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UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA - RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA

Report of the Panel

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I. INTRODUCTION

1.1 On 19 May 2005, Canada requested the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter "*DSU*") concerning the United States' alleged failure to implement the recommendations and rulings of the Dispute Settlement Body (hereinafter "DSB") in the dispute "*United States – Final Dumping Determination on Softwood Lumber from Canada*".[1]

1.2 At its meeting on 1 June 2005, the DSB referred this dispute to the original panel, in accordance with Article 21.5 of the *DSU*, to examine the matter referred to the DSB by Canada in document WT/DS264/16. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS264/16, the matter referred to the DSB by Canada in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".[2]

1.3 On 3 June 2005, the Panel was composed as follows:

Chairman: Mr. Harsha V. Singh

Members: Mr. Gerhard Hannes Welge
Mr. Adrián Makuc.[3]

1.4 China, the European Communities, India, Japan, New Zealand and Thailand reserved their third-party rights.

1.5 On 3 August 2005, following his appointment as a Deputy Director-General of the WTO Secretariat, Mr. Harsha Singh resigned from his position as Chairman of the Panel. Subsequently, on 18 August 2005 Canada requested the Director-General to appoint a replacement Chairperson, pursuant to paragraph 7 of Article 8 of the *DSU*.

1.6 On 26 August 2005, the Director-General appointed a new Chairman of the Panel. Accordingly, the composition of the Panel is as follows:

Chairman: Dr. Toufiq Ali

Members: Mr. Gerhard Hannes Welge
Mr. Adrián Makuc[4]

1.7 The Panel met with the parties on 15-17 November 2005. It met with the third parties on 16 November 2005. The Panel issued its interim report to the parties on 14 February 2006.

II. FACTUAL ASPECTS

2.1 This dispute concerns the implementation by the United States of part of the rulings and recommendations of the DSB in respect of *United States – Final Dumping Determination on Softwood Lumber from Canada (DS264).* The relevant part of the rulings and recommendations of

[1] WT/DS264/16, 20 May 2005.
[2] WT/DS264/20/Rev.2, 17 June 2005.
[3] WT/DS264/20/Rev.2, 17 June 2005.
[4] WT/DS264/23, 29 August 2005.

the DSB concerned the finding that the use of "zeroing" by the US Department of Commerce (DOC) in the underlying investigation was inconsistent with Article 2.4.2 of the *AD Agreement* in the context of a comparison of "a weighted average normal value with a weighted average of all comparable export transactions".

2.2 In the original anti-dumping investigation underlying this dispute, DOC divided the product under investigation into groups of identical, or broadly similar, product types. After making certain adjustments within each product type, DOC calculated a weighted average normal value and export price for each product type, and then compared the weighted averages for each product type. This process resulted in multiple results, one for each product type. In some instances this comparison showed that the weighted average export price for a specific product type was less than the weighted average normal value, *i.e.*, an amount of dumping, while in other instances, the comparison showed that the weighted average export price was more than the weighted average normal value, *i.e.*, no dumping. These results were then aggregated to produce one single margin of dumping for the product under investigation for each investigated exporter. In the aggregation process, a value of "zero" was attributed as the amount of dumping for those product type comparisons where the weighted average export price was more than the weighted average normal value. DOC then aggregated the positive amounts of dumping from the individual product type comparisons, that is, those instances where the weighted average export price was less than the weighted normal value, and divided the result by the total value of exports, to arrive at a weighted average margin of dumping. This process of attributing a "zero" value as the amount of dumping for individual product type comparisons where the weighted average export price is more than the weighted average normal value for the same product type is the process of "zeroing" which was at issue before the original panel and Appellate Body in this dispute.

2.3 The issue before the original panel was whether zeroing is allowed when an investigating authority is calculating an overall margin of dumping under the weighted average-to-weighted average methodology set forth in Article 2.4.2. The original panel observed that "It is clear that Article 2.4.2 requires that all comparable export transactions have to be taken into account when the weighted average normal value is compared to the weighted average of prices of all comparable export transactions. ... Through the use of zeroing, it is clear to us that the entirety of the prices of some export transactions, *i.e.*, those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, in the second stage of the process, are not taken into account."[5] Consequently, the original panel concluded (subject to a dissenting opinion[6]) that:

> "...the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation".[7]

2.4 The original panel concluded that the United States "acted inconsistently with Article 2.4.2 of the *AD Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing'."[8]

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[5] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, paras. 7.215-216.

[6] Panel Report, *US – Softwood Lumber V*, *supra* note 5, paras. 9.1-9-24.

[7] Panel Report, *US – Softwood Lumber V*, *supra* note 5, para. 7.224.

[8] Panel Report, *US – Softwood Lumber V*, *supra* note 5, para. 8.1(a).

2.5 The United States appealed that conclusion by the original panel. The Appellate Body upheld the original panel's finding that the United States acted inconsistently with Article 2.4.2 of the *AD Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing.[9]

2.6 In reaching its conclusions, the Appellate Body emphasized that it was addressing the issue specifically in the context of the weighted average-to-weighted average comparison methodology. The Appellate Body concluded that dumping, and "margins of dumping", can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product, and further stated that the weighted average normal value/weighted average export price comparisons for the product types in the DOC analysis did not result in the calculation of "margins of dumping", but only in intermediate calculations on the way to the calculation of a margin of dumping for the product (as defined by DOC), lumber, as a whole. In looking at the text of Article 2.4.2, the Appellate Body relied on the presence of the phrase "all comparable export transactions", and stated, similarly to the original panel: "Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price." (footnote omitted) [10] The Appellate Body specifically stated that the issue of whether zeroing is permitted under the transaction-to-transaction methodology or the average-to-transaction methodology was not before it, and it refused to consider the United States' arguments that this issue should be considered as context in assessing the permissibility of zeroing under the average-to-average methodology.

2.7 The Appellate Body's report was adopted 31 August 2004.

2.8 Under US law (commonly referred to as "Section 129"), if a WTO Panel or Appellate Body report finds that a determination by the DOC is not consistent with US obligations, then, following consultations with and upon receipt of a written request from the USTR, the DOC "shall ... issue a determination in connection with the particular proceeding that would render the [DOC's] action ... not inconsistent with the findings of the panel or the Appellate Body".[11] In this dispute, the USTR made such a request to the DOC on 5 November 2004. The DOC issued its "Section 129" determination within the statutory deadline set out in US law, on 2 May 2005. In that determination, the DOC calculated new rates for the exporters subject to the anti-dumping duty order, based on a comparison of normal value and export prices on a transaction-to-transaction basis. Specifically, the DOC matched individual sales of Canadian lumber in the United States (export transactions) with individual sales of Canadian lumber in Canada (normal value transactions), using criteria developed in the original investigation for matching comparable transactions, and then compared the price of each export transaction for which it had data with the price of a comparable normal value transaction. The resulting comparisons yielded a positive amount where normal value exceeded export price, or a negative amount where normal value was less than export price. DOC then calculated a final margin of dumping for individually examined exporters by adding together the positive amounts, and dividing by the value of all export transactions for that exporter individually examined. DOC did not take into account the negative amounts.

2.9 Canada claims that the methodology adopted by the DOC in the Section 129 determination is inconsistent with Articles 2.4.2 and 2.4 of the *AD Agreement.* The United States denies Canada's claims.

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[9] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, para. 117.

[10] Appellate Body Report, *US – Softwood Lumber V*, *supra* note 9, para. 101.

[11] 19 U.S.C. §3538(b)(2).

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Canada asks the Panel to find that the United States failed to implement the DSB's recommendations and rulings and rule that it has acted inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by continuing to determine dumping on the basis of a methodology that incorporates the practice of zeroing.

3.2 Canada also requests that the Panel recommend pursuant to Article 19.1 of the *DSU* that the United States bring its measures into conformity with its obligations under Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by recalculating dumping margins for all investigated exporters and the "all others rate" on the basis of a methodology that does not incorporate the practice of zeroing and that it return all anti-dumping cash deposits collected as a result of its failure to eliminate the practice of zeroing.

3.3 The United States requests that the Panel reject Canada's claims in their entirety and find that the United States properly implemented the recommendations and rulings of the DSB in this dispute.

3.4 With respect to Canada's request that the Panel recommend that the United States bring its measures into conformity in a particular manner, the United States notes its understanding that Canada is asking for a "suggestion" under Article 19.1 of the *DSU*. The United States asserts that there should be no need for such a suggestion, as the United States has come into compliance with its WTO obligations. However, in the event the Panel were to accept Canada's arguments, the United States requests that the Panel decline Canada's request as inappropriate, asserting that it goes beyond anything relevant to implementing a recommendation and seeks to impose an obligation – to return anti-dumping cash deposits – nowhere called for under the WTO agreements.

3.5 The arguments of the parties and third parties are set out in their written submissions and oral statements to the Panel. Executive summaries of those submissions and statements are appended to this report.

IV. INTERIM REVIEW

4.1 On 31 January 2006, we submitted our interim report to the parties. On 20 February 2006, Canada and the United States submitted written requests for review of precise aspects of the interim report. On 27 February 2006, Canada and the United States submitted written comments on each other's request for interim review.

A. REVIEW REQUESTED BY CANADA

4.2 Canada requested review of paragraphs 5.11, 5.14, 5.19, 5.37, 5.39 (footnote 54), 5.70 (footnote 82), and 6.80 of the interim report. Canada asked the Panel to correct alleged mischaracterizations of Canada's position in these paragraphs.

4.3 In the absence of any objections from the United States, we made the changes requested by Canada to paragraphs 5.11, 5.19, 5.37, 5.39 (footnote 54), and 6.80 of the interim report (mis-numbered in the interim report, paragraph 6.2 of the final report).

4.4 In respect of paragraph 5.14, in the absence of any objections from the United States, we made changes to the text to reflect Canada's argument, based on the comments made by Canada.

4.5 In respect of paragraph 5.70, footnote 82, Canada asked the Panel to insert a reference to a letter it had submitted to the Appellate Body on 28 September 2004 regarding Canada's position in the *US – Softwood Lumber V* Appellate Body proceedings. Canada asked the Panel to insert specific language regarding this matter. The United States objected to the language proposed by Canada,

alleging that it referred in an unbalanced way to Canada's letter. The United States proposed alternative language to be used in the event that the Panel decided to include a reference to Canada's letter in footnote 82.

4.6 In response to Canada's request, we included a reference to Canada's 28 September 2004 in footnote 82 (footnote 84 in the final report). In doing so, we relied in part on the language proposed by the United States.

B. REVIEW REQUESTED BY THE UNITED STATES

4.7 The United States requested review of paragraphs 5.28, 5.31 and 5.73 of the Panel's interim report. The United States also referred the Panel to a number of typographical errors in the interim report.

4.8 In the absence of any objections from Canada, we made the changes requested by the United States to paragraphs 5.31 and 5.73 of the interim report.

4.9 In respect of paragraph 5.28, the United States requested the deletion of the phrase "even though it does not reflect the full results of all comparisons" from the final sentence of that paragraph. The United States asserted that, although the phrase is not inconsistent with the Panel's findings, it might be mis-read as being inconsistent. In its comments on the US request for interim review, Canada asserted that the phrase accurately reflects the Panel's finding that an investigating authority may treat non-dumped or negative transaction-specific comparison results as a zero value (*i.e.*, less than they actually were) in calculating a margin of dumping.

4.10 We see no need to make the change requested by the United States. In the context of paragraph 5.28, the meaning of the phrase "even though it does not reflect the full results of all comparisons" should be clear. However, we have amended the text of paragraph 5.28 in order to ensure that it clearly reflects our view that, when establishing the amount of dumping for the purpose of calculating a margin of dumping under the T-T comparison methodology, an investigating authority need not include in its calculations the results of comparisons where export price exceeds normal value.

4.11 We also corrected the typographical errors identified by the United States, as well as others we identified.

V. FINDINGS

A. INTRODUCTION AND GENERAL ISSUES

5.1 The claims put forward by Canada in this case challenge the DOC's Section 129 determination, and specifically one aspect of its methodology in calculating dumping margins for individual exporters examined. Canada has not challenged any of the procedural aspects of the Section 129 process, including the DOC's methodology in matching transactions for purposes of the transaction-to-transaction comparisons in the dumping margin calculation.

5.2 The role of a Panel in an Article 21.5 proceeding is to evaluate the challenged measure to determine its consistency with the defending Member's obligations under the relevant WTO Agreements. Thus, the Panel is not limited by the original analysis and decision – rather, it is to consider, with a fresh eye, the new determination before it, and evaluate it in light of the claims and arguments of the parties in the Article 21.5 proceeding.

5.3 In this case, there is no dispute as to the measure at issue, or as to the propriety of the claims raised by Canada. The principal task for us is to assess, applying the familiar concepts regarding

standard of review and burden of proof, whether the methodology used by DOC in its dumping margin calculation in the Section 129 determination is consistent with the asserted obligations in Articles 2.4 and 2.4.2 of the *AD Agreement*.

5.4 The concepts of standard of review and burden of proof applicable in this dispute are the same as those applied in the original Panel's report. As the Panel noted in that report, Article 11 of the *DSU* sets forth the appropriate standard of review, in general, for panels for all covered agreements. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.[12]

5.5 Furthermore, Article 17.6(i) of the *AD Agreement* sets forth the special standard of review applicable to anti-dumping disputes. It provides with regard to factual issues that:

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

In this case, there is no dispute between the parties as to the establishment of the facts relevant to the claims before us.

5.6 Article 3.2 of the *DSU* notes that the dispute settlement system serves, *inter alia*, to "clarify the existing provisions of [covered] agreements in accordance with customary rules of interpretation of public international law". Furthermore, pursuant to Article 3.2 of the *DSU*, it is clear that a panel's decision "must not add to or diminish rights and obligations provided in the *WTO Agreement*".[13] With respect to questions of the interpretation of the *AD Agreement*, Article 17.6(ii) provides:

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

Thus, since Article 17.6(ii) requires us to apply the customary rules of interpretation of treaties in interpreting the *AD Agreement*, our task is in this respect no different from the task of all panels. Article 31.1 of the *Vienna Convention*,[14] which is generally accepted as reflecting such customary rules, provides that:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

It is thus clear that our interpretation of the relevant provisions in this dispute must be based, first and foremost, on the text of the treaty, while context and object and purpose may also play a role.[15] It is

[12] Panel Report, *US – Softwood Lumber V*, *supra* note 5, para. 7.6.

[13] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 46.

[14] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 *International Legal Materials* 679.

[15] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11. The

also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[16]

5.7 What Article 17.6(ii) of the *AD Agreement* adds is an explicit recognition that the provisions of the *AD Agreement* may admit of more than one permissible interpretation, and an instruction that, if the process of treaty interpretation leads us to the conclusion that the interpretation of a provision in question put forward by the defending party is permissible, we shall find the measure in conformity with the *AD Agreement* if it is based on that permissible interpretation.

5.8 Finally, we recall that, in WTO dispute settlement proceedings, the burden of proof rests with the party that asserts the affirmative of a particular claim or defence.[17] Canada as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the *AD Agreement*, which the United States as respondent must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[18] We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".[19]

B. CANADA'S ARTICLE 2.4.2 CLAIM

5.9 Canada claims that the United States violated Article 2.4.2 of the *AD Agreement* because DOC engaged in zeroing when applying the transaction-to-transaction comparison methodology in the Section 129 Determination.

5.10 Article 2.4.2 of the *AD Agreement* provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

Appellate Body has recently emphasized the importance of the "ordinary meaning" of the terms used in the treaty text in, for example, Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 ("US – Offset Act (Byrd Amendment)")*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375.

[16] Appellate Body Report, *India – Patents (US)*, *supra* note 13, para. 45.

[17] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, p. 14, *et seq*.

[18] See Appellate Body Report, *US – Wool Shirts and Blouses*, *supra* note 17.

[19] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701, para. 136.

1. Main arguments of the parties

5.11 Canada submits that the Appellate Body has already found that zeroing is prohibited in the context of the weighted average-to-weighted average ("W-W") comparison methodology. Canada asserts that the Appellate Body's reasoning should also apply in respect of zeroing in the context of the transaction-to-transaction ("T-T") comparison methodology at issue in these proceedings.

5.12 Canada asserts that the Appellate Body ruled, in the appeal of the original Panel's decision in this case, that, when establishing "margins of dumping" "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions", margins of dumping can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product. In this regard, Canada refers to the Appellate Body's finding that:

> … the results of the multiple comparisons at the sub-group level are … not "margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.[20]

5.13 Canada also relies on the Appellate Body's statement that it:

> ... fail[ed] to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.[21]

5.14 Canada notes that this approach led the Appellate Body to find that zeroing is prohibited in the context of the W-W comparison methodology because the margin of dumping was not established for the product as a whole, in the sense that zeroing meant that non-dumped comparisons were treated as if the result were zero rather than the actual negative result, such that not all the results for all the multiple comparisons were taken into account. Canada submits that the same approach should apply in the context of the T-T comparison methodology. In particular, Canada asserts that, as with the W-W methodology, the T-T methodology involves multiple comparisons, in the sense that every transaction-specific comparison made by DOC represents an intermediate calculation in the context of establishing a margin of dumping for the product under investigation. According to Canada, therefore, DOC must aggregate all (*i.e.*, without zeroing any) of these transaction-specific "intermediate values" in order to arrive at a single margin of dumping for the product as a whole. In other words, Canada claims that zeroing is prohibited under the T-T comparison methodology for the same reasons that it is prohibited under the W-W comparison methodology.[22]

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[20] Appellate Body Report, *US – Softwood Lumber V*, para. 97 (emphasis in original).

[21] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis in original).

[22] Canada's arguments are broadly supported by China, the European Communities, India, Japan and Thailand, as third parties.

5.15 According to the United States, there is no textual basis for any obligation to offset the results of comparisons in which export prices are less than normal value with the results of comparisons in which export prices are greater than normal value when aggregating the results of multiple transaction-to-transaction comparisons. With regard to the Appellate Body Report, the United States asserts that the Appellate Body's condemnation of zeroing under the W-W comparison methodology was based on an integrated interpretation of the phrases "margins of dumping" and "all comparable export transactions". The United States submits that the latter phrase is absent in that part of the first sentence of Article 2.4.2 providing for the T-T comparison methodology. In addition, the United States asserts that, rather than being treated as "intermediate values", the results of T – T comparisons between normal value and export price may themselves be treated as "margins of dumping". The United States asserts that the term "margins of dumping" should be interpreted in the context of the particular comparison methodology being applied by the investigating authority. The United States argues that although "margins of dumping" must be determined for all comparable export transactions, and therefore the product as a whole, in the context of the W – W methodology, transaction-specific "margins of dumping" may be determined in the context of the T – T methodology. According to the US, the prohibition of zeroing under the W-W comparison methodology therefore does not apply in the context of the T-T comparison methodology.[23]

2. Evaluation by the Panel

(a) The Issue

5.16 In its Section 129 Determination, the DOC calculated a single margin of dumping for softwood lumber for each respondent foreign producer or exporter. It calculated that margin of dumping by determining the total amount of dumping on the basis of individual comparisons of export price and normal value for each export transaction, and then expressing that total amount as a proportion of the total value of all export sales, including those sales for which export price exceeded normal value. In order to establish the amount of dumping, the DOC summed up the amounts by which, on individual transactions, export price was less than the normal value. The DOC did not include in that summing up the amounts by which, in individual transactions, export price exceeded the normal value. In other words, the DOC did not offset the amounts attributable to non-dumped transactions against the amounts attributable to dumped transactions. The issue presented by Canada's Article 2.4.2 claim is whether it was permissible for the DOC to not make such offsets when calculating the margin of dumping for each producer/exporter.[24] In other words, we must decide whether the DOC was permitted to sum only the amounts derived from T-T comparisons showing dumping, or whether it was required to also include the amounts derived from comparisons involving non-dumped transactions in that aggregation.

(b) Text

5.17 The starting point for our analysis of this issue is the relevant text of the first sentence of Article 2.4.2 of the *AD Agreement*, which provides, *inter alia*, that "[s]ubject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping" may be established

[23] In effect, the US argues that the investigating authority may therefore concentrate on the positive (transaction-specific) margins of dumping, without needing to make an offsets for non-dumped transactions. New Zealand, as third party, agrees that zeroing is permitted in the context of the T-T comparison methodology, albeit for different reasons than those presented by the United States.

[24] Canada asserts that the onus is on the United States to demonstrate that Article 2.4.2 allows an investigating authority to disregard the results of (non-dumped) intermediate values. See, *e.g.*, Canada's Comments on the United States' Answers to the Panel's Questions at page 4. However, as complaining Member, the onus is on Canada to establish a *prima facie* case of violation, which entails demonstrating that Article 2.4.2 requires an investigating authority using the T-T comparison methodology to treat each transaction-specific comparison as an intermediate value, and to sum up all such intermediate values in calculating a single margin of dumping.

"by a comparison of normal value and export prices on a transaction-to-transaction basis". This is all that the relevant text of the first sentence of Article 2.4.2 says. It contains no definition of the term "margins of dumping", nor any additional instruction, or even guidance, on practical issues to be addressed by investigating authorities using the transaction-to-transaction comparison methodology. For example, will the margin of dumping be expressed as an absolute amount, or will it be expressed as a proportion of the value of export sales? Which export transactions will be compared with which transactions in the exporting Member? Will the results of the transaction-to-transaction comparisons be aggregated and, if so, how? We stress that such issues are not explicitly addressed by the relevant text of the first sentence of Article 2.4.2.

5.18 Thus, if an investigating authority chooses to express the margin of dumping in proportion to the value of export sales, and to aggregate the results of the relevant transaction-to-transaction comparisons, the text contains no explicit instruction that such aggregation should include offsets for non-dumped amounts. In particular, the relevant part of the first sentence of Article 2.4.2 does not explicitly prohibit zeroing. Nor does Canada argue that it does. Instead, Canada argues that the prohibition of zeroing stems from the proposition that the phrase "margins of dumping" (in the relevant part of the first sentence of Article 2.4.2) refers to the margin of dumping "for the product as a whole", fully reflecting the results of all transaction-to-transaction comparisons. Canada relies in this regard on the findings of the Appellate Body in *US - Softwood Lumber V*.

(c) Scope of Appellate Body Findings in *US – Softwood Lumber V*

5.19 *US - Softwood Lumber V* concerned the DOC's treatment of the results of model-to-model, or sub-group, comparisons when applying the weighted-average-to-weighted-average comparison methodology, which is also provided for in the first sentence of Article 2.4.2. The Appellate Body found that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".[25] In the present case, Canada asserts that the Appellate Body's reasoning should have been applied by the DOC to establish a single margin of dumping (per exporter/producer) for "the product as a whole" by aggregating all the results of the transaction-to-transaction comparisons (concerning that exporter/producer), and specifically by taking into account the full amount by which, in some of those comparisons, export price exceeded normal value against the amounts by which, in other comparisons, export price was less than normal value, *i.e.*, showed dumping. In other words, Canada asserts that the DOC was required to fully reflect the value of all import transactions included in the transaction-to-transaction comparisons, rather than focusing on only those import transactions where export price was less than normal value.

5.20 We are not persuaded by Canada's argument, however. The Appellate Body's *ratio decidendi* were necessarily limited to the legal issues before it, and those issues concerned the application of the W-W comparison methodology.[26] The Appellate Body did not make findings regarding the T-T comparison methodology which is at issue in these proceedings, and its decision does not contain any legal analysis of the permissibility of zeroing under that methodology. Indeed, the Appellate Body explicitly declined to apply its findings regarding zeroing under the W-W comparison methodology to zeroing under the T-T comparison methodology. In particular, the Appellate Body "fail[ed] to see

[25] Appellate Body Report, US – Softwood Lumber V, *supra* note 9, para. 96.

[26] Canada also relies on the Appellate Body's finding in *EC - Bed Linen* that "[w]hatever the method used to calculate the margins of dumping, ... these margins must be, and can only be, established for the *product* under investigation as a whole" (Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, para. 53) (see para. 12 of Canada's second written submission). Since the Appellate Body in *US - Softwood Lumber V* was simply reiterating its earlier finding in *EC – Bed Linen* to support its position in *US - Softwood Lumber V*, we see no need to address the findings of the Appellate Body in *EC – Bed Linen* in detail. Instead, we shall focus - as the parties have done – on the findings of the Appellate Body in *US - Softwood Lumber V*.

how [it] could find that the transaction-to-transaction and average-to-transaction methodologies could provide contextual support for the United States' interpretation of Article 2.4.2 without examining first *whether zeroing is permitted under those methodologies*".[27] If the Appellate Body's interpretation of the term "margins of dumping" (in isolation from the phrase "all comparable export transactions) necessarily leads to the prohibition of zeroing under the T-T comparison methodology, as alleged by Canada,[28] there would have been no need for the Appellate Body to first examine "whether zeroing is permitted" under the T-T methodology before addressing the contextual argument advanced by the United States. The fact that the Appellate Body declined to extend its interpretation of "margins of dumping" from the context of the W-W methodology to the T-T methodology suggests strongly that that interpretation was indeed limited to the situation where the term "margins of dumping" is used in conjunction with the phrase "all comparable export transactions".

5.21 Furthermore, the first clause of the first sentence of Article 2.4.2 describes the W-W methodology as the establishment of margins of dumping "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions". The phrase "all comparable export transactions" is not included in the description of the T-T comparison methodology, which is set out in the **second** clause of the first sentence Article 2.4.2, and is the methodology at issue in these Article 21.5 proceedings. According to the Appellate Body, the parties in *US - Softwood Lumber V* "disagree[d] as to the proper interpretation of the terms 'all comparable export transactions' **and** 'margins of dumping' ...".[29] Although Canada asserts that "[t]he phrase 'all comparable export transactions' was not central to the Appellate Body's findings that intermediate comparisons must be aggregated to arrive at margins of dumping",[30] the Appellate Body explicitly "emphasize[d]" that because "both of these terms occur in the same sentence and relate to establishing the existence of margins of dumping under Article 2.4.2", "they should be interpreted in an integrated manner".[31] Accordingly, we do not consider it appropriate to focus on the Appellate Body's interpretation of the term "margins of dumping", in isolation from the phrase "all comparable export transactions".[32]

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[27] Appellate Body Report, *US – Softwood Lumber V*, *supra* note 9, para. 105 (footnote omitted, emphasis supplied).

[28] Canada also asserts that the term "margins of dumping" appears, without modification, in a single sentence that applies to both the W-W and T-T comparison methodologies. According to Canada, therefore, it is not possible, as a matter of grammatical construction, for "margins of dumping" to have one meaning for one methodology and another meaning for the other. We are not persuaded by this argument, however, because the two comparison methodologies in the first sentence are separated and distinguished by the disjunctive "or". Since "margins of dumping" may therefore be established in different ways, using different methodologies, it is entirely possible that the nature of the resultant "margins of dumping" may also differ, in order to reflect the nature of the comparison methodology at issue.

[29] Appellate Body Report, *US – Softwood Lumber V*, *supra* note 9, para. 82 (emphasis supplied).

[30] Canada's second written submission, para. 16.

[31] The importance attached by the Appellate Body to the phrase "all comparable export transactions" may also be implied from the fact that it upheld, without modification, the finding of the original panel that had placed great emphasis upon this phrase. Indeed, the Panel had found that the United States violated Article 2.4.2

> "by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation."

Panel Report, *US – Softwood Lumber V*, *supra* note 5, para. 7.224. The Panel's views did not address the term "margins of dumping" or the concept of "product as a whole" as discussed by the Appellate Body.

[32] We note that Canada also relies on the Appellate Body's statements regarding Article VI.1 of the *GATT 1994* and Article 2.1 of the *AD Agreement* (see, for example, para. 9 of Canada's second written submission). Since these statements were made in the context of the Appellate Body's interpretation of the phrase "margins of dumping" (see, Appellate Body Report, *US – Softwood Lumber* V, *supra* note 9, paras. 92-

(d) "Product As A Whole" Under The T-T Methodology

5.22 Besides, in a case where the DOC had applied the W-W methodology, making a comparison for each of several sub-groups of the product, and then aggregating them to determine the margin of dumping, it was entirely logical for the Appellate Body to have concluded that the margin of dumping for the "product as a whole" must fully reflect those instances where, for a particular sub-group,[33] the weighted average export price was greater than the weighted average normal value. We do not consider that this necessarily requires that in a calculation based on the T-T methodology, the same logic applies and the same result must obtain. In particular, although there is little doubt that a margin of dumping is established for each exporter/producer with respect to the product under investigation, further examination indicates that "product" need not necessarily be interpreted as "product as a whole", in the sense that Canada posits, that is, the summed results, fully reflecting negative and positive results, of all comparisons concerning the product under investigation. There are also good reasons why "margins of dumping" need not necessarily relate to "the product as a whole" in all circumstances in the *AD Agreement*.

5.23 The Appellate Body drew its conclusion that dumping is to be found for the "product as a whole" from its consideration of Article VI of *GATT 1994* and Article 2.1 of the AD Agreement, which both define the concept of "dumping", in the case of the latter, by its own terms for the entire *AD Agreement*.[34] To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of *GATT 1994*, and the *AD Agreement*, wherever the term "product" or "products" appears.[35] A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot

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93), these statements should likewise be read in light of the phrase "all comparable export transactions". Since Canada has not raised any claims based on these provisions, there is no need for us to examine their application in the context of the T-T comparison methodology, *i.e.*, independent of the phrase "all comparable export transactions". That being said, we consider that there is nothing inherent in the word "product[]" (as used in Article VI:1 of the *GATT 1994* and Article 2.1 of the *AD Agreement*) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis, although this should not imply that a margin of dumping established with respect to a particular transaction is sufficient to impose an anti-dumping measure on all subsequent imports of the product. The notion that "a product is introduced into the commerce of another country" (Article 2.1) clearly can meaningfully apply to a particular export sale and does not require consideration of different export sales taken together. Indeed, even Canada acknowledges that a margin of dumping may be established for a single export transaction when an investigation involves only one transaction. See Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 27.

[33] We note that the Appellate Body itself described the "product as a whole" in *US - Softwood Lumber V* as "softwood lumber", rather than "all comparisons involving softwood lumber". Appellate Body Report, *US – Softwood Lumber* V, *supra* note 9, para. 99. In light of the Appellate Body's own description of "the product as a whole", we believe that the Appellate Body simply used the phrase "product as a whole" to emphasise the difference between establishing a margin of dumping for a single model of the product under investigation on the one hand, and establishing a margin of dumping for the product under investigation writ large, in all its types, models or categories.

[34] Article 2.1 begins "For the purpose of this Agreement,...".

[35] We note that the phrase "product as a whole" does not appear in either Article VI of *GATT 1994*, or the *AD Agreement*.

refer to a single import transaction. In many places where the words product and products are used in Article VI of the *GATT 1994*, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[36]

5.24 The Appellate Body supported its reference to "product as a whole" by having regard to Articles 6.10 and 9.2 of the *AD Agreement*. For the reasons set forth below, we do not consider that these provisions provide any guidance as to whether or not offsets should be made outside the context of the W-W comparison methodology at issue in *US – Softwood Lumber V*.

5.25 Article 6.10 of the *AD Agreement* requires that, as a rule, "an individual margin of dumping" shall be determined for each known exporter or producer of "the product under investigation". That is to say, known exporters or producers must be treated individually for purposes of determining dumping. In addition, this provision can also reasonably be understood to imply that for each of these exporters or producers a single margin of dumping must be calculated. Thus, Article 6.10 arguably entails a need to aggregate the results of the comparisons made in respect of different transactions in order to establish "an individual margin of dumping" for a particular exporter or producer. Assuming such an obligation exists, this does not answer the question of what methodology can be used to calculate that margin. The *AD Agreement* contains no express provision on the precise methodology to be used to calculate an overall margin. It certainly does not preclude the view that, in the methodology at issue in this dispute, the DOC did, in fact, calculate a single overall margin for each investigated producer/exporter of softwood lumber, *i.e.* a margin derived by aggregating the results of multiple transaction-specific comparisons of export price and normal value. Except in the case of Article 5.8, the *AD Agreement* does not expressly indicate whether such a margin must be expressed as an absolute amount or as a percentage. Where a margin is expressed as a percentage, which implies that the magnitude of one variable is defined as a proportion of another variable, the *AD Agreement* does not contain any rules regarding the methodology for computing these variables, *i.e*,. the denominator and numerator. Absent such rules, the mere fact that Article 6.10 uses the term "product under investigation" is insufficient to conclude that this provision dictates the use of a particular methodology for calculating an overall margin of dumping whereby the numerator of that margin must include the sum total of all (positive and negative) differences between export prices and the normal value.

5.26 Similarly, the fact that Article 9.2 of the *AD Agreement* provides for the imposition of anti-dumping duty on "product" is of limited relevance to the question of the precise methodology for calculating margins of dumping. It is obvious that there must be identity between the product subject to the anti-dumping duty and the product in respect of which determinations of dumping and injury are made.[37] It also stands to reason that, because the duty is applied to all subsequent imports of the product, the determination of dumping on the basis of a T-T comparison must be based on an analysis that takes into account all transactions under consideration. It does not necessarily follow, however, that transactions in which export prices are above the normal value must be treated in the same manner as transactions in which export prices are below the normal value.

(e) "Margins of Dumping" Under The T-T Methodology

5.27 We are also not persuaded that, outside the context of the W-W comparison methodology, "margins of dumping" must necessarily be established for "the product as a whole", on the basis of the

[36] More generally, an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with "product as a whole" in the sense in which Canada uses that term in this proceeding. Thus, for example, when Article VII:3 of the GATT refers to "the value for customs purposes of any imported product", this can only be interpreted to refer to the value of a product in a particular import transaction.

[37] Of course, the "product" on which the duty is actually imposed after the conclusion of an investigation is not the universe of exports that was subject to the investigation, as these exports have already been imported without duty.

full results of all comparisons. While "margins of dumping" is not defined by the *AD Agreement*, Article VI:2 of the *GATT 1994* provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). Leaving aside the use of constructed normal value and third country reference markets, addressed in Article VI:1(b)(i) and (ii), Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible[38] for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".

5.28 In the absence of any definition of the phrase "margins of dumping" in Article 2.4.2, and in the absence of any obligation under the T-T methodology to ensure that "all comparable export transactions" are represented in a weighted average export price, we see no reason why a Member may not, when applying the transaction-to-transaction comparison methodology, establish the "margin of dumping" on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values. In such cases, the margin of dumping clearly would reflect the price difference for dumped, rather than non-dumped, exports of the product by a particular exporter.[39] In our view, this would be a permissible interpretation of the relevant part of the first sentence of Article 2.4.2, even though it does not reflect the full results of all comparisons. In other words, when establishing the amount of dumping for the purpose of calculating a margin of dumping under the T-T comparison methodology, an investigating authority need not include in its calculations the results of comparisons where export price exceeds normal value.

(f) Margins of Dumping Without Averaging

5.29 In any event, even if we were to accept the argument that "margins of dumping" must be established "for the product as a whole", this concept in and of itself does not explain whether offsets should be made in the context of the T-T comparison methodology. It seems clear to us that the concept of a "weighted average export price", and particularly combined with the phrase "all comparable export transactions" is reasonably understood to require taking into account the entire universe of export prices for all transactions under consideration, regardless of whether they are above or below normal value. Thus, that the Appellate Body, drawing on the concept of "product as a whole", concluded that the margin of dumping should reflect all comparisons involving the product, or all import transactions involving the product, seems entirely consistent with the obligation to establish margins of dumping under the W-W comparison methodology, which is an averaging methodology that requires consideration of "all comparable export transactions". But, since this latter phrase does not appear in the text with reference to the T-T comparison methodology, we see no basis to conclude that the phrase "margins of dumping for the product as a whole" must be understood in the same way when applying the T-T comparison methodology. Moreover, although the T-T methodology might involve aggregation or summing up of results of comparisons of transaction-specific prices, this should not be confused with averaging. There is no requirement that aggregation

[38] We recall in this regard, the applicable standard of review set out Article 17.6(ii) of the *AD Agreement*, as discussed in paras. 5.5 - 5.7 above.

[39] In the Section 129 Determination, the DOC expressed the amount of dumping as a proportion of the total value of export sales. The denominator (i.e., the total value of export sales) included the value of both dumped and non-dumped export transactions. Only the numerator included only dumped export transactions. Canada has not challenged the DOC's calculation of the denominator.

under the T-T methodology should result in, or reflect, averages. Thus, we see no reason to conclude that a concept of a "margin of dumping for the product as a whole" **must** be understood, as Canada has argued, to be a margin of dumping that incorporates (through aggregation) price differences on individual transactions where export price is both greater than and less than normal value. Rather than investigating average pricing behaviour over a given period, the T-T methodology allows authorities to investigate transaction-specific instances of dumping, where export price is less than normal value, and calculate an overall margin of dumping which reflects the total amount of dumping on the imports subject to the investigation.[40] As a result, the US interpretation of the first sentence of Article 2.4.2, in the context of the T-T comparison methodology, as not precluding zeroing would seem at a minimum to be permissible.[41]

(g) Summary

5.30 In summary, we recall that Canada has not argued that the relevant text of Article 2.4.2 explicitly prohibits zeroing during the aggregation of transaction-to-transaction comparisons. Canada's Article 2.4.2 claim is instead dependent on the Appellate Body's finding in *US - Softwood Lumber V* that margins of dumping should be established for "the product as a whole". However, we have demonstrated that the Appellate Body's findings regarding the need to establish margins of dumping for "the product as a whole" should not necessarily be applied in the same manner outside the W-W comparison methodology. Those findings may in any event not be isolated from its consideration of the phrase "all comparable export transactions", which phrase does not appear in the relevant text concerning the transaction-to-transaction comparison methodology. This difference in language reflects a fundamental distinction between the nature of the W-W and T-T comparison methodologies. Although both methodologies might involve aggregation, the W-W methodology is based on an analysis of average price behaviour, while the T-T methodology allows an investigating authority to identify transaction-specific instances of dumping. In these circumstances, we conclude that there is no basis to uphold Canada's claim that Article 2.4.2 required the DOC to establish margins of dumping by aggregating the results of all transaction-to-transaction comparisons, offsetting non-dumped comparisons against dumped comparisons.

