UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

WT/DS294

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

April 7, 2005

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Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
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EC – Bed Linen (Article 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/AB/RW, adopted 24 April 2003
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, Report of the Panel circulated 7 March 2005 (proposed for adoption at the DSB meeting scheduled for April 11, 2005)
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916; Complaint by Japan*, WT/DS162/R, Report of the Panel, as modified by the Appellate Body, adopted 26 September 2000
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US – Corrosion-Resistant Steel 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
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US – Section 301	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000
US – Softwood Lumber (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R
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A. GENERAL

1. US: Does the US have any specific observations on the factual accuracy of the EC's description of US anti-dumping laws and regulations and of the cases at issue in this dispute (paragraphs 15-61 of the First Submission of the EC)?

1. The EC's summary of U.S. law in investigations and administrative reviews is generally accurate, to the extent that is based directly on the text of the Tariff Act of 1930 and Commerce regulations. To the extent that the EC uses terms in a manner inconsistent with U.S. law[1], or characterizes U.S. methodologies in subjective ways[2], the United States stands by the positions it has expressed in its various submissions to the panel. The exhibits that the EC has attached to its summary of U.S. law are accurate inasmuch as they include original documents that are on the record of the administrative proceedings that the EC is challenging here. To the extent that the EC has created attachments, worksheets, or calculations that reflect their own legal theories, those materials were not before Commerce during any U.S. administrative proceeding, did not form a part of the record upon which the Department based its determinations, and the United States is unable to confirm their accuracy.

2. The United States generally rejects any EC characterization of U.S. law that contains the term "zeroing" or "negative dumping." The EC repeatedly characterizes the methodology applied in U.S. investigations as "model zeroing", and the methodology applied in assessment reviews as "simple zeroing." But there is no textual basis in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") or U.S. law for either term. Even the term "simple zeroing" as defined by the EC begs the question at the heart of this dispute: Is there an obligation under the AD Agreement in assessment proceedings to offset dumping duties found on some entries against distinct, non-dumped import transactions? The United States disputes the existence of such an offset obligation in the AD Agreement, and categorically rejects any EC characterization of U.S. law that involves the use of the term "zeroing."

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[1] See, e.g, EC First Written Submission at para. 32, contending that in a U.S. assessment review, "USDOC then conducts an investigation". U.S. law does not provide for "investigations" in assessment proceedings, contrary to the EC's contention.

[2] See, e.g., EC First Written Submission at para. 40, contending that "because the total margin or amount of dumping calculated during the period of review is super-inflated, due to the use of simple zeroing, the assessment rate is similarly super-inflated." The United States categorically rejects this characterization of the U.S. margin calculation methodology and its impact. Similarly, it is inaccurate to assert that under U.S. law, "the results of the first periodic review will thus eclipse entirely the results of the original investigation." See EC First Written Submission at para. 34, 54. That is because in the investigation phase, Commerce analyzes information from a period of investigation that *precedes the initiation of an anti-dumping proceeding*. In contrast, the U.S. assessment proceeding only calculates dumping liability for individual entries of the subject merchandise that enter the United States *after the imposition of provisional measures in that proceeding*. So it is false to state that the "results of the first periodic review eclipse entirely the results of the original investigation." The two inquiries analyze completely different sets of data that do not overlap.

B. SCOPE OF APPLICATION OF ARTICLE 2.4.2

5. US: If, in the view of the US, the rules on the establishment of dumping margins in Article 2.4.2 do not apply to phases of an anti-dumping proceeding other than the investigation phase, what rules do apply? What is the relevance of Article 9.3 and its reference to "the margin of dumping established under Article 2"? What is the relevance of the fact that identical language to that in Article 9.3 appeared in Article 8.3 of the Tokyo Round Anti-Dumping Code, which had no provision comparable to current Article 2.4.2?

3. Article 2.4.2 contains obligations relevant to determining "the existence of margins of dumping during the investigation phase". The "existence" of margins of dumping is only relevant in the Article 5 investigation phase to determine whether dumping occurred at greater than *de minimis* levels so as to warrant the imposition of an anti-dumping measure. In contrast, Article 9 is concerned with the calculation of the "amount of the antidumping duty" for particular imports subject to that anti-dumping measure.

4. The reference in Article 9.3 to "the margin of dumping as established under Article 2" means that all the rules set forth in Article 2 apply to the imposition and collection of antidumping duties under Article 9, with the exception of Article 2.4.2, which, by its terms, is limited to the investigation phase. For example, Article 2.1 provides that "[f]or the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Similarly, Article 2.3 provides for the use of constructed export prices, and is not restricted to the investigation phase; Article 2.4 sets forth rules for making a fair comparison; Article 2.5 sets forth the rules governing trans-shipments; and Article 2.6 defines "like product". All of these Article 2 provisions apply throughout the AD Agreement, without regard to the particular phase of an antidumping proceeding.

5. The presence of language identical to Article 9.3 in the Tokyo Round Anti-Dumping Code demonstrates that the Uruguay Round drafters carried forward the general requirement that the amount of duty assessed for a given import not exceed the margin of dumping for that import. The margin of dumping is defined in Article VI:2 of GATT 1994 as "the price difference determined in accordance with the provisions of [GATT Article VI:1]." Thus, whether reference is made to Article 8.3 of the Tokyo Round Anti-dumping Code or to Article 9.3 of the AD Agreement, the "margin of dumping as established under Article 2" refers to the price difference between an export price and normal value, both established consistent with Article 2, and compared through a fair comparison as required by Article 2.4.

6. The plain language of the AD Agreement does not support the existence of an obligation to apply Article 2.4.2 in the Article 9 assessment phase. The absence of such an obligation was noted by the Appellate Body in *EC – Bed Linen*, when it found 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."[3]

7. US: Article 18.3 of the ADA reads in part: "subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications ... ". There are two terms used here: "investigations" and "reviews". Subparagraph 3.1 specifically addresses the subject matter of Articles 9.3, i.e., refunds. Might this not imply that "refunds" are covered by either the term "investigations" or "reviews"? What implications, if any, would this have for the meaning of the word "investigation" as it appears in Article 2.4.2?

7. When read together as a whole, Articles 18.3 and 18.3.1 establish a set of transition rules that provide for the application of the AD Agreement to particular proceedings after the effective date of the AD Agreement. The text of these provisions plainly contains distinct transition rules for investigations and reviews of existing measures (Article 18.3) and proceedings under Article 9.3 (Article 18.3.1) and, to that extent, are consistent with the fact that Article 9.3 proceedings are distinct from investigations and reviews of existing measures.

8. The United States does not believe there are any implications for the meaning of the word "investigation" in Article 2.4.2, because the context in which the term "investigation" is used in Article 2.4.2 makes it clear that it is limited to the Article 5 investigation phase. This issue is addressed further in response to Question 10.

8. US: Does the US consider that duty assessment proceedings are neither investigations nor reviews? If so, does this mean that Article 6 of the ADA, which applies to investigations under Article 5 and reviews under Article 11, does not apply to refund and assessment proceedings pursuant to Article 9?

9. Yes, the United States considers that duty assessment proceedings under Article 9.3 are distinct from both investigations and reviews, as those terms are used in the AD Agreement. While investigations are conducted to determine the existence, degree and effect of dumping pursuant to Article 5.1, assessment proceedings are conducted to determine the final liability for payment of antidumping duties or whether a refund of excess antidumping duties is owed pursuant to Article 9.3. While Article 11 provides for different types of reviews ("changed circumstances" reviews and five-year or "sunset" reviews), footnote 21 to Article 11.2 explicitly provides that an Article 9.3 determination does not constitute a review within the meaning of that Article 11. Similarly, footnote 22 to Article 11.3 explicitly refers to a proceeding conducted pursuant to Article 9.3.1 as an "assessment proceeding" and not as an investigation or a review.

