BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Measures Relating to Zeroing and Sunset Reviews

(AB-2006-5)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

November 6, 2006

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SERVICE LIST

APPELLANT

APPELLEE

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I. Introduction and Executive Summary

1. In this dispute, Japan has argued that Articles 2.1 and 2.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") establish a general prohibition on zeroing. The Panel examined Japan's arguments and rejected them, with the exception of zeroing in average-to-average comparisons in investigations. In a comprehensive analysis, the Panel correctly concluded that Article 2.1 does not require the calculation of a margin of dumping for the "product as a whole," *i.e.*, on the basis of multiple transactions over a particular period of time. The Panel also correctly concluded that the prohibition on zeroing in average-to-average comparisons in investigations in Article 2.4.2 is derived from the phrases "margins of dumping" and "all comparable export transactions." Because the phrase "all comparable export transactions" does not apply to transaction-to-transaction or average-to-transaction comparisons, that phrase cannot serve as the source of any alleged "general" prohibition on zeroing.

2. Having established that there is no "general" prohibition on zeroing, the Panel further considered whether any of the language specific to the transaction-to-transaction comparison supported an interpretation of Article 2.4.2 as prohibiting zeroing in that context.[1] The Panel found none.

3. The Panel then examined whether Article 2.4 prohibits zeroing. Recognizing that a general "fairness" requirement would be subjective, the Panel rejected this argument as well.

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[1] The United States recalls that it has appealed the question of whether any measure including a "transaction-to-transaction" comparison is within the terms of reference of this dispute.

4. With respect to assessment reviews, the Panel recalled its analysis that Article 2.1 does not provide a general prohibition on zeroing. The Panel further found that Article 2.4.2 is not applicable. The Panel next evaluated whether Article 9 prohibits zeroing in assessment reviews. Carefully examining the text of Article 9.3, the Panel conducted an expert analysis of the context provided by the existence of prospective normal value systems, concluding that the margin of dumping and liability for antidumping duties may both be calculated on a transaction-specific basis. Because they may both be calculated on a transaction-specific basis, there is no obligation to offset the margin calculated on one transaction with the margin calculated on a separate transaction.

5. For that reason, the Panel also concluded that Japan's claim regarding new shipper reviews and sunset reviews fail.

6. Japan argues that the Panel's interpretation errs because there is a general prohibition on zeroing based on the alleged obligation to calculate a margin of dumping for the "product as a whole." However, the Panel exposed the flaws in Japan's argument. Japan has, in turn, failed to explain why the Panel's analysis was flawed. Therefore, the United States respectfully requests that the Appellate Body reject Japan's claims.

II. Zeroing in Transaction-to-Transaction Comparisons in Investigations

7. The United States recalls that it has appealed the Panel's conclusion that there is one measure, "zeroing procedures." In particular, the United States has appealed the Panel's conclusion that the measure subject to challenge "as such" includes the use of zeroing in a transaction-to-transaction comparison in an investigation. Therefore, if the Appellate Body were to find that the Panel erred, Japan's appeal of the Panel's finding on the use of zeroing in

transaction-to-transaction comparisons in investigations would be moot, although the Panel's reasoning would still be useful as context for its Article 9.3 analysis.[2] The United States addresses the substance of Japan's claim of legal error below, first in connection with Article 2.1, and then in connection with Article 2.4.

A. Article 2.1

8. Japan's central argument before the Panel was the proposition that a margin of dumping can be established only with respect to a "product as a whole," by which Japan understood that "Article 2.1 of AD Agreement and Article VI of the GATT 1994 define 'dumping' and 'margins of dumping' in relation to a product . . . [and,] as a result, dumping margins must be determined for the product, not for particular transactions."[3] Thus, Japan argued that "product" must always and necessarily mean "product as a whole." Therefore, Japan reasoned, it is not permissible to understand "dumping" and "margins of dumping" to exist at a transaction-specific level.

9. In support of its view, Japan asserts, without supporting analysis, that the Panel expressly concurred with the view of the panel in *US – Softwood Lumber (21.5)* and states that the Appellate Body later reversed those findings.[4] However, Japan is incorrect for two reasons.

10. First, the Panel did not simply state that it concurred with the findings of the panel in *US – Softwood Lumber (21.5)* without engaging in further analysis. Rather, the Panel stated that it concurred with *certain aspects* of the panel report in *US – Softwood Lumber (21.5)*, and

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[2] *See, e.g.,* Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, circulated 20 September 2006 (hereinafter "Panel Report"), para. 7.194-7.195. The Panel also noted that it did not consider Article 2.4.2 to be applicable in assessment reviews. Panel Report, para. 7.211.

[3] Japan Response to Panel Questions, para. 53; Panel Report, para. 7.104, n.740.

[4] Japan Appellant Submission, para. 43.

identified those aspects with precision.[5] Further, the Panel also undertook its own independent analysis of the claim, supplying its own reasoning, consistent with the requirements of Article 11 of the DSU. It is this Panel's reasoning, and not the reasoning of the *US – Softwood Lumber (21.5)* panel, that Japan should have addressed if it was attempting to demonstrate that it was error for the Panel to conclude that zeroing in transaction-to-transaction comparisons is a permissible interpretation of the Antidumping Agreement.

11. Second, the basis of the Appellate Body's reasoning in *Softwood Lumber (21.5)* was not that a margin of dumping must be determined "for the 'product' under investigation as a whole." In fact, the phrases "product under investigation as a whole" and "product as a whole" do not form part of the Appellate Body's analysis of the prohibition on the use of zeroing in connection with the transaction-to-transaction comparison.[6] Therefore, Japan's reliance on the argument that an obligation to calculate a margin of dumping for a "product as a whole" prohibits zeroing is insufficient to demonstrate that this Panel's analysis of the permissibility of zeroing in connection with transaction-to-transaction comparisons was erroneous.

12. Indeed, it seems that Japan is trying to have it both ways. Having argued that the original *US – Softwood Lumber* report necessarily means that zeroing is prohibited in all contexts,[7] Japan also asserts that the analysis in the original *US – Softwood Lumber* report – which hinged on

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[5] Panel Report, n. 758.

[6] Japan strains to create the impression that the reasoning in *Softwood Lumber (21.5)* is based on a requirement to calculate a margin of dumping for the "product as a whole." *See, e.g.*, Japan Appellant Submission, para. 92. However, the Appellate Body's analysis is not based on the "product as a whole" theory.

[7] *See, e.g.*, Japan First Submission, paras. 76-80, discussing Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004 (hereinafter "*US – Softwood Lumber*").

interpreting the phrases of "margins of dumping" and "all comparable export transactions" in an "integrated manner" – is now "simply irrelevant" to the analysis of transaction-to-transaction comparisons.[8]

13. In any event, the Panel's analysis was correct, and should be upheld. The Panel provided an extensive discussion as to why it rejected Japan's "product as a whole" argument.[9] The Panel concluded that the phrase "product as a whole" could not be extended beyond the context in which it first appeared: the use of zeroing in average-to-average comparisons in investigations. Contrary to Japan's assertion, the Panel did not simply conclude that zeroing is permitted in the transaction-to-transaction context because the phrase "all comparable export transactions" in Article 2.4.2 is uniquely linked to the average-to-average comparison.[10] Rather, the Panel noted that because the phrase "all comparable export transactions" in Article 2.4.2 is limited to the average-to-average context, the "product as a whole" rationale for precluding zeroing in the original *US – Softwood Lumber* report is likewise limited to the average-to-average context.[11]

14. Japan responds by criticizing the Panel for failing to recognize that the phrase "all comparable export transactions" is not applicable to transaction-to-transaction comparisons because this phrase refers to an obligation to include all comparable export transactions when calculating an average export price for a model when model-based averaging is used.[12] Japan misses the point and attempts to avoid the implications of its own argument.

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[8] Japan Appellant Submission, para. 98.
[9] Panel Report, paras. 7.92-7.105.
[10] Japan Appellant Submission, para. 98.
[11] Panel Report, n. 715.
[12] Japan Appellant Submission, para. 98.