(h) Broader Contextual Considerations

5.31 The above analysis is confirmed by a number of broader contextual considerations which highlight a number of difficulties that would result from simply extending the findings of the Appellate Body in *US - Softwood Lumber V*, as Canada would have us do. One of these broader contextual considerations concerns the impact of Canada's "margins of dumping for the product as a whole" argument on the targeted dumping comparison methodology set forth in the second sentence of Article 2.4.2. Further contextual considerations concern the consequences of applying Canada's "margins of dumping for the product as a whole" argument to other provisions of the *AD Agreement*. In its final submission to the Panel, Canada sought to discourage the Panel from taking the latter

[40] We note that there is a fundamental underlying question whether the concept of dumping may relate to individual export transactions or whether it relates exclusively to the average pricing behaviour of an exporter over time. Although Canada has not expressly argued that dumping in the AD Agreement and in the *GATT 1994* should be conceptualized in terms of average pricing behaviour, the argument that positive differences between individual export prices and normal values in a T-T comparison must be offset by negative differences between individual export prices and normal values, leads to a result tantamount to a comparison on an average-to-average basis. However, there is no indication in the *AD Agreement* or *GATT 1994* to suggest any agreement or common understanding among Members on this underlying question, and thus no principled basis on which to conclude that one or the other view should influence the interpretation of the text of the *AD Agreement*. Consequently, there would seem no basis to prohibit a calculation methodology which generates an overall margin of dumping which reflects precisely the amount of anti-dumping duty that could have been collected on the import transactions from which it was calculated.

[41] We recall that, pursuant to Article 17.6(ii) of the *AD Agreement*, we shall find in favour of the defending party if its measure is based on a permissible interpretation of the *AD Agreement*.

considerations into account. In particular, Canada stated that it "has not argued that the term 'margins of dumping' must have the same meaning throughout the Agreement".[42] Instead, Canada asserts that "margins of dumping" simply has the same meaning throughout Article 2.4.2. In its oral statement at the substantive meeting, however, Canada explicitly stated that "the Appellate Body interpreted 'margins of dumping' in the context of Article VI of the *GATT* and Article 2.1 of the *Anti-Dumping Agreement* – provisions that apply to the entire *Anti-Dumping Agreement*".[43] Despite its protestations in its final submission, therefore, Canada has clearly argued that the phrase "margins of dumping" should have the same meaning throughout the *AD Agreement*, and that that meaning must necessarily be that set forth in the findings of the Appellate Body in *US - Softwood Lumber V*.

5.32 Since Canada's Article 2.4.2 claim is essentially based on the extension of the Appellate Body's *US - Softwood Lumber V* findings beyond the scope of that case, contextual considerations demonstrating the difficulties of applying those Appellate Body findings universally, throughout the *AD Agreement*, are highly relevant to the case before us. We begin by discussing the difficulty of applying the Appellate Body's findings in the context of the second sentence of Article 2.4.2. We then examine the implications of extending those findings to prospective normal value duty assessment systems. Thereafter, we examine the consequences of finding that margins of dumping must be established for the product as a whole in the context of Article 2.2 of the *AD Agreement*. We conclude our analysis by identifying the problem of reconciling the "margins of dumping for the product as a whole" approach with prior GATT discussion of the use of transaction-specific margins of dumping.

(i) Article 2.4.2, second sentence

The US mathematical equivalence argument

5.33 The second sentence of Article 2.4.2 provides for a departure from the two comparison methodologies provided for in the first sentence of that provision "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". In instances of such targeted dumping, "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions" (the "W-T comparison methodology"). In such cases, the margins of dumping are established using the W-T comparison methodology. If Canada is correct in arguing that the Appellate Body "did not limit its analysis of 'dumping' and 'margins of dumping' to the meaning of these terms under the weighted-average-to-weighted-average methodology",[44] there is seemingly nothing to prevent the Appellate Body's interpretation applying not only to the T-T methodology set forth in the second part of the first sentence of Article 2.4.2, but also to the W-T methodology provided for in the second sentence thereof.[45] This would effectively prohibit zeroing under the W-T comparison methodology (just as Canada alleges that it prohibits zeroing under the T-T comparison methodology). The United States asserts that such prohibition of zeroing in the context of the W-T methodology would mean that the margin of dumping using the W-T methodology would be mathematically equivalent to the margin of dumping established using the W-W methodology, thereby depriving the second sentence of Article 2.4.2 of effect. It is by now well established that panels may not interpret provisions in a way that would reduce those provisions to redundancy or inutility.[46] If the United States is correct, therefore, we are precluded from endorsing a prohibition of zeroing on the basis of the Appellate Body's interpretation of the term "margins of dumping" in *US - Softwood Lumber V.*, as argued by Canada. For this reason, we explored this issue

[42] See Canada's Comments on the United States' Answers t the Panel's Questions, page 1.
[43] Oral Statement of Canada, para. 13.
[44] *Ibid*. para. 9.
[45] Canada has not provided any basis for restricting the application of the Appellate Body's interpretation to only the first sentence of Article 2.4.2.
[46] See, for example, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, para. 21.

in detail with the parties and third parties, both at the substantive meeting, and through subsequent written questions. We did not explore this issue in order to make findings under the second sentence of Article 2.4.2, which is, of course, not before us in this dispute. Instead, we explored this issue to test the validity of the US mathematical equivalence argument. Our analysis of the various arguments made in respect of this issue led us to accept the US mathematical equivalence argument.

Separate margins of dumping for patterns of export prices

5.34 In response to the US argument, Canada and certain third parties sought to demonstrate that the W-T comparison methodology may be applied so as to give a result that is mathematically different from the W-W methodology, even without zeroing in the manner practised by the United States. In other words, they sought to demonstrate that the W-T methodology would not be nullified in the manner alleged by the United States. As described below, they do so by effectively arguing that the term "margins of dumping" has a different meaning under the W-T comparison methodology than under the W-W and T-T comparison methodologies, and that this difference in meaning is linked to the targeted nature of the dumping examined in the second sentence of Article 2.4.2.[47]

5.35 We presented Canada with a written question asking how the targeted dumping mechanism might operate to produce a mathematically distinct result from that obtained in a W-W comparison, without zeroing, in a hypothetical case regarding regional targeting, where imports into one region are dumped, and imports into other regions are not dumped. In reply, Canada stated that, having proven the regional pattern of dumping:

> an investigating authority would ... have a choice. It could either continue its anti-dumping investigation into export transactions to other parts of the country or it could terminate the investigation outside the targeted region. As the example in the question provides that transactions to other regions were not dumped, Canada assumes that the investigating authority would terminate its investigation into the non-targeted regions and continue the investigation with respect to transactions to the targeted region only.
>
> The investigating authority could then calculate the amount of dumping to the targeted region and place this value in the numerator. Canada is of the view that zeroing would not be permitted in the aggregation of any intermediate comparisons, just as it is not permitted in the two other methodologies found in the first sentence of Article 2.4.2. Similarly, the denominator would consist of the total value of dumped and non-dumped export transactions to the targeted region. The necessary injury analysis would also consider the same series or group of export transactions.
>
> As this example resulted in the termination of the investigation outside the targeted region, anti-dumping duties would only be applied to imports into the targeted region. Were an investigating authority to use the targeted dumping methodology in this example, it necessarily would produce a different margin of dumping than the weighted-average-to-weighted average methodology which would be applied to all imports into a country because the latter methodology would necessarily examine a different data set (*i.e.*, all export transactions, rather than the subset of export transactions that make up transaction involving the targeted region).

[47] We note that this was not the position taken by Thailand. Thailand explicitly stated that the results of the W-T comparisons within the targeted pattern were merely intermediate comparisons that needed to be aggregated. See Thailand's Responses to the Panel's Questions for Parties and Third Parties, Response to Question 45, para. 12.

5.36 In reply to a further question, Canada described how the second sentence of Article 2.4.2 might be applied in respect of purchaser-specific targeting. Canada asserted that, having identified such a pattern, an investigating authority could conduct a W-T calculation and apply that margin of dumping to the transactions involving that purchaser. Canada acknowledged that

> [t]his procedure would result in two margins of dumping being applied to an exporter or producer who has some sales to the purchaser to which the targeted dumping methodology was applied and other sales to other purchasers that were not subject to the targeted dumping methodology.[48]

5.37 Regarding the application of the second sentence of Article 2.4.2 in respect of time-specific targeting, Canada asserts that "the investigating authority would ... calculate a margin for the transactions that fall within the pattern", and "apply that margin of dumping to those transactions".[49] Canada submits that "only one margin of dumping would be applied at any particular point in time. If an import occurred within the period of time of the year in which targeted dumping was found, then the targeted dumping rate would be applied. If the import occurred at a point in time that was outside the targeted dumping time period, then the rate calculated for the balance of the year would be applied."[50]

5.38 We note as an initial matter that each of Canada's proposed methods of applying the targeted dumping provision changes the parameters of the analysis from those that would apply in a W-W analysis. Thus, Canada's arguments do not address the question of how a targeted dumping analysis based on W-T comparison without zeroing could yield a result different from a W-W comparison, in a situation holding everything except the comparison methodology equal. Nor does Canada address how any anti-dumping duty calculated under one of its proposed methodologies could be applied consistently with the *AD Agreement*. For instance, Article 9.2 provides that "[w]hen an anti-dumping duty is imposed in respect of any product, such duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product form all sources found to be dumped and causing injury". It is not clear that collection of duty only on imports into certain regions, to certain purchasers, or during certain time-periods, even if otherwise possible[51], would be consistent with this requirement. We note also in this regard Article 6.10, which provides that "[t]he authorities shall, as a rule determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation" (emphasis added). It is not clear that calculation of two different duty rates, for imports forming the targeted pattern, and other imports, would be consistent with this provision. On the other hand, the alternative, of imposing the duty calculated for the imports forming the targeted pattern on all imports from the producer/exporter in question without limitation would, presumably, be an even worse outcome than the imposition of a duty calculated with zeroing, and has not been suggested by any party or third party as a possibility.

Separate universes of export transactions treated as the "product as a whole"

5.39 Canada addresses the US mathematical equivalence argument by showing that the results of the W-T methodology will differ from those of the W-W methodology when one margin of dumping is calculated (using the W-T methodology, without zeroing) for the targeted sub-category of product, and another is calculated for the non-targeted sub-category.[52] At first glance, the calculation of multiple margins of dumping for different sub-categories of product would appear to be at odds with

[48] Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 6.

[49] *Ibid., para. 30.*

[50] *Ibid*., para. 31.

[51] See discussion below at para. 5.44 regarding imposition of duties in regional industry cases, for which special provision is made in Article 4.2 of the *AD Agreement*.

[52] In each case, the amount of dumping attributable to the imports forming the targeted pattern is not offset by non-dumping outside of that pattern.

Canada's argument that a single[53] margin of dumping should be established for the product as a whole, regardless of which Article 2.4.2 comparison methodology is being used.[54] Canada seeks to reconcile this apparent inconsistency by defining the "product as a whole" as "the universe of transactions that would be aggregated to arrive at a margin of dumping". In other words, Canada treats the imports forming the targeted pattern of dumping as a separate universe of transactions, calculates a single margin of dumping for that universe, and refers to that margin of dumping as being the margin for the product as a whole. Canada claims that this is the sense in which the Appellate Body used the phrase "product as a whole". Specifically, Canada asserts that the Appellate Body "used the phrase 'product as a whole' to refer to the universe of transactions that would be aggregated to arrive at a margin of dumping".[55] However, Canada points to nothing in the Appellate Body Report to support its argument that the Appellate Body used the phrase "product as a whole" to mean a separate universe, or sub-category, of export transactions, either in general, or in the context of the second sentence of Article 2.4.2.[56] Nor have we been able to find anything to this effect in the Appellate Body Report. Rather, we note that the Appellate Body frequently refers instead to "the product under investigation as a whole", as opposed to "a type, model, or category of that product"[57]. By the phrase "the product under investigation as a whole", we understand the Appellate Body to mean the product as defined upon initiation of the investigation. This understanding is shared by Canada, which itself points out in reply to Question 11 that "[t]he Appellate Body properly concluded that 'product under investigation' referred to the 'product' defined *at the outset* of an investigation".[58] We therefore see no basis for concluding that the Appellate Body, as alleged by Canada, used the phrase "product as a whole" to refer to a sub-category, or universe, of transactions that could be carved out from the totality of the transactions initially under investigation. In addition, Canada's argument would mean that an investigating authority might calculate different "margins of dumping" in one investigation for one exporter for different sub-categories of products based on purchasers, regions, or time periods. This is at odds with Canada's argument that, throughout Article 2.4.2, "margins of dumping" always means a single margin of dumping (per exporter/producer) for the product as a whole, that is, the entire universe of exports subject to the investigation.

5.40 Although Canada has sought to rely on the findings of the Appellate Body in *US - Softwood Lumber V*, it does not point to anything in the text of the second sentence of Article 2.4.2 that would justify the calculation of separate margins of dumping for separate universes of transactions. Nor have we been able to identify any language that might support such an approach.[59] Rather, because

[53] We note in this regard that Canada asserted that "an investigating authority [] must aggregate *all* the results of transaction-specific comparisons to arrive at a **single** margin of dumping for the product as a whole". Canada's second written submission, para. 13 (bold emphasis supplied).

[54] We recall Canada's statement that "[t]he consistent meaning of the phrase 'margins of dumping' within Article 2.4.2 warrants emphasis". Canada's Comments on the United States' Answers to the Panel's Questions, page 2.

[55] Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 6, para. 28 and Question 11, paras. 46-48.

[56] Indeed, as noted above, the Appellate Body declined to consider the second sentence of Article 2.4.2 as context in its analysis, and thus did not address it at all.

[57] See, for example, Appellate Body Report, *US – Softwood Lumber V*,, *supra* note 9, at paras, 93, 96 and 103..

[58] Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 11, para. 46, emphasis supplied. Likewise, the EC asserts that the Appellate Body used the words "as a whole" "to emphasise that 'the product' is 'the product' *as defined by the investigating authority at the outset of the original proceeding, and not some type, model or category of that product*". European Communities Responses to the Panel's Questions, Response to Question 32 (emphasis supplied).

[59] In our view, the only text in the second sentence of Article 2.4.2 that might possibly be of relevance in this regard is the phrase "individual export transactions". However, there is nothing to suggest that the group of "individual export transactions" to be compared with normal value (established on a weighted average basis) may be confined to the "pattern of export prices" identified by the investigating authority. Indeed, had the concepts of "individual export transactions" and "pattern of export prices" been identical, we would have expected them to be described within a single sentence in identical terms.

the W-T methodology is presented as a limited alternative to the W-W and T-T methodologies, the text of Article 2.4.2 would appear to indicate that an investigating authority should use only the W-T methodology if the factual circumstances are such that it is entitled to not use either the W-W methodology or the T-T methodology. In other words, if targeted dumping is identified, and the investigating authority invokes the second sentence of Article 2.4.2, the whole investigation would be conducted on the basis of the W-T methodology.[60] Just as there is no basis in Article 2.4.2 for combining the W-W and T-T methodologies, so too there would seem to be no basis for combining one, or both, of these methodologies with the W-T methodology under the second sentence of Article 2.4.2.

5.41 In addressing the US mathematical equivalence argument, therefore, Canada's position exposes a fundamental inconsistency between its argument that the term "margins of dumping" has the same meaning throughout Article 2.4.2 on the one hand, and its assertion that the Appellate Body has found that "margins of dumping" may only ever be calculated for a product as a whole on the other. This inconsistency means either that the term "margins of dumping" does not have the same meaning throughout Article 2.4.2, or that "margins of dumping" need not necessarily (outside of the W-W comparison methodology) be established for the product as a whole by aggregating the results of all transaction-specific comparisons. Either way, this inconsistency fundamentally undermines Canada's claim that the term "margins of dumping" must be interpreted and applied in the same way under both the W-W and T-T comparison methodologies.

Targeted dumping as an exception to the need to establish margins of dumping for the "product as a whole"

5.42 The EC, as third party, seeks to avoid this inconsistency by arguing that the second sentence of Article 2.4.2 is an exception.[61] Thus, the EC asserts that a single "margin of dumping" must be established for the product as a whole throughout the *AD Agreement*, except in the case of targeted dumping.[62] However, the ordinary meaning of the text of the second sentence of Article 2.4.2 provides no basis for such an approach. The second sentence simply states that the two primary comparison methodologies provided for in the first sentence need not be applied when certain

[60] In its comments on the US replies to our questions, Canada further asserts that the mathematical equivalence argument would be undermined when the W-T methodology is used to calculate a margin of dumping for the targeted export transactions, and the T-T methodology is used to calculate a margin of dumping for the non-targeted export transactions. Canada's Comments on the United States' Answers to the Panel's Questions, page 5. In our view, such a combination of the W-T and T-T methodologies is not envisaged by Article 2.4.2. In any event, we are examining ways in which the W-T methodology might continue to have meaning in and of itself. We do not consider it sufficient to reject the mathematical equivalence argument on the basis that the second sentence of Article 2.4.2 continues to have some limited applicability provided the W-T methodology is combined with the T-T methodology.

[61] We note that the European Communities has brought its own case against US zeroing measures (see WT/DS294, currently on appeal). We have only considered the arguments presented by the European Communities in its capacity as third party in these proceedings.

[62] In response to a Question from the Panel, the EC asserts that the term "margin of dumping"

> "has the same meaning throughout Article VI:2 of the *GATT 1994* and the ADA, subject to the targeted dumping provisions. [The EC] agree[s] with Canada that if there is targeted dumping by purchaser, region or time, an investigating authority is entitled – for example - to calculate the dumped amount relating to a purchaser, region or time so identified. The second sentence of Article 2.4.2 is an exception to the first sentence of Article 2.4.2; thus, similarly, the targeted dumped amount may, subject to the conditions provided for in the second sentence of Article 2.4.2, be expressed as a percentage of export price, or characterized as a "margin of dumping". Rather than expressing this in terms of the second sentence of Article 2.4.2 constituting an exception to the general requirement to calculate a margin of dumping for the product as a whole, the EC would say that the targeted dumping provisions provide for a specific methodology to determine such margin in exceptional circumstances."

European Communities Responses to the Panel's Questions, Response to Question 1.

conditions are met, *i.e.*, when there is evidence of particular types of targeted dumping. In such circumstances, the second sentence provides for the use of a third comparison methodology. There is nothing in the second sentence to suggest that the scope of the investigation is different when the targeted dumping provision applies than when the W-W or T-T comparison methodology is used. Nor is there anything in the second sentence to suggest that an investigating authority may focus on (and calculate separate margins of dumping for) sub-categories of products that it would not otherwise be able to focus on in the context of a W-W or T-T comparison. In other words, the second sentence merely allows the investigating authority to compare the investigated data differently than in the first sentence (by using a W-T approach, rather than W-W or T-T); it does not allow the investigating authority to change that data, or ignore parts thereof.[63] Thus, in examining the US mathematical equivalence argument, we are exploring ways in which the W-T targeted dumping methodology might be applied without zeroing so as to produce results that are different from the W-W methodology on a *ceteris paribus* basis.

5.43 Indeed, the European Communities appears to implicitly acknowledge that Article 2.4.2 *per se* does not allow an investigating authority to focus on sub-sets of transactions because, in the context of regional targeted dumping, it relies on Article 4.2 of the *AD Agreement* to justify the imposition of the resultant anti-dumping measure on a regional basis. Thus, after stating that the investigating authority could focus its analysis on the set of transactions in the targeted region, the EC asserts that the resultant anti-dumping duty "could, for example, be imposed on the products consigned for final consumption to [that] region [], when the domestic industry has been interpreted as referring to the producer in [that] region [] consistent with Article 4.2".[64] We recall that this argument has been advanced by the EC in response to the US argument that a broad prohibition of zeroing (based on the proposition that a single "margin of dumping" must be calculated for "the product as a whole") would nullify the comparison methodology set forth in the second sentence of Article 2.4.2. In this context, we are not persuaded by an argument that the W-T comparison methodology still has meaning, despite a broad prohibition of zeroing, provided the second sentence of Article 2.4.2 is applied in conjunction with Article 4.2. In testing the continued utility of the W-T comparison methodology, the Panel is interested in exploring ways in which the second sentence of Article 2.4.2 continues to have meaning in and of itself.[65] The EC's argument says nothing regarding how the targeted dumping provision would apply in a case where the "region" did not satisfy the strict requirements of Article 4.1(ii) regarding regional markets, and thus Article 4.2 did not apply.

5.44 Furthermore, unlike in Article 4.2, there is no provision in Article 2.4.2 for application of the anti-dumping duty resulting from a targeted dumping analysis to only imports into the region. Article 4.2 requires the imposition of anti-dumping duties only on imports into the defined geographical market, unless the Constitutional law of the importing Member precludes such selective

[63] For this reason, we also reject Canada's argument that a regional targeted dumping analysis would produce a margin of dumping different from a W-W analysis "because the latter methodology would necessarily examine a different data set (*i.e.*, all export transactions, rather than the subset of export transactions that make up transaction[s] involving the targeted region". Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 5, para. 20.

[64] European Communities Responses to the Panel's Questions, Response to Question 33.

[65] We also note the EC assertion. in response to Question 33 from the Panel, that if "the domestic industry has [not] been interpreted as referring to the producers in a certain area" (pursuant to Article 4.2), then the investigation would not focus on transactions in the targeted region. Instead, the investigation would cover both targeted and non-targeted regions together, and calculate a total dumped amount for both regions. In the numerical example provided by the EC in its response to our Question 33, non-dumped transactions are zeroed, i.e., there is no offset for non-dumped transactions. Although the EC purports to justify such zeroing on the basis of "the targeted dumping provisions" (See European Communities Responses to the Panel's Questions, Response to Question 33), we note that the comparison methodology employed is not targeted, because it is based on the weighted average export price for both targeted and non-targeted regions. In the context of such a non-targeted investigation, it makes no sense to speak of something being justified by the targeted pattern of export prices.

imposition. In such cases, Article 4.2 permits the imposition of the duties without limitation, provided certain conditions are met. In the context of Article 4.2, such non-selective duty imposition is generally not problematic because the dumped imports must be concentrated into an isolated geographic market as a prerequisite for regional analysis under Article 4.1(ii). In other words, there are generally few or no imports of the subject merchandise into other areas of the importing Member. This is not necessarily the case in the context of targeted dumping, however. The fact that Members found it necessary to include a specific provision dealing with this issue in the context of regional industries strongly suggests to us that selective imposition of anti-dumping duties in the case of targeted dumping would also have been specifically provided for.

Targeted dumping as a difference affecting price comparability

5.45 The EC also seeks to justify its focus on the set of transactions in the targeted region by reference to the allowances permitted under Article 2.4. In particular, the EC asserts that if there is a pattern of dumped prices in one region, but not in the other, then there is a difference between those regions that "affect[s] price comparability" in the meaning of Article 2.4.[66] The EC states that "price comparability" is affected because the dumping into the targeted region would be masked if a single W-W comparison had to be made covering both the targeted and non-targeted regions. The EC asserts that, in such cases, the export price into the non-targeted region could be "adjusted" so that the margin of dumping for that region is zero, *i.e.*, there would be no non-dumping to offset against the dumping in the targeted region.[67]

5.46 The United States asserts that the EC essentially confuses two concepts that have nothing to do with one another: (1) differences in prices in the export market between regions, purchasers and time-periods; and (2) differences (which affect price comparability) in the importing country market between export price and normal value.[68] The United States asserts that the EC has identified a difference that falls within the first category, whereas Article 2.4 only justifies allowances for difference falling under the second category.

5.47 We note that the EC made the same argument to the *US – Zeroing (EC)* panel. That panel rejected the EC's argument in the following terms:

> This argument reflects a misinterpretation of the very concept of price comparability as used in Article 2.4 of the *AD Agreement*. Differences in price comparability in Article 2.4 for which an adjustment or allowance may have to be are differences between the product as sold in the export market and the product as sold in the domestic market with respect to factors such as level of trade, taxation, quantities, etc. The existence of differences in prices in the export market between regions, purchasers and time-periods is conceptually wholly irrelevant to, and outside the scope of, Article 2.4 because such differences have nothing to with whether or not export sales and domestic sales are comparable with regard to factors such as level of trade, taxation, quantities, etc. (...)[69]

5.48 We agree with this reasoning. We therefore reject the EC argument that the Article 2.4 allowance mechanism provides a justification for focusing an investigation on the set of transactions

[66] See, for example, European Communities Responses to the Panel's Questions, Response to Question 35(d).

[67] See, for example, Third Party Oral Submission by the European Communities, para. 34.

[68] See Answers to the United States to the Panel's Questions of 18 November, Reply to Question 15, para. 14.

[69] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/R, 31 October 2005 (appeal pending) at para. 7.279.

in the targeted region (or any other pattern of export prices), without making offsets for non-dumped transactions outside of that region (or outside of the relevant pattern).[70]

Change in the normal value data set

5.49 Finally, the EC, Japan and Thailand also challenge the US mathematical equivalence argument by suggesting that the result of a W-T comparison will differ from the result of a W-W methodology to the extent that different weighted average normal values are used, *i.e.*, to the extent that the "W" in the W-W methodology is not the same as the "W" in the W-T methodology. Thus, the EC asserts that the second sentence of Article 2.4.2 permits the use of a normal value "calculated by reference to the sub-set of transactions within the pattern identified by the investigating authority".[71] Japan states that "[s]o long as Members are not prohibited from using different bases or methods (including different time periods) to calculate the 'W' in the W-to-W and W-to- T comparisons, the outcomes of the comparisons will almost inevitably differ because the groups of transactions making up the weighted average normal value will differ".[72] In respect of time-specific targeted dumping, Thailand asserts that "[i]f a W to T methodology is used for one period, and a W to W or T to T methodology for another, export sales prices in the different periods will be compared to different normal values ..."[73]

5.50 In response, the United States submits that:

> nothing in the text of Article 2.4.2 supports such a leap from the treatment of prices in the export market to the treatment of prices in the normal value market. Moreover, there is no logic to the proposition that targeting in the export market according to purchaser, region, or time, which might justify special treatment of export prices, would also justify corresponding special treatment of normal value prices. That proposition assumes without any basis that the events that justify special treatment of prices in the export market also are occurring in the normal value market. Just because prices in the export market exhibit a targeted pattern with respect to purchaser, region or time does not mean that a corresponding targeted pattern is being exhibited in the normal value market. [74]

5.51 In our view, the second sentence of Article 2.4.2 provides for a specific comparison methodology to address situations where there is a "pattern of export prices" that result in targeted dumping that might not be identified through the W-W or T-T comparison methodologies. The relevant pattern, therefore, is the pattern of export sales into the importing Member. There is no reference in the second sentence of Article 2.4.2 to patterns of home market sales in the exporting Member. Once the relevant pattern has been identified, the symmetrical comparison methodologies provided for in the first sentence of Article 2.4.2 may be replaced by the asymmetrical comparison

[70] Furthermore, we note the US argument that the possibility of restricting the universe of export transactions in the context of a targeted dumping analysis ignores Article 6.10 of the AD Agreement. This provision provides in relevant part that, "[i]n cases where the number of exporters, producers, importers or types of products involved is so large" as to make it impracticable to determine an individual margin of dumping for each know exporter or producer of the product under investigation, "the authorities may limit their examination ... to the largest percentage of the volume of the exports from the country in Question which can reasonably be investigated". In our view, the fact that this provision addresses explicitly the circumstances in which less than all export transactions may be examined in an investigation undermines the suggestion that the scope of an investigation may be limited – implicitly – through the second sentence of Article 2.4.2.

[71] See European Communities Responses to the Panel's Questions, Response to Question 9.

[72] See Replies of Japan to the Questions of the Panel, Response to Question 44.

[73] See Thailand's Responses to the Panels Questions for Parties and Third Parties, Response to Question 45, at para. 8.

[74] See Comments of the United States on Canada's and the third Parties Responses to the Panel's Questions, para 45 (footnote omitted).

methodology provided for in the second sentence. That asymmetrical comparison methodology employs a "normal value established on a weighted average basis". In order for the argument of the EC, Japan and Thailand to succeed, that normal value would have to differ (or at least have the potential to differ) from the "weighted average normal value" provided for in the first sentence. However, the abovementioned third parties have provided no textual analysis justifying any such conclusion. Given that the second sentence of Article 2.4.2 is designed to address a problem that might result from particular patterns of export prices, rather than home market prices, we ourselves see no basis in the text of that provision to conclude that the "normal value established on a weighted average basis" is different from the "weighted average normal value". Furthermore, we note that even Canada, the complaining Member, does not support the contrary argument of the EC, Japan and Thailand.[75] As a result, we are not persuaded by these third parties' assertion that the US mathematical equivalence argument may be disposed of by varying the "W" in the W-T comparison methodology.

Summary

5.52 In response to a very simple argument of mathematical equivalence, Canada and certain third parties have provided convoluted explanations of how the W-T comparison methodology might be applied, without zeroing, so as to give results that are mathematically different from the results of the W-W comparison methodology. Their arguments are essentially based on the notion that targeted dumping allows investigating authorities to reach their determinations on the basis of the pricing behaviour in respect of universes of transactions that are narrower than the initial scope of the investigation, and narrower than those analysed under the W-W methodology. Such an approach is at odds with the very text of the second sentence of Article 2.4.2 and/or other provisions of the *AD Agreement*. In other words, Canada and the relevant third parties have failed to explain how the second sentence of Article 2.4.2 might be applied, without zeroing, in a WTO-consistent manner, so as to give results that are mathematically different from the results of the W-W comparison methodology. Such an approach also means that Canada and the relevant third parties have failed to address the US mathematical equivalence argument on a *ceteris paribus* basis. In these circumstances, and noting that the US mathematical equivalence argument has been confirmed by the panel in *US – Zeroing (EC)*,[76] we accept the US mathematical equivalence argument. We therefore agree with the United States that a general prohibition of zeroing based purely on the Appellate Body's interpretation of the phrase "margins of dumping" in *US - Softwood Lumber V* would deprive the second sentence of Article 2.4.2 of effect.

(ii) Prospective normal value duty assessment[77]

5.53 Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a

[75] In response to Question 9 from the Panel, Canada asserted that the "weighted average normal value" (Article 2.4.2, first sentence) is the same as the "normal value established on a weighted average basis" (Article 2.4.2, second sentence). Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 9. Canada "understands these terms to both refer to an aggregate weighted-average normal value for the 'like product'." Furthermore, the only change in the data set referred to by Canada in its discussion of targeted dumping hypotheticals concerns the export transactions, not the home market transactions in the exporting Member. Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 5, para. 20).

[76] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/R, 31 October 2005 (appeal pending) at para. 7.266.

[77] We have focused our analysis on the type of prospective normal value assessment system applied, for example, by Canada. Similar issues will likely arise in respect of other prospective assessment systems applied by other Members. For example, the issue of offsets could arise in the context of export prices exceeding the minimum export price in the duty assessment system applied by Argentina, or export prices exceeding the floor price occasionally applied by the European Communities.

prospective normal value. Article 9.3 of the *AD Agreement* provides that the amount of anti-dumping duty shall not exceed the "margin of dumping" established under Article 2. Canada asserts that "[a] prospective normal value assessment system ... assesses anti-dumping duties as imports occur through a comparison between the export price and the prospective normal value. An investigating authority assesses anti-dumping duties when the export price is lower than the weighted-average normal value, but applies no anti-dumping duties to non-dumped transactions when the opposite is true."[78] We therefore understand Canada to accept that, in the context of a prospective normal value duty assessment system, the "margin of dumping" referred to in Article 9.3 is the transaction-specific margin of dumping established in respect of the specific import transaction being assessed. This approach is confirmed by Article 9.2 of the *AD Agreement*, which provides that anti-dumping duties are levied in respect of "imports of [the relevant] product". In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as a whole, by aggregating the results of all comparisons, since there is only one comparison at issue.

5.54 If other comparisons were somehow relevant in the context of a prospective normal value duty assessment system, the application of the Appellate Body's interpretation of the phrase "margins of dumping" in the sense argued by Canada would require offsets for non-dumped transactions, in light of the obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole. In other words, an importer being assessed an anti-dumping duty for a dumped transaction, *i.e.*, one in which export price was less than the prospective normal value, would receive an offset for non-dumped transactions, *i.e.*, those in which export price was more than the prospective normal value, even if those transactions are made by other importers.[79] This is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage *vis-à-vis* other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.

5.55 When asked a question regarding this issue, Canada "observe[d]that a prospective normal value system does not employ the practice of zeroing. ... An investigating authority assesses anti-dumping duties when the export price is lower than the weighted-average normal value, but applies no anti-dumping duties to non-dumped transactions when the opposite is true. It is not the same as the practice of zeroing, *i.e.*, the changing of the results of intermediate values prior to their aggregation into a margin of dumping" (see Canada's reply to Question 4 from the Panel). Canada's answer ignores the anomaly that we have identified, since it is premised on the fact that investigating authorities apply prospective normal value assessment systems on a transaction-specific basis, without any obligation to offset for non-dumped amounts. Canada's answer does not explain how investigating authorities may assess on a transaction-specific basis notwithstanding the alleged obligation to calculate margins of dumping for the product as a whole. Nor does Canada explain why, despite the establishment of margins of dumping for the product as a whole, there is no need to offset non-dumped amounts against dumped amounts at the time of assessment.

5.56 Furthermore, the first sentence of Article 9.3.2 of the *AD Agreement* provides:

> When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon, request, of any duty paid in excess of the margin of dumping.

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[78] See Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 4, para. 13.

[79] This is because margins of dumping are established per exporter/producer, not per importer. Thus, "the single margin of dumping for the product as a whole" referred to by Canada is actually a margin specific to a given exporter/producer, on the basis of all import transactions by all importers sourcing the product from that exporter/producer.

5.57 If the Appellate Body's interpretation of "margins of dumping" were to apply throughout the *AD Agreement* in the sense argued by Canada, this provision, which expressly applies in respect of prospective duty assessment systems, would mean that a refund becomes payable if an anti-dumping duty is paid in excess of the single margin of dumping for the product as a whole, calculated by aggregating the results of all intermediate comparisons, without zeroing. Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in *US - Softwood Lumber V*.

(iii) Article 2.2

5.58 Article 2.2 provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (footnote omitted)

5.59 The Panel asked the parties the following question regarding this provision:

> Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2 permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

5.60 Canada replied in relevant part that:

> most investigating authorities, including CBSA, examine whether there are sufficient "like product" sales in the ordinary course of trade for a particular sub-group or model when these authorities conduct a weighted-average-to-weighted-average calculation. Canada does not believe that this practice is problematic – investigating authorities are simply conducting a more detailed analysis to ensure that the "margin of dumping" is calculated in a more accurate manner. If investigating authorities failed to conduct such an analysis it could lead to less accurate sub-group calculations with the weighted-average export price being compared to a weighted-average normal value that is comprised of a handful of normal value transactions. The Appellate Body found that the general language of Article 2.4.2 permitted the use of "multiple averaging" or "model matching" provided that the intermediate values are properly aggregated. Article 2.2 also uses general language that should be interpreted in a permissive manner. Article 2.2 provides a conceptual description of the practice of using constructed normal values or third country sales. It should not be interpreted

> to prohibit a more detailed form of this analysis that increases the accuracy of the calculation methodology.

5.61 This provision governs, *inter alia*, the use by investigating authorities of a constructed normal value. If the reference in Article 2.2 to "margin of dumping" were understood to mean a single margin of dumping for the product as a whole, this would suggest to the Panel that a constructed normal value would have to be used to establish a single margin of dumping for the product as a whole "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison". In other words, once the conditions for use of a constructed normal value were triggered, a constructed normal value would necessarily be used in all aspects of the determination of the margin of dumping for the product as a whole.

5.62 In our view, Canada's suggestion that Article 2.2 may be applied on a model basis to increase the accuracy of the calculation methodology is not consistent with its view that investigating authorities must calculate a single margin of dumping for the product as a whole. For example, if there were ten models of the like product, and the Article 2.2 trigger conditions applied with respect to only one model, Canada asserts that an investigating authority may use a constructed normal value for only that one model (by making a "sub-group calculation"). However, Article 2.2 stipulates that the "margin of dumping" shall be established using a constructed normal value whenever the trigger conditions are fulfilled. If "margin of dumping" in Article 2.2 means a single margin of dumping for the product as a whole (and not for a specific model), this must mean that the margin of dumping *for the product as a whole* must be calculated using a constructed normal value for all models, even if the trigger conditions only apply in respect of one model. In other words, there would never be a "sub-group calculation" of the sort envisaged by Canada. We can see nothing in the text of Article 2.2 that would require this result, and, as Canada indicates, investigating authorities do not understand it to require this result. Indeed, the use of different methods for establishing normal value for different models or sub-groups of product is an integral part of model averaging, which itself is permitted under Article 2.4.2 of the *AD Agreement*.[80] Moreover, such mandatory use of constructed normal value in respect of all models would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. It would also increase the burden on respondents, who would be required to produce cost data for all models, rather than just one or a few for which constructed normal value is necessary. We are not convinced that the Appellate Body could have intended its *US - Softwood Lumber V* findings to be applied in this manner. We also note that this approach is at odds with Canada's description of its own application of Article 2.2. These considerations serve to confirm our doubts regarding the broader application of the Appellate Body's *US - Softwood Lumber V* interpretation of the term "margins of dumping" sought by Canada.

