22.

“Zeroing procedure” in identifying the measure subject to challenge – for example, in paragraphs B.1.(a)(iii), (iv), (v), (vi), (b)(i),(ii), (iii), (c), (c)(i), and (d)(i). Moreover, Japan’s request also identifies the substance of these procedures in a more than sufficiently clear manner.

17. Accordingly, consistent with Article 6.2 of the DSU, Japan “specifically identified” the zeroing procedures that constitute the measure at issue in this dispute. Whether or not Japan included the term “practice” in its request for a panel is irrelevant, because Japan is not challenging mere practice.

40. Both parties: if a Member has a policy of systematically applying the same methodology in dumping margin calculations, can that policy as such be found to be WTO-inconsistent?

18. Yes. If the Member’s systematically applied “policy” is a general rule, norm or standard with prospective application, then it may, “as such”, be subject to challenge and found to be WTO-inconsistent.

41. Japan: is it the position of Japan that the requirement to determine a margin of dumping for a product as a whole means that the *Anti-Dumping Agreement* proscribes the assessment of the amount of anti-dumping duty in respect of an individual transaction?

19. No. The “amount of anti-dumping duty” can be assessed on individual transactions. However, as required by Article 9.3 of the *Anti-Dumping Agreement*, the amount assessed cannot exceed the “margin of dumping as established under Article 2.” And the “margin of dumping” must be determined for the product as a whole, as the Appellate Body has repeatedly explained.¹⁸

42. Japan: could Japan explain further how the idea that a margin of dumping can be importer-specific relates to the requirement to determine a margin of dumping for a product as a whole? What factors determine whether a margin of dumping must be established on an importer- or exporter-specific basis?

20. The scope of a dumping margin determination is defined in terms of three elements: (1) the person for whom the dumping margin is determined; (2) the universe of export transactions to be considered; and (3) the time period to be covered by the investigation or review. The Panel’s question focuses on the first of these three elements: the person concerned.

21. The text of the *Anti-Dumping Agreement* provides certain textual guidance in answering this question. Article 6.10 states that the investigating authorities “shall, as a rule, determine an individual margin of dumping for each known exporter or producer”. Articles 6.10.2 and 9.5 also refer to the determination of margins for exporters or producers. None of these provisions refers to the calculation of margins for other persons. The text, therefore, expressly supports the view that the person must be an individual exporter or producer, and it does not expressly permit margins to be calculated for other persons.

¹⁸ See Japan Opening Statement at the Second Panel Meeting, paras. 27-30.

22. In dispute settlement, panels and the Appellate Body have relied on these textual indications to conclude that margins of dumping are calculated for exporters or producers. Japan summarized the case-law in paragraphs 92 and 93 of its July 20 Answers.¹⁹ To date, no panel or the Appellate Body has recognized that margins of dumping may be calculated for persons other than the exporter or producer.

23. Japan notes that, in some Members, including the United States, liability for anti-dumping duties is assessed for importers on the basis of an “importer-specific” margin of dumping calculated in review proceedings under Article 9.3.1 of the Anti-Dumping Agreement. In this dispute, Japan does not contest the United States’ rules in this regard.

24. Japan observes that the *Anti-Dumping Agreement* does not expressly permit or prohibit the calculation of importer-specific margins in review proceedings under Article 9.3. In these circumstances, the *Agreement* could be interpreted to permit the calculation of such margins. In this regard, it should be noted that neither Article 2.1 of the *Agreement* nor Article VI of the GATT 1994 expressly specify the person concerned for purposes of the *Agreement’s* definition of “dumping”. Instead, these provisions state that dumping and, therefore, margins of dumping, are determined for the “product”. This definition leaves open the identity of the person concerned. None of the other sub-paragraphs of Article 2 appears to address the question of the person concerned.

25. In Japan’s view, absent an express statement in Article 2 or Article VI, the person concerned must be identified in other provisions of the *Anti-Dumping Agreement*. Articles 9.3.1 and 9.3.2 of the *Agreement* set forth rules for determining the final liability for payment of anti-dumping duties. Because the maximum amount of duties cannot exceed the margin of dumping, these rules envisage the calculation of a margin of dumping in review proceedings. Article 9.3 does not expressly state whether the margins are to be calculated for individual exporters/producers or for individual importers. Because liability for the payment of duties is generally incurred by the importer of goods, the liability being assessed under Article 9.3 is usually that of the importer. Indeed, the text of Article 9.3.2 expressly refers to refund requests by importers.

26. In these circumstances, Japan believes that the text of Article 9.3 could support a reading that permits margins to be calculated in reviews for importers, rather than for exporters and producers. However, Japan stresses that this issue is not a feature of its claims in this dispute, and Japan is not taking a definitive position on this question.

27. Rather, this dispute concerns the second of the three elements Japan identified in paragraph 20 above, namely the universe of export transactions with respect to which margins of dumping are calculated. Japan does not believe that the identity of the person for whom a margin is calculated is of decisive importance to its claim that dumping margins are determined for the “product”. In other words, even if margins of dumping can be determined in reviews on an importer-specific basis, Japan considers that these margins must be calculated for the product as a whole, as required by Article 2.1 of the *Anti-Dumping Agreement* and the Article VI of the GATT 1994, not for each individual transaction.

¹⁹ See, in particular, 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; and Panel Report, *Mexico – Rice*, para. 7.137.

28. In that regard, although Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 do not specify the person concerned, they do specify expressly that dumping and margins of dumping must be calculated for the product. Thus, regardless of the identity of the person concerned, the universe of export transactions must be for the entire “product”, as defined by the authorities. Neither an individual transaction nor a sub-group of transactions represents the “product”.

