

**UNITED STATES – MEASURES RELATING TO
ZEROING AND SUNSET REVIEWS**

WT/DS322

**ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS
TO THE PARTIES IN CONNECTION WITH THE FIRST
SUBSTANTIVE MEETING**

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<i>Argentina – Poultry</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Brazil – Desiccated Coconut (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997
<i>EC – Audio Tapes</i>	Committee on Anti-Dumping Practices, Panel Report, <i>EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, circulated 28 April 1995 (unadopted)
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>Korea – Commercial Vessels</i>	Panel Body Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>US – Atlantic Salmon</i>	GATT Panel Report, <i>United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway</i> , ADP/87, adopted 27 April 1994.
<i>US – Corrosion-Resistant Steel AD Sunset Review (Panel)</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R
<i>US – Corrosion-Resistant Steel AD Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May, 1996
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<i>US – Stainless Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R, adopted 1 February 2001

A. MEASURES

Q1. 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. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* provides for dispute settlement with respect to “measures,” but it does not provide a definition of a “measure.” In *US – Corrosion-Resistant Steel AD Sunset Review*, the Appellate Body noted that panels have “frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application.”¹ Therefore, according to the Appellate Body, an instrument that sets forth rules or norms that are intended to have general and prospective application *could* constitute a measure.² As discussed below, however, the question of whether an instrument is a measure subject to WTO dispute settlement is separate from the question of whether the measure can be found, as such, to mandate a breach of a WTO obligation.

2. The United States notes that Japan has not established that the “standard computer program” or what it refers to as “zeroing procedures” meet any of the above criteria. As the United States noted at the panel meeting, without an explanation as to what in U.S. law Japan is referring to by the phrase “zeroing procedures,” it is impossible to conclude that Japan has identified an instrument that sets forth rules or norms of general and prospective application. With regard to the computer program, the United States explained in its first submission why the computer programs and particular lines within those programs are not measures subject to challenge.³

Q2. 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 ?

3. The Appellate Body has clarified that, with respect to the narrow jurisdictional question of whether an instrument can be challenged in WTO dispute settlement as a measure, the instrument need not be mandatory. Nevertheless, whether a measure is mandatory remains relevant to whether the measure is inconsistent with a Member’s WTO obligations. In the *US – Section 211* case, the Appellate Body found that “where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith.”⁴ As noted by a subsequent panel, “[t]his is generally understood to be the very rationale behind the traditional

¹ *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 82.

² *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 82 (emphasis added). In the DSU negotiations, Members are discussing the circumstances under which something is an instrument, under which an instrument contains rules or norms, and under which an instrument is a measure. See TN/DS/W/74.

³ U.S. First Submission, paras. 31-34.

⁴ *US – Section 211 (AB)*, para. 259.

mandatory/discretionary distinction.”⁵ Therefore, while it is not necessary for an instrument to be mandatory in order to be challengeable as a measure, whether the measure is mandatory does continue to be relevant to the question of whether the measure constitutes a breach of a Member’s WTO obligations. In that connection, the question is not whether the measure is “mandatory” as a general matter; the question is whether the measure mandates a breach of a specific WTO obligation. In other words, does the measure mandate a breach of a WTO obligation, or preclude the exercise of discretion so as to avoid breaching a WTO obligation?

4. The panel in *Korea – Commercial Vessels* used the terms “binding” and “mandatory” in this way as well.⁶ However, the United States has generally used the word “binding” differently. The United States uses the word “binding” to describe the legal nature of an instrument, *i.e.*, whether a given government entity is legally obliged to do what the instrument says. For example, Commerce is legally obliged to follow its regulations; they are binding. The computer program, however, does not legally oblige Commerce to do anything. Therefore, it is not binding. The United States uses the word “mandatory” in the sense of the mandatory/discretionary distinction, which requires an examination not only of the nature of the instrument – it must be binding – but also of what the instrument says. Therefore, whether regulations, which are binding, also mandate a breach depends on whether they require a breach or preclude the exercise of discretion so as to avoid breaching a WTO obligation.

Q8. 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?

5. Japan has identified three different lines of computer instruction that Commerce officials have used in conjunction with the SAS© software. They are: “WHERE EMARGIN GT 0;”, “WHERE UMARGIN GT 0;” and “IF EMARGIN GT 0;”.⁷ The United States agrees that these are all lines of computer instruction that have been used by Commerce officials to prevent the granting of offsets in investigations and assessment proceedings. However, this does not mean that these lines of computer instructions are the only methods by which an overall margin of dumping may be calculated without granting offsets for non-dumped sales.

6. As discussed further in response to question 9, Commerce may elect to utilize a different software package, other than SAS©, to conduct a margin calculation. To date, Commerce has utilized both Lotus 1-2-3© and Microsoft Excel© software for margin or duty calculation purposes. The decision to utilize one of these alternate software packages is made on a case-

⁵ *Korea – Commercial Vessels*, para. 7.62.

⁶ *Korea – Commercial Vessels*, para. 7.63.

⁷ Japan First Submission, paras. 39, 43, 68, 72, 73, 168, 181, 189.

specific (even respondent-specific) basis consistent with the size of the databases and the computing capabilities of the respondent.

Q9. 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”.