(iv) Past GATT Discussion

5.63 On 27 May 1960, GATT Contracting Parties adopted the Second Report of the Group of Experts on *Anti-Dumping and Countervailing Duties*. That Report discussed what was referred to as the "pre-selection system" in the following terms:

> *The pre-selection system*
>
> 7. In considering the pre-selection system in comparison with other systems the Group of Experts thought it desirable to re-affirm the following principles:

[80] Appellate Body Report, *US - Softwood Lumber V*, *supra* note 9, at para. 80.

(a) Anti-dumping duties should never be used for the purpose of ensuring normal protection for a domestic industry; such protection was the task of the tariff.

(b) The imposition of anti-dumping duties was justified only:

(i) where a product was in fact found to be dumped, and,
(ii) where the dumping caused or threatened material injury to a domestic industry - the judgment of which rested with the governmental authorities of the importing country.

8. The Group considered that *the ideal method of fulfilling these principles was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned*. This, however, was clearly impracticable, particularly as regards injury.

9. Failing such a method, the pre-selection system seemed to be the most satisfactory, since under such a system anti-dumping duties were applied only after a specific complaint had been investigated and a finding of dumping and material injury made. Provided the pro-selection system was administered at a high level, it could substantially reduce the number of cases in which anti-dumping duties were actually applied. An additional advantage of the system was that it involved a certain amount of publicity which in itself might serve as a deterrent to dumping.

10. The Group was, in general, of the opinion that anti-dumping measures adopted after the pre-selection procedure had been followed should be directed only against such firms as had been found responsible for the dumping, or at most against those countries from which the dumped imports came."[81]

5.64 In referring to a "determination ... of ... dumping ... in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the *GATT* that would preclude the calculation of such transaction-specific margins. This in turn would suggest that the GATT Contracting Parties would have disagreed with Canada's reliance on the same provision of the *GATT 1994* to support its argument that "margins of dumping" must always be calculated "for the product as a whole" by aggregating all transaction-specific comparisons.

(i) Conclusion

5.65 To conclude, neither the ordinary meaning of the first sentence of Article 2.4.2 as a whole, nor the ordinary meaning of the phrase "margins of dumping" in particular, require that all transaction-specific comparisons under the T-T comparison methodology must be treated as "intermediate values" and aggregated, without zeroing, in order to arrive at a single margin of dumping for the product as a whole. Nor is such an approach mandated – in the context of the T-T comparison methodology – by the Appellate Body's interpretation of the phrase "margins of dumping" in *US - Softwood Lumber V*. Indeed, broader contextual considerations demonstrate that the application of the Appellate Body's interpretation beyond the confines of the W-W comparison methodology would lead to absurd results that could never have been intended by the Appellate Body, let alone the drafters of the *AD Agreement*.

5.66 Conscious that Article 3.2 of the *DSU* precludes the DSB from "add[ing] to ... the ... obligations" of the United States, and taking into account the standard of review provided for in

[81] BISD 9S/194, para. 7 (emphasis supplied)

Article 17.6(ii) of the *AD* Agreement, we reject Canada's interpretation of the phrase "margins of dumping" in the context of the transaction-to-transaction comparison methodology provided for in the first sentence of Article 2.4.2, and find that the interpretation put forward by the United States is permissible. We therefore find that the DOC was entitled not to offset the non-dumped transactions against the dumped transactions when calculating the margin of dumping for each respondent foreign producer or exporter. Accordingly, we reject Canada's claim that the DOC's use of zeroing in the T-T comparison methodology at issue is inconsistent with Article 2.4.2 of the *AD Agreement*.

C. CANADA'S ARTICLE 2.4 CLAIM

5.67 Canada claims that DOC's zeroing in the Section 129 Determination is inconsistent with Article 2.4. Canada's Article 2.4 claim is based on the first sentence of that provision, which provides:

> A fair comparison shall be made between the export price and the normal value.

1. Main Arguments of the Parties

5.68 Canada asserts that DOC manipulated the comparisons where the export price was higher than the home market price by disregarding the difference between these prices and replacing it with a zero value. According to Canada, this manipulation of transaction-to-transaction comparisons cannot be considered a "fair comparison" between the export price and the normal value as it inflated the margins of dumping. In support, Canada relies on the Appellate Body's statement in *EC – Bed Linen* that by not taking into account *all* comparisons, the practice of "zeroing" does not provide a fair comparison between the export price and the normal value and is, therefore, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. Canada also argues that, according to the Appellate Body in *U.S. – Corrosion-Resistant Steel Sunset Review*, zeroing introduces an "inherent bias" that "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[82] Canada submits that, because of such "inherent bias", the practice of zeroing in the context of the transaction-to-transaction methodology is by definition inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[83]

5.69 The US submits that the case law relied on by Canada is without relevance. The US asserts that, because Article 2.4 was not at issue in the *EC – Bed Linen* dispute, any reference by the Appellate Body in that case to Article 2.4 was *obiter dictum*. The US asserts that the Appellate Body's reference to Article 2.4 in *U.S. – Corrosion-Resistant Steel Sunset Review* is not relevant because it was made in the context of an average-to-transaction comparison methodology.

5.70 The United States further submits that Canada's interpretation of Article 2.4 would mean that that provision pertains to steps an investigating authority takes *after* making a comparison between export price and normal value, whereas Article 2.4 addresses only adjustments that must be made *before* a comparison is performed. The United States also submits that Canada's suggestion that the "fair comparison" requirement in Article 2.4 contains a general obligation to offset dumping margins also cannot be reconciled with Article 2.4.2. The United States asserts that, if Canada were correct in arguing that there is a general obligation to offset, then the fair comparison obligation would also require the investigating authority to provide for an offset for transactions that exceed normal value

[82] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, at para. 135.

[83] Canada's arguments are broadly supported by China, the European Communities, India, Japan and Thailand.

even when using the targeted dumping methodology.[84] The United States argues that if offsetting were required, the overall dumping margin calculated for an exporter must, mathematically, be the same under both a symmetrical comparison of weighted averages of normal values and export prices and an asymmetrical comparison of weighted average normal values and individual export prices. According to the United States, the "general obligation" that Canada posits therefore cannot exist, because if it existed it would nullify any distinction between the average-to-average and the average-to-transaction methodologies in Article 2.4.2. The United States notes that this approach was adopted by the panel in *US – Zeroing (EC)*.[85]

5.71 The United States further notes that the panel in *US – Zeroing (EC)* found that any analysis of the "fairness" of a methodology should be discerned from a "standard of appropriateness or rightness within the four corners of the Antidumping Agreement which would provide a basis for reliably judging that there has been an unfair departure from that standard."[86] According to the United States, that panel found that the fact that one assessment methodology may result in a higher margin than another may only be deemed "unfair" if the other methodology could be determined to be the only "correct" methodology pursuant to the text of the *AD Agreement*.[87] [88]

2. Evaluation by the Panel

5.72 Canada claims that zeroing is "by definition" inconsistent with Article 2.4 because it fails to take into account all comparisons, and because it introduces an "inherent bias" that inflates the margin of dumping.

5.73 Canada's arguments are primarily based on statements made by the Appellate Body in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*. We are not persuaded of the relevance of these statements by the Appellate Body to the case in hand. First, we note that, in the *EC – Bed Linen* case, none of the legal issues before the Appellate Body concerned Article 2.4 of the *AD Agreement*. Anything the Appellate Body may have said regarding Article 2.4 was therefore *obiter dictum*. Second, we note that, as relevant here, the *US – Corrosion-Resistant Steel Sunset Review* case concerned the application of the W-T comparison methodology in the context of an assessment review, as opposed to an original investigation, whereas the present Article 21.5 proceedings concern DOC's use of the T-T comparison methodology in an original investigation.

5.74 Turning to the substance of Canada's claim, we believe that a claim based on a highly general and subjective test such as "fair comparison" should be approached with caution by treaty interpreters. For this reason, any conception of "fairness" should be solidly rooted in the context provided by the

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[84] The United States asserts that, in the underlying proceeding before the Appellate Body, Canada conceded that "zeroing is permitted under the third methodology [*i.e.*, the targeted dumping methodology]." See Appellate Body Report, *US – Softwood Lumber V*, *supra* note 9, at para. 105 n.164. We note that, in response to the US assertion, Canada filed a letter with this Panel that it had provided to the Appellate Body on 28 September 2004. In that letter, Canada stated that it "did not take the position [during the appeal] that zeroing is permitted under the third methodology." Canada's letter recognized that the Appellate Body report had already been adopted, and for that reason, Canada's letter did not ask the Appellate Body to take any specific action in this regard. According to the United States, Canada did not offer then and does not offer now any textual basis for a distinction between the fair comparison requirement as applied to the targeted dumping methodology and the fair comparison requirement as applied to the other two methodologies provided for in Article 2.4.2. The United States asserts that, in fact, Canada expressly characterizes the obligation it asserts as a "general obligation." Canada's first written, para. 28.

[85] Panel Report, *US – Zeroing (EC)*, *supra* note 76, at para. 7.266.

[86] *Ibid*, para 7.260.

[87] *Ibid*.

[88] New Zealand broadly supports the US interpretation of Article 2.4, claiming that the calculation of margins of dumping using the T-T comparison methodology is inherently a "fair comparison" in terms of Article 2.4 of the *AD Agreement*..

AD Agreement, and perhaps the *WTO Agreement* more generally. As such, there must be a discernable standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been "fair" or "unfair". Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard.[89] If, however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.

5.75 Since we have already concluded that T-T *with* zeroing (resulting in higher margins) is not inconsistent with Article 2.4.2, one can not conclude that failure to use a comparison methodology that would have resulted in lower margins (*i.e.*, T-T without zeroing) is "unfair". For the same reason, one can not conclude that failure to use a comparison methodology that would have reflected all comparisons, by offsetting non-dumped amounts against dumped amounts (*i.e.*, T-T without zeroing), is "unfair". The principle of effective treaty interpretation implies that the "fair comparison" obligation in article 2.4 must not be interpreted in a manner so as to trump the more specific provisions of Article 2.4.2.[90]

5.76 The principle of effective treaty interpretation is also relevant to Canada's argument that zeroing is "by definition" inconsistent with Article 2.4. Since Canada's argument (that zeroing when comparing normal value and export price is unfair) is unqualified, it must apply to zeroing under any of the three comparison methodologies set forth in Article 2.4.2. We have already established, however, that a prohibition of zeroing under the targeted dumping comparison methodology would render the second sentence of Article 2.4.2 meaningless, in the sense that it would result in a margin of dumping mathematically equivalent to that established under the W-W comparison methodology. Since zeroing therefore can not be prohibited as "by definition" unfair in the context of Article 2.4.2, Article 2.4 can not provide for the unqualified, "by definition" prohibition suggested by Canada.

5.77 In addition, we recall our discussion of certain contextual considerations when examining Canada's Article 2.4.2 claim.[91] In our view, these contextual considerations suggest that there is no general obligation under the *AD Agreement* to offset non-dumped amounts against dumped amounts. Indeed, any such general obligation would have profound implications for prospective normal value duty assessment procedures of the sort applied by Canada. In light of these contextual considerations, we are unable to accept that mandatory offsets establish a standard by which to assess fairness for the purpose of Article 2.4.

5.78 For the above reasons, we reject Canada's claim that the United States has violated the fair comparison obligation provided for in the first sentence of Article 2.4 of the *AD Agreement*.

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[89] This approach was set forth in the dissenting opinion in the original panel report, see, Panel Report, *US - Softwood Lumber V*, *supra* note 5, at para. 9.16-9.22, and was also followed by the panel in Panel Report, *US – Zeroing (EC)*, *supra* note 76, at para. 7.260.

[90] In its reply to Question 22 from the Panel, Canada appears to endorse such an approach to the issue. Responses of Canada to Questions to the Parties following the Substantive Meeting of the Panel, Response to Question 22. In particular, having cited the statement of the panel in *US – Zeroing (EC)* regarding the "discernable standard" (cited above), Canada asserts that "[i]t follows that the concept of 'fairness' relates to the substantive rules concerning the calculation of margins of dumping under the methodologies found in Article 2.4.2 – rules which prohibit zeroing when aggregating intermediate comparisons." In other words, Canada agrees that the fairness obligation in Article 2.4 may be interpreted in light of the substantive rules of Article 2.4.2. Canada errs in its conclusion, however, because, as we concluded above, Article 2.4.2 does not prohibit zeroing in the context of the T-T comparison methodology.

[91] See paras. 5.31 - 5.64 above.

VI. CONCLUSIONS AND RECOMMENDATION

6.1 Based on the foregoing, we conclude that the determination of the DOC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of Articles 2.4 and 2.4.2 of the *AD Agreement.*

6.2 We therefore consider that the United States has implemented the recommendations and rulings of the DSB in *US – Softwood Lumber V*, to bring its measure into conformity with its obligations under the *AD Agreement*.

6.3 Having found that the United States did not act inconsistently with its obligations under the asserted WTO Agreements, we consider that no recommendation under Article 19.1 of the *DSU* is necessary, and we make none.

ANNEX A

FIRST SUBMISSION BY THE PARTIES

ANNEX A-1

FIRST WRITTEN SUBMISSION OF CANADA

22 June 2005

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I. INTRODUCTION

1. In *United States – Final Dumping Determination on Softwood Lumber From Canada*, the Appellate Body upheld the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*Anti-Dumping Agreement*) in determining the existence of dumping on the basis of a methodology incorporating the practice of zeroing.[1] The Panel and Appellate Body reports were subsequently adopted by the Dispute Settlement Body (DSB).

2. Rather than eliminate zeroing in response to these recommendations and rulings, the United States Department of Commerce (DOC) has issued a revised determination in which it continued to apply the practice of zeroing under a different methodology.

3. The only difference in the US approach is that instead of zeroing in a weighted-average-to-weighted-average methodology, it now has zeroed in a transaction-to-transaction methodology. The Appellate Body found the practice of zeroing in a weighted-average-to-weighted-average methodology inconsistent with US obligations under Article 2.4.2 of the *Anti-Dumping Agreement*. This reasoning applies equally to the practice of zeroing in a transaction-to-transaction methodology. Indeed, the original Panel indicated that: "the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*".[2]

4. The Appellate Body has held that the "inherent bias" of zeroing is that it inflates and distorts dumping margins.[3] Proper implementation of the DSB's recommendations and rulings in this case would have resulted in a reduction of the margins of dumping for all of the investigated exporters and of the "all others rate". Instead, the United States has put forward as implementation in this case new margins of dumping that are higher than the ones originally determined.[4]

5. Accordingly, the United States has failed to comply with the DSB's recommendations and rulings to bring its measures into conformity with its obligations under Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

II. FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

6. On 22 March 2002, DOC announced a final affirmative determination of dumping against imports of certain softwood lumber products from Canada (Final Determination).[5] The original panel that reviewed the Final Determination found that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing".[6] The Appellate Body upheld the Panel's finding and recommended that the DSB request the "United States to bring its measure into

[1] Appellate Body Report, at para. 183(a).
[2] Panel Report, at note 361.
[3] See, for instance, *US – Corrosion-Resistant Steel Sunset Review*, at para. 135.
[4] The continued use of "zeroing" by DOC resulted in increases in dumping margins for the investigated exporters: Abitibi from 12.44% to 13.22%; Canfor from 5..96% to 9.27%; Slocan from 7.71% to 12.91%; Tembec from 10.21% to 12.96%; West Fraser from 2.18% to 3.92%; and Weyerhaeuser from 12.39% to 16.35%. The "all others" rate increased from 8.43% to 11.54%, a relative increase of 37%.
[5] *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (Dep't Commerce 2 April 2002) (final determination).
[6] Panel Report, at para 7.224.

conformity with its obligations under the *Anti-Dumping Agreement*".[7] The DSB adopted the Appellate Body and Panel reports on 31 August 2004.[8]

7. On 27 September 2004, the United States notified the DSB of its intention to implement the DSB's recommendations and rulings.[9] On 6 December 2004, Canada and the United States reached agreement pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) on a reasonable period of time to implement the DSB's recommendations and rulings. The United States confirmed in this agreement that it would complete implementation no later than 15 April 2005.[10] Canada and the United States subsequently agreed to extend the reasonable period of time until 2 May 2005.[11]

8. On 5 November 2004, pursuant to section 129(b)(2) of the *Uruguay Round Agreements Act*[12] (URAA), the United States Trade Representative requested that DOC issue a determination that would render its actions in the investigation not inconsistent with the findings of the DSB.

9. On 15 April 2005, DOC released a final determination under section 129 of the URAA (Section 129 Determination), which purported to implement the DSB's recommendations and rulings. In the Section 129 Determination, DOC once again calculated dumping margins using a methodology that incorporated the practice of "zeroing".[13] Specifically, DOC asserted that the DSB's rulings only applied in a weighted-average-to-weighted-average comparison, determined that it would switch to a transaction-to-transaction comparison, and continued to zero as part of the transaction-to-transaction methodology. As a result, the margins of dumping for all of the investigated exporters and the "all others" rate increased.

10. On 19 May 2005, the United States informed the DSB that it had complied with the DSB's recommendations and rulings. Canada considers that the United States failed to comply with these recommendations and rulings. Accordingly, on 1 June 2005, Canada requested the establishment of this Panel pursuant to Article 21.5 of the DSU.[14]

B. THE US PRACTICE OF ZEROING IN THE FINAL DETERMINATION

11. The US practice of zeroing as applied by DOC in the Final Determination was described by both the Panel and the Appellate Body.[15]

12. First, DOC divided the product under investigation (*i.e.*, softwood lumber) into sub-groups of identical or very similar product types. Within each sub-group, DOC made certain adjustments to ensure price comparability of the transactions, and then calculated a weighted-average normal value

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[7] Appellate Body Report, at paras. 183-184.

[8] DSB, *Minutes of Meeting (31 August 2004)*, WT/DSB/M/175, 24 September 2004, 4(a), at para. 42.

[9] DSB, *Minutes of Meeting (27 September 2004)*, WT/DSB/M/176, 19 October 2004, at para. 34.

[10] *United States – Final Dumping Determination on Softwood Lumber from Canada – Agreement under Article 21.3(b) of the DSU*, WT/DS264/12, 8 December 2004.

[11] *United States – Final Dumping Determination on Softwood Lumber from Canada – Modification of the Agreement under Article 21.3(b) of the DSU*, WT/DS264/15, 17 February 2005.

[12] *Uruguay Round Agreements Act*, Pub. L. No. 103-465, § 129, 108 Stat. 4838, codified at 19 U.S.C. § 3538 (2000).

[13] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce 2 May 2005) ("Section 129 Determination") (Exhibit CDA-1).

[14] *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada – Request for the Establishment of a Panel*, WT/DS264/16, 2 May 2005.

[15] Appellate Body Report, at paras. 64-65; and Panel Report, at para. 7.185. See also Panel Report, Annex B-2, Responses of the United States to Questions Posed in the Context of the Second Substantive Meeting of the Panel, Question 109, at paras. 52-56.

and a weighted-average export price per unit of the product type. If the weighted-average normal value per unit exceeded the weighted-average export price per unit for a sub-group, the difference was regarded as a "dumping margin" for that comparison. In contrast, if the weighted-average normal value per unit was equal to or less than the weighted-average export price per unit of a sub-group, DOC assigned a zero value to that comparison.

13. DOC then aggregated the results of the positive sub-group comparisons where it considered there was a "dumping margin".[16] Finally, DOC divided the result of this aggregation by the value of all export transactions of the product under investigation (including those to which it had attributed a zero value). In this way, DOC obtained an "overall margin of dumping", for each investigated exporter, for the product under investigation.[17]

C. THE US PRACTICE OF ZEROING IN THE SECTION 129 DETERMINATION

14. In its Section 129 Determination, rather than eliminating zeroing from its weighted- average-to-weighted-average calculation methodology and recalculating the margins of dumping for each investigated exporter and the "all others" rate, DOC used a different methodology (transaction-to-transaction) to determine dumping, and continued to "zero" results of negative comparisons. DOC claimed that it was allowed to continue to zero despite the decision of the Appellate Body because the decision was limited to the weighted-average-to-weighted-average methodology.[18]

15. Under the transaction-to-transaction methodology, the DOC compared or matched each export transaction for which it had data with a normal value transaction (*i.e.*, a transaction in the Canadian home market). In seeking to determine which specific home-market transaction would be the most suitable match for a given export transaction, DOC used the same model-match characteristics used in the Final Determination.[19]

16. If a particular comparison between an export sale and a home market sale yielded a negative result (*i.e.*, the home market price was lower than the export price), DOC treated that result as zero. In the Section 129 Determination, DOC stated that it did not apply "the offset for non-dumped sales in [its] transaction-to-transaction comparison."[20] In other words, DOC assigned a zero value to all results of comparisons where the export price exceeded the normal value, rather than using the actual difference. As in the Final Determination, DOC then added only the positive results together, and divided the sum by the value of all export transactions to produce a final margin of dumping for each investigated exporter.[21]

III. ISSUE

17. The issue before this Panel is whether the practice of zeroing in the transaction-to-transaction methodology as applied by DOC in the Section 129 Determination is inconsistent with US obligations under Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

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[16] Appellate Body Report, at para. 64; and Panel Report, at para. 7.185.
[17] Appellate Body Report, at para. 64; and Panel Report, at para. 7.185.
[18] Section 129 Determination, 70 Fed. Reg. at 22,639 (Exhibit CDA-1).
[19] *Ibid.*, at 22,637.
[20] *Ibid.*, at 22,639.
[21] DOC accomplished zeroing in the Section 129 Determination, as it did in the Final Determination, through just a few computer instructions that assign a zero to each comparison with a negative value. See Tembec Margin Programme for US Sales Administrative Duty (Exhibit CDA-2).

IV. LEGAL ANALYSIS

18. The Appellate Body found the practice of zeroing in the weighted-average-to-weighted-average methodology inconsistent with US obligations under Article 2.4.2 of the *Anti-Dumping Agreement*. As the original Panel concluded, "the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*".[22] The Section 129 Determination is exactly contrary to this conclusion.

19. It is no defence that DOC used zeroing in a transaction-to-transaction methodology in the Section 129 Determination instead of a weighted-average-to-weighted-average methodology. This change in methodology does not render DOC's actions consistent with US obligations under the *Anti-Dumping Agreement*.

20. It is also well-established that the mandate of Article 21.5 panels is to examine the consistency of measures taken to comply with the recommendations and rulings of the DSB with obligations under the covered agreements. An Article 21.5 panel is not confined to examining the measures taken to comply from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceeding.[23]

A. THE DETERMINATION OF THE EXISTENCE OF DUMPING BY DOC USING A METHODOLOGY THAT INCORPORATES THE PRACTICE OF ZEROING IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE *ANTI-DUMPING AGREEMENT*

21. Article 2.4.2 of the *Anti-Dumping Agreement* provides, in relevant part, as follows:

the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

22. The Appellate Body held, consistent with the definition of dumping contained in Article 2.1, that, pursuant to Article 2.4.2: "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product."[24] The Appellate Body further held that:

> … the results of the multiple comparisons at the sub-group level are … not "margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.[25]

[22] Panel Report, at note 361.

[23] See *e.g.*, *EC – Bed Linen (Article 21.5 – India)*, at para. 79 and *Canada – Aircraft (Article 21.5 – Brazil)*, at para. 41.

[24] Appellate Body Report, at para. 96.

[25] *Ibid.*, at para. 97 [emphasis in original].

23. The Appellate Body also stated:

> We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.[26]

24. Accordingly, the Appellate Body agreed with the Panel that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* when DOC determined the existence of margins of dumping on the basis of a methodology that zeroed the results of all negative intermediate comparisons.

25. As with the weighted-average-to-weighted-average methodology, the transaction-to-transaction methodology involves multiple comparisons. Every comparison made by DOC under this methodology represents an intermediate calculation in the context of establishing margins of dumping for the product under investigation. Thus, DOC must aggregate all these "intermediate values" in establishing the margins of dumping for the product under investigation as a whole.

26. There is no textual basis under Article 2.4.2 that could justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping based on either the weighted-average-to-weighted-average or the transaction-to-transaction methodology, while disregarding other "results". Both methodologies involve multiple comparisons. The Appellate Body has held that an investigating authority, including DOC, necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.

27. The reasoning of the Appellate Body applies to the transaction-to-transaction methodology. By failing to take into account the results of *all* multiple comparisons in order to establish the margin of dumping for the product under investigation as a whole, DOC continues to act inconsistently with US obligations under Article 2.4.2 of the *Anti-Dumping Agreement*.

B. THE DETERMINATION OF THE EXISTENCE OF DUMPING BY DOC USING A METHODOLOGY THAT INCORPORATES THE PRACTICE OF ZEROING IS INCONSISTENT WITH ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT*

28. Article 2.4 of the *Anti-Dumping Agreement* sets forth a general obligation to make a "fair comparison" between export price and normal value. In *EC – Bed Linen*, the Appellate Body held that by not taking into account *all* comparisons, the practice of "zeroing" does not provide a fair comparison between the export price and the normal value and is, therefore, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. The Appellate Body stated as follows:

> [W]e are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison"

[26] *Ibid.*, at para. 98 [emphasis in original].

between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[27]

29. Likewise, as the Appellate Body explained in *U.S. – Corrosion-Resistant Steel Sunset Review*, zeroing introduces an "inherent bias" that "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[28] Accordingly, not only is the practice of zeroing in applying the transaction-to-transaction methodology inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, it is also inconsistent with Article 2.4.

V. REQUEST FOR FINDINGS AND RECOMMENDATIONS

30. For these reasons, Canada asks the Panel to find that the United States failed to implement the DSB's recommendations and rulings and rule that it has acted inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by continuing to determine dumping on the basis of a methodology that incorporates the practice of zeroing.

31. Canada also requests that the Panel recommend pursuant to Article 19.1 of the DSU that the United States bring its measures into conformity with its obligations under Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by recalculating dumping margins for all investigated exporters and the "all others rate" on the basis of a methodology that does not incorporate the practice of zeroing and that it return all anti-dumping cash deposits collected as a result of its failure to eliminate the practice of zeroing.

[27] *EC – Bed Linen*, at para. 55 [emphasis in original].
[28] *US – Corrosion-Resistant Steel Sunset Review*, at para. 135.

ANNEX A-2

EXECUTIVE SUMMARY OF FIRST WRITTEN SUBMISSION OF THE UNITED STATES

14 July 2005

Introduction

1. It is a fundamental tenet of WTO dispute settlement that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".[1] Nevertheless, adding to the obligations of the United States is precisely what Canada seeks to do through the present dispute settlement proceeding. Specifically, it asks the Panel to find an obligation on the US Department of Commerce ("Commerce") in establishing the existence of margins of dumping using the transaction-to-transaction methodology, though such an obligation has no basis in any article of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("*AD Agreement*").

2. Canada asks the Panel to find that, when aggregating the results of multiple transaction-to-transaction comparisons, Commerce has an obligation to offset the results of comparisons in which export prices are less than normal value with the results of comparisons in which export prices are greater than normal value. There is no textual basis for such an obligation. While Canada urges the Panel to extend the logic that allowed the original panel and the Appellate Body to find an offset obligation with respect to the average-to-average methodology, the leap to an obligation under the transaction-to-transaction methodology has no textual support. The key language relied upon to find an obligation in the first case is glaringly absent in the second.

Procedural History

3. At issue in the underlying dispute was Commerce's Final Determination in the less than fair value investigation on certain softwood lumber from Canada.[2] Canada asserted numerous claims regarding the initiation, scope, and methodologies applied in that investigation. The original panel rejected all of those claims except one, concerning an aspect of Commerce's methodology for establishing margins of dumping, and the Appellate Body upheld that result.[3] Following the DSB's adoption of its recommendations and rulings on 31 August 2004, the United States undertook to come into compliance with its obligations under the *AD Agreement*.

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[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Arts. 3.2 and 19.2.

[2] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 **(2 April 2002) (*"Final Determination"*)** and accompanying Issues and Decision Memorandum. Following an affirmative injury determination by the United States International Trade Commission, Commerce amended its final determination and published an antidumping duty order on 22 May 2002. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Anti-Dumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (22 May 2002). These documents were exhibits before the panel in the underlying proceeding (specifically, exhibits CDA-1, CDA-2, and CDA-3). As these documents are not otherwise referred to in this submission, they have not been attached as exhibits. However, the United States would be pleased to make them available, should the Panel so request.

[3] AB Report and Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS64/AB/R and WT/DS64/R, respectively, adopted 31 August 2004 (referred to hereafter as "AB Report" and "Panel Report", respectively).

4. Commerce engaged in a process that resulted in the modification of its methodology for establishing the existence of margins of dumping for softwood lumber from Canada.[4] The new methodology involved transaction-to-transaction comparisons of United States export prices, or constructed export prices, of certain softwood lumber to identical or similar normal value transactions in Canada. For comparisons for which the US sale was made at less then normal value, the results were aggregated and divided by the total of all the respondent company's US sales to determine whether the dumping margin for that respondent was above the *de minimis* level.[5] Commerce's new determination ("Section 129 Determination") was issued on 15 April 2005 and entered into force effective 27 April 2005.[6]

Scope and Standard of Review

5. With respect to the scope of the present proceeding, Canada states in its first written submission that "the mandate of Article 21.5 panels is to examine the consistency of measures taken to comply with the recommendations and rulings of the DSB with obligations under the covered agreements".[7] The United States does not disagree with that proposition. What is curious, however, is the statement that follows, in which Canada urges the Panel not to confine itself to "the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceeding".[8] The United States notes, in particular, Canada's apparent effort to distance itself from "arguments . . . relating to the measure that was the subject of the original proceeding".[9] While it is true, of course, that this Panel is not "confined" to examine the measure now at issue from the perspective of arguments made in the underlying proceeding, it is not unreasonable to expect a modicum of consistency between a party's arguments in the original proceeding and its arguments before a panel established pursuant to Article 21.5. Yet, in Canada's case, such consistency is noticeably lacking.

6. In the underlying proceeding, both before the panel and before the Appellate Body, Canada's argument with respect to an offset requirement purported to be firmly grounded in text – in particular, the phrase "all comparable export transactions" in Article 2.4.2 of the *AD Agreement*. Thus, in its submission to the Appellate Body, Canada stated, "The Panel's interpretation of Article 2.4.2 should be upheld because it is consistent with the ordinary meaning of the requirement in Article 2.4.2 that 'all comparable export transactions' be included in a weighted-average to weighted-average dumping calculation".[10] Similarly, in its first submission to the original panel, Canada argued that "zeroing"

[4] The process involved the application of the new methodology in a preliminary determination issued to the interested parties, followed by briefing on the new methodology by the interested parties, followed by the issuance of a final determination.

[5] By contrast, in the measure at issue in the underlying proceeding, Commerce had established margins of dumping by dividing the product under consideration into sub-groups according to model, level of trade, etc., performing weighted-average-to-weighted-average comparisons for each sub-group.

[6] By the time Commerce issued its Section 129 Determination, it already had completed an administrative review of each of the investigated exporters and producers. Accordingly, the Section 129 Determination had no practical effect on the cash deposit rate applicable to those companies' exports. The "all others" rate established in the Section 129 Determination does currently apply to exports of companies subject to that rate. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products From Canada*, 70 *Fed. Reg.* 22,636 at 22,645 to 22,646 (Dep't Commerce 2 May 2005) ("Section 129 Determination") (Exhibit CDA-1). Canada glosses over this distinction in its recitation of the facts in its first written submission.

[7] Canada First Written Submission, para. 20.

[8] Canada First Written Submission, para. 20.

[9] Canada First Written Submission, para. 20.

[10] Canada Appellee's Submission, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, para. 22 (7 June 2004) ("Canada Appellee's Submission") (Exhibit US-1); *see also*

was prohibited in the aggregation of average-to-average comparisons "precisely because it fails to take *fully* into account all comparable export transactions".[11] And, in its second submission to the original panel, Canada urged, "'All comparable export transactions' requires inclusion of export transactions that result in positive intermediate margins as well as those that result in negative intermediate margins".[12]

7. While the United States disagreed with Canada's proffered interpretation of "all comparable export transactions", the debate undeniably was about the meaning of that text. By contrast, in the present proceeding, Canada has departed from a textual basis for its argument all together. It cannot rely on the phrase "all comparable export transactions", because that phrase does not modify the provision in Article 2.4.2 that refers to the transaction-to-transaction methodology. Instead, Canada attempts to leverage the obligation found to exist with respect to the average-to-average methodology in order to identify a new obligation with respect to the transaction-to-transaction methodology. This may be why Canada is now trying to distance itself from arguments in the underlying proceeding that were so closely bound to particular text.

8. With respect to the standard of review, the applicable rule (as in the underlying proceeding) is set forth in Article 17.6 of the *AD Agreement*. In particular, since the only issue now in dispute is a legal issue, the applicable rule is that set forth in clause (ii) of Article 17.6. As the original panel explained, Article 17.6(ii) contains "an explicit acknowledgment that the relevant provision/s of the *AD Agreement* may admit of more than one permissible interpretation, and an instruction that, if this process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity with the *AD Agreement* if it is based on that permissible interpretation".[13]

9. In this submission, the United States will demonstrate that the measure taken to comply with the recommendations and rulings of the DSB was consistent with a permissible interpretation of Articles 2.4.2 and 2.4 and, accordingly, should be upheld.

The Section 129 Determination is Consistent With Article 2.4.2 of the *AD Agreement*

10. Article 2.4.2, first sentence reads as follows:

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

The first sentence thus contemplates two alternative methodologies that "normally" are to be used to establish the existence of margins of dumping during the investigation phase: the average-to-average methodology and the transaction-to-transaction methodology.

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id., paras. 35-37 (defending original panel report based on interpretation of words "all comparable export transactions").

[11] Canada First Written Submission, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, para. 171 (11 April 2003) ("Canada First Written Submission (Original)") (Exhibit US-2); *see also id.*, para. 170 (same).

[12] Canada Second Written Submission, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, para. 141 (9 July 2003) ("Canada Second Written Submission (Original)") (Exhibit US-3); *see also id.*, para. 144 (same).

[13] Panel Report, para. 7.11.

11. Canada's argument with respect to Article 2.4.2, as laid out in its first submission, essentially relies on a generalization of the reasoning of the Appellate Body in the underlying proceeding. There, the Appellate Body found: that when applying the average-to-average comparison methodology, Commerce established and compared multiple sub-groups of the like product "softwood lumber", obtaining "intermediate values"; that it could establish margins of dumping only by aggregating those intermediate values; and that in doing so, Article 2.4.2 required it to include all of the intermediate values obtained. Canada extrapolates from this finding that, because the transaction-to-transaction methodology also allegedly yields intermediate values, an aggregation of those values to establish a single margin of dumping also must include all of the intermediate values.[14]

12. There are two principal flaws with this line of reasoning. First, it does not comport with the textual basis for the findings by the Appellate Body and the panel in the underlying proceeding. Second, it assumes incorrectly that an obligation found with respect to the average-to-average methodology logically must extend to the transaction-to-transaction methodology, notwithstanding differences between the two methodologies and between the texts of the clauses providing for them.

13. In the underlying proceeding, both the panel and the Appellate Body were careful to stress that the question before them was limited to whether "zeroing" is permitted under the average-to-average methodology.[15] In addressing that question, both the original panel and the Appellate Body engaged in a close reading of the text of Article 2.4.2 and, in particular, the phrase "all comparable export transactions" – a phrase included in the article's articulation of the average-to-average methodology but not in its articulation of the other two methodologies. Thus, found that:

> the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account *all comparable export transactions* when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of *all comparable export transactions*, that is, for all transactions involving all types of the product under investigation.[16]

14. In defending this finding, Canada urged the Appellate Body to uphold the original panel's interpretation of Article 2.4.2 (as noted above) precisely because "it is consistent with the ordinary meaning of the requirement in Article 2.4.2 that 'all comparable export transactions' be included in a weighted-average to weighted-average dumping calculation".[17]

15. In analyzing the question on appeal, the Appellate Body, after addressing the threshold issue of the permissibility of "multiple averaging" under the average-to-average methodology, observed correctly that the crux of the parties' disagreement was "as to the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2 as they relate to zeroing."[18] The Appellate Body went on to "emphasize that [the two terms] should be interpreted in an integrated manner."[19] Accordingly, the Appellate Body's conclusion was the result of its interpretation of "all comparable export transactions" together with "margins of dumping."

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[14] Canada First Written Submission, paras. 22-25.

[15] *See* AB Report, para. 63 ("[I]n this appeal, we are not required to, and do not address, the issue of whether zeroing can, or cannot, be used under the other methodologies prescribed in Article 2.4.2. . . ."); *id.*, paras. 77, 104, 108: Panel Report, para. 7.219 (noting that the use of the two methodologies described in Article 2.4.2 besides average-to-average are not within the terms of reference); *id.*, paras. 7.196, 7.200, 7.213, 7.214.

[16] Panel Report, para. 7.224 (emphases added).

[17] Canada Appellee's Submission, para. 22 (Exhibit US-1).

[18] AB Report, para. 82.

[19] AB Report, para. 85.

16. In sum, the term "all comparable export transactions" was central to the findings in the underlying proceeding. Yet, that term is absent from the provision now at issue. The first sentence of Article 2.4.2 contemplates the establishment of margins of dumping in one of two alternative ways: *first*, "on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all comparable export transaction*,," (emphasis added) or, *second*, "by a comparison of normal value and export prices on a transaction-by-transaction basis". As interpretation of the term "all comparable export transactions" was essential to the original panel's findings, to Canada's defence of those findings, and to the Appellate Body's findings, this Panel should reject Canada's assertion that the findings from the underlying proceeding should extend to a provision in which that term is absent.