29. Finally, although neither the *Anti-Dumping Agreement* nor the GATT 1994 expressly address the third element, namely the time period, the definition of “dumping” in Article 2.1 imposes certain limitations on investigating authorities with respect to the time period involved. In *EC – Tube or Pipe Fittings*, Brazil argued that margins could be calculated based on data from a period of just four months. The Appellate Body disagreed. It held that the time period chosen “allow[s] the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation.”²⁰ The Appellate Body agreed with the Panel that the period of investigation, “although not fixed in duration by the Anti-Dumping Agreement, assures the investigating authority and exporters of ‘a consistent and reasonable methodology for determining present dumping’ which anti-dumping duties are intended to offset.”²¹

30. This reasoning applies equally to investigations and reviews. In all proceedings, the level of dumping determines the maximum level of anti-dumping duties that may be imposed to offset dumping. Market fluctuations and the vagaries of prices are one of the reasons Japan gave in paragraph 39 of its Opening Statement at the Second Meeting for the Members’ duty to determine dumping margins for the product as a whole.

43. Japan: in light of the explanation by the United States of its duty assessment system, on what basis does Japan adopt the view that the US retrospective duty assessment system does not determine final liability for payment of anti-dumping duties on an entry-by-entry basis?

31. The United States’ portrayal of its retrospective review system as “operating” on an “entry-by-entry basis”, like a prospective system, is misleading.²² As the standard computer programs demonstrate, in administrative reviews, the USDOC conducts a comparison for *all* transactions of the product during the review period. As demonstrated in the reviews that Japan has identified in its “as applied” claims, review proceedings can involve multiple comparisons undertaken for a very large number of transactions. If the USDOC were to stop its margin calculation at this point, and assess the duty on each entry, based on the results of the comparison result specific to a particular transaction, the United States’ assessment system could be considered to operate on an “entry-by-entry basis”. However, that is not how the United States’ margin calculation methodology operates. Instead, on the basis of the multiple comparisons undertaken, the USDOC determines a single, overall margin of dumping for all transactions in the review period. As Japan explained in its first written submission,²³ the single, overall margin becomes a fixed duty deposit rate that applies to all future entries of the product, pending review.

²⁰ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 80. Emphasis added.

²¹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 80.

²² United States’ SWS, para. 59.

²³ Japan’s First Written Submission, paras 33-42.

32. In addition, in reviews, the United States calculates a single importer-specific assessment rate for each importer. That fixed rate is applied to all of the importer's entries of the product during the review period. In calculating the importer-specific rate, the USDOC allocates the overall dumping margin among the importers. Specifically, the USDOC divides the numerator in the overall dumping margin among the different importers. The denominator is based on the total entered value of imports by importers. The result is a single overall assessment rate for each individual importer that is applied to all of an importer's entries.

33. The United States asserts that the total amount of assessed duties due from each importers is the same, whether duties are calculated for each entry of the product and summed, or a single assessment rate is calculated for each importer. This may be true as a matter of mathematics, if zeroing is not used. However, the outcome of the United States' methodology does not change the fact that the methodology involves: multiple comparisons for all transactions; the calculation of a single, overall margin for all these transactions; and the application of a single rate (duty deposit or importer-specific) to all entries.

34. Thus, whereas an entry-by-entry comparison would arrive at multiple entry-specific 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.

44. Both parties: please explain further your views on the implications, if any, of the reference to "price difference" in the definition of margin of dumping in Article VI of the GATT 1994.

35. 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 Anti-Dumping Agreement, namely that the existence and magnitude of dumping are determined for the product as a whole.

36. The second sentence of Article VI:2 states that the margin of dumping is "the price difference" determined in accordance with Article VI:1. Although this sentence refers to a "price difference", it does not state what the price difference in question measures. To ascertain the price difference being measured, the context provided by Article VI:1, as well as by the first sentence of Article VI:2, must be examined. These provisions demonstrate that "the price difference" in question is the price difference for the "product", not for individual transactions.

37. Article VI:1 sets forth a definition of dumping. 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.

38. The text of Article VI:1 is reflected, of course, in the text of Article 2.1 of the Anti-Dumping 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”.

39. The interpretation of the term “price difference” in the second sentence of Article VI:2 is further confirmed by the immediate context provided in the first sentence of that provision. The first sentence states that “an anti-dumping duty” levied on “any dumped product” shall not exceed “the margin of dumping in respect of such product”.

40. Thus, the text of Article VI:2 explicitly refers both to a dumped “product” and to the margin of dumping determined “in respect of such product”. The text also refers to a single margin of dumping – “the margin” – that is determined for the product. To borrow from the language of Articles 6.10, 6.10.2 and 9.5 of the Anti-Dumping Agreement, this sentence provides strong textual support for the view that “an individual margin of dumping” is determined for the product. This means that there cannot be multiple margins of dumping for each transaction or for groups of transactions. In fact, it is difficult to see how the drafters of the text could have been any more explicit that dumping and the margin of dumping are determined for the product.

41. The text of Articles VI:1 and VI:2 of the GATT 1994, therefore, confirm that both dumping and margins of dumping are determined for the product as a whole, not for particular transactions.

45. Both parties: is there any significance to be attached to the fact that the *Anti-Dumping Agreement* does not define the term "margin(s) of dumping"? To what extent does the meaning of this term in the *Anti-Dumping Agreement* depend upon the particular context in which it is used? In your estimation, how does the Appellate Body's holding in *US – Softwood Lumber V* influence or dictate the answers to these questions?

42. The terms “dumping” and “margin of dumping” are inextricably linked, in that a dumping margin is no more than an expression of the magnitude of dumping. As a result, it suffices that the *Anti-Dumping Agreement* provides a definition of the term “dumping” because that definition dictates a meaning for the term “margin(s) of dumping”. Thus, because “dumping” exists only for a “product”, the measurement of the magnitude of that dumping can also exist only for the product. In other words, no additional definition of the term “margin(s) of dumping” is necessary because that which does not exist cannot be measured.

43. In any event, the term “margin of dumping” is not bereft of definition in the covered agreements. Article VI:2 of the GATT 1994 provides a definition of the term that complements the definition of “dumping” in Article VI:1. As noted in reply to the previous question, Article VI:2 provides that the “margin of dumping” is “the price difference” established “*in respect of such product*”. This confirms that the terms “dumping” and “margin of dumping” are both defined by reference to the product, not particular transactions.