7. The United States has determined that Commerce has not applied the specific lines of computer programming identified by Japan in its first written submission in all margin and duty calculations conducted over the last ten years. The lines of computer programming identified by Japan (as well as the “standard computer programs” themselves) are written for the SAS© programming language. The United States has identified several instances in which it did not utilize the SAS© programming language for the margin or duty calculation program.

8. In the past ten years, there have been instances where Commerce has used spreadsheet software, such as Microsoft Excel© or Lotus 1-2-3©, instead of the SAS© software to perform the calculations. Examples of such instances include the new shipper review of crawfish from the People’s Republic of China for Shouzhou Huaxiang Foodstuffs Co., Ltd and North Supreme Seafood (Zhejiang) Co., Ltd.,⁸ and the antidumping duty investigation of saccharin from the People’s Republic of China.⁹

9. When Commerce has used spreadsheet software to calculate the margin of dumping in place of SAS©, the programming which provides that no offset is given for non-dumped sales varied, depending on the programming approach adopted by the Commerce personnel who designed the spreadsheet. In some instances, Commerce personnel would enter the data, create fields that would compare each export price to its normal value, and then manually revise the results so that no offsets are provided for non-dumped comparisons where the export price exceeded normal value. In other instances, Commerce personnel utilized a formula to compare each per unit export price to the appropriate per unit normal value and to enter the difference only if the export price was dumped (i.e., less than the normal value), otherwise a zero would be entered to reflect that the comparison was not dumped. In yet other instances, when Commerce personnel would calculate the total amount of the antidumping duty that would be due as a result of each comparison by multiplying the per unit margin of dumping by the export quantity, the

⁸ Freshwater Crawfish Tail Meat from the People’s Republic of China; Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review, 68 Fed. Reg. 1439 (January 10, 2003) (covering the periods September 1, 2000 through August 31, 2001 for Shouzhou Huaxiang and September 1, 2000 through October 15, 2001 for North Supreme).

⁹ Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People’s Republic of China, 68 Fed. Reg. 27530 (May 20, 2003).

formula would only include the results of that comparison when the export price was less than the normal value.¹⁰

10. In addition to these identified differences, the specific instructions used in the formulas varied depending on the software used (i.e., Microsoft Excel© or Lotus 1-2-3©).

Q10. 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. With respect to the substantive decision as to whether to provide offsets for non-dumped transactions, the Assistant Secretary has the discretion to decide whether to provide for such offsets in any particular investigation. If the Assistant Secretary were to decide to provide such offsets, that decision would be implemented by the Commerce officials charged with writing the margin calculation program. Exactly how such a decision would be implemented would depend on the software Commerce used to perform the antidumping calculations, and the computer programming skills and preferences of the Commerce official who writes that particular computer program. The Assistant Secretary for Import Administration has traditionally not been an expert in computer programming. As such, the Assistant Secretary may be informed of technical changes that are being made to the programs. However, the Assistant Secretary would not be called upon to approve or disapprove specific lines of computer instruction that go into Commerce’s computer programs.

12. As noted in response to question 9, Commerce has, on a number of occasions, opted not to utilize SAS©. In these cases, Commerce did not utilize the “standard zeroing lines” identified by Japan. Changes to the specific lines of instruction in the SAS© program, or changes in the software, can be made without any prior public notice.¹¹

¹⁰ When using any of these three methods, the value of the transaction where export price exceeded normal value was included in the denominator of the calculation of the weighted average dumping margin for all sales of a single exporter or producer.

¹¹ Commerce does, however, does have a “disclosure” proceeding, whereby an interested party to a specific antidumping proceeding may request that Commerce officials explain how Commerce reached a certain result. During these disclosure proceedings, Commerce officials may explain any changes in the computer program that were made within that antidumping proceeding.

Q11. Both parties: Are the measures challenged “as such” by Japan in the present case either mandatory or binding?

13. The computer program and “zeroing procedures” are neither measures, nor are they mandatory or binding. As the United States has noted, Japan in its first submission only addresses whether the so-called “standard computer program” is a measure subject to dispute settlement and not whether it mandates a breach of any obligation.¹² The United States explained in its first submission that the computer program is not a measure, nor does it mandate anything at all, let alone a breach of a WTO obligation.¹³

14. Regarding the so-called “zeroing procedures,” in its oral statement, Japan merely asserts that it has “demonstrated that, by their own terms, [these] procedures require that USDOC automatically disregard all negative results”¹⁴ However, Japan’s first submission offers no arguments as to how these “zeroing procedures” are measures or mandate a breach. The only discussion Japan provided in its first submission of the mandatory/discretionary distinction was in connection with the jurisdictional question of what measures are subject to dispute settlement, not the question of whether a breach has occurred.¹⁵

15. Further, given that Japan has not even identified what (if anything) in U.S. law it is referring to when it uses the phrase “zeroing procedures,” it is impossible to conclude that Japan is referring to a measure that mandates anything at all under U.S. law, let alone a WTO breach.

16. With respect to whether these “measures” are binding, the computer program is not binding. It is not an instrument with legal effect. Under U.S. law, regulations bind Commerce, but the computer program does not; by its very nature, the computer program cannot tell Commerce what to do. As for the “zeroing procedures,” it is impossible to conclude that these “procedures” are binding for the same reasons described above – Japan has not identified what in U.S. law it is referring to by the phrase “zeroing procedures.”