17. The original panel correctly observed, "[W]e are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning".[20] The converse of that observation is also true in this dispute. When the drafters excluded language from the treaty, it must be assumed that they did so deliberately, and the absence of a term in one provision that is included in another provision must not be ignored; it must be accorded significance. Here, the obligation that Canada asks the Panel to find is an obligation that has been found to stem from text that is absent from the portion of Article 2.4.2 that addresses the methodology that Commerce used in the measure at issue – the transaction-to-transaction methodology. Because of that crucial textual difference, the Panel should reject Canada's claim that the measure is inconsistent with Article 2.4.2.

18. Moreover, in addition to ignoring the textual difference between the provision at issue in the underlying proceeding and the provision now at issue, Canada's argument is flawed for a second reason. Canada assumes, without explanation, that when it comes to the aggregation of multiple values, there is no difference between the average-to-average methodology and the transaction-to-transaction methodology. Therefore, under Canada's argument, what goes for one necessarily must go for the other. That assumption has no basis.

19. In the underlying proceeding, Canada pointed out that, with respect to the average-to-average methodology, "zeroing fails to compare a 'weighted average' normal value with a 'weighted average' of prices of all comparable export transactions, as required by Article 2.4.2. Due to the conversion of some intermediate margins to zero, the overall margin of dumping that results does not reflect an actual average, in violation of Article 2.4.2".[21] In other words, the problem with "zeroing" when it comes to aggregating the results of average-to-average comparisons, as Canada itself argued, is that it causes the final result to be something other than an "actual average".

20. By contrast, the clause in Article 2.4.2 providing for the transaction-to-transaction methodology makes no reference to an "average" or "averages". In short, the average-to-average methodology and the transaction-to-transaction methodology are textually distinct methodologies. When aggregating results under the former, according to Canada's argument, an investigating authority is required to obtain an "actual average", which arguably involves applying non-dumped results as offsets to dumped results. The transaction-to-transaction methodology, however, does not involve averages. Therefore, the finding of an offset requirement applicable to the first methodology does not mean that an offset requirement logically must apply to the second.

21. Finally, Canada seeks support for its argument on Article 2.4.2 from a footnote in the original panel report.[22] Its reliance on that footnote is entirely misplaced. Canada neglects to recall that in the very same sentence that Canada partially quotes, the original panel acknowledged that it was "not

[20] Panel Report, para. 7.203.
[21] Canada Second Written Submission (Original), para. 142 (Exhibit US-3).
[22] Canada First Written Submission, paras. 3 and 18 (quoting Panel Report, n.361).

called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies".[23] Accordingly, the statement on which Canada relies is *obiter dictum*. Moreover, the sentence at issue states a conclusion without offering any explanation. And, of course, as the matter was outside of the original panel's terms of reference, it was not the subject of argument before the original panel (other than tangentially, as part of discussion of the context for the matter that was before the panel).

The Section 129 Determination is Consistent With Article 2.4 of the AD Agreement

22. Regarding Canada's argument with respect to Article 2.4, the United States notes, first, that Canada incorrectly asserts, at paragraph 5 of its first written submission, that the DSB made recommendations and rulings with respect to US obligations under Article 2.4 of the *AD Agreement*.[24] Of course, neither the original panel nor the Appellate Body ever reached the question of compliance of the underlying measure with Article 2.4. Therefore, that provision was not the subject of any recommendation or ruling of the DSB. Nevertheless, the United States recognizes that it is Canada's prerogative to raise in this proceeding the question of the implementing measure's consistency with Article 2.4.

23. Like its argument with respect to Article 2.4.2, Canada's argument with respect to Article 2.4 amounts to a conclusory statement based on an over-generalization of statements in certain Appellate Body reports. In fact, Canada offers no analysis of its own with respect to the interpretation of Article 2.4. It simply quotes two fragments from the Appellate Body reports in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* and says, in effect, "*Quid est demonstratum*".[25]

24. The fragments on which Canada relies are completely irrelevant to the question of whether Commerce's aggregation of the results of transaction-to-transaction comparisons in the present case is consistent with Article 2.4 of the *AD Agreement*. In fact, Article 2.4 was not even at issue in the *EC – Bed Linen* dispute. That dispute concerned, in relevant part, whether the EC's application of the average-to-average methodology was consistent with Article 2.4.2 of the *AD Agreement*.[26] The fragment that Canada quotes regarding Article 2.4, therefore, was *obiter dictum* and, accordingly, should not be relied on as providing any persuasive value in the present dispute.[27]

25. Canada's reliance on a fragment from *US – Corrosion-Resistant Steel Sunset Review* is similarly misplaced. While the question of whether a measure was consistent with Article 2.4 was before the Appellate Body in *Corrosion-Resistant Steel Sunset Review*, it came up in the context of completing the panel's analysis after finding legal error, and the Appellate Body ultimately was unable to reach a conclusion on whether the measure was consistent with Article 2.4.[28] Given that fact, and the fact that the methodology at issue in that dispute was an average-to-transaction comparison methodology used in an assessment proceeding, which differs from the transaction-to-transaction comparison methodology at issue here, the fragment quoted by Canada is of no relevance.

26. As Canada makes no argument to support its Article 2.4 claim other than quoting the two irrelevant fragments noted above, Canada has failed to make a *prima facie* case that the Section 129

[23] Panel Report, para. 7.219, n.361.

[24] Canada First Written Submission, para. 5.

[25] Canada First Written Submission, paras. 28-29.

[26] *See* AB Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/RW, adopted 12 March 2001, para. 45(a).

[27] *See* Panel Report, Dissenting Opinion, para. 9.23 (noting that the Appellate Body's statement regarding Article 2.4 in *Bed Linen* report "is *obiter dictum*, as Article 2.4 was not part of a claim before the Appellate Body").

[28] AB Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 138.

Determination was inconsistent with Article 2.4 of the *AD Agreement*. As was correctly observed in the original panel report, "[I]n WTO dispute proceedings, the burden of proof rests with the party that asserts the affirmative of a particular claim or defence".[29] Here, Canada has done nothing more than assert a claim followed by two fragments from Appellate Body reports that are not on point. Accordingly, the Panel should find that Canada has failed to make a *prima facie* case that the Section 129 Determination is inconsistent with Article 2.4.

27. Finally, the United States notes Canada's observation that "[p]roper implementation of the DSB's recommendations and rulings in this case would have resulted in a reduction of the margins of dumping for all of the investigated exporters and of the 'all others rate'".[30] Canada seems to be suggesting that the complaining party (or its stakeholders) *must* fare better under the measure implementing the DSB's recommendations and rulings than it did under the original measure complained of. There is no such standard under the DSU.

Conclusion

28. For the reasons stated above, Canada's claims against the US implementation of the DSB's recommendations and rulings in this dispute are groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety and find that the United States properly implemented the recommendations and rulings of the DSB in this dispute.[31]

[29] Panel Report, para. 7.13.

[30] Canada First Written Submission, para. 4.

[31] As in the underlying proceeding, Canada asks the Panel to "recommend", pursuant to Article 19.1 of the DSU, that the United States "bring its measures into conformity with its obligations under Article 2.4 and 2.4.2 of the *Anti-Dumping Agreement*" in a particular manner. Canada First Written Submission, para. 31. We understand Canada to be asking for a "suggestion" under Article 19.1 of the DSU. For the reasons set forth in the present submission, there should be no need for such a suggestion, as the United States has come into compliance with its WTO obligations. However, in the event the Panel were to accept Canada's arguments, it nevertheless should decline Canada's requested "recommend[ation]" as inappropriate, as was the case in the original panel and Appellate Body reports. *See* Panel Report, para. 8.6; AB Report, paras. 37, 183(a)-184 (noting Canada's request but declining to grant it); *see also* Panel Report, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, paras. 8.5-8.14. In any event, Canada's request goes beyond anything relevant to implementing a recommendation and again seeks to impose an obligation – "return [of] all anti-dumping cash deposits collected as a result of [Commerce's] failure to eliminate the practice of zeroing" – nowhere called for under the WTO agreements.

ANNEX B

THIRD PARTIES' SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY
THIRD PARTY SUBMISSION OF CHINA

22 July 2005

I. CANADA'S REQUEST THAT THE UNITED STATES BRINGS ITS MEASURES INTO CONFORMITY WITH THE DSB'S RECOMMENDATION IS CONSISTENT WITH ARTICLE 21.5 OF THE DSU

1. China disagrees with the United States that there is not "a modicum of consistency" between Canada's arguments in the original proceeding and its arguments before this Panel established pursuant to Article 21.5.[1] China notes that the US claimed here that it has implemented the DSB's recommendations and rulings by reaching Section 129 Determination adopting the transaction-to-transaction methodology.[2] Therefore, China believes that Canada's new claim regarding zeroing in transaction-to-transaction methodology concerns the "measures taken to comply" under Article 21.5 of the DSU.

2. The Scope of Article 21.5 that Canada advocates is also consistent with the prior decisions of the Panel and the Appellate Body in several WTO dispute cases. For example, in the EC-Bed Linen Case, the Appellant Body stated that "*an Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceedings….*"[3] Thus, it is understandable that the claims, arguments, and factual circumstances relating to the "measures taken to comply" will not necessarily be the same as those relating to the measures in the original dispute.

3. Turning to the case before the Panel, Canada's argument challenges the inappropriate practice of zeroing in the transaction-to-transaction methodology. The purpose of the new claim is to assess whether the United States' "measures taken to comply" with the Panel and Appellate Body's prior findings are fully consistent with the DSB's recommendations or rulings. To this end, China urges the Panel to conclude that Canada's claim in this proceeding is consistent with Article 21.5 of the DSU.

II. THE SECTION 129 DETERMINATION INCORPORATING ZEROING IN TRANSACTION-TO-TRANSACTION METHODOLOGY IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT.

A. "ALL COMPARABLE EXPORT TRANSACTIONS" SHALL APPLY TO THE TRANSACTION-TO-TRANSACTION METHODOLOGY

4. For the purpose of a fair comparison under Article 2.4.2, China believes that the investigation authority should take into account "all comparable export transactions" in the entire process of determining the existence of dumping of the product, and should not be limited only to the weighted average-to-weighted average comparisons. China further believes that the determination of dumping shall be based on the product at issue, rather than certain individual transactions that are conducted at

[1] US's First Written Submission, para. 5.

[2] *See* Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Anti-Dumping Measures on Certain softwood Lumber Products From Canada.

[3] *EC-Bed Linen (Article 21.5 -India),* WT/DS141/AB/RW, para. 79.

a particular price level. China also believes that the purpose of an anti-dumping investigation is to establish whether dumping exists. For this purpose, all the products described shall be fully taken into consideration, and not only those sold at the dumped prices. However, in the underlying proceeding, the practice of zeroing in transaction-to-transaction comparisons, in fact, excludes those transactions in which the export prices are higher than the normal value. In doing so, US DOC is changing the prices of the export transactions in those "negative margin" comparisons. As a result, the dumping margin was inflated, and an affirmative determination could be made in circumstances where no dumping would have been established in the absence of zeroing.

B. ZEROING IN THE TRANSACTION-TO-TRANSACTION METHODOLOGY IS INCONSISTENT WITH ARTICLE 2.4.2 OF ANTI-DUMPING AGREEMENT

5. In Article 2.4.2 of AD Agreement, there is in fact a textual difference between the provisions concerning weighted-average-to-weighted-average methodology and the transaction-to-transaction methodology. However, Article 3.2 of the DSU requires panels to interpret "covered agreements", including the AD Agreement, "in accordance with customary rules of interpretation of public international law". Pursuant to general principle provided in Article 31.1 of the *Vienna Convention on the Law of Treaties*, a reasonable interpretation of Article 2.4.2 shall serve its object and purpose.

6. The language of Article 2.4.2 specifically establishes the permissible bases for establishing the "existence of margins of dumping", as stated in Article 2.1 of the AD Agreement. And it is clear that the ultimate goal of Article 2 is to establish whether the product concerned is being dumped, or in other words, whether dumping exists, rather than determining the dumping margins of those transactions below the normal value. As the requirements of Article 2.4.2 should be construed as applicable to the entire process of determining the existence of margins of dumping for the product, China believes that the investigation authority should follow Article 2.1 and try to discover whether the product as a whole, rather than a particular model or transaction of the product, is dumped.

7. In addition, China believes that since the AD Agreement contains no preference or priority of one methodology over the other in Article 2.4.2 in relation to the weighted-average-to-weighted-average methodology and transaction-to-transaction methodology, it should be interpreted to mean that those two methodologies shall be applied equally in an anti-dumping investigation, and it should also be reasonable to assume that adopting either of those methodology should not lead to materially different results. Therefore, the zeroing practice prohibited in weighted-average-to-weighted-average methodology should not be used in the transaction-to-transaction methodology.

III. THE SECTION 129 DETERMINATION INCORPORATING ZEROING IS INCONSISTENT WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

8. China believes that Article 2.4 imposes on Members a general obligation of making a fair comparison between export price and normal value in determining the existence of dumping and calculating dumping margin. In order to make such comparison, the investigation authority is required to make "due allowance" affecting "price comparability" whenever appropriate. However, such allowance shall not include the adjustment of the export prices which are above the normal value.

9. In addition, pursuant to the principle of treaty interpretation provided in Article 31 of *the Vienna Convention on the Law of Treaties*, we believe that "fair comparison" here in the ordinary meaning, context as well as its object and purpose of AD Agreement, should not exclude those transactions that are above their normal value.

10. Firstly, from the ordinary meaning given in the context, we believe that "fair" should mean "free of prejudice", "just", "equitable" or "having the qualities of impartiality and honesty".[4] As the

[4] *See* Black's Law Dictionary 6th Ed, Page 412.

Appellate Body states in *US – Corrosion-Resistant Steel Sunset Review*, "*the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping*"[5]. Therefore, it is clear that the zeroing methodology with the "inherent bias" will certainly violate the requirement of "fair comparison" provided in Article 2.4 of the AD Agreement. Due to its adoption of zeroing methodology with the "inherent bias", the Section 129 Determination is inconsistent with the "fair comparison" requirement in Article 2.4.

11. Secondly, we can understand the content of "fair comparison" from the object and purpose of AD Agreement. As a part of Article 2, the provision of Article 2.4 is subject to the object and purpose of the Article 2 "Determination of Dumping". Just as the Panel states in *EU- Bed Linen*, "*a determination that there is dumping, can only be established for the product at issue, and not for individual transactions concerning that product, or discrete models of the product.*"[6] Further, in the Appellate Body finding in the *EU- Bed Linen*, the Appellate Body held that "*whatever the method used to calculate the margins of dumping „…these margins must be, and can only be, established for the product under investigation as a whole*"[7]. Thus, the investigation authorities shall make a "fair comparison" of all the comparable transactions for the purpose of determining dumping for the product under investigation as a whole.

12. By adopting zeroing, the US DOC failed to take into account all the export transactions. As a result, it essentially distorted the fair basis for comparison. Just as the Appellate Body stated in the EU- Bed Linen that "*we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is not a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2.*"[8].

13. In fact, by adopting zeroing methodology, the US DOC is selecting the transactions for comparison, which is not permitted by AD Agreement. China is of the view that, as the zeroing is formulated with an inherent bias that distorts the comparison of normal value and export price, it is inconsistent with the "fair comparison" requirement in Article 2.4 of the AD Agreement. Therefore, the Section 129 Determination is inconsistent with Article 2.4 of the AD Agreement.

IV. CONCLUSION

14. In conclusion, China is of the opinion that,

1. Canada's request that the United States bring its measures into conformity is consistent with Article 21.5 of DSU

2. The Section 129 Determination incorporating zeroing is inconsistent with Article 2.4.2 of the AD Agreement

3. The Section 129 Determination incorporating zeroing is inconsistent with Article 2.4 of the AD Agreement

[5] *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, para. 135.
[6] *EU- Bed Linen*, WT/DS141/R, para. 6.114.
[7] *EU- Bed Linen*,, WT/DS141/AB/R, para. 7.9.
[8] *EU- Bed Linen*,, WT/DS141/AB/R, para. 7.11.

15. China hereby wishes to thank the Panel for this opportunity to comment on the issues involved in this proceeding, and hopes that these comments will prove to be useful.

ANNEX B-2

THIRD PARTY WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITY EXECUTIVE SUMMARY

I. ARTICLE 2.4, FIRST SENTENCE AND ARTICLE 2.4.2, FIRST SENTENCE

A. A TRANSACTION IS NOT EQUIVALENT TO A NORMAL VALUE

1. Article VI of the GATT 1994 and the *ADA* contain 9 definitions, but not of "transaction". A transaction encapsulates the parties' agreement on the terms of a trade : product description; quantity; price; delivery date; payment date. Typically, it is evidenced by an invoice. In the phrase "transaction-to-transaction" the first use of the word "transaction" refers to the home market of the exporting country; and the second use refers to the market of the country of import. The word "to" indicates that one transaction is juxtaposed to the other.

2. The price at which a transaction in the home market of the exporting country is concluded, considered in isolation, is not equivalent to a "normal value". Rather, the final word "basis" in the first sentence of Article 2.4.2 indicates that "transaction-to-transaction" juxtapositions may be the *basis* for the calculation of a margin of dumping. The word "basis" indicates that there is one thing (one or more transaction-to-transaction juxtapositions) that is an underlying support for something else (a margin of dumping). Thus, in a first step of the calculation, there may be one or more transaction-to-transaction juxtapositions. However, ultimately, in a subsequent step of the calculation, Article 2.4.2 expressly provides that there is "a comparison" (that is, a single comparison) of "normal value" (also in the singular) and export prices, which therefore requires an aggregation of all intermediate results established in the first step of the calculation.

3. The AB in *US-Softwood Lumber V* analysed the very same word ("basis") as it is used in connection with the wa-to-wa method. If this is what the word means when it is first used in the first sentence of Article 2.4.2, in relation to the wa-to-wa method, then this must also be what it means when it is used a second time in relation to the t-to-t method. This is further confirmed by the first sentence of Article 2.4, which provides that a fair comparison (in the singular) must be made between the export price (singular) and the normal value (singular). Similarly, the sixth sentence of Article 2.4 also refers to "a fair comparison" (in the singular); and Article 2.4.1 refers to "the comparison" (also in the singular). Furthermore, Article VI of the GATT 1994 consistently refers only to "normal value" in the singular. The same is true of the *ADA*, which refers 15 times to normal value in the singular, including in respect of the t-to-t method.

4. This is confirmed by a consideration of the ordinary meaning of the word "normal". Normal means "constituting or conforming to a type or standard; regular, usual, typical; ordinary, conventional." Normality is a relative rather than an absolute concept. What is "normal" in one society or population is not necessarily normal in another. And this is just as true when a set (the home market of the exporter) is populated with data (such as transactions). Thus, an IA cannot select and isolate one transaction and characterise it as "normal". Rather, it is only possible to ascertain normal value by a fair and balanced consideration that takes into account the appropriate data populating the relevant set.

5. Further support is provided by the phrase "ordinary course of trade" in Article 2.2. Absent any explanation, a single transaction cannot be taken as representative of the "ordinary course of trade" and cannot therefore be considered a "normal value". Further support is provided by the repeated references to "sales" (in the plural); and "the low volume of sales"; and "representative"; and "sufficient quantity" and "sufficient magnitude" in Article 2.2, footnote 2, and Article 2.2.1. These provisions envisage a situation in which, in all cases in which *normal* value is to be derived from transactions, there is a population of transaction data sufficient and adequate for the purpose, taking into account all the circumstances of the case, and which is duly taken into account.

B. CONSEQUENTLY, INTERMEDIATE RESULTS ARE NOT MARGINS OF DUMPING

6. Given the definitions of dumping and margin of dumping in Article VI of the GATT 1994, as implemented and elaborated in Article 2 of the *ADA*, a margin of dumping can only result from a comparison between a normal value and export price(s). If an IA does not first determine a normal value, it cannot calculate a margin of dumping. Thus, it necessarily follows from the analysis in the preceding section that the intermediate results of a series of t-to-t juxtapositions cannot be "margins of dumping", because they do not involve a comparison between a normal value and export price. It is only when any such intermediate results are finally combined, in a second stage of the calculation, that the margin of dumping for the specific exporter will have been calculated.

C. THIS ANALYSIS IS NOT AFFECTED BY THE USE OF THE PLURAL

7. This analysis is not altered by the use of the plural "margins of dumping" in Article 2.4.2. One proceeding may concern more than one country; and in accordance with Article 6.10, the authorities shall, as a rule, determine an individual margin of dumping for each known exporter. A single proceeding may therefore result in more than one margin of dumping. The use of the plural thus has a logic to it, whether or not the IA makes the comparison on a transaction-to-transaction basis. In similar vein, one proceeding may involve more than one normal value, because there may be more than one country and/or exporter. That explains the use of the plural "normal values" in the final sentence of Article 9.4.

D. THE SECOND STAGE CANNOT FALL OUTSIDE THE ADA

8. In *EC-Bed Linen* and *US-Softwood Lumber V* the AB rejected the notion that, in circumstances where there are two stages to the calculation, the second stage falls outside Article 2 and indeed outside the *ADA* altogether. The precise and detailed rules set out in the *ADA* would be pointless if, in the final step of the calculation, the IA would be free to make an unfair comparison. This is confirmed by Article 1, pursuant to which an anti-dumping measure may only be applied under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the *ADA*. The provisions of the *ADA* govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

E. IA CANNOT DISREGARD CERTAIN EXPORT VALUES

9. An IA cannot disregard the results of multiple comparisons at the aggregation stage. Other provisions of the *ADA* are explicit regarding the permissibility of disregarding certain matters. For example, Article 2.2.1 sets forth the only circumstances under which sales of the subject product may be disregarded. Similarly, Article 9.4 expressly directs IAs to "disregard" zero and *de minimis* margins of dumping, under certain circumstances. Article 2.7 effectively excludes the disciplines of Article 2 in cases involving non-market economies. Annex II permits IAs in certain circumstances to disregard information. When the Members permitted IAs to disregard certain matters, they did so explicitly.

10. As the AB has observed, "dumping" within the meaning of the *ADA* can be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product. In similar vein, the Panel in *US-Softwood Lumber V* stated that the use of zeroing when determining a margin of dumping based on the t-to-t method would not be in conformity with Article 2.4.2.

F. FAIR COMPARISON

11. The object and purpose of the comparison rules in the *ADA* is to ensure that there is a fair comparison between normal value and export price, as provided in the first sentence of Article 2.4. The first sentence of Article 2.4 establishes an overarching and independent obligation to make a fair comparison. The importance of the rule embodied in this obligation has been repeatedly confirmed by the WTO AB and Panels. The text of the Uruguay Round *ADA* contains an important and significant innovation by comparison with the text of the previous Tokyo Round *Anti-Dumping Code*.

12. The ordinary meaning of the word "fair" indicates a comparison that is "just, unbiased, equitable, impartial"; "offering an equal chance of success"; conducted "honestly, impartially"; and "evenly, on a level". Fairness, in the context of a comparison between domestic sales and export sales, requires that, under normal circumstances, the same treatment be applied to both domestic and export sales, i.e. that such sales be treated in a symmetrical way. That means that the same methodology must be adopted to establish the value of the sales that will be used for the calculations. Because "zeroing", which consists, in effect, in an arbitrary and artificial reduction of the value of certain export transactions, is only applied to export transactions, there is no symmetrical treatment.

13. The EC believes that this view is supported by the context and the object and purpose of the *ADA*. The EC does not enter into a discussion of the several possible economic rationales for the anti-dumping rules, much discussed in the literature and well known. The fact remains, however – and this much is uncontroversial – that they are all economic. The application of the discipline of economics requires a minimum of consistency. It is not by chance that the *ADA* uses the words "market" or "competition" or "compete" 28 times, these being the indispensable and basic building blocks of consistent economic analysis. And it is not by chance that the basic parameters by which markets are generally defined : product (or physical characteristics), geography and time play a central role in the *ADA*. Nor is it chance that these are also the basic parameters essentially referred to in the second sentence of Article 2.4.2. Finally, it must come as no surprise that the reasoning of the AB in the *EC-Bed Linen* and *US-Softwood Lumber V* cases is essentially about consistency with respect to one of these parameters : product definition. Viewed in this light, it is not possible to fairly measure international price discrimination between two different markets (the domestic market of the exporting country and the domestic market of the importing Member), if the fundamental methodology for defining and measuring behaviour in each of the markets is different. Absent good reason (targeted dumping), such an approach is actually *incapable* of measuring alleged international price discrimination. It is unfair, because it is internally inconsistent.

G. THE SELECTION OF THE PERIOD OF INVESTIGATION

14. Just as an anti-dumping proceeding concerns "a product" (the subject product), so it also concerns a margin of dumping based on a comparison of sales made at as nearly as possible "the same time" (the investigation or review period). Just as the *ADA* contains no express rule governing the definition of the "subject product", so it contains no express rule governing the definition of the period of investigation or the period of review. The "same time" might be a shorter period or a longer period (such as a year). Just like product characteristics, time (along with geography) is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the US defined the "subject product", so the US defined the period of investigation. Just as the EC does not take issue, in this case, with the

definition of the subject product, so the EC does not take issue, in this case, with the definition of the period of investigation. Just as in the case of the "model zeroing" method that was the subject of the *EC-Bed Linen* and *US-Softwood Lumber V* cases, having defined the period of investigation, the US was obliged to ensure that the margin of dumping for that period of investigation was calculated in conformity with Article 2.4.2. The US had become bound by its own logic.

15. The US having fixed the relevant period, it had effectively decided that "the same time" in this case was the period of investigation. In short, the reasoning of the AB in the *EC-Bed Linen* and *US-Softwood Lumber V* cases in relation to model zeroing also applies whenever an IA decides to fix the parameters of its investigation, whether in relation to subject product, time, level of trade, region, or any other parameter. The IA thereby becomes bound by its own logic, and must complete its analysis on the basis of the same logic.

16. The EC finds contextual support for the preceding analysis in the second sentence of Article 2.4.2, which refers expressly to certain other parameters of the determination, including "time periods". These words indicate that, having fixed the temporal parameters of its investigation, the US had become bound by its own logic, and could not change those parameters only for certain aspects of its investigation, unless the exceptional situation described in the second sentence of Article 2.4.2 was present (which it was not). The same is true in respect of any other parameters of the investigation fixed by the IA, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2 of the *ADA*. The zeroing method used by the US is, at least potentially, offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. Further contextual support may be found in a number of other provisions of the *ADA* which indicate that temporal considerations are relevant to the calculation of a dumping margin.

H. PRICE VARIATION

17. The US offers no explanation for the t-to-t method that it has employed, and in the context of which it claims that zeroing is permitted. It merely asserts that its choice of methodology was justified because otherwise "given the high level of price volatility" US sales would be "matched to home market sales made under different market conditions." The EC does not take issue with the US attempt to match export and domestic transactions at as nearly as possible the same time, as provided for in Article 2.4. However, price variation or volatility cannot justify zeroing.

18. The whole point about the calculation of a margin of dumping is that it involves a comparison between two <u>different markets</u> : the home market and the export market. To consider these together to be one market, and, all other things being equal, at the same time attempt to measure sustained price discrimination in that one market, would be perfect nonsense : if there would be one market then, by definition, the lower and higher priced sales would simply equalise at the point of market equilibrium. USDOC agrees, referring consistently to the US market and the home market, as two distinct markets.

19. Viewing each of these markets independently, price volatility within one or both of them does not, in itself, delineate the parameters of distinct sub-markets. In fact, aside from the perfect theoretical market (which does not exist), price variation or volatility is *the* defining characteristic of a market, as opposed to a command economy. Thus, assuming that both the home market and the US market are exhibiting a degree of price variation within each market, prices moving up and down over time; that the pricing behaviour of an exporter in each market also varies in the same way; and that on average prices in the two markets are the same or nearly the same - when the two price curves are placed alongside each other, there will almost always be some instances where one curve is above the other, and *vice versa*. It would be highly unlikely, to the point of miraculous, if the two curves would match exactly. In such a case, in truth, absent special circumstances, there is no international price

discrimination. And yet the practice of zeroing, in the context of the t-to-t methodology used by USDOC, would certainly lead to a determination of dumping. In that sense, the choice of the methodology makes the result a foregone conclusion, and that is why it is inherently biased and unfair.

20. The fact that market conditions in the US market and in the home market may be different (for example, demand might be very different in the two markets) has nothing to do with a comparison between normal value (in one market) and export price (in the other market) – assuming, of course, that all appropriate adjustments for any differences affecting price comparability have been made, in accordance with Article 2.4. The existence of other differences (such as different demand) might contribute to explaining why there is or is not dumping. They are irrelevant to determining how dumping should be measured.

21. Thus, in truth, the question before USDOC was how the US market and the home market should be defined, independently, in terms of product, geography and time; and in truth what USDOC has done – by using a transaction-to-transaction zeroing methodology - is to posit that the home market, for example, should be temporally defined by reference to each day or each moment in time, each day or time being a "different market". This is implausible in the extreme, to the point of passing beyond a determination that could be made by an objective and even-handed authority.

I. POSSIBLE EXCLUSION OR REPEATED USE OF HOME MARKET TRANSACTIONS

22. The preceding analysis does not mean that it is in all circumstances impossible for an IA to exclude some transactions in the home market. It may be that there are more home market transactions than export transactions. In these circumstances, an IA may conduct a series of t-to-t juxtapositions, and at the end of that process, a number of transactions in the home market may not yet have entered into the calculation. That does not mean that the IA is precluded from using the intermediate results. Article 2.4.2 expressly provides for the intermediate results to be part of the basis of the final calculation of the margin of dumping. Similarly, if there are more export transactions that home market transactions, it cannot be excluded that an IA might use a home market transaction more than once.

23. However, it does not follow that the IA is released from its obligation, in the second stage of the calculation, when aggregating the intermediate results, to make a fair comparison between normal value and export price. Consequently, at the second stage of the calculation, an IA must consider whether or not the home market transactions it is using constitute a "normal value", capable of being used to effect a fair comparison. If that is not the case, an IA is obliged to make whatever adjustments or allowances are necessary, and if necessary return to or re-visit the first stage of the calculation, in order to ensure that it uses a normal value that is comparable to export price, where appropriate bringing other home market transactions into the calculation, or changing the home market transactions used more than once, in order to ensure that it has a representative picture of normal value in the home market.

24. Second, it does not mean that an IA is entitled, when combining the intermediate results at the second stage of the calculation, to disregard (or zero) certain values or amounts.

J. THE UTILITY OF THE TRANSACTION-TO-TRANSACTION METHOD

25. It is not correct to say that the t-to-t method, without zeroing, will always produce the same result as the wa-to-wa method, without zeroing. The results in each case may vary according to the precise distribution of transactions, and particularly according to which home market transactions eventually do not form part of the final calculation, or which home market transactions are used more than once. The t-to-t method may be particularly useful insofar as it may eliminate the need to make

adjustments for differences affecting price comparability – differences that may be difficult to objectively quantify.

K. THE PHRASE "ALL COMPARABLE EXPORT TRANSACTIONS"

26. The US devotes its submission to the phrase "all comparable export transactions", which is irrelevant. The EC has explained why the measure is inconsistent with Article 2.4, first sentence and Article 2.4.2, first sentence; and, in addition, with Article 2.4, first sentence and Article 2.4, second to fifth sentences, without referring to that phrase.

II. ARTICLE 2.4, FIRST SENTENCE AND ARTICLE 2.4, SECOND TO FIFTH SENTENCES

27. The first sentence of Article 2.4.2 is "[s]ubject to the provisions governing fair comparison in paragraph 4". The provisions governing fair comparison in paragraph 4 are the second to fifth sentences of Article 2.4. Consequently, a comparison of normal value and export prices on a t-to-t basis may not be conducted in a manner that conflicts with the obligations in the second to fifth sentences of Article 2 4. The second to fifth sentences of Article 2.4 describe the circumstances in which a due adjustment or allowance may be made for differences affecting price comparability. It necessarily follows that, if an adjustment is made in circumstances in which there is no such difference, then an IA would act inconsistently with that provision Consequently, when an IA combines the intermediate results of t-to-t juxtapositions, in order to calculate the margin of dumping for the exporter, it is not permitted to introduce into the calculation any adjustments, whether to export price, normal value, or otherwise, other than those duly permitted by the second to fifth sentences of Article 2.4.

28. The ordinary meaning of the word "allowance" includes : "A sum or item put to someone's credit; deduction, discount" and "Addition or deduction in consideration of something". The ordinary meaning of the word "adjust" includes : "Arrange, compose, harmonize, (differences, discrepancies, accounts); assess (loss or damages)". The words "allowance" and "adjustment" in Article 2.4 have the same meaning. The allowance or adjustment may be to normal value, or export price, or in some other way, before, during or after comparison. Nothing in the second to fifth sentences of Article 2.4 limits the type or timing of allowance or adjustment with which the provision is concerned. The US zeroing method is an "allowance" or "adjustment", effectively reducing the value of certain export transactions. The US makes this allowance or adjustment because of the *difference* between some intermediate results (they are positive) and other intermediate results (they are negative); or because of the sign (negative) of an intermediate difference between one transaction and another. That *difference* is not something that *affects* price comparability, but *part of* the very comparison between normal value and export price that the IA is obliged to carry out. Thus, the US acted inconsistently with the second to fifth sentences of Article 2.4, and thus also with the first sentence of Article 2.4.

29. This analysis is consistent with the second sentence of Article 2.4.2. A correctly executed targeted dumping analysis, where all the conditions provided for in that provision are met, is a fair comparison within the meaning of the first sentence of Article 2.4. An adjustment or allowance in the context of targeted dumping *might* be "due", within the meaning of the third sentence of Article 2.4, if it is made under the conditions laid out in the second sentence of Article 2.4.2. If two distinct patterns of export prices are identified, based on different patterns among different purchasers, regions or time periods, then there is a difference. If a comparison with normal value (market C) shows dumping in market A, but not market B, an IA *might* be justified in not "setting-off" the "negative dumping" in market B against the dumping in market A. If A and B may be considered not comparable, then by definition AB may also be considered not comparable with C. Insofar as this would be characterised as an "adjustment" to the export data in market B, such adjustment would be made for a difference

(between markets A and B) that affected price comparability (between markets A and B; *and* between AB and C).

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

21 July 2005

I. SECTION 129 DETERMINATION

1. In calculating the margin of dumping in the Section 129 Determination, the USDOC compared normal value and export price on a transaction-to-transaction ("T-to-T") basis. For each comparable set of transactions, the USDOC calculated a price difference. To derive an overall margin of dumping for the subject product, the USDOC proceeded to aggregate the multiple transaction-specific comparisons undertaken. However, in aggregating the multiple comparison results, the USDOC summed exclusively the positive price differences; all comparisons with negative differences were systematically disregarded from the calculation of the overall margin of dumping for the product under investigation as a whole. As a result, the total of amount of dumping was inflated by an amount equal to the excluded negative differences.

II. FAILURE TO CALCULATE A MARGIN FOR THE PRODUCT AS A WHOLE UNDER ARTICLES 2.1 AND 2.4.2 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI OF THE GATT 1994

2. The Appellate Body in *US–Corrosion-Resistant Steel* has stated that Article 2 of the *Anti-Dumping Agreement* (the "*Agreement*") sets forth the "agreed disciplines" for determining the existence of dumping and also calculating the margin of dumping. Article 2.1 of the *Agreement* reiterates the definition of "dumping" under Article VI:1 of the GATT 1994. Relying on this textual language, the Appellate Body in *US-Softwood Lumber V* stated explicitly that "dumping is defined in relation to a *product as a whole* as defined by the investigating authority" , "the definition of 'dumping' as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2", and that the term "'margin of dumping' refers to the magnitude of dumping. As with dumping, 'margins of dumping' can be found only for the *product under investigation as a whole*, and cannot be found to exist for a product type, model, or category of that product." (Emphasis and underline added).

3. Thus, Article 2.1 of the *Agreement* and Article VI of the GATT 1994 require that "dumping" and the "margin of dumping" as the scale to measure the magnitude of dumping be determined for the "product" as a whole. And, because Article 2.1 and Article VI of the GATT 1994 apply to the entire *Agreement*, the terms "dumping" and "margin of dumping" have uniform meanings throughout the *Agreement* and accordingly, Article 2.4.2 imposes the same requirement, for that provision specifically refers to the very term "margins of dumping". Consequently, a comparison that is based only on a sub-part of the product cannot produce a margin of dumping for the "product" as a whole.

4. As the above conclusion is reached by virtue of the textual analysis of Article 2.1 and Article VI of the GATT 1994, it applies to the "margins of dumping" under Article 2.4.2 regardless of whether a weighted average-to-weighted average or T-to-T comparison methodology is used. Indeed, the first sentence of Article 2.4.2 makes no distinction as to the meaning of "margins of dumping" depending on the methodology to compare normal values and export prices.

5. The Appellate Body in *US – Softwood Lumber V* clarified the ramification of the requirement to establish the margins of dumping for the product under investigation as a whole, when the investigating authorities adopt a comparison method that relies on multiple comparisons, by saying "the results of the multiple comparisons at sub-group level are…not "margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these "intermediate value" that an investigating authority can establish margins of dumping for the product under investigation as a whole. … If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2." (Underlining added).

6. In the Section 129 Determination, the USDOC established the margin of dumping on the basis of multiple transaction-specific comparisons. Thus, the results of each of the transaction-specific comparisons the USDOC undertook in reaching the Section 129 Determination are *not* "margins of dumping" for the product as a whole within the meaning of Article 2.4.2 of the *Agreement*. Instead, they are all "intermediate calculations" for a *sub-part* of the product (i.e. a single transaction). To calculate a margin of dumping for the product as whole, *all* of these intermediate calculations must be aggregated. However, in aggregating the multiple transaction based comparison results, USDOC disregarded each and every comparison with negative differences from the calculation of the overall margin of dumping.

