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 SECOND SUBSTANTIVE MEETING

October 19, 2005

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Argentina – Poultry (Panel)	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Mexico – Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice,* WT/DS295/R, circulated June 2005
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Bed Linen (21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003
US – Corrosion-Resistant Steel AD Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – DRAMs (AB)	Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Softwood Lumber (AB)	Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004

*Q37. **United States: with reference to Article 18.4 of the AD Agreement, could the United States identify its laws, regulations and administrative procedures which govern the calculation of margin(s) of dumping (including the granting of offsets for non-dumped transactions) in anti-dumping proceedings and any published or publicly available documents explaining the operation of such laws, regulations or administrative procedures.***

1. There are no laws, regulations or administrative procedures which govern the calculation of margin(s) of dumping with respect to the issue of whether an offset is required for non-dumped transactions. To the extent that Japan believes otherwise, the burden is on Japan to identify the law, regulation or administrative procedure which it asserts is inconsistent with U.S. WTO obligations.

2. U.S. courts have ruled that section 771(35) of the Tariff Act of 1930 does not govern this issue. Section 771(35) of the Tariff Act of 1930 defines the terms "dumping margin" and "weighted average dumping margin" in U.S. law:

> (35) Dumping margin; weighted average dumping margin.
>
> (A) Dumping margin. The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.
>
> (B) Weighted average dumping margin. The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.[1]

3. In construing this provision, the U.S. Court of Appeals for the Federal Circuit has held that it neither prohibits Commerce from granting an offset for non-dumped comparisons, nor does it require Commerce to provide an offset for such comparisons.[2]

*Q38. **United States: further to the Panel's question 10, could the United States provide details of the legal basis under United States' law for the discretion enjoyed by the Assistant-Secretary to provide offsets for non-dumped transactions? Could the United States also indicate whether this discretion has been exercised in respect of any margin calculation in any anti-dumping proceedings during the past 10 years? Absent the exercise of the discretion of the Assistant-Secretary referred to above, what determines whether offsets for non-dumped transactions will or will not be permitted?***

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[1] 19 U.S.C. § 1677(35).

[2] Timken v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 160 L. Ed. 2d 352, 125 S. Ct. 412 (2004).

4. The U.S. Supreme Court has recognized that in drafting a law, Congress may speak directly to a particular question.[3] However, it is also possible that the law may not speak to a particular question. In those circumstances, such as where the statute is silent or ambiguous on a specific question, Congress has delegated to the administrative agency the authority to address the issue.[4] As discussed in response to Question 37, the U.S. Court of Appeals for the Federal Circuit has found that the antidumping law does not directly address whether an offset is required or prohibited for non-dumped comparisons.

5. Therefore, Commerce enjoys the discretion to provide – or not to provide – an offset. The question seems to suggest that the Assistant Secretary exercises his discretion only if he wishes to provide an offset. But because the statute is silent, the Assistant Secretary exercises his discretion to provide or *not* provide an offset, and that discretion is exercised in each investigation and review. That the Assistant Secretary has exercised that discretion not to provide offsets does not mean he is bound not to provide offsets in the future.

Q39. United States: in respect of an "as such" claim, if a measure is not written down, how would a party establish the existence of such a measure independently of its repeated application, absent an admission that such a measure existed?

6. A Member may present circumstantial evidence to demonstrate the existence of an unwritten measure. For example, in the dispute *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, the United States has challenged the EC's moratorium on granting approvals of products made with biotechnology. To demonstrate the existence of the measure, the United States cited to references by senior EC and member State officials to the moratorium, as well as reports of statements by member State and Commission officials that the decision-making process of the EC had been directly affected by the existence of the moratorium. In the dispute *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, the Appellate Body acknowledged that it was not inappropriate for the U.S. administering authority to look at circumstantial evidence that the Government of Korea directed Korean banks to provide advantageous loans to the domestic industry.[5] The circumstantial evidence included newspaper reports, internal bank documents regarding the existence of government efforts to save troubled firms, and public submissions to regulatory authorities attesting to the government having pressured banks to assist troubled firms.

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[3] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (Exhibit US-17).