B. AD ARTICLE 2.4.2

Q12. 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 arguing that this language limits the application of Article 2.4.2 to the investigation phase of a proceeding?

17. The phrase “during the investigation phase” is unique to AD Article 2.4.2. This phrase limits the mandatory application of the comparison methodologies provided in Article 2.4.2 to

¹² See Japan First Submission, paras. 59-60.

¹³ U.S. First Submission, paras. 31-37.

¹⁴ Japan Opening Statement, para. 15.

¹⁵ Japan First Submission, para. 52.

“during the investigation phase.” For the reasons articulated below, this means that the mandatory application of Article 2.4.2 is limited to the determination of dumping during the Article 5 investigation.

18. The word “phase” is defined as “[a] distinct period or stage in a process or change or development.”¹⁶ The use of the definite article “the” with the term “investigation phase” further confirms that Article 2.4.2 is limited to a single, distinct investigation phase. To apply Article 2.4.2 to multiple “investigations,” as Japan implicitly and others explicitly argue, the text would refer to “an” investigation phase or “any” investigation phase.

19. The context in which this phrase appears in Article 2.4.2 further clarifies the distinct investigation phase to which it is limited. In particular, Article 2.4.2 refers to “the existence of margins of dumping during the investigation phase.” The only stage of an antidumping proceeding where the investigating authority is required to determine the “existence” of dumping is during an investigation pursuant to Article 5 of the AD Agreement. Therefore, the use of the phrase “during the investigation phase,” both in terms of its text and its context, indicates that the mandatory application of Article 2.4.2 is limited to Article 5 investigations.

Q13. 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?

20. Article 9.3 provides that the amount of antidumping duties “shall not exceed the margin of dumping as established under Article 2.” This general reference to Article 2 must necessarily include any specific limitations contained therein. Therefore, the disciplines established in Article 2 with respect to the calculation of the margin of dumping apply to Article 9.3 assessment proceedings, except where otherwise specified. As demonstrated above, by its own terms Article 2.4.2 is limited to the determination of the existence of margins of dumping “during the investigation phase.”

21. The United States establishes normal values and export prices and makes comparisons between them consistent with all of the other provisions of Article 2, including the obligation to make a “fair comparison” under Article 2.4, in its Article 9.3.1 assessment proceedings, and Japan has not alleged otherwise.

22. Article 11 reviews, however, do not require the calculation of antidumping margins or duties. Indeed, when the United States conducts a review pursuant to Article 11, Commerce does not calculate antidumping margins or duties. Rather, Commerce considers numerous factors,

¹⁶ New Shorter Oxford English Dictionary, p. 2182.

including the continued existence of dumping as determined in Article 9.3 assessment proceedings. Commerce does not rely on the magnitude of dumping when conducting an Article 11 review.

23. The United States considers that there is no basis in the AD Agreement to require a Member to provide offsets to dumping for export transactions that exceed normal value. Nonetheless, to the extent that the Appellate Body has found such an obligation, it exists only with respect to the use of the average-to-average methodology to determine the existence of margins of dumping during the investigation phase.¹⁷

Q14. 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?

24. Japan contends that it would be permissible for a Member utilizing the targeted dumping (*i.e.*, the third) methodology to select only those export transactions that make up the pricing pattern envisioned by Article 2.4.2 and compare those export transactions to normal value.¹⁸ Japan’s argument is not supported by the text of Article 2.4.2.

25. The second sentence of Article 2.4.2 describes the situation in which an asymmetrical methodology may be used. It does not establish a set of circumstances under which a Member may select a subset of export transactions that indicate the greatest amount of dumping. Japan is essentially arguing that the drafters implicitly authorized Members to use a subset of export transactions, when the drafters adopted language that explicitly authorizes the use of an asymmetrical comparison methodology. Japan’s argument is a *non sequitur* – and without textual support. If the drafters had intended for Members to respond to targeted dumping by using a limited set of export transactions, then Article 2.4.2 would have said so. Instead, the text provides for an asymmetrical comparison methodology, using the same universe of export transactions as the other two methodologies; the asymmetrical comparison methodology by its very nature will produce results addressing dumping in a targeted dumping scenario, avoiding the “masking” of dumping that otherwise might occur in a symmetrical comparison methodology.

26. Moreover, the drafters demonstrated an ability to be quite clear in expressing the circumstances in which a Member is authorized to consider a subset of transactions. Article 6.10, for example, addresses the circumstances in which a Member may so limit its examination.

¹⁷ See *US – Softwood Lumber (AB)*, para. 108.

¹⁸ Japan Opening Statement at the First Panel Meeting, para. 52.

Article 6.10 provides that “where the number of exporters, producers, importers or types of products involved is so large” a Member may limit its examination based on a statistically valid sample, or the largest percentage of volume of exports that can be reasonably investigated.

27. Japan’s interpretation of the second sentence of Article 2.4.2 essentially requires that words be read into that sentence that do not otherwise appear there. Moreover, inferring those words in that provision would allow that provision to be applied in a manner that is similar to other provisions explicitly provided in the AD Agreement, but without any of the safeguards or limitations that the drafters found appropriate when explicitly permitting the kind of analysis contemplated by Japan. Consequently, the United States is of the view that Japan’s interpretation would be inconsistent with both the specific text of the second sentence of Article 2.4.2 and with the broader context provided by the AD Agreement.