15. First, the Panel did not argue that the absence of the phrase "all comparable export transactions" in connection with the transaction-to-transaction comparison *ipso facto* meant that zeroing was permissible in that context. Rather, the Panel rejected Japan's assertion that the Appellate Body's reasoning in the original *US – Softwood Lumber* report meant of necessity that zeroing was also prohibited in the transaction-to-transaction context, precisely because the original *US – Softwood Lumber* report was interpreting the meaning of the phrases "all comparable export transactions" and "margins of dumping" in an "integrated manner."[13] And the Appellate Body in the *US – Softwood Lumber (21.5)* report appears to have taken the same view as the Panel, noting that the phrase "all comparable export transactions" in Article 2.4.2 is limited to the average-to-average comparison in investigations and therefore does not apply to the analysis of zeroing in transaction-to-transaction comparisons.[14] Thus, the theory that Japan proffered to the Panel, and which Japan criticizes the Panel for rejecting,[15] is one that the Appellate Body itself later declined to incorporate into its reasoning with respect to transaction-to-transaction comparisons.

16. Second, the meaning Japan attributes to the phrase "all comparable export transactions" contradicts the Appellate Body's reasoning in *US – Softwood Lumber*. In that dispute, the Appellate Body interpreted the phrase "all comparable export transactions," in conjunction with the phrase "margins of dumping," to require the margin of dumping to incorporate comparison results spanning *across* each of the multiple average-to-average comparisons. Japan's proposed

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[13] *US – Softwood Lumber*, para. 85.

[14] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada; Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (hereinafter "*US – Softwood Lumber (21.5)*"), para. 91.

[15] Japan Appellant Submission, paras. 95-96.

interpretation in this dispute is that "all comparable export transactions" only refers to the inclusion of all comparable export transactions *within* each of the multiple average-to-average comparisons – an interpretation expressly rejected by the Appellate Body in *US – Softwood Lumber*. Recognizing that Japan's attempt to offer an explanation is necessary to avoid rendering the phrase "all comparable export transactions" redundant, it nevertheless remains true that if the phrase "all comparable export transactions" has the meaning Japan suggests, then that phrase could not have been relevant to the question of whether margins of dumping can be established at the model-specific level. That interpretation plainly contradicts the Appellate Body's express recognition that it was interpreting the phrases "margins of dumping" and "all comparable export transactions" in an integrated manner. Contrary to Japan's proposed interpretation, the Panel's analysis is consistent with the Appellate Body's reasoning in *US – Softwood Lumber*.

17. As noted above, the Panel's conclusion that zeroing is permissible in transaction-to-transaction comparisons under Article 2.4.2 is not based exclusively on the absence of the phrase "all comparable export transactions" in that context. Instead, the Panel provided a further detailed textual analysis as to whether the Antidumping Agreement provided any *other* basis for concluding that zeroing is prohibited in a transaction-to-transaction comparison in an investigation.

18. First, the Panel noted that the phrase "product as a whole" does not appear in Article 2.1 of the Antidumping Agreement or Articles VI:1 and VI:2 of the GATT 1994.[16] The Panel explained that the terms "dumping" and "margin of dumping" do not necessarily require the

[16] Panel Report, para. 7.104.

aggregation of transaction-to-transaction comparisons and the provision of an offset for one transaction against another.

19. Second, the Panel noted that Japan had failed to explain why the context in which the words "product" and "products" are used supports the proposition that transactions must be aggregated and offsets provided.[17] The Panel examined the definition of dumping and noted that the fact that dumping occurs

> when a product is introduced into the commerce of another country at less than its normal value, i.e., when the *price* of a product is *less* than its normal value in our view undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions. We fail to see why the notion that "a product as introduced into the commerce of another country" cannot apply to a particular export sale and would necessarily require an examination of different export sales at an aggregate level.[18]

From that, the Panel concluded that the "ordinary meaning" of the words "product" and "products" provides no basis for concluding that zeroing is prohibited by requiring an examination of aggregated transactions.[19]

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[17] Panel Report, para. 7.106.

[18] Panel Report, para. 7.106 (emphasis in original).

[19] Panel Report, para. 7.107. In this regard, the definition of "dumping" in Article 2.1 and Article VI:1 references "product[] . . . introduced into the commerce of another country at less than its normal value." The comparison described in Article VI is directed at the "price of the product exported." The ordinary meaning of "price" is the "payment in purchase of something." *New Shorter Oxford English Dictionary* (1993), p. 2349. In the ordinary course of commercial activity, merchandise is introduced into a country transaction by transaction, and prices are agreed to by buyers and sellers for particular quantities of merchandise under the terms of a sales transaction. If the export price is not found to be less than normal value, it is not "considered as being introduced into the commerce of an importing country at less than its normal value," and is not condemned. On the other hand, if the export price is found to be less than normal value, it is "considered as being introduced into the commerce of an importing country at less than its normal value," and, if causing injury, is to be condemned. Although the injury caused by a single dumped transaction may not satisfy the injury threshold required by Article VI:1, the accumulated injury caused by repetition of individually dumped transactions may rise to the level of material injury. There is nothing in the GATT 1994 or the Antidumping

20. The Panel further noted that the record of discussions under the GATT 1947 demonstrated that the "concept of dumping has been understood to be applicable at the level of individual export transactions."[20] The Panel derived the same conclusion from its analysis of the text of Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994, concluding that the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions."[21]

21. Finally, the Panel considered as context the use of the term "product" elsewhere in the covered agreements. The Panel noted that, for example, the phrase "importation of any product" in GATT Article VI:6 implies that "product" is applicable at a transaction-specific rather than an aggregate level, as is the phrase "the value for customs purposes of any imported product."[22]

Agreement that suggests that this accumulated injury is mitigated by the occurrence of other individual transactions made at fair prices. Indeed, the commercial reality is that the foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of non-dumped export transactions exceed normal value. The dumping definition's description of the conduct that antidumping duties are intended to remedy provides strong contextual support that these provisions should be interpreted to permit an authority to examine dumping in relation to the particular conduct described, i.e., individual import transactions. The Panel similarly concluded that the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions." Panel Report, para. 7.106.

[20] Panel Report, para. 7.107.

[21] Panel Report, para. 7.106. Thus, the Panel's analysis of the "product as a whole" concept also addressed the theory that the term "margins of dumping" has the same meaning regardless of which of the two comparisons in the first sentence of Article 2.4.2 is used to establish them. Japan Appellant Submission, paras. 83, 84. If the requirement to "aggregate" is not found in Article 2.1, then a general requirement to aggregate cannot be found in Article 2.4.2 without rendering the phrase "all comparable export transactions" redundant. Further, as described in detail below, this conception of dumping and margins of dumping also fails to account for the inherent differences between the average-to-average and transaction-to-transaction comparisons, and the Panel was correct in rejecting it as a basis for finding a general prohibition on zeroing.

[22] Panel Report, para. 7.108. As the United States noted, such a broad definition of product is difficult to reconcile with other provisions of the Agreement. For example, Article 2.2

22. Japan also criticizes the Panel for identifying, in the course of rejecting Japan's "product as a whole" theory, certain ambiguities and contradictions in the reasoning set forth in *US – Zeroing (EC) (AB)* with respect to the question at hand: the use of zeroing in connection with the transaction-to-transaction comparison. It bears noting that *US – Zeroing (EC) (AB)* did not involve *any* claim in connection with the transaction-to-transaction comparison.[23] Thus, Japan's stated "disappointment" at the Panel's "wilful" disregard[24] for the reasoning in that report would

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of the Antidumping Agreement confirms that the term "product" may refer to the product in the context of an individual transaction, rather than in the context of aggregated transactions. Under Article 2.2, a Member may calculate normal value based on constructed value. Many Members do so on a model- or transaction-specific basis. That is, if the home market sales of a particular model were not in the ordinary course of trade, the importing Member might resort to using a constructed normal value for that particular model; however, normal value for other models might still be based on home market sales. For example, if there are 100 different export transactions of a product, and there are domestic market comparison sales for all but 25 of them (e.g., because the comparison sales for the remaining 25 were not in the ordinary course of trade), a Member would use third country sales or constructed normal value to determine normal value only for those 25 comparisons. It would use the domestic market sales as the normal value for the remaining 75 comparisons.