[4] *Id*. at 843-44.

[5] *US – DRAMs (AB)*, para. 150.

7. Therefore, a party may establish the existence of a measure independently of its "repeated application" and absent an admission from the Member complained against. On the other hand, concluding that a measure exists because of its so-called "consistent application" is an exercise in circular reasoning – to state that a so-called "measure" has been "consistently applied" presupposes the very existence of that "measure." Consistent application cannot, as a matter of logic, be the basis upon which the "measure" is found to exist. As a result, there must be evidence establishing the existence of a measure that is independent of its "repeated application."

8. In this connection, the United States recalls the point made in its closing statement at the second Panel meeting, that what is being referred to as "consistent application" is in reality nothing more than "consistent results," with an assumption that there is a measure that is causing those results. However, governments often exercise their discretion in a consistent manner, without being compelled to do so by any measure. There are very good reasons of policy why an authority, when confronted by a particular factual pattern, might want to respond to that factual pattern in the same manner when administering its laws and regulations – even without a separate measure that is requiring them to do so. In the WTO context, such policy values find expression, among other places, in the terms of GATT Article X:3(a), which provides for administration "in a uniform, impartial and reasonable manner" of laws such as the antidumping laws.

9. The Japanese position in this dispute, however, asks the WTO dispute settlement system to give a surprising response to a Member that pursues those values by exercising its discretion in a uniform manner. Japan essentially asks that the WTO dispute settlement system respond to such a Member's exercise of discretion by inferring the existence of a measure that does not exist, in order to make findings against that non-existent measure. Put another way, nothing in the WTO Agreement suggests that Members have two and only two choices: either to adopt a measure that compels outcomes, or to act arbitrarily (for example, by reacting to identical fact-patterns differently when administering their laws). The context provided by Article X:3(a) argues strongly against inferring the existence of a measure simply because of consistent results in the administration of laws such as antidumping laws.

10. Of course, also as noted at the second Panel meeting, a more fundamental reason to avoid inferring a measure where none exists is that it is simply incorrect, as a matter of fact. Such a result would not serve the credibility of the dispute settlement system.

Q40. 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?

11. The answer in part depends on what is meant by "policy." If the term "policy" is used simply to describe the fact that an act has been repeated in a given number of cases, then there is in fact no instrument independent of the individual acts and therefore no measure subject to dispute settlement. On the other hand, if the term policy is used in the sense of an instrument

which exists independently of its application in individual cases, and which may cause the act to occur in individual cases, that policy might be a measure, and could be examined for its WTO-consistency if found to be a measure

12. With respect to what constitutes a measure subject to dispute settlement, the Appellate Body has distinguished between acts that can be challenged as "applied only to a specific situation" and "instruments of a Member containing rules or norms."[6] The latter may be challenged "irrespective of how or whether those rules or norms are applied in a particular instance."[7] Thus, there is a qualitative difference between a measure that can only be challenged "as applied" and a measure that can be challenged "as such," the latter constituting a rule or norm intended to have general and prospective application. In this context, it is clear that mere application of an individual act in repeated situations does not constitute a measure susceptible of challenge "as such" because repetition does not transform the individual act into a rule or norm intended to have general and prospective application, nor does mere repetition mandate that the "act" occur in the future. This is true even if the repetition is consistent with a "policy" which does not require that the act occur.

13. With respect to a policy that exists independently of its application in individual cases, that policy, to be WTO-inconsistent as such, would have to require authorities to use a methodology that, when applied, would be WTO-inconsistent. To the extent that the policy does not actually require the authorities to use the methodology, there is no basis for concluding that the policy could be WTO-inconsistent.

Q44. 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.

14. Article VI:2 of the GATT 1994 defines the margin of dumping as a "price difference." Read in conjunction with Article VI:1, the margin of dumping is the price difference when "products of one country are introduced into the commerce of another country at less than the normal value of the products." The AD Agreement implements Article VI of the GATT 1994. Thus, this definition of the margin of dumping is relevant context throughout the AD Agreement. Namely, the margin of dumping involves a comparison of prices. It exists when the price at which goods introduced into the commerce of one country is less than the price established as normal value.