Q15. 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?

28. For the reasons stated in the answer to question 14, the United States does not consider Japan’s interpretation of the second sentence of Article 2.4.2 to be a viable methodology. As such, the United States does not consider that Japan’s interpretation has any implications for the U.S. argument.

Q16. 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?

29. First, as discussed in response to question 14, the United States does not agree with Japan’s proposed interpretation of the third methodology. Nevertheless, with respect to the first part of the Panel’s question, the text of Article 2 does not contain the phrase “product as a whole.” The United States considers that Article 2.1, Article 2.4, and Article 2.4.2 do not create, either individually or in combination, an obligation to aggregate the results of comparisons involving individual transactions to calculate a margin of dumping for the “product as a whole.”

30. Article 2.4.2 provides for three different methodologies for calculating the margins of dumping: (1) average-to-average, (2) transaction-to-transaction, and (3) average-to-transaction. When a Member utilizes either the second or third methodologies, that Member will necessarily realize multiple results. Article 2.4.2 does not provide any detail concerning the manner by which a Member aggregates those results and, in fact, does not require that a Member aggregate those results. Accordingly, the text of Article 2 does not provide an obligation to calculate the margin of dumping for the “product as a whole.”

31. Nonetheless, having argued that there is an obligation in Article 2 to calculate the margin of dumping for the product as a whole, Japan must admit that its interpretation of the targeted dumping provision would constitute an exception to the alleged obligation to calculate a margin for the product as a whole.¹⁹ However, by the text of the Agreement, the targeted dumping provision is an exception to the requirement to conduct a symmetrical comparison during the investigation phase. The text does not support an argument that the targeted dumping provision is an exception to any other obligation regarding the calculation of margins of dumping. Consequently, Japan’s proposed interpretation of the second sentence of Article 2.4.2 is inconsistent with its argument that the margins of dumping must be calculated for the “product as a whole.”

Q17. Parties and Third Parties: What is the object and purpose of the second sentence of Article 2.4.2?

32. Article 31(1) of the Vienna Convention provides that, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The word “its” before “object and purpose” refers to the singular “treaty,” rather than to the plural “terms of the treaty.” This view has been confirmed, for example, by the panel in *US – Corrosion-Resistant Steel AD Sunset Review*, which refers explicitly to the “object and purpose of the *treaty*,”²⁰ and the Appellate Body in *EC – Hormones*, which discusses “the *treaty’s* object and purpose.”²¹

33. An individual treaty provision can have an individual “purpose” or function. For example, GATT Article I sets out MFN obligations, and GATT Article III sets out national treatment obligations. But the “purpose” of any provision can be determined only by ascertaining what the provision means. In turn, ascertaining the meaning of a provision requires interpreting that provision; and, under customary rules of interpretation of international law (and therefore under DSU Article 3.2) that process of interpretation proceeds in accordance with the rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention (*i.e.*, “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” etc.). However, there are good reasons why under customary rules of interpretation a treaty interpreter is not called upon to attempt to assign an “object and purpose” to an individual provision or sentence of a provision. At the level of an individual provision or sentence, such an exercise would not be productive and could instead invite parties to call for a re-write of the provision, or to import obligations not agreed upon, under the guise of assigning it an object and purpose. As the Appellate Body has indicated, the best indication of parties’ agreement is the text itself.²² It should not be left to

¹⁹ Japan Opening Statement at the First Panel Meeting, para. 55.

²⁰ *US – Corrosion-Resistant Steel AD Sunset Review (Panel)*, para. 7.44 (emphasis added).

²¹ *EC – Hormones*, para. 104 (emphasis added).

²² *See, e.g., EC – Hormones*, para. 181.

disputing parties to divine “purposes” for reasons of policy or otherwise in order to obtain a desired result.

34. Applying these principles, the meaning of the second sentence of Article 2.4.2 must be considered in light of the object and purpose of the AD Agreement, which is to implement the provisions of GATT Article VI. Article VI:1 of GATT 1994 states that dumping “is to be condemned if it causes or threatens to cause material injury” to a domestic industry. Members, therefore, agreed that antidumping duties may be levied “to offset or prevent dumping” pursuant to Article VI:2 of GATT 1994.

35. The negotiating history to Article 2.4.2 provides supplementary means of confirming the meaning of the second sentence of Article 2.4.2.²³ That history indicates that the targeted dumping methodology was meant to be an option available to Members in order to counteract injurious dumping when certain pricing patterns could not be accounted for using either the average-to-average or transaction-to-transaction methodologies.

36. Prior to the Uruguay Round, many Contracting Parties to the GATT 1947, such as the United States and the European Communities, compared individual export transactions to weighted average normal values. This methodology, known as an “asymmetrical” comparison, was examined by a GATT panel during the Uruguay Round negotiations and found to be consistent with the Antidumping Code.²⁴ The asymmetrical comparison methodology was also raised during the Uruguay Round negotiations.

37. The drafters of the AD Agreement reached a compromise, embodied in Article 2.4.2. The normal rule would be that comparisons should be made on a symmetrical basis, that is on an average-to-average or transaction-to-transaction basis. Nonetheless, the second sentence of Article 2.4.2 recognizes that there may be certain instances where patterns of dumping exist with respect to different purchasers, regions or time periods that cannot be accounted for when a Member uses the average-to-average or transaction-to-transaction methodologies to determine the existence of margins of dumping. Essentially, the dumping that is occurring with respect to such purchasers, regions or time periods would be masked if analyzed using a symmetrical comparison methodology. Thus, in order to counteract the injurious dumping that otherwise might not be identified, the drafters provided for the use of the average-to-transaction methodology in such circumstances.