7. Contrary to the United States' assertion, the phrase "all comparable export transactions" is irrelevant for the panel to decide the case before it. The Appellate Body in *US-Softwood Lumber V* did not refer to the phrase "all comparable export transactions" in concluding that "dumping" and "margin of dumping" can be only determined for the product as a whole and the authorities are not allowed to disregard the certain results of multiple comparisons. In fact, the Appellate Body observed that the issue "centres on how the results of multiple comparisons are interpreted and aggregated when all comparable transactions have admittedly been taken into account at the sub-group level" and that issue flow[ed] in essence from [the meaning] of "the terms 'dumping' and 'margin of dumping' in the *Agreement* – whether these terms apply at the product or sub-product level". As described above, the obligation to give full effect to all "intermediate calculations" arises from the requirement set out in Article 2.1 and Article VI of the GATT 1994 that dumping is to be determined for the "product as a whole". The United States' argument confuses two related but distinct sets of obligations – on the one hand, the requirement to include, in the context of multiple comparisons, "all comparable export transactions" in the intermediate calculations of *weighted average* export prices at the sub-group level of the product, which arises in the average-to-average comparison methodology under Article 2.4.2, and, on the other hand, the requirement that, once an investigating authority has identified the universe of comparisons it will undertake, it must "take into account the results of *all* those multiple comparisons, in the aggregation stage, with a view to establishing margins of dumping for the product as a whole".

8. In the Section 129 Determination, the USDOC failed to include the results of all of the intermediate calculations in calculating the alleged margin of dumping for the softwood lumber product as a whole. However, the aggregation of *some*, but *not all*, of the comparison results does not show that softwood lumber is "dumped" under Article 2.1 and Article VI of the GATT 1994 nor does it amount to a "margin of dumping" under Article 2.4.2. In other words, the purported margin of dumping in the Section 129 Determination is not for the product as a whole but for only a carefully selected sub-part of the product.

9. Therefore, in making the Section 129 Determination, the United States acted inconsistently with Articles 2.1 and 2.4.2 of the *Agreement*, together with Articles VI:1 and VI:2 of the GATT 1994.

III. FAILURE TO CONDUCT A FAIR COMPARISON UNDER ARTICLE 2.4.2 OF THE *AGREEMENT*

10. The first sentence of Article 2.4 of the *Agreement* requires that "A *fair comparison* shall be made between the export price and the normal value. (Emphasis added.)"

(a) Scope of the "comparison" in Article 2.4

11. As the panel in *Egypt – Rebar* found, "Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the *calculation of the dumping margin* …"

12. According to the Appellate Body in *EC-Bed Linen*, the requirements of a "fair comparison" involve "a *general* obligation" that "informs *all of Article 2* …" In particular, the fairness obligation applies to the provisions of Article 2 that relate to "the calculation of the dumping margin", as the panel in *Egypt – Rebar* found.

13. Moreover, although Article 2.4 requires that certain adjustments be made to normal value and/or export price to ensure "price comparability," the enumerated adjustments do not exhaust the requirements of a "fair comparison". Instead, the requirements of fairness guide the comparison from beginning to end. This is entirely appropriate because the goal of the comparison is to establish whether producers or exporters are engaging in international price discrimination. Such discrimination can only be shown through a focus on the producer's or exporter's own pricing behaviour, free from manipulation by the investigating authorities.

14. As the panel in *Egypt – Rebar* found, the comparison process for calculating the dumping margin begins when the "basic establishment" of normal value and export price is complete, and ends when "the price difference", or "margin of dumping", for the product as a whole has been calculated. In consequence, the process by which the USDOC sub-divided (i.e. matched individual transactions) and then re-aggregated the product must be free of manipulation that would undermine the fairness of the comparison.

(b) Scope of the duty to make a "fair" comparison

15. Throughout the "comparison" of normal value and export price, Article 2.4 imposes a "general" obligation that requires the investigating authorities to ensure a *fair* comparison. According to its dictionary meaning, a "*fair*" comparison is one that is "*unbiased*" and "*impartial*," and that "offer[s] an *equal chance of success*" to all parties affected by an investigation. The panel in *EC – Tube or Pipe Fittings* held in the context of Article 2.4 that an "investigating authority must act in an *unbiased, even-handed* manner and must not exercise its discretion in an *arbitrary* manner." This suggests a meaning that is rooted in the basic requirements of good faith and fundamental fairness. The Appellate Body in *EC-Hormones* and *EC-Bed Linen (Article 21.5)* has observed that "fundamental fairness" is known in many jurisdictions "as due process of law or natural justice."

16. The context provided by other provisions of the *Agreement* offers useful guidance for the proper construction of the "fairness" obligation in Article 2.4. First, other provisions of Article 2 impose similar requirements. For example, in *US – Hot-Rolled Steel*, the Appellate Body stated that Articles 2.1 and 2.2.1 require investigating authorities to assess whether home-market sales are in the ordinary course of trade "in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation", and that there was a "lack of *even-handedness*" in the USDOC procedures at issue because the "combined application of [the measures] operated systematically to raise normal value", which "disadvantaged exporters". (Underlining added).

17. Second, panels and the Appellate Body have consistently held that, in making "injury" determinations under Article 3.1, investigating authorities must respect "the basic principles of good

faith and fundamental fairness". This finding is based on the need for authorities to conduct an "objective examination". In *EC – Bed Linen (Article 21.5)*, the Appellate Body ruled that this language requires authorities to reach a result that is "*unbiased*, *even-handed*, and *fair*". In *US – Hot-Rolled Steel*, the Appellate Body found that it would not be "even-handed" for investigating authorities "to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured". (Emphasis added). The Appellate Body also opined that fairness precludes an investigating authority from "*favouring the interests* of any interested party, or group of interested parties, in the investigation." (Emphasis added).

18. Third, through the standard of review in Article 17.6(i), the *Agreement* effectively imposes a duty on investigating authorities to evaluate facts in an "*unbiased* and *objective*" manner, as the Appellate Body in that case also stated.

19. In sum, under Article 2.4, the process by which authorities identify "the price difference" between normal value and export price for the product as a whole must not be biased, lack even-handedness, favour particular interests or outcomes, or otherwise distort the facts, in particular to the detriment of exporters or foreign producers.

20. Finally, the United States errs in asserting that Article 2.4 was not even at issue in *EC – Bed Linen*. Although that dispute focused on the interpretation of Article 2.4.2, the applicability of the "fair comparison" obligation imposed by Article 2.4 to the calculation of "margins of dumping" under Article 2.4.2 was directly considered by the Appellate Body, and its conclusion regarding that obligation comprised a necessary part of its reasoning. As the Appellate Body noted in *US-Corrosion-Resistant Steel*, "[w]e . . . emphasized that a comparison such as that undertaken by the [EC in *EC – Bed Linen*] is not a 'fair comparison' between export price and normal value *as required by Article 2.4* and 2.4.2."

(c) <u>The United States' failure to make a "fair" comparison</u>

21. In making the Section 129 Determination, the USDOC failed to comply with the duty to conduct a fair comparison. In *US – Corrosion-Resistant Steel*, the Appellate Body identified two unfair elements of zeroing; (i) zeroing may lead to an affirmative determination that dumping exists in circumstances where no dumping would have been established in the absence of zeroing; and (ii) zeroing necessarily "inflates" the margin of dumping by always excluding from the aggregation stage the results of negative intermediate comparisons that would reduce the overall amount of dumping if they were included. Immediately after noting these unfair elements, the Appellate Body found that there is an "inherent bias in a zeroing methodology … of this kind". The Appellate Body took the view that such a comparison "is *not* a 'fair comparison' between export price and normal value, as required by Articles 2.4 and 2.4.2".

22. The zeroing applied by the USDOC in making the Section 129 Determination involves the same unfair comparison. By excluding the negative comparisons results from the aggregation of total dumping, the USDOC overstated the total amount of dumping by an amount equal to the excluded negative values. As a result, the dumping margin was inflated. By inflating the dumping margin for softwood lumber through zeroing, the USDOC deprived the comparison of normal value and export price of even-handedness. Instead, the comparison systematically favoured the interests of petitioners, and systematically prejudiced the interests of Canadian producers and exporters of the softwood lumber.

23. The Appellate Body in *US-Softwood Lumber V* has described that "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were <u>less than</u> what they actually are. … Zeroing does not take into account the *entirety* of the *prices* of *some* export transactions." (Underlining added).

24. In the Section 129 Determination, the use of zeroing resulted in these same price-based distortions. By improperly excluding all negative comparison results from the aggregation stage, the USDOC effectively attributed a zero value to the excluded comparisons in question, instead of a negative value. This means that, for the excluded comparisons, the USDOC treated normal value as *equal* to export price, whereas, in fact, export price was *greater* than normal value. Accordingly, as a result of zeroing, the export transactions considered in the excluded comparisons were systematically "treated as if they were less than what they actually are", as described by the Appellate Body in *US-Softwood Lumber V*, or in other words, the zeroing systematically treated normal value as being *higher* than it actually was. On either view, through zeroing, the USDOC distorted the comparison of normal value and export price by interfering with price-based data for home-market or export sales.

25. The zeroing in the Section 129 Determination occurred through the inclusion of a single line of computer code in the margin calculation program. This means that the inflation and distortion of the margin of dumping, in the Section 129 Determination, were not accidental. Instead, the United States' margin calculation procedures are, through the inclusion of the zeroing line, purposefully designed and structured *always* to be biased in favour of a particular outcome and particular interests (i.e., existence of dumping and the interests of petitioners), and conversely *always* to be biased against exporters' interests.

IV. CONCLUSION

26. Japan submits that the Panel should find in favour of Canada's complaint because, the United States acted inconsistently with Articles 2.1, 2.4 and 2.4.2 of the *Agreement*, as well as with Articles VI:1 and VI:2 of the GATT 1994.

ANNEX B-4

EXECUTIVE SUMMARY OF NEW ZEALAND'S THIRD PARTY SUBMISSION

21 July 2005

I. INTRODUCTION

1. The interpretation and application of the provisions of Article VI of the *General Agreement on Tariffs and Trade 1994* (GATT) has long been a concern of WTO Members. The approach to anti-dumping has sustained interest and controversy through successive negotiating Rounds, leading to the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* 1994 ("*Anti-Dumping Agreement*").

2. New Zealand has joined this dispute because of our systemic interests in ensuring that the balance of rights and obligations set out in the WTO Agreements, including the *Anti-Dumping Agreement*, is maintained. More particularly, New Zealand has an interest in the use of the transaction-to-transaction methodology in the calculation of dumping margins and in ensuring that the negotiating history of the Agreement is given adequate consideration when considering the interpretation of the Agreement.

3. New Zealand prefers to use the transaction-to-transaction methodology in anti-dumping investigations due to the relatively small number of shipments into the New Zealand domestic market. This approach allows the export price to be compared with the corresponding normal value for individual transactions in the domestic market of the exporting country. New Zealand considers that it is a fair methodology which targets more precisely the dumping taking place.

II. TRANSACTION-TO-TRANSACTION METHODOLOGY

4. The history of the Tokyo Anti-Dumping Code and the *Anti-Dumping Agreement* is well documented. As part of the development of the Code, a Group of Experts on Anti-Dumping and Countervailing Duties met in Geneva from 13 to 17 April, 1959 and discussed the problems that arose from the fact that rarely was there only one selling price of a product on the domestic market. More often than not there was a range of domestic prices for a particular product. The Group agreed that adopting a uniform system of averaging of prices could in some circumstances nullify attempts to deal with genuine dumping and could in other circumstances lead the importing country to conclude that there was a margin of dumping where in fact dumping had not occurred. In this way transaction-to-transaction was seen as the preferred methodology to establish margins of dumping in anti-dumping investigations.

5. Article 2.4.2 of the *Anti-Dumping Agreement* lays down three methodologies that may be used: weighted average-to-weighted average; transaction-to-transaction; and weighted average-to-transaction. The Article was the subject of contentious negotiations during the Uruguay Round which centred on two main issues: how to ensure a consistent methodology in comparing normal values and export prices; and how to treat "negative dumping", in particular, how the practice of "zeroing" (not taking into account negative dumping margins but taking into account volumes associated with those negative margins) should be treated when establishing margins of dumping. Various proposals were tabled by proponents during the negotiation in an effort to constrain the recourse to anti-dumping, including proposals to limit the methodology for establishing dumping margins to a comparison of

weighted average normal values to weighted average export prices, and to require that negative dumping margins be included in the calculations.

6. The proposals met with resistance. The final text included not only the weighted average-to-weighted average and the transaction-to-transaction methodologies but also the weighted average-to-transaction methodology. The ability to use the transaction-to-transaction methodology was preserved and has equal status to the weighted average-to-weighted average methodology under the *Anti-Dumping Agreement*. The various draft texts, however, are less clear on the extent to which negative dumping margins should be included in the overall calculation of dumping. The Dunkel draft did make one significant addition to the earlier New Zealand texts, namely that a comparison of weighted average normal values and weighted average export prices had to be of "all comparable export transactions".

III. LEGAL ANALYSIS

7. The *Anti-Dumping Agreement* details the procedures for how Members are to go about determining whether dumping has taken place and whether a remedy may be applied. There must be a determination of whether dumping has occurred. An analysis must also be undertaken of whether there is material injury to the domestic industry. If these elements are met, there must be a causal analysis of the effect of the dumped imports, and the effect of other factors, including non-dumped imports, on the domestic industry. If it is established that the dumped imports are causing material injury or threat thereof to the domestic industry, a remedy may be applied to the dumped imports. The level of the remedy cannot exceed the dumping margin but can be at a lesser level if that removes the injury caused by the dumped imports.

8. This process from beginning to end has relevance when one is assessing the validity of certain actions taken by a Member in applying a remedy to redress dumping. It means that how dumping margins are calculated has to be considered along side the determination of material injury, the causation analysis, and the remedy that may or may not be applied. In New Zealand's view, a proper interpretation of the *Anti-Dumping Agreement* must take a holistic perspective that takes into account all these elements of the anti-dumping regime.

9. Article 2 of the *Anti-Dumping Agreement* provides the framework for the determination of the existence of dumping. The purpose of the transaction-to-transaction methodology is to compare export prices in each transaction with the prices in comparable normal value transactions to determine the transactions that have been dumped. There are three primary methods of determining margins of dumping using a transaction-to-transaction methodology. First, all individual transactions, whether dumped or non-dumped, are included in the determination of any dumping margins. Second, only dumped transactions are included in the determination and if dumping does not exist in relation to a particular transaction it is disregarded on the grounds that there is no dumping. Third, the zeroing method is used.

10. Using the transaction-to-transaction methodology as is permitted under the *Anti-Dumping Agreement* does not necessarily dictate that any one of the above three methods be used. In all three calculations, the non-dumped transactions are considered when completing the injury analysis under Article 3.5 of the Agreement.

11. Article 3 lays down the requirements for a determination of injury, the effect of the dumped imports on prices in the domestic market, and the consequent impact of these imports on domestic producers. It sets out the factors which have to be taken into account in an examination of the impact of the dumped imports on the domestic industry, including "the magnitude of the margin of dumping". Further, the investigating authority must demonstrate that the dumped imports, through the effects of dumping, are causing or threatening to cause material injury to the domestic industry. And there must be a demonstration of a causal relationship between dumped imports and injury to the domestic

industry, based on factors other than dumped imports, including the volume and prices of imports not sold at dumping prices. Following a determination of the existence of dumping and that such dumping has caused or threatened to cause material injury to the domestic industry, Article 9 sets out the requirements for the imposition of anti-dumping duties. In particular Article 9.3 provides that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. In this way Article 9 establishes a direct link between the determination of dumping in accordance with Article 2 and the imposition and collection of anti-dumping duties in accordance with Article 9.

12. In New Zealand's view there should be a symmetry between the manner in which the existence of dumping is established, the injury analysis under Article 3, the causal relationship between the dumping and material injury or threat thereof, and how the anti-dumping remedy is applied. There is support for this in the context of the *Anti-Dumping Agreement* as a whole. Article 3 makes a distinction between the effect of dumped imports on prices, and the impact of non-dumped imports on producers. Article 9 makes it plain that anti-dumping duties are to be applied only to dumped imports, and at a level no greater than the margin of dumping.

13. When using any of the three primary methods under the transaction-to-transaction methodology, only those transactions found to be dumped are taken into account in the analysis of the volume and price effects and consequent economic impact on the domestic industry of dumped imports. Therefore, in order to preserve symmetry, the determination of the margin of dumping may be based only on those dumped transactions so taken into account. In the same way, symmetry is preserved by taking into account those transactions found to be non-dumped in the analysis of the volume and prices of imports not sold at dumping prices. This ensures "consistent treatment" and "even-handedness" in the anti-dumping investigation.

14. Article 2.1 sets out the basic definitional concept of "dumping" and lays the foundation for the rest of the Article. The purpose of Article 2 as a whole is to provide a methodology for determining whether a product is dumped, i.e. whether the export price is less than the normal value.

15. The calculation of dumping margins must also meet the "fair comparison" requirements of Article 2. The Appellate Body (in *European Communities – Bed Linen*) has indicated that this is a general obligation that informs all of Article 2, but applies in particular to Article 2.4.2. Article 2.4 imposes specific requirements including, *inter alia*, to make comparisons at the same level or trade and at as nearly as possible at the same time, and to make due allowance for differences affecting price comparability. These requirements condition the selection of individual transactions which are used for the determination of the existence of dumping.

16. The obligation to make a fair comparison applies regardless of the methodology used. In terms of allowing for a fair comparison between the export price and the normal value, the transaction-to-transaction methodology is the most accurate approach as it targets the dumped goods and directly addresses the material injury or threat thereof. The weighted average-to-weighted average methodology is not as targeted, may not reflect the range of dumping margins in an investigation, and may not fully address the material injury being caused or threatened by the dumped imports. In contrast, the calculation of dumping margins using the transaction-to-transaction methodology is inherently a "fair comparison" as it targets the dumping that is occurring and takes into account the impact of dumped and non-dumped imports on the domestic industry. This applies irrespective of the method used to calculate dumping margins using the transaction-to-transaction methodology.

17. Article 2.4.2 enables the existence of dumping margins to be determined on the basis of a comparison of individual transactions where the transaction-to-transaction methodology is used. The comparison of the individual domestic sales transactions to export sales transactions leads to the determination of whether dumping of the product under investigation exists.

18. The Appellate Body in *US – Softwood Lumber* upheld the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing'. The Appellate Body expressly confined the issue in that case to the weighted average-to-weighted average methodology, not the transaction-to-transaction methodology. It based its reasoning on the particular wording of Article 2.4.2 as it relates to the weighted average-to-weighted average methodology. In particular, the Appellate Body interpreted the phrase "all comparable transactions" as requiring the results of *all* comparisons to be taken into account including the results of all multiple comparisons of product types. The words "all comparable transactions", however, are not found in connection with comparisons on a transaction-to-transaction basis. The omission of a phrase in respect of one methodology, where it is used in relation to another, must be given weight.

19. New Zealand also wishes to draw the attention of the Panel to the dissenting opinion by a Member of the Panel in that dispute which drew no comment from the Appellate Body. New Zealand believes this dissenting opinion warrants close attention by the Panel in these proceedings.

20. The Appellate Body (in *EC – Bed Linen*) considered the term "product" in Article 2.1 when interpreting the margins of dumping referred to in Article 2.4.2. It considered that margins of dumping should be established for the "product as a whole". In comparing the normal value and the export price on a transaction-to-transaction basis the individual transactions where dumping has been found to exist are assessed to determine whether dumping is considered to exist for the product under investigation. In this way the transaction-to-transaction methodology targets the importation of the product that is being dumped. It does not attempt to calculate dumping on the basis of the averaging of transactions for all sales of the product.

21. The interpretation of "product" in Article 2.1 of the *Anti-Dumping Agreement* has to be seen in light of the context of Article 2.4.2. The term "product" when referring to the transaction-to-transaction methodology must take into account the nature of that methodology. That methodology selects individual transactions for analysis which are representative of the "product as a whole". Therefore the "dumping of a product" within the terms of Article 2.1 means, in relation to the use of the transaction-to-transaction methodology, the dumping established through the selection of comparable individual transactions representing the product which is the subject of the anti-dumping investigation. Any of the three methods which may be used to calculate the dumping margins using a transaction-to-transaction methodology can be used to establish that dumping exists.

22. The standard of review that governs the work of Panels when examining whether a Member has violated the *Anti-Dumping Agreement* is set out in Article 17.6(ii). In New Zealand's view the text of the *Anti-Dumping Agreement* does not exclude the possibility of taking only dumped transactions into account in establishing the dumping margin using a transaction-to-transaction methodology and that this is a permissible interpretation in accordance with Article 17.6.

IV. CONCLUSION

23. New Zealand considers that there is no textual support in the *Anti-Dumping Agreement* for an obligation to take non-dumped transactions into account in establishing the existence of dumping margins under Article 2.4.2 where using the transaction-to-transaction methodology (as distinct from the weighted average-to-weighted average methodology). Indeed, it is permissible to interpret Article 2.4.2 as permitting a Member to take into account only dumped imports in establishing the existence of dumping margins under Article 2. Such permissible interpretations are specifically preserved under Article 17.6(ii) of the *Anti-dumping Agreement*.

ANNEX C

SECOND SUBMISSION BY THE PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CANADA

1 August 2005

I. INTRODUCTION

1. The United States' first written submission challenges Canada's arguments regarding the proper interpretation of Article 2.4.2 of the *Anti-Dumping Agreement* in essentially three ways: (1) by arguing that this Panel should find the US interpretation of this provision to be a "permissible" interpretation under Article 17.6(ii); (2) by avoiding the central importance of the Appellate Body's findings regarding the terms "dumping" and "margins of dumping" for the proper interpretation of Article 2.4.2; and (3) by arguing that "aggregation" of intermediate values is different under the transaction-to-transaction methodology than under the weighted-average-to-weighted-average methodology. Canada considers that the US arguments are without merit and will respond to each of them in turn in this submission.

2. The Appellate Body interpreted critical language that applies to both methodologies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* and reasoned that zeroing was prohibited because of the definitions of "dumping" and "margins of dumping". The Appellate Body also found that where the drafters of the *Anti-Dumping Agreement* wanted to allow investigating authorities to disregard certain matters they did so explicitly. Article 2.4.2, first sentence, contains no wording that would permit investigating authorities to disregard certain export transactions.

3. The United States wrongly claims that the aggregation of "margins of dumping" under the weighted-average-to-weighted-average and transaction-to-transaction methodologies occurs in a different manner. In addition, the US interpretation of Article 2.4.2 would prohibit zeroing under one of the first two methodologies used to calculate margins of dumping, but allow it under the other. In effect, it would allow investigating authorities to establish different "margins of dumping", solely on the basis of zeroing under one calculation methodology, when it could not do so under the other methodology.

4. Finally, Article 2.4 of the *Anti-Dumping Agreement* requires an investigating authority to make a "fair comparison" between the normal value and the export price for the product under investigation. As zeroing distorts the results of such comparisons it also violates this provision.

II. LEGAL ARGUMENT

A. THE UNITED STATES MISAPPLIES ARTICLE 17.6(II) OF THE *ANTI-DUMPING AGREEMENT*

5. Article 17.6(ii), in conjunction with Article 11 of the DSU, sets out the standard of review for the legal interpretation of the provisions of the *Anti-Dumping Agreement*. Article 17.6(ii), first sentence, provides that a panel "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law". In addition, the second sentence of this provision provides that panels may determine in exceptional circumstances that a measure rests upon a provision that has more than one "permissible" interpretation.

6. Therefore, Article 17.6(ii), second sentence, must be understood in the context of its relationship to the first sentence of this provision. Article 17.6(ii) provides that a panel may only find that a provision has more than one "permissible" interpretation after it has applied these customary rules of treaty interpretation and determined that it could not discern the ordinary meaning of the provision. As the Appellate Body explained in *US – Hot-Rolled Steel* "… a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*".

7. The United States asserts that Canada has departed from a "textual basis" for its interpretation of Article 2.4.2 in this case; and argues that the US position is a "permissible" interpretation of this provision. The United States fails to mention that the Appellate Body already has concluded that:

> [T]he *Anti-Dumping Agreement*, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), does not permit establishing margins of dumping for product types when the product as a whole is under investigation. The United States' interpretation of Article 2.4.2 is, therefore, *not* a "permissible interpretation" of that provision within the meaning of Article 17.6(ii).

Article 2.4.2 also requires the aggregation of transaction-to-transaction comparisons to arrive at "margins of dumping" for the product under investigation *as a whole*. Accordingly, this Panel should find that there is no need to reach the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement*.

B. ARTICLE 2.4.2 PROHIBITS ZEROING UNDER THE TRANSACTION-TO-TRANSACTION METHODOLOGY

1. The US Interpretation Ignores the Definitions of "Dumping" and "Margins of Dumping"

8. The United States wrongly asserts that Canada provides no "textual basis" for its argument that zeroing is prohibited under the transaction-to-transaction methodology. The "textual basis" resides in the definitions of the terms "dumping and "margins of dumping" in the *Anti-Dumping Agreement*. Canada demonstrated in its first written submission that these terms, in accordance with their plain meaning as already construed by the Appellate Body, provide a clear "textual basis" that prohibits zeroing under the transaction-to-transaction methodology.

9. The Appellate Body began its analysis with the definition of "dumping" under *GATT 1994* and the *Anti-Dumping Agreement*. After reviewing Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement* (which, based on its opening phrase "[f]or the purpose of this Agreement", informs the meaning of Article 2.4.2) the Appellate Body found that "… '[d]umping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product." Accordingly, the Appellate Body determined that "dumping" only occurs with respect to the whole "product under investigation", rather than in relation to a smaller subset of the product.

10. The Appellate Body observed that Article VI:2 of the *GATT 1994* provides that "… the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the GATT 1994]." As a consequence, it concluded that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".

11. The Appellate Body's interpretation of these definitions led it to conclude that zeroing was prohibited under the weighted-average-to-weighted-average methodology. It found that "intermediate values" cannot be considered "margins of dumping" because these calculations do not reflect whether dumping occurred for the entire product under investigation. The Appellate Body concluded that, in order to establish "… margins of dumping for the product under investigation as a whole", an investigating authority must aggregate "*all* these intermediate values".

12. Article 2.4.2 requires an investigating authority to calculate "margins of dumping" for the entire product under investigation in both of the normal calculation methodologies. As the Appellate Body pointed out in *EC – Bed Linen* and reiterated in its report in the original proceeding, in considering the proposed methodologies raised in those cases, "whatever the method used to calculate the margins of dumping … these margins must be, and can only be, established for the product under investigation as a whole."

13. It follows that the results of the comparisons envisaged under the transaction-to-transaction methodology cannot constitute "margins of dumping", any more than "sub-group" comparisons could under the weighted-average-to-weighted-average methodology. An investigating authority still must aggregate *all* the results of these transaction comparisons to arrive at a single margin of dumping for the product as a whole.

14. The US interpretation is also inconsistent with the ordinary meaning of the term "comparison". A "comparison" as the term is used in Article 2.4.2 entails "the action … of observing and estimating similarities, differences, etc." An investigating authority improperly aggregates transaction comparisons where it aggregates the results of some comparisons and replaces the results of other comparisons with a zero value.

15. As a consequence, the Appellate Body's interpretation of the terms "dumping" and "margins of dumping" demonstrates that zeroing is prohibited under both the weighted-average-to-weighted-average and transaction-to-transaction methodologies.

16. The US argument to the contrary relies heavily on the absence of the phrase "all comparable export transactions" in the language describing the transaction-to-transaction methodology. Canada, however, has shown that the analysis of the Appellate Body turned on the requirement that "margins of dumping" must relate to "the product under investigation as a whole". The phrase "all comparable export transactions" was not central to the Appellate Body's findings that intermediate comparisons must be aggregated to arrive at margins of dumping.

17. As a final matter, New Zealand asserts in its third party submission that the transaction-to-transaction methodology also permits investigating authorities to eliminate non-dumped transaction comparisons entirely from the calculation of margins of dumping. New Zealand attempts to rationalize its position on the basis that an investigating authority should be permitted to do this as it "… targets more precisely the dumping taking place".

18. In *EC – Bed Linen*, the Appellate Body dismissed the argument that zeroing should be permitted to deal with targeted dumping against different product types, finding that "... had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of 'targeted' dumping, they would have done so explicitly in Article 2.4.2 second sentence."

19. Article 2.4.2, second sentence, provides that in exceptional circumstances, where evidence of targeted dumping exists, investigating authorities may use an asymmetrical comparison methodology (*i.e.*, a comparison of weighted-average-normal-value to individual export transactions). If the transaction-to-transaction methodology permitted the elimination of non-dumped transactions to deal with "targeted dumping", the third methodology would be reduced to redundancy.

2. Article 2.4.2 Contains No Language That Would Permit Investigating Authorities to Zero Transaction-to-Transaction Comparisons

20. The United States asserts that the exclusion of the phrase "all comparable export transactions" demonstrates that zeroing is permitted under the transaction-to-transaction methodology. It argues that "[w]hen the drafters excluded language from the treaty, it must be assumed that they did so deliberately …". However, the United States provides no explanation for the absence of language that would permit zeroing under the transaction-to-transaction methodology. In its report, the Appellate Body found that the absence of language authorizing an investigating authority to disregard comparisons was deliberate:

> [W]e observe that Article 2.4.2 contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage. Other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 2.2.1 of the *Anti-Dumping Agreement*, which deals with the calculation of normal value, sets forth the *only* circumstances under which sales of the like product may be disregarded. … Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.

Article 2.4.2 contains no express language that would permit an investigating authority to disregard some of the results of transaction-to-transaction comparisons. Accordingly, the transaction-to-transaction methodology, like the weighted-average-to-weighted-average methodology, does not permit zeroing of intermediate transaction comparisons.

C. THE UNITED STATES AGGREGATES "MARGINS OF DUMPING" UNDER THE TRANSACTION-TO-TRANSACTION AND THE WEIGHTED-AVERAGE-TO-WEIGHTED-AVERAGE METHODOLOGIES

21. The United States suggests that the actual method of aggregation under the transaction-to-transaction methodology is somehow different from aggregation under the weighted-average-to-weighted-average methodology. As both methodologies involve investigating authorities making a series of intermediate comparisons, authorities must necessarily aggregate those comparisons in order to determine the margins of dumping for the product under investigation as a whole. Aggregation is nothing more than combining the results of the multiple comparisons into a single result (*i.e.*, an average) for the product under investigation as a whole.

22. The US practice confirms that there is no difference in aggregation under these methodologies. In the section 129 determination, the DOC aggregated transaction-to-transaction comparisons in the same manner that it aggregated sub-group or model comparisons in the underlying investigation to arrive at what it, itself, described as a "weighted-average margin" for each of the investigated producers. In particular, the DOC added together the results of all positive dumping comparisons, but, rather than subtracting the results of the negative non-dumped comparisons, it treated these results as zero. This "total" amount was then divided by the amount of all exports to arrive at a "weighted-average dumping margin" for each respondent.

23. If the United States is to rely upon a weighted average in aggregating intermediate transaction-to-transaction comparisons to develop an overall margin of dumping, it cannot ignore some transactions in calculating such an overall margin of dumping for the product as a whole any more than it could in aggregating the intermediate weighted-average-to-weighted-average comparisons. The United States certainly cannot claim that "the transaction-to-transaction methodology … does not involve averages".

D. ARTICLE 2.4.2 PROHIBITS THE USE OF ZEROING UNDER BOTH THE WEIGHTED-AVERAGE-TO-WEIGHTED-AVERAGE AND THE TRANSACTION-TO-TRANSACTION METHODOLOGIES

24. The position advanced by the United States – that Article 2.4.2 prohibits the use of zeroing under one of the normal calculation methodologies, but permits it under the other – is at odds with the concerns expressed by the Appellate Body that, whenever it is used, zeroing tends to distort and inflate dumping margins because it "… does not take into account the *entirety* of the *prices* of *some* export transactions".

25. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body expressed this concern in the context of the use of zeroing under the weighted-average-normal-value-to-individual-export-transactions methodology. The Appellate Body observed that the distorting effect of zeroing was not limited to the weighted-average-to-weighted-average methodology, stating that:

> When 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. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. … Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.

This statement is significant for this case because the Appellate Body made it in the context of its assessment of a methodology other than the weighted-average-to-weighted-average methodology. The Appellate Body subsequently added to these comments, in explaining why it could not rule on this claim, that "in these circumstances … it is not possible for us to assess whether the [weighted-average-normal-value-to-individual-export-transactions] methodology that … DOC used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used by the European Communities and considered by us in *EC – Bed Linen*".

26. The Appellate Body, therefore, indicated that if zeroing in a calculation methodology were equivalent in effect to the use of zeroing under the weighted-average-to-weighted-average methodology, it would be inconsistent with the *Anti-Dumping Agreement*. As is evident from the United States' own description of the methodology applied in this case, the use of zeroing under the transaction-to-transaction methodology has an equivalent effect and creates the same "inherent bias", which inflates margins of dumping. Consequently, the use of zeroing under the transaction-to-transaction methodology runs contrary to the reasoning of the Appellate Body in this dispute.

27. Finally, the US interpretation of Article 2.4.2 is inconsistent with its position before the original panel and the Appellate Body. In the original proceeding, the United States argued that "[t]here is no basis for finding a different rule applicable to the two principal methodologies under Article 2.4.2." Canada agrees, Article 2.4.2 prohibits the use of zeroing in both of these calculation methodologies.

E. ARTICLE 2.4 PROHIBITS THE USE OF ZEROING UNDER THE TRANSACTION-TO-TRANSACTION METHODOLOGY

28. Article 2.4 of the *Anti-Dumping Agreement* provides that "[a] fair comparison shall be made between the export price and the normal value". The obligation to provide a fair comparison "informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'".

29. The *New Shorter Oxford English Dictionary* defines "fair" in its relevant meaning as "just, unbiased, equitable, impartial, legitimate, in accordance with the rules or standards". Zeroing, as the Appellate Body already noted in *US – Corrosion-Resistant Steel Sunset Review*, introduces an "inherent bias" in the comparisons. Therefore, by definition, zeroing cannot yield a fair comparison and is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

30. The transaction-to-transaction methodology involves a series of comparisons of export prices to selected normal value transactions. Article 2.4 requires investigating authorities to take into account the "comparison" or the full difference between these prices. When an investigating authority zeroes under the transaction-to-transaction methodology, the "margins of dumping" do not properly reflect the results of these comparisons. As the Appellate Body explained "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are".

31. In the section 129 determination, the DOC manipulated the comparisons where the export price was higher than the home market price by disregarding the difference between these prices and replacing it with a zero value. This manipulation of transaction-to-transaction comparisons cannot be considered a "fair comparison" between the export price and the normal value as it inflated the margins of dumping. Accordingly, the United States has acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by zeroing in its section 129 determination.

III. CONCLUSION

32. As is apparent from the above, the use of zeroing under the transaction-to-transaction methodology results in investigating authorities treating some export transactions as if they were less than they actually are because it treats negative comparison results as zero. In other words, zeroing under the transaction-to-transaction methodology fails to take into account the entirety of the prices of some export transactions for the whole product under investigation. Accordingly, zeroing under the transaction-to-transaction methodology suffers from the same deficiencies that led the original panel and the Appellate Body to find its use inconsistent with US obligations under Article 2.4.2 of the Anti-Dumping Agreement. Moreover, a margin calculated using zeroing cannot by its nature satisfy the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement.

33. For these reasons, Canada requests that the Panel find the DOC's use of zeroing under the transaction-to-transaction methodology in the section 129 determination inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement; and that, as a consequence, the United States has not brought its measures into conformity with the recommendations and rulings of the DSB.

ANNEX C-2

EXECUTIVE SUMMARY OF REBUTTAL SUBMISSION OF THE UNITED STATES

1 August 2005

I. INTRODUCTION

1. In its rebuttal submission, the United States focuses on two aspects of the applicable text that further confirm that Canada's claims have no merit. First, the United States demonstrates that Canada's proffered interpretation of the fair comparison requirement in Article 2.4 of the AD Agreement does not withstand scrutiny under the customary rules of treaty interpretation. It yields an anomaly that must cause it to be rejected under those rules. Second, the United States analyzes the term "margin of dumping" in light of its context, demonstrating that the term may refer to the result of a transaction-to-transaction comparison even if, in certain circumstances, it also may refer to a single, overall "margin of dumping" for an exporter or producer.

2. Canada substitutes for treaty text a reliance on *obiter dicta*, passing statements in footnotes, and conclusions unsupported by reasoning. These all fail to demonstrate that the measure taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") is not based on a permissible interpretation of the AD Agreement. As the measure taken to comply is, in fact, based on a permissible interpretation of the AD Agreement, it must be upheld under the applicable standard of review in Article 17.6(ii) of that agreement.

II. THE APPROACH OF THE UNITED STATES TO INVESTIGATING WHETHER DUMPING EXISTS IS CONSISTENT WITH ARTICLE 2.4 OF THE AD AGREEMENT, WHICH CONTAINS NO OBLIGATION WITH RESPECT TO "ZEROING"

3. The AD Agreement contains no general obligation to offset dumping with transactions that exceed normal value. The Appellate Body has found such an obligation to exist only in one circumstance: determining whether dumping exists in the investigation phase when using the average-to-average methodology. The basis for that finding is the particular text in Article 2.4.2 providing for that circumstance. In this regard, the Appellate Body in the underlying proceeding specifically recognized that the issue before it was whether so-called "zeroing" was prohibited under the average-to-average methodology found in Article 2.4.2. The basis for its finding was the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ." (AB Report, paras. 82, 86, 98.)