15. As the United States has previously explained, the reference to "price difference" in the definition of the margin of dumping in Article VI: 2 of the GATT 1994 indicates an

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[6] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.

[7] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.

understanding that the margin of dumping can be established on a transaction-by-transaction basis.[8] Price is defined as the "[p]ayment in purchase of something."[9] Because the amount that is paid to purchase something may vary from transaction to transaction, even with respect to sales of identical models within the same market, the price difference and, thus, the margin of dumping, may vary from transaction to transaction.

16. By defining the margin of dumping based on a "price difference," Article VI of the GATT 1994 provides flexibility to determine a margin of dumping on a transaction-specific basis, or in the aggregate, as appropriate. This is confirmed by Article 2.4.2 of the AD Agreement. There, the Members established three potential comparison methodologies for determining the existence of margins of dumping during the investigation phase: (1) comparing average normal values to average export prices; (2) comparing individual normal values to individual export prices; and (3) in certain specified circumstances, comparing average normal values to individual export prices. The existence of the last two alternatives confirms that even when the AD Agreement speaks to the comparison methodology (i.e., when determining the existence of margins of dumping during the investigation phase), the margin of dumping may be calculated on a transaction-specific basis.

17. Thus, the terms "margin of dumping" or "margins of dumping" cannot always refer to a single "product as a whole," as Japan contends. Rather, consistent with customary rules of treaty interpretation, the precise meaning of the terms "margin of dumping" or "margins of dumping" in any particular provision of the AD Agreement depends, *inter alia*, on the context in which those terms are being used.[10]

Q45. Both parties: is there any significance to be attached to the fact that the AD Agreement does not define the term "margin(s) of dumping"? To what extent does the meaning of this term in the AD 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?

18. The term "margin of dumping" is defined by Article VI:2 of the GATT 1994. As discussed in response to questions 24 and 44, among others, the term is defined by reference to a "price difference." The AD Agreement governs the application of Article VI of the GATT 1994, and in that vein, the definition of "margin of dumping" in Article VI provides context for the meaning of that phrase in the AD Agreement. When the definition of "margin of dumping" from Article VI:2 is read in conjunction with the three comparison methodologies available for

[8] *See* United States, Answers to the Panel's Questions in Connection with the First Substantive Meeting, para. 47.

[9] New Shorter Oxford Dictionary, p. 2349.

[10] *See US – Gasoline (AB)*, at 17.

determining the existence of margins of dumping during the investigation phase in Article 2.4.2 of the AD Agreement, it is clear that margins of dumping may be calculated either on a transaction-specific basis, or in the aggregate. The meaning of margin(s) of dumping, therefore, depends on the context in which the term is used within GATT and the AD Agreement.

19. For example, the United States has demonstrated that the use of the term "margin of dumping" in GATT Ad Article VI, Paragraph 1 refers to a single transaction.[11] While Japan has responded that Ad Article VI, Paragraph 1 does not provide a definition of either dumping or the margins of dumping, Japan misses the point.[12] The context in which Ad Article VI, Paragraph 1 uses the phrase "margin of dumping" demonstrates an understanding that the term may refer to the results of transaction-specific comparisons.

20. The Appellate Body report in *US – Softwood Lumber* confirms the importance of the context in which the terms "margin of dumping" or "margins of dumping" are used in determining their meaning. There, the Appellate Body specifically examined the term "margins of dumping" as it is used in Article 2.4.2 with respect to the average-to-average comparison methodology during the investigation phase. In the context of that provision, the Appellate Body found that 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 margins of dumping on the basis of average-to-average comparisons.[13] The limited finding of the Appellate Body in that particular situation cannot be applied to every instance in the AD Agreement where either the term "margin of dumping" or "margins of dumping" is used. Rather, consistent with the customary rules of treaty interpretation, terms are to be given their ordinary meaning, *in their context.*[14] The context in which these terms appear differs throughout the Agreement, and thus the meaning of these terms may differ throughout the Agreement.

Q46. 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 AD Agreement?

Q53. Both parties: what provisions of the AD Agreement, if any, impose an obligation to aggregate results of multiple comparisons between export price and normal value?

