UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

WT/DS322

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I. INTRODUCTION

1. It is a fundamental principle of customary rules of international treaty interpretation that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.[1] Further, in settling disputes among Members, WTO dispute settlement panels "cannot add to or diminish the rights and obligations provided in the covered agreements."[2]

2. In this dispute, however, Japan asks this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that no such obligation exists. Namely, Japan seeks to read into the agreements an obligation to provide for an offset for export transactions that exceed normal value.

3. Japan does so by inventing an obligation to calculate a margin of dumping for "the product as a whole," which it purports to find in Article 2.4.2 of the AD Agreement. However, no such obligation exists in either Article 2.4.2 of the AD Agreement or the GATT 1994. Moreover, Japan seeks to expand the obligation to make a "fair comparison" of export price to normal value beyond the specific price adjustments required by the text of Article 2.4 of the AD Agreement. This Panel should decline to adopt Japan's interpretation and instead remain faithful to the text of the agreements.

4. In the two disputes that have addressed the issue of offsets to date, panels and the Appellate Body, relying on the "all comparable export transactions" language in the text of Article 2.4.2 of the AD Agreement, have found that this part of Article 2.4.2 of the AD Agreement sets forth an obligation to provide offsets. This language in Article 2.4.2 applies only to antidumping investigations and only when authorities use the average-to-average comparison method pursuant to Article 2.4.2 of the AD Agreement. Accordingly, the findings of a requirement to "offset" do not apply in general, but apply only as a consequence of the use of weighted-average to weighted-average comparisons. In this dispute, Japan seeks to read this language into the requirements for all investigation phase comparison methodologies and all post-investigation proceedings. However, any obligation to provide for an offset to dumping does not extend to other comparison methodologies, assessment proceedings, sunset proceedings, or any other antidumping proceeding.

5. In addition, the United States respectfully disagrees with the Appellate Body's interpretation of Article 2.4.2 and, as further explained below, requests that this Panel decline to follow the Appellate Body's reasoning.

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[1] *India – Patents*, para. 45.

[2] Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

II. FACTUAL BACKGROUND

6. The U.S. antidumping duty law provides domestic producers with a remedy against injurious dumping. The U.S. statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Tariff Act"). The Tariff Act, consistent with the AD Agreement, provides for at least two distinct phases in antidumping proceedings. In the first stage of the proceeding, the investigation phase, the United States determines, among other things, whether dumping existed during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. Separately, the United States determines whether an industry in the United States is materially injured by reason of the dumped imports.

7. If the U.S. Department of Commerce ("Commerce") finds that dumping existed during the period of investigation, and if the U.S. International Trade Commission ("ITC") determines that a U.S. industry was injured by reason of dumped imports, the investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

A. The Article 5 Investigation Phase

8. With respect to the investigation phase of an antidumping proceeding, U.S. law provides that Commerce will normally use the average-to-average method for comparable transactions during the period of investigation.[3] U.S. law also provides for the use of transaction-to-transaction comparisons[4] and, provided that there is a pattern of prices that differs significantly by region or time period,[5] for use of the average-to-transaction method.[6]

9. In the investigation phase, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Section 771(35)(A) of the Tariff Act, consistent with Article 2.1 of the AD Agreement, defines "dumping margin," for the purposes of U.S. law, as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."[7] Thus, for purposes of U.S. law, the "dumping margin" is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. Some of these comparisons could result in dumping margins while other comparisons might result in no dumping margin.

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[3] 19 C.F.R. 351.414(c)(1) (Exhibit JPN-3).
[4] 19 U.S.C. 1677f-1(d)(1)(A) (Exhibit US-4).
[5] In antidumping circles, this pattern commonly is referred to as "targeted dumping."
[6] 19 U.S.C. 1677f-1(d)(1)(B) (Exhibit US-4).
[7] 19 U.S.C. 1677(35)(A) (Exhibit JPN-2).

10. Section 771(35)(B) of the Tariff Act defines "weighted average dumping margin" as 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."[8] Thus, to calculate a single weighted-average dumping margin for each foreign exporter/producer individually examined in an investigation, Commerce first sums the total quantum of dumping found for each comparison group for that exporter/producer in the United States during the period of investigation. Commerce then divides that number by the aggregate export prices of *all* U.S. sales by the exporter/producer during the period of investigation.[9] The resulting margin of dumping is therefore simply an expression of the overall quantum of dumping observed during the period of investigation as a percentage of total sales during the period. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure.[10] If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping proceeding is terminated.[11]

11. If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an "antidumping duty order" or, simply "order" in U.S. parlance).[12] The issuance of an antidumping duty order completes the investigation phase.

B. The Article 9 Assessment Phase

12. Unlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied prospectively to imports of the merchandise subject to the antidumping measure. The normal values or *ad valorem* rate determine the duties that will be assessed at the time the merchandise is imported.

13. The United States has a retrospective assessment system. Under the U.S. system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Specifically, once a year (during the anniversary month of the orders) interested parties may request a review to

[8] 19 U.S.C. 1677(35)(B) (Exhibit JPN-2).
[9] 19 U.S.C. 1677(35)(B) (Exhibit JPN-2).
[10] 19 C.F.R. 351.204(e)(1) (Exhibit US-1).
[11] 19 U.S.C. 1673d(c)(2) (Exhibit US-2).
[12] 19 U.S.C. 1673e(a) (Exhibit US-3).

determine the amount of duties owed on each entry made during the previous year.[13] Antidumping duties are calculated on a transaction-specific basis and are assessed on an importer-specific basis, in much the same way as duties are assessed in prospective assessment systems. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties.

III. PROCEDURAL BACKGROUND

14. This dispute began when Japan requested consultations on November 24, 2004.[14] Consultations in response to this request were held on December 20, 2004.

15. On February 4, 2005, Japan requested the establishment of a panel.[15] On February 28, 2005, the Dispute Settlement Body established a panel pursuant to Japan's request.

IV. GENERAL PRINCIPLES

A. Burden of Proof

16. Under the WTO, the burden of proving that obligations have not been satisfied is on the complaining party. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof with respect to an "as such" claim as well as an "as applied" claim:

> We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
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> > … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*. (emphasis added)
>
> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is

[13] The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[14] WT/DS322/1 (29 November 2004).

[15] WT/DS322/8 (7 February 2005).

> inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.[16]

17. Accordingly, the burden is on Japan to prove that the United States acted in a WTO-inconsistent manner with respect to both Japan's "as applied" and its "as such" claims. The burden is not on the United States as a respondent to prove that it acted in a WTO-consistent manner.