44. With respect to the requirement to determine dumping, and margins of dumping, for the product, the meaning of the terms does not vary with the context of the terms. Article 2.1 provides an overarching definition that applies to the entire *Anti-Dumping Agreement*. Article 18.1 of that *Agreement* provides that anti-dumping measures must be consistent with Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. There is,

therefore, no room for contextual variation of the meaning of the terms “dumping” and “margins of dumping”, as defined in Article 2.1 and Article VI.

45. Japan’s response to the final part of this question is provided in conjunction with its response to questions 51 and 54 below.

46. Both parties: is there an obligation to calculate an overall margin of dumping for the product as a whole (for all exporters and producers)? If so, does this obligation arise only in Article 5 investigations or wherever the term "margin of dumping" is used in the *Anti-Dumping Agreement*?

46. As Japan has stated repeatedly in its submissions and its oral statements to this Panel, Japan believes that Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 define the terms “dumping” and “margins of dumping” in relation to a “product”. In consequence, these provisions create an obligation for authorities to determine dumping margins for the product as a whole, not for particular transactions. Moreover, as the opening clause of Article 2.1 states, the definition in Article 2.1 applies to the entire *Anti-Dumping Agreement*.²⁴ Equally, Article 18.1 of the *Agreement* renders the definitions in Article VI applicable to the entire *Anti-Dumping Agreement*. Accordingly, the requirement to determine dumping margins for the “product” applies to investigations under Article 5, as well as to reviews conducted pursuant to Articles 9.3, 9.5, 11.2 and 11.3. Japan has set forth detailed arguments on this issue in its written and oral submissions, relying on text, context and object and purpose, as well as earlier Appellate Body rulings.

47. Japan: does Japan consider that Article 2.4.2 of the *Anti-Dumping Agreement* applies to proceedings other than investigations within the meaning of Article 5?

47. Japan’s claims in this dispute are based primarily on the obligations to determine the margin of dumping for the product under Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994, as well as the “fair comparison” requirement under Article 2.4 of the *Agreement*. 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, 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. Accordingly, the possible application of Article 2.4.2 of the *AD Agreement* to proceedings other than Article 5 investigations is not decisive to the outcome of this dispute.

48. Japan: with reference to footnote 23 of the First Submission of the United States, could Japan indicate how the "Standard Zeroing Line" reflects the use of zeroing in connection with the transaction-to-transaction comparison method?

48. Japan claims that the United States’ zeroing procedures and the Standard Zeroing Line are inconsistent, as such, with the *Anti-Dumping Agreement* and Article VI of the GATT 1994, regardless of the comparison methodology utilized (i.e., W-to-W, W-to-T, or T-to-T).²⁵

²⁴ Appellate Body Report, *US – Softwood Lumber V*, para. 93.

²⁵ See Japan First Written Submission, paras. 92-110.

49. Japan submitted Exhibit JPN-8 and JPN-24 to the Panel to demonstrate that the Standard Zeroing Line reflects the use of zeroing in a T-to-T comparison. This exhibit includes the relevant excerpts from the computer program used in an antidumping proceeding in which the USDOC used the T-to-T comparison methodology.²⁶ This excerpt demonstrates that standard zeroing procedures and the Standard Zeroing Line are featured in the program. It is simply incorrect, therefore, for the United States to claim in its first written submission that “none of the computer programs identified by Japan utilize the transaction-to-transaction [T-to-T] comparison methodology.”

49. Japan: could Japan indicate why in its interpretation of the second sentence of Article 2.4.2 it is permissible to exclude export transactions that are not part of the "patterns" referred to in that provision from the denominator of the dumping margin calculation?

50. As noted in its response to question 17 of the Panel’s first set of questions, the Appellate Body explained in *EC – Bed Linen* that the second sentence of 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.²⁷

51. The particular purpose of the second sentence of this provision, therefore, is to allow Members to combat targeted dumping that might be indicated through particular pricing patterns among different purchasers, regions or time periods. This raises the issue of how an authority should “structure” the method of comparison to take “appropriate account” of those pricing patterns in calculating the dumping margin. 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 *will* enable the authorities to take appropriate account of those differences. Conversely, a comparison that compares the entire universe of export transactions cannot address pricing patterns, or the possibility of targeted dumping, confined to a certain group of transactions. Thus, as explained by Japan in its Rebuttal Submission, the W-to-T comparison methodology permitted by the second sentence of Article 2.4.2 allows an authority that finds a pricing pattern to establish the existence of the margin of dumping on the basis of the specific transactions within the pricing pattern.²⁸

52. Although the United States argues that Japan incorrectly construes the second sentence of Article 2.4.2, Japan’s interpretation is entirely consistent with the USDOC’s “targeted dumping” regulation. This regulation provides that where:

there is targeted dumping in the form of export prices . . . that differ significantly among purchasers, regions, or periods of time . . . the Secretary will normally limit the application of the average-to-

²⁶ See Exhibit JPN-24 and paras. 33-40 of Japan’s First Written Submission. Because this proceeding did not involve Japan, it is not one of the proceedings challenged on as applied basis.

²⁷ Appellate Body Report, *EC – Bed Linen*, para. 62.

²⁸ Japan Rebuttal Submission, paras. 69-70.

transaction method to those sales that constitute targeted dumping.²⁹

53. Thus, under the United States' own system, the application of the third method of comparison is confined to the transactions making up the pricing pattern. The transactions outside the pattern are not subject to the W-to-T comparison. In other words, the USDOC's own regulations are consistent with Japan's position that, pursuant to the second sentence of Article 2.4.2, the transactions included in the W-to-T comparison should be confined to those export transactions making up the pricing pattern, and does not extend to the entire universe of export transactions. Therefore, the existence of dumping margin can be determined on the basis of those transactions.

Does this mean that this second sentence constitutes an exception to the requirement to determine a margin of dumping for a product as a whole?

54. Yes. As explain in paragraph 50 to 53, the express language of the second sentence of Article 2.4.2 permits the authorities to determine the existence of margins on the basis of a confined group of export transactions that involve a pricing pattern.