If, however, the "margin of dumping" must refer, regardless of context, to the "product as whole," then, when the conditions of Article 2.2 have been met, an investigating authority would be required to use constructed value for the "product as a whole," not just for specific models or transactions of the product. That is, the margin of dumping for the "product as a whole," and therefore for all comparisons, would have to be calculated using constructed normal value, even if the condition precedent for using Article 2.2 relates only to 25 of the 100 comparisons. This would be inconsistent with the principle that constructed normal value is to be used only in limited circumstances. It also would increase the burden on respondents, who would be required to provide cost information for all models, rather than just those models for which the use of constructed value would be appropriate.

For a detailed discussion of this point, *see* U.S. Comments on Appellate Body Report, May 10, 2006, Attachment 2, paras. 13 *et seq.*

[23] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006 (hereinafter "*US – Zeroing (EC) (AB)*").

[24] Japan Appellant Submission, para. 103 ("Japan is extremely disappointed that the Panel wilfully disregarded the Appellate Body's product-wide definition of 'dumping'" . . . .) Japan's terminology in this dispute – for example, that the Panel "wilfully disregarded" prior Appellate Body reasoning – is difficult to reconcile with the fact that Japan has not claimed that

appear to be unwarranted,[25] particularly in view of the fact that the Appellate Body itself disregarded that same reasoning in *US – Softwood Lumber (21.5)*.

23. In short, Japan argued that Article 2.1 requires a margin of dumping to be calculated for the product as a whole, and Japan therefore argued that Article 2.1 establishes a general prohibition on zeroing. The Panel reasoned that an examination of the "product as a whole" requires an analysis of "all comparable export transactions" in connection with an average-to-average comparison and is not otherwise an independent obligation under the Agreement. Japan has failed to demonstrate that the Panel's reasoning was in error.

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the Panel acted inconsistently with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[25] The Panel noted that the argument that Members have a "choice" to undertake multiple comparisons at an intermediate stage is limited to average-to-average comparisons. More specifically, the reference to a "choice" in undertaking comparisons arose in the context of a Member's decision to divide a product into sub-products, as discussed in the original *US – Softwood Lumber* report, and whether in the course of engaging in multiple averaging, a Member takes into account "all comparable export transactions". Aside from the fact that both Japan and the Appellate Body have argued that the phrase "all comparable export transactions" is not pertinent to the transaction-to-transaction analysis, Japan's arguments here further confirm that a reference to "choosing" to undertake multiple comparisons is limited to model-based multiple averages – *i.e.*, average-to-average comparisons. Japan argues that a Member chooses to undertake multiple comparisons when it engages in model-based comparisons. Japan Appellant Submission, para. 109. Therefore, Japan agrees that "choice" only arises in the context of model-based averages, and that no such choice exists outside of that context. Finally, Japan reiterates its argument that a Member may "choose" to conduct a single average-to-average comparison. However, as the Panel recognized, Members may have no such "choice" but may be obligated to do so by the provisions of Article 2.4.2. Panel Report, para. 7.100 ("if a Member compares normal value and export price on an average-to-average basis . . . it may well be *obligated*, depending upon the facts of [a] particular case, to use multiple averaging and thus to make multiple comparisons in order to take into account differences affecting price comparability, as required by the introductory clause to Article 2.4.2.") (emphasis in original).

B. Article 2.4.2

24. The Panel did not simply examine whether a general prohibition on zeroing stems from an alleged obligation to calculate the margin of dumping for the product as a whole. Rather, the Panel continued with its textual analysis to determine whether the use of zeroing in a transaction-to-transaction comparison in an investigation rests on a permissible interpretation of the Antidumping Agreement.[26] The question, therefore, is whether the Panel's analysis is flawed. The Panel's analysis is not flawed, nor has Japan shown that it is.

25. The Panel explained the need, in accordance with the customary rules of interpretation of public international law, for an "internally coherent interpretation of Article 2.4.2."[27] First, the Panel examined the text of Article 2.4.2. The Panel noted that the text does not expressly address the question of the permissibility of zeroing in connection with the transaction-to-transaction or average-to-transaction comparisons.[28] The Panel noted that, unlike an average-to-average comparison, a transaction-to-transaction comparison is inherently conducted at the level of an individual transaction, and Article 2.4.2 does not speak to the methodology for converting those individual comparisons into "margins of dumping."[29] The Panel further noted that "[b]ecause 'dumping' occurs when the export price of a product is less than the normal value, the fact that Article 2.4.2 expressly permits the use of a transaction-to-transaction comparison in our view logically means that a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal

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[26] Panel Report, para. 7.113 *et seq*.
[27] Panel Report, para. 7.115, *et seq.*
[28] Panel Report, para. 7.118.
[29] Panel Report, para. 7.119.

value."[30] Thus, through a careful analysis of the text of Article 2.4.2, the Panel concluded that nothing in that text prohibits the use of zeroing in connection with a transaction-to-transaction comparison in an investigation.

26. Japan does not address the Panel's textual analysis of Article 2.4.2, except to reiterate the view that dumping must be calculated for the "product as a whole."[31] Japan's failure to provide any other rebuttal to the Panel's analysis is notable. Instead, Japan simply continues to imply that the Appellate Body's reasoning in *US – Softwood Lumber (21.5)* supports its "product as a whole" argument.[32] However, the quotations from *US – Softwood Lumber (21.5)* on which Japan relies do not support that view. These passages simply state that the plural "export prices" in the first sentence of Article 2.4.2 "suggests" that a transaction-to-transaction comparison will involve multiple transactions, particularly because the word "comparison" in Article 2.4.2 is singular.[33] Japan cannot meet its burden of demonstrating that zeroing is prohibited by referring to textual "suggestions." If the text does not in fact prohibit zeroing, then zeroing is a permissible interpretation of the text.

27. The Panel explained why the phrase "export prices" in Article 2.4.2 does not address the question of zeroing. As the Panel noted, "[a]ssuming . . . that the use of the plural 'prices' and 'export transactions' must necessarily be interpreted to mean that margins of dumping can only be established under Article 2.4.2 on the basis of a consideration of "multiple export transactions", it does not logically follow that a Member may not treat a transaction in which the

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[30] Panel Report, para. 7.119.
[31] Japan Appellant Submission, paras. 94, 121.
[32] Japan Appellant Submission, para. 102.
[33] *US – Softwood Lumber (21.5)*, para. 87.

export price is below the normal value differently from another transaction in which the export price is above the normal value."[34] Japan simply ignores this aspect of the Panel's reasoning.

28. Yet the Panel's reasoning is correct, and that point is further confirmed by the text of Article 2.4.2. The United States recalls that in concluding that zeroing is prohibited in average-to-average comparisons in investigations, the Appellate Body emphasized that the first sentence of Article 2.4.2 requires investigating authorities to take into account "*all*" comparable export transactions[35] rather than just *some* of those transactions. Presumably, then, if the drafters of Article 2.4.2 intended to convey the same concept in connection with transaction-to-transaction comparisons, they would have specified that the margins of dumping would be calculated on the basis of "all" export prices, rather than simply "export prices." Yet the word "all" is absent from the text of Article 2.4.2 *except* in connection with the phrase "all comparable export transactions" in average-to-average comparisons.

29. Further, any interpretive significance attached to the use of the singular "comparison" in the first sentence of Article 2.4.2[36] only highlights the use of the *plural* in the phrase "margins of dumping" in that same sentence. The use of the plural "margins of dumping" implies just the opposite of what Japan argues – "margins of dumping" implies that there is one comparison of normal value and export price, that each such comparison is a margin of dumping, and that all such comparisons constitute "margins of dumping" for purposes of Article 2.4.2.[37]

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[34] Panel Report, n. 757.