B. Standard of Review

1. Findings of Fact: The Applicable Standard of Review is Whether the Authority's Establishment of Facts was Proper and Whether its Evaluation of Those Facts was Objective and Unbiased, *Not* Whether the Panel Would Have Made the Same Establishment and Evaluation

18. With respect to an investigating authority's establishment and evaluation of facts, the standard of review, as set forth in Article 17.6(i) of the AD Agreement, is as follows:

> in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

19. Several panels have summed up the role of a panel under Article 17.6(i) as the panel did in *US – India Steel Plate*:

> The standard requires us to assess the facts to determine whether the investigating authorities' *own* establishment of facts was proper, and to assess the investigating authorities' *own* evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review.[17]

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[16] *US – Corrosion-Resistant Steel CVD (AB),* paras. 156-157 (emphasis in original) (footnote omitted).

[17] *US – India Steel Plate*, para. 7.6 (emphases added); *see also Argentina – Poultry*, para. 7.45 (Under Article 17.6(i), panels "may not engage in *de novo* review"); *Egypt – Rebar*, paras. 7.8 and 7.14 (acknowledging that Article 17.6(i) precludes *de novo* review); *Guatemala – Cement II*, para. 8.19 ("We consider that is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case.").

2. Conclusions of Law: The Applicable Standard of Review is Whether the Authority's Measure Rests on a Permissible Interpretation of the AD Agreement

20. With respect to an investigating authority's interpretation of provisions in the AD Agreement, the standard of review, as set forth in Article 17.6(ii), is as follows:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

21. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) acknowledges that there may be provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[18]

22. The negotiators of the AD Agreement saw fit to make specific provision for those instances in which the customary rules of treaty interpretation would find a provision of the AD Agreement susceptible to more than one permissible reading. That very fact provides context for the interpretation of the AD Agreement. It reflects the negotiators' understanding that they had left a number of issues unresolved, and that customary rules of interpretation would not always yield only one permissible reading of a given provision. The negotiators also recognized that they could not possibly foresee every interpretive question in the conduct of highly technical and complex anti-dumping proceedings. They understood that, with regard to many of these complex issues, the established practices of national authorities at the time of the AD Agreement's conclusion differed, and that the AD Agreement should allow sufficient flexibility for authorities to continue their different practices.

23. Thus, for example, one recent panel report involved a situation in which Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be less than 50 percent. The panel upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation.[19]

24. Thus, in applying Article 17.6(ii) to the present case, the Panel should recall that there may be multiple permissible interpretations of particular provisions in the AD Agreement.

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[18] *See Argentina–Poultry*, para. 7.341 and n. 223 ("We recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it.").

[19] *Id.*

Accordingly, the Panel should reject Japan's claims where the U.S. position is the result of a permissible interpretation.

V. ARGUMENT

25. The U.S. argument in this submission is structured in the following manner. First, in Section A, the United States addresses Japan's "as such" claims regarding computer programs (which Japan alternatively refers to in the singular and plural forms). Japan has failed to demonstrate both that the programs are measures subject to dispute settlement and that they require WTO-inconsistent action or preclude WTO-consistent action. Therefore, the Panel should reject these "as such" claims.

26. In Section B, the United States responds to Japan's argument that the AD Agreement requires a Member to provide an offset for transactions exceeding normal value, not only in the investigation phase, but in other contexts as well. In this regard, the Appellate Body's finding in *US – Softwood Lumber (AB)* addresses only the use of the average-to-average methodology in the investigation phase, pursuant to Article 2.4.2.[20] With respect to Japan's argument concerning the "fair comparison" obligation under Article 2.4, the United States will demonstrate that Article 2.4 deals only with the making of adjustments to normal value and export price *before* comparisons are made. The "fair comparison" requirement does not extend to the uses of the *results* of those fair comparisons. More importantly, to interpret Article 2.4 as Japan does would render superfluous the average-to-transaction methodology provided for in Article 2.4.2. Moreover, by the terms of the AD Agreement, the obligations with respect to Article 2.4.2 apply only to the investigation phase, and not to any phase thereafter. Therefore, the Panel should reject both Japan's "as applied" and "as such" claims.

27. In Section C, the United States will address Japan's claims as they relate to new shipper, changed circumstances, and sunset reviews. These claims are all dependent upon Japan's argument with respect to the "fair comparison" language of Article 2.4 and its argument regarding the alleged obligation to calculate a margin of dumping for a product as a whole. Having addressed these arguments in Section B, the United States will demonstrate that these claims should be rejected as well.

28. Finally, in Section D, the United States will address Japan's claims regarding ITC investigations. The United States will demonstrate that Japan's claims are speculative, at best, and should be rejected by the Panel. Specifically, even if Japan's claims regarding Commerce's

[20] When referring to the average-to-average comparison methodology, Japan uses the term "model zeroing" as a shorthand. *See* Japan First Submission, para. 18. This shorthand term, however, glosses over the legal and practical issues involved in determining the existence of dumping consistent with the obligations specified in Article 2 of the AD Agreement. For example, Article 2.4 recognizes that there may be multiple distinctions among the normal value and export price sales transactions being examined. Even where the transactions involve the same model of the product, there may be distinctions in the transactions that render the transactions non-comparable, such as level of trade. Japan's shorthand would simply disregard all such distinctions when considering the results of the multiple comparisons.

requirement to provide for an offset are correct, Japan has not demonstrated that Commerce's approach mandates injury determinations by the ITC that are inconsistent with Article 3 of the AD Agreement. With respect to Japan's *as applied* challenges to certain ITC determinations, Japan cannot presume that Commerce's use of different approach would have resulted in the reporting of different margins to the ITC.

A. The Panel Should Reject Japan's "As Such" Claims

29. As an initial matter, the "as such" claims set forth in Japan's panel request are limited to one so-called measure – the "computer program."

30. The panel request is not a model of clarity, but it does identify "USDOC's AD Margin Calculation computer program" in section B.1(a) prior to the listing of articles allegedly violated.[21] Japan's first submission only addresses what it refers to as the "computer programs" as the measures subject to dispute settlement.[22] (Indeed, the core of Japan's argument is limited to the "standard zeroing line" in the "computer programs.")[23]

1. Commerce's "Standard Computer Program" Is Not A Measure

31. The first question is whether there is a "standard computer program" that is a "measure" as understood under Article 6.2 of the DSU. The Appellate Body has indicated that an instrument setting out rules or norms of general application could be challenged "as such."[24] First, Japan variously refers to "computer program" and "computer programs." This distinction is important. In fact, there is no single computer program to be challenged "as such." Commerce staff do not apply a uniform computer program to every case; instead, the computer programs are tailored to each one. Japan implicitly acknowledges as much in its exhibits; if there were only one computer program, then Japan would not have had to include the computer program for each determination in its exhibits.[25]

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[21] That section of the panel request vaguely refers to "other related procedures" and states that these are collectively referred to as "Zeroing," but Japan never identifies what these "other related procedures" are. Moreover, in specifying the articles violated, Japan refers to "the Zeroing procedure" but does not explain what "the Zeroing procedure" is. Paragraph 2 refers to "United States laws, regulations and administrative procedures *described above* . . . ," yet no laws, regulations, or administrative procedures were described above (except perhaps the computer program, which is not a law, regulation, or administrative procedure).

