UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS (WT/DS322)

JAPAN'S COMMENTS ON THE UNITED STATES RESPONSE TO JAPAN'S SECOND OPENING STATEMENT AND ITS RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

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Japan's Comments on the United States Response to Japan's Second Opening Statement

1. Japan maintains that, under the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, when investigating authorities find a pricing pattern based on purchasers, regions or time periods, they may confine the W-to-T comparison under that sentence to the transactions making up pattern. In support of that argument, Japan notes that the USDOC's Regulations provide that, where such a pricing pattern is found, the W-to-T comparison addressed in the second sentence of Article 2.4.2 is, indeed, confined to the export transactions making up the pricing pattern.

2. The United States responds that its Regulations do not support Japan's position because, in addition to applying the W-to-T method to the transactions in the pattern, the USDOC will apply a W-to-W comparison method to the remaining export transactions.[1] The United States also argues that, without zeroing, this combination of methodologies would produce the same result as a single W-to-W comparison. Neither of these arguments provides an effective rebuttal to Japan's point.

3. The interpretive question raised by the United States' redundancy argument is, how should the authorities conduct a *W-to-T comparison*, under the second sentence of Article 2.4.2, where there is a pricing pattern based on purchasers, regions or time periods? Japan's interpretation is that the *W-to-T comparison* is confined to the subset of transactions making up the pricing pattern. The United States, in contrast, has argued that the *W-to-T comparison* envisaged in Article 2.4.2 is not confined to the subset of transactions.[2] However, as the United States' 19 October response confirms, under the USDOC's Regulations, where there is a pricing pattern, the USDOC does indeed confine the *W-to-T comparison* to the transactions in the pricing pattern.

4. Japan and the United States, therefore, agree on an important point: where there is a pricing pattern, the *W-to-T comparison* addressed by the second sentence of Article 2.4.2 is confined to the export transactions making up the pricing pattern. This enables the authorities to take appropriate account of the pricing differences disclosed by the pattern and to determine the existence and margin of targeted dumping.

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[1] Response of the United States to Japan's Opening Statement at the Second Substantive Meeting of the Panel, para. 3 ("United States 19 October Response").

[2] *See, for example,* United States' Second Written Submission, para. 37.

5. With the W-to-T comparison confined to a subset of transactions, a question arises as to the treatment of the remaining export transactions that are excluded from the W-to-T comparison. For the United States redundancy argument to be correct as a matter of law, a Member must be *required* to conduct a further symmetrical comparison for the remaining transactions (i.e. W-to-W or T-to-T). That is, the *Anti-Dumping Agreement* must compel authorities to conduct a combined comparison using two of the methodologies in Article 2.4.2.

6. Nothing in Article 2.4.2 indicates any such requirement. In terms of Article 2.4.2, each of the methods of comparison constitutes, on its own, a basis for determining "the existence of margins of dumping". Thus, the "individual margin of dumping"[3] established for an exporter or producer under any one of the three comparison methods[4] constitutes a valid and sufficient dumping determination on its own.[5]

7. An ironic feature of this debate is that, for the United States' to be correct, the investigating authorities must be *required* to conduct a comparison for *all* export transactions, not just for those in the pricing pattern. This is because, if the *Agreement* permitted a margin to be based on a comparison of a subset of transactions, there would be no need for a combined approach using the W-to-W and the W-to-T comparisons. The United States, therefore, insists that any export transactions not in the pricing pattern *cannot* be "*ignored*" in determining an overall dumping margin.[6]

8. From the outset, Japan has claimed that the zeroing procedures are WTO-inconsistent because certain export transactions are effectively "*ignored*" when the USDOC calculates an overall dumping margin. The United States, however, argues that there is no obligation to calculate a single margin for all export transactions because the price difference for a *single transaction* constitutes a margin of dumping under the T-to-T and W-to-T methods.[7] Yet, to preserve its redundancy argument under the second sentence of Article 2.4.2, the United States now argues that the authorities *are* obliged to conduct a comparison for *all* export

[3] Article 6.10 of the *Anti-Dumping Agreement*.
[4] This assumes that, for the third methodology, the prerequisites in the second sentence of Article 2.4.2 have been satisfied.
[5] Japan believes that, in situations in which the third methodology is used to calculate the margin of dumping on the export sales that comprise the pricing pattern", the *Anti-Dumping Agreement* does not preclude Members from conducting a separate symmetrical comparison (though it does not compel the Member to do so either), as the United States says it would for the export transactions that do not form part of the pattern.
[6] United States 19 October Response, para. 3.
[7] *See, for example,* United States' Second Written Submission, para. 52.

transactions. It is not clear on what legal basis the United States believes that *all* export transactions must be compared. However, Japan has always maintained that this duty stems primarily from Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

9. The United States' arguments appear to be contradictory. If the United States is correct that the price difference for a single transaction constitutes a margin of dumping under the T-to-T and W-to-T methods, the authorities would not be compelled, for the purpose of determining the existence of the dumping margin, to combine a W-to-T method on the export transactions forming part of the pricing pattern with a W-to-W method for the remaining export transactions. The price difference established under the W-to-T method – whether for a single transaction or a subset of transactions – would be "an individual margin of dumping" for the producer or exporter. Because the authorities would have determined the existence of an individual margin, they could freely "ignore" all the other export transactions. Yet, the United States contends that the authorities cannot "ignore" export transactions in conducting a comparison.