4. The Appellate Body did not base its findings on an interpretation of the obligation to make a "fair comparison" of export price and normal value as set forth in Article 2.4. The obligation to make a "fair comparison" under Article 2.4 addresses the appropriate adjustments that an investigating authority must make for differences between export price and normal value that are demonstrated to affect price comparability.

5. Indeed, reading the Article 2.4 obligation to make a "fair comparison" as requiring an offset to dumping for transactions that exceed normal value in all situations would be at odds with the approach advocated by the Appellate Body, namely that an "interpretation must give meaning and effect to all the terms of a treaty". "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (*US – Gasoline (AB)*, p. 23.)

6. Specifically, an interpretation that Article 2.4 imposes such an offset obligation would render meaningless the targeted dumping methodology set forth in Article 2.4.2. A general obligation to provide for an offset to dumping for sales exceeding normal value would mean that an investigating authority must, mathematically, realize the same result, regardless of whether it uses the average-to-average methodology in the investigation phase, as set forth in the first sentence of Article 2.4.2, or the average-to-transaction methodology, as set forth in the targeted dumping provision of Article 2.4.2. Such an interpretation would reduce the targeted dumping clause to inutility.

7. Although the targeted dumping methodology is not itself at issue in this dispute, the implications for that methodology of the general Article 2.4 requirement that Canada posits demonstrate the fallacy of Canada's claim. These implications confirm that the general Article 2.4 requirement that Canada posits cannot exist. As Canada's claim that the fair comparison obligation requires offsetting with respect to the transaction-to-transaction methodology rests on the premise that the fair comparison obligation requires offsetting generally, that claim must fail.

A. THE "FAIR COMPARISON" OBLIGATION IN ARTICLE 2.4 REFERS TO THE ADJUSTMENTS NECESSARY TO ACCOUNT FOR DIFFERENCES IN EXPORT PRICE AND NORMAL VALUE THAT ARE DEMONSTRATED TO AFFECT PRICE COMPARABILITY

8. Canada asserts that when the United States, using transaction-to-transaction comparisons, does not reduce the amount of dumping found based on export transactions sold at above normal value, it has failed to make a "fair comparison" pursuant to Article 2.4. There are two principal flaws with the suggestion that Article 2.4 contains a general offset requirement. First, such a requirement would pertain to steps an investigating authority takes *after* making a comparison between export price and normal value, whereas Article 2.4 plainly addresses only adjustments that must be made *before* a comparison is performed. Second, such a requirement would impermissibly render part of Article 2.4.2 superfluous.

9. Article 2.4 of the AD Agreement provides:

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

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

11. The focus of Article 2.4 is on how an investigating authority is to select transactions for comparison and make the appropriate adjustments for differences that are demonstrated to affect price comparability. The article does *not* address steps that an investigating authority may take *after* a comparison is made. As the panel in *Egypt – Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (Para. 7.335).

12. Every Appellate Body and panel report that has turned on the question of price comparability has interpreted Article 2.4 to address *pre*-comparison price adjustments for differences that are demonstrated to affect the comparability of prices between markets. Thus, the original panel in the underlying proceeding summarized the scope of Article 2.4, finding:

> An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a difference between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. *Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets* concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, *an adjustment would not be required to be made by that provision.*
>
> (Panel Report, para. 7.356 (emphasis added).)

13. Similarly, as the Appellate Body stated in *US – Hot-Rolled Steel*, "[A]n examination of whether USDOC acted consistently with Article 2.4 of the Anti-Dumping Agreement must focus on . . . whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value." (Para. 179.)

14. Canada's view appears to be that to comply with the fair comparison requirement in Article 2.4, the United States had to apply the result of one comparison (not involving dumping) as an offset to the result of another comparison (involving dumping). In other words, Canada's view seems to be that the fair comparison requirement is a requirement to adjust the results of one comparison in light of the results of a distinct comparison. However, Article 2.4 is quite clear in requiring adjustments for differences that are demonstrated to affect price comparability and in delineating illustrations of such differences. Canada has not shown – and, logically, cannot show – that the result of a comparison between two particular transactions is a difference affecting the price comparability of two completely different transactions.

15. As Article 2.4 contains no general obligation to make an adjustment to the result of one transaction-to-transaction comparison in light of the result of another transaction-to-transaction comparison, the United States did not breach any obligation under Article 2.4 by declining to make such an adjustment.

B. CANADA'S INTERPRETATION OF ARTICLE 2.4 WOULD RENDER PART OF ARTICLE 2.4.2 SUPERFLUOUS

16. Canada's suggestion that the "fair comparison" requirement in Article 2.4 contains a general obligation to offset dumping margins also cannot be reconciled with Article 2.4.2. This interpretive problem results from application of the general offset obligation that Canada posits to the targeted dumping methodology provided for in Article 2.4.2. Under Canada's interpretation of Article 2.4, the targeted dumping methodology would become redundant with the average-to-average methodology. Reference to a distinct targeted dumping methodology in Article 2.4.2 thus would be superfluous. That unavoidable result undermines Canada's proposed interpretation.

17. The targeted dumping methodology provided for in Article 2.4.2 mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In this respect, an offset requirement (or "non-zeroing" requirement) based on the "fair comparison" requirement of Article 2.4 would render the targeted dumping exception in Article 2.4.2 a nullity.

18. The "targeted dumping" methodology is an exception to the obligation to engage in a symmetrical comparison in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ." When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

19. The targeted dumping methodology is not an exception to the fair comparison requirement of Article 2.4. It is an exception only to the symmetrical comparison requirements for investigations set forth in the first sentence of Article 2.4.2. Article 2.4, on the other hand, applies to all comparison methodologies. Canada argues that "zeroing" violates the fair comparison obligations of Article 2.4. However, if Canada were correct, then the fair comparison obligation would require the investigating authority to provide for an offset for transactions that exceed normal value even when using the targeted dumping methodology. In fact, in the underlying proceeding before the Appellate Body, Canada conceded that "zeroing is permitted under the third methodology [*i.e.*, the targeted dumping methodology]." (AB Report, para. 105 n.164.) However, Canada did not offer then, and does not offer now, any textual basis for a distinction between the fair comparison requirement as applied to the targeted dumping methodology and the fair comparison requirement as applied to the other two methodologies provided for in Article 2.4.2.

20. If offsetting were required, the overall dumping margin calculated for an exporter must, mathematically, be the same under both a symmetrical comparison of weighted averages of normal values and export prices and an asymmetrical comparison of weighted average normal values and individual export prices. The reason for this is that, if offsetting were required, then all non-dumped sales (*i.e.*, negative values) would offset the margins on all dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculations are based on comparing weighted-average normal values to weighted-averages of all comparable export transactions or on comparing weighted-average normal values to transaction-specific export prices. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

21. An interpretation of Article 2.4 of the AD Agreement that requires such offsets in general would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 a nullity. A panel should not interpret the AD Agreement in such a

way that its express provisions are rendered meaningless or superfluous. The Appellate Body has consistently found that "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (*US – Gasoline (AB)*, p. 23.)

22. The "general obligation" that Canada posits cannot exist, because if it existed it would nullify any distinction between the average-to-average and the average-to-transaction methodologies in Article 2.4.2. As the posited obligation cannot exist with respect to the average-to-transaction methodology, it cannot exist at all, for there is no textual basis for any distinction between the fair comparison requirement as applicable to the average-to-transaction methodology and the fair comparison requirement as applicable to the transaction-to-transaction methodology. Canada has asserted no such distinction and, in fact, refers to the asserted requirement at issue as a "general obligation". As the Article 2.4 "general obligation" that Canada posits does not and cannot exist, Canada's claim that the measure taken to comply is inconsistent with Article 2.4 must be rejected.

III. ARTICLE 2.4.2 DOES NOT REQUIRE CALCULATION OF ONE MARGIN OF DUMPING FOR THE "PRODUCT AS A WHOLE" WHEN USING THE TRANSACTION-TO-TRANSACTION COMPARISON METHODOLOGY

23. Having demonstrated that the fair comparison obligation in Article 2.4 is not an obligation to provide for offsets, the United States now turns to Canada's argument that "margins of dumping" can be found only for the "product as a whole". Canada's argument, in effect, is that the reasoning of the Appellate Body in the underlying proceeding, concerning the meaning of the term "margins of dumping" in the context of the average-to-average methodology, is equally applicable here, in the context of the transaction-to-transaction methodology. That is, Canada argues that, regardless of context, "margins of dumping" always means margins of dumping for the "product as a whole". Canada's argument is fatally flawed, because it ignores the ordinary meaning of "margin of dumping" in light of relevant context, including Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). From the ordinary meaning of that term read in light of relevant context, it is clear that a particular transaction-to-transaction comparison itself may yield a margin of dumping. Moreover, the AD Agreement imposes no obligation whatsoever with respect to transaction-to-transaction comparisons that do *not* yield margins of dumping. In particular, it imposes no obligation to apply the results of those comparisons as offsets to comparisons that do yield margins of dumping.

A. ARTICLE 2.4.2 ADDRESSES ONLY THE METHODOLOGIES AVAILABLE TO DETERMINE THE EXISTENCE OF DUMPING, NOT THE AGGREGATION OF MULTIPLE TRANSACTION-TO-TRANSACTION COMPARISONS

24. Article 2.4.2 does not contain an obligation to calculate a single margin of dumping for the product as a whole when the transaction-to-transaction comparison methodology is used. Article 2.4.2 provides three methodologies for comparing export prices to normal values in an investigation: (1) weighted-average-to-weighted-average comparisons; (2) transaction-to-transaction comparisons; and, (3) under certain circumstances, weighted-average-to-transaction comparisons. In most circumstances, the second and third methodologies will result in multiple comparisons, because neither is limited to the rare circumstance of investigations involving only one export transaction. Under these methodologies, each export transaction will result in a separate comparison.

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

B. CONSISTENT WITH ARTICLE VI:2 OF THE GATT 1994, ARTICLE 2.4.2 OF THE AD AGREEMENT ENVISIONS THE ESTABLISHMENT OF MULTIPLE TRANSACTION-TO-TRANSACTION MARGINS OF DUMPING

26. The question framed by Canada's argument is, "What is a 'margin of dumping' in the context of the transaction-to-transaction methodology provided for in Article 2.4.2 of the AD Agreement?" For the answer to that question, it is appropriate to begin with Article VI of the GATT 1994, which provides the relevant definition of the term.

27. Paragraph 2 of Article VI provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1". When read with the provisions of paragraph 1, the "margin of dumping" is the price difference between export price and normal value when a product has been "introduced into the commerce of an importing country at less than its normal value", *i.e.*, the difference between export price and normal value when the product has been dumped.

28. For present purposes, the key term in Article VI:2 is "price". A price is a transaction-specific fact. It follows that a "price difference" is the difference between two transaction-specific facts. Accordingly, through its reference to "the margin of dumping" as "the price difference determined in accordance with the provisions of paragraph 1", Article VI:2 plainly envisions a margin of dumping being established with respect to individual transactions.

29. The fact that a margin of dumping within the meaning of Article VI:2 may be found with respect to transaction-specific comparisons is further confirmed by the text of the first paragraph of Ad Article VI, Paragraph 1 of the GATT 1994, which uses the term "margin of dumping" in a manner that cannot reasonably be interpreted as requiring a single result for the "product as a whole". Thus, Ad Article VI:1(1) provides:

> Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by the exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

30. This provision expressly refers to a particular type of export transaction. In such a circumstance, the margin of dumping may be calculated based on the price charged by the importer. Of course, exports of the product at issue may be sold through a variety of different channels. Some sales may be made to importers unrelated to the seller, and others may be made to "associated houses". The fact that Ad Article VI:1(1) contemplates a margin of dumping being calculated with respect to "the price at which the goods are resold by the importer" in the case of "associated houses" demonstrates that under Article VI a "margin of dumping" may refer to a transaction-specific margin and need not refer, in all contexts, to a margin for a "product as a whole".

31. This interpretation of "margin of dumping" in Article VI is also consistent with the manner in which many Contracting Parties to the GATT 1947 conducted anti-dumping proceedings prior to the conclusion of the GATT 1994 and the AD Agreement. As is well established, prior to the conclusion of these agreements, the Contracting Parties commonly established margins of dumping based on comparisons between individual export transactions and average normal values. This practice is reflected, for example, in *US – Atlantic Salmon* (para. 483) and in *EC – Audio Tapes* (paras. 499-501). In concluding the GATT 1994 and the AD Agreement, the Contracting Parties did not amend the meaning of "margin of dumping" as used in the GATT 1947 at all, let alone in a way that would have indicated a departure from the meaning of that term as followed in their contemporaneous practice.

This circumstance of the conclusion of the agreements confirms the agreed-upon meaning of "margin of dumping" in Article VI, *i.e.*, a margin of dumping may be established on a transaction-specific basis.

32. As Article VI of the GATT 1994 plainly envisions that a margin of dumping may be established on a transaction-specific basis, the AD Agreement (that is, the agreement that implements Article VI) may not be interpreted in a way that prohibits establishing a margin of dumping on a transaction-specific basis. Canada's suggestion to the contrary would require an interpretation of the AD Agreement that is inconsistent with the GATT article that the AD Agreement implements.

33. That the drafters of Article 2.4.2 of the AD Agreement understood the term "margin of dumping" to include a transaction-specific comparison, consistent with Article VI:2 of the GATT 1994, is evident from their use of the plural form – "margins of dumping". With respect to at least two of the methodologies set forth in Article 2.4.2, the transaction-to-transaction and average-to-transaction methodologies, except in the unusual situation in which there is only one export transaction, there will be multiple comparisons. Each of those comparisons will yield a price difference. To the extent that such a price difference reflects a normal value greater than export price, the price difference will be a margin of dumping within the meaning of Article VI:2 of the GATT 1994 and, by extension, within the meaning of Article 2.4.2 of the AD Agreement. Thus, with respect to the transaction-to-transaction and transaction-to-average methodologies there will ordinarily be multiple "margins of dumping".

34. This conclusion is not affected by the fact that "margins of dumping" may have a different meaning in the context of the average-to-average methodology in Article 2.4.2. There, as was found in the underlying proceeding, the term "margins of dumping" has been interpreted "in an integrated manner" with "all comparable export transactions", such that offsets for non-dumped comparisons must be provided in order to properly establish a single margin of dumping for each exporter or producer. (AB Report, paras. 85-103). As is clear from the Appellate Body report in the underlying proceeding, this finding is a function of the particular text specific to average-to-average comparisons in Article 2.4.2 (matters not expressly addressed in Article VI:2 of the GATT 1994). Nothing in this finding changes the fact that, as expressly addressed in Article VI:2 of the GATT 1994, a price difference between two transactions, where normal value exceeds export price, is a margin of dumping.

35. Finally, that the term "margin of dumping" can refer to the results of a comparison involving a single export transaction is confirmed by Article 9.3 of the AD Agreement. Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping . . . ". In that instance, the context for "margin of dumping" is the term "anti-dumping duty", which is a transaction-specific concept. That is, a "duty" normally is based on the particular characteristics of the import and is often calculated based on the value/price of that particular import. Thus, the anti-dumping duty for a specific import cannot exceed the extent to which the export price for that transaction falls below normal value (*i.e.*, the margin of dumping). The clear meaning of "margin of dumping" in Article 9.3 as a transaction-specific concept further undermines Canada's suggestion that "margin of dumping" necessarily and always refers to a margin of dumping for a "product as a whole".

36. Canada's argument that Article 2.4.2 of the AD Agreement contains a requirement that non-dumped transaction-to-transaction comparisons be applied as offsets to dumped transaction-to-transaction comparisons is predicated largely on the supposition that under the transaction-to-transaction methodology there can be only one margin of dumping for the "product as a whole". That supposition is refuted by the ordinary meaning of "margin of dumping" as used in Article VI:2 of the GATT 1994 and the AD Agreement, the context for that term, and the circumstances of the conclusion of the GATT 1994 and the AD Agreement.

C. NEITHER THE GATT 1994 NOR THE AD AGREEMENT RECOGNIZES "NEGATIVE MARGINS OF DUMPING"

37. Article VI of the GATT 1994 provides that the "margin of dumping" is the amount by which normal value "exceeds" export price. If normal value does not exceed export price, the result of the comparison is not a margin of dumping. Such a comparison simply is not the concern of Article VI. For its argument to succeed with respect to the transaction-to-transaction comparison methodology, Canada would need this Panel to accept that where export price exceeds normal value the result is a "negative margin of dumping", equally cognizable as a "margin of dumping" under Article VI of the GATT 1994 and the AD Agreement. However, neither Article VI of the GATT 1994 nor the AD Agreement recognizes such a concept.

38. Since Article VI of the GATT 1994 and the AD Agreement do not recognize "negative margins of dumping", they do not require an investigating authority to take any particular steps where it finds that export price exceeds normal value in a given transaction-to-transaction comparison. The Appellate Body report in the underlying proceeding is not inconsistent with this proposition. The Appellate Body "emphasize[d] that [the terms "all comparable export transactions" and "margins of dumping"] should be interpreted in an integrated manner". (Para. 85.) Accordingly, the Appellate Body's conclusion that there was an obligation to provide offsets when using the average-to-average comparison methodology during the investigation phase was the result of its interpretation of "all comparable export transactions" together with "margins of dumping".

39. Any offsets that occur in this context reflect the use of *averages* of all export prices and normal values. That is, in applying the average-to-average methodology, the Appellate Body found that the United States was entitled to make multiple intermediate comparisons. However, in order to establish the weighted average margin of dumping for "all comparable export transactions", the Appellate Body concluded that the United States would have had to aggregate all of the results of those intermediate comparisons including those comparisons that were not dumped. The offsets, therefore, were tied to the use of the average-to-average methodology in an investigation, and did not arise out of any independent obligation to offset prices.

40. Canada has offered *no* textual analysis in support of its claim that offsetting is required when applying the transaction-to-transaction comparison methodology pursuant to Article 2.4.2. The lack of a textual basis for Canada's argument is unavoidable because the scope of the AD Agreement and the GATT 1994, with respect to the measurement of dumping, is limited to instances in which there are *positive* differences between normal value and export prices. Because there is no basis for Canada's assertion that Article 2.4.2 requires a Member, when using the transaction-to-transaction comparison methodology, to reduce the amount of dumping found based on non-dumped comparisons, Canada's claim under Article 2.4.2 should be rejected.

IV. CONCLUSION

41. For the reasons stated in the first submission and the rebuttal submission of the United States, Canada's challenge to the implementation by the United States of the DSB's recommendations and rulings in this dispute is groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety and find that the measure the United States took to comply with the recommendations and rulings of the DSB is consistent with its obligations under the AD Agreement.

ANNEX D

ORAL STATEMENTS, 1ST/2ND MEETINGS

ANNEX D-1

ORAL STATEMENT OF CANADA

15 November 2005

I. INTRODUCTION

1. Mr. Chairman, distinguished members of the Panel, on behalf of Canada I thank you for your continued efforts to help resolve this dispute. Canada and the United States are here before you again because the United States, in the Section 129 Determination, continued to zero. Consequently, this measure suffers from the same flaws as the Final Determination, and is inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

2. Article VI of the *GATT* and Article 2.1 of the *Anti-Dumping Agreement* define "dumping" and "margins of dumping" in relation to the product under investigation *as a whole*. "Margins of dumping" calculated under Article 2.4.2 are for the entire product, as a whole, rather than for the intermediate results of sub-groups, or transaction-to-transaction comparisons. As zeroing sub-groups or transaction-to-transaction comparisons requires an investigating authority to accord less weight to some export transactions, a dumping margin that is calculated using zeroing cannot be representative of the product as a whole. The Appellate Body found that zeroing violated Article 2.4.2 on this basis. Article 2.4 requires a "fair comparison", one that takes into account the full difference between each comparison made under the transaction-to-transaction methodology.

3. The United States asserts that zeroing is permitted under the transaction-to-transaction methodology. However, the US argument that such comparisons can themselves constitute "margins of dumping" is nothing more than an attempt to revive its failed argument from the original proceedings, that sub-groups results constitute "margins of dumping". Article 2.4.2 requires the aggregation of intermediate comparisons to arrive at "margins of dumping" for the whole product – whether these comparisons are sub-groups under the weighted-average-to-weighted-average methodology or transaction-specific comparisons under the transaction-to-transaction methodology. The Appellate Body's straightforward reasoning applies with equal force to both of these methodologies.

4. In the balance of this presentation, Canada will demonstrate how the reasoning of the Appellate Body applies equally to the use of zeroing in the transaction-to-transaction methodology. Canada will then respond to US assertions concerning the meaning of the term "margins of dumping". Finally, Canada will turn to the most recent US arguments concerning the Article 2.4 "fair comparison" requirement, including its argument about mathematical equivalence.

II. LEGAL ARGUMENT

A. THE APPELLATE BODY'S INTERPRETATION OF "DUMPING" AND "MARGINS OF DUMPING"

5. Consistent with Article VI of the *GATT* and Article 2.1 of the *Anti-Dumping Agreement*, Article 2.4.2 requires investigating authorities to establish "margins of dumping" for the product under investigation *as a whole*. An investigating authority does not treat the product as a whole when it zeros non-dumped transaction-to-transaction comparisons and places greater weight on dumped comparisons. The Appellate Body, in both *EC – Bed Linen* and in its decision in this dispute, ruled

that "margins of dumping" are to be measured for the product as a whole and that zeroing violates Article 2.4.2 of the *Anti-Dumping Agreement*.[1]

6. The United States wrongly asserts that the Appellate Body report turned on the phrase "all comparable export transactions". It claims that this Panel must find that zeroing is permitted because this phrase does not appear in the final clause of the first sentence of Article 2.4.2.

7. The Appellate Body began its analysis by summarizing the arguments of the participants concerning the interpretation of "all comparable export transactions" and "margins of dumping". It is these summaries, and not any other analysis, which the United States relies on to support its contention that the Appellate Body decision hinged on the phrase "all comparable export transactions".

8. After summarizing the arguments of the participants, the Appellate Body observed that Canada and the United States agreed that "all comparable export transactions" should be taken into consideration, and that this consideration occurred within the aggregation of the sub-group comparisons. The Appellate Body then found that the actual disagreement between the participants related to differing interpretations of the terms "dumping" and "margins of dumping".[2] The Appellate Body thus based its analysis on the definitions of "dumping" and "margins of dumping", and not, as the United States insists, on the phrase "all comparable export transactions".

9. The Appellate Body began its analysis of "dumping" and "margins of dumping" by examining the meaning of these terms under Article VI of the *GATT* and Article 2.1 of the *Anti-Dumping Agreement*. It interpreted these terms in paragraphs 91 to 100 of its report. It was only after this analysis and interpretation of "dumping" and "margins of dumping" that the Appellate Body applied its legal interpretation of these terms to the use of zeroing under the weighted-average-to-weighted-average methodology in the Final Determination. As a consequence, and contrary to US assertions, the Appellate Body did not limit its analysis of "dumping" and "margins of dumping" to the meaning of these terms under the weighted-average-to-weighted-average methodology.

10. The Appellate Body has also made clear that its findings as to zeroing were based on the impact of zeroing on margins of dumping, regardless of the calculation methodology used by an investigating authority. In both *Corrosion-Resistant Steel* and its report in this case, the Appellate Body has emphasized that zeroing fails to fully consider some export transactions.[3] The Appellate Body recognized that this failure leads to an "inherent bias" through the inflation of "margins of dumping".[4] This bias exists whether applied in the weighted-average-to-weighted-average methodology or otherwise.

11. An investigating authority distorts the margin of dumping when it manipulates some "intermediate values" by setting them to zero. It makes no difference whether the "intermediate values" in question come from transaction-to-transaction comparisons as in this proceeding, or sub-groups of the product under investigation as in the original proceeding. In both cases the intermediate values have not been properly aggregated into the margin of dumping for the product under

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[1] *United States – Final Dumping Determination on Softwood Lumber from* Canada, Report of the Appellate Body, WT/DS264/AB/R, adopted 31 August 2004, at paras. 93-96, 183(a). ["Appellate Body Report"] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted 12 March 2001, at para. 53, 86(a). ["*EC – Bed Linen*"]

[2] Appellate Body Report, at para. 90.

[3] *Ibid*., at para. 101; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, adopted 9 January 2004, at para. 135. ["*US – Corrosion-Resistant Steel*"]

[4] *Ibid*.

investigation as Article 2.4.2 contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage.[5] As a consequence, Article 2.4.2 prohibits zeroing under both of these calculation methodologies.

B. THE UNITED STATES DISTORTS THE DEFINITION OF "MARGINS OF DUMPING"

12. The United States argues that zeroing is permitted because "margins of dumping" refers to transaction-specific comparisons, rather than "margins of dumping" for the product as a whole. The United States advances four arguments to support its assertion that individual transaction-to-transaction comparisons constitute separate "margins of dumping".

13. The United States first asserts that the meaning of "margins of dumping" changes depending on the calculation methodology selected under Article 2.4.2.[6] The US argument assumes that the Appellate Body established the meaning of "margins of dumping" only in the context of the weighted-average-to-weighted-average methodology. The Appellate Body's reasoning, however, is not so limited. Rather, the Appellate Body interpreted "margins of dumping" in the context of Article VI of the *GATT* and Article 2.1 of the *Anti-Dumping Agreement* – provisions that apply to the entire *Anti-Dumping Agreement*.[7]

14. The term "margins of dumping" also appears, without modification, in a single sentence that applies to both the weighted-average-to-weighted-average and the transaction-to-transaction methodologies.[8] It is not possible, as a matter of grammatical construction, for "margins of dumping" to have one meaning for one methodology and another meaning for the other, in this sentence.

15. In addition, the United States fails to recognise that the Appellate Body relied on Article VI:2, which includes a reference to price difference, in support of its finding that dumping margins must be calculated for the product as a whole.[9] Therefore, the term "price difference" refers to the product as a whole and Article VI:2 does not envisage a "margin of dumping" being established for individual transactions.[10]

16. The US interpretation of "margins of dumping" is also inconsistent with its treatment of transaction-to-transaction comparisons in its Section 129 Determination. If these transaction comparisons were to constitute "margins of dumping" (and they do not), Commerce would have had to assess whether each of these supposed "margins of dumping" was *de minimis* in accordance with Article 5.8 of the *Anti-Dumping Agreement*. Commerce has done nothing of the sort.

17. The United States derives significance in a separate argument from the use of "margins of dumping" in the plural in Article 2.4.2.[11] The Appellate Body has already rejected this argument.[12] Article 2.4.2 refers to "margins" in the plural because investigating authorities are required to calculate a dumping margin for each producer or exporter of the product under investigation. Article 2.4.2 does not refer to "margins of dumping" to sanction the existence of separate "margins of dumping" for tens of thousands of transaction-to-transaction comparisons.

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[5] Appellate Body Report, at 100.

[6] Rebuttal Submission of the United States, at para. 37.

[7] See *e.g.*, Appellate Body Report, at paras. 91-96.

[8] *United States – Final Dumping Determination on Softwood Lumber from* Canada, Report of the Panel, WT/DS264/R, adopted 31 August 2004, at para. 7.119, footnote 361. ["Panel Report"]

[9] Appellate Body Report, at para. 94-96.

[10] Rebuttal Submission of the United States, at para. 31.

[11] *Ibid.*, at para. 36.

[12] Appellate Body Report, at footnote 158 and para. 115; and *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, at para. 118.

18. Third, the United States relies on AD Article VI:1 in support of its assertion that specific transaction-to-transaction comparisons may constitute "margins of dumping".[13] The US reliance on this AD Article is misplaced. AD Article VI:1 provides that a resale price may be used to replace the export price where a related importer and exporter raise export prices to avoid the application of anti-dumping duties. This AD Article does not have the relevance that the United States ascribes to it. It affects how export prices are calculated in a particular circumstance, not how they are compared to normal values to calculate "margins of dumping" for the product as a whole.

19. AD Article VI:1 also provides that where hidden dumping exists, the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer. AD Article VI:1 and Article 2.4.2 both use the phrase "on the basis of" in the same manner to refer to "the underlying support for a process".[14] Thus, investigating authorities may make a comparison "on the basis of" – in other words, by using – the resale export prices, rather than by using the export prices found on an invoice. Nowhere does this article, or any other, say that a transaction-to-transaction comparison constitutes a "margin of dumping".

20. Fourth, the United States argues that Article 9.3 of the *Anti-Dumping Agreement* demonstrates that "margins of dumping" are transaction-specific comparisons.[15] However, as the Appellate Body has observed, pursuant to Article 9.2, the anti-dumping duties described in Article 9.3 are "to be imposed in respect of the *product* under investigation."[16] The US claim that the reference to "anti-dumping duties" in Article 9.3 is transaction-specific is thus at odds with the Appellate Body's analysis.

C. THE APPELLATE BODY ALREADY HAS REJECTED US ARGUMENTS CONCERNING "NEGATIVE MARGINS OF DUMPING"

21. The United States attempts to repeat its claim that there is no such concept as a negative margin of dumping under the *GATT* or the *Anti-Dumping Agreement*.[17] The Appellate Body has already rejected this argument.

22. The United States asserted in the original proceedings that the results of multiple comparisons in which the weighted-average export price exceeds the weighted-average normal value may be excluded because they do not involve "dumping". The Appellate Body rejected this argument, finding that Commerce's exclusion of these "non-dumped" or negative intermediate comparisons was not in accordance with Article 2.4.2.[18] Moreover, as we have just discussed, the results of transaction-to-transaction comparisons, whether they are positive or negative, are not "margins of dumping", but rather are intermediate comparisons that must be taken into consideration for the product as a whole. My colleague, Mr. Owen, will now continue our presentation.

[13] Rebuttal Submission of the United States, at paras. 32-33.
[14] Panel Report, at para. 7.210; footnote 355.
[15] Rebuttal Submission of the United States, at para. 38.
[16] Appellate Body Report, at para. 94.
[17] Rebuttal Submission of the United States, at paras. 40-43.
[18] Appellate Body Report, at para. 102.

D. ARTICLE 2.4 REQUIRES A FAIR COMPARISON BETWEEN THE NORMAL VALUE AND THE EXPORT PRICE

23. Mr. Chairman, Members of the Panel, the view of the Appellate Body on the obligations imposed by Article 2.4 of the *Anti-Dumping Agreement* is unambiguous. According to the Appellate Body, this provision sets out a general obligation to make a "fair comparison" between an export price and a normal value.[19] Moreover, the Appellate Body has found that this general obligation informs all of Article 2, and applies, in particular, to Article 2.4.2.[20]

24. Despite the unambiguous view of the Appellate Body, the United States continues to assert that Article 2.4 addresses only adjustments that are made *prior to* a comparison.[21] In support of this assertion, the United States cites only excerpts that speak to the obligation to make the appropriate adjustments to ensure price comparability. The United States ignores all other findings that demonstrate that the "fair comparison" requirement extends beyond price comparability[22], and, in particular, to the substantive rules and concepts relevant to calculating a margin of dumping. [23]

25. A comparison that does not take into account the entirety of prices of some export transactions reflected in the sub-groups is not a fair comparison under Article 2.4. Likewise, an investigating authority fails to make a "fair comparison" when it does not take into account the entirety of all export prices in transaction-to-transaction comparisons.

26. Commerce failed in precisely this manner in the Section 129 Determination. Faced with comparisons where the export price was greater than the normal value, Commerce changed the actual price difference of these comparisons. The results of these manipulations do not take into account the full difference between the export price and normal value, and are not a "fair comparison".

27. The United States is also incorrect when it asserts that Article 2.4 cannot prohibit zeroing because such a prohibition would lead to mathematical "equivalence" in the outcomes of the weighted-average-to-weighted-average and weighted-average-to-transaction methodologies.[24] This assertion raises questions about the operation of the third methodology in Article 2.4.2 – the targeted dumping methodology.

28. The targeted dumping provision has never been applied by Canada or the United States, and it is not clear exactly how the provision should work in practice. The only way mathematical equivalence would be achieved between the third methodology and another would be if both were to examine the exact same data set. But, examining the same data set would defeat the entire purpose of the third methodology and effectively read it out of Article 2.4.2.

29. The third methodology is designed to address the problem of targeted dumping. When an investigating authority determines that a pattern of export prices differs significantly among different purchasers, regions or time periods it is permitted to use the third methodology, comparing the weighted-average normal value to the targeted transactions. The targeted dumping methodology, therefore, by definition, would not be applied to all export transactions.

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[19] *EC –Bed Linen*, at para. 59.

[20] *Ibid*.

[21] Rebuttal Submission of the United States, at para. 11.

[22] *EC – Bed Linen*, at para. 55; *US – Corrosion-Resistant Steel*, at para. 134; *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R, adopted October 1, 2002, at paras. 7.333-7.334; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, Report of the Panel, WT/DS294/R, circulated October 31, 2005, at para. 7.256. ["*US – Zeroing*"]

[23] *US –Zeroing*, at para. 7.262.

[24] Rebuttal Submission of the United States, at paras. 19-25.

30. The US assumption that applying this methodology to all transactions would also fail to address the problem of targeted dumping. If the targeted export transactions were dumped at a hypothetical margin of 20% (as, for example are the transactions labelled with a letter "A" in US Exhibit 4), calculating an 8.79% margin on all transactions will not address the targeted dumping. Rather, a 20% margin should be calculated for the exports fitting the pattern, and other exports should be analysed and treated appropriately.

31. Once an investigating authority has identified certain export transactions as different under the last sentence of Article 2.4.2, it is fair to analyze them separately. Because the problem of targeted dumping can be addressed by application of the third methodology the use of zeroing in that methodology is not required.

32. Although Commerce has never applied the third methodology, US anti-dumping regulations concerning the targeted dumping methodology appear to support this view. They provide that Commerce will normally limit the application of the weighted-average-to-transaction methodology to those sales that relate to targeted dumping.[25]

33. The United States claims that Canada accepted zeroing under the third methodology under Article 2.4.2. As the United States well knows, Canada clarified with the Appellate Body that it did not take the position that zeroing is permitted under this methodology.[26]

III. CONCLUSION

34. To conclude, the Appellate Body ruled against zeroing in an investigation. The United States, claiming to conform, continued to zero by changing methodologies. Canada has shown that the use of zeroing under the transaction-to-transaction methodology results in investigating authorities treating some export transactions as if they were less than they actually are. Zeroing under the transaction-to-transaction methodology fails to establish "margins of dumping" for the product as a whole. Zeroing in this methodology suffers from the same deficiencies that led the original panel and the Appellate Body to find the use of zeroing inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Moreover, a margin of dumping calculated using zeroing cannot, by its very nature, satisfy the "fair comparison" requirement of Article 2.4 of the *Anti-Dumping Agreement*.

35. Canada requests that this Panel find that Commerce's use of zeroing under the transaction-to-transaction methodology in the Section 129 Determination is inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*; and that, as a consequence, the United States has not brought its measures into conformity with the recommendations and rulings of the DSB.

36. Mr. Chairman, Members of the Panel, we would like to thank you for your attention and, we will, of course, answer any questions you might have.

[25] 19 C.F.R. Section 351.414(f)(2). (Exhibit CDA-6)

[26] Letter from R. Behboodi, First Secretary of the Mission of Canada to V. Hughes, Director, Appellate Body Secretariat (28 September 2004). (Exhibit CDA-7)

ANNEX D-2

OPENING STATEMENT OF THE UNITED STATES AT THE SUBSTANTIVE MEETING OF THE PANEL

15 November 2005

1. Mr. Chairman and members of the Panel, the United States welcomes this opportunity to meet with you to discuss the issues raised in this dispute.

2. The issues before the Panel are straightforward. In the Section 129 Determination, Commerce took into consideration every export transaction by each of the exporting companies analyzed. For each transaction, Commerce compared the transaction to the most appropriate normal value transaction to determine whether it was dumped, and so has fulfilled the US obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). For each company, the total amount of dumping found was based on the results of these transactions. Canada would have us go further and use any non-dumped transactions to reduce or offset the total amount of dumping found with respect to the dumped transactions. However, as we have explained in our submissions, there is no textual basis for such an obligation.

3. Following adoption of the Dispute Settlement Body's ("DSB") recommendations and rulings in this dispute[1], the United States Department of Commerce ("Commerce") revised its methodology for establishing the existence of margins of dumping in its softwood lumber investigation. Instead of using the average-to-average methodology, it used a transaction-to-transaction methodology, as provided for in Article 2.4.2 of the AD Agreement. Based on the transaction-to-transaction comparisons, some transactions were sold at less than normal value while others were not. Commerce aggregated the results of those comparisons for which the export price was below normal value (that is, sales for which there was dumping). It did not use non-dumped sales to offset that aggregation by the amount that the export price for those non-dumped transactions exceeded the respective normal values. The results of Commerce's revised approach were set forth in a new determination, known as the "Section 129 Determination."[2]

4. The issues for this Panel are whether, pursuant to Article 2.4.2 or 2.4 of the AD Agreement, any dumping that Commerce found in transaction-to-transaction comparisons was required to be offset by the results of non-dumped comparisons. Canada has failed to establish the existence of such an obligation. No such obligation exists in Article 2.4.2 because the transaction-to-transaction comparison provision differs significantly from the average-to-average comparison provision. The phrase "all comparable export transactions," which was the basis for requiring an offset when using the average-to-average comparison methodology in the underlying dispute, is absent from the provision at issue in the present dispute.

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[1] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, (WT/DS64/R)("*US - Softwood Lumber (Panel)*" adopted along with the Appellate Body Report (WT/DS64/AB/R)("*US - Softwood Lumber (AB)*") on 31 August 2004.