[3] *EC – Bed Linen (Article 21.5) (AB)*, para. 123-124 (emphasis in original).

10. As to the Panel's question about the consequences of this distinction with respect to the application of Article 6, the United States notes that there are no cross-references to Article 6 in Article 9, nor the converse. Notwithstanding the lack of cross-references, the United States routinely applies procedural and evidentiary requirements in its assessment proceedings that meet or exceed the provisions of Article 6. The EC is making no claims as to the applicability of Article 6 to any of the measures before the Panel and, therefore, the Panel need not reach the applicability of Article 6 to Article 9.3 proceedings in order to address the claims before it.

9. Both parties: How does the word "during" in Article 2.4.2 inform the meaning of Article 2.4.2?

11. Consistent with the customary rules of treaty interpretation, "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."[4]

12. The ordinary meaning of the preposition "during" according to *The New Shorter Oxford English Dictionary* is "throughout the duration of; in the course of, in the time of." The word "during" before the term "the investigation phase" in Article 2.4.2 indicates the drafters' intention to refer to the finite administrative process in which dumping margins are established on the basis of one of the three comparison methodologies provided for in Article 2.4.2.

13. The context of Article 2.4.2 also supports an interpretation of the term "during" that refers to the temporal period in which the administering authority conducts its analysis, before making a final determination whether or not to impose an anti-dumping measure. Article 2.4.2 establishes the permissible calculation *methodologies* that may be applied by the investigating authority to determine the existence of margins of dumping. Consistent with Article 5.1 of the AD Agreement, an investigation concerning the existence of dumping is an exercise uniquely provided for in Article 5.

10. US: Does the US contend that an "investigation", within the meaning of Article 2.4.2, means an investigation as provided for in Article 5, which is terminated completely within the timeframe described in 5.10, and that an "investigation" cannot take place anywhere else in the ADA including under Article 9?

14. Yes. An "investigation", within the meaning of Article 2.4.2, means an investigation as provided for in Article 5, which is terminated within the timeframe described in Article 5.10.

15. The text of the AD Agreement expressly provides, in Article 1 and Article 5.1, for the existence of a discrete investigation phase. An Article 5 investigation is a *sui generis* proceeding that resolves the threshold question of the existence, degree, and effect of dumping. The first

[4] *Vienna Convention on the Law of Treaties*, Article 31 ("*Vienna Convention*").

sentence of Article 1 cross-references Article 5 to define "investigations initiated" under the AD Agreement. Only Article 5 investigations are "initiated" under the AD Agreement. Article 5.1, in turn, defines the scope of such investigations as "to determine the existence, degree, and effect of any alleged dumping" (emphasis added). Article 2.4.2 establishes how the "existence" of dumping is to be determined: "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison ... ."(emphasis added). Article 2.4.2 has no bearing on any other phase of an antidumping proceeding other than the original investigation phase.

11. Both parties: Is there any cogent basis for distinguishing between investigations and other proceedings, in the light of the object and purpose of the ADA?

16. There is a clear and cogent basis for distinguishing between investigations and other proceedings. Article 5.1 defines the purpose of such investigations as being to determine "the existence, degree, and effect of any alleged dumping" in accordance with Articles 2 and 3. Under Article 1 of the AD Agreement, an antidumping measure may only be applied pursuant to such an investigation.

17. The collection and assessment of antidumping duties under Article 9 is a separate and distinct phase that necessarily occurs *after* an anti-dumping measure is imposed. In an Article 9 assessment proceeding, the investigating authority determines the final liability for the payment of antidumping duties. Antidumping duties, like other duties, are levied on individual imports, consistent with the circumstances associated with each particular import transaction. Individual importers pay such duties. Thus, to the extent that an authority may use weighted average to weighted average comparisons in an investigation to determine whether margins of dumping exist sufficient to justify the imposition of an antidumping measure, once that measure is imposed, it is the importers that will incur liability for duties. Consequently, it is appropriate to determine that liability on an importer- and transaction-specific basis.

18. Similarly, an Article 11 review can only occur *after* the imposition of measures following the investigation phase. Members may conduct Article 11 reviews only after the completion of an investigation in which it has been established that the requirements of dumping, injury and causation have been fulfilled. An Article 11 review, by its terms, reviews "the need for the continued imposition of the duty . . . provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty".[5]

13. US: Article 1 of the ADA reads in part: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."

[5] AD Agreement, Article 11.2.

What does the US consider to be the ordinary reading of the words "pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."?

19. The words "pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement" refer to investigations initiated pursuant to Article 5 and conducted in accordance with Articles 2 through 8, and 12, 14-15, 18 and Annexes I and II. An antidumping investigation, as referenced in Articles 1 and 5 of the AD Agreement, is typically commenced on the filing of a proper "application" by or on behalf of the domestic industry in accordance with Article 5.2. If the Article 5 investigation results in an affirmative determination of (1) dumping, (2) injury, and (3) causation, the investigating authority may impose an antidumping measure.

- ***How does the footnote to Article 1, which refers to Article 5, affect the US' view of the scope of the word "investigations" as used in Article 1?***

20. The footnote to Article 1 of the AD Agreement states that "[t]he term 'initiated' as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5." The footnote thereby confirms that the "investigation" referred to in the first sentence of Article 1 is an Article 5 investigation "to determine the existence, degree and effect of any alleged dumping."[6]

- ***Does the US consider that Article 1 only refers to investigations initiated and conducted, and that by defining the term "initiate", Article 1 essentially limits its scope of operation to original investigations?***

21. The first sentence of Article 1 is limited to "original investigations", consistent with the provisions of Article 5. The first sentence establishes that antidumping measures may only be applied following the conclusion of "investigations initiated and conducted in accordance with the provisions of this Agreement."

- ***Does the US consider that the imposition and collection of anti-dumping duties properly effected under Article 9 would be part of an "anti-dumping measure" described in Article 1?***

22. As provided for in Article 9.1, the "imposition" of an antidumping duty may occur when all the requirements for imposition have been fulfilled (including affirmative determinations of the existence of dumping, injury and causation). In the view of the United States, the imposition of an antidumping duty referred to in Article 9.1 is synonymous with the application of the antidumping measure referred to in the first sentence of Article 1 of the AD Agreement.

[6] AD Agreement, Article 5.1.

23. The collection and assessment of antidumping duties is dependent upon the existence of an antidumping measure. Dumping duties are not, however, distinct antidumping "measures" as that term is used in the first sentence of Article 1. Assessment proceedings to determine the amount of antidumping duty to be assessed for particular entries, consistent with Article 9.3, are more appropriately considered "actions" within the meaning of the second sentence of Article 1.

- ***Does the US consider that a breach of the provisions of Article 9.3 regarding the collection of anti-dumping duties would not be a breach of the first sentence of Article 1?***

24. As discussed in response to the prior bullet question, a breach of the provisions of Article 9.3 regarding the collection of antidumping duties normally would not constitute a separate breach of the first sentence of Article 1.

- ***Does the US contend that a different meaning should be given to "action ... taken under anti-dumping legislation or regulations" in the second sentence of Article 1 compared with an "anti-dumping measure" in the first sentence of Article 1?***

25. Yes. As discussed in response to the third bullet question, the second sentence of Article 1 provides that the provisions of the AD Agreement "govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations." The collection or assessment of an anti-dumping duty in a manner inconsistent with Article 9.3 would be an "action" within the meaning of the second sentence of Article 1.