[35] *US – Softwood Lumber*, para. 86 ("a Member . . . must compare *all* such transactions.") (emphasis in original).

[36] Japan Appellant Submission, para. 101, quoting *US – Softwood Lumber (21.5),* para. 87.

[37] It should further be noted that it is understood that a "single" comparison is not conducted under a transaction-to-transaction approach, but rather that there will be as many

30. In this regard, it bears repeating that the question for the Panel was, under Article 17.6 of the Antidumping Agreement, whether zeroing is a *permissible* interpretation of Article 2.4.2. In other words, unless the Panel concluded that Article 2.4.2 could *only* be read as prohibiting zeroing, it must be allowed as a permissible interpretation of Article 2.4.2. Nothing in Japan's arguments, particularly in light of the Panel's detailed analysis and the importance previously attached to the phrase "all comparable export transactions", establishes that the *only* interpretation of Article 2.4.2 is one that prohibits zeroing.[38]

31. Japan also relies on a quotation from the WTO Antidumping Handbook that is out of context and that ultimately contradicts the point Japan seeks to make. According to Japan, the Handbook supports the argument that in a transaction-to-transaction comparison, multiple comparisons are aggregated to arrive at "one margin of dumping."[39] However, what Japan fails to note is that the Handbook was not referring to the calculation of "one dumping margin for the

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comparisons as there are export sales. WTO Handbook on Antidumping Investigations, pp. 127-128. A single comparison under a transaction-to-transaction comparison would therefore only arise if there were one export sale.

[38] In this respect, Japan's contention that a coherent interpretation of Article 2.4.2 mandates a prohibition on zeroing fails. Japan Appellant Submission, para. 115. Japan notes the Appellate Body's statement that it would be "illogical" to interpret one methodology in a manner that would lead to results that are systematically different from those obtained under another. However, the WTO Handbook (to which Japan looks for support) has recognized that in "most cases, *the two methods* [average-to-average and transaction-to-transaction] *will yield different results for any given set of normal values and export prices."* WTO Handbook on Antidumping Investigations, p. 120 (emphasis added). The reason is that transaction-to-transaction comparisons depend, to a significant degree, on the particular normal value transactions that are found to be the most comparable to the export transactions under examination. However, the step of matching a particular normal value transaction involving a specific model with each export transaction involving the same model is eliminated for the average-to-average and average-to-transaction comparisons because all comparable normal value transactions are averaged together, which is why the average-to-average and average-to-transaction comparisons produce the same results if zeroing is prohibited.

[39] Japan Appellant Submission, para. 106.

subject product" as the *only* dumping margin that is calculated under the transaction-to-transaction comparison. Rather, the Handbook noted that if there are "48 export sales . . . 48 transaction-specific margins will have to be calculated."[40] As the Panel noted, Article 2.4.2 "provides no guidance on the specific methodology to be used in [any] aggregation of results of multiple comparisons."[41] Thus, the Handbook's conversion of 48 individual margins into a single weighted average margin does not change the fact that the phrase "margins of dumping" can be, and has been, interpreted to preclude its application to particular transaction-to-transaction comparisons. Thus, the Handbook confirms the Panel's conclusion that it is a permissible interpretation of the Antidumping Agreement that each transaction-to-transaction comparison yields its own margin of dumping and that zeroing is thus not prohibited under the Antidumping Agreement.

32. Further support for this approach lies in the fact that Article 2.4.2 expressly references "margins of dumping" *plural*. Therefore, there is no basis for concluding that a transaction-to-transaction comparison must produce one margin, or that in calculating any such margin, the negative results from one comparison must be offset against the positive results from another.[42]

33. Moreover, to the extent that the average-to-average comparison provides some context for interpreting the transaction-to-transaction comparison, Japan fails to take any account of the inherent distinction between average-to-average and transaction-to-transaction comparisons. In

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[40] WTO Antidumping Handbook, p. 128.

[41] Panel Report, para. 7.119.

[42] Further, the Panel noted that Article 2.4.2 "provides no guidance on the specific methodology to be used in [any] aggregation of results of multiple comparisons." Thus, whether the Handbook suggests that multiple margins may be aggregated into a single margin is not the question.

particular, under the average-to-average comparison, the proper comparison of export price and normal value is considered to occur at the level of the overall average for all export transactions, as the Appellate Body interpreted that phrase in *US – Softwood Lumber*, which leads to the conclusion that aggregation is necessary to complete an average-to-average comparison when model-based averaging (*i.e.,* "multiple averaging") is employed. In contrast, under the transaction-to-transaction comparison, the comparison is naturally made at the level of the transaction and no aggregation is necessary to complete the analysis. Moreover, as mentioned above, there is no systematic relationship between the results of average-to-average and transaction-to-transaction comparisons as a result of the distinct procedures that are necessarily employed under each comparison. Therefore, there is no basis upon which to reason that an obligation related to a distinct procedure under one comparison must logically translate into a corresponding procedure and obligation under the other comparison. The Panel recognized that nothing in the text of Article 2.4.2 provided justification for finding an aggregation requirement in the transaction-to-transaction comparison context such that recognition of the amount by which some transaction-to-transaction comparisons demonstrated above-normal value export prices was required.[43]

34. Instead of addressing the Panel's detailed textual analysis, Japan focuses on the Panel's factual finding that a general prohibition on zeroing would, as a matter of mathematics, collapse average-to-average and average-to-transaction comparisons.[44] At the outset, it should be noted

[43]Panel Report, para. 7.101.

[44] Panel Report, n.763 ("Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amounts by which export prices are above normal value will offset the sum total amounts by which export prices are less than normal value.")

that Japan has not made a claim that the Panel erred in its fact-finding. The Panel's "mathematical equivalence" finding was part of, but by no means the only aspect of, the Panel's evaluation of Japan's claim. However, that finding merely confirms that there are two possible interpretations of the Antidumping Agreement: one to permit zeroing, and one to prohibit it. Under Article 17.6, no breach arises in connection with an act that rests on a permissible interpretation of the Antidumping Agreement.

35. Specifically, the Panel noted that, in accordance with customary rules of treaty interpretation, it was obliged to ensure that "full effect" is given to the comparisons provided for in Article 2.4.2. In an exceptionally thorough analysis, the Panel recognized that an interpretation of Article 2.4.2 to prohibit zeroing would render the average-to-transaction comparison a nullity, but the Panel also recognized that targeted dumping might not be masked by a transaction-to-transaction comparison.[45] The Panel ultimately concluded that the principle of effective treaty interpretation meant that zeroing had to be permitted in order to avoid rendering the average-to-transaction comparison a nullity.[46]

36. Japan sought to rebut the mathematical equivalence argument during the panel proceedings by arguing that, if zeroing were prohibited, average-to-average comparisons would not always yield the same result as average-to-transaction comparisons if the calculations are

[45] Panel Report, para. 7.125. In response to the Panel's concern, the United States notes that even if zeroing is permitted, a transaction-to-transaction comparison may not reveal certain patterns of targeted dumping where a small and unrepresentative subset of normal value transactions effectively mirrors the export transactions. Such a pattern, however, may be revealed through an average-to-transaction comparison.