[2] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Certain Softwood Lumber Products From Canada*, 70 *Fed. Reg.* 22,636 at 22,645 to 22,646 (Dep't Commerce 2 May 2005) ("Section 129 Determination") (Exhibit CDA-1).

5. Moreover, the "fair comparison" provision in Article 2.4 of the AD Agreement did not require Commerce to apply the results of non-dumped comparisons as an offset to dumped comparisons. Article 2.4 prescribes adjustments to be made *before* transactions are compared, in order to ensure that those comparisons are fair. It does not speak to the aggregation of results *after* transactions are compared.

6. Indeed, if Article 2.4 were construed as a general requirement to provide an offset when aggregating the results of multiple comparisons, it would render the results of the targeted dumping comparison methodology, in the second sentence of Article 2.4.2, mathematically identical to the average-to-average comparison methodology. Under the customary rules of interpretation of public international law, a treaty interpreter is to avoid reading a provision in a way that would render another provision without effect. Accordingly, Article 2.4 is not a basis for requiring an offset for non-dumped transactions.

Standard of Review

7. Before we discuss in more detail the arguments supporting the consistency of the Section 129 Determination with Articles 2.4.2 and 2.4, it is important to take a moment to discuss the standard of review applicable to this proceeding. The relevant standard of review for these issues is set forth in Article 17.6(ii) of the AD Agreement. As we have explained, applying customary rules of interpretation, neither Article 2.4.2 nor 2.4 contains the obligation claimed by Canada.

8. As the party asserting that the United States is in breach of Articles 2.4.2 and 2.4, Canada bears the burden of demonstrating that the Section 129 Determination is inconsistent with those provisions. For the reasons set forth in our written submissions, and as we will elaborate in a moment, it has not met that burden.

9. Canada does not dispute that it bears the burden of proof, and it recognizes that Article 17.6(ii) provides the applicable standard of review.[3] However, it construes that standard in a way that is not supported by the text. In particular, Canada states that "the second sentence of [Article 17.6(ii)] provides that panels may determine in exceptional circumstances that a measure rests upon a provision that has more than one 'permissible' interpretation."[4]

10. We do not see this dispute as one where the Panel would find that either provision "admits of more than one permissible interpretation". Rather, there is no textual basis to read either provision as including the obligation urged by Canada. But even aside from that error by Canada, Canada further errs by arguing for reading a reference to "exceptional circumstances" into Article 17.6(ii). Quite to the contrary, it is not only in "exceptional circumstances" that a panel "may determine . . . that a measure rests upon a provision that has more than one 'permissible' interpretation". Rather, in any case in which a panel finds that a relevant provision admits of more than one permissible interpretation it *must* uphold a measure that rests on one of those permissible interpretations. Indeed, the panel in the dispute *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*[5] did not find "exceptional circumstances" when it applied Article 17.6(ii) and found that one permissible reading of the provision at issue meant that Brazil's claim failed.

11. Canada goes on to argue that the Panel may find that a provision admits of more than one permissible interpretation only if "it could not discern the ordinary meaning of the provision".[6]

[3] Canada Second Written Submission, paras. 5-7.
[4] Canada Second Written Submission, para. 5.
[5] Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, para. 7.341 (adopted 19 May 2003).
[6] Canada Second Written Submission, para. 6.

Again, this dispute does not involve a situation where Canada's proposed reading is "permissible", but even aside from this, Canada's construction finds no support in the text. Canada seems to suggest that the first and second sentences of Article 17.6(ii) relate to each other in a hierarchical way, and that the second sentence applies only if the Panel is not able to discern a provision's interpretation under the rule prescribed by the first sentence. But this simply is not so. The second sentence plainly envisions that a finding that a provision admits of more than one permissible interpretation will be the result of the application of customary rules of interpretation of public international law. The statement from the Appellate Body report in *US - Hot-Rolled Steel* that Canada quotes is not to the contrary.[7]

12. Canada concludes its discussion of the standard of review by denying that it "has departed from a 'textual basis' for its interpretation of Article 2.4.2 in this case".[8] Yet, as we will see, Canada's argument is not based on the text of Article 2.4.2, but instead rests primarily on an attempt to extend the conclusions of the panel and Appellate Body reports in the underlying dispute while ignoring that the conclusions were based on language – specifically, the phrase "all comparable export transactions" – that is absent from the provision now at issue. Significantly, it was Canada's own arguments that urged the panel and Appellate Body to base its original conclusions on that language.[9] Now it has abandoned those text-based arguments in favour of a more vaguely defined construction of Article 2.4.2 that has no basis in text.

13. In short, Canada has urged on the Panel an erroneous construction of the applicable standard of review under which a panel may find an interpretation of Article 2.4.2 or 2.4 to be permissible only in the "exceptional circumstance" in which the customary rules of interpretation of public international law do not permit the panel to discern the meaning of those provisions. Not only is this argument unsupported by the text, but it simply makes no sense. It suggests inexplicably that the Panel may find a permissible interpretation of AD Agreement provisions not by applying customary rules of interpretation of public international law, but rather, by applying some other, unidentified set of rules. Accordingly, the Panel should reject Canada's proposed construction of Article 17.6(ii). We turn now to Canada's particular arguments concerning Articles 2.4.2 and 2.4.

<u>The Reasoning of the Appellate Body Concerning the Average-to-Average Methodology Does Not Extend to the Transaction-to-Transaction Methodology</u>

14. Canada's principal Article 2.4.2 argument is that "[t]he reasoning of the Appellate Body [in the underlying dispute] applies to the transaction-to-transaction methodology".[10] Canada starts with the premise that, in its original determination, Commerce made average-to-average comparisons based on sub-groups, which resulted in "intermediate values". According to Canada, the Appellate Body found that when Commerce aggregated the "intermediate values", it could not exclude any "intermediate values". Canada then asserts that transaction-to-transaction comparisons also result in "intermediate values". Therefore, Canada concludes, when aggregating the "intermediate values" from transaction-to-transaction comparisons, Commerce must include all such "intermediate values".[11]

15. Canada is wrong. The fatal flaw in Canada's argument is that it completely ignores distinctions between the average-to-average comparison methodology and the transaction-to-

[7] Canada Second Written Submission, para. 6 (*quoting* Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 60 (adopted 23 August 2001)).

[8] Canada Second Written Submission, para. 7.

[9] *See* US First Written Submission, para. 14 (*citing* Canada Appellee's Submission (Exhibit US-1), para. 22); *id.*, para. 19 (*citing* Canada Second Written Submission (Original) (Exhibit US-3), para. 142).

[10] Canada First Written Submission, par. 27.

[11] *See* Canada Second Written Submission, paras. 11-13.

transaction comparison methodology. Canada incorrectly assumes that, except for the identity of the things being compared (i.e., individual transactions rather than weighted averages of groups of transactions), the methodologies are the same and, therefore, any AD Agreement obligations found to apply to the first must apply to the second. That assumption is wrong for the following reasons. It ignores a key textual difference between the two methodologies as provided in Article 2.4.2. Additionally, it ignores the fact that the term "margins of dumping" has a different meaning in the context of transaction-to-transaction comparisons than it does in the context of average-to-average comparisons.

Canada ignores a key textual difference between the average-to-average methodology and the transaction-to-transaction methodology

16. Article 2.4.2 provides for three alternative comparison methodologies in an investigation. The drafters used different language to describe each different methodology. Consequently, an interpretation applicable to one methodology cannot be presumed applicable to the other methodologies.

17. Under the first methodology, "the existence of margins of dumping during the investigation phase" may be established "on the basis of a comparison of a weighted average normal value with a weighted average of all comparable export transactions". Under the second methodology, "the existence of margins of dumping during the investigation phase" may be established "by a comparison of normal value and export prices on a transaction-to-transaction basis". Notably, the latter provision makes no reference to "all comparable export transactions".

18. In this dispute, Canada dismisses that textual difference as irrelevant. In fact, it even goes so far as to claim that, in the underlying dispute, "[t]he phrase 'all comparable export transactions' was not central to the Appellate Body's findings that intermediate comparisons must be aggregated to arrive at margins of dumping".[12] But, that statement ignores the Appellate Body's own language. As we already have noted, the Appellate Body emphasized that the terms "all comparable export transactions" and "margins of dumping" "should be interpreted in an integrated manner".[13]

19. Canada would have this Panel believe that the Appellate Body's conclusion in the underlying dispute turned entirely on its interpretation of the term "margins of dumping", separate from the term "all comparable export transactions" and that, accordingly, the Appellate Body's reasoning can be applied automatically to this dispute. However, as the Appellate Body made clear, it did not examine the term "margins of dumping" in isolation. It examined that term to understand what it means to establish margins of dumping "on the basis of a comparison of a weighted average normal value with a weighted average of all comparable export transactions".[14]

20. In focusing its analysis this way, the Appellate Body followed the path originally suggested by Canada's own argument. Canada had not argued that the underlying panel report should be affirmed on the theory that "margins of dumping" can be established only when all of the results of comparisons – both dumped and non-dumped – under *any* of the Article 2.4.2 methodologies are aggregated. Rather, Canada specifically argued that the original panel's conclusion was "consistent with the ordinary meaning of the requirement in Article 2.4.2 that 'all comparable export transactions' be included in a weighted-average to weighted-average dumping calculation".[15]

[12] Canada Second Written Submission, para. 16.
[13] *US - Softwood Lumber (AB)*, para. 85.
[14] *See US - Softwood Lumber (AB)*, para. 86.
[15] Canada Appellee's Submission (Exhibit US-1), para. 22; *see also* Canada Second Written Submission (Original) (Exhibit US-3), paras. 141-42.

21. Moreover, the Appellate Body made quite clear that it was avoiding interpreting the term "margins of dumping" with reference to any context other than the average-to-average comparison methodology. Indeed, the Appellate Body explicitly declined to consider the other two methodologies in Article 2.4.2 as relevant context for the interpretive question in the underlying dispute.[16] In short, given the clear focus of the Appellate Body's analysis on the average-to-average comparison methodology, the Panel should reject Canada's suggestion that it mechanically apply that analysis to the textually different transaction-to-transaction comparison methodology.

22. Canada also asserts that Commerce must provide offsets for non-dumped transactions because no AD Agreement provision expressly permits it not to do so.[17] In Canada's view, offsetting is required absent any text explicitly allowing an investigating authority not to offset. But as with Canada's main Article 2.4.2 argument, this variation ignores a critical aspect of the analysis that led to the Appellate Body's conclusion in the underlying dispute.

23. Under the Appellate Body's analysis in the underlying dispute, it is not the case that the *absence* of language *prohibited* Commerce from declining to provide an offset when aggregating the results of average-to-average comparisons. Rather, under the Appellate Body's reasoning, the *presence* of particular language – the phrase "all comparable export transactions" – *required* Commerce to provide an offset. Since that language is *not* present in the provision now at issue, Commerce was *not* required to provide an offset in aggregating the results of transaction-to-transaction comparisons.

> *Canada incorrectly assumes that "margins of dumping" means the same thing in the context of the average-to-average methodology as it does in the context of the transaction-to-transaction methodology*

24. Additionally, without any basis, Canada assumes that the term "margins of dumping" means the same thing in the context of average-to-average comparisons as it does in the context of transaction-to-transaction comparisons. As we explained in our second written submission, that assumption is manifestly incorrect.[18]

25. The term "margin of dumping" may refer to the result of a transaction-to-transaction comparison. This is evident from Article VI:2 of the GATT 1994, which refers to a "margin of dumping" as a "price difference". As the term "price" is a transaction-specific concept, it must be the case that the difference in price between two particular transactions may constitute a "margin of dumping". Put another way, it is *not* the case that a margin of dumping is established only when the price differences resulting from multiple transaction-to-transaction comparisons for a given product are aggregated.

26. Canada relies heavily on the fact that in the context of average-to-average comparisons, the Appellate Body found that "margin of dumping" is a concept pertaining to "the product under investigation as a whole".[19] But that finding was specific to that context and cannot be generalized to other contexts. In particular, it does not follow logically from the Appellate Body's finding that a "price difference" – that is, the result of a comparison between two transaction-specific facts – cannot be a "margin of dumping". The fact that "margin of dumping" means something different in the transaction-to-transaction context than in the average-to-average context is a further reason for rejecting Canada's suggestion that the Appellate Body's reasoning simply be applied automatically to the present dispute.

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[16] *US - Softwood Lumber (AB)*, paras. 104-05.
[17] Canada Second Written Submission, para. 21.
[18] *See* US Second Written Submission, paras. 29-39.
[19] *See* Canada Second Written Submission, paras. 9-10.

Canada's argument is not supported by "concerns" allegedly expressed by the Appellate Body

27. Finally, Canada attempts to support its Article 2.4.2 argument with vague reference to "concerns" supposedly expressed by the Appellate Body in a dispute that did not address the permissibility of declining to provide offsets in aggregating the results of transaction-to-transaction comparisons in the investigation phase of an anti-dumping proceeding.[20] Of course, generally stated "concerns" that the Appellate Body may have expressed in another dispute have absolutely nothing to do with the question before this Panel and, indeed, were peripheral to the question before the Appellate Body in the dispute at issue. As such, they were *dicta* and should not be relied upon by the Panel.

28. The Appellate Body report on which Canada relies is the report in *US - Corrosion-Resistant Steel Sunset Review*.[21] At issue there was use of an average-to-transaction comparison methodology in an assessment proceeding, as opposed to use of the transaction-to-transaction comparison methodology in an investigation, which is at issue here. Since that dispute concerned an assessment proceeding, it did not involve Article 2.4.2 at all, as that article pertains only to investigations. Thus, it is difficult for us to see how Canada can rely on the report in that dispute to support its suggested interpretation of Article 2.4.2.

29. Because the Appellate Body in *US - Corrosion-Resistant Steel Sunset Review* was examining an entirely different issue in an entirely different context, *dicta* from that dispute have no relevance to the dispute at hand. Accordingly, the Panel should reject Canada's attempt to rely on such statements to support its Article 2.4.2 argument.

The Section 129 Determination is Consistent With Article 2.4

Canada fails to satisfy its burden of proving its Article 2.4 claim.

30. We turn now to Canada's Article 2.4 argument, an argument that it makes in a mere six paragraphs in its two written submissions. In its first written submission, Canada simply quoted two fragments from the Appellate Body reports in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*, providing no actual analysis whatsoever.[22] As we discussed in our first written submission, neither of the fragments quoted is relevant to the present dispute. As Canada made no other argument, it failed to meet its burden of proof.[23]

31. Remarkably, Canada's second written submission added no argument to support its Article 2.4 claim. Instead, Canada simply repeated quotes from the *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* reports.[24] With respect to *US – Corrosion-Resistant Steel Sunset Review*, Canada even went so far as to effectively acknowledge that the Appellate Body statements on which it relies amount to *dicta*. Thus, it stated that "*regardless whether the United States actually zeroed* in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body's statement that zeroing introduces an 'inherent bias' remains valid".[25] In other words, Canada concedes that the Appellate Body statement was not based on a measure before the Appellate Body but was instead *dicta*.

[20] Canada Second Written Submission, paras. 25-26.
[21] *See* Canada Second Written Submission, para. 26.
[22] Canada First Written Submission, paras. 28-29
[23] US First Written Submission, paras. 23-26.
[24] Canada Second Written Submission, paras. 29-31.
[25] Canada Second Written Submission, para. 30 n.35 (emphasis added).

32. In effect, Canada is taking selected Appellate Body statements, separating them from the contexts in which they were made, disregarding whether they pertained to conduct found "actually" to have occurred, and asking this Panel to treat those statements as determinative of the question now in dispute. Such use of Appellate Body *dicta* is improper. Apart from the fact that there is no *stare decisis* in WTO dispute settlement, and so such statements cannot themselves determine the question in this dispute[26], such out-of-context quotation of *dicta* from a previous report does not contribute reasoning that provides useful guidance to this Panel.

Canada's suggested interpretation of Article 2.4 is erroneous, as it would render provisions of Article 2.4.2 redundant of one another.

33. Simply stated, Canada's Article 2.4 argument is that "by definition, zeroing cannot yield a fair comparison".[27] This proposition does not distinguish among the three alternative comparison methodologies set forth in Article 2.4.2. Canada does not state that "zeroing cannot yield a fair comparison" under the average-to-average and transaction-to-transaction methodologies. It just states that "by definition, zeroing cannot yield a fair comparison". On its face, this absolute proposition applies to all three methodologies in Article 2.4.2, including the average-to-transaction methodology – even though, in the underlying proceeding, Canada conceded that "zeroing is permitted under the third methodology".[28]

34. It is precisely because Canada's "fair comparison" proposition applies indiscriminately to all three Article 2.4.2 comparison methodologies that it must be incorrect. Under that proposition, it would be impermissible not to provide offsets when aggregating the results of average-to-transaction comparisons pursuant to the targeted dumping comparison methodology in the second sentence of Article 2.4.2. But providing offsets in that situation would lead to the same mathematical result as from applying the average-to-average methodology, as illustrated in Exhibit US-4. This is not the outcome expected under the customary rules of interpretation of public international law. A provision of the AD Agreement should not be construed in a manner that would render another provision without effect.[29]

35. Moreover, Canada's assertion that the Appellate Body has interpreted the "fair comparison" requirement in Article 2.4 to require offsets in aggregating results under each of the Article 2.4.2 comparison methodologies is flatly contradicted by the Appellate Body's approach in the underlying dispute. In its appeal from the original panel report, the United States asked the Appellate Body to consider the transaction-to-transaction and average-to-transaction provisions of Article 2.4.2 as context for interpreting the average-to-average provision. The Appellate Body declined to do so on the ground that this would require it to "examin[e] first whether zeroing is permitted under those methodologies".[30] In other words, the Appellate Body did not take it to be a foregone conclusion that "by definition, zeroing cannot yield a fair comparison".

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[26] Appellate Body Report, *United States - Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, para. 129 (adopted 2 Nov. 2005) ("We observe, first, that the DSB rulings in *US – Oil Country Tubular Goods Sunset Reviews* cannot, in and of themselves, 'establish' that there was no WTO-consistent basis for the USITC's likelihood-of-injury determination in the case before us now, even though there may be factual similarities between the two cases.")

[27] Canada Second Written Submission, para. 30.

[28] *US – Softwood Lumber (AB)*, para. 105 n.164.

[29] *See United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US - Zeroing (Complaint by EC)*"), para. 7.266 (circulated 31 Oct. 2005); *see also* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 23 (adopted 20 May 1996); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 (adopted 1 Nov. 1996); Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, para. 7.277 (adopted 1 Oct. 2002).

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

36. Finally, as the panel discussed in the recently circulated report in *US – Zeroing (Complaint by EC)*, with respect to the so-called issue of "zeroing" in assessment proceedings, any analysis of the "fairness" of a methodology should be discerned from a "standard of appropriateness or rightness within the four corners of the Anti-Dumping Agreement which would provide a basis for reliably judging that there has been an unfair departure from that standard".[31] To this end, the panel found that the fact that one assessment methodology may result in a higher margin than another may only be deemed "unfair" if the other methodology could be determined to be the only "correct" methodology pursuant to the text of the AD Agreement.[32]

37. The text of Article 2.4.2 explicitly permits the use of transaction-to-transaction comparisons to determine the existence of margins of dumping. Article 2.4.2, however, contains no language requiring the aggregation of the results of transaction-to-transaction comparisons, nor does it contain language addressing the manner in which such results may be aggregated. To that extent, it is clear that there is no "standard of appropriateness or rightness within the four corners of the Anti-Dumping Agreement" which would provide a basis for this Panel to consider the fairness of denying offsets without engaging in the creation of rights or obligations in a manner inconsistent with Article 3.2 of the DSU.

Conclusion

38. In conclusion, we want to thank the Panel again for this opportunity to address the issues in this dispute, and we look forward to responding to any questions that the Panel may have.

[31] *US - Zeroing (Complaint by EC)*, para. 7.260.
[32] *US - Zeroing (Complaint by EC)*, para. 7.260.

ANNEX D-3

ORAL STATEMENT OF THE PEOPLE'S REPUBLIC OF CHINA

16 November 2006

Mr. Chairman, distinguished members of the Panel, it is my great honour to appear before you today to present the views of the People's Republic of China as a third party to this dispute. I do not intend to restate all the comments contained in our written submission. Rather, considering that China has systemic interests in the correct interpretation on the Anti-Dumping Agreement, in this third party session, I would like to focus on the clarification of Article 2.4.2 and Article 2.4 of the AD Agreement as well as their application in this dispute.

First, with respect to 2.4.2 of the AD Agreement, China believes that the determination of dumping margin shall be based on the product at issue as a whole, rather than certain individual transactions that are conducted at a particular price level. However, in the underlying proceeding, the US DOC's practice of zeroing in transaction-to-transaction comparisons, in fact, excludes those transactions in which the export prices are higher than the normal value. For the purpose of a fair comparison under Article 2.4.2, China believes that the investigation authority should take into account "all comparable export transactions" in the entire process of determining the existence of dumping of the product, and should not be limited only to the weighted average-to-weighted average comparisons.

Further, China believes that since the AD Agreement contains no preference of one methodology over the other in Article 2.4.2 in relation to the weighted-average-to-weighted-average methodology and transaction-to-transaction methodology, it should be interpreted to mean that those two methodologies shall follow the same reasoned principle in an anti-dumping investigation, and it should also be reasonable to assume that adopting either of those methodology should not lead to materially different results. Therefore, the zeroing practice prohibited in weighted-average-to-weighted-average methodology should not be used in the transaction-to-transaction methodology.

Second, with respect to 2.4 of the AD Agreement, China believes that Article 2.4 imposes on Members a general obligation of making a fair comparison between export price and normal value in determining the existence of dumping and calculating dumping margin. It is clear that the zeroing methodology with the "inherent bias" will certainly violate the requirement of "fair comparison" provided in Article 2.4 of the AD Agreement.

By adopting zeroing, the US DOC failed to take into account all the export transactions, as we have mentioned and analyzed in our written submission. As a result, it essentially distorted the fair basis for comparison. China recalls that the Appellate Body stated in the EU- Bed Linen that "*we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is not a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2.*"

In conclusion, China is of the view that, the U.S. DOC's practice of zeroing in transaction-to-transaction comparisons in 129 Determination is inconsistent with Article 2.4.2 of the AD Agreement.

Besides, as the zeroing is formulated with an inherent bias that distorts the comparison of normal value and export price, it is inconsistent with the "fair comparison" requirement in Article 2.4 of the AD Agreement.

Mr. Chairman, this concludes the third party statement of the People's Republic of China. I hope China's view in this dispute would prove to be helpful. Thank you very much for your attention.

ANNEX D-4

THIRD PARTY ORAL SUBMISSION BY THE EUROPEAN COMMUNITIES

16 November 2005

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I. INTRODUCTION

1. Mr. Chairman, Members of the Panel, in this oral statement the European Communities would first like to explain why it does not agree with certain aspects of the written third party submission of New Zealand. We would then like to comment on the second written submissions of the parties. Finally, we would like to conclude by offering you a brief overview of what we see as the key issue in this case.

II. INDIVIDUAL TRANSACTIONS ARE NOT NORMAL VALUES AND RESULTS OF INTERMEDIATE JUXTAPOSITIONS ARE NOT MARGINS OF DUMPING

2. New Zealand appears to consider[1] that an investigating authority is entitled to take one transaction in the domestic market, in isolation, and, without further explanation, assume that the price at which that transaction is concluded is a "normal value"; and that when the transaction-to-transaction method is used there are multiple normal values, and therefore multiple margins of dumping. The European Communities disagrees, for the reasons set out in its written submission. In particular, New Zealand does not give any meaning to the word "basis", as it is twice used in the first sentence of Article 2.4.2; New Zealand uses the plural ("transactions" or "normal values"), when the *Anti-Dumping Agreement* uses the singular; and New Zealand seeks to insert the words "normal value" before the word "transaction" in the final phrase of the first sentence of Article 2.4.2, when those words do not in fact appear in the text of that provision.

III. CONSISTENCY BETWEEN ARTICLES 2 AND 3

3. One of the objections (but not the only objection) raised against zeroing in the *EC-Bed Linen* and *US-Softwood Lumber V* cases was an internal inconsistency in the reasoning of the investigating authority : considering some exports to be "non-dumped" for the purposes of Article 2 (concerning the determination of dumping); yet part of the volume of "dumped" imports for the purposes of Article 3 (concerning determination of injury). New Zealand attempts to respond to this objection by proposing what it refers to as a "symmetrical"[2] approach : if an export is considered non-dumped in the context of Article 2, it should also be considered non-dumped in the context of Article 3.

4. New Zealand's reasoning, however, does not hold good.

5. First, New Zealand's proposition addresses only <u>one</u> of the objections to zeroing raised in the previous cases (consistency between the analysis under Articles 2 and 3). It does not address the arguments derived from the text of Articles 2.4 and 2.4.2, having regard to context, object and purpose, as set out in the written third party submission of the European Communities.

6. Second, New Zealand's proposition is internally inconsistent, and inconsistent with the *Anti-Dumping Agreement*, as we will now explain. Before doing so, however, the European Communities would recall that New Zealand refers to three "sub-methods" in the context of the transaction-to-transaction method. We will refer to these as the first, second and third **T-T** sub-methods – to avoid confusion with the three methods set out in Article 2.4.2 (weighted average-to-weighted average; transaction-to-transaction; and weighted average-to-transaction).

[1] See, for example, New Zealand written third party submission, para 3.04: "The purpose of the transaction-to-transaction methodology is to compare export prices in each transaction with the prices in comparable <u>normal value</u> transactions". (emphasis added)

[2] New Zealand written third party submission, para 3.08.

7. Let us consider the "first T-T sub-method" referred to by New Zealand[3]. We assume a situation where we have one domestic transaction of 1 tonne at 100; 1 tonne of exports at 90, with a positive "dumping amount" of 10; and 1 tonne of exports at 105 with a negative "dumping amount" of 5. In the context of Article 2, in New Zealand's "first T-T sub-method", any negative intermediate results will "offset" any positive intermediate results - in our example leading to a final "margin of dumping" of **2.56 %** (5 expressed as a percentage of 195). However, in the context of Article 3, in the injury analysis, New Zealand would appear to be suggesting that there should be a volume of "dumped" imports of 1 tonne; and the "magnitude of the margin of dumping" for those "dumped" imports will therefore be **11.11 %** (10 expressed as a percentage of 90).[4] In short, according to New Zealand, there are going to be two "margins of dumping" – one for the analysis under Article 2; and a different one for the injury analysis under Article 3. The European Communities does not agree that this is a legally permissible interpretation of the *Anti-Dumping Agreement*. Absent targeted dumping, for a given exporter there is one margin of dumping, which is the same for both Article 2 and Article 3.

8. New Zealand cannot save its analysis by asserting, with respect to the above example, that the "margin of dumping" in the injury analysis will in fact also be 2.56 %, because in order to achieve that result, New Zealand would have to bring into the calculation the volume of what it calls "non-dumped" transactions – which is precisely what it has said must be excluded from the injury analysis. In any event, if this is what New Zealand means, it is simply agreeing with the position of Canada and the European Communities.

9. In short, New Zealand's attempt to de-couple the volume of dumped imports from the magnitude of any margin of dumping must fail, because these two concepts are, by definition, inseparable, since they both depend on the threshold question of what is meant by "dumping" and "margin of dumping" – terms defined in Article VI of the GATT 1994, which definitions are further elaborated in Article 2 of the *Anti-Dumping Agreemen*t.

10. The correct answer in the above example is much simpler, and the same under both Articles 2 and 3. The margin of dumping is 2.56 % and the volume of dumped imports is 2 tonnes.

11. The "second T-T sub-method" referred to by New Zealand[5] is inconsistent with Articles 2.4 and 2.4.2 for the reasons set out in the European Communities written third party submission. The European Communities would point out that this "second method" is likely to inflate the margin of dumping (in the example it would be 11.11% (10 expressed as a percentage of 90)) even more than the "zeroing" used in the "third T-T sub-method" referred to by New Zealand.

12. The "third T-T sub-method" referred to by New Zealand is vitiated for the same reason as the "first T-T method". It would result, under Article 2, in a margin of dumping of 5.13 % (10 expressed as a percentage of 195); and under Article 3 in a <u>different</u> margin of dumping of 11.11 % (10 expressed as a percentage of 90). That does not constitute a permissible interpretation of the *Anti-Dumping Agreement*.

13. Finally, if, at the end of the day, all that New Zealand is saying is that the margin of dumping for both dumping and injury purposes will be 2.56 %, 11.11 % or 5.13 % depending on which method is selected by the investigating authority, then it is not saying very much at all. The issue of

[3] New Zealand written third party submission, para 3.04.

[4] New Zealand written third party submission, footnote 12 : "Where all transactions are included in the calculation [we take this to refer to the first T-T sub-method], the volumes of the goods with negative or *de minimis* dumping margins are incorporated into the volume of <u>non-dumped</u> goods for the purposes of assessing other causes of injury to the domestic industry."

[5] New Zealand written third party submission, para 3.04.

symmetry between Articles 2 and 3 is only one part of the discussion. Achieving such symmetry is a necessary, but not sufficient requirement, when calculating a lawful margin of dumping. In fact, given that a margin of dumping is an objective concept, and cannot depend on the arbitrary or capricious selection of one methodology or another by an investigating authority, all that New Zealand's submissions illustrate is that its approach to zeroing in the context of the transaction-to-transaction method cannot be correct.

IV. TARGETED DUMPING

14. New Zealand repeatedly refers to the concept of "targeted dumping" in support of its proposition that, in the context of the transaction-to-transaction method, individual export transactions, taken in isolation, may be considered to have been "dumped" and "targeted".[6] The European Communities does not agree.

15. First, this assertion does not address the arguments derived from the text, context and object and purpose, as set out in the European Communities written third party submission.

16. Second, in the view of the European Communities, it is the second sentence of Article 2.4.2 that addresses the problem of so-called "targeted dumping". That provision may be invoked when there is a "pattern" of export prices which differ significantly among different purchasers, regions or time periods, and the necessary explanation is provided. A single transaction, taken in isolation, is not a "pattern".

V. SINGLE TRANSACTION ALLEGEDLY CAUSING INJURY

17. New Zealand asserts that a single "dumped" export transaction can cause injury. There are two serious objections to that proposition.

18. The first objection is essentially a legal one. The concept of dumping is defined in the *Anti-Dumping Agreement* entirely independently of the concept of injury. If there is no dumping, the fact that there is one export transaction made at a low price and which penetrates the domestic market of the importing Member is entirely irrelevant: if there is no dumping, there can be no dumping causing injury, and that is an end of the matter. Just because an exporter competes successfully on price once in the domestic market of the importing Member, that fact is irrelevant to the question of what is meant by "dumping" under the *Anti-Dumping Agreement*.

19. The second objection is essentially an economic one. The European Communities agrees with New Zealand that the *Anti-Dumping Agreement* is aimed at unfair competition, but not at fair competition[7]; and that "fair competition" includes (by definition) *some* competition on price. It necessarily follows that some basic appreciation of what is supposed to be competing with what is an essential part of any objective and even-handed analysis. The Appellate Body has indicated that a "market" is "an area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[8] It follows that once an investigating authority has defined the parameters of its investigation, particularly in terms of product, region and time, it has essentially taken as a premise that the same forces of supply and demand affect *all* prices within those parameters. Absent good reason (namely, a pattern of targeted export transactions, as provided for in the second sentence of Article 2.4.2), there is no basis for departing from that premise only for certain aspects of the analysis. In these circumstances, to speak of one export transaction causing "injury" to the domestic industry of the importing Member makes no more sense than to speak of that same

[6] For example, New Zealand written third party submission, paras 1.03, 3.12, 3.13, 3.14, 3.21.
[7] New Zealand written third party submission, para 3.01.
[8] Appellate Body Report, *US-Upland Cotton*, para 404.

transaction causing injury to the exporter itself. Just as the concept of dumping must be assessed by reference to the reasonable market parameters established by the investigating authority, so the concept of something causing injury by unfair competition can only be assessed by reference to all relevant events within those same parameters.[9]

VI. NEGOTIATING HISTORY

20. With regard to New Zealand's invocation of "preparatory work" within the meaning of Article 32 of the Vienna Convention, the European Communities would point out that the meaning of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* – as outlined in the European Communities written third party submission, results from Article 31 of the Vienna Convention, and particularly from the ordinary meaning of the text, having regard to context and object and purpose. New Zealand is invoking the negotiating history not to "confirm" this meaning, but to contradict it. The application of Article 31 of the Vienna Convention does not leave the meaning "ambiguous or obscure" and does not lead "to a result which is manifestly absurd or unreasonable", within the meaning of Article 32 of the Vienna Convention. For this reason alone, New Zealand's submission's regard the negotiating history should be rejected.

21. With regard to Exhibit NZ-1, the European Communities would point out that this document is not part of "the preparatory work of the treaty" within the meaning of Article 32 of the Vienna Convention – "the treaty" in this case being the *Anti-Dumping Agreement*. It is not therefore a lawful basis for interpretation by this Panel. In fact, based on the terms of reference in Annex B of Exhibit NZ-1, the document would not even appear to be part of the negotiating history of the Kennedy Round Code – the group being primarily "convened for the purpose of exchanging information regarding the technical requirements of existing legislation on dumping and countervailing duties in their respective countries".

22. In any event, in substance, the document does not support New Zealand's analysis. It does not refer to a "transaction-to-transaction" method. And the reference to "genuine dumping" may simply be taken as a reference to the type of targeted dumping for which provision has now been made in the second sentence of Article 2.4.2. This document therefore requires no further consideration by this Panel.

23. With regard to Exhibit NZ-2, the European Communities would also point out that this document is not part of "the preparatory work of the treaty" within the meaning of Article 32 of the Vienna Convention, but merely an extract from a book expressing certain opinions, and published after the conclusion of the treaty. It is not a lawful tool for interpretation by this Panel, in support of the arguments contained in paras 2.03 to 2.05 of New Zealand's written third party submission.

24. In any event, in truth, the negotiating history of the *Anti-Dumping Agreement* fully confirms the analysis set out in the European Communities written third party submission. It is summarised with tolerable accuracy for the purposes of the present discussion at page 1540 and footnote 951 of Exhibit NZ-2. During the negotiations, concerns about the methods of comparison between export price and normal value were driven by a desire to catch "targeted dumping" (precisely the alleged problem invoked by New Zealand in its written third party submission); and the eventual compromise consisted of the targeted dumping rules, based on purchasers, regions and time periods, contained in the second sentence of Article 2.4.2. There is therefore no basis for New Zealand's assertion that the transaction-to-transaction method was intended by the Members to systematically address allegedly "targeted" export transactions, considered in isolation.

[9] Appellate Body Report, *US-Softwood Lumber V*, paras 93 and 96 : dumping and margins of dumping "can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product."

VII. COMMENTS ON THE SECOND WRITTEN SUBMISSIONS

25. Mr. Chairman, Members of the Panel, we now turn to the second written submissions of the parties, and particularly that of the United States.

26. We think it is clear from the rebuttal submission of the United States that one of the issues that this Panel will need to carefully consider is whether or not an investigating authority is entitled to assume that the result of each transaction-to-transaction juxtaposition is always a "margin of dumping"; the second aggregation stage of the calculation falling outside the scope of the *Anti-Dumping Agreement*. We think that we have demonstrated that this point of view – analogous to that defended by the European Communities in the *Bed Linen* case but dismissed by the Appellate Body - is erroneous: particularly by pointing to the term "normal value"; and the word "basis"; and by explaining the utility of the transaction-to-transaction method, without zeroing. The results of transaction-to-transaction comparisons are *intermediate results*, and it is only when they are aggregated, in a second stage of the calculation, that the margin of dumping for that exporter is calculated.

27. One of the highly significant consequences is that Canada is not asking for an "offset" or adjustment *after* the calculation of a margin of dumping.[10] Rather, Canada is asking the United States to stop making a zeroing adjustment during the calculation of the margin of dumping; an adjustment that is not made for a difference affecting price comparability, and which is therefore, self-evidently, inconsistent with the third to fifth sentences of Article 2.4.

28. Mr. Chairman, we do not agree with the United States that price is *necessarily* "a transaction-specific fact".[11] First, it is perfectly possible that one transaction (or one invoice) incorporates more than one price, perhaps in relation to different models. Second, it is perfectly possible, and indeed quite common, for exporters and importers to conclude framework contracts, expressly or by implication, indicating an export price that will remain more or less unchanged over time, unless one of the parties seeks to re-negotiate the commercial relationship. Third, we do not agree that an investigating authority is entitled to *assume* that, in a given *market*, price variations from one instant (region or purchaser) to the next are *always* disconnected, in the sense that they do not together constitute the forces of supply and demand that define that very market.

29. Rather, if an exporter suddenly increases price from one day to the next an importer will certainly question that and, absent good reason, may seek supplies elsewhere. Similarly, if an importer is aware that the same product is being sold to another purchaser at a lower price, it may be expected to question that and, absent good reason, seek supplies elsewhere. Similarly, if an importer is aware that the same product is being sold into another region at a lower price, it may be expected to question that and, absent good reason, seek supplies elsewhere. Furthermore, from the supply side point of view, an exporter's decision on whether or not to continue to make the necessary investment in order to sell into a given export market will not be made on the basis of one transaction, but rather on the basis of general performance over time. In short, price is not "transaction specific", but *market* specific; and the whole sense of Article 2.4 of the *Anti-Dumping Agreement* is that, if – and only if - the export market in reality consists of a number of sub-markets (by purchaser, region or time), then – and only then – is an investigating authority entitled to calculate margins of dumping for each sub-market.