26. In contrast, a decision to impose an "anti-dumping measure" within the meaning of Article 1, first sentence, refers to the result of an Article 5 investigation. A measure may be imposed after the administering authority determines that the legal conditions for the imposition of measures have been satisfied. In some cases, antidumping duties may not actually be assessed, even though an antidumping measure has been put into place in accordance with the first sentence of Article 1.

14. Both parties: Please provide your interpretation of the term "investigation(s)" at each of the places it is used or subject to a reference in the ADA. Please indicate how your interpretations inform the meaning of "during the investigation phase" as it appears in Article 2.4.2.

27. It is not necessary for the Panel to determine the meaning of the term "investigation" each and every time it used in the AD Agreement in order to resolve the meaning of the Article 2.4.2 provision regarding the establishment of "the existence of margins of dumping during the investigation phase". The issue before the Panel is whether Article 2.4.2, which addresses the comparison methodologies used to establish "the existence of margins of dumping during the investigation phase," applies in an Article 9.3.1 assessment proceeding to determine the amount

of the "antidumping duty" to be assessed. It is clear from the text and context of the AD Agreement, however, that Article 2.4.2 only applies in the original Article 5 investigation.

28. Article 2.4.2 sets forth the rules that govern the determination of the "existence" of margins of dumping for purposes of Article 5 investigations. The text of Article 2.4.2 expressly limits its application to the "investigation phase"and provides three methodologies that an investigating authority may use. A single margin of dumping, expressed as a percentage, is only necessary in the context of an Article 5 investigation to determine whether overall margins exceed the *de minimis* level set forth in Article 5.8, such that the imposition of a measure is warranted.

29. The text of Article 2.4.2 expressly limits itself to an Article 5 investigation in two different ways. First, it expressly provides that it applies only in the "investigation phase." Second, it provides that its purpose is to establish the "existence" of dumping. There is only one investigation phase that requires a determination of the "existence" of dumping: the Article 5 investigation that follows the initiation of an anti-dumping investigation.

30. The Appellate Body and a panel have found that the application of Article 2.4.2 is limited to Article 5 investigations. The Appellate Body in *EC-Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2, and 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."[7] Accordingly, the panel in *Argentina-Poultry* found that "if the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that 'the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2'. This is not what Article 9.3 says."[8]

16. Both parties: The EC has suggested that the term "investigation phase" could mean "period of investigation". Is there any relevance to the fact that the term "period of investigation" was used in various drafts of Article 2.4.2 itself alongside the term "investigation phase"? See e.g., Ramsauer I dated 26/11/1991.

31. The text of Article 2.4.2 in Ramsauer I provided:

> Subject to the provisions governing fair comparison in paragraph 2.4, in cases where prices vary in both the exporting and importing country, the normal value and the export price shall normally be compared on a weighted average to weighted average or transaction to transaction basis <u>when establishing the existence of dumping margins during the investigation phase</u>. A weighted

[7] *EC – Bed Linen (Article 21.5) (AB)*, paras. 123-124 (emphasis in original).
[8] *Argentina – Poultry,* para. 7.358 (emphasis added).

> average normal value may be compared to individual export transactions when the pattern of export transactions to particular customers reveals a distinct pattern of targeted dumping during the period of investigation, provided that the authorities ensure that no margins of dumping are found when there are similar movements in levels of prices at the same time in the two markets, and provided that the authorities give an explanation of the reasons for using such a comparison. (emphasis added).

32. The text of the Ramsauer draft undermines the EC's contention that the terms "investigation phase" and "period of investigation" could be synonymous. The Ramsauer draft clearly distinguished between the administrative exercise of the investigating authority, when it is engaged in "establishing the existence of dumping margins during the investigation phase," and the pricing patterns "during the period of investigation" that are the focus of the investigating authority's analysis. The Ramsauer draft suggests, rather, that the term "during the investigation phase" is more likely to be synonymous with the time in which the investigating authority examines pricing behavior that occurred within the period of investigation.

17. Both parties: It could be argued that the use of the term "investigation phase" implies that there are other distinct phases(s). Please comment on the meaning of the word "phase" and its relevance to this dispute.

33. The AD Agreement does not define the word "phase." The ordinary meaning of the word "phase" according to *The New Shorter Oxford English Dictionary* is "a distinct period or stage in a process of change or development; any one aspect of a thing of varying aspects." Thus, the word "phase" in the context of the AD Agreement recognizes that an antidumping proceeding consists of more than one phase.

34. The text of the AD Agreement, from the first sentence of Article 1, indicates the existence of multiple phases. At a minimum, these phases consist of an Article 5 investigation, defined in its headnote of "Initiation and Subsequent Investigation", that is commenced upon the filing of a proper "application" by or on behalf of the domestic industry. If the Article 5 investigation phase results in an affirmative determination of injurious dumping, the Member may apply an antidumping measure.

35. The relevance of the ordinary meaning of the term "phase" to this dispute is clear. The AD Agreement provides for the existence of a unique investigation phase. The collection and assessment of antidumping duties under Article 9.3, as the United States discusses in more detail in response to Question 11, is a separate and distinct phase that necessarily occurs *after* the imposition of an antidumping measure.

36. The text of the AD Agreement clearly refers to an "investigation phase". An interpretation of the AD Agreement that would read the meaning of the term "phase" out of Article 2.4.2 would be inconsistent with the interpretive principle of effectiveness, which

provides that a treaty interpreter must "read all applicable provisions of a treaty in a way that gives meaning to all of them."[9]

19. US: Please comment on the four possible meanings of the term "during the investigation phase" posited by the EC in its closing marks at the meeting with the Panel.

37. In its closing statement, the EC sought to articulate a menu of "alternative" interpretations of "during the investigation phase", and invited the Panel to select among them. But each of the alternative "interpretations" offered by the EC requires a contrived and tortured reading of Article 2.4.2 that ignores the plain text of the AD Agreement. The forced quality of the EC "interpretations" underscores the clarity of the text of the AD Agreement. This clear view is precisely that of the Appellate Body in *EC-Bed Linen,* when it found that the phrase "during the investigation phase" in Article 2.4.2 should be viewed as synonymous with the Article 5.1 investigation phase, and does not include Article 9 assessment proceedings.

38. First, the EC posits that the term "during the investigation phase" in Article 2.4.2 is synonymous with the term "period of investigation" and reflects an effort by the drafters to prevent investigating authorities from using data from outside the period of investigation. In addition to the issues addressed by the United States in response to Question 16, the EC's interpretation would deny any meaning to the drafters' decision to utilize the unique "investigation phase" terminology in Article 2.4.2. Such an interpretation would be inconsistent with the customary rules of treaty interpretation. Numerous provisions in the AD Agreement refer to the concept of a "period of investigation", and the drafters' use of the distinct and unique Article 2.4.2 phrase in lieu of this otherwise accepted phrase must have been deliberate.

39. Second, the EC suggests that "associating [the words "during the investigation phase"] with the word 'established' in Article 2.4.2 . . . preserves the effectiveness of the 'fresh data' rule" and means that "the end of the investigation period must be reasonably proximate to the initiation of the investigation."[10] But the EC points to nothing in the text of the AD Agreement to support this interpretation. The absence of any text or context in the AD Agreement to support the EC's second interpretation renders its meaning inscrutable.

40. Third, the EC suggests that its general definition of "investigation" would not apply in the pre-initiation phase because "it would be unreasonable to require applicants to apply the highly technical rules in Article 2.4.2, before the necessary data had even been collected - in the questionnaire responses." This forced workaround highlights the absurdity of the EC's broad definition of "investigation phase" that incorporates every segment of an antidumping proceeding. Article 5 provides that an investigation "shall not be initiated" unless certain threshold requirements have been satisfied with respect to evidence and industry support.