[46] Panel Report, para. 7.127.

made on different bases, or only a subset of transactions is used in connection with an average-to-transaction comparison.[47] The Panel responded to Japan's arguments by noting that

> nothing in the text of Article 2.4.2 . . . suggests any distinction between the bases upon which the normal value is established under the average-to-average method, on the one hand, and under the average-to-transaction method, on the other. There exists no substantive difference between "a weighted average normal value" in the first sentence of Article 2.4.2 and a "normal value established on a weighted average basis" in the second sentence of that provision. Moreover, the average-to-transaction method provided for in the second sentence is manifestly designed to address a problem arising from a particular pattern of *export prices*, not domestic prices. Thus, Japan's interpretation of the second sentence as contemplating an average normal value established on a basis different from the average normal value referred to in the first sentence of Article 2.4.2 is without support in the text of Article 2.4.2 and has no logical relationship to the purpose of the average-to-transaction method. In this respect, we see no merit in Japan's argument that Article 2.4.2 does not prohibit a Member from using different bases for calculating the average normal values in the average-to-average comparison and the average-to-transaction comparison and that Article 2.4.2 was thus crafted on the assumption that Members could choose to use different bases for calculating the average normal value under these two methods.[48]

37. To support its argument that the Panel erred, Japan contends that the Appellate Body "decisively" rejected this Panel's arguments concerning the relationship between the average-to-transaction and transaction-to-transaction comparisons.[49] According to Japan, the Appellate Body dismissed the argument that the average-to-average and average-to-transaction comparisons would be equivalent in the absence of zeroing on the grounds that such analysis rests on an "untested hypothesis."[50] Canada and some third parties had asserted that the average-to-transaction comparison would not necessarily yield the same results as the average-to-average comparison, even if zeroing were permitted with the former, and Thailand argued that the

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[47] Panel Report, para. 7.128.
[48] Panel Report, para. 7.129 (emphasis in original).
[49] Japan Appellant Submission, para. 117.
[50] Japan Appellant Submission, para. 117.

mathematical equivalence argument only works if the average normal value in the average-to-average and average-to-transaction comparisons were the same.[51]

38. These arguments were put forward in the current dispute, and the Panel addressed them extensively in the course of its examination of the facts before it, which Japan did not appeal. The Panel noted that the average normal value under the first and second sentences is the same, and nothing in the Agreement suggests the contrary.[52]

39. Secondly, it is critical to understand the arguments that Japan has made concerning the operation of the average-to-transaction approach. Japan argued that the results of an average-to-average and average-to-transaction comparison would differ because the investigating authority would only examine a *subset* of export transactions in an average-to-transaction comparison.[53] Indeed, Japan contended that the U.S. regulations provided for such an analysis.[54] In rebuttal, the United States pointed out that, in fact, *all* export transactions would be examined; Japan then conceded that it had been unaware of that fact.[55] In response, Japan withdrew its claim concerning the average-to-transaction comparison, conceding that Japan in fact was unsure as to how the average-to-transaction comparison operated under U.S. law.[56]

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[51] *US – Zeroing (EC) (AB)*, para. 99.
[52] Panel Report, para. 7.129.
[53] Japan First Opening Statement, para. 52.
[54] Japan Second Opening Statement, para. 59.
[55] Japan Comments on Appellate Body Report, n. 55.
[56] Japan's claim in this regard never in fact depended on the operation of U.S. law. Japan only raised the issue of the operation of that comparison under U.S. law because, as noted above, Japan erroneously read U.S. law to authorize an examination of a subset of export transactions. Notably, Japan did not withdraw its claim upon learning that the United States in fact takes into account all export transactions; rather, Japan withdrew its claim *after* the Panel issued its interim report, in which the Panel concluded that the average-to-average comparison and average-to-transaction comparisons would collapse if zeroing were prohibited. Thus, the argument that Japan withdrew its claim based on a lack of understanding of the operation of U.S.

40. Japan argues that the onus is on the United States to demonstrate how prohibiting zeroing in average-to-transaction comparisons would render such comparisons inutile for the case where such comparisons are combined with those resulting from average-to-average comparisons. The United States recalls that it has yet to be demonstrated how the combination of such comparisons has any bearing on whether the average-to-average and average-to-transaction comparisons would collapse if zeroing were prohibited. And there is a reason for that: no matter *how* those two comparisons are combined, the fact remains that if *all* export transactions are taken into account, and zeroing is prohibited, the average-to-average and average-to-transaction comparisons produce the *same result.* The mathematical equivalence, demonstrated by Table 1 below, obtains regardless of the particular figures used for the price or quantity of the transactions and regardless of the number of transactions or models examined.

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law is at odds with the factual posture of the dispute.

Table 1

Normal Value Transactions			Export Price Transactions			Comparison Results	
Quantity Model X	Normal Value Prices	Weighted Average Normal Value (a)	Quantity Model X	Export Prices (b)	Weighted Average Export Price (c)	Average-to-Transaction (a-b)	Average-to-Average (a-c)
5	$ 11	$ 12.5[57]	3	$ 10	$ 12.0	$ 2.5	$ 0.5
6	$ 12		4	$ 11		$ 1.5	
7	$ 14		5	$ 14		$ -1.5	
Model X Total							
Model X Results	Weighted Average of Average-to-Transaction Results:[58] **$ 0.5** =						**$ 0.5**
Model Y		$15.15	Model Y		$ 16.12		$ -0.97
5	$ 14		7	$ 15		$ 0.1	
7	$ 15		8	$ 16		$ -0.9	
8	$ 16		10	$ 17		$ -1.9	
Model Y Total							
Model Y Results	Weighted Average of Average-to-Transaction Results: **$ -0.97** =						**$ -0.97**
Models X and Y Results	Weighted Average of Average-to-Transaction Results for Models X and Y: **$ -0.49324**						
	Weighted Average of Average-to-Average Results for Models X and Y:						**$ -0.49324**

[57]By way of demonstration, this weighted average normal value was calculated as follows: [(5 x 11) + (6 x 12) + (7 x 14)] / (5 + 6 + 7) = 12.5.

[58]By way of demonstration, this weighted average of average to transaction results is calculated as follows: [(3 x 2.5) + (4 x 1.5) + (5 x (-1.5))] / (3 + 4 + 5) = 0.5.

41. Japan's withdrawal of its claim with respect to average-to-transaction comparisons is extremely enlightening in this regard. Japan did not attempt to provide an example of how not zeroing when combining the results of the two types of comparisons would not yield the same result as for average-to-average alone. Rather, Japan felt compelled to argue that an investigating authority applying the average-to-transaction methodology will only look at a subset of export transactions. However, as already noted, when confronted with the U.S. regulation that demonstrates that Commerce would examine *all* transactions, along with the Panel's interim report which explained that there is no basis in Article 2.4.2 for examining a *subset* of such transactions, Japan withdrew its Article 2.4.2 claim, rather than substantiate it.

42. The United States met its evidentiary burden before the Panel in this regard, and the Panel made a factual finding that the mathematical equivalence argument demonstrated that average-to-average and average-to-transaction comparisons would collapse if zeroing were prohibited. Japan has not argued that the Panel failed to make an objective assessment of the matter, nor that the Panel erred in its collection and examination of the evidence. Therefore, based on the evidence in this proceeding, and the findings of fact made by the Panel, the finding that zeroing is permissible in connection with a transaction-to-transaction comparison in an investigation must stand.

43. The United States notes Japan's argument that whether the responding party has "tested" the mathematical equivalence hypothesis is significant to the proper interpretation of agreement provisions.[59] However, the United States is aware of no principle of treaty interpretation that

[59] Japan Appellant Submission, para. 117.

requires a responding party to have applied a particular provision of the Antidumping Agreement in order for an examination of that provision to be salient to the textual analysis in question.[60]

44. Further, the "hypothesis" is not an untested one. The European Communities, for example, has frequently availed itself of average-to-transaction comparisons in investigations. Although before the Appellate Body, the EC "rejects the 'mathematical equivalence' argument," elsewhere the EC takes the opposite view.[61] In particular, the Council of the European Union argued before the Court of First Instance that

> the asymmetrical method [average-to-transaction], as compared with the first symmetrical method [average-to-average], makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.[62]

The Court agreed, finding that

> as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method . . . .[63]

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[60] Indeed, it is difficult to see how a Member's implementation of a particular provision can be a prerequisite to contextual analysis of provisions of an Agreement. The very purpose of examining context is to shed light on the meaning of a particular provision – *i.e.*, to understand the drafters' intent; the drafters' intent by definition *predates* any Member's implementation of the provisions that were drafted.

[61] *US – Softwood Lumber (21.5)*, para. 49 ("The European Communities rejects the 'mathematical equivalence' argument . . . .")