[22] Japan First Submission, para. 57.

[23] *See* Japan First Submission, paras. 60-61. Moreover, Japan has failed to identify any measure to which its claims concerning the issue of offsets when using the transaction-to-transaction methodology apply. The United States has not used the transaction-to-transaction methodology in any of the measures Japan challenges "as applied." In addition, none of the computer programs identified by Japan utilize the transaction-to-transaction comparison methodology.

[24] *US – OCTG from Argentina (AB)*, para. 187; *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 82.

[25] In this regard, Ms. Owenby testifies that Commerce may have "anywhere from two to five separate standard programs to calculate a dumping margin." Owenby Declaration, para. 8 (Exhibit JPN-1).

32. Accordingly, Japan has not even identified a "standard computer program," and it would thus be difficult to conclude that it has identified a measure at all.

33. Further, Japan's argument on the "computer programs" themselves are limited to one line in the programs, the so-called "standard zeroing line." Japan does not even attempt to argue that the "standard computer programs" meet the criteria to be measures. For example, Japan argues that the "standard zeroing line" is "generalized and prospective," without addressing the computer programs in their entirety.[26] For this reason as well, Japan has not met its burden of demonstrating that the computer programs are measures subject to dispute settlement.

34. In any event, even in the context of a particular proceeding, whether one looks at an entire computer program or one line in the computer program, these are simply convenient tools to allow Commerce officials to calculate dumping margins accurately and efficiently. Commerce officials tell the computer programs what to do, rather than the opposite. In that regard, it is difficult to see how a computer program, or one line of a computer program, is an instrument that sets out rules or norms, nor do they have general or prospective application. They do not have general application because they are tailored for each case. Similarly, they do not have prospective application because they apply only to the particular case and do not apply to future cases.

2. Commerce's "Standard Computer Programs" Are Tailored to Each Proceeding and Do Not Mandate Any Action

35. If a particular instrument is challenged as such, then, to be found WTO-inconsistent, it must mandate a breach. The mandatory/discretionary doctrine has been consistently applied in GATT and WTO dispute settlement proceedings. The test reflects the fact that, as the Appellate Body has noted, panels may not presume bad faith on the part of Members.[27] Thus, if a measure provides a Member with the discretion to act in a WTO-consistent manner, it may not be presumed that the Member will exercise that discretion in bad faith.[28]

36. Therefore, even if Commerce computer programs were considered to be measures, they cannot be found to be inconsistent with the WTO Agreements because they do not mandate any action, and Japan has not argued that they do. These programs do not preclude the Commerce decision-maker from offsetting negative dumping margins, nor do they require the Commerce decision-maker to ignore negative dumping margins. If the Commerce decision-maker decided to offset negative dumping margins in a particular case, his decision would be implemented simply by using a different set of computer instructions.

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[26] Japan First Submission, para. 60.
[27] *Brazil – Aircraft (AB)*, para. 114.
[28] This does not preclude the possibility that a particular obligation, by its terms, prohibits such discretion.

37. Japan has referred to nothing in U.S. law which would support the conclusion that computer programs are anything but the means by which decision-makers implement their decisions, or that such programs require decision-makers to act in any particular way.

B. The United States' Approach to Investigating Whether Dumping Exists and Assessing Antidumping Duties is Consistent with Article 2.4 of the AD Agreement

38. Turning to the legal basis for Japan's claims, the AD Agreement provides no obligation to offset dumping with transactions that exceed normal value. The Appellate Body has only found such an obligation to exist based on the particular text of Article 2.4.2, which applies only within the narrow confines of determining whether dumping exists in the investigation phase when using the average-to-average methodology in Article 2.4.2.[29] In this regard, the Appellate Body's report in *US – Softwood Lumber* specifically recognized that the issue before it was whether so-called "zeroing" was prohibited under the average-to-average methodology found in Article 2.4.2.[30] The basis of the Appellate Body's finding was the obligation found in Article 2.4.2 that "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 . . . .*"[31]

39. The Appellate Body did not base its findings in *US – Softwood Lumber* on an interpretation of the obligation to make a "fair comparison" of export price and normal value as set forth in Article 2.4. As discussed below, the obligation to make a "fair comparison" under Article 2.4 addresses the appropriate adjustments that an investigating authority must make for differences between export price and normal value that affect price comparability.

40. Indeed, reading the obligation to make a "fair comparison" in Article 2.4 to require an offset to dumping with transactions that exceed normal value in all situations would violate a key tenet of customary rules of treaty interpretation, namely that an "interpretation must give meaning and effect to all the terms of a treaty."[32] "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[33]

41. Specifically, and as further discussed below, an interpretation that Article 2.4 imposes such an obligation would render meaningless the targeted dumping methodology set forth in Article 2.4.2. A general obligation to provide for an offset to dumping for sales exceeding normal value would mean that an investigating authority must, mathematically, realize the same result regardless of whether it used the average-to-average methodology in the investigation

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[29] The United States will demonstrate below that even this finding is flawed.
[30] *US – Softwood Lumber (AB)*, para. 104, 105, 108.
[31] Emphasis added. *See US – Softwood Lumber (AB)*, para. 82, 86, 98.
[32] *US – Gasoline*, p. 23.
[33] *US – Gasoline*, p. 23.

phase as set forth in Article 2.4.2, or the average-to-transaction methodology as set forth in the targeted dumping provision of Article 2.4.2. Such an interpretation would reduce the targeted dumping clause to inutility.

42. In addition, any obligation to provide for an offset cannot stem from a requirement to calculate margins of dumping for "the product as a whole" in all antidumping proceedings. The text of the AD Agreement provides for no such obligation.

43. Not providing an offset for non-dumped comparisons when not utilizing the average-to-average methodology in the investigation phase is a permissible interpretation of the AD Agreement, and the United States respectfully requests that the Panel so find, pursuant to the standard of review in Article 17.6(ii).