21. The United States responds to questions 46 and 53 together.

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[11] *See* United States, Answers to the Panel's Questions in Connection with the First Substantive Meeting, paras. 48-49.

[12] Japan, Opening Statement at the Second Meeting with the Panel, para. 25.

[13] *US – Softwood Lumber (AB)*, paras. 85-103, 105.

[14] *US – Gasoline (AB),* at 17.

22. As the United States has previously indicated, Article VI of the GATT 1994, Article 2.1 of the AD Agreement, and Article 2.4.2 of the AD Agreement do not contain an obligation to calculate an overall margin of dumping for the product as a whole.[15] The only textual basis for finding an obligation to calculate an overall margin of dumping for the product as a whole can be found in Article 5.8, which provides that the investigating authority must terminate an investigation if it determines that the margin of dumping is *de minimis*.[16] This is the only provision of the AD Agreement creating any obligation to aggregate the results of multiple comparisons.

23. Article 5.8 does not create an obligation to calculate an overall margin of dumping for a country (i.e., combining the results for all exporters and producers). As explained previously, Article 5.8 properly applies to the overall margin of dumping for each exporter or producer.[17] This interpretation has been confirmed by the panel in *Mexico – Rice*.[18]

24. The United States is aware that the Appellate Body has found an obligation to calculate a margin of dumping for the product as a whole, in the context of the average-to-average comparison methodology during the investigation phase. This interpretation is based on language within Article 2.4.2, "all comparable export transactions," which is specific to the use of the average-to-average comparison methodology during the investigation phased.[19]

Q51. 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?

25. The term "product as a whole" does not appear anywhere in the text of either Article VI of the GATT 1994 or the AD Agreement. It is a term that appears only in Appellate Body reports addressing the use of the average-to-average comparison methodology during the investigation phase, in the context of the Appellate Body's clarification of the text relating to that methodology.

26. A Member's obligations derive from the terms of the agreements. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU")

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[15] United States, First Written Submission, paras. 60-63; United States, Second Written Submission, paras. 44-50.

[16] United States, First Written Submission, para. 63.

[17] United States, Answers to the Panel's Questions in Connection with the First Substantive Meeting, para. 56-57.

[18] *Mexico – Rice (Panel),* paras. 7.137 *et seq.*

[19] *US – Softwood Lumber (AB)*, paras. 104, 105, 108; *EC – Bed Linen (AB)*, paras. 55-60.

specifically states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

27. In this instance, the Appellate Body based its findings in *EC – Bed Linen*, and *US – Softwood Lumber (AB)* on the use of the average-to-average comparison methodology during the investigation phase pursuant to Article 2.4.2. Article 2.4.2 provides as follows:

> Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all comparable export transactions* or by a comparison of normal value and export prices on a transaction to transaction basis. (Emphasis added.)

28. The term "all comparable export transactions" refers specifically to the use of the average-to-average comparison methodology during the investigation phase. Thus, the analysis in the Appellate Body report – which made it clear that such analysis was limited to the "as applied" challenge in that dispute[20] – is confined to the average-to-average methodology, and use of that methodology in the investigation phase only. Therefore that analysis is confined to the use of average-to-average comparisons to determine the existence of margins of dumping during the investigation phase and cannot be read to require offsets in other phases using other methodologies.

Q54. 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 AD Agreement?

29. Yes. Both *US – Softwood Lumber (AB)* and *EC – Bed Linen* examined the use of the term "margins of dumping" in Article 2.4.2 with respect to the average-to-average comparison methodology during the investigation phase. The Appellate Body in *US – Softwood Lumber (AB)* "emphasize[d] that [the terms 'all comparable export transactions' and 'margins of dumping'] should be interpreted in an integrated manner."[21] The term "all comparable export transactions" is specific to the use of the average-to-average methodology during the investigation phase. In this regard, the Appellate Body specifically noted that the only issue before it in *US – Softwood Lumber (AB)* was the use of the average-to-average methodology.[22]

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[20] *US – Softwood Lumber (AB)*, para. 63 ("First, we note that both Canada and the United States agree that this dispute relates to the consistency, with Article 2.4.2, of the Anti-Dumping Agreement, of a methodology incorporating the practice of zeroing (hereinafter "zeroing") *as applied* in the investigation at issue in this case. Secondly, we understand that Canada's claim . . . was limited to the consistency of zeroing when used . . . on the based of . . . the 'weighted-average-to-weighted-average methodology' . . . under Article 2.4.2 . . . . Therefore, in this appeal, we are not required to, and do not address, the issue of whether zeroing can, or cannot, be used under the other methodologies prescribed in Article 2.4.2 . . . .").