10. This reveals a further peculiarity in the United States' argument. For the United States, the authorities must conduct a comparison for *all* export transactions in order to determine "an individual margin" for a producer or exporter. Yet, having done so, the United States argues that the authorities can simply ignore the negative comparison results for certain export transactions when aggregating those results to produce "an individual margin". However, by disregarding the negative comparisons results, this approach eviscerates the obligation to compare all export transactions, because ignoring comparisons results for certain transactions amounts to ignoring the transactions themselves.

11. Japan, therefore, believes that the USDOC's Regulations support Japan's position that, under a *W-to-T comparison*, solely the export transactions in the pricing pattern are compared. Moreover, the United States' argument that the authorities cannot ignore the remaining export transactions contradicts its arguments that the authorities can ignore certain export transactions when applying the zeroing procedures.

12. The United States is also incorrect in arguing that, in mathematical terms, the outcome of a combined W-to-W and W-to-T comparison, without zeroing, would be the same as the result of a W-to-W comparison for all transactions. The argument is based on the premise that the same basis for calculating the weighted average normal value is always to be

used for the W-to-W and W-to-T comparison method. However, nothing in the text of Article 2.4.2 or any other provisions precludes the Member from using a different basis. Furthermore, the United States once again overlooks the fact that under the U.S. antidumping statute and the USDOC's regulations, the universe of comparison market transactions used to calculate normal value differs as between the W-to-T and W-to-W methodologies. In the former situation, the comparison market transaction universe is normally determined on a monthly basis, whereas in the latter situation, the comparison market transaction universe is normally determined on an annual basis.[8] As a result, although the Preamble to the USDOC's regulations anticipates that margins will be calculated on all export transactions in the targeted dumping situation (not just the transactions that comprise the targeted dumping pattern), the calculation can and will still be performed in a manner that ensures that the results, even without zeroing, will not be the same as the W-to-W methodology alone.

13. As noted above, Japan agrees that a Member may combine the W-to-T and W-to-W methodologies for targeted and non-targeted export transactions, respectively, which would mathematically derive the same outcome, in the absence of zeroing, as that which would obtain from application of the W-to-W methodology alone. But as Japan has already explained, the fact that a Member *may* adopt approaches that would lead to the same outcome in the absence of zeroing is not sufficient, as a matter of law, to demonstrate that Japan's interpretation of Article 2.4.2 of the *Agreement* renders the second sentence of that provision a "nullity".

[8] *Compare* Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended, *with* Section 777A(d)(2).

Japan's Comments on the United States Responses to the Panel's Second Set of Questions

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

1. The United States errs in stating that "[t]here are no laws, regulations or administrative procedures which govern the calculation of dumping with respect to the issue of whether an offset is required for non-dumped transactions."[9] Japan does not dispute the United States' point that U.S. courts have held that the U.S. anti-dumping law does not prohibit the USDOC from engaging in the zeroing practice.[10] But that, of course, does not resolve the question whether there is an "administrative procedure" regarding zeroing.

2. Under Article 18.4, the Appellate Body held that the term "administrative procedure":

> seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.[11]

3. Accordingly, for purposes of this dispute, the measure at issue must be an act attributable to the United States and, from the perspective of WTO law, it must form part of the generally applicable rules, norms or standards maintained by the USDOC in connection with the conduct of anti-dumping proceedings. The form and name of the measure is irrelevant, provided that in content and substance it is part of the USDOC's "administrative procedures".

4. In past submissions to this Panel, Japan has exhaustively explained the existence of the zeroing procedures on the basis of a broad range of evidence. Without rehearsing Japan's arguments in detail, the evidence identifying the existence of zeroing as an "administrative procedure" includes (i) the USDOC Import Administration's Anti-Dumping Manual, including the standard dumping margin calculation computer program; (ii) the Standard Zeroing Line of computer programming found in the standard computer program; (iii) statements by the USDOC, by the USDOJ in defending the zeroing procedures in U.S. courts,

[9] Answers of the United States to the Panel's Questions to the Parties in Connection with the Second Substantive Meeting, para. 1 ("United States 19 October Answers").
[10] United States 19 October Answers, paras. 2-3.
[11] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, para. 87.

and by the United States courts themselves; (iv) the statement of Valerie Owenby; and (v) the USDOC's consistent application of the zeroing procedures that is shown by the 26 case-specific programs that Japan has submitted to the WTO and not denied by the United States.[12]

5. Taken together, this evidence demonstrates that the United States maintains a margin calculation methodology that Japan has called the "zeroing procedures". As reflected in the Standard Zeroing Line and the case-specific computer programs, the standard zeroing procedures constitute a norm or rule, in margin calculations, that is of general and prospective application. In terms of Article 18.4 of the *Anti-Dumping Agreement*, the standard zeroing procedures are, therefore, "administrative procedures".[13] The mere assertion by the United States that "[t]here are no . . . administrative procedures" with respect to zeroing is insufficient to overcome the overwhelming array of evidence that Japan has submitted demonstrating the contrary.

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

6. Japan notes that the United States has failed to respond directly to one of the parts of the Panel's question – namely, "[c]ould the United States also indicate whether this discretion [i.e., on the part of the Assistant Secretary] been exercised in respect of any margin calculation in any anti-dumping proceedings during the past 10 years." The United States does not answer that question because it would have to acknowledge that the Assistant Secretary has *never* exercised the alleged discretion to decline to zero in calculating dumping margins in any anti-dumping proceeding over the past 10 years, and longer. The USDOC has a perfectly consistent practice of zeroing in every proceeding.