1. Article 2.4 Does Not Contain Obligations With Respect to "Zeroing"

44. The United States will first demonstrate that the obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets. Article 2.4 addresses only the required adjustments that must be made to export price and normal value in order to account for "differences which affect price comparability." Not only does the text of Article 2.4 itself not provide an obligation with respect to offsets, but to interpret the obligation to make a "fair comparison" – as Japan does – as the basis for a general requirement to provide offsets would render the targeted dumping methodology in Article 2.4.2 superfluous. As such, Japan's claims based on the obligation to make a "fair comparison" under Article 2.4 should be rejected.

a. The "Fair Comparison" Obligation in Article 2.4 Refers to the Adjustments Necessary to Account for Differences in Export Price and Normal Value Which Affect Price Comparability

45. Japan asserts that Article 2.4 of the Agreement "imposes a fundamental obligation that limits the discretion of the administering authorities" and requires the authorities to offset positive and negative margins in any calculation of dumping margins "in any type of antidumping proceeding."[34] In particular, Japan contends that the "fair comparison" obligation in Article 2.4 means that by "excluding the negative results of any comparisons from the aggregation of total dumping, the zeroing procedures overstate the total amount of dumping by an amount equal to the excluded negative values."[35]

46. An analysis of Japan's claims necessarily begins with the text of Article 2.4. Article 2.4 of the AD Agreement provides as follows:

> 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, normally at the

[34] Japan First Submission, para. 85.
[35] Japan First Submission, paras. 85, 104

> ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

47. From the text, it is clear that Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities.

48. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Rebar* explained:

> [A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value.[36]

49. The panel's discussion in *Egypt-Rebar* of the scope of the fair comparison language was expressly quoted and supported by the panel in *Argentina – Poultry*.[37] 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.[38] 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.[39] 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

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[36] *Egypt – Rebar*, para. 7.335.
[37] *Argentina – Poultry*, para. 7.265
[38] *See, e.g., US – Softwood Lumber (Panel)*, para. 7.356; *US – Hot-Rolled Steel (AB),* para. 179.
[39] *See, e.g., Argentina – Poultry*, para. 265; *Egypt – Rebar*, para. 7.269.

> 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 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.*[40]

50. 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."[41] Thus, Japan's proposed interpretation of Article 2.4 to encompass the *results* of comparisons between export price and normal value is erroneous; Article 2.4 does not apply to the *results* of comparisons.

51. Japan has not offered any argument as to how an offset to the dumping found on one export transaction as a result of a distinct export transaction having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under Article 2.4. Quite the opposite, Japan itself recognizes a distinction between the adjustments that are required pursuant to Article 2.4 in order to make a "fair comparison," and "zeroing."[42] Accordingly, because the "fair comparison" obligation in Article 2.4 refers to the required price adjustments, it does not create an obligation with respect to how the results of those comparisons are treated.

52. Japan appears to be arguing that in addition to the appropriate price adjustments envisioned in Article 2.4, the United States is obligated to provide some form of compensation in the process of aggregating the results of its price comparisons to negate the effect of not allowing an offset for sales that exceed normal value.[43] The focus of Article 2.4, however, is limited to the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. Even as described by Japan, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves.[44] Consequently, it falls outside the scope of Article 2.4.[45]

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

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

[42] Japan First Submission, para. 107.

[43] Japan First Submission, para. 107.

[44] Japan First Submission, para. 2.

[45] The United States notes that Japan's "as applied" claims include claims of inconsistency with Article 18.4 of the AD Agreement and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"). Assuming for purposes of argument that Japan's positions regarding "symmetry" and offsets for "negative dumping" are valid, Japan fails to explain how the obligations of these provisions relate to determinations made in specific antidumping proceedings. Accordingly, the Panel should reject Japan's claims.

53. Not content with the text of the Article 2.4 as written, Japan now seeks to read into the phrase "fair comparison" the words "good faith" in an attempt to create a new obligation.[46] However, the customary rule of interpretation reflected in Vienna Convention Article 31 calls for a "good faith" reading of the actual text of an agreement, in its context and in light of the agreement's object and purpose; substituting or inserting words into the text that are not there – even if those words are "good faith" – is not in fact a good faith reading. The principles of interpretation set forth in Article 31 "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[47] As discussed above, a proper reading of the actual language of the AD Agreement yields the conclusion that the phrase "fair comparison" in Article 2.4 simply has nothing to do with offsetting.

54. In short, the United States cannot be found to have violated an obligation that does not exist. There is simply no "general obligation" in Article 2.4 to offset any negative differences between normal value and export price.

b. Japan's Interpretation of Article 2.4 Cannot Be Reconciled With The Text of the AD Agreement Because Offsetting Positive Margins with Non-Dumped Sales Would Render the Targeted Dumping Provision Superfluous

55. Japan's interpretation of the "fair comparison" requirement in Article 2.4 to create a general obligation to offset dumping margins also cannot be reconciled with the remaining text of the AD Agreement in a manner consistent with customary rules of treaty interpretation. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In this respect, an offset requirement would render the targeted dumping exception in Article 2.4.2 a complete nullity.

56. The express terms of Article 2.4.2 demonstrate that the drafters of the AD Agreement did not intend to require that dumped comparisons be offset with non-dumped comparisons in determining an exporter's final overall dumping margin. The "targeted dumping" methodology was drafted as an exception to the obligation to engage in a symmetrical comparison in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ." When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

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[46] Japan First Submission, para. 36.
[47] *India Patent*s, para. 45.

57. The targeted dumping methodology is not an exception to the "fair comparison" requirement of Article 2.4. It is only an exception to the symmetrical comparison requirements for investigations set forth in the first sentence of Article 2.4.2. Article 2.4, on the other hand, applies to all those comparison methodologies. Japan asserts that "zeroing" violates the "fair comparison" obligations of Article 2.4 because it is "inherently biased."[48] However, if Japan is correct, then the "fair comparison" obligation, when applied to the targeted dumping methodology, would require the investigating authority to provide for an offset for transactions that exceed normal value even when using the targeted dumping methodology.

58. If offsetting were required, the overall dumping margin calculated for an exporter must, mathematically, be the same under a symmetrical comparison of weighted averages of normal values and export prices, or an asymmetrical comparison of weighted average normal values and individual export prices.[49]

59. An interpretation of Article 2.4 of the AD Agreement that requires such offsets in general would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning. A panel may not interpret a provisions of the AD Agreement in such a way that its express provisions are rendered meaningless or superfluous.[50] As the Appellate Body has consistently found, "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[51] An interpretation of Article 2.4 of the AD Agreement to require that dumping margins be offset by non-dumped transactions is therefore impermissible and must be rejected.