²³ Vienna Convention on the Law of Treaties, Art. 32.

²⁴ *US – Atlantic Salmon*, paras. 474-86.

Q18. 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?

38. The third methodology in Article 2.4.2 provides relevant context for the interpretation of the first two methodologies listed. The United States notes that the Appellate Body has stated in the past that “an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”²⁵

Q19. 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?

39. Article 2.4.2 provides for three different methodologies for calculating the margins of dumping. The first two methodologies listed in Article 2.4.2 (average-to-average and transaction-to-transaction) are the two options normally available to an investigating authority to determine the existence of margins of dumping during the investigation phase. Both of these methodologies require a symmetrical comparison. The third methodology, average-to-transaction, is an exception to either symmetrical methodology. It can be used by an investigating authority when there is “a pattern of export prices which differ significantly among different purchasers, regions or time periods” and the investigating authority shows that this pattern cannot be taken into account appropriately by the use of the average-to-average or transaction-to-transaction methodology.

40. Because the average-to-transaction methodology is provided for as an exception to both the average-to-average and the transaction-to-transaction methodologies, the text of Article 2.4.2 recognizes that there could be three different results, depending on which methodology is used. In other words, if the AD Agreement were to be interpreted such that the results of the average-to-average methodology were always the same as the results of the average-to-transaction methodology, the average-to-transaction methodology would not, in fact, be available as an exception to the application of the average-to-average methodology. Such an interpretation would nullify language contained in the second sentence of Article 2.4.2.

Q20. 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

²⁵ US – Gasoline (AB), p. 23.

limit its investigation to export transactions targeted at particular regions, purchasers or time-periods?

¹If 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.

41. If there is an obligation to provide offsets that applies to both the average-to-average and average-to-transaction methodologies, then the results of the comparisons will be the same. The United States has demonstrated this mathematically through Exhibit US-5. This would render the average-to-transaction methodology a nullity. Therefore, to the extent that the AD Agreement contains any obligation to provide offsets, that obligation must be grounded in a textual provision that does not apply to the average-to-transaction methodology.

42. As the United States explained in its answer to question 14, Japan’s interpretation of the second sentence of Article 2.4.2, namely that an investigating authority may limit its investigation to exports targeted to certain regions, purchasers, or time periods, cannot be reconciled with the actual text of Article 2.4.2.

Q21. 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”?

43. If there is any obligation to provide for offsets, it stems from the use of the average-to-average methodology during the investigation phase and the use of the phrase “all comparable export transactions” in that provision. This interpretation is consistent with the Appellate Body’s findings in *US – Softwood Lumber (AB)*. There, the Appellate Body observed that the crux of the parties’ disagreement was “as to the proper interpretation of the terms ‘all comparable export transactions’ and ‘margins of dumping’ in Article 2.4.2 as they relate to zeroing.”²⁶ The Appellate Body went on to “emphasize that [the two terms] should be interpreted in an integrated manner.”²⁷ Accordingly, the Appellate Body’s conclusion that there was an obligation to provide offsets when using the average-to-average comparison during the investigation phase was the result of its interpretation of “all comparable export transactions” together with “margins of dumping.”

44. The phrase “all comparable export transactions” applies only to the use of the average-to-average methodology in Article 2.4.2. As such, the obligation to provide offsets occurs as a consequence of using the average-to-average methodology during the investigation phase. Any

²⁶ *US – Softwood Lumber (AB)*, para. 82.

²⁷ *US – Softwood Lumber (AB)*, para. 85.

offset obligation does not extend to the use of any other methodology, such as the average-to-transaction methodology.

C. MARGIN(S) OF DUMPING

45. In order to provide the most comprehensive answers with the least amount of repetition, the United States responds first to question 24, then responds to questions 22, 23, and 25, in this section.

Q24. 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?

46. Before addressing the use of the terms “margins of dumping” and “margin of dumping” in the AD Agreement, it is appropriate to begin with the use of that term in GATT Article VI. Paragraph 2 of Article VI of the GATT 1994 provides that “[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.” When read with the provisions of paragraph 1, the “margin of dumping” is the price difference when a product has been “introduced into the commerce of an importing country at less than its normal value”; *i.e.*, the price difference when the product has been dumped.

47. By relying on a difference in price to determine a margin of dumping, it was clear that, consistent with GATT Article VI, a margin of dumping may be found to exist on a transaction-specific basis. Because prices are established and exist on a transaction-specific basis, and a margin of dumping is based on a difference in prices, GATT Article VI clearly permits Members to find a margin of dumping with respect to individual transactions.

48. The fact that a margin of dumping within the meaning of GATT Article VI:2 may be found with respect to transaction-specific comparisons is further confirmed by the text of the first paragraph of Ad Article VI, Paragraph 1 of the GATT which uses the term “margin of dumping” in a manner which can only be reasonably interpreted to apply on a transaction-basis. Specifically, Ad Article VI:1 provides:

Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by the exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

49. This provision refers specifically to a particular type of export transaction. In such a circumstance, the margin of dumping may be calculated based on the price charged by the importer. Because imports of the product may be sold in different manners (i.e., some may be direct sales while others are sold through “associated houses”), Ad Article VI:1(1) clearly recognizes that the term “margin of dumping” may apply on a transaction-specific basis.