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[9] *US - Gasoline (AB)*, p. 23, footnote 12.
[10] *EC Closing Statement* at para. 5.

Article 5 does not require the calculation of a margin of dumping. It only requires information on prices. Thus, the EC's purported "meaning" is without meaning.

41. Finally, the EC contends that "the words could just be 'descriptive', in the sense that the United States considers the words 'the existence, degree and effect of any alleged dumping' in Article 5.1 to be 'descriptive'". The United States respectfully submits that it cannot discern what it is that the EC is attempting to convey with this last "interpretation," and, thus, is unable to comment thereon.

C. SCOPE OF ARTICLE 2.4

22. US: Does the US contest the claim of the EC that the application of "model zeroing" in the original investigations identified in the Exhibits to the First Submission of the EC was inconsistent with Article 2.4 of the ADA?

42. The United States disagrees that what the EC terms "model zeroing" in investigations is inconsistent with Article 2.4 of the AD Agreement. As the United States discussed in detail in its First Written Submission at paragraphs 59 to 69, Article 2.4 cannot create any 'overarching' obligations with respect to the "zeroing"/offset issue, because such an interpretation would render the "targeted dumping" provisions of Article 2.4.2 a nullity.

26. US: Apart from the Panel Report in Egypt - Rebar, could the US cite other Panel and Appellate Body Reports that support its interpretation of the scope of the fair comparison language in Article 2.4?

43. The panel's interpretation in *Egypt-Rebar* of the scope of the fair comparison language was expressly quoted and affirmed by the panel in *Argentina – Poultry*.[11] In addition, numerous Appellate Body and panel reports support the U.S. interpretation of the scope of the fair comparison language in Article 2.4. Every Appellate Body and Panel report that has turned on the question of price comparability has narrowly interpreted Article 2.4 to address pre-comparison price adjustments that affect the comparability of prices between markets. The panel in *US – Softwood Lumber* summarized the scope of Article 2.4 when it found:

> An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a difference between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets concerned, for instance, where the packaging of the allegedly dumped product and that of

[11] *Argentina – Poultry*, para. 7.265

> the like product sold in the domestic market of the exporting country is identical, in our view, an adjustment would not be required to be made by that provision.[12]

44. Accordingly, as the Appellate Body stated in *US – Hot-Rolled Steel*, "an examination of whether USDOC acted consistently with Article 2.4 of the Anti-Dumping Agreement must focus on...whether there were "differences", relevant under Article 2.4, which affected the comparability of export price and normal value."[13] The EC's proposed definition of Article 2.4. to encompass the results of comparisons between export price and normal value is inconsistent with numerous Appellate Body and panel reports that have interpreted Article 2.4 as applicable to pre-comparison adjustments to export price and normal value. No Appellate Body or panel report has turned on a finding that the Article 2.4 fair comparison obligation extends to how a Member uses the results of those comparisons.[14]

29. US: The US asserts in paragraph 65 that a methodology cannot "be designated as 'fair' or 'unfair' within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down". In this respect, what are the comments of the US on the observations of the Appellate Body in EC –Bed Linen and in US - Corrosion-Resistant Steel Sunset Review that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?

45. With all due respect to the Appellate Body, the United States disagrees with the quoted statement. In both cases, the Appellate Body made its observations with respect to Article 2.4 without providing any analysis of Article 2.4. Instead, in the context of *EC – Bed Linen*, the Appellate Body's references to Article 2.4 suggest that it viewed the Article 2.4 issue as flowing from its analysis of Article 2.4.2.[15] In *US – Corrosion Resistant*, the Appellate Body simply referred back to its discussion of Article 2.4 in *EC – Bed Linen*, again, without providing any reasoning or analysis of the provision and, in that case, without even having facts before it.[16]

30. US: What is the view of the US on the interpretation of the fair comparison requirement set out in paragraphs 33-39 of the Third Party Submission of Japan?

46. As discussed in response to Question 26, the scope of Article 2.4 is limited to pre-comparison price adjustments to export price and normal value. Article 2.4 requires that the administering authority compare comparable transactions, and establishes an obligation to make certain adjustments so as to ensure comparability.

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[12] *US – Softwood Lumber (Panel)*, para. 7.356 (emphasis added).

[13] *US – Hot-Rolled Steel (AB),* para. 179.

[14] As discussed in response to Question 37, the Appellate Body's statements with respect to Article 2.4 and so-called "zeroing" in *EC-Bed Linen* and *US-Corrosion Resistant* are no more than *obiter dicta* and contain no persuasive reasoning or analysis that is applicable here.

[15] *EC – Bed Linen (AB)*, para. 59.

[16] *US – Corrosion Resistant Steel Sunset Review (AB)*, paras 134-38.

34. US: How does the US respond to the points made in paragraphs 153-154 of the First Submission of the EC?

47. The EC contends that the U.S. methodology for calculating antidumping duty liability is "unfair" because dumping duty liability may accrue for a given exporter in the assessment phase, even if that exporter's pricing behavior would have yielded a zero margin if considered using the weighted average-to-weighted average margin calculation methodology provided in Article 2.4.2. The EC's analysis is without merit for two reasons: (1) it disregards the clear distinction in the AD Agreement between the investigation phase and the assessment phase of antidumping proceedings, and (2) it is only true of one of the three permissible methodologies set forth under Article 2.4.2.

48. The function of Article 9 assessment proceedings is distinct from that of investigations governed by Article 2.4.2. The Article 9 assessment phase follows the conclusion of an investigation phase in which it has been determined, among other things, that margins of dumping *generally* exist such that the imposition of a measure is justified. The focus of Article 9.3 is on the assessment of duties with respect to *particular* export transactions. The fact that different methodologies apply in Article 9 assessment proceedings than in investigations reflects the fundamentally different inquiry in each phase. Nothing in the AD Agreement requires Members to determine the final liability of any importer based on an exporter's average pricing behavior. It is not surprising that two distinct methodologies, established to answer different questions, may arrive at different answers.

49. For this reason, the "examples" that the EC presents in paragraphs 153 and 154 of its submission are misleading. The EC states in paragraph 153 that "even if the exporter raises its prices so as to eliminate the margin of dumping found by USDOC in the original investigation, USDOC will still calculate a margin of dumping" in the assessment phase. But this is false as to two of the three permissible investigation phase methodologies. If the United States were to apply either of the transaction-to-transaction or targeted dumping methodologies at the investigation phase – both of which are explicitly provided for under Article 2.4.2 – the overall investigation phase margin of dumping would be very similar if not identical to the overall results that would obtain in the assessment review given identical data.[17]

50. The EC's second hypothetical is similarly misleading. The EC's hypothetical is predicated on the legally groundless assumption that the only "fair" way to calculate normal values and export prices is on an aggregated "weighted average" basis, and that margins calculated on the basis of individual prices are inherently "unfair." But this assumption is demonstrably false, because two out of the three investigation phase methodologies set forth in

[17] The oversimplified facts in the EC hypothetical are not sufficient to calculate investigation phase margins using a transaction to transaction or targeted dumping approach.

Article 2.4.2 rely on the use of individual transactions, not weighted averages. Consequently, there is no support in the AD Agreement for the EC's contention that dumping calculated on a transaction by transaction basis, rather than a weighted average-weighted average basis, is "an illusion – nothing more than that."

36. Both parties: In the US – Softwood Lumber case, the Appellate Body did not refer to Article 2.4 in its analysis of Article 2.4.2. Please indicate whether you consider this to be of any significance for the present matters in dispute.