2. There Is No Obligation In the AD Agreement to Calculate One Margin of Dumping for the "Product As A Whole"

a. Article 2.4.2 Addresses Only the Methodologies Available to Determine the Existence of Dumping

60. Having demonstrated that any obligation to provide for offsets cannot stem from the "fair comparison" obligation in Article 2.4, the United States now turns to Japan's claim that Members must calculate the "margin of dumping" for the "product as a whole." Article 2.4.2 establishes an

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[48] Japan Fist Submission, para. 9, 194.

[49] The reason for this is that, if offsetting is required, then all non-dumped sales (i.e., negative values) will offset the margins on all of the dumped sales (i.e., positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

[50] See *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages*, p. 12; *Egypt – Rebar*, para. 7.277.

[51] *US – Gasoline* at p. 23; see also *Japan – Alcoholic Beverages* at p. 12 (same); *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted Feb. 25, 1997, p. 16 (same).

obligation for the administering authority to determine whether dumping "exists" for purposes of the Article 5 investigation phase based on certain methodological constraints. The text of Article 2.4.2 of the AD Agreement does not require Members to calculate a margin for the "product as a whole" and Japan does not establish that such an obligation otherwise exists.

61. Article 2.4.2 provides three methodologies for comparing export prices to normal values in an investigation: (1) weighted-average-to-weighted-average comparisons; (2) transaction-to-transaction comparisons; and, (3) under certain circumstances, weighted-average-to-transaction comparisons. In most circumstances, each of these methodologies will result in multiple comparisons. This is self-evident with respect to the second and third methodologies, as neither one is limited to the extremely rare circumstance of investigations involving only one export transaction. Under these methodologies, each export transaction will result in a separate comparison.

62. Article 2.4.2 simply does not address the issue of aggregating the results of multiple comparisons. While the specified methodologies will, in most cases, lead to multiple comparisons between export transactions and normal values, Article 2.4.2 does not provide any guidance as to how the results of those comparisons are to be aggregated to determine a single overall margin. In fact, Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all.

63. Emblematic of the narrow scope of Article 2.4.2 is that fact that nothing in Article 2.4.2 requires the expression of the margin of dumping as a percentage. Article 5.8 is the only place in the AD Agreement where the amount of dumping must somehow be expressed as a percentage margin so that it may be measured against the *de minimis* standard.

b. Article 2.4.2 of the AD Agreement Does Not Oblige Members to Offset Positive and Negative Dumping Margins

64. The United States now turns to the issue of whether the text of the AD Agreement imposes an obligation to provide for offsets. Japan offers *no* textual analysis in support of its claim that offsetting is required by Article 2.4.2.

65. Japan's failure to provide a textual basis for its argument is unavoidable because the scope of the AD Agreement and GATT 1994, with respect to the measurement of dumping, is limited by its terms to instances in which there are *positive* differences between normal value and export prices.

66. In the AD Agreement, the word "margin" is modified by the word "dumping," giving it a special meaning. Paragraph 2 of Article VI of GATT 1994 provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an

importing country at less than its normal value," *i.e.,* the price difference when the product has been dumped.

67. The provisions of the AD Agreement must be read in conjunction with Article VI of GATT 1994.[52] While the AD Agreement does not provide a definition of "margin of dumping," it does define "dumping" in a manner consistent with the definition of "margin of dumping" provided in Article VI. Article 2.1 provides:

> For 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* its 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.[53]

68. The express terms of GATT 1994 provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT or the AD Agreement for the concept of "negative dumping."

69. Accordingly, the Appellate Body and panels have never found in the text of the AD Agreement an independent obligation to offset margins. The Appellate Body and panels have only ever found an "offsetting" obligation to exist in the narrow context of the investigation phase average-to-average methodology. In *US – Softwood Lumber*, the Appellate Body found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-

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[52] This interpretative principle has been underscored by the Appellate Body. In *Argentina -- Safeguard Measures on Imports of Footwear* and *Korea -- Definitive Safeguard Measures on Imports of Certain Dairy Products*, the Appellate Body stated that:

> [T]he GATT 1994 was incorporated into the WTO Agreement as one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the WTO Agreement. … The Agreement on Safeguards is one of the thirteen Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement. It is important to understand that the WTO Agreement is one treaty.
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> Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. … [A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.

Argentina -- Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted January 12, 2000, para. 81. This basic principle applies equally to Article VI of the GATT 1994 and the AD Agreement. The official title of the AD Agreement is "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994." As an agreement whose object is to implement Article VI of GATT 1994, the AD Agreement is, by its very title, anchored in Article VI of GATT 1994.

[53] Emphasis added.

average-to-weighted-average methodology."[54] The Appellate Body discussed both the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2.[55] While the Appellate Body discussed both, however, the textual basis for the Appellate Body's finding lies in the phrase "all comparable export transactions" used in Article 2.4.2.

70. In this regard, the Appellate Body's conclusion that "dumping is defined in relation to a product as a whole," at most, relates only to the determination of whether dumping exists when using the average-to-average methodology under Article 2.4.2.[56] The phrase "all comparable export transactions" does not apply to the transaction-to-transaction methodology or the average-to-transaction methodology.

71. Any offsets that occur in this context reflect the use of *averages* of all export prices and normal values. That is, in applying the average-to-average methodology, the Appellate Body found that a Member may make multiple intermediate comparisons.[57] However, in order to establish the weighted average margin of dumping for "all comparable export transactions," the Appellate Body concluded that the Member must aggregate all of the results of those intermediate comparisons including those comparisons which are not dumped. The offsets, therefore, are tied to the use of the average-to-average methodology in an investigation, and do not arise out of any independent obligation to offset prices.

72. This conclusion 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.

c. Article 2.4.2 Only Applies to the Article 5 Investigation Phase of Anti-Dumping Proceedings

73. Japan contends that the Panel should not recognize a distinction between the investigation phase and other phases of an antidumping proceeding.[58]

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[54] *US – Softwood Lumber (AB)*, para. 108.
[55] *Id*., paras. 86 - 103.
[56] *U.S. – Softwood Lumber (AB)*, para. 93, 96.
[57] *US – Softwood Lumber*, para. 97.
[58] Japan First Written Submission at para. 138, 139, 142, 144.

74. Regardless of whether the Panel follows the reasoning in *US – Softwood Lumber*, the text of the AD Agreement and prior panel and Appellate Body reports do not support Japan's claims. The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the AD Agreement Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, which requires that all the terms of an agreement be given meaning.[59] Japan ignores the plain language of Article 2.4.2 and improperly seeks to expand it to other proceedings.

75. 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.)