7. This perfectly consistent record is neither an accident nor a coincidence arising from the possibility that, in every anti-dumping proceeding, the Assistant Secretary has carefully exercised his discretion whether or not to apply the zeroing procedures, and has always decided to do so. To the contrary, the USDOC has repeatedly explained that "[*w*]*e do not*

[12] *See* Japan's Answers to the Panel's Questions to the Parties in Connection with the Second Substantive Meeting, paras. 3-4 ("Japan 19 October Answers").

[13] Japan's First Written Submission, para. 56

allow U.S. sales that were not priced below normal value, however, to offset dumping margins we find on other U.S. sales. …"[14] Likewise, in defending the USDOC's practice before the U.S. courts, the USDOJ has explained that "[*t*]*he agency* [i.e. USDOC] *has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the URAA*."[15] These passages from the United States' government, as well as the others quoted previously by Japan,[16] contain unequivocal statements attesting to the long-standing existence and the content of the zeroing procedures as a general and prospective rule in margin calculations.

8. Thus, the United States' assertion that the Assistant Secretary "exercises his discretion to provide or *not* provide an offset, and that discretion is exercised in each investigation and review,"[17] is a fiction. Neither the Assistant Secretary nor anyone else in the USDOC considers, in each and every anti-dumping proceeding, whether or not to apply the zeroing procedures in calculating the dumping margins for the parties involved. The application of the zeroing procedures is *automatic*, and is treated by the USDOC as a norm or rule of general and prospective application.

9. Moreover, as Japan has previously noted, the fact that the Assistant Secretary might not apply the zeroing procedures in the future does not deprive them of their mandatory character.[18] The substance of the standard zeroing procedures and the Standard Zeroing Line requires that negative comparison results be excluded from the calculation of the overall margin. The theoretical possibility that the Assistant Secretary might not apply this rule, or might even change it, does not alter this conclusion. In other words, the fact that "administrative procedures" can be changed at some point in the future does not deprive the procedures of their binding character today. This is particularly so because the unrefuted evidence demonstrates that the Assistant Secretary has *never* elected not to apply the standard zeroing procedures.

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[14] Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom for the Period of Review May 1, 2002, through April 30, 2003, Comment 1 (at 12) (15 September 2004) (emphasis added). Exhibit JPN-21.D.

[15] *SNR Roulements* v. *United States* (Consol, Ct. No. 01-00686), Memorandum of the United States in Opposition to the Plaintiff's Motions for Judgment Upon the Agency Record, at 56 (23 January 2003). Emphasis added. Exhibit JPN-28. This litigation involved an appeal of the final determination of the 1999/2000 periodic review of ball bearings, an "as applied" measure in the current dispute.

[16] *See* Japan's Rebuttal Submission, paras. 14-32.

[17] United States 19 October Answers, para. 5.

[18] Japan's Answer s of 20 July 2005 to the Panel's Questions After the First Substantive Meeting, para. 36.

10. This conclusion also demonstrates yet another error in the United States' answer, as revealed in its last sentence, where it states, "T[he fact] that the Assistant Secretary has exercised that discretion not to provide offsets does not mean that he is *bound* not to provide offsets in the future."[19] As Japan has already explained, the issue is not whether the Assistant Secretary is bound or compelled to provide "offsets".[20] As the Appellate Body held in *US – Corrosion-Resistant Steel*, the mandatory or binding character of the act in question cannot alter its status as a measure that can be subject, as such, to dispute settlement.[21]

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

11. Japan has three comments on the United States' answer to this question.

12. *First*, Japan notes that the United States' response to this question recognizes that a general rule may exist in unwritten form. Citing the Appellate Body Report in *US – DRAMS Countervailing Duties*, the United States also agrees that panels may use "circumstantial evidence" to support a finding of the existence of an unwritten measure.[22] In *US – DRAMS Countervailing Duties*, the Appellate Body ruled:

> Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence.[23]

13. The Appellate Body insisted that, in reviewing circumstantial evidence, panels "should consider that evidence *in its totality*, rather than individually, in order to assess its probative value".[24] The Appellate Body added that, an individual piece of evidence viewed in isolation "may initially appear to be of little or no probative value"; however, when examined with other evidence, it may "form part of an overall picture that gives rise to a reasonable inference".[25]

14. In these proceedings, as explained in its response to Question 34 and in paragraph 4 above, Japan relies on several different pieces of evidence that, viewed in their totality,

[19] United States 19 October Answers, para. 5.
[20] Japan's First Written Submission, para. 52.
[21] Appellate Body Report, *U.S. – Corrosion-Resistant Steel*, paras. 88 and 89.
[22] United States 19 October Answers, para. 6.
[23] Appellate Body Report, *US – DRAMS Countervailing Duties*, para. 150.
[24] Appellate Body Report, *US – DRAMS Countervailing Duties*, para. 150.
[25] Appellate Body Report, *US – DRAMS Countervailing Duties*, para. 154.

demonstrate that the United States maintains a general rule regarding the granting of what it calls "offsets". Japan refers to that general rule as the "standard zeroing procedures".