50. Japan: if export transactions that fall outside of the particular pricing patterns that may justify the use of an asymmetrical comparison method may be removed from the denominator of the dumping margin, what does this imply with respect to the scope of application of the anti-dumping duty resulting from a determination made on such a basis? Is it the position of Japan that the *Anti-Dumping Agreement* permits the imposition of a duty limited to particular regions, purchasers or time-periods or that the *Anti-Dumping Agreement* requires that the duty be imposed on all imports of the subject product?

55. 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."³⁰ In order to impose anti-dumping duties, Article 9.1 of the *Anti-Dumping Agreement* requires that Members first make "the determination of dumping, injury, and causation under Articles 2 and 3".³¹ For purposes of the dumping determination in an investigation, Article 2.4.2 prescribes the comparison methodologies that are to be used. The prior determination of the existence of the dumping margin by using any one of these methodologies pursuant to Article 2, permits the imposition of duties under Article 9 on all entries of the product into the territory of the importing Member, provided that the authorities also make affirmative injury and causation determinations under Article 3. In other words, where all prerequisites to determine "the existence of dumping margin, injury, and a causal link" "have been fulfilled", the Members are consequently conferred "the rights to impose anti-dumping duties under Article 9" on all imports of the product.³²

56. Japan notes that the liability for duties imposed on the basis of a dumping determination under the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*

²⁹ 19 C.F.R. § 351.414(f)(2).

³⁰ Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

³¹ *Id.*, para. 123.

³² *Id.*

would be subject to review under either Article 9.3.1 or 9.3.2. In such circumstances, a question may arise whether authorities would be permitted to use the W-to-T method in review proceedings in the exceptional manner set forth in Article 2.4.2 (i.e. confined to a limited group of transactions). The answer to this question depends on the applicability of Article 2.4.2 to review proceedings.

57. In this dispute, Japan has not challenged Members' right to use a W-to-T comparison in review proceedings. The United States has, though, argued that Article 2.4.2 does not apply to anti-dumping proceedings other than investigations. Japan takes no position on this issue in the present dispute. However, supposing for the sake of argument that Article 2.4.2 applies solely to original investigations, final liability for the payment of anti-dumping duties would have to be determined on the basis of a product-wide dumping margin determination, even if the third method in Article 2.4.2 is used in an investigation to justify the imposition of duties on the basis of a comparison of a limited group of export transactions. On the other hand, if Article 2.4.2 is applicable to review proceedings, and assuming that the conditions in that provision are met, the margin of dumping could also be determined in review proceedings on the basis of a comparison of a limited group of export transactions within a pricing pattern.

51. Both parties: how broad a meaning should be given to the term "product as a whole" as used by the Appellate Body in *US – Softwood Lumber V* and *EC – Bed Linen*? Is the application of this term limited to a situation where multiple averaging is undertaken or does it apply to any situation in which multiple comparisons are made?

58. The Appellate Body Reports in *US – Softwood Lumber V* and *EC – Bed Linen* do not create or modify treaty text; rather, they represent an interpretation of that text. Accordingly, the Panel's interpretation of the covered agreements is not dictated by the Appellate Body Reports. Nonetheless, the Reports provide an influential guide to the Panel's interpretation in this dispute. In *US – Shrimp (Article 21.5)*, the Appellate Body held that the panel in that was "correct" in relying upon, and referring to, an earlier Appellate Body.³³

59. The Appellate Body Reports in *US – Softwood Lumber V* and *EC – Bed Linen* are relevant to the interpretive question before this Panel because those Reports addressed the same interpretive question that confronts this Panel: namely, the meaning of the term "margin of dumping". Although the facts of the earlier disputes concerned the calculation of a margin using the W-to-W methodology, the Appellate Body's reasoning is based on interpretations of the terms "dumping" and "margin of dumping" that apply to the entire *Anti-Dumping Agreement*.

(i) The Appellate Body Report in *US – Softwood Lumber V*

60. The Appellate Body's reasoning indicates strongly that the duty to determine dumping margins for the product is general in nature, and not confined to situations where the authorities undertake a W-to-W comparison.

³³ Appellate Body Report, *US – Shrimp (Article 21.5)*, para. 109. The Appellate Body in *US – OCTG Sunset Reviews* found that "following the Appellate Body's conclusion in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same". See para. 188. See also Appellate Body Report, *US – Softwood Lumber V*, paras. 111-112.

61. The structure of the Appellate Body’s reasoning is telling. The Appellate Body begins by identifying the two interpretive questions before it, which related to the terms “all comparable export transactions” and “margins of dumping”.³⁴ The Appellate Body examined, first, the term “all comparable export transactions” in Article 2.4.2 and concluded that “there is no basic disagreement among the participants” concerning this term.³⁵ Under the measure at issue, all comparable export transactions had been taken into account through multiple comparisons at the sub-group level. The issue was “how the results of these multiple comparisons are interpreted and aggregated”.³⁶ This “disagreement”, the Appellate Body said, “flows, in essence, from the participants’ respective interpretations of the terms ‘dumping’ and ‘margins of dumping’ in the *Anti-Dumping Agreement*.”³⁷ In consequence, the Appellate Body shifted its analysis from the phrase “all comparable export transactions” in Article 2.4.2 to the terms “dumping” and “margins of dumping”, which are used throughout the *Agreement*.

62. This description of the parties’ “disagreement”, and the shift in analysis, shows that the obligation the Appellate Body subsequently found to aggregate multiple comparison results stemmed from its interpretation of the terms “dumping” and “margins of dumping”, not from its interpretation of Article 2.4.2, as to which there was no “basic disagreement”.

63. Moreover, in interpreting the terms “dumping” and “margins of dumping”, the Appellate Body immediately examined provisions other than Article 2.4.2. It began with Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994, noting that these provisions “define ‘dumping’ in the context of the GATT 1994 and the *Anti-Dumping Agreement*”.³⁸ Thus, from the outset, the scope of the Appellate Body’s analysis of the terms “dumping” and “margins of dumping” went considerably beyond Article 2.4.2.