76. Other provisions of the AD Agreement also expressly limit their application to the investigation phase of an antidumping proceeding and do not apply elsewhere. For instance, Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated by or on behalf of a domestic industry." Similarly, Article 5.7 provides that evidence of dumping and injury must be considered simultaneously "in the decision whether or not to initiate an investigation" and "during the course of the investigation." Panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an antidumping proceeding.[60] As the panel found in *US – Corrosion-Resistant Steel AD Sunset Review*:

> [T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.[61]

77. The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the "investigation phase." Thus, the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase. Indeed, a

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[59] *See, e.g., Japan – Alcohol Taxes (AB)*, sections G & H (discussing fundamental principle of effectiveness in treaty interpretation); *see also US – 1916 Act (AB)*, para. 123.

[60] *US – DRAMS AD*, para. 521, at footnote 519 ("investigation" means the investigation phase leading up to the final determination of the investigating authority); *EC – Bed Linen (Article 21.5) (Panel)*, para. 6.114 (Article 5.7 applies to investigations).

[61] *US – Corrosion-Resistant Steel AD Sunset Review (Panel)*, para. 7.70.

panel has already recognized that the application of Article 2.4.2 is expressly limited to the investigation phase of an antidumping proceeding. As the panel in *Argentina – Poultry* found:

> Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase."[62]

Thus, the ordinary meaning of the term "investigation phase," as it is used in the AD Agreement, does not include subsequent phases, such as assessment proceedings.

78. Japan's argument that Article 2.4.2 applies in Article 9 assessment proceedings ignores the clear distinctions made in the text of the AD Agreement between original investigations and other proceedings, distinctions that Japan itself recognizes. Specifically, Japan acknowledges that the AD Agreement distinguishes between the purpose of investigations and assessment proceedings, when it notes that Article 2.4.2 is concerned with establishing the "existence" of margins of dumping in the investigation phase of an antidumping proceeding,[63] whereas Article 9 proceedings are concerned with determining the amount of duty assessed.[64]

79. Despite this acknowledged distinction, Japan repeatedly asks the Panel to ignore the explicit limitation in Article 2.4.2 to investigations and extend the requirements of that provision to Article 9 assessment proceedings. Japan complains, for example, that in the assessment proceedings at issue here, the United States did not apply the investigation phase comparison methods set out Article 2.4.2 of the AD Agreement.[65] But as discussed previously, Article 2.4.2, by its express terms, does not apply outside of the investigation phase and, in the absence of such application, Japan's claim is without merit.

80. The limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[66] Contrary to Japan's contention, the AD Agreement does not require Members to examine whether margins of dumping "exist" in the assessment phase. Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping "exists" above a *de minimis* level such that the imposition of antidumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation

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[62] *Argentina – Poultry*, para. 7.357.
[63] Japan First Submission, para. 80.
[64] Japan First Submission, para. 149.
[65] Japan First Submission, para. 80.
[66] *See, e.g.*, *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 87.

of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.[67]

81. The express limitation in Article 2.4.2 to the investigation phase is also consistent with the fact that the antidumping systems of Members are different for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* assessment. If the requirements of Article 2.4.2 regarding comparison methods applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or transaction-to-transaction method, because such systems compare weighted average normal values to individual export prices to assess dumping duties on individual transactions. Thus, to retain the flexibility in assessment systems reflected in Article 9, it was not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase.

d. Article 9 Does Not Incorporate the Requirements of Article 2.4.2

82. For the reasons discussed above, an analysis of the text of Article 2.4.2 demonstrates that Article 2.4.2 does not apply to assessment proceedings. Japan, however, argues that Article 2.4.2 is nonetheless applicable to assessment proceedings by virtue of Article 9.3 of the AD Agreement. Article 9.3 provides:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

83. Japan interprets Article 9.3 to mean that all the provisions of Article 2 – including Article 2.4.2 – are directly applicable in the context of assessment proceedings.[68]

84. But Japan's interpretation is contrary to the express terms of the AD Agreement. The general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. As discussed above, Article 2.4.2 by its own terms is explicitly limited to the investigation phase. The text of Article 9.3, therefore, does not support Japan's argument that the requirements of Article 2.4.2 apply in assessment proceedings.

85. The reference in Article 9.3 to Article 2 means that the amount of antidumping duty assessed may not exceed the amount of antidumping duty calculated in accordance with the

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[67] *See e.g*, AD Agreement, Article 9.1 ("the decision whether the amount of antidumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the importing country or customs territory"); Article 9.3 ("the amount of antidumping duty shall not exceed the margin of dumping as established under Article 2").

[68] Japan First Submission, paras. 135-141.

general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. As the panel found 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 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.[69]

86. The context of Article 9 also demonstrates that there is no basis in Article 9 to overcome the explicit language in Article 2.4.2, limiting its reach to investigations. As the panel found in *Argentina – Poultry*:

> [N]othing in the AD Agreement explicitly identifies the form that anti-dumping duties must take . . . . As the title of Article 9 of the AD Agreement suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected.[70]

87. In other words, Article 9 contains certain procedural obligations applicable in assessment reviews. However, Article 9 does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the investigation phase. Instead, Article 9 establishes time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess antidumping duties collected by a Member.[71]

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[69] *Argentina – Poultry*, para. 7.357.

[70] *Argentina – Poultry*, para. 7.355.

[71] Article 9.3.1 and Article 9.3.2, respectively, establish for retrospective and prospective assessment systems timetables with respect to the amount of time within which final liability for payment of antidumping duties is to be determined or refunds of any duty paid in excess of the margin of dumping are to made.

88. Accordingly, Japan's claim that the United States is required to provide an offset to dumping in the assessment phase must fail.

e. The Appellate Body's Report in *US – Softwood Lumber* is Flawed and Should not Be Followed by This Panel

89. In *US – Softwood Lumber*, the Appellate Body found that due to the failure of Commerce to account for non-dumped comparisons in an antidumping investigation on softwood lumber from Canada, the United States had acted inconsistently with Article 2.4.2 of the AD Agreement.[72] The United States believes that the Appellate Body erred in finding that the AD Agreement requires Members, in the investigation phase, to calculate and give credit for weighted average comparisons when the export price exceeds the normal value. The Panel is not obligated to follow the Appellate Body's reasoning. Therefore, while the United States recognizes that the Dispute Settlement Body adopted the Appellate Body report in *US – Softwood Lumber*, we feel compelled to point out for the Panel, in the context of Japan's claims in this dispute, the errors in the Appellate Body's reasoning.