[21] *US – Softwood Lumber (AB)*, para. 85.

[22] *US – Softwood Lumber (AB)*, para. 77, 105.

30. Similarly, in *EC – Bed Linen*, the Appellate Body relied on its analysis of the term "all comparable export transactions" to find that the EC had acted inconsistently with its obligations pursuant to Article 2.4.2.[23] Moreover, the Appellate Body also noted that, with respect to its examination of "zeroing", there is a distinction between the rules governing the calculation of the margin of dumping pursuant to Article 2.4.2, and those governing the assessment of antidumping duties pursuant to Article 9.[24] Thus, there is no textual basis to expand the Appellate Body's interpretation of "margins of dumping" beyond the context of the use of the average-to-average methodology during the investigation phase.

Q55. Both parties: what is the interpretive significance, if any, of the following phrases for the interpretation of the term "margin(s) of dumping": "as established" in Article 9.3; "the" in "the margin of dumping" in Article 9.3; "actual " in "actual margin of dumping" in the second sentence of Article 9.3.2; "zero and de minimis" margins in Article 9.4; "individual" in "individual duties or normal values" in the last sentence of Article 9.4; and "individual" in "individual margins of dumping" in the first sentence of Article 9.5?

Article 9.3, "as established":

31. Article 9.3 sets the upper limit of the amount of the antidumping duty as the margin of dumping "as established under Article 2." The use of the phrase "as established" demonstrates the intention that in an Article 9.3 assessment review, the investigating authority calculate any margin of dumping applying the disciplines set forth in Article 2. Of course, any limitations contained within Article 2 itself, such as the limitation of Article 2.4.2 to the investigation phase, would still apply.

32. Nothing in the use of the phrase "as established" suggests that the margin of dumping refers back to the margin of dumping calculated in the investigation, as opposed to the margin of dumping calculated in the assessment review. As noted above, Article 2 applies to all phases of a proceeding, including the assessment phase, except where otherwise stated (such as in Article 2.4.2). Thus, there is no textual basis to support the argument that the margin of dumping refers to the investigation phase.

33. This is consistent with the Panel's finding in *Argentina – Poultry*:

> Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2", but to the margin of dumping established "under Article 2". In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely

[23] *EC – Bed Linen (AB)*, paras. 55-58.
[24] *EC – Bed Linen (AB)*, fn. 30; *EC – Bed Linen (21.5) (AB)*, para. 124.

consistent with the introductory clause of Article 2, which sets forth a definition of dumping "for the purpose of this Agreement . . .". In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4.[25]

Article 9.3, "the" in "the margin of dumping":

34. Article 9.3 addresses payments of and liabilities for antidumping duties. Antidumping duties are paid by importers. The use of the word "the" in the phrase "the margin of dumping" in Article 9.3, therefore, refers to the margin of dumping determined on an import or importer-specific basis for the purpose of assessing antidumping duties. The use of the word "the" does not mean that there is only one margin of dumping – that which is established in the investigation phase. Rather, the margin of dumping to which Article 9.3 refers is the margin of dumping calculated by following the applicable methodologies established in Article 2. Japan concedes as much in its opening statement at the second meeting of the parties, when it notes that margins of dumping are calculated in "investigations *or reviews*."[26]

Article 9.3.2, "actual":