[62] Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Attachment 1).

[63] Ritek Corp., para. 109.

Thus, a Member that has actually used the average-to-transaction comparison in investigations agrees with the United States, and the Panel, that zeroing must be permitted in order to avoid rendering the average-to-transaction comparison inutile.

45. Finally, Japan argues that because the targeted dumping methodology is an exception it "cannot determine the interpretation of the two methodologies provided in the first sentence . . . ."[64] However, whether the targeted dumping provision is an exception to the average-to-average and transaction-to-transaction comparisons is irrelevant. Rather, the question is whether the targeted dumping provision continues to be effective if zeroing is prohibited. The Panel made a factual finding that the mathematical equivalence of the average-to-average and average-to-transaction comparisons in the absence of zeroing rendered the latter inutile.

46. The Panel provided a detailed explanation as to why it considered the mathematical equivalence argument to be persuasive, and given that the question before the Appellate Body is whether the Panel's analysis is correct, Japan cannot succeed in its claim without addressing that analysis. Japan has failed to address the other elements of the Panel's analysis – particularly its textual analysis – and so Japan has not shown that the Panel's findings were in error.

47. At the same time, it is worth recalling that the mathematical equivalence argument was not the sole basis upon which the Panel drew the conclusion that zeroing in transaction-to-transaction comparisons is permitted under the Agreement. That analysis, in connection with its textual analysis, led to the correct conclusion that zeroing in connection with a transaction-to-transaction comparison in an investigation is a permissible interpretation of the Agreement.

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[64] Japan Appellant Submission, para. 117.

C. Article 2.4

48. Japan contends that the Panel erred in concluding that zeroing in a transaction-to-transaction comparison in an investigation was not a breach of Article 2.4 of the Antidumping Agreement. According to Japan, the Panel "ruled that zeroing was 'fair' under Article 2.4 because it was permitted under the 'more specific provisions of Article 2.4.2.'"[65] Japan argues that the Panel should have begun its analysis not with an analysis of Article 2.4.2, but with an analysis of Article 2.4.[66]

49. Japan neglects to recognize that the Panel *did* examine the fair comparison requirement in Article 2.4 as an "independent legal obligation." The Panel pointed out that if Article 2.4 were not treated as such, it would render that provision "inutile."[67] The Panel went on to note that the "precise meaning of" the fair comparison requirement "must be understood in light of the nature of the activity at issue."[68] The Panel concluded that "the 'fair comparison' requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context."[69]

50. The Panel then went on to examine Article 2.4.2 as context for the correct interpretation of Article 2.4. Having made the factual finding that the average-to-average and average-to-transaction approaches would be indistinguishable absent zeroing, the Panel reasoned that a

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[65] Japan Appellant Submission, para. 129.
[66] Japan Appellant Submission, para. 131.
[67] Panel Report, para. 7.154.
[68] Panel Report, para. 7.155.
[69] Panel Report, para. 7.158.

general prohibition on zeroing in Article 2.4 was not a proper interpretation of the Agreement because it would render the second sentence of Article 2.4.2 inutile.

51. Moreover, Japan's insistence that the analysis begin with Article 2.4 appears to be at odds with its own appellant submission, as well as with the Appellate Body's own analysis of zeroing in any of the disputes to date. An examination of Article 2.4 explains why: the text of Article 2.4 cannot resolve the question of whether zeroing is "fair" or "unfair". Japan's argument that zeroing "artificially inflates the magnitude of dumping"[70] and is therefore unfair is predicated on the assumption that zeroing is prohibited – otherwise, zeroing does not produce an "artificially inflated" magnitude of dumping but rather the correct magnitude of the margin of dumping. It may be that zeroing always produces higher margins of dumping, and that respondents may consider that to be "unfair"; but then it is equally true that prohibiting zeroing always produces lower margins of dumping, and the domestic industry – an industry that of necessity has been found to be injured if the order is imposed – may consider that to be "unfair". Higher or lower margins are not inherently fair or unfair; rather, the specific agreement provisions on how to conduct a comparison must serve as context for making that evaluation.

52. It is also useful to recall that the Antidumping Agreement imposes obligations on Members that benefit "all interested parties",[71] which Article 6.11 defines to include both respondent interested parties *and* domestic interested parties. Furthermore, when the

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[70] Japan Appellant Submission, para. 133.

[71] *See, e.g.,* Article 6.1 ("*All* interested parties in an anti-dumping investigation shall be given notice . . . .") (emphasis added); Article 6.2 ("*all* interested parties shall have a full opportunity for the defence of their interests . . . .") (emphasis added); Article 6.4 ("*all* interested parties [may] see all information) (emphasis added). Under Article 6.11, all interested parties includes "a producer of the like product in the importing Member.")

Antidumping Agreement provides rights specifically to one set of interested parties rather than "all" interested parties, it does so expressly.[72] The text of Article 2.4 does not suggest that "fair comparisons" are viewed only from the perspective of what is beneficial to exporters and foreign producers. Indeed, the Appellate Body itself has recognized the "need" to balance of the rights and obligations of respondents with those of other interested parties.[73] Thus, Article 2.4 cannot be read as prohibiting a particular comparison because respondents consider such a comparison to be "unfair" to them. Article 2.4 is simply silent as to the question of the permissibility of zeroing, as the Panel correctly found.

III. Zeroing in Periodic Reviews

53. Japan argues that the Panel erred in finding that zeroing is permissible in assessment reviews. The crux of Japan's argument is, again, that the margin of dumping must be determined for the "product as a whole"[74] and that the Panel erred in rejecting Japan's "product as a whole" argument. However, as noted above, the Panel provided a detailed explanation of why it found Japan's "product as a whole" argument to be lacking in persuasive value beyond the context of average-to-average comparisons in investigations, an explanation the Panel incorporated into its discussion of zeroing in connection with assessment reviews.

54. More than that, however, the Panel explained why an interpretation requiring a Member to aggregate transactions to determine a margin of dumping in an assessment review is otherwise inconsistent with the very nature of an assessment review under Article 9.3. The Panel explained

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[72] *See, e.g.,* Articles 6.11 and 6.10.1.

[73] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 243.

[74] Japan Appellant Submission, para. 150.

that if a Member applies a retrospective duty assessment system, a Member may be "precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value."[75] The Panel further noted that "Article 9.3 contains no language requiring such an aggregate examination of export transactions in determining final liability for payment of anti-dumping duties under Article 9.3.1 or in determining the amount, if any, of refund due under Article 9.3.2."[76]

55. The Panel's analysis did not stop there. Rather, the Panel continued its examination of Article 9, noting the "important contextual support" for that position provided by Article 9.4(ii) and prospective normal value systems. As the Panel noted, under a prospective normal value system, liability for payment of anti-dumping duties is collected on a transaction-specific basis,[77] and the Panel rejected Japan's argument that in a prospective normal value system final liability for payment of antidumping duties must be determined through a review under Article 9.3.2. The Panel noted that such a review would be "inconsistent with the *prospective* nature of such a system" because under Article 9.4(ii) the *liability* for duty payment is calculated on the basis of a *prospective* normal value, and that value would cease to be *prospective* if it were calculated on the basis of a retrospective examination of transactions.[78] Moreover, the Panel noted that while a refund procedure exists, that refund proceeding is "not a *determination of final liability for payment of anti-dumping duties.* The phrase 'determination of the final liability for payment of

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[75] Panel Report, para. 7.199.
[76] Panel Report, para. 7.199.
[77] Panel Report, para. 7.208.
[78] Panel Report, para. 7.204.

anti-dumping duties' is used in Article 9.3.1 in connection with retrospective duty assessment procedures but does not figure in Article 9.3.2."[79] Thus, liability attaches at the time of importation and is not reconsidered in a later proceeding – *i.e.*, after taking into account other export transactions during a particular period of time.[80]

56. In fact, the United States is not aware of a single prospective normal value system that provides for a review or refund mechanism to recalculate a margin of dumping based on aggregated export transactions. Rather, the margin and the liability for antidumping duties under a prospective normal value system both are determined at the time of importation. The margin of dumping and the ceiling on the liability for antidumping duties are mathematically equivalent, although the liability may be less than the margin of dumping if that is what the Member chooses to assess.