90. As stated above, the Appellate Body's finding in *US – Softwood Lumber* was based on a perceived obligation within Article 2.4.2 to provide an offset in an investigation when the investigating authority uses the average-to-average methodology.[73] The Appellate Body's finding, however, is contradicted by the text and negotiating history of the AD Agreement. Article 2.4.2 restricts the use of the average-to-transaction method, a method that was commonly used in antidumping investigations before the Uruguay Round. Article 2.4.2 was not intended to require an offset for non-dumped sales in an antidumping investigation.

91. The negotiating history confirms that Article 2.4.2 does not require an offset for negative dumping. Pursuant to customary principles of treaty interpretation, as reflected in Article 32 of the *Vienna Convention on the Law of Treaties*, the Panel may have recourse to this preparatory material to confirm the meaning arrived at through the application of the rules reflected in Article 31 or to determine the meaning should an Article 31 analysis leave the meaning ambiguous or obscure, or leads to an absurd or unreasonable result . The Appellate Body's analysis would have benefitted from a consideration of this negotiating history.

92. Prior to the entry into force of the WTO Agreement, many users of the antidumping remedy, including the United States and the EC, determined the existence of dumping margins by using the average-to-transaction comparison method.[74] Several delegations sought to negotiate a

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[72] *US – Softwood Lumber (AB)*, para. 183(a).

[73] *US – Softwood Lumber (AB)*, para. 104, 105, 108.

[74] *Communication from Japan Concerning the Anti-Dumping Code*, MTN.GNG/NG8/W/81 (9 July 1990), at 2; *Submission of Japan on the Amendments to the Anti-Dumping Code*, MTN.GNG/NG8/W/48 (3 August 1989), at 5; *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/51/Add. 1 (22 December, 1989), at 4; *Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989), at 8.

change in this practice in the Uruguay Round negotiations.[75] The negotiations over this "asymmetry" issue were protracted and difficult.

93. Article 2.4.2 of the AD Agreement was ultimately agreed upon specifically to address this "asymmetry" issue. Article 2.4.2 established the major new requirement that in antidumping investigations, investigating authorities would normally establish the existence of margins of dumping on the basis of either the average-to-average method or the transaction-to-transaction method. Under Article 2.4.2, the use of the average-to-transaction method is limited to "targeted dumping" situations; *i.e.*, situations involving "a pattern of export prices which differ significantly among different purchasers, regions or time periods."[76] If the average-to-transaction method is used in an investigation, Article 2.4.2 provides that Members must explain "why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

94. Separately, a number of signatories to the Tokyo Round Anti-Dumping Code, including the United States and the EC, calculated the final overall margin of dumping for a company by aggregating the positive dumping amounts for comparisons where normal value exceeded export price and dividing that number by the aggregate of all export prices.[77] So-called "negative margins" (for those comparisons where export price exceeded normal value) were not taken into account in aggregating the overall amount of dumping. This approach was well-known by the Uruguay Round negotiators and was referred to as "zeroing." Concurrent with the negotiations, "zeroing" was reviewed by two dispute settlement panels and was found to be consistent with the Anti-dumping Code.[78] In the Uruguay Round negotiations, several delegations sought to prohibit "zeroing" and to require an offset for "negative dumping."[79] The negotiators did not agree to any such requirement. While negotiators reached agreement to address the "asymmetry" issue through, and to the extent provided for in, the language of Article 2.4.2 of the AD Agreement, the Agreement ultimately did not address the "zeroing" issue.

95. For the foregoing reasons, the reasoning of the Appellate Body in *US – Softwood Lumber* is not persuasive, and the arguments and evidence before this Panel demonstrate that no obligation to offset is found in Article 2.4.2 of the AD Agreement.

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[75] *Id*.

[76] AD Agreement, Article 2.4.2.

[77] With respect to the term "margins of dumping" as it is used in Article 2.4.2, the United States notes that both the GATT 1994 and the AD Agreement reflect the drafters' use of the term to refer both to the results of particular comparisons between normal value and export price AND to the overall results of those comparisons. As previously discussed, Article 2.4.2 provides three different comparison methodologies and each will often result in multiple "margins of dumping" as the term is used in Article 2.4.2. It is only with respect to Article 5.8, wherein it is provided that the investigating authority must terminate an investigation if it determines that the margin of dumping is *de minimis*, that the AD Agreement requires Members to determine a single percentage-based margin of dumping based on the export price.

[78] *See EC – Cotton Yarn*, paras. 500-501; *EC – Audio Tapes*, para. 356.

[79] *See Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989), at 7; *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/46 (3 July 1989), at 7.

C. The Panel Should Reject Japan's "As Such" Claims Regarding New Shipper, Changed Circumstances and Sunset Reviews

96. Japan asserts that its "challenge encompasses the prohibition on zeroing under any method of comparing normal value and export price" including "administrative or periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews."[80] Japan appears to suggest that its "as such" claims concerning investigations and assessment proceedings also apply to the three types of reviews to which it refers. However, Japan does not offer any new arguments concerning these types of reviews.

97. In the preceding sections, the United States has demonstrated that the Panel should reject Japan's claims insofar as investigations and assessment proceedings are concerned. Specifically, the United States has demonstrated that the "fair comparison" obligation of Article 2.4 cannot be read to require offsets in all proceedings. The United States has demonstrated that the Appellate Body in *US – Softwood Lumber* only addressed whether Article 2.4.2 requires an offset when the investigating authority uses the average-to-average methodology in the investigation phase. Moreover, by its own terms, the obligations of Article 2.4.2 apply only to the investigation phase, and not to any other antidumping proceeding. For the same reasons, the Panel should reject Japan's claims with insofar as new shipper, changed circumstances and sunset reviews are concerned.

98. Additionally, with respect to changed circumstances reviews and sunset reviews, Japan argues that Commerce cannot rely on margins calculated in prior proceedings, because "these margins are not based on a fair comparison and are not calculated for the product as a whole."[81] However, Japan never demonstrates that Commerce *does* rely on such margins. Indeed, neither Commerce's determination of "whether the continued application of antidumping duties is necessary to offset dumping" under Article 11.2, nor its likelihood determination in a sunset review under Article 11.3 is dependent on any specific magnitude of dumping.

99. Article 11.2 obligates a Member to terminate an antidumping duty when the Member determines "that the anti-dumping duty is no longer warranted." Specifically, the Member is charged with determining "whether the continued application of antidumping duties is necessary to offset dumping . . . ." The panel in *US – DRAMS AD* found:

> The word "continued" covers a temporal relationship between past and future. . . . Thus, the inclusion of the word "continued' signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.[82]

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[80] Japan First Submission at para. 6.
[81] Japan First Submission, para. 157.
[82] *US – DRAMS AD*, para. 6.27.

100. Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

101. Thus, the focus of a changed circumstances review under Article 11.2 and the focus of a sunset review under Article 11.3 is on future behavior, *i.e.*, whether the continued application of antidumping duty is necessary to offset dumping in the future, and whether dumping and injury are likely to continue or recur in the event of expiry of the duty. Neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is determinative. Indeed, such precision is unattainable in what is inevitably a somewhat speculative projection of future behavior.[83] Because neither determination relies on the *magnitude* of the margin of dumping in any of the assessment reviews, Japan has failed to establish a *prima facie* case concerning Commerce's likelihood determination in either a changed circumstances review or a sunset review.

D. ISSUES RELATING TO JAPAN'S CLAIMS CONCERNING ITC INJURY DETERMINATIONS

1. "As Such" Claims Under Article 3 of the AD Agreement

102. As discussed above, Japan fails to show how the standard computer program can require Commerce to breach any WTO obligations. But even if Japan has identified an actionable measure regarding Commerce's dumping determination, Japan has failed to explain how Commerce's discretion to not offset dumping based on non-dumped transactions mandates that the ITC breach any WTO obligations.

103. With respect to its "as such" claims concerning the ITC's injury determinations, the crux of Japan's argument is that the evidence upon which the ITC bases its injury determinations is not "positive evidence" because it results from a flawed dumping determination.[84] Japan fails to explain how Commerce's approach *necessarily* results in a lack of positive evidence in any, let alone *every* injury determination.

104. Indeed, Japan's explanation of its claim is based on speculation about a series of consequences that *may* occur because of Commerce's approach. For example, Japan states that "the flaws in the calculation procedures *may* lead to a finding of dumping for a product where there is no dumping."[85] Similarly, Japan states that the "dumped imports *may* be shown to have increased sharply during the period of investigation, whereas in fact there *might* have been: no

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[83] *See, e.g.*, *US - Argentina Sunset (AB)*, para. 341 (discussing prospective nature of analysis in Article 11.3 reviews). Although there is no requirement to quantify the amount of dumping likely to continue or recur, as discussed below, the United States does so under its domestic law. Commerce transmits this information to the ITC.

[84] *See* Japan First Submission, para. 114.

[85] Japan First Submission, para. 115.

dumping at all; a slight increase in dumped imports; or, even a decline or disappearance of dumped imports."[86]

105. In this regard, Japan implicitly admits that Commerce's approach does *not* mandate a breach with respect to the injury determination. The assertion that the approach "might" lead to one result or another is not evidence that it mandates a breach. Japan simply has not met its burden of showing that Commerce's application of the standard computer program *requires* the ITC to make injury determinations that are not based on positive evidence or that are otherwise inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement.[87]

2. "As Applied" Claims Under Article 3 of the AD Agreement

106. The speculative nature of Japan's Article 3 challenges is further confirmed by its attempts to argue that the ITC acted inconsistently with the provisions of that Article in reaching certain injury determinations.

i. *CTL Plate Injury Determination*[88]

107. Japan contends that Commerce's calculation of dumping margins in the *CTL Plate* investigation rendered the ITC's corresponding injury determination inconsistent with Articles 3.1, 3.2, 3.3, 3.4, and 3.5 of the AD Agreement.[89] Japan argues that the ITC investigation was not objective and its determination was not based on positive evidence because the ITC had "no objective, verifiable, credible, or otherwise reliable evidence regarding dumped import volumes and prices, and the magnitude of dumping."[90]

108. The Panel should dismiss Japan's claims concerning the *CTL Plate* injury determination, whether or not Commerce's decision not to offset was inconsistent with the AD Agreement. First, as noted above, the United States respectfully disagrees with the Appellate Body's conclusion that offsets are required when using the average-to-average methodology under Article 2.4.2. Therefore, the United States respectfully disagrees that Commerce's decision not to "offset" in this investigation was WTO-inconsistent. Second, Japan's assertion that the margins calculated pursuant to the average-to-average approach in this investigation caused the ITC to act in a manner inconsistent with Articles 3.1, 3.2, 3.3, 3.4, and 3.5 is speculative and unfounded.

109. Even assuming that the margin calculations were inconsistent with the AD Agreement, it does not follow that Commerce would have reported different margins of dumping to the ITC had

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[86] Japan First Submission, para. 116.

[87] *See United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted December 17, 2004, para. 202.

[88] *Cut-To-Length Carbon Steel Plate from Japan*, Investigation Nos. 701-TA-387-391 and 731-TA-816-821, (Final), USITC Pub. No. 3273 (January 2000) (Exhibit JPN-10.B).

[89] Japan First Submission, paras. 69, 173-175.

[90] Japan First Submission, para. 174.

it applied a different approach. Because the AD Agreement provides more than one permissible comparison methodology by which dumping margins may be calculated (average-to-average, transaction-to-transaction, or in certain circumstances, average-to-transaction), Japan cannot presume or establish that Commerce necessarily would have calculated different dumping margins in the *CTL Plate* investigation. In the absence of such a showing, Japan has failed to meet its burden to demonstrate that the ITC's injury determination in *CTL Plate* is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement.

ii. *ITC Sunset Reviews in Ball Bearings*[91] *and Corrosion Resistant Steel* [92]

110. Japan also asserts that Commerce's calculation of dumping margins resulted in certain sunset determinations by the ITC that were inconsistent with Article 11.3 of the AD Agreement. Japan alleges that the ITC's determinations of the likelihood of continuation or recurrence of injury in *Ball Bearings* and *Corrosion Resistant Steel* are invalid because the ITC relied on flawed dumping margins.[93] Japan's claims on this issue, like those regarding the *CTL Plate* injury determination, are speculative and unfounded.[94]

VI. CONCLUSION

111. As set forth above, the United States requests that the Panel reject Japan's claims in their entirety.

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[91] *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, Investigation Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review), USITC Pub. No. 3309 (June 2000) (Exhibit JPN-22.C).

[92] *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and United Kingdom*, Investigations Nos. AA-1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350, and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), USITC Pub. 3364 (Nov. 2000) (Exhibit JPN-23.B)

[93] Japan First Submission, para. 192.

[94] The United States further notes its disagreement with Japan's characterization that the ITC relied on the dumping margins reported by Commerce in the cited cases. In *Japan Sunset*, the Appellate Body recognized that Article 11.3 does not even require investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of dumping. *Japan Sunset AB*, para. 127. Likewise, there is nothing in Article 11.3 that creates an obligation for investigating authorities to rely on dumping margins in making their determination of likelihood of continuation or recurrence of injury.