51. The United States is of the position that the lack of a reference in *US – Softwood Lumber* to Article 2.4 is significant. It reflects an outcome in which the Appellate Body was faced with substantive arguments and analysis as to the interpretive problems with its *dicta* in *EC – Bed Linen* and *US – Corrosion Resistant*, including the fact that such a finding would render the targeted dumping provision in Article 2.4.2 a nullity. In addition, while the EC was a proponent of having the Appellate Body reach the Article 2.4 arguments, the EC eventually acknowledged in the meeting with the Appellate Body that "zeroing is not inherently unfair." Thus, the United States is of the view that the lack of reference to Article 2.4 in *US – Softwood Lumber* reflects a development in the Appellate Body's consideration of this issue.

37. Both parties: What do the parties consider to be the relevance of the Appellate Body's statements in the EC – Bed Linen and US – Corrosion Resistant Steel Sunset cases regarding Article 2.4 and its relevance to the calculation of dumping margins? Do the parties consider such statements to be obiter dictum or something more substantive? Please explain and elaborate your answer.

52. As discussed in response to Question 29, the Appellate Body's statements in *EC – Bed Linen* and in *US – Corrosion Resistant* lacked any textual analysis or reasoning and, in the case of *US – Corrosion Resistant*, even lacked a factual record. Moreover, the actual findings in both reports did not contain findings with respect to Article 2.4 with respect to the so-called "zeroing" issue. Thus, the statements are no more than *obiter dictum*.

39. Both parties: If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?

53. It is difficult to anticipate all the practical consequences associated with this question given its hypothetical nature. However, the United States makes the following observations.

54. First, in order to consider "zeroing" unfair as such, it would be necessary for the panel to find that the "fair comparison" requirement in Article 2.4 has a broader application than simply providing for proper comparisons between export price and normal value, with adjustments as

appropriate pursuant to the provisions of Article 2.4. As the Panel's question suggests, once such a leap is taken, the real question is where does that requirement end.

55. Second, as the United States observed at the First Panel Meeting, Article 9.3 contains no apparent requirements with respect to the time period to be covered in an assessment proceeding. Nothing in Article 9.3 indicates that Members have any obligations as to whether they conduct such assessment proceedings on an import-specific basis, on imports over a six-month period, over a one-year period, or over a multi-year period (or some other time period).

56. Third, the United States does not understand the EC to be arguing that there is an obligation to provide an "offset," or not to "zero," across assessment proceedings covering distinct time periods. In other words, the EC has not suggested that, under its current understanding of the AD Agreement, if the United States were to find that imports during a given 12-month assessment proceeding were sold at greater than normal value, the United States would have to either pay the difference to the importer or to carry that "negative balance" forward to the next 12-month period.

57. Fourth, it is the combination of these three observations, and, to some extent, the characterization of the "zeroing" or "offset" obligation, that will inform the extent of the practical consequences of such a finding. If the concept would be that "zeroing" is "unfair", that would appear to be tantamount to a recognition of "negative margins." Such recognition would then appear to run throughout the AD Agreement. Thus, for example, to the extent that Article 9.3 provides that antidumping duties may not exceed the margin of dumping, a zero dumping duty would be in excess of a negative margin of dumping and, to that extent, would indicate that, pursuant to Article 9.3, Members agreed to compensate importers for non-dumped imports.

58. If, by contrast, the finding were phrased as a requirement to provide an "offset" for non-dumped imports against imports that were dumped, it would seem that the aggregation issue would then be more relevant. As noted above, Article 9.3 contains no aggregation requirement. Members are free to conduct assessment proceedings on any time period – from import-specific to some longer, multi-month time period. However, an "offset" requirement would presume some amount of aggregation, otherwise there is nothing within the proceeding to offset against. Effectively, the Panel would find that a Member's obligations differ in a significant, substantive fashion depending solely upon whether they aggregate imports for assessment purposes. There does not appear to be any legal basis for finding that a Member's substantive obligations differ depending upon whether they maintain discrete assessment proceedings for each import or, for the convenience of all, conduct those import-specific assessment proceedings in an aggregate assessment proceeding.

40. US: Is the view of the US that the first sentence of Article 2.4 means something over and above what is set out in the second sentence and what comes thereafter, or does the remainder of Article 2.4 exhaust the meaning of the word "fair" used in the first sentence? If not, why does the first sentence of Article 2.4 exist?

59. 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.

60. 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. . . ."

Arguably, that formulation was ambiguous as to whether the requirement to make a fair comparison was free standing. In the final draft, however, the language was amended to read:

> "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.

61. 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."

62. 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.

D. RELATIONSHIP BETWEEN ARTICLE 2.4 AND 2.4.2

42. Both parties: Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"?

63. Please see the U.S. response to Question 40 wherein the United States addresses the meaning of these phrases.

44. US: How does the US respond to the argument of Hong Kong China in paragraph 24 of its third Party Submission that the phrase "Subject to the provisions governing fair comparison in paragraph 4" supports the view that the fair comparison requirement is an overarching substantive obligation that is independent of substantive obligations in other parts of Article 2.4, including Article 2.4.2?

64. The United States disagrees with Hong Kong China. The mere fact that the drafters found it necessary to specify that the provisions of Article 2.4.2 were subject to the fair comparison provisions of Article 2.4 belies Hong Kong China's claim.

46. Both parties: Does Article 2.4.2 prohibit zeroing when a Member establishes the existence of margins of dumping on the basis of (a) the second (transaction-to-transaction) methodology set forth in Article 2.4.2; and (b) the third methodology set forth in Article 2.4.2 (weighted average to individual)? If not, does this imply that the term "margins of dumping" as used in Article 2.4.2 has different meanings depending upon which of the three methodologies is used?

65. Article 2.4.2 does not require that non-dumped transactions offset dumping found for distinct transactions when a Member establishes the existence of margins of dumping during the investigation phase on the basis of either transaction-to-transaction comparisons or weighted-average-to-transaction comparisons. This, however, does not necessarily mean that the term "margins of dumping" as used in Article 2.4.2 has different meanings depending upon which of the three comparison methodologies is used.

66. In *US – Softwood Lumber*, the Appellate Body found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology."[18] The Appellate Body discussed both the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2.[19] While the United States acknowledges that the report may be somewhat ambiguous in this regard, the United

[18] *US – Softwood Lumber (AB)*, para. 108.
[19] *Id*., paras. 86 - 103.

States submits that the textual basis for the Appellate Body's finding must lie in the phrase "all comparable export transactions."

67. The U.S. position is based on the same interpretive reasoning that the United States has identified with respect to the relevance of the "fair comparison" provisions of Article 2.4. Specifically, the targeted dumping (weighted average to transaction) methodology provided for in the second sentence of Article 2.4.2 is provided as an exception to the symmetrical comparison methodologies in the first sentence of Article 2.4.2. The targeted dumping methodology is an exceptional basis of comparison to the normal bases of comparison found in the first sentence – nothing more. It is not an exception to the "fair comparison" provisions of Article 2.4.2, nor is it an exception to the "margins of dumping" language contained in the first sentence. Thus, unless the Appellate Body's conclusion was based on the phrase "all comparable export transactions," a phrase which is unique to the weighted-average-to-weighted-average comparison methodology, the Appellate Body would have rendered the targeted dumping provision a nullity as a matter of mathematics. As Turkey acknowledged in its oral presentation to the Panel,[20] if offsets are made in both average-to-average comparisons and average-to-transaction comparisons, the results will be identical, all other things being equal. Such a result would clearly be at odds with the need to "give meaning and effect to all the terms of a treaty," and the United States presumes that was not the Appellate Body's intent.