35. Article 9.3.2 provides for a refund of duties paid in excess of the "actual" margin of dumping in a prospective assessment system. In prospective systems, the customs authority collects the antidumping duty at the time that the goods enter the country. However, importers have the ability to request an assessment proceeding pursuant to Article 9.3 to determine if the amount of the antidumping duty paid exceeds the actual amount by which the import was sold at less than normal value. Thus, during a refund proceeding, the Member would compare the import price to a contemporaneous normal value to calculate the "actual" margin of dumping for that transaction, to determine whether the importer is due a refund. Whether the Member utilizes this approach to determining the "actual" margin of dumping or the Member considers the difference between the prospective normal value in effect at the time of the import and the export price as the "actual" margin of dumping[27] (a distinction not relevant to this dispute), in either case, it is clear that the "actual" margin of dumping is distinct from the margin of dumping determined during the investigation.

Article 9.4, "zero and *de minimis*":

36. Article 9.4 addresses the antidumping duties to be applied to imports of an exporter or producer for whom the investigating authority did not calculate an individual margin of dumping

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[25] *Argentina – Poultry (Panel)*, para. 7.357.
[26] Japan, Opening Statement at the Second Meeting with the Panel, , para. 28 (emphasis added).
[27] *Argentina – Poultry (Panel)*, paras. 7.357-7.361.

pursuant to Article 6.10. Article 9.4 provides that, in making this determination, the investigating authorities shall disregard any "zero and *de minimis*" margins.

37. The use of the phrase "zero and *de minimis*" confirms the U.S. interpretation that the AD Agreement does not recognize so-called "negative" margins of dumping. That is, either export price is less than normal value, and a margin of dumping exists, or export price exceeds normal value, thus demonstrating there is no, or a "zero", margin of dumping. Otherwise, the drafters would have addressed what Japan would call "negative margins of dumping" in Article 9.4.

Article 9.4, "individual duties or normal values":

38. Article 9.4 provides, *inter alia*, that:

> The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

39. The word "individual", as used in this provision of the AD Agreement, indicates that the antidumping duty rate for an exporter or producer that was not included in the original examination must be based on that exporter or producer's own data, and not the data of others, when the conditions of Article 9.4 and 6.10.2 apply.

Article 9.5, "individual margins of dumping":

40. 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.

41. As with the use of the word "individual" in Article 9.4, the use of the word "individual" in Article 9.5 indicates that a calculated margin of dumping for "new shipper" exporter or producer must be based on that exporter's or producer's own data, not the data of others. In the context of Article 9.5, when a new shipper satisfies the requirements of Article 9.5 and has applied for its own calculated margin of dumping, the Member must calculate that margin of dumping based on that new shipper's own information.

42. In sum, as reflected in response to these questions as well as throughout the written submissions of the United States, the context in which the term "margin of dumping" is used is critical to its proper interpretation. The use of the term in Article 5.8 in the context of an overall margin of dumping for an exporter or producer in an investigation does not resolve the meaning of the term when used in other contexts throughout the AD Agreement.

Q56. 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.

43. Such an interpretation cannot be reconciled with the text of Article 9.3. First, as discussed above, there is no textual basis in Article VI of the GATT 1994 or in the AD Agreement to calculate a margin of dumping for the product as a whole (with the possible exception of Article 2.4.2's application to establishing margins of dumping using average-to-average comparisons during the investigation phase). Moreover, duties are assessed on imports. Thus, it is entirely permissible for a Member, in an assessment proceeding, to calculate a margin of dumping on an import transaction-specific basis, and establish that margin of dumping as the limit on the amount of antidumping duties assessed on that particular import transaction. This is exactly what occurs when a Member uses a prospective normal value system.

44. Second, nothing in the text of Article 9.3, or elsewhere, limits the amount of antidumping duty that can be assessed on an import to the margin of dumping calculated in an investigation. As noted in response to Question 55, the margin of dumping in an assessment review must be calculated pursuant to Article 2.[28]

45. Third, Article 9.3 assessment proceedings are considered an integral part of the AD Agreement; however, interpreting Article 9.3 as suggested by the question would appear to deprive the provision of virtually all substantive meaning. If Article 9.3 proceedings are to be limited as suggested in the question, they would serve no purpose other than to provide for refunds in the case of an error in applying the investigation results to any particular import. The extended periods provided for conducting Article 9.3 proceedings belies any such limited purpose.