64. After stating that Article 2.1 and Article VI define “dumping” “in relation to a product as a whole”, the Appellate Body noted that the definition in Article 2.1 “applies to the entire *Agreement*, which includes, of course, Article 2.4.2.”³⁹ Thus, the Appellate Body reached an *Agreement*-wide conclusion based on Article 2.1 and, by deduction, applied that interpretation to Article 2.4.2 (reasoning “*a majore ad minus*”). Further, in reaching its conclusion regarding Article 2.1 and Article VI, the Appellate Body did not refer to any of the language in Article 2.4.2, other than the term “margin of dumping” itself.

65. The Appellate Body then turned to context to confirm its conclusions regarding the ordinary meaning of the terms “dumping” and “margins of dumping”. It referred, first, to Article 9.2 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, and the rule that anti-dumping duties are imposed “in respect of the *product*”.⁴⁰ Next, it observed that Article 6.10 of the *Agreement* provides that authorities shall, as a rule, determine “an

³⁴ Appellate Body Report, *US – Softwood Lumber V*, para. 85.

³⁵ Appellate Body Report, *US – Softwood Lumber V*, para. 90.

³⁶ Appellate Body Report, *US – Softwood Lumber V*, para. 90.

³⁷ Appellate Body Report, *US – Softwood Lumber V*, para. 90.

³⁸ Appellate Body Report, *US – Softwood Lumber V*, para. 91, last sentence.

³⁹ Appellate Body Report, *US – Softwood Lumber V*, para. 93.

⁴⁰ Appellate Body Report, *US – Softwood Lumber V*, para. 94.

individual margin of dumping for each known exporter or producer concerned *of the product*".⁴¹ This context has nothing to do with the methodologies set forth in Article 2.4.2.

66. Further context was found in the definition of "margin of dumping" in Article VI:2 of the GATT 1994.⁴² The Appellate Body observed that:

... the term "margin of dumping" refers to the magnitude of dumping. As with dumping, 'margins of dumping' can be found only for the product under investigation as a whole...⁴³

67. This conclusion bears out Japan's argument that the terms "dumping" and "margins of dumping" are inextricably linked. The latter is not a separate concept, but simply the measurement of the former.

68. By this stage in its reasoning, the Appellate Body had found that the terms "dumping" and "margins of dumping" are defined by reference to the product, and not particular transactions. Up to this point, *nothing* in the Appellate Body's interpretation of "dumping" and "margins of dumping" was based on Article 2.4.2. The entire reasoning was based on other provisions, some of which apply to the entire *Agreement* (i.e. Article 2.1/Article VI); others which apply to investigations generally (i.e. Article 6.10); and yet others which apply to the imposition of duties generally (i.e. Article 9.2 and Article VI:2). None of these provisions is concerned with or limited to the methodologies in Article 2.4.2.

69. Against this background, the Appellate Body applied its interpretation of the term "margin of dumping" to Article 2.4.2. It noted that authorities are permitted to conduct "multiple averaging". However, in light of its earlier interpretation, it said that the results of these multiple comparisons are not margins; they are "intermediate calculations" that must be aggregated "in order to establish margins of dumping for the product as a whole under Article 2.4.2."⁴⁴ This conclusion stemmed from its earlier interpretation of the term "margin of dumping" and was not rooted in the text of Article 2.4.2. Indeed, at no point did the Appellate Body rely affirmatively on any language in Article 2.4.2.

70. The Appellate Body summarized its conclusions in paragraph 99:

... 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 *Anti-Dumping Agreement*, an antidumping duty can be levied only on a dumped product.

71. The breadth of these statements belies the United States' attempts to portray the Appellate Body's reasoning as rooted in "all comparable export transactions" language in

⁴¹ Appellate Body Report, *US – Softwood Lumber V*, para. 94.

⁴² Appellate Body Report, *US – Softwood Lumber V*, para. 95.

⁴³ Appellate Body Report, *US – Softwood Lumber V*, para. 96.

⁴⁴ Appellate Body Report, *US – Softwood Lumber V*, para. 98.

Article 2.4.2. In particular, the injury and causation determinations the Appellate Body mentioned in paragraph 99 are made pursuant to Article 3, and the imposition of duties occurs under Article 9. Instead of confining its analysis to Article 2.4.2, the Appellate Body described a series of product-wide determinations made by the authorities that have product-wide consequences. The dumping margin determination was placed very firmly into this overall product-wide picture.

72. Strikingly, throughout its interpretation of the terms “dumping” and “margin of dumping”, the Appellate Body *never* referred to the words “all comparable export transactions” in Article 2.4.2. The last reference to these words is in paragraph 90 of the Report, *before* the Appellate Body begins its examination of the terms “dumping” and “margin of dumping”.

73. Absent any reference to these words, it is extremely difficult to give credence to the United States’ view that the obligation to determine dumping margins for the product as a whole arises solely where authorities must examine “all comparable export transactions”. This is particularly so because the Appellate Body *could* have said that comparison results cannot be discarded because of the duty to examine “all comparable” transactions. However, it did not. Instead, at every turn, the thrust of the Appellate Body’s interpretation is that the definitions of “dumping” and “margin of dumping” – which apply to the entire *Agreement* – require a product-wide determination. As Japan has noted, under the *Agreement*, these product-wide determinations have a series of product-wide consequences, including the imposition of duties that may exceed bound commitments for the product.⁴⁵

(ii) The Appellate Body Report in *EC – Bed Linen*

74. The reasoning in *EC – Bed Linen* is as clear as the reasoning in *US – Softwood Lumber V*. The Appellate Body began its reasoning by citing Article 2.4.2 in full, emphasizing the phrase “existence of margins of dumping”.⁴⁶ The Appellate Body stated that Article 2.4.2 “explains how [the authorities] must proceed in establishing that there *is* dumping”.⁴⁷ Thus, the Appellate Body made an explicit link between determining that dumping margins exist and determining that there is dumping. This bears out Japan’s argument that these two concepts are inextricably linked.