47. Both parties: Does Article 2.4 (fair comparison) prohibit zeroing when a Member establishes the existence of a margin of dumping on the basis of (a) the second (transaction-to-transaction) methodology set forth in Article 2.4.2; and (b) the third methodology set forth in Article 2.4.2 (weighted average to individual)? Please explain your response.

68. No. Please see the U.S. response to Question 46.

48. Both parties: Is the use of an asymmetrical comparison methodology, i.e. the comparison of a weighted average normal value to individual export transactions, always inconsistent with Article 2.4 (fair comparison)? Is this true even when the third methodology of Article 2.4.2 is used consistent with Article 2.4.2? If not, please explain.

69. The fact that the AD Agreement expressly provides for the use of an "asymmetric" comparison methodology in the targeted dumping provisions (which provide that "[a] normal value calculated on a weighted average basis may be compared to prices of individual export transactions") demonstrates that the use of such a methodology is not always inconsistent with Article 2.4. The Article 2.4.2 provisions that relate to targeted dumping are not an "exception" to a notional Article 2.4 "obligation" to make symmetrical comparisons. Rather, the targeted dumping provisions are an exception to the Article 2.4.2 provision that the administering authority shall, in the investigation phase, "normally" make symmetrical comparisons.

[20] Third Party Submission of Turkey, Oral Presentation, at para. 8.

70. The fact that the symmetrical comparison methodologies in the first sentence of Article 2.4.2 are made "subject to" the provisions governing fair comparisons belies any claim that the fair comparison requirement includes symmetry.

E. MEASURES

55. US: First Submission of the US, paragraph 72: could the US provide evidence of the consistent application of the mandatory/discretionary test in WTO Panel and Appellate Body Reports? Please comment in this respect on the Panel and Appellate Body Reports cited in Third Party Submissions of Japan (paragraph 50) and China (paragraphs 11-14) as support for their view that the mandatory nature of a measure is not a decisive consideration.

71. The United States is not aware of any instance in which a panel or the Appellate Body has found an "as such" WTO inconsistency with respect to a measure that was found to neither mandate WTO-inconsistent action nor preclude WTO-consistent action. The number of instances in which WTO panels have applied the mandatory/discretionary distinction are too numerous to mention. With respect to the Appellate Body, the United States simply would note that 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."[21] As noted by a subsequent panel, "[t]his is generally understood to be the very rationale behind the traditional mandatory/discretionary distinction."[22]

US - Section 301

72. Turning to the reports cited by Japan and China in their third party submissions, both Japan and China mention the report in the *US – Section 301* case. China cites that report for the proposition that discretionary legislation is capable of being inconsistent with a WTO agreement.[23]

73. Japan quotes the report for the proposition that "a '*prima facie* violation [of WTO law] was created by the *possibility* under the statute of the USTR making a determination of inconsistency.'"[24] Footnote 80 of Japan's submission is blank and does not indicate the paragraph of the report from which the quoted passage is taken. However, it appears that the passage is taken from paragraph 7.100 of the *US – Section 301* report, with the emphasis on "possibility" added by Japan.

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[21] *US – Section 211 (AB)*, para. 259.
[22] *Korea – Commercial Vessels*, para. 7.62.
[23] China Third Party Submission, para. 11.
[24] Japan Third Party Submission, para. 50.

74. It also appears that Japan's quotation is not accurate. Japan inserts a period after "inconsistency", thereby creating the impression that the quoted passage ends there. In fact, there is more, the full sentence reading as follows: "The *prima facie* violation was created by the possibility under the statute of the USTR making a determination of inconsistency which negates the assurances that WTO partners of the US and individuals in the market place were entitled to expect *under Article 23*." (Emphasis added). The full sentence makes it clear that the panel was talking specifically about the obligation in Article 23 of the DSU, and not just any WTO obligation.

75. The significance of the misquotation is that Japan seems to be attempting to obscure the limited nature of the panel's findings in *US – Section 301*. The panel was at great pains to limit its findings to Article 23, and emphasized that "[c]onstruing a WTO obligation as prohibiting a domestic law that 'merely' exposes Members and individual operators to risk of WTO inconsistent action should not be done lightly."[25] The panel also emphasized that it was not purporting to reverse "the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO inconsistency, could, as such, violate WTO provisions."[26]

76. The United States does not disagree with the notion that a particular obligation, by its terms, may prohibit discretion. However, to date, the only obligation found to be of this nature, rightly or wrongly, is Article 23 of the DSU. Neither the EC, Japan, China nor any of the other third parties have alleged, let alone demonstrated, that the obligations at issue in this dispute are such as to prohibit the existence of discretion in a measure and the application of the "classical" mandatory/discretionary distinction.

US – Countervailing Measures

77. Japan refers to the Appellate Body report in *US – Countervailing Measures*, in which the Appellate Body found, *inter alia*, that a provision of the U.S. Tariff Act of 1930 was not inconsistent with U.S. WTO obligations, as such, because the provision did not prevent the DOC from acting in a manner consistent with the SCM Agreement. Japan quoted the following statement by the Appellate Body: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation."[27]

78. Again, however, Japan provides an incomplete quotation. In the very next sentence, the Appellate Body states: "We make no finding in this respect."[28] In the view of the United States, the (fully) quoted statement amounts to nothing more than a statement by the Appellate Body that

[25] *US – Section 301*, para. 7.93.
[26] *US – Section 301*, para. 7.54 (footnote omitted).
[27] Japan Third Party Submission, para. 50, *quoting US – Countervailing Measures*, para. 159, footnote 334.
[28] *US – Countervailing Measures*, para. 159, footnote 334.

it did not need to, and was not going to, address the EC argument that the existence of "discretion is incompatible with the nature of the WTO obligations at issue."[29]

79. The United States reiterates that it does not disagree with the notion that a particular obligation, by its terms, may prohibit discretion. However, as noted above, the obligations at issue in this dispute are not of this nature. Moreover, neither the EC, Japan, China nor any of the other third parties have alleged, let alone demonstrated, that the obligations at issue in this dispute are such as to prohibit the existence of discretion in a measure and the application of the "classical" mandatory/discretionary distinction.

US – 1916 Act

80. China refers to the report in *US – 1916 Act (Japan)* and the assertion of the panel in that case that Article 18.4 of the AD Agreement may override the mandatory/discretionary distinction.[30] China fails to mention that in its review of the panel report, the Appellate Body relegated the panel's observation to the status of *obiter dicta*. The Appellate Body stated as follows:

> We note that answering the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement* would have no impact upon the outcome of these appeals, because the 1916 Act is clearly not discretionary legislation, as that term has been understood for purposes of distinguishing between mandatory and discretionary legislation. Therefore, we do not find it necessary to consider, in these cases, whether Article 18.4, or any other provision of the *Anti-Dumping Agreement*, has supplanted or modified the distinction between mandatory and discretionary legislation. For the same reasons, the Panel did not, in the Japan Panel Report, need to opine on this issue.[31]

81. China then refers to the Appellate Body report in *US – 1916 Act*, asserting that the Appellate Body noted in that report that the mandatory/discretionary distinction "existed prior to the establishment of the WTO, and was relevant only in determining when legislation as such was inconsistent with a Contracting Party's GATT 1947 obligations."[32] First of all, the word "only" is China's. Furthermore, the United States does not see anything remarkable or controversial in the Appellate Body's observation (as the Appellate Body framed it in paragraph 88 of that report). The distinction did exist prior to the establishment of the WTO and, like today, was relevant in assessing the consistency of legislation "as such."