15. *Second*, the United States appears to argue, again, that a general rule may exist only if a government is "compelled" or "required" to act in particular way.[26] However, as Japan has explained in paragraph 10, GATT and WTO panels, as well as the Appellate Body, have ruled that binding character of a general rule, in municipal law, is irrelevant to its characterization as a "measure" in WTO law.[27]

16. *Third*, Japan also takes issue with the United States' suggestion that Members "have two and only two choices: either to adopt a measure that compels outcomes, or to act arbitrarily".[28] With respect to the administration of anti-dumping procedures, Japan envisages that Members have, at least, four options and, possibly, more:

(a) the administrator is compelled by law to act in a particular way;

(b) the administrator adopts its own general rule, written or unwritten, governing its conduct;

(c) the administrator makes independent *ad hoc* decisions, according to the particular factual pattern, and on the basis of reasonableness;

(d) the administrator makes decisions on an arbitrary basis.

17. In reply to Questions 37, 38 and 39, the United States appears to suggest that the USDOC has no general administrative rules regulating the calculation of dumping margins and the grant of so-called "offsets". Instead, the United States appears to contend that, for each and every margin calculation, the Assistant-Secretary gives careful consideration to the particular factual pattern, decides afresh on how to go about the process of calculating margins and, specifically, whether to grant offsets, and has co-incidentally reached the same conclusion in each and every anti-dumping proceeding in the last 10 years, or longer. As noted in paragraphs 7 and 8, this is a fiction. Rather, as the totality of the evidence shows, the USDOC has adopted general rules, norms or standards governing the calculation of margins and these include the zeroing procedures.

[26] See, e.g. United States 19 October Answers, paras. 8 and 13.
[27] Japan's First Written Submission, para. 52.
[28] United States 19 October Answers, para. 9.

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

18. Generally, the United States' answer to this question is consistent with Japan's own. However, contrary to the United States' position,[29] Japan notes that a general rule, norm or standard *does* exist where a Member adopts and consistently applies a "policy", even if the policy is not binding in domestic law. The binding character of an act in municipal law is not relevant to the issue of whether the measure at issue can be challenged as such in WTO.[30]

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

19. Japan will not repeat its own answer to this question. However, Japan notes that the United States' response overlooks entirely that Article VI:2 states expressly that the margin of dumping is the margin "*in respect of such product*". The United States also overlooks the fact that Article VI:1, as well as Article 2.1 of the *Anti-Dumping Agreement*, refers to the "dumping" of a "product" – not of individual sales of a product. Thus, as the Appellate Body has held, the "price difference" in question is that between the normal value *for the product* and the export price *for the product*.[31]

20. In Japan's opening statement at the second meeting with the Panel, Japan explained that the requirement to determine a margin of dumping for the product is consistent with the fact that the existence of "an individual margin of dumping" has several product-wide consequences, in particular: for the determination of the volume of dumped imports; the pursuit of the investigation; and the imposition and collection of duties.[32] If the United States is correct that the price difference for an individual transaction constitutes a margin, the result would be that product-wide consequences – including the imposition of duties in excess of bound tariff rates – can be derived from the uncertain foundation of the price of a single export transaction.

[29] United States 19 October Answers, para. 12.
[30] Japan's First Written Submission, para. 52.
[31] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93. See also paras. 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53, following panel report, *EC – Bed Linen*, para. 6.118.
[32] Japan's Opening Statement at the Second Meeting with the Panel, paras. 34-39.

21. In *EC – Tube or Pipe Fittings*, the Appellate Body emphasized that, through the duration of the period of investigation, the *Anti-Dumping Agreement* aims to avoid subjecting dumping determinations "to market fluctuations or other vagaries that may distort a proper evaluation."[33] The requirement to determine a margin for the product pursues the same objective because relying on the price difference for an individual transaction would inevitably subject determinations to the "vagaries" of the marketplace.

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

22. Japan has three comments on the United States' answer to this question.

23. *First*, the United States' answer to this question continues its erroneous theme that the term "margin(s) of dumping" changes meaning, like a kaleidoscope, depending on the context in which it appears in the GATT 1994 and the *Anti-Dumping Agreement*. Japan has already thoroughly addressed this issue.[34] In short, the drafters of the *Agreement* and the GATT 1994 excluded this possibility because, in Article 2.1, they provided a single definition of "dumping" that applies to the "entire *Anti-Dumping Agreement*".[35] In terms of that definition, "dumping" is for a "product" and not individual transactions.

24. In light of the fact that the *Agreement* does not permit the definition of "dumping" to change like a kaleidoscope – sometimes referring to the product as a whole, sometimes to an individual transaction – the only way in which a "margin of dumping" could, as the United States suggests, exist for an individual transaction, is if the existence of a "margin of dumping" is not related to the existence of "dumping" itself. This possibility, however, is logically meaningless because a "margin" is merely the expression of the "magnitude of *dumping*"[36]; it has no existence independent of dumping itself.

25. *Second*, the United States also continues to assert that the "use of the term 'margin of dumping' in GATT *Ad* Article VI, Paragraph 1 refers to a single transaction."[37] This

[33] Appellate Body Report, *EC – Tube of Pipe Fittings*, para. 80.
[34] *See, e.g.*, Japan's Opening Statement at the Second Meeting with the Panel, paras. 17-23.
[35] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 109.
[36] Appellate Body Report, *US – Softwood Lumber V*, para. 96 (emphasis added).
[37] United States 19 October Answers, para. 19.

assertion is still erroneous. As Japan explained previously, *Ad* Article VI:1 addresses the *price* that may be used for certain export transactions in the process of calculating the margin of dumping.[38] The *Ad* Article does not provide a definition of the term margin of dumping nor does it modify the definition given in Article VI.