75. Continuing in the same paragraph, the Appellate Body turned to Article 2.1 to ascertain the meaning of the term “dumping”:

From the wording of [Article 2.1], it is clear to us that the Anti-Dumping Agreement concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.⁴⁸

76. The Appellate Body stated that, “having defined the *product* as it did”, the EC “was

⁴⁵ Japan Opening Statement at the Second Panel Meeting, paras. 34-39.

⁴⁶ Appellate Body Report, *EC – Bed Linen*, para. 50.

⁴⁷ Appellate Body Report, *EC – Bed Linen*, para. 51.

⁴⁸ Appellate Body Report, *EC – Bed Linen*, para. 51. Original emphasis.

bound to treat that *product* consistently thereafter in accordance with that definition”.⁴⁹ It added that the EC’s duty under Article 2.4.2 was to establish “‘the existence of margins of dumping’ for the *product* ... and not for the various types or models of that product”.⁵⁰ It also found that “all references to the establishment of ‘the existence of margins of dumping’ are references to the *product* that is subject of the investigation”.⁵¹

77. Again, the whole thrust of the reasoning is that “dumping” and “margins of dumping” must be determined for the product. To underscore this conclusion, the Appellate Body italicized the word “*product*” nine times in just 23 lines of reasoning.

78. Moreover, in reaching its conclusion on the interpretation of the terms “dumping” and “margins of dumping”, the Appellate Body *never* relied on the phrase “all comparable export transactions”. The duty to determine margins for the product was seen as a requirement that stemmed from Article 2.1, not Article 2.4.2. Indeed, it was only when the Appellate Body had completed its interpretation of the terms “dumping” and “margins of dumping” that it turned, “with this [interpretation] in mind”, to apply its interpretation to the W-to-W comparison.⁵² Thus, a pillar of the Appellate Body’s reasoning was its conclusion that Article 2.1 requires that dumping and margins of dumping be determined for the product as a whole.

79. Accordingly, in both *US – Softwood Lumber V* and *EC – Bed Linen*, the Appellate Body emphasized that the duty to determine dumping and margins of dumping for the product as a whole stemmed from the definitions in Article 2.1 – which it held applies to the entire *Anti-Dumping Agreement* – and Article VI. Significantly, despite the United States’ arguments, the Appellate Body’s reasoning on the origins of the “product as a whole” requirement never relies on the phrase “all comparable export transactions”. There is, therefore, no justification for confining the Appellate Body’s findings to W-to-W comparisons.

80. Moreover, the more recent of the two Reports – *Softwood Lumber V* – contains the more comprehensive reasoning. It draws on a wider range of context and places dumping margin determinations into the broader picture of anti-dumping proceedings generally. The findings in this Report constitute a strong affirmation of the original conclusion in *EC – Bed Linen*, justifying that conclusion by reference to several treaty provisions that have nothing whatsoever to do with the methods of comparison in Article 2.4.2.

52. Japan: what is the response of Japan to the argument in paragraph 23 of the opening statement of the United States at the second meeting that the word "comparison" only refers to the act of observing or establishing the difference between normal value and export price but not to the process of aggregating the results of separate comparisons?

81. Japan strongly disagrees with the United States’ position that the fair comparison requirement contained in the first sentence of Article 2.4 only applies to calculating the

⁴⁹ Appellate Body Report, *EC – Bed Linen*, para. 53. Original emphasis.

⁵⁰ Appellate Body Report, *EC – Bed Linen*, para. 53. Original emphasis.

⁵¹ Appellate Body Report, *EC – Bed Linen*, para. 53. Original emphasis.

⁵² Appellate Body Report, *EC – Bed Linen*, para. 54.

intermediate comparison results, and not to the entire process, including the aggregation of those intermediate results to calculate the overall dumping margin. *First*, Japan notes that to read the fair comparison requirement in this limited manner would render the first sentence of Article 2.4 inutile, if all that it requires is that an authority make those adjustments that are listed in the remainder of that paragraph.

82. *Second*, as discussed in *Egypt – Steel Rebar*, the text of Articles 2.4.1 and 2.4.2 of the *Anti-Dumping Agreement* indicate that the “fair comparison” requirement contained in Article 2.4 does not merely apply to those provisions. Specifically, that Panel explained:

Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be “fair”. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value.

The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where “the *comparison* under paragraph 4 requires a conversion of currencies” (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as “the provisions governing fair comparison”, and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis).⁵³

83. Thus, the Panel equated a comparison of export price and normal value – which is subject to the fair comparison requirement – with the calculation of the dumping margin. As a result, the way in which authorities elect to disaggregate and re-aggregate the “product” for purposes of the comparison is an integral part of the process of “observing ... differences”⁵⁴ between normal value and export price for the product.⁵⁵ The authorities, therefore, cannot 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.

84. Finally, to construe the term “comparison” in the manner suggested by the United States, whereby a fair comparison would be limited to merely selecting comparable transactions and making appropriate adjustments, is to suggest that on the one hand, authorities are required to make adjustments that promote fairness and, on the other hand, permits them to make any other adjustments to prices they see fit. It is absurd, however, to interpret the Article to require the authorities to give with one hand to ensure fairness that

⁵³ Panel Report, *Egypt – Steel Rebar*, paras. 7.333-7.334 (underlining added) (footnote omitted).

⁵⁴ See Japan First Written Submission, para. 82.

⁵⁵ See Japan Opening Statement at the Second Panel Meeting, paras. 44.

which they can simply remove with the other hand to deny it.

85. In short, 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, which in turn necessarily inflates the margin of dumping, and makes a finding of dumping more likely.

53. Both parties: what provisions of the *Anti-Dumping Agreement*, if any, impose an obligation to aggregate results of multiple comparisons between export price and normal value?

86. *First*, Article 2.1 of the *Anti-Dumping 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. Moreover, because these definitions apply to the entire *Anti-Dumping Agreement*, the duty to determine margins for the product applies in all types of anti-dumping proceedings.