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[29] *US – Countervailing Measures*, para. 39.
[30] China Third Party Submission, *citing US – 1916 Act (Japan)*, para. 6.189.
[31] *US – 1916 Act (AB)*, para. 99 (emphasis added; footnotes omitted).
[32] China Third Party Submission, *citing US – 1916 Act (AB)*, para. 88.

US – Corrosion-Resistant Steel Sunset Review (AB)

82. Finally, China cites to the portion of the report in *US – Corrosion-Resistant Steel Sunset Review*, in which the Appellate Body refers to the mandatory/discretionary distinction as an "analytical tool."[33] The implication that China appears to want to convey is that the Appellate Body has relegated the mandatory/discretionary distinction to a lesser status than it had under the GATT 1947 regime.

83. The United States disagrees that this is the case, and agrees with the following analysis of the panel in *Korea – Commercial Vessels*:

> In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body examined two issues. First, it considered whether certain types of measures could not, as such, be subject to dispute settlement proceedings. Second, the Appellate Body considered whether the measure at issue in that case could be inconsistent with the *AD Agreement*. The Appellate Body treated the first issue as a jurisdictional matter. Thus, having found that there was "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'", the Appellate Body stated that panels are not "obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory". However, this does not mean that the Appellate Body was excluding the application of the traditional mandatory / discretionary distinction, since it went on to acknowledge that the distinction might be relevant as part of the second issue, i.e., the panel's assessment of whether the measure at issue was inconsistent with particular obligations. In addressing that second issue, the Appellate Body "caution[ed] against the application of [the traditional mandatory / discretionary] distinction in a mechanistic fashion". In particular, the Appellate Body condemned the panel for having taken a "narrow approach", and failing to consider other indications as to whether or not the measure at issue was "binding" or of a "normative nature". The use of such phrases suggests to us that the Appellate Body ultimately resolved the case on the basis of whether or not the measure at issue was mandatory (i.e., "binding", or "normative" in nature). Furthermore, we note that the Appellate Body stated that it was not "undertak[ing] a comprehensive examination of this distinction". Having explicitly applied the traditional mandatory / discretionary distinction in *US – Section 211 Appropriations Act*, we fail to see how the Appellate Body could be understood to have excluded the continued application of that distinction in a subsequent case in which it was not even conducting a "comprehensive examination" of the distinction.[34]

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[33] China Third Party Submission, *citing US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 93.
[34] *Korea – Commercial Vessels*, para. 7.63.

56. US: How does the GATT and WTO case law reflect the two rationales of the mandatory/discretionary test described in paragraph 72 of the First Submission of the US?

84. The United States did not use the term "rationale" in paragraph 72 of its first submission. Nonetheless, the United States agrees with the finding of the panel in *Korea – Commercial Vessels* that the bar on presuming bad faith on the part of a WTO Member "is generally understood to be the very rationale behind the traditional mandatory/discretionary distinction."[35]

85. The second point made by the United States was that the mandatory/discretionary distinction "accords with the presumption in many Members' legal systems against conflicts in the interpretation of laws and treaty provisions."[36] The panel in *US – Section 301* acknowledged this point.[37]

57. US: Could the US comment on the reference made by the EC in paragraph 109 of its Submission to the statement of the Appellate Body that Article 18.4 covers "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings"?

86. Although paragraph 109 of the EC submission does not refer expressly to a particular Appellate Body report, the United States believes that the Panel is referring to paragraph 87 of the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review*. The Appellate Body's statement must be understood within the context of the language of Article 18.4, which provides as follows:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Thus, only "generally applicable rules, norms and standards" that satisfy the definition of a "law", "regulation", or "administrative procedure" are covered by Article 18.4. The United States does not believe that a few lines of computer programming code fall within the definition of "administrative procedure."

87. The EC's suggestion that the Appellate Body's statement should be examined out of context to justify an interpretation that is at odds with the text of Article 18.4 is contrary to the customary rules of interpretation of public international law, as reflected in Article 31 of the *Vienna Convention*. It also is an attempt to have the Panel rewrite Article 18.4 in contravention

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[35] *Korea – Commercial Vessels*, para. 7.62.
[36] US First Submission, para. 72.
[37] *US – Section 301*, para. 7.108, footnote 681.

of Articles 3.2 and 19.2 of the DSU, which make clear that a Panel "cannot add to or diminish the rights and obligations provided in the covered agreements."

59. US: Does the US agree with the interpretation of the words "procedures" and "administrative" in paragraph 113 of the First Submission of the EC and paragraph 13 of the Third Party Submission of Japan? Does the US agree with Japan that an "administrative procedure" within the meaning of Article 18.4 of the ADA is "a system or method that directs the administering authority's conduct or management of anti-dumping proceedings"?

88. With respect to paragraph 113 of the EC First Submission, the only interpretation offered by the EC is in the last sentence of the paragraph and concerns the word "procedures." The EC refers to the definition of "procedures" in *The New Shorter Oxford English Dictionary* that pertains to "*Computing*." and that includes computer instructions and sub-routines as "procedures".[38]

89. Article 31(1) of the *Vienna Convention* calls for interpretation "in accordance with the *ordinary* meaning to be given to the terms of the treaty ... ." (Emphasis added). The ordinary meaning of "procedures" is not "computer sub-routines." While Article 31(4) of the *Vienna Convention* provides that a special meaning can be given to a term if it is established that the parties so intended, the burden of proof is on the EC to establish that the Members intended that "procedures", as used in Article 18.4 of the AD Agreement, mean computer instruction and sub-routines.[39] The EC has not offered any evidence, let alone proved, that the drafters intended that the word "procedures" have the special meaning advocated by the EC.

90. The EC's assertion of a special meaning is further undermined by the fact that "procedures" is modified by the adjective "administrative." The word "administrative" is not suggestive of computer instructions or sub-routines. If the drafters had intended the meaning advocated by the EC, presumably they would have used some phrase like "computer procedures."

91. Turning to Japan's proposed definition – "a system or method that directs the administering authority's conduct or management of anti-dumping proceedings" – Japan does not explain the basis for inserting "directs" into its definition. If one simply slaps together the definitions of "administrative" and "procedures" – as Japan has done – the more natural result would be "a system or method pertaining to the conduct or management of anti-dumping proceedings." Neither definition, however, would cover computer instructions or sub-routines.

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[38] EC First Submission, para. 113, note 150. Because Japan says that it agrees with the EC on this point, the U.S. comments on the EC's arguments pertain to the corresponding arguments of Japan, as well. *See* Japan Third Party Submission, para. 13.

[39] *See Report of the International Law Commission to the General Assembly, Yearbook of the International Law Commission*, 1966, Vol. II, p. 222.

92. In this regard, the United States notes that in the Declaration of Valerie Owenby (Exhibit JPN-2), which the EC has now introduced as its own exhibit, Ms. Owenby strays from her script when she states, at paragraph 7, that "the USDOC's standard computer programs have undergone various alterations in response to changes in the law, procedures, policies and technology." (Emphasis added). If, as the EC and Japan would have us believe, computer programs are "administrative procedures," then Ms. Owenby is making the nonsensical statement that "procedures have undergone various alterations in response to changes in procedures."

60. US: First Submission of the US, paragraph 91. How does the US respond to the argument in paragraph 22 of Japan's Third Party Submission that if the AD Margin Program "implements rules or norms adopted by a decision-maker in some other instrument" , the implication is that the program is covered by Article 18.4 of the ADA?

93. The point made by the United States at paragraph 91 was that the Appellate Body has said that instruments setting out rules or norms can be challenged "as such." The United States then explained that a computer program, at most, implements norms established by a decision-maker "in some other instrument." The United States would not dispute that an instrument establishing a norm is a "measure" and generally would fall within the scope of Article 18.4 of the AD Agreement.