26. *Third*, the United States argues incorrectly that the Appellate Body's interpretation of the term "margins of dumping" in *Softwood Lumber V* is limited to situations involving the W-to-W comparison under the first sentence of Article 2.4.2 of the *Agreement*.[39] Nothing in that decision supports this narrow view. To the contrary, as laid out in detail in Japan's answer to Question 51, the structure of the Appellate Body's analysis involved separate consideration of the phrase "all comparable transactions" in Article 2.4.2, and of the terms "dumping" and "margins of dumping". The Appellate Body noted that there was "no basic disagreement among the participants"[40] regarding the phrase "all comparable transactions". It therefore shifted its analysis to the terms "dumping" and "margins of dumping" in Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*. It relied primarily on the definition of the term "dumping" in Article 2.1 and Article VI, that "applies to the entire"[41] *Anti-Dumping Agreement*. Moreover, in concluding that "dumping" and "margins of dumping" are determined for the product, the Appellate Body never referred to the phrase "all comparable transactions".[42] Thus, the United States ignores entirely the detailed structure of the Appellate Body's reasoning in order to reach a conclusion not supported by that reasoning.

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

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

27. In reply to these question, the United States again admits that Article 5.8 imposes an "obligation to aggregate the results of multiple comparisons" into an "overall margin of

[38] *See* Japan's Rebuttal Submission, paras. 47-48.
[39] United States 19 October Answers, para 20.
[40] Appellate Body Report, *US – Softwood Lumber V*, para. 90.
[41] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[42] *See* Japan 19 October Answers, paras. 60-73.

dumping for each producer or exporter."[43] However, the United States asserts that no such obligation exists in any other provision of the *Anti-Dumping Agreement* or the GATT 1994.[44]

28. The United States provides absolutely no reasons to explain why Article 5.8 is unique. Japan notes that Article 5.8 contains no "disciplines" governing the calculation of margins of dumping (because these are contained in Article 2[45]). Nothing in the text of Article 5.8 suggests that "the margin of dumping" to which it refers is, in any way, different from the "individual margin of dumping" determined for each producer or exporter under Article 6.10. There is simply no basis, under the rules of treaty interpretation, to conclude that Article 5.8 requires that the margin be for the product, but that Articles 2.1 and 2.4.2, and GATT Article VI do not. Instead, on a proper interpretation, under all of these provisions, the margin of dumping must be determined for the product.

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

29. Again, as in its response Questions 45 and 46/53, the United States argues that the Appellate Body's ruling that dumping margins must be determined for the "product as a whole" applies solely to W-to-W comparisons under Article 2.4.2.[46] Although it is true that the facts at issue in *EC – Bed-Linen* and *Softwood Lumber V* involved W-to-W comparisons, the Appellate Body made it abundantly clear that that the "product as a whole" requirement stems from obligations imposed by Article VI of the GATT 1994 and by other provisions of the *Anti-Dumping Agreement*, particularly Article 2.1.

30. In short, throughout its interpretation of the terms "dumping" and "margin of dumping" in *Softwood Lumber V*, the Appellate Body never referred to the words "all comparable export transactions" in Article 2.4.2. The Appellate Body also supported its conclusion by reference to several provisions of the *Anti-Dumping Agreement* that have nothing whatsoever to do with the W-to-W comparison.[47] Absent any reference to these words, it is extremely difficult to give credence to the United States' view that the obligation

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[43] United States 19 October Answers, paras. 22 and 23.
[44] United States 19 October Answers, para. 22.
[45] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 127.

[46] United States 19 October Answers, paras. 25, 28.
[47] *See, further,* Japan 19 October Answers, paras. 60-73.

to determine dumping margins for the product as a whole arises solely where authorities must examine "all comparable export transactions".

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

31. Yet again, the United States asserts incorrectly that the Appellate Body's interpretation of the term "margins of dumping" in *Softwood Lumber V* and *EC – Bed Linen* is limited to situations involving the W-to-W comparison methodology under the first sentence of Article 2.4.2 of the *Agreement*.[48] Japan has commented on this issue in paragraphs 29 and 30.

32. The United States also asserts that the Appellate Body held that "there is a distinction between the rules governing the calculation of the margin of dumping pursuant to Article 2.4.2 and those governing the assessment of antidumping duties pursuant to Article 9".[49] Although that is generally correct, Article 9 refers to "margins of dumping" and expressly states that margins calculated for purposes of reviews must be established consistently with Article 2. Thus, the definition of "dumping" in Article 2.1 governs the determination of dumping margins in periodic and new shipper reviews in Article 9.

33. Moreover, as part of the context for the product-wide interpretation of the terms "dumping" and "margins of dumping" in Articles 2.1 and 2.4.2, the Appellate Body relied on the rules in Article 9 on the imposition of duties. In particular, the Appellate Body reasoned as follows:

> Our view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. . . . Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an antidumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole …[50]

34. Thus, the product scope of an anti-dumping action remains constant from the investigation through to the imposition of duties. The "product" subject to dumping and injury determinations in the investigation is the same as the "product" subject to duties, and it

[48] United States 19 October Answers, paras. 29-30.
[49] United States 19 October Answers, para. 30 (citation omitted).
[50] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99 (underlining added).

always refers to product as a whole.[51] The Appellate Body's reliance upon the product-wide imposition of duties to support its parallel conclusion that dumping margin determinations are made on a product-wide basis belies the United States' portrayal of the rulings in *US – Softwood Lumber V* and *EC – Bed Linen* as confined to the "all comparable export transactions" language in Article 2.4.2.