50. As discussed during the first panel meeting, this interpretation of “margin of dumping” in GATT Article VI is also consistent with the manner in which many Contracting Parties conducted antidumping proceedings prior to the AD Agreement. As is well established, prior to the AD Agreement, Contracting Parties commonly established margins of dumping based on comparing individual export transactions with average normal values.²⁸

51. While the AD Agreement established a number of new obligations with respect to the implementation of GATT Article VI, the AD Agreement did not alter the definition of “margin of dumping” established in GATT Article VI:2. Consequently, the provisions of the AD Agreement must be read in conjunction with Article VI of GATT 1994.²⁹

52. While the AD Agreement did not alter the definition of margin of dumping provided in GATT Article VI:2, the context in which it is used in the AD Agreement may allow it to be applied in more than one way. The most relevant example of this is in Article 2.4.2 of the AD Agreement. The use of the plural “margins of dumping” indicates that an investigating authority may calculate more than one margin of dumping during the investigation phase. With respect to at least two of the methodologies set forth in Article 2.4.2, the transaction-to-transaction and average-to-transaction methodologies, except in the unusual situation in which there is only one export transaction, there will be multiple comparisons. With respect to these methodologies, “margins of dumping” in Article 2.4.2 refers to the results of those multiple, transaction-specific comparisons, consistent with the use of the term “margin of dumping” in GATT Article VI:2.

53. This argument is without prejudice to the application of the term “margins of dumping” with respect to the average-to-average comparison methodology. The United States has argued that a permissible interpretation of “margins of dumping” as used in Article 2.4.2 is that it refers to the results of each of multiple comparisons between weighted average normal values and all comparable export transactions on a model and level of trade specific basis (and any other relevant characteristics of the transactions for matching purposes). Nevertheless, the United

²⁸ See, e.g., *US – Atlantic Salmon*, para. 483 (margins of dumping established by comparing an average normal value to individual export transactions); *EC – Audio Tapes*, paras. 499-501.

²⁹ This is made clear by Article 1 of the AD Agreement, which provides that “[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994” It also is consistent with the Appellate Body’s analysis of the relationship between the SCM Agreement and Article VI insofar as countervailing duty proceedings are concerned. *Brazil – Desiccated Coconut (AB)*, pages 17-18 (approving panel’s finding that Article VI and SCM Agreement together create a single package of rights and obligations). Indeed, the title of the AD Agreement indicates that it is an agreement concerning the implementation of Article VI. Thus, as an agreement whose object is to implement Article VI, the AD Agreement is anchored in Article VI.

States recognizes that, in *US – Softwood Lumber (AB)*, the Appellate Body found that, in the context of the average-to-average comparison methodology, the term “margins of dumping” must be interpreted “in an integrated manner” with “all comparable export transactions”, such that offsets for non-dumped comparisons must be provided in order to properly establish a single margin of dumping for each exporter or producer.³⁰

54. While the United States does not believe this is the only permissible interpretation of the term “margins of dumping” in Article 2.4.2 with respect to the average-to-average comparison methodology, the United States notes that this interpretation does not impact its interpretation of “margin of dumping” as defined in GATT Article VI:2 or for the other two comparison methodologies in Article 2.4.2. In essence, by articulating the comparison methodologies that must be used during the investigation phase in Article 2.4.2, the drafters of the AD Agreement did not alter the meaning of “margin of dumping” in GATT Article VI:2, but, instead, clarified the manner in which the normal value and export prices were to be determined for purposes of establishing those margins of dumping.

55. Consistent with this discussion, the term “margin of dumping” may refer to the result of an individual comparison for purposes of GATT Article VI:2 while the term “margins of dumping” may refer to the single (or overall) margin of dumping for an exporter or producer when using average-to-average comparisons, without any internal inconsistency.

56. The context in which “margin of dumping” or “margins of dumping” is used in other provisions of the AD Agreement may similarly impact its proper interpretation. For example, Article 5.8 provides for an obligation to aggregate the results of multiple comparisons for the specific purpose of determining whether the margin of dumping is *de minimis*. Because the implication of such a finding is that the investigating authority must terminate the antidumping investigation and because investigations occur with respect to exporters’ and producers’ sales of the product and not simply with respect to individual transaction prices, the United States believes that Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer.

57. Article 3.3 establishes the conditions under which the effect of dumped imports from multiple countries may be cumulated for injury purposes. Specifically, Article 3.3 establishes the condition 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” As the United States explained at the first panel meeting, while Article 3.3 appears to speak to a margin of dumping “from each country”, the reference to the *de minimis* standard in Article 5.8 indicates that Article 3.3 may properly be understood as applicable when, for each country, there is at least one exporter or producer with a non-*de minimis* single, overall margin of dumping.

³⁰ *US – Softwood Lumber (AB)*, paras. 85-103.