94. However, Japan totally ignores the U.S. reference to "some other instrument", and confuses the decision-maker's establishment of a norm with the application of the norm. Japan asserts: "According to Article 18.4 of the *Anti-Dumping Agreement*, decisions adopted regarding the administration of anti-dumping proceedings are implemented through 'laws, regulations and administrative procedures.'"[40] The United States is unclear as to what this means, and, in any event, it is not what Article 18.4 says.

95. The essential point is that computer software does not establish the "rule or norm" of what the EC calls "zeroing." Instead, the software performs calculations that effectuate that methodology or norm in a given case. The result is no different than if a quill pen, a sliderule, or an electronic calculator is used to do the calculations.

96. The United States also would note that Article 16.5 of the AD Agreement requires each Member to notify to the AD Committee "its domestic procedures" governing the initiation and conduct of investigations referred to in Article 5. To the best of our knowledge, no Member has ever notified a computer program to the AD Committee. This suggests an understanding among Members that computer software does not constitute a "procedure."

61. US: What is the US response to the argument of the EC in paragraph 123 of its First Submission that "a computer program and the procedures it contains are perhaps the

[40] Japan Third Party Submission, para. 22.

paradigm example of normative rules that apply mechanistically and automatically to a given set of facts, without further human intervention"?

97. At the outset, the United States would note that it awaits with interest the EC's clarification as to precisely which computer program – or which aspect of a computer program – it is challenging. As implied in the question posed by the United States to the EC, and acknowledged in the Owenby Declaration, the United States has often revised the "standard" computer program. Moreover, that standard computer program is revised in *every* case in which an antidumping margin calculation is performed. Thus, the United States simply would reiterate that a computer program simply performs calculations, and the result is no different than if a quill pen, a sliderule, or an electronic calculator is used to do the calculations.

63. US: Could the US please comment on the statement in paragraph 30 of Japan' s Third Party Submission that

> ***"...in light of (1) the standard AD Margin Calculation Program, (2) the many specific margin calculation programs provided by the EC, (3) the manual, and (4) the testimony of ms. Owenby, model and simple zeroing are norms or rules that are applied by the US on a generalized and prospective basis. In terms of Article 18.4 of the ADA, the norm constitutes an 'administrative procedure.' (footnote omitted) The very purpose of the AD Margin calculation program is to establish standard 'programming procedures' that operate mechanistically to ensure that a particular – 'proper' – calculation methodology is applied universally and predictably. This is the very essence of an administrative norm, rule or procedure because it provides instructions that predetermine or systematize regulatory conduct in a given set of circumstances. These instructions are – and have always been – applied generally and prospectively."***

98. Japan says that "model and simple zeroing are norms or rules." Even were this statement correct, that would not demonstrate that it is the computer program – or a computer sub-routine – that establishes the norm or rule. As the Owenby Declaration confirms, the computer programs *respond to* changes in law, procedures and policies.[41] They do not establish law, procedures or policies.

64. US: What is the view of the US on the argument advanced by Japan and Norway that the fact that the US could alter AD manual and the AD margins programme is not relevant? (paragraph 51 of the Third Party Submission of Japan; paragraph 46 of the Third Party Submission of Norway).

99. The argument is incorrect. The key point is that the Assistant Secretary for Import Administration is not obligated to follow either the AD Manual or use the "AD margins programme" (whatever that term may mean). The Assistant Secretary could decide to grant an

[41] Exhibit JPN-2, para. 7.

offset for non-dumped sales in a given case without making any changes to the Manual or the so-called "standard" program.

65. US: First Submission of the US, paragraph 92. Please comment on the argument of Japan in paragraph 52 of its Third Party Submission that "there is considerable evidence before the Panel that the US treats the zeroing procedure as a binding, mandatory part of its administrative procedures".

100. In fact, there is *no* evidence that the "United States" treats the zeroing procedure – whatever that may be – as binding or mandatory. The evidence before the Panel is that U.S. courts have made clear that "zeroing" is not mandated by the statute.[42] The courts also have made clear that the AD Manual is not a binding legal document.[43]

101. With respect to computer software, Japan refers to the fact that the Manual makes reference to the software.[44] However, as noted, U.S. courts have ruled that the Manual is not binding. Japan fails to explain how a reference to computer software in a non-binding document somehow transforms the software into a binding, mandatory measure. The only other "evidence" offered by Japan is the fact that the United States has consistently refrained from granting offsets for non-dumped sales. However, the fact that an approach has been consistently taken does not mean that the approach is binding or mandatory.

102. Moreover, there is no principle of interpretation in U.S. law that provides that an examination of an agency's past references to a non-binding document, such as the Manual or a piece of programming code, can change the legal status of the document or particular language within the document. Commerce has the discretion to change its approach. Nothing in the Manual, any piece of programming code or anything else in U.S. law changes that. Quite simply, neither the Manual nor any programming code *caused* Commerce to refrain from providing offsets for non-dumped transactions. The Manual and the programming code do no more than reflect an approach that Commerce is free to depart from.

66. US: First Submission of the US, paragraphs 77-78. Please indicate which specific provisions of the Tariff Act were at issue in these two judgements of the Court of Appeals.

103. Chronologically, the first case was *Timken* (Exhibit US-1). In that case, Commerce and Timken, a U.S. company, unsuccessfully argued that section 771(35)(A) of the Tariff Act of 1930, 19 U.S.C. 1677(35)(A), prohibits offsets for negative dumping margins.

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[42] US First Submission, paras. 74-80.
[43] With respect to the status of the AD Manual, see US First Submission, para. 87, and cases cited therein.
[44] Japan Third Party Submission, para. 52.

Section 771(35)(A) defines the term "dumping margin." Koyo, a Japanese company,[45] unsuccessfully argued that section 773(a) of the Tariff Act, 19 U.S.C. 1677b(a) – and, in particular, the "fair comparison" requirement of that provision – requires offsets for negative dumping margins. Section 773(a) deals with the determination of normal value.

104. The second case was *Corus* (Exhibit US-2), in which Corus, a Dutch steel producer,[46] invoked the following provisions of the Tariff Act of 1930 in support of its argument that Commerce must provide offsets for negative dumping margins in investigations:

- Section 771(35), 19 U.S.C. 1677(35), which, among other things, defines the term "dumping margin" and "weighted average dumping margin" for purposes of the Tariff Act of 1930;;
- Section 777A(d)(1)(A)(I), 19 U.S.C. 1677f–1(d)(1)(A)(I), which deals with the comparison method to be used in investigations; and
- Section 751(a)(2)(A), 19 U.S.C. 1675(a)(2)(A), which deals with assessment proceedings.

73. US: Can the US point to any occasion when the AD margin computer program has been applied without the application of "zeroing"?

105. Whether calculations have been done by hand or by computer (using either a PC SAS, Lotus 123, or Microsoft Excel program), the United States is unable to identify any instance where the DOC has given a credit for non-dumped sales.[47] However, it would be erroneous to conclude that this fact is caused by the existence of the computer programs.

[45] Technically, the court used the term "Koyo" to refer collectively to the Japanese producer/exporter and its U.S. subsidiary.

[46] Technically, the court used the term "Corus" to refer collectively to the Dutch producer/exporter and its U.S. subsidiary.

[47] When Commerce determines the existence of margins of dumping in the investigation phase using multiple averaging groups, it weight averages export prices within particular averaging groups. This has the effect of offsetting within the averaging group. The United States assumes that the Panel's question is not addressed to such circumstances.