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

(a) Article 9.3, "as established"

35. Generally, the United States answer to this question is consistent with Japan's own.

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

36. In its response to this Question, the United States agrees with Japan that the phrase "the margin of dumping" in Article 9.3 refers to "the margin of dumping calculated by following the applicable methodologies established in Article 2."[52] This is significant because Article 2.1 of the *Agreement* (together with Article VI:1 of the GATT 1994) defines the word "dumping" for the *entire Agreement*, including therefore Article 9, "in relation to a *product as a whole*".[53]

37. Thus, because there is only one "margin of dumping" *for the product* subject to the review under Article 9.3, that provision uses the word "the" along with the singular "margin", in the phrase "*the* margin of dumping".

(c) Article 9.3.2, "actual"

38. In reply to this question, the United States contends that the difference between a prospective normal value (PNV) and the price of an individual import is the "actual" margin of dumping. As explained further in paragraphs 55 to 57 below, this contention is incorrect because the comparison does not respect the substantive and procedural rules in Article 2.4.

[51] *See* Japan's Rebuttal Submission, paras. 42-43.
[52] United States 19 October Answers, para. 34.
[53] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 93. See also paras. 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53, following panel report, *EC – Bed Linen*, para. 6.118.

In particular, as the United States recognizes, because the PNV is based on historical home market sales, the comparison *cannot* comply with the requirement in Article 2.4 to ensure a contemporaneous comparison of normal value and export price.

39. In addition, if the price difference to which the United States refers were the "actual" margin of dumping, this would render redundant the importer's right to a refund. On the United States' view, the amount of the variable duty for a given transaction equals the "actual" margin of dumping. That being so, there would be no possible basis for a refund. On Japan's view, however, the comparison that the authorities undertake in a refund procedure, using a "contemporaneous normal value",[54] would produce the "actual" margin of dumping that could be different from the amount of the variable duties.

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

40. The United States' response to this Question reveals its confusion regarding the fundamental issue at the core of this dispute. The United States asserts that "[t]he use of the phrase 'zero and *de minimis*' [in Article 9.4] confirms the U.S. interpretation that the AD Agreement does not recognize so-called 'negative' margins of dumping. That is, either export price is less than normal value, and a margin of dumping exists, or export price exceeds normal value, thus demonstrating that there is no, or a 'zero', margin of dumping."[55]

41. This interpretation is simply wrong. The United States confuses two fundamentally distinct concepts – "margins of dumping" and "intermediate comparison results" (or "intermediate values") – that must be considered separately to obtain a proper understanding of the obligations established by the *Agreement*. The "intermediate results" are the mathematical output of the individual comparisons of export price and normal value under the comparison methodology used in any particular anti-dumping proceeding. Those results can be either positive (for those individual comparisons in which export price is less than normal value), negative (for those individual comparisons in which export price exceeds normal value) or zero (where the two values are equal). But those intermediate results are most emphatically *not* "margins of dumping", such as the "margins" referenced in Article 9.4. Rather, as the Appellate Body has explained, "it is only on the basis of aggregating *all* these

[54] United States 19 October Answers, para. 35.

[55] United States 19 October Answers, para. 37.

'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole."[56]

42. Thus, although Japan agrees that the overall "margin of dumping" for a "product" cannot be less than zero, the intermediate results of individual comparisons often are. And in calculating the overall "margin of dumping" for the product as a whole, the investigating authority must give full mathematical effect to those negative intermediate results; the authority may not distort those figures (thereby artificially inflating the margin of dumping) by converting them to zero, before aggregating them. However, this is precisely what the United States zeroing procedure does; by excluding all negative intermediate comparison results from the aggregation, the United States effectively attributes a zero value to the excluded comparisons, meaning that, for those comparisons, the export prices are systematically "treated as if they were less than what they actually are".[57]

(e) "individual duties or normal values" in Article 9.4

43. The United States says that the word "individual", as used in Article 9.4 of the *Anti-Dumping Agreement*, "indicates that the antidumping duty rate for an exporter or producer that was not included in the original examination must be based on that exporter or *producer's own data and not the data of others* . . . ."[58] Japan does not quarrel with this statement, but submits that it does not go far enough in recognizing the import of this provision of the *Agreement*.

44. As Japan explained in its answer to this question, Articles 6.10 and 6.10.2, to which Article 9.4 refers, provide that "an *individual margin of dumping*" must be calculated for an individual exporter or producer. The parallel use of the word "individual" in Articles 6.10 and 9.4 indicates that the individual margin of dumping calculated for an exporter or producer constitutes the basis, and establishes the ceiling, for the "individual" rate at which dumping duties may be imposed on imports from that exporter or producer.[59]

(f) "individual margins of dumping" in Article 9.5

45. The United States' answer to this Question again overlooks the interpretive significance of the word "individual". It notes that the quoted phrase means that the margin

[56] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 97.
[57] Appellate Body Report, *US – Softwood Lumber V*, para 101.
[58] United States 19 October Answers, para. 39.
[59] Japan 19 October Answers, paras. 99-100.

of dumping for an exporter or producer in a "new shipper" review under Article 9.5 must be calculated on the basis of its own data, "not that of others."[60] Again, Japan does not dispute this interpretation, but submits that it is incomplete. As with Articles 6.10 and 6.10.2, the word "individual" in Article 9.5 signifies that a single ("individual") margin of dumping must be calculated for the exporter or producer subject to the new shipper review.