58. Finally, Article 9.3 provides that “[t]he amount of the anti-dumping duty shall not exceed the margin of dumping” In this instance, the reference to the margin of dumping is in the context of the reference to the antidumping duty. Duties normally are based on the particular characteristics of the import and are often calculated based on the value/price of that particular import. For example, duties are often calculated on an *ad valorem* basis, applying the *ad valorem* rate to the price of the import. In light of this context, the use of the term “margin of dumping” in Article 9.3 indicates that the antidumping duty for a specific import cannot exceed the extent to which the export price for that transaction falls below normal value.

59. Japan has not presented claims to the Panel based on other provisions of the AD Agreement, nor have they made arguments to the Panel based on other provisions as context. While the United States has not addressed every use of the phrase “margin(s) of dumping” in the AD Agreement, it believes it has addressed those uses relevant to this dispute and would be pleased to address any additional uses the Panel finds relevant.

Q22. 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?

60. Nowhere in the text of Article VI of GATT 1994 or in Articles 2.1, 2.4, or 2.4.2 of the AD Agreement did the drafters use the phrase “product as a whole.” The United States does not consider that these provisions of GATT 1994 or the AD Agreement create an obligation to calculate a margin of dumping for the product as a whole, as Japan argues. Nevertheless, as discussed in response to question 24, above, at least for purposes of applying the *de minimis* standard in Article 5.8, Members must determine an overall margin of dumping for an exporter or producer.

61. As discussed in response to question 24, the United States considers that the terms “margin of dumping” and “margins of dumping,” as used in GATT 1994 and the AD Agreement may apply differently, depending upon the context in which the term is used. Indeed, depending on the context, the terms can refer to an overall margin of dumping for all transactions or a margin of dumping for a specific transaction.

62. With respect to the reference in the question to a margin of dumping for a country, the United States refers the Panel to its discussion of Article 3.3 in response to question 24.

Q23. 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?

63. As stated in the answer to question 24, the terms “margin of dumping” and “margins of dumping” can refer to a single transaction or a group of transactions, depending on the context in which the term is used.

64. The United States refers the Panel to its discussion of Article 5.8 in response to questions 24 and 22, above.

65. Additionally, Article 6.10 requires Members to “determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.” This is to ensure that each exporter or producer is assigned an antidumping duty based on its own pricing behavior, and not that of other exporters or producers, unless, as provided for in Article 6.10, “the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable”

66. Similarly, Article 9.5 requires the calculation of “individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation” Again, this provision ensures that “new shippers” may obtain an antidumping duty rate based on their own pricing behavior in an expeditious manner.

Q25. 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?

67. Article 2.4.2 establishes the basic methodologies for determining the existence of “margins of dumping” during the investigation phase. However, it does not provide the details of how those methodologies or any other methodologies might be applied in other phases of an antidumping proceeding, such as the assessment phase. For example, when using the average-to-average method during the investigation phase, the investigating authority must calculate “a weighted average normal value” to compare to “a weighted average of prices of all comparable export transactions.” In interpreting this provision, the panel in *US – Stainless Steel* found “that there must be a single weighted average normal value and export price in respect of comparable transactions.”³¹

68. When using the average-to-transaction methodology during the investigation phase, Article 2.4.2 refers to “[a] normal value established on a weighted average basis.” The

³¹ *US – Stainless Steel*, para. 6.112.

implication is that the weighted average calculated for the entire period of investigation pursuant to the first sentence of Article 2.4.2 is the same weighted average that a Member would use when using the average-to-transaction methodology in the investigation phase. However, regardless of the extent to which this would be a correct interpretation of Article 2.4.2 for the investigation phase, because Article 2.4.2 does not contain obligations applicable beyond the investigation phase, those same limitations would not apply. In this regard, in assessment proceedings under Article 9.3.1, the United States calculates weighted average normal values on a monthly basis, and compares them to the prices of individual export transactions to determine the margin of dumping, and thus the amount of antidumping duty that may be assessed.

D. FAIR COMPARISON

Q27. 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?

69. The first sentence of Article 2.4.2 provides that, subject to the fair comparison provision of Article 2.4, a Member is obligated to calculate the margins of dumping during the investigation phase by using the average-to-average or transaction-to-transaction methodology. The second sentence of Article 2.4.2 establishes a third comparison methodology that can be used only when certain conditions apply. This third method, average-to-transaction, is an exception to the symmetry requirement. However, it is not an exception to the “fair comparison” obligation.

Q28. 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?

70. The first sentence of Article 2.4 creates a general obligation for the administering authority to make appropriate adjustments to ensure that export prices and normal values are comparable before margin calculations are undertaken. It cannot be divorced from the remainder of Article 2.4. The remainder of Article 2.4 is exemplary of the types of adjustments that the administering authority is obliged to make in pursuit of price comparability. But it is not necessarily an exhaustive list of the permissible bases for adjusting normal values and export prices so as to allow for a fair comparison.

71. Article 2.4 of the current AD Agreement is clearly mandatory – it requires members to make the fair comparison, and instructs them how to do it. This interpretation of Article 2.4 is also consistent with its drafting history. In what is known as the “Dunkel Draft”, Article 2.4 read:

“A fair comparison shall be made between the export price and the normal value. The two prices shall be compared at the same level of trade. . . .”

In the final draft, however, the language was amended and removed any ambiguity as to whether the first sentence was free-standing. The final draft reads:

“A fair comparison shall be made between the export price and the normal value. *This comparison* shall be made at the same level of trade. . . .” (Emphasis added).