46. The United States would further note that Japan does not appear to be making this argument, inasmuch as Japan has argued that margins of dumping are determined in reviews in addition to investigations.[29]

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[28] *See Argentina – Poultry (Panel)*, para. 7.357.

[29] Japan, Opening Statement at the Second Meeting with the Panel, para. 28.

Q57. United States: with reference to paras. 27-30 of Japan's opening statement at the second meeting, how does the United States respond to the argument that the calculation and imposition of variable duties does not involve the establishment of margins of dumping?

47. In the referenced paragraphs, Japan seeks to rebut some rather obvious observations with respect to Article 9.3 – that Article 9.3 provides relatively few substantive disciplines with respect to the conduct of assessment proceedings; that Article 9.3 does not require that any period of time or exporter-specific collection of imports or importers be grouped together for purposes of the assessment proceedings; and that the focus of Article 9.3 is on the proper assessment of antidumping duties (which, of course, are paid by importers on imports). Japan seeks to rebut these observations by asserting, among other things, that a prospective normal value system (i.e., a variable duty does not involve the establishment of margins of dumping. Instead, according to Japan, such a system involves a mechanical comparison of import prices with a "reference price" which need not respect the substantive rules of Article 2.

48. The United States disagrees with Japan's conclusion and, more importantly, with the reasoning that Japan used to arrive at the conclusion. Japan's reasoning depends upon a mis-application of statements by the Appellate Body in *EC – Bed Linen (21.5)*. In the paragraphs relied on by Japan, the Appellate Body was responding to an argument by the EC which sought to justify a particular investigation methodology by reference to language that was specifically applicable to the post-investigation phase of an antidumping proceeding. The Appellate Body rejected that argument, noting, *inter alia*, that "the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made." Similarly, in a footnote to the following paragraph, the Appellate Body quoted language from its original report in *EC – Bed Linen* in which it noted the distinction between Article 2.4.2, which is concerned with "the existence of margins of dumping" in an investigation and Article 9, which relate to the subsequent collection and assessment of antidumping duties.[30]

49. The relevant lesson from the quotations from *EC – Bed Linen (AB)* referenced above and by Japan is that *context matters*. The AD Agreement rules for determining the margin of dumping in an investigation differ from the rules for determining the margin of dumping and, consequently, the antidumping duty under Article 9. That, of course, is entirely consistent with the United States' point that whatever Article 2.4.2 requires with respect to offsets in an investigation, if anything, there is no textual basis for imputing such requirements to an Article 9.3 assessment proceeding.

50. Regarding Japan's specific conclusion with respect to prospective normal value systems – that "customs authorities mechanically compare import prices with a reference price; they do not

[30] *EC – Bed Linen (21.5)(AB)*, para. 124, fn. 155.

undertake – and are not required to undertake – a comparison that respects the detailed procedural and substantive rules set forth in Article 2, for example, in Article 2.4"[31] – the United States notes that Japan cites no support for its assertion that prospective normal value systems need not undertake to make a "fair comparison," taking into account differences in physical characteristics, levels of trade, and other such differences that may affect price comparability between the prospective normal value and the export price under consideration. The United States finds no support for that assertion, except to the extent that Japan sought to obfuscate its argument by referring to a "reference price" that is less than the prospective normal value (in the sense of the application of the "lesser duty rule" in Article 9.1). In that case, the United States agrees that the authorities would not have to undertake "a comparison that respects the detailed procedural and substantive rules set forth in Article 2" applicable to calculating the higher, maximum antidumping duty.

Q58. United States: With reference to paragraph 49 of the opening statement of Japan at the second meeting, could the United States explain its views on the implications of the statement made by the Appellate Body in US - Corrosion-Resistant Steel Sunset Review that "[w]hen investigating authorities use a zeroing methodology such as that examined in EC - Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated"?