46. In the last paragraph of its answer to Question 55, the United States indicates, again, that the sole conclusion to be drawn from the Appellate Body's rulings in the Zeroing cases, as well as from the text of the *Anti-Dumping Agreement*, is that: "the context in which the term 'margin of dumping' is used is critical to its proper understanding."[61] The United States repeatedly makes this point throughout its answers, which at one point it distills down to the slogan that "context matters."[62] This slogan, however, is merely a cover for interpretive anarchy. It would permit the United States to evade the impact of the Appellate Body's rulings that zeroing violates the *Anti-Dumping Agreement*, simply by asserting that those rulings are limited to whatever facts happened to exist in the particular disputes in which those rulings were rendered.

47. The significance of the Appellate Body's rulings is, however, not so limited, and "context" is not an infinitely elastic concept. To the contrary, certain WTO obligations have the same meaning in different contexts. As Japan has repeatedly noted, Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* establish that "dumping is defined in relation to a *product as a whole* as defined by the investigating authority,"[63] and hence, "'margins of dumping' can be found only for the *product under investigation as a whole* . . . ."[64] Furthermore, because Article 2 is the sole provision setting forth the "agreed disciplines" for calculating dumping margins, "for the purpose of" the *Agreement*,[65] these conclusions are equally true for margins calculated in all anti-dumping proceedings. Moreover, in reaching this conclusion, the Appellate Body drew on a wide range of contexts, from different phases of an anti-dumping action.

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[60] United States 19 October Answers, para. 41.
[61] United States 19 October Answers, para. 42.
[62] United States 19 October Answers, para. 49 (emphasis deleted).
[63] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[64] Appellate Body Report, *US – Softwood Lumber V*, para. 96.
[65] Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 127.

48. For all these reasons, the definition of "dumping" and "margin of dumping" applies to dumping margins calculated in investigations under Article 2.4.2, as well as new shipper, periodic, and changed circumstances reviews, under Articles 9 and 11 of the *Agreement*.

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

49. Japan agrees with the United States that the amount of anti-dumping duties cannot exceed the margin of dumping determined in investigations or reviews.

50. In its answer, the United States asserts that, because "duties are assessed on imports", "it is entirely permissible for a Member, in an assessment proceeding, to calculate a margin of dumping on an import transaction-specific basis".[66] The United States' arguments are illogical and based on a *non-sequitur*. Although antidumping duties are assessed on all imports of the dumped product, and paid by importers, it does not follow that the margin of dumping established as a ceiling for the duties must be determined for individual import transactions. As the Appellate Body found, "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."[67] Irrespective of who ultimately pays the duties, the margin of dumping is determined for the product as required under Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

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

51. The United States' disagrees with Japan's argument that the calculation and imposition of variable duties do not involve the establishment of margins of dumping. Yet, its response fails to address the substance of Japan's arguments.

[66] United States 19 October Answers, para. 43.
[67] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124 (emphasis original).

52. The United States narrates the Appellate Body's findings that "the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made".[68] Having done so, it summarily dismisses the significance of the finding with the statement that "context matters".[69] The United States does not, however, explain why the context in Article 9 means that the imposition of variable duties suddenly also involves the determination of dumping margins, contrary to the Appellate Body's statement.

53. In the same passage, the United States suggests that the "rules for determining the margin of dumping in an investigation *differ* from the rules for determining the margin of dumping and, consequently, the anti-dumping duty under Article 9."[70] Thus, the United States appears to suggest that there are two sets of rules for determining margins of dumping – one set for investigations and the other for reviews. This argument blatantly disregards the Appellate Body's ruling that "the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins" are set forth in Article 2.[71] There is, therefore, only *one set of agreed disciplines* and these "are distinct and separate from the rules on the imposition and collection of anti-dumping duties."[72]

54. In its answer, the United States also notes that Japan has not supported its assertion "that prospective normal value systems need not undertake a 'fair comparison'".[73] To be clear, Japan agrees that the establishment of margins in *refund procedures* under the PNV system must involve a fair comparison. However, in assessing and collecting variable duties, *customs authorities* do not calculate a margin of dumping within the meaning of Article 2; indeed, in comparing the PNV with the import price, they *cannot* comply with the rules in Article 2. There are several reasons why the imposition of variable duties in a PNV system does not involve a margin of dumping, none of which is addressed by the United States.

55. *First*, Article 2.4 *requires* that a margin be based on a comparison between "sales made at *as nearly as possible the same time*". By definition, a PNV is based on sales made *during the period of investigation*, which ends up to a year *before* duties are even imposed.

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[68] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123 (underlining added).
[69] United States 19 October Answers, para. 49.
[70] United States 19 October Answers, para. 49.
[71] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 127.
[72] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.
[73] United States 19 October Answers, para. 50.

This stale, historic PNV is then applied in imposing duties throughout the life of the anti-dumping action – that is, for up to five years or more *after* the imposition of anti-dumping duties begins. As a result, in imposing variable duties, customs authorities compare a *historic* home market price with a *contemporaneous* import price. This means that it is impossible for the customs authorities to comply with the requirement to compare *contemporaneous* sales. As a result, the imposition of variable duties *cannot* involve the determination of a margin of dumping.