Substitution of the phrase “this comparison” establishes a reference back to the subject of the prior sentence; *i.e.*, a fair comparison, which is what is being defined.

72. Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2, which refers to “the provisions governing fair comparison in paragraph 4.” The plural term “provisions,” as well as the reference to “paragraph 4,” rather than “the first sentence of paragraph 4,” makes clear that this clause refers to the entirety of Article 2.4. Further, this clause clarifies that the entirety of Article 2.4, and not just the first sentence, comprise the provisions that “govern fair comparison.”

73. There is no basis for an interpretation of Article 2.4 that divorces the obligation in Article 2.4 to make a fair comparison from the allowances required to establish price comparability. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market. By requiring due allowance for all factors affecting price comparability, Article 2.4 assures that the prices used to establish dumping in Article 2.1 are “comparable”; *i.e.*, a comparison of such prices is fair. Thus, the second through fifth sentences of Article 2.4 do exhaust the meaning of the “fair comparison” that a Member must make.

Q29. Parties and Third Parties: What discipline does the first sentence of Article 9.3 impose upon the remaining part of Article 9.3?

74. The first sentence of Article 9.3 states that “[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” This reference to Article 2 indicates that when a Member calculates the margin of dumping in the assessment phase, that the calculation is to be consistent with the applicable provisions of Article 2. This general reference to Article 2, however, does not obviate any specific limitations contained within the text of Article 2. Thus, because Article 2.4.2 refers to the determination of the existence of margins of dumping “during the investigation phase,” its application is thereby limited to the investigation phase and this limitation is not overcome by the general reference in Article 9.3 to Article 2.

75. This is supported by the panel’s finding in *Argentina – Poultry* that “Article 9.3 does not refer to the margin of dumping established ‘under Article 2.4.2’, but to the margin of dumping

established ‘under Article 2’.”³² Brazil had argued that the antidumping duties collected in an assessment proceeding could not exceed the margin of dumping as calculated during the investigation phase pursuant to Article 2. The panel rejected this argument, stating, “In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2.”³³

76. The United States also refers the Panel to its discussion of Article 9.3 in response to question 24, above.

Q30. 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?

77. The term “margin of dumping” is defined in Article VI(2) of GATT 1994 as “the price difference determined in accordance with paragraph 1 [of Article VI].” Pursuant to Article VI(1), a product is to be considered dumped if “the price of the product from the exporting country” falls below normal value as established in the home market of the exporting country, or if such price is not available, in a third country or by adding reasonable “selling cost and profit” to the cost of production. The terms “margin of dumping” and “margins of dumping” must be interpreted consistently with this definition.

78. Article 2.1 establishes when a product is to be considered dumped “[f]or the purpose of this Agreement.” This implies that the disciplines set forth in Article 2 apply throughout the AD Agreement, except to the extent that, by their terms, they are otherwise limited, as is the case with Article 2.4.2.

Q31. 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?

79. Article 9.3 establishes the obligations concerning the calculation of the amount of antidumping duties that can be assessed. As such, the reference to Article 2 simply emphasizes that the disciplines contained within Article 2 still apply. The United States also refers the Panel to its discussion of Article 9.3 in response to question 24, above.

³² *Argentina – Poultry*, para. 7.357.

³³ *Argentina – Poultry*, para. 7.357.

80. Article 9.5 provides:

If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product.

81. One of the purposes of an Article 9.5 proceeding is to determine expeditiously whether a new shipper has engaged in dumping and if so, the margin of dumping. Such proceedings are to be carried out on an accelerated basis as “compared to normal duty assessment and review proceedings” pursuant to Article 9.3 and, like Article 9.3 proceedings, they may result in duties which “can be levied retroactively to the date of the initiation of the review.” To this extent, an Article 9.5 review might be regarded as a special category of assessment review that is otherwise addressed in Article 9.3. Consistent with this view, the United States treats the assessment of antidumping duties pursuant to an Article 9.5 review in the same way it treats Article 9.3 assessment proceedings, applying all of the same Article 2 disciplines regarding the calculation of the margin of dumping that apply to Article 9.3 proceedings.

82. Article 11 refers to reviews to determine whether to terminate an antidumping duty. Such reviews do not require the calculation of margins of dumping during the review itself.³⁴ Rather, under Article 11.2, the Member is to determine whether the antidumping duty continues to be necessary to offset dumping, or whether the injury were likely to continue or recur if the duty were removed. Similarly, under Article 11.3, a Member is charged with determining whether the expiration of the antidumping duty after five years would lead to a recurrence or continuation of dumping and injury. For that reason, no reference to a “margin of dumping” is made in Article 11.

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?*

83. The obligation to make a “fair comparison” pursuant to Article 2.4 does not give rise to a general principle that a Member must provide offsets to dumping for export transactions that exceed normal value. The United States has demonstrated that if a prohibition on “zeroing” exists, it must stem from the interpretation of the phrase “margins of dumping” read in

³⁴ US – Corrosion-Resistant Steel AD Sunset Review (AB), para. 123.

conjunction with the phrase “all comparable export transactions” as used in the first sentence of Article 2.4.2. This prohibition, if it exists, only applies with respect to the use of the average-to-average methodology during the investigation phase. As such, this principle does not apply to proceedings under Article 9 or Article 11.