57. Canada, for example, has a prospective normal value system. According to Canada, under its system the exporter knows the prospective normal value and has the option of raising its sales price to meet the prospective normal value of the good. In Canada's view, under a prospective normal value system, both the margin of dumping and the liability for duty payment are fixed at the time of importation, rather than on an examination of aggregated transactions.[81] Indeed, a proposal was made to convert Canada's prospective normal value system to a retrospective

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[79] Panel Report, para. 7.204 (emphasis added). A refund procedure under a prospective normal value system allows an importer to receive a refund for errors in completing the importation documents for a transaction. *See*, e.g., SIMA Self-Assessment Guide, http://www.cbsa-asfc.gc.ca/sima/self-e.html#12 (Attachment 2).

[80] Panel Report, para. 7.204.

[81] Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (Attachment US- 3) (hereinafter "SIMA Report"). *See also* SIMA Self-Assessment Guide (Attachment 2).

normal value system by "determining final liability . . . on review with excess duties being returned and, where required, additional duties being demanded. This system is employed by the United States."[82] Canada rejected that approach, and in doing so echoed the Panel's own analysis of what makes a prospective normal value system *prospective* rather than retrospective:

> Canada uses a prospective approach, which establishes margins of dumping . . . which apply to future importations thereby allowing authorities to determine the amount of duty liability at the time of importation.[83]

58. Further, Canada explains that it favored its existing system, rather than a system providing for reviews, because under the latter importers "will not know their ultimate duty liability on each shipment until months or even years after the date of importation."[84] Yet a review is precisely what Japan argues is required in connection with a prospective normal value system. As Canada's example confirms, a prospective normal value system does not contemplate a review of the margin of dumping (and thus of duty liability) on the basis of a totality of transactions, to be examined retrospectively. That is precisely the conclusion the Panel drew based on its textual analysis of Article 9.

59. The WTO Trade Policy Review of Canada confirms that under Canada's system the margin of dumping and liability for payment of duties are fixed on the date of importation. According to the Review:

> The authorities have noted that Canada operates a prospective system in which exporters are informed of the normal values for the products that they export to Canada. If future sales are made at price levels equal to or higher than the normal value of the product, no duties are assessed. The authorities consider that Canada's prospective enforcement system operates in a manner that is very similar to, and

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[82] SIMA Report.
[83] SIMA Report.
[84] SIMA Report.

> has the same effect as, price undertakings at a level sufficient to remove the dumping.[85]

Table III.5 of that report is particularly instructive: The fourth column notes that the "definitive duty" and the "dumping margin" are mathematically equivalent and occur on the same date.

60. The Panel's examination of prospective normal value systems likewise concludes that margins may be calculated on the basis of a single transaction, rather than an aggregation of transactions. As the Panel noted:

> If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value, we see no reason why liability for payment of anti-dumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective duty assessment system applied by the United States.[86]

61. In response, Japan repeats its assertion that dumping margins must be calculated for the "product as a whole."[87] As noted above, however, the Panel correctly found that there is no independent obligation under the Agreement to calculate a margin of dumping for the product as a whole. Rather, the use of the term "product as a whole" has been a device to explain the obligation under Article 2.4.2 to take into account "all comparable export transactions" in connection with model-based comparisons in an average-to-average comparison. Therefore, Japan's argument fails.

62. Japan defends its argument by turning to *US – Softwood Lumber (21.5)*.[88] Japan implies that the Appellate Body report in that dispute supports the alleged requirement to aggregate the

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[85] Trade Policy Review of Canada, WT/TPR/S/112, para. 68.
[86] Panel Report, para. 7.207.
[87] Japan Appellant Submission, para. 150.
[88] Japan Appellant Submission, para. 159.

results of all comparisons to establish a margin of dumping for the "product as a whole."[89] However, as noted above, the Appellate Body did not make any finding in that dispute that the margin of dumping must be calculated for the "product as a whole." Rather, the Appellate Body's analysis in that dispute was derived from the text of the first sentence of Article 2.4.2, which the Panel here found inapplicable to its analysis of Article 9 and which Japan does not appeal.

63. Japan also notes the Panel's textual analysis of Article 9. Japan's criticism of the Panel's analysis is that it misapprehends the distinction between a margin of dumping on the one hand, and antidumping duty liability on the other.[90] Japan emphasizes that although duties may be "imposed on and collected from *importers*, margins of dumping are determined for *foreign exporters or producers*."[91] Japan argues that margins of dumping are established for foreign producers and exporters and as a result the Panel "erred in finding that margins of dumping, under Article 9.3, are determined on an importer-specific basis."[92]

64. Japan makes two serious errors. First, the Panel made *no finding* that margins of dumping are determined on an importer-specific basis. Rather, the Panel sought to examine whether the text of Article 9 requires aggregation of multiple export transactions in calculating a margin of dumping. In examining that question, the Panel considered the fact that antidumping duty liability is incurred by the importer because the *implication* of that fact is as follows: if a Member is obliged to aggregate an exporter's transactions, then a member may be "precluded from

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[89] Japan Appellant Submission, para. 159.
[90] Japan Appellant Submission, para. 153.
[91] Japan Appellant Submission, para. 155.
[92] Japan Appellant Submission, para. 155.

collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value."[93] The Panel further noted that it was "significant" that Article 9.3 contains "no language requiring such an aggregate examination of export transactions in determining final liability for payment of anti-dumping duties . . . ."[94] In other words, there is no indication in the text of the Antidumping Agreement that the drafters intended to create a system of duty liability on the part of importers by establishing the ceiling for such liability on the *totality* of transactions by exporters.

65. The following example illustrates what happens when the negative comparison results are required to offset positive comparison results on an exporter-wide basis. Below is a table representing a single exporter that has export transactions using two importers.

[93] Panel Report, para. 7.199.
[94] Panel Report, para. 7.199.

Table 2

	Export Prices (a)	Normal Values (b)	Results (U.S. DOC Dumping Margins) (b-a)	Absurd Results Obtained in the Absence of Zeroing		
				Alternative 1	Alternative 2	Alternative 3
Importer 1 Model X	$ 19	$ 25	$ 6 duty	$ 6 duty		
Model X	$ 20	$ 25	$ 5 duty	$ 5 duty		
Model X	$ 21	$ 25	$ 4 duty	$ 4 duty		
Importer 1 Total	$ 60		$15 duty (25% actual assess rate)	$ 15 duty (25% actual assess rate)	$ 12 duty (15 offset 3) (20% actual assess rate)	$ 6.37 duty (10.62% actual assess rate)
Importer 2 Model Y	$ 26	$ 25	(-1) $ 0 duty	$ 1 subsidy		
Model Y	$ 27	$ 25	(-2) $ 0 duty	$ 2 subsidy		
Importer 2 Total	$ 53		(-3) $ 0 duty (0% actual assess rate)	$ 3 subsidy (5.67% subsidy)	$ 0 duty (0% actual assess rate)	$ 5.63 duty (10.62% actual assess rate)
Exporter A Total	$ 113		$ 15 duty (apparent assess rate = 13.27%)	$12 net collection ($15 duty, $3 subsidy)	$12 duty (apparent assess rate = 10.62%)	$12 duty (apparent assess rate = 10.62%)