56. *Second*, Article 2.4 imposes an obligation on the authorities to make price adjustments for any differences that affect price comparability.[74] Fulfillment of this obligation requires a careful and detailed consideration of the comparability of the respective contemporaneous home market and export sales. In imposing variable duties on the basis of a PNV, customs authorities do not undertake any such examination.

57. *Third*, the last sentence of Article 2.4 imposes procedural obligations on the authorities: "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." In imposing variable duties, the customs authorities do not request any information from the parties for the purpose of a fair comparison nor do they receive and weigh evidence in terms of a burden of proof.

58. In consequence, the comparison of a PNV and import prices does not – and, indeed, cannot – involve the *establishment of a margin of dumping*. Rather, the comparison is a facet of the *imposition of anti-dumping duties*.

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

59. The United States' answer to this question is limited by its erroneous view that the Appellate Body has only considered the implications of zeroing in the context of W-to-W

[74] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.

comparisons in the investigation phase.[75] In fact, in *US – Corrosion-Resistant Steel Sunset Review*, which did not involve an investigation, the Appellate Body expressly condemned the practice of zeroing "whether in an investigation or otherwise,"[76] as evidenced by the text quoted by the Panel in this question. Thus, the Appellate Body's explanation of the WTO-violations caused by zeroing was not limited to situations in which that procedure is used in a W-to-W comparison.

60. The United States asserts that because the Appellate Body could not complete the analysis in *US – Corrosion-Resistant Steel Sunset Review*, its statements in that report may be dismissed as *obiter dicta*. This is incorrect. Although the Appellate Body's reasoning is not binding on subsequent panels, it creates "legitimate expectations" that must be taken into account, if relevant, in the interests of the "security and predictability" of the multilateral trading system.[77]

61. The Appellate Body's reasoning in *US – Corrosion-Resistant Steel Sunset Review* is highly relevant to this dispute because it considered zeroing in the context of margins calculated in administrative reviews and used in sunset reviews. The Appellate Body expressly stated that zeroing "in an original investigation *or otherwise*" tends to inflate the dumping margin; could convert a negative margin into a positive one; and, in the same paragraph, involves "*inherent bias*".[78]

62. All that the United States offers in reply is that the "Appellate Body said nothing as to whether such inflation was or was not permitted".[79] It is absurd to believe that the Appellate Body contemplated that these effects of zeroing could be any more permissible in reviews than they are in investigations. This is particularly so because the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* had just recalled that the zeroing methodology in *EC – Bed Linen* produced these same unfair effects, and violated Article 2.4. The Appellate Body had also already noted that:

> In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously

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[75] United States 19 October Answers, para. 51.
[76] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.
[77] Appellate Body Report, *US – Softwood Lumber V*, para. 112.
[78] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[79] United States 19 October Answers, para. 52.

> calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.[80]

63. In light of the Appellate Body's recognition that zeroing would have the same distortive effects, "whether in an investigation or otherwise", i.e. in reviews as well as investigations, it would be strange indeed to conclude that the Appellate Body intended that zeroing is WTO-inconsistent when used in investigations, but is permissible when used in reviews. Also the Appellate Body concluded that "in the absence of uncontested facts on the Panel record, it is not possible for [the Appellate Body] to assess whether the methodology in the administrative reviews [in Corrosion-Resistant Steel] was *equivalent in effect* to the methodology [used] in *EC – Bed Linen*."[81] These statements show that, if zeroing in investigations and reviews produce "equivalent" distortive effects, Article 2.4 would be violated in both situations.

64. In the current case, there is no dispute or question regarding the factual contours of the zeroing procedures used by the USDOC nor their effects on margin calculations. The use of zeroing systematically inflates the single, overall margin that the United States calculates; it may create a positive margin where there would otherwise be none; and it distorts the prices being compared. These are precisely the reasons that led the Appellate Body to condemn the zeroing methodology in *EC – Bed Linen* that also distorted the calculation of a single, overall margin in these same, or "equivalent", ways.

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

65. The United States reply to this question is very misleading. The United States expressly acknowledges that Article 5.8 requires authorities "to aggregate the results of multiple comparisons" into "an overall margin of dumping" for each producer or exporter.[82] In other words, the United States agrees with Japan that, under Article 5.8, the margin of dumping must be determined for the product. As noted in paragraphs 27 and 28 above, the

[80] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[81] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 137 (emphasis added).

[82] United States 19 October Answers, paras. 22 and 23.

United States believes that Article 5.8 is unique in this respect, although it is unable to explain why. For its part, Japan believes that this duty derives not from any uniqueness in Article 5.8, but rather from Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

66. Irrespective of the legal source of the duty to aggregate comparison results into an overall margin for the product, the United States cannot comply with that duty because, under the zeroing procedures, it disregards negative comparison results. Moreover, because this dispute concerns "as such" measures, Japan's claims are not speculative nor wanting in factual basis. As explained in the First Written Submission, the zeroing procedures deprive the USDOC of an adequate and credible basis for determining, under Article 5.8, whether sufficient evidence of dumping to justify proceeding with an anti-dumping investigation.[83] In consequence, the Panel must find against the United States.

[83] See Japan's First Written Submission, paras. 122 -130.