87. In consequence, when the authorities have selected a method of comparing export price and normal value that involves multiple comparisons at the sub-product level, the authorities must aggregate the results of these comparisons.⁵⁶

88. *Second*, independent of the obligations in Article 2.1 and Article VI, the duty to conduct a “fair comparison”, under Article 2.4 of the *Anti-Dumping Agreement*, precludes a Member from discarding multiple comparison results. Although Members have choices in determining how they will compare export price and normal value, Members must respect fully the logic of the method of comparison they choose.⁵⁷ Where a Member elects to determine a single overall margin of dumping for all comparable export transactions of the product based on multiple comparisons, the fairness obligation in Article 2.4 prohibits the Member from aggregating solely those comparison results that would tend to make a dumping margin determination more likely, or would inflate it. This is particularly the case where the single overall margin is used to justify a determination that has product-wide consequences. In these circumstances, irrespective of Article 2.1, it is not fair and even-handed for the Member to aggregate the positive comparison results, to the exclusion of other results.

89. Under the zeroing procedures, in both investigations and reviews, the United States calculates a single overall margin of dumping on the basis of a comparison of all comparable export transactions. Moreover, in both investigations and reviews, the overall margin has a variety of product-wide regulatory consequences, including justifying the imposition of duties on all entries of the product.

90. Leaving aside the proper interpretation of Article 2.1, the United States cannot determine a single overall margin on the basis of a comparison that initially compares all export transactions but then excludes any negative comparison results. Within the logic of the United States’ comparison methodology, the excluded comparison results are not the final results of margin calculations; rather, they are simply intermediate comparison results

⁵⁶ See Appellate Body Report, US – Softwood Lumber V, paras. 97 – 98.

⁵⁷ See Appellate Body Report, EC – Bed Linen, paras. 53-62.

awaiting aggregation. The exclusion of negative intermediate comparison results from the calculation of the overall margin distorts that margin, systematically prejudicing exporters and foreign producers, and favoring domestic producers. This is contrary to the obligations established by Article 2.4.

54. Both parties: can the interpretation by the Appellate Body of the term "margin of dumping" in *US – Softwood Lumber V* and *EC – Bed Linen* be viewed as specific to the location and context of that term in Article 2.4.2 of the *Anti-Dumping Agreement*?

91. Please see Japan’s response to Question 51 above.

55. Both parties: what is the interpretive significance, if any, of the following phrases for the interpretation of the term "margin(s) of dumping":

(a) "as established" in Article 9.3;

92. Article 9.3 of the *Anti-Dumping Agreement* sets forth a mechanism whereby the final liability for payment of anti-dumping duties can be determined in both prospective and retrospective systems. The *chapeau* of Article 9.3 confirms the rule in Article 9.1 of the *Agreement* that the amount of anti-dumping duties imposed cannot exceed the margin of dumping. The words “as established” in Article 9.3 dictate that, in determining the final liability for duties, the investigating authorities must calculate margins of dumping in a manner that is fully consistent with both the substantive and procedural disciplines set forth in Article 2 of the *Agreement*.

(b) "the" in "the margin of dumping" in Article 9.3;

93. As noted in the previous paragraph, the *chapeau* of Article 9.3 provides that the maximum amount of the anti-dumping duty imposed shall not exceed “the margin of dumping”. The interpretive significance of the word “the” must be understood in light of the phrase that accompanies it textually. In the *chapeau* of Article 9.3, the word “the” is combined with the singular word “margin” in the phrase “the margin of dumping as established under Article 2”. The combination of the words “the” and “margin” indicates that the maximum amount of duty is determined by reference to “*the*” *single* “*margin* of dumping” established pursuant to Article 2. This language is fully consistent with Japan’s view that authorities establish a single margin for the product as a whole, not a separate margin for each transaction or multiple margins for groups of transactions.

94. Article 9.1 also twice refers to “the margin” in the singular form. The first sentence states “an anti-dumping duty” may be imposed up to “*the* full *margin* of dumping”, and the second sentence mentions the desirability of “the duty” being less than “the margin”. This language also supports the view that one overall margin is determined for the product.

(c) "actual" in "actual margin of dumping" in the second sentence of Article 9.3.2;

95. Article 9.3.2 provides that, where anti-dumping duties are assessed on a prospective basis, importers may request a refund of duties. In that event, authorities conduct a review of past entries to establish whether duties were paid “in excess of the [actual] margin of dumping”. The quoted phrase appears twice in Article 9.3.2, the first time without the word

“actual”, the second time with it. In each case, the phrase refers to the same “margin of dumping”, namely, the margin of dumping calculated for the review period. In this setting, the word “actual” refers to the margin that is determined on the basis of the transactions in the specified review period. The word “actual” is used to contrast the margin determined for the review period with the original margin calculated in the investigation, which formed the basis for the imposition of the duties subject to review. Thus, the duties paid on the basis of the original margin must be reviewed in light of “the actual margin” for the review period.

96. The United States argues that, where variable duties are imposed by reference to prospective normal value, the difference between the transaction price and the reference price is itself the margin of dumping for the transaction.⁵⁸ On this view, the amount of the variable duties imposed *equals* the margin of dumping for the transaction. Yet, 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..

(d) "zero and *de minimis*" margins in Article 9.4;

97. Article 9.4 applies to any exporters or producers that do not receive an individual margin of dumping pursuant to Article 6.10 or Article 6.10.2. In the absence of an individual margin of dumping, Article 9.4 authorizes Members to impose duties on imports from these exporters or producers at an “all others” rate based on the individual margins calculated for the sampled exporters or producers. Article 9.4 adds that, in determining the all others rate, the authorities shall disregard any “zero and *de minimis* margins”. This language requires the authorities to exclude from the calculation of the “all others” rate any individual margins determined for sampled parties that are zero or *de minimis*.