None of importer 2's transactions were dumped. Accordingly, under the U.S. system, importer 2's antidumping duty assessment rate would be set to zero and a full refund of any cash deposits would be issued to importer 2. In contrast, each of importer 1's transactions were dumped. Under the U.S. system, an assessment rate of 25 percent is established to collect a total of $15 on $60 worth of imported merchandise, which is the total amount by which export prices were

exceeded by normal value for importer 1's transactions. If, as Japan suggests, the total amount of antidumping duties permitted to be collected cannot exceed an individual exporter-specific margin of dumping calculated without "zeroing," then $12 is the maximum amount collectable on exporter A's transactions. This amount reflects the extent to which importer 1's transactions were dumped (i.e., $15) and an offset for the extent to which importer 2's transactions exceeded normal value (i.e., $3). Because the U.S. system results in the assessment of antidumping duties on importer 1 of $15, this appears to exceed the "cap," as understood by Japan. As a consequence, there are three absurd alternatives. First, a negative antidumping duty could be assessed on importer 2 in the form of a $3 payment. We note that the Appellate Body has indicated that it would not be mandatory for this particular alternative to be employed,[95] but this concession merely leads to other, equally absurd, alternatives as follows. Second, the antidumping duty assessed on importer 1 could be reduced by $3 so that the total antidumping duty collected would not exceed the $12 exporter-specific cap despite the fact the amount of dumping associated with importer 1's transactions was indisputably $15 and the only basis for the reduction in importer 1's assessment rate is to take importer 2's transactions into account as an offset. Third, the United States could impose a uniform 10.62 percent assessment rate on both importer 1 and importer 2 to collect $12 despite the fact that importer 1's transaction were dumped by an amount of $15 and importer 2's transactions were not dumped. Such an illogical inter-importer accounting of antidumping duty offsets is not required by any provision of Article 9.3, and the Panel properly recognized that such an interpretation was inconsistent with

[95] *US – Softwood Lumber (21.5)*, n.182; *US – Zeroing (EC) (AB)*, n.234.

the importer- and import-specific character of antidumping duty assessment contemplated by the text of Article 9.3.[96]

66. On the other hand, if both the margin of dumping and the liability for antidumping duties are incurred on a transaction-specific basis, no such complexities arise because the margin of dumping and the antidumping duty result in precisely the same number. Duty liability may be incurred by the importer, and a margin of dumping may be calculated for the exporter, precisely as provided for under Article 9, without requiring a subsequent calculation based on an aggregation of transactions. In other words, just as the Trade Policy Review of Canada indicates, the liability and the margin are fixed on the same date – the date of importation. Thus, the Panel's extensive discussion of Article 9.4(ii) and the prospective normal value system is relevant; under such a system, as noted above, the margin of dumping and the antidumping duty liability results in the same number and are determined at the time of importation, not at a later date.

67. Second, Japan argues that the Panel simply confused "margins of dumping" and the "amount of the duty."[97] As discussed above, however, nothing could be further from the truth. The Panel carefully examined the difference between the margin of dumping and the amount of the duty, particularly noting that in a prospective normal value system, final liability for payment of antidumping duties attaches at the time of importation, rather than *retrospectively*.[98] It is precisely the distinction the Panel made between the antidumping duty and the margin of

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[96] Panel Report, para. 7.199.
[97] Japan Appellant Submission, para. 157.
[98] Panel Report, para. 7.205.

dumping, particularly in connection with prospective normal value systems, that led to its conclusion that the margin of dumping can be calculated on a transaction-specific basis.[99]

68. Japan states that "the amount of duties on entries of a product is *not* a 'margin of dumping' for those entries, and vice versa."[100] But the Panel never argued that they were. Rather, the Panel pointed out that both the margin of the dumping and the antidumping duty liability could be calculated on a transaction-specific basis. While in principle those could be the same, they might not; a Member is free to fix liability for payment of duties at *less* than the full margin of dumping.[101] Therefore, Japan wrongly contends that the Panel "erred in finding that the imposition of duties on individual import transactions constitutes the determination of a margin of dumping for those transactions."[102] The Panel made no such finding.

69. The United States notes that Japan's arguments concerning Article 2.4 in assessment reviews are the same as those in investigations, and for the same reason, they fail.

IV. Zeroing in New Shipper Reviews

70. Japan properly notes that "the reasons that led the Panel to conclude that zeroing is permitted in periodic reviews also led the Panel to conclude that zeroing was permitted in new

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[99] As the Panel noted, "to deny the relevance of the relationship that exists in Article 9.3 between 'margin of dumping' and the payment of an anti-dumping duty is illogical and contrary to the text and purpose of Article 9." Panel Report, para. 7.203. This is so because the amount of antidumping duties cannot exceed the margin of dumping. It is impossible to tell if the amount of antidumping duties exceed the margin of dumping without examining both the antidumping duty and the margin of dumping. Again, a transaction-specific calculation of a margin of dumping means that an antidumping duty calculated on that same basis will, by definition, not exceed the margin of dumping.

[100] Japan Appellant Submission, para. 160.

[101] *See, e.g.*, Article 9.1 ("the duty may be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.")

[102] Japan Appellant Submission, para. 161.

shipper reviews."[103] In this regard, the Panel found "there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing."[104] The reasons for the Panel's conclusion have been described in detail above.

71. With regard to its conclusion as applied to new shipper reviews, Japan argues that the Panel gave no separate interpretive consideration to Article 9.5. In particular, Japan notes that new shipper reviews are conducted for the purpose of "determining individual margins of dumping for any exporters or producers" not reviewed in the original investigation.[105] Thus, Japan argues that the Panel did not consider the impact of this text on its interpretation.

72. The Panel's finding does take the text of Article 9.5 into account, however, albeit without expressly citing that provision. Indeed, the Panel expressly found that even when considered "in conjunction with a requirement to establish margins of dumping for exporters or foreign producers" there was no requirement to determine margins for the product as a whole such that "zeroing" was generally prohibited.[106]

73. Japan further argues that the term "individual margins of dumping" used in Article 9.5 "expressly contemplates" the determination of a "single" margin of dumping for "the product as a whole." The word "individual" in this context, however, does not necessarily imply a "single" margin of dumping. Because the purpose of new shipper reviews is to determine individual

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[103] Japan Appellant Submission, para. 180.
[104] Panel Report, para. 7.194.
[105] Article 9.5.
[106] Panel Report, para. 7.196.

margins of dumping for exporters and producers who did not have subject exports during the investigation, a more natural meaning for the word "individual" is to connote that exporters and producers participating in the new shipper review would receive their *own* separate margins of dumping in contrast to being assigned a dumping margin derived from exporters and producers who were examined during the investigation.[107] Nothing in the text of Article 9.5 implies that the "individual margins of dumping" are necessarily and always a "single" dumping margin determined on the basis of the "product as a whole" for each exporter or producer.

V. Japan's As Applied Claims Regarding Assessment Proceedings and Sunset Reviews

74. With regard to Panel's finding that Commerce did not act inconsistently with Articles 2.1, 2.4, 9.1, 9.2 and 9.3 of the Antidumping Agreement in the eleven assessment proceedings identified by Japan in Exhibits JPN-11 to JPN-21, Japan raises a single argument claiming error by the Panel. Namely, for the same reasons Japan alleges with respect to Japan's "as such" claim, Japan asserts that the Panel also erred in concluding that "zeroing" is permissible in determining dumping margins in assessment proceedings with respect to Japan's "as applied" claims in the eleven assessment proceedings. As discussed in detail above, the Panel's findings in this regard were not erroneous, and therefore, the Panel's conclusions with respect to Japan's "as applied" claims in the eleven assessment proceedings should be affirmed.

75. With regard to Panel's finding that Commerce did not act inconsistently with Articles 2 and 11 of the Antidumping Agreement in the sunset reviews of corrosion-resistant carbon steel and anti-friction bearings, Japan raises a single point of error. Namely, Japan asserts that the

[107]The Panel reached a similar interpretation of the term "individual" similarly used in Article 6.10 as it described the margin of dumping based on an examination of data pertaining to that particular exporter or foreign producer. Panel Report, n. 747.

Panel erred in its conclusion that "zeroing" is permissible in determining dumping margins in assessment reviews. As discussed in detail above, the Panel's findings in this regard were not erroneous, and therefore, the Panel's conclusions with respect to Japan's "as applied" claims in the two sunset review should be affirmed.

VI. Conclusion

76. For the foregoing reasons, the United States respectfully requests that the Appellate Body reject Japan's claims.