51. The United States notes that Japan, in paragraph 49, states that the United States was "incorrect" in stating that the Appellate Body "'at no time has found that . . . an obligation [to provide offsets] exists with respect to other comparison methodologies during investigations, or in the context of Article 9 duty assessment proceedings . . . .'"[32] In fact, it is Japan that is incorrect; the Appellate Body has not so found. As the United States noted above, the Appellate Body's actual findings have been limited to the average-to-average methodology when used during the investigation phase.

52. There are no implications for this dispute with respect to the Appellate Body's statement in *US – Corrosion-Resistant Steel Sunset Review*. First, the Appellate Body expressly stated that it was "unable to rule" on whether the United States acted inconsistently with Article 2.4 and Article 11.3 in the context of the sunset review before it.[33] Thus, the quoted statement was not necessary to resolve the issue in that dispute and is mere *obiter dicta*. Second, the Appellate Body did not provide any textual analysis of the AD Agreement, let alone of Article 2.4, to support that statement. Finally, it should be noted that all the Appellate Body said was that zeroing would tend to inflate margins; the Appellate Body said nothing as to whether such

[31] Japan, Opening Statement at the Second Meeting with the Panel, para. 30.

[32] Japan Opening Statement at the Second Meeting, para. 48, quoting United States Second Written Submission, para. 33.

[33] United States, Second Written Submission, para. 25 (citing *US – Corrosion-Resistant Steel Sunset Review*, para. 138).

inflation was or was not permitted under the AD Agreement. Thus, this quotation provides no support for Japan's sweeping assertion that the denial of offsets in all instances, including in assessment proceedings, is inconsistent with the "fair comparison" obligation in Article 2.4.

53. In this regard, it should be noted that a Member's obligations flow from the text of the AD Agreement itself. Article 3.2 of the DSU provides that not even *recommendations and rulings* can add to or diminish the rights and obligations flowing from the AD Agreement, let alone *obiter dicta.* Japan is attempting to use a passing comment by the Appellate Body to create a new obligation, not provided for in the text of the AD Agreement itself.

54. Finally, in the passage quoted by Japan, the Appellate Body makes a specific reference to "a zeroing methodology such as that examined in *EC – Bed Linen* . . . ." In *EC – Bed Linen*, the Appellate Body examined the European Communities' use of the average-to-average methodology to determine the existence of margins of dumping during the investigation phase, pursuant to Article 2.4.2. Thus, this statement by the Appellate Body refers only to the use of the average-to-average methodology during the investigation phase. It does not address the use of any other methodology, in any other phases of an antidumping proceeding, such as the use of average-to-transaction comparisons during an Article 9.3 assessment proceeding. In fact, the Appellate Body explicitly recognized that the "requirements of Article 9 do not have a bearing on Article 2.4.2 because the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties."

Q59. United States: how does the United States respond to the claim of Japan that maintaining zeroing procedures in original investigations is inconsistent with Article 5.8 of the AD Agreement (paras. 122-130 of the First Submission of Japan)?

55. Japan contends that the denial of offsets is "inconsistent with Article 5.8 because [it] deprive[s] the USDOC of accurate, adequate or otherwise credible 'evidence' of 'dumping,' . . . ."[34] This argument, however, is entirely dependent on a finding that the denial of offsets is inconsistent with Articles 2.1, 2.4 or 2.4.2 of the AD Agreement.[35] That is, the United States cannot independently act inconsistently with Article 5.8 of the AD Agreement, if the denial of offsets is not inconsistent with Articles 2.1, 2.4 and 2.4.2.

56. In addition to being dependent upon a separate violation of Articles 2.1, 2.4 or 2.4.2, Japan's argument with respect to Article 5.8 is also speculative. Even if the Panel were to find that the United States acted inconsistently with Article 2.1, 2.4 or 2.4.2, Japan has not established a factual basis for its allegation with respect to Article 5.8. Article 5.8 only requires termination of an investigation in cases where the authorities determine that the margin of dumping is *de*

[34] Japan, First Written Submission, para. 126.

[35] *See* Japan, First Written Submission, para. 127.

minimis. Japan has not established that, were it to prevail with respect to its claims that the United States acted in breach of Articles 2.1, 2.4 or 2.4.2, the only margins that could be determined in a WTO-consistent manner must be less than *de minimis*.