98. In *US – Softwood V*, the Appellate Body relied on the express exclusion of zero margins in Article 9.4 to show that, where the negotiators intended to exclude zero margins from calculations, they did so expressly.⁵⁹ However, nothing in the remainder of the treaty permits authorities to disregard negative multiple comparison results in the calculation of an overall margin of dumping.

(e) "individual" in "individual duties or normal values" in the last sentence of Article 9.4;

99. The last sentence of Article 9.4 refers to Article 6.10.2 of the *Anti-Dumping Agreement*, which therefore constitutes context for interpreting that sentence. For its part, Article 6.10.2 complements Article 6.10, which in turn provides that the authorities shall, as a general rule, determine “*an individual margin of dumping for each known exporter or producer*”. Article 6.10 qualifies this general rule by stating that where it is “impracticable”

⁵⁸ United States’ Second Written Submission, para. 54.

⁵⁹ Appellate Body Report, *US – Softwood Lumber V*, para. 100.

to calculate an individual margin for each exporter/producer, the authorities may engage in sampling. In that event, an individual margin is determined solely for the sampled exporters or producers. However, Article 6.10.2 adds that “*an individual margin of dumping*” must be calculated for any exporter or producer that was not included in the sample but that submits the necessary information.

100. Article 9.4 sets forth rules that apply where the authorities have engaged in sampling under Article 6.10. As noted, it provides that the authorities may apply an “all others” rate to exporters or producers “not included in the examination”. The last sentence of Article 9.4 clarifies that the “all others” rate does not apply to exporters or producers that obtain “an individual margin” pursuant to Article 6.10.2. For these producers and exporters, the authorities must apply an “*individual*” rate of duty. The parallel use of the word “individual” in Articles 6.10.2 and 9.4 underscores that the individual margin of dumping calculated for an exporter or producer constitutes the basis, and provides the ceiling for, the “individual” rate imposed on imports from the exporter or producer.

(f) "individual" in "individual margins of dumping" in the first sentence of Article 9.5?

101. Article 9.5 provides a “review” procedure for “new shippers” that did not export the product during the period of investigation. Pursuant to Article 9.5, the “purpose” of the review procedure is to determine “individual margins of dumping” for the new shippers. As with Articles 6.10 and 6.10.2, the word “individual” refers to the individual margin of dumping calculated for each of the new shippers. The use of this word again demonstrates that a single margin of dumping must be determined, as to the “new shipper”, for the product as a whole. Authorities cannot calculate a separate margin of dumping for each transaction or multiple margins for groups of transactions.

56. Both parties: drawing on the views expressed during the second panel hearing, would a possible interpretation of Article 9.3 be as follows: "the amount of the anti-dumping duty imposed, collected and assessed shall not exceed the margin of dumping for the product as a whole as established in investigations pursuant to Article 5". Please provide reasons for your position.

102. Japan agrees with this statement modified in the following manner:

The amount of the anti-dumping duty imposed, collected and assessed shall not exceed the margin of dumping established for the product as a whole on the basis of a fair comparison under Article 2, in investigations pursuant to Article 5 or in reviews pursuant to Articles 9.3, 9.5 or 11.2.

103. Articles 9.1 and 9.3 provide that the maximum amount of anti-dumping duty that may be imposed cannot exceed the margin of dumping. Neither Article 9.1 nor Article 9.3 states that the ceiling on anti-dumping duties is fixed exclusively by reference to the margin of dumping determined in investigations under Article 5. Accordingly, Japan believes that the ceiling on the imposition of anti-dumping duties imposed by Articles 9.1 and 9.3 of the *Anti-Dumping Agreement* refers to any margin of dumping determined consistently with the disciplines Article 2.

60. Japan: how does Japan respond to the argument of the United States in paras. 98-101 of the First Submission of the United States that Japan has not demonstrated

that USDOC actually relies on dumping margins calculated in prior proceedings?

104. 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 expressly mandated that in sunset reviews, the USDOC “shall consider . . . the weighted average dumping margins determined in the investigation and subsequent reviews”⁶⁰ The mandatory nature of this obligation is further demonstrated by: (1) the specific requirement in the USDOC’s regulations that respondents report this information in their substantive responses to the USDOC’s notice of initiation of sunset reviews⁶¹; 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.⁶² It is hard to imagine a clearer instance in which an authority “actually relies” on the specified types of information.

How does Japan respond to the argument in footnote 94 of this Submission that Japan is incorrect in asserting that "the ITC relied on the dumping margins reported by Commerce in the cited cases"?

105. The United States submits in footnote 94 of its First Written Submission that it cannot be said that the “ITC relied on the dumping margins reported by Commerce in the cited cases”, in light of the point, recognized by the Appellate Body in *U.S. – Corrosion Resistant Steel*, 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.”

106. It is a non-sequitur, however, to suggest that an authority *may* not rely on a category of information, simply because it is not *required* by the *Anti-Dumping Agreement* to do so. In other words, the question is not whether the *Anti-Dumping Agreement* requires members to “rely on” dumping margins in making their determinations on the likelihood of continuation or recurrence of injury; rather, the question is whether a Member (in this case, the United States) has actually done so. Japan claims that the USITC has actually relied on dumping margins in reaching its likelihood determinations. Quotations from the Appellate Body regarding the legal requirements imposed by the *Anti-Dumping Agreement* do nothing to resolve the question as to the accuracy of Japan’s claim.

107. In this case, Japan has demonstrated that the USITC routinely relies on dumping margins calculated in earlier investigations and periodic reviews as part of its likelihood

⁶⁰ Section 752(c)(1) of the Tariff Act of 1930, as added by the Uruguay Round Agreements Act. Emphasis added.

⁶¹ *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.*

⁶² *See, e.g.*, Final Results of Expedited Sunset Reviews: Antifriction Bearings From Japan (USDOC sunset review in case number A-588-804), 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).

determination, through references to those previously-calculated dumping margins. *See* paras. 187-192 of Japan's First Written Submission. The United States has not provided any evidence to the contrary. It is therefore absurd for the United States to assert that Japan has failed to demonstrate that "the ITC relied on the dumping margins reported by Commerce in the cited cases".