30. That brings us, logically, to the second pillar of the United States defence : the repeated and erroneous assertion that Canada's arguments *necessarily* generate an "anomaly" that "cannot be

[10] United States rebuttal, para 11.
[11] United States rebuttal, para 31

reconciled" with the targeted dumping provisions, because targeted dumping without zeroing *necessarily* always produces the same result as the weighted average-to-weighted average method.[12]

31. The first and most obvious reason why this argument fails is the words "[s]ubject to the provisions governing fair comparison" in the first sentence of Article 2.4.2. These include the provisions in the third to fifth sentences of Article 2.4. If one provision (Article 2.4.2) is "subject to" another provision (the third to fifth sentences of Article 2.4), it means that, in case of conflict, the latter provision (the third to fifth sentences of Article 2.4) must prevail.[13] Consequently, it follows that the provisions of Article 2.4.2 cannot be interpreted in such a way as to give rise to a result that conflicts with the third to fifth sentences of Article 2.4. Any such conflict must be "reconciled" in favour of the third to fifth sentences of Article 2.4. This being so, the United States errs when it bases its reasoning on the assertion (erroneous in any event) that Canada's interpretation of Article 2.4 cannot be "reconciled" with Article 2.4.2, given that the *Anti-Dumping Agreement* itself contains a rule reconciling any such conflict in favour of the third to fifth sentences of Article 2.4.

32. This is confirmed by the preparatory work. The New Zealand I and II texts were not qualified by the words "[s]ubject to the provisions governing fair comparison in paragraph 2.4", thus leaving some ambiguity about the relationship between these provisions. In the New Zealand III, Ramsauer text and in the final Dunkel Draft the Members decided to eliminate this ambiguity, by inserting the words "[s]ubject to the provisions governing fair comparison in paragraph 2.4", thus making it clear that, in case of conflict, the former provisions are to prevail. This change marked a significant difference, and must be respected.

33. The second reason why the United States argument must fail is because it is based on the erroneous assumption that what an investigating authority must necessarily do in a targeted dumping analysis is the same as the zeroing adjustment under discussion in the present case. But this is not so. Article 2.4.2, second sentence, does not specify in every detail how an investigating authority might conduct its targeted dumping analysis. For example, an investigating authority faced with an allegation of targeted dumping (perhaps by region) might first perform an intermediate disaggregated asymmetrical analysis in order to see whether or not there is, in fact, a pattern of export transactions at different prices into two different regions (A and B). If there is a pattern of below normal value transactions to region A, but not B, the investigating authority might simply proceed to calculate a margin of dumping that takes that fact into consideration, but without necessarily making the kind of zeroing adjustment made by the US. In other words, it cannot be excluded that there might be different tools available, ranging from the calculation of the margin of dumping exclusively on the basis of the targeted sales (resulting in the complete exclusion of the high priced export transactions from the calculation (including from the denominator)), to methods such as "zeroing". This is, in fact, precisely what is foreseen in US municipal anti-dumping law. Once again, this observation is, in itself, sufficient to settle the matter.

34. Third, in any event, even if the investigating authority would combine the results of its analysis for regions A and B and impose an anti-dumping duty on *all* imports, having first "adjusted" the export price of region B, it is perfectly possible to reconcile this with Article 2.4. Such adjustment would be made for a difference (between markets A and B) that affected price comparability (between markets A and B; *and* between AB and the exporter's home market, C).

35. Finally, Mr. Chairman, distinguished Members of the Panel, the European Communities considers that the United States argument based on Article 9 of the *Anti-Dumping Agreement* is circular and without merit. We take the view that when an anti-dumping duty is levied, an

[12] United States rebuttal, paras 3, 8 and 19 to 25.

[13] Vienna Convention, Article 30(2) : "When a treaty specifies that it is subject to … an earlier or later treaty, the provisions of that other treaty prevail."

investigating authority is still required to comply with the basic rules for calculating a margin of dumping, including those in Article 2.4. We have a specific systemic interest in this matter, it being the subject of other DSU proceedings, which have not yet terminated.

VIII. CONCLUSION

36. Mr. Chairman, distinguished Members of the Panel. The arguments in this case are becoming increasingly complicated. So much so that, dare I say it, one can hardly "see the wood for the trees". However, as is so often the case, the truth is both complex and simple at the same time; and to see that it is sometimes helpful to go back to first principles.

37. As Jacob Viner, the father of the anti-dumping rules, observed:

> … sufficient justification is to be found in the usage of the most authoritative writers and in the considerations of economy and precision of terminology for confining the term dumping to *price-discrimination between national markets*. This definition, I venture to assert, will meet all reasonable requirements.
>
> … The one essential characteristic of dumping, I contend, is price-discrimination between purchasers in different national markets.[14]

38. And this is confirmed by the repeated references to "markets" in the *Anti-Dumping Agreement*, notably in Article 2.

39. The *Anti-Dumping Agreement* is a framework agreement, and in interpreting it one has to think both economically and legally : to do one to the exclusion of the other is simply not to do justice to the Members' objectives when they concluded it.

40. Zeroing, in all its various forms, is essentially about market definition, and particularly about consistency, as the Appellate Body has made clear in the model zeroing cases. The United States position in the present case is economic nonsense and legally contrived in the extreme. Canada's position reflects the true economic and legal compromise agreed by the Members.

Mr. Chairman, Members of the Panel, thank you for your attention.

[14] Jacob Viner, *Dumping, A Problem in International Trade*, First Edition 1923, Reprinted 1991, Chapter I, *The Definition of Dumping*, pages 3 and 4 (original emphasis, footnote omitted).

ANNEX D-5

ORAL STATEMENT BY INDIA

16 November 2005

Mr. Chairman, Members of the Panel,

I thank you for having provided India an opportunity to present its views in this dispute. Mr. Chairman, the central issue before the Panel is the interpretation of Article 2:4:2 regarding determination of dumping margin when using the methodology of comparison of normal value and export prices on a transaction to transaction basis. Our statement would therefore be limited to the issue of the legal interpretation of Article 2:4:2 and its interplay with Article 2:4 of the Anti-Dumping Agreement.

The US has asserted that there is no textual basis to support Canada's argument that zeroing cannot be applied in the transaction to transaction methodology. The US asserts that Canada ignores the textual difference between the provision at issue in the earlier determination using weighted average to weighted average (W to W) methodology and the provision now at issue in the transaction to transaction (T to T) comparison. Secondly, the US notes that Canada assumes, without explanation, that when it comes to the aggregation of multiple values, there is no difference between the average to average methodology and the transaction to transaction comparison.

In India's view, there is no support for the US assertions in the text of Article 2.4.2. The text does not support the US stand that the transactions giving negative values of dumping margin are to be ignored or treated as zero while aggregating dumping margins of intermediate transactions for determining a single dumping margin for the product under consideration.

Article 2.4 mandates that a fair comparison shall be made between the export price and the normal value. This is an overarching obligation for determining dumping margin and the comparison methodology to be used under Article 2.4.2. Fair comparison between export price and the normal value embodies comparison of all transactions unless the text states otherwise.

In *EC-Bed linen* dispute case, the Appellate Body held that by not taking into account all comparisons, the practice of zeroing does not provide a fair comparison between export prices and normal value and is therefore inconsistent with Article 2:4 of the AD Agreement. In this dispute, the Appellate Body also held that "whatever the method used to calculate the margins of dumping… these margins must be, and can only be established for the product under investigation as a whole".

In the light of the above, the interpretation of the US to ignore those transactions that give negative value of dumping margin appears flawed as this does not lead to fair comparison as per the obligation under the first sentence of Article 2:4, which requires that, "A fair comparison shall be made between the export price and the normal value…".

In a situation, where on comparison of individual transactions at intervening stage, it is found that *all* the transactions show the export price to be higher than the normal value, the result would be a negative dumping margin. This determination however will take into account all the transactions that were giving negative dumping margin at the intervening stage. In this process, thus, the investigating authority would have taken into consideration all the transactions. In another situation, by extending

the same logic, where some transactions may give positive margins and some transactions may give negative margins at intervening stage, the overall aggregation of dumping margins for **determining a dumping margin** for the product as a whole, shall take into account the results of all the comparisons and not only of those that give positive dumping margins.

The US determination in ignoring the margins of those transactions that give negative values in the intermediate comparisons is incorrect and is not supported by the text of Articles 2:4 and 2:4:2.

ANNEX D-6

ORAL STATEMENT OF JAPAN AT THE THIRD PARTY SESSION

16 November 2005

I. INTRODUCTION

1. Mr. Chairman, Members of the Panel, Japan would like to thank you, and the Secretariat, for your efforts in preparing for this hearing. Mr. Chairman, may I also join previous speakers by congratulating on your assuming the chairmanship of this panel.

2. In its Opening Statement this morning, Japan will summarize for you, briefly, why the United States' Section 129 Determination is inconsistent with its obligations under the *Anti-Dumping Agreement*. Japan will also respond to certain arguments advanced by the United States and New Zealand in their written submissions.

II. DUMPING DETERMINATIONS ARE FOR THE PRODUCT UNDER INVESTIGATION AS A WHOLE

3. In its Third Party Submission, Japan outlined that the *Anti-Dumping Agreement* and the GATT 1994 require authorities to calculate the existence and amount of "dumping" for the "product" under investigation. This obligation derives from the text of both Article 2.1 of the *Anti-Dumping Agreement* and from Article VI:1 of the GATT 1994, each of which refers to the dumping of a product.[1] In turn, because dumping is determined for a product, under Article 2.4.2, the margin or amount of that dumping must also be determined for the product as a whole.

4. This text-based obligation is in keeping with the fact that the authorities themselves determine the product scope of the investigation. Having done so, the *Agreement* requires that they be consistent throughout the investigation and, indeed, also in imposing duties. The product under investigation, as a whole, remains the central focus of the process. The Appellate Body put it in these terms:

> 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. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. 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 …[2]

[1] Appellate Body Report, *US – 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.

[2] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

5. Ignoring the Appellate Body's interpretation, the United States contends that, for purposes of the T-to-T comparison, there is no obligation to calculate a margin for the product as a whole.[3] This is plainly wrong and, in substance, invites the Panel to reverse panel and Appellate Body reports adopted by the DSB. The United States' argument also seeks to destroy the consistency between the product scope of dumping determinations and the resulting anti-dumping duties. On the United States' view, dumping determinations deliberately confined to a sub-grouping of a product – even a single transaction[4] – could justify the imposition of duties on the product as a whole.

6. The United States advances four arguments in support of its position. *First*, relying on the word "price" in Article VI:2, the United States argues that margins of dumping may be transaction-specific because they involve a comparison of "prices" that are fixed on a transaction-specific basis.[5] Mr. Chairman, this is an absurd argument. The fact that prices are usually determined in the marketplace on a transaction-specific basis does not dictate that the words "product", "dumping" and "margin of dumping" have a transaction-specific ordinary meaning under the *Vienna Convention*.

7. To the contrary, the text of Article VI demonstrates that "the price difference" in question is that for the "product", not for individual transactions. Article VI:2 defines the margin of dumping as the price difference that must be "determined in accordance with the provisions of paragraph 1". Article VI:1, in turn, provides that "[f]or the purpose of this Article", "a product" is dumped "if the [export] price of the product" is less than the comparable domestic price "for the like product" or less than "the cost of production of the product". This definition of "dumping" in relations to "a product" shows that the dumping determination is based on a comparison of prices for the product. This interpretation is further confirmed by the immediate context provided in the first sentence of Article VI:2, which states that "an anti-dumping duty" levied on "any product" shall not exceed "the margin of dumping *in respect of such product*". This provision, therefore, defines the "margin of dumping" in terms of the product, not individual transactions.

8. *Second*, the United States' argument on *Ad* Article VI:1 suffers from the same misconception. *Ad* Article VI:1 does not indicate that margins of dumping are calculated for sub-groupings of a product; rather, it addresses the *price* that may be used for certain export transactions in calculating the margin of dumping for the product. Specifically, the provision addresses the situation where the import prices for certain export transactions are unreliable because of an association between the exporter and the importer; for these transactions, the authorities are permitted to use downstream resale prices, in the importing Member, in calculating the export price. The *Ad* Article does not purport to alter the requirement in Article VI:1 that dumping, and margins of dumping, are determined for a product.

9. The rule in *Ad* Article VI:1 is now reflected in Article 2.3 of the *Anti-Dumping Agreement*. As the drafters did in the *Ad* Article, they have, again, incorporated the rule into the treaty without disturbing the requirements in Article 2.1 of the *Agreement* and Article VI of the GATT 1994 that a margin of dumping must be determined for the product under investigation as a whole.

10. *Third*, the United States asserts that the use of the plural "margins of dumping" in Article 2.4.2 means that there can be multiple margins for each T-to-T comparison result. The United States is simply recycling an argument it has advanced, and lost, in the original proceedings in this dispute[6].

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[3] United States' Rebuttal Submission, paras. 26 and 27.

[4] *See, for example,* United States' Rebuttal Submission, paras. 31 and 35.

[5] United States' Rebuttal Submission, para. 31.

[6] Rejecting this interpretation, the Appellate Body held: "'margins of dumping' is in the plural because a single investigation may involve establishing margins of dumping for a number of exporters or producers, and may relate to more than one country." Appellate Body Report, *Softwood Lumber V*, para. 115.

11. In fact, nothing in the text of Article 2.4.2 supports the United States' view. The term "margins of dumping" in that provision refers to the "magnitude of dumping".[7] Because Article 2.1 states that "dumping" exists only for the "product" as whole, the measurement of the amount of that "dumping" can also be calculated only for the "product" as a whole. Furthermore, as the opening clause of Article 2.1 indicates, the definitions of margin of dumping set forth in Article 2.1, and the "margin of dumping", apply "to the entire Agreement, which includes, of course, Article 2.4.2".[8] The United States also argues that Article 9.3 confirms its views that the "margin of dumping" can be determined, for purpose of duty assessment, for a single export transaction. However, Article 9.3 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 reviews in Article 9.3.

12. The United States argues incorrectly that the Appellate Body's interpretation of the term "margins of dumping" in the underlying proceeding is limited to situations involving the W-to-W comparison under the first sentence of Article 2.4.2 of the *Agreement*.[9] However, the structure of the Appellate Body's analysis involved separate consideration of the phrase "all comparable export 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"[10] regarding the phrase "all comparable export 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"[11] *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 export transactions". 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.

13. *Fourth*, and finally, contrary to the United States' contention, there was no "subsequent practice" under the GATT 1947 indicating that the GATT Contracting Parties agreed that the term "margin of dumping" referred to transaction-specific margins.[12] As the Appellate Body stated, "[t]he purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty".[13] The practices of some of the Contracting Parties to the GATT 1947, or their action or inaction that the United States claims to be the "circumstance of the conclusions of the GATT 1994 and the Anti-Dumping Agreement"[14] cannot qualify as such, because they hardly "help[] to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision"[15], in this case, the meaning of the term "margin of dumping". The United States' arguments regarding adopted GATT panel reports[16] are also misplaced because they do not establish "subsequent practice" under the GATT 1947 and they are not binding in WTO law.[17]

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[7] Appellate Body Report, *US – Softwood Lumber V*, para. 96.
[8] Appellate Body Report, *US – Softwood Lumber V*, para.93..
[9] United States Rebuttal Submission, para. 37..
[10] Appellate Body Report, *US – Softwood Lumber V*, para. 90.
[11] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[12] The exacting legal standard for establishing the existence of subsequent practice under the WTO agreements and the GATT 1947 is set forth in Appellate Body Report, *US – Gambling Services*, paras. 191 and 192. *See also* Appellate Body Report, *EC-Chicken Classification*, paras. 256 – 258.
[13] Appellate Body Report, *EC – Computer Equipment*, para. 93 (emphasis original).
[14] See United States Rebuttal Submission, para. 34.
[15] Appellate Body Report, *EC – Chicken Classification*, para. 289.
[16] United States' Rebuttal Submission, para. 34.
[17] Appellate Body Report, *Japan – Alcoholic Beverages II*, page 13.

14. Mr. Chairman, Japan will now turn to New Zealand's arguments on this issue. New Zealand appears to recognize that dumping margins must be determined for the product as a whole. Indeed, it states explicitly that the T-to-T methodology must involve a selection of transactions "which are representative of the 'product as a whole'."[18]

15. However, New Zealand does not accept the logic of its own arguments. Elsewhere in the submission, it sets forth three alternative methods of conducting a T-to-T comparison, two of which involve the systematic disregard of all negative T-to-T comparison results. Specifically, under New Zealand's second T-to-T method, it says, "only dumped transactions are included in the determination". And, under the third method, zeroing is used to eliminate negative results from the calculation of the total amount of dumping.[19]

16. New Zealand's approach is tantamount to a determination that the excluded export transactions do not form part of the "product". However, the export transactions producing negative and positive comparison results are all part of the "product" and all comparison results must be included in the overall determination.

17. New Zealand also argues that the way a dumping margin is calculated must be understood in light of the way an injury determination is conducted.[20] For New Zealand, in an injury determination, "*only those transactions found to be dumped are taken into account*".[21] In consequence, it says, "to preserve symmetry, the determination of the margin of dumping may be based only on those dumped transactions so taken into account".[22]

18. However, contrary to these arguments, injury determinations are *not* based solely on transactions found to be dumped. As noted above, in *US – Softwood Lumber V*, the Appellate Body ruled that the "determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping" all relate to the product as a whole.[23]

19. New Zealand also argues that "there should be a symmetry" between the determination of dumping, injury, the causal relationship, and the imposition of anti-dumping duties. However, without making a product-wide determination, it is not clear how New Zealand's approach could ensure symmetry or consistency because duties are applied to the product as a whole.[24] New Zealand's approach effectively severs the link between subjects of the determination of dumping and the imposition of anti-dumping duties.[25] However, the *Anti-Dumping Agreement* requires that a product-wide margin determination provide the basis for the product-wide imposition of duties.

20. The United States' Section 129 Determination fails to meet the requirement to determine a margin for the product because negative comparison results were excluded from the calculation of the total amount of dumping. The Determination is, therefore, inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, as well as with Article VI of the GATT 1994.

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[18] New Zealand's Third Party Submission, para. 3.22.
[19] New Zealand's Third Party Submission, para. 3.04.
[20] New Zealand's Third Party Submission, para. 3.03.
[21] New Zealand's Third Party Submission, para. 3.09.
[22] New Zealand's Third Party Submission, para. 3.09.
[23] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.
[24] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 94.
[25] The Appellate Body found that "import transactions attributable to a particular producer or exporter need not be separated into two categories – dumped and non-dumped transactions." Appellate Body Report, *EC – Bed Linen (Article 21.5)*, footnote 177.

III. A MARGIN OF DUMPING MUST BE BASED ON A FAIR COMPARISON OF NORMAL VALUE AND EXPORT PRICE

21. Mr. Chairman, Japan has set forth, in detail, in its Third Party Submission that Article 2.4 imposes a general obligation for the investigating authorities to conduct a fair comparison of normal value and export price. Rather than repeat those submissions, Japan will address certain arguments made by the United States and New Zealand.

22. It is worth recalling at the outset that the Appellate Body has twice ruled that zeroing does not meet the requirements of a fair comparison.[26] It held that zeroing is "inherently biased" because it "inflates" the margin of dumping by the value of the excluded negative intermediate comparison results. And zeroing may even create a margin of dumping that would not otherwise exist. Because the United States disagrees with these findings, it invites the Panel to pretend that they were never made.

23. The United States contends that zeroing occurs *after* the comparison of normal value and export has happened, whereas Article 2.4 applies solely to price adjustments made *before* the comparison is performed.[27] The Unites States is wrong that Article 2.4 applies only to pre-comparison price adjustments. The word "comparison" refers to the process by which the authorities calculate the margin of dumping for the product. That process necessarily includes the way that the authorities aggregate and disaggregate the product for purposes of the comparison.[28] The authorities cannot structure that comparison in a manner that systematically prejudices the interests of foreign producers and exporters.

24. Further, the United States' argument that the first sentence of Article 2.4 refers only to a duty to make price adjustments renders that sentence redundant, because the duty to make adjustments is already set forth in the remainder of Article 2.4. The first sentence of the provision would, therefore, add nothing to the rest.

25. The United States' interpretation would also nullify the disciplines in Articles 2.2, 2.3 and 6.6 of the *Agreement* on calculation and verification of normal value and export price. After carefully calculating and confirming these values, authorities would be permitted to structure the comparison process in such a way that, irrespective of the normal value and export price, dumping is found.

26. The United States interpretation produces absurd results. On the United States' view, Article 2.4, on the one hand, requires authorities to make "pre-comparison" adjustments that promote fairness and, on the other hand, permits them to make any "post-comparison" adjustments they see fit. Nothing in the text supports the view that the Article requires the authorities to give with one hand to ensure fairness that which they can simply remove with the other to deny it.

27. New Zealand suggests a "fair" methodology is one that targets the "*dumped goods*" through the exclusion of negative comparison results.[29] Mr. Chairman, New Zealand turns the idea of fairness on its head. The purpose of the comparison is to ascertain *whether or not there is dumping*. Yet, because only the positive comparison results are aggregated on New Zealand's approach, dumping will almost certainly be found. As a result, as shown by New Zealand's reference to a methodology that targets "dumped goods", an objective inquiry becomes a self-fulfilling prophecy. But as the

[26] Appellate Body Report, *EC – Bed Linen*, paras. 55 and 59; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, paras. 134 and 135.
[27] United States' Rebuttal Submission, para. 11.
[28] *See* Japan's Third Party Submission, para. 16.
[29] New Zealand's Third Party Submission, paras. 3.12 and 3.14.

Appellate Body said in *EC – Bed Linen (Article 21.5 – India)*, the "result" of the authorities' investigation cannot be "predetermined by the methodology itself".[30]

28. Mr. Chairman, the Section 129 Determination involves just such an unfair comparison. By systematically excluding all negative comparison results, the United States made a finding of dumping considerably more likely and it also inflated the amount of the margin. The unfair comparison involves bias that operates exclusively to benefit the United States' own lumber industry and systematically to the detriment of Canadian producers and exports. This constitutes a violation of Article 2.4.

IV PROHIBITION OF ZEROING UNDER ARTICLE 2.4 DOES NOT NULLIFY THE THIRD COMPARISON METHOD IN ARTICLE 2.4.2 OF THE *ANTI-DUMPING AGREEMENT*

29. The United States argues that a prohibition of zeroing would nullify the W-to-T comparison in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.[31]

30. It asserts that in mathematical terms, the W-to-W and W-to-T comparisons would produce identical results, absent zeroing. However, this assumes wrongly that all other things are treated equally. In particular, the argument presupposes that the same basis for calculating the weighted average normal value *must always* 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 calculation basis for normal value. Even in US domestic law, there are differences in the ways that the USDOC conducts W-to-W and W-to-T comparisons that ensure that the results of the two comparisons would *not* be the same. For example, the US statute itself prescribes that the weighted average normal value is to be calculated using different time periods (and hence different pools of transactions) in W-to-W comparisons in original investigations and in W-to-T comparisons in periodic reviews.[32] As a result, the weighted average normal values will differ in the two situations, and the comparisons of those different normal values with export prices mathematically will *not* collapse into the same outcome.

31. Second, and more importantly, the text of the second sentence of Article 2.4.2 suggests that a W-to-T comparison can be conducted in a way that would not produce the same result as a W-to-W comparison. Article 2.4.2 provides for three methods of comparison. The first two are "symmetrical" methods that compare normal value and export price on the same basis, either on a W-to-W or a T-to-T basis. Article 2.4.2 does not provide restrictions or conditions for using either symmetrical comparison method.

32. The third method of comparison is the "asymmetrical" W-to-T method of comparison set forth in the second sentence of Article 2.4.2. Unlike the symmetrical comparisons, the investigating authorities are entitled to use this method of comparison exclusively in exceptional circumstances.

33. According to the text, the circumstances justifying the use of the exception arise where the investigating authorities find that there is "a *pattern*" of "*export prices which differ significantly*" among purchasers, regions or time periods. According to its ordinary meaning, a pricing "pattern"

[30] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

[31] United States' Rebuttal Submission, paras. 19–25.

[32] *Compare* Section 777A(d)(1)(A) of the Act, which, in original investigations, authorizes the calculation of a weighted average of the normal values (impliedly over the entire period investigated) *with* Section 777A(d)(2), which, in periodic reviews, provides for the calculation of weighted average normal value over "a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."

exists where, among all export transactions, there is discernible configuration of prices by purchasers, time periods or regions.

34. The second requirement for recourse to the third methodology is that the authorities must explain why the significant pricing differences could not be "taken into account appropriately" by use of either of the symmetrical methods of comparison. Thus, although Article 2.4.2 does not indicate exactly how the W-to-T comparison is different from the other two methods of comparison, the distinguishing features of the third method must be rooted in the exceptional circumstances that justify its use. In consequence, the third methodology must enable authorities to focus the comparison on the export transactions making up the pricing "pattern". If the authorities do not focus on those transactions, they would fail to take "appropriate account" of the pricing differences discernible in those transactions.

35. To enable the authorities to focus on the transactions in the "pattern", the text supports a methodology that includes the targeted selection of particular export transactions (i.e. those in the pattern) for comparison with normal value. By selecting certain transactions for comparison, and excluding others, authorities can focus on the transactions making up the pricing pattern. This targeted selection of export transactions enables the authorities to address properly targeted dumping.

36. Conversely, if the comparison under the third methodology were to include *all* export transactions (or a fully representative sample), the methodology would not address the transactions in the pricing pattern and would, therefore, *not* "take into account appropriately" the significant pricing differences in that pattern, as required by the text of Article 2.4.2.

37. When a pricing pattern has been identified, the authorities must conduct a fair comparison that takes into account all transactions making up the pattern. The existence of an export pricing "pattern" does not mean that there is dumping, targeted or otherwise. Instead, like the other methodologies, the third methodology under second sentence of Article 2.4.2 is intended to enable authorities to determine whether there is dumping and to calculate the dumping margin.

38. Because the universe of transactions used in a W-to-T comparison comprises only the transactions in the pricing pattern, the results of this comparison will be different from comparisons under the symmetrical methods in the first sentence of Article 2.4.2. There is, therefore, no basis for the United States concerns that a prohibition on zeroing would nullify the W-to-T comparison in the second sentence of Article 2.4.2.

V. THE NEGOTIATING HISTORY DOES NOT SUPPORT THE UNITED STATES

39. New Zealand argues that, although not entirely clear, the negotiating history of the *Anti-Dumping Agreement* indicates that zeroing is permitted.[33] Because the ordinary meaning of the *Agreement* under Article 31 of the *Vienna Convention* is neither ambiguous nor absurd, it is not necessary for the Panel to examine the negotiating history.

40. In any event, in the original proceedings in this dispute, the Appellate Body examined the negotiating history of the *Anti-Dumping Agreement* and concluded that it did not support the view that zeroing is permissible.[34] It added that, when the drafters intended to permit Members to exclude certain elements from their determinations, they did so expressly. It noted, though, that there is no

[33] New Zealand's Third Party Submission, paras. 2.01–2.05.
[34] Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 107 and 108.

express authority to exclude negative comparison results.[35] The documents that New Zealand has submitted, purportedly as negotiating history, do not alter these conclusions.[36]

VI. CONCLUSION

41. Mr. Chairman, by continuing to apply its zeroing procedures in the Section 129 Determination, the United States disregards the findings of this Panel and the Appellate Body. The Section 129 Determination is tainted by the same flaws as the original determination in this dispute. In making both determinations, the United States failed to reach conclusions for the "product" under investigation and it failed to conduct a fair comparison. These failures result in violations of Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. And the consequence is that the advantages the United States' industry derives from zeroing are prolonged, as is the prejudice to Canadian producers and exporters.

42. Mr. Chairman, members of the Panel, staff of the Secretariat, Japan thanks you for your attention.

[35] Appellate Body Report, *US – Softwood Lumber V*, para. 100.
[36] Exhibits NZ-1 and NZ-2.

ANNEX D-7

NEW ZEALAND'S ORAL STATEMENT

16 November 2005

1. Mr Chairman, Members of the Panel, New Zealand welcomes this opportunity to present its views to the Panel in this dispute. New Zealand has joined this dispute not only for systemic reasons, but also because we have an interest in the use of the transaction-to-transaction methodology in the calculation of dumping margins. Our submission is based on what we see as a permissible interpretation of the *Anti-Dumping Agreement* which is specifically preserved under Article 17.6 of that Agreement.

2. At the heart of this dispute is whether the practice of 'zeroing' is inconsistent with the WTO Agreement when used in conjunction with the transaction-to-transaction methodology in anti-dumping investigations. New Zealand notes that while the Appellate Body in *US-Softwood Lumber* has considered that the practice of zeroing is precluded in the weighted average-to-weighted average methodology, the question of whether zeroing is permissible when using the transaction-to-transaction methodology has not been addressed by the Appellate Body. In fact, the Appellate Body was very careful to note that its analysis applied to the weighted average-to-weighted average methodology only.

3. The purpose of the transaction-to-transaction methodology is to compare actual export prices for each shipment with the prices of comparable normal value transactions in the exporter's domestic market. New Zealand prefers to use this methodology due to the relatively small number of shipments entering the New Zealand domestic market. Consistent with the approach of the experts who worked on the development of the Tokyo Anti-Dumping Code, New Zealand considers that this is a fair methodology which targets more precisely the dumping taking place.

4. In considering the use of the transaction-to-transaction methodology, it is important to note that the determination of dumping cannot be seen in isolation from the other elements of the *Anti-Dumping Agreement*. Aside from a determination as to whether dumping has occurred, there must also be an analysis of whether there is material injury to the domestic industry. If these elements are met, there must be a causal analysis of the effect of the dumped imports, and the effect of other factors, including the volume and prices of imports not sold at dumping prices, on the domestic industry. This process has relevance when assessing the validity of certain actions taken by a Member in applying a remedy to redress dumping. How dumping margins are calculated must be considered alongside the determination of material injury, the causation analysis, and the remedy that may or may not be applied – in other words, a holistic approach must be taken.

5. Article 2 of the *Anti-Dumping Agreement* provides the framework for the determination of the existence of dumping. Under Article 2.4.2 three methodologies may be used to calculate dumping margins: weighted average-to-weighted average; transaction-to-transaction; and weighted average-to-transaction. While curbs were placed on the situations in which the latter methodology might be used, these were not applied to the other two methodologies.

6. New Zealand has indicated in its submission that in using the transaction-to-transaction methodology, there are three primary methods of determining margins of dumping, one of which involves zeroing. The *Anti-Dumping Agreement* does not necessarily dictate that any one of the three

methods be used. In all three ways of using the transaction-to-transaction methodology, the non-dumped transactions are considered when completing the injury and causation analysis under Article 3.5 of the Agreement.

7. In New Zealand's view there should be symmetry between the manner in which the existence of dumping is established, the injury analysis under Article 3, the causal relationship between the dumping and material injury or threat thereof, and how the anti-dumping remedy is applied. Symmetry preserves fairness in the anti-dumping investigation as a whole. There is support for a symmetrical approach in the context of the *Anti-Dumping Agreement*. For example, Article 3 makes a distinction between the effect of dumped imports on prices, and the impact of non-dumped imports on producers. Article 9 makes it plain that anti-dumping duties are to be applied only to dumped imports, and at a level no greater than the margin of dumping.

8. When using any of the three primary methods within the transaction-to-transaction methodology, only those transactions found to be dumped are taken into account in the analysis of the volume and price effects and consequent economic impact on the domestic industry of dumped imports. Therefore, in order to preserve symmetry, the determination of the margin of dumping may be based only on those dumped transactions so taken into account. In the same way, symmetry is preserved by taking into account those transactions found to be non-dumped in the analysis of the volume and prices of imports not sold at dumping prices. This ensures "consistent treatment" and "even-handedness" in the anti-dumping investigation.

9. New Zealand wishes to highlight two aspects related to the determination of the existence of dumping: "fair comparison" under Article 2.4; and the interpretation of "product" under Article 2.1.

10. The calculation of dumping margins must meet the "fair comparison" requirement of Article 2.4. This requirement should be interpreted in a way which has regard to the context in which it is used. This context includes the specific rules relating to anti-dumping investigations and the nature of the methodologies used to determine the existence of dumping margins that are expressly allowed by the Agreement.

11. The calculation of dumping margins using the transaction-to-transaction methodology is inherently a "fair comparison" as it targets the dumping that is occurring while still taking into account the impact of dumped and non-dumped imports on the domestic industry. This is the case irrespective of the particular method used to calculate dumping margins under the transaction-to-transaction methodology. By contrast, the weighted average-to-weighted average methodology is not as targeted, may not reflect the range of dumping margins in an investigation, and may not fully address the material injury being caused or threatened by the dumped imports.

12. Turning to the interpretation of the term "product" in Article 2.1 - the Appellate Body in the *EC-Bed Linen* case took into account this term when interpreting the margins of dumping referred to in Article 2.4.2. It considered that margins of dumping should be established for the "product as a whole". In comparing the normal value and the export price on a transaction-to-transaction basis, the individual transactions where dumping has been found to exist are compared to determine whether dumping is considered to exist for the product under investigation. In this way the transaction-to-transaction methodology targets the importation of the product that is being dumped. It does not attempt to calculate dumping on the basis of the averaging of transactions for <u>all</u> sales of the product.

13. The interpretation of "product" in Article 2.1 of the *Anti-Dumping Agreement* has to be seen in light of the context of Article 2.4.2. The term "product", when used in relation to the transaction-to-transaction methodology, must reflect the nature of that methodology. That methodology selects individual transactions for analysis which are representative of the "product as a whole". Therefore, in relation to the transaction-to-transaction methodology, the "dumping of a product" referred to in

Article 2.1 means the dumping established through the selection of comparable individual transactions representing the product which is the subject of the anti-dumping investigation. Comparisons must be made at the same level of trade and at as nearly as possible the same time, with due allowance being made for differences affecting price comparability. Any of the three methods which may be used to calculate the dumping margins using a transaction-to-transaction methodology can be used to establish that dumping exists.

14. In conclusion, New Zealand considers that there is no textual support in the *Anti-Dumping Agreement* for an obligation to take non-dumped transactions into account in establishing the existence of dumping margins under Article 2.4.2 when using the transaction-to-transaction methodology. Indeed, it is permissible to interpret Article 2.4.2 as permitting a Member to take into account only dumped imports in establishing the existence of dumping margins under Article 2. Such permissible interpretations are specifically preserved under Article 17.6(ii) of the *Anti-Dumping Agreement*.

ANNEX D-8

ORAL STATEMENT OF THAILAND

16 November 2005

I. INTRODUCTION

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to present its views on this matter to the Panel today. In general, Thailand supports the arguments made by Canada in its first written submission.[1] Accordingly, Thailand will provide just a few additional views in today's proceeding.

II. THE ZEROING METHODOLOGY IS INCONSISTENT WITH ARTICLES 2.4 AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT

2. Thailand submits that the zeroing methodology is inconsistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement, regardless of what method is initially used to compare export prices to normal values. The fair comparison requirement of Article 2.4 imposes a fundamental obligation on the investigating authority to avoid biased and inaccurate determinations of dumping margins. The Appellate Body has confirmed that this obligation "informs all of Article 2,"[2] and hence includes Article 2.4.2 of the ADA.

3. Moreover, the Appellate Body has stated that "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping". ADA Article 2.4 thus prohibits the use of such an inherently distorted methodology to make a comparison between export price and normal value.

4. In addition, the Appellate Body has found that the reference to "margins of dumping" in Article 2.4.2 refers to the calculation of overall dumping margins for the product as a whole, rather than transaction- or model-specific comparisons. In the words of the Appellate Body in *US – Softwood Lumber V*, "the results of the multiple comparisons at the sub-group level are . . . not "margins of dumping" within the meaning of Article 2.4.2. . . . it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole."[3] The Appellate Body went on to find that the United States acted inconsistently with ADA Article 2.4.2 by "determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing".[4] In Thailand's view, the Appellate Body's finding neither differentiated between types of zeroing, nor suggested that the permissibility of zeroing was dependent on which methodology the United States used under Article 2.4.2 to make multiple comparisons at the sub-group level. Thus, the Appellate Body's reasoning applies equally in situations in which aggregate dumping margins are determined using the transaction-to-transaction comparison method.

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[1] First Written Submission of Canada, 22 June 2005.
[2] Appellate Body Report, *EC – Bed Linen*, para. 59.
[3] Appellate Body Report, *US – Softwood Lumber V*, para. 97 (emphasis in original).
[4] *Ibid.*, para. 117.

5. The United States attempts to portray Canada as seeking an "offset" to the results of individual comparisons "when aggregating the results of multiple transaction-to-transaction comparisons".[5] However, it is the United States, not Canada, that seeks to make such an offset by asserting the right to include the results of only some of the multiple comparisons in its aggregation. For other comparisons, the United States asserts the right to adjust the results of these comparisons so that the export price is no longer greater than the normal value for those comparisons. Therefore, the US practice constitutes an adjustment that is neither permitted under Article 2.4 of the ADA nor, by any definition of the term, can be considered fair.

6. The United States in effect argues that because the phrase "all comparable export transactions" in Article 2.4.2 does not refer to transaction-to-transaction comparisons, there is no prohibition on using the zeroing methodology in aggregating the results of such comparisons. However, it presumably would not be a fair comparison to make transaction-to-transaction comparisons and, in aggregating the results, simply to omit some of those results. If it would not be permissible simply to exclude these results, then *a fortiori* it is not permissible to exclude or adjust some of those results for the sole reason that the results of those comparisons are favourable to the exporters.

7. The text of Article VI of the GATT and of the ADA supports this position. First, the fair comparison requirement of Article 2.4 prohibits the use of zeroing following a transaction-to-transaction comparison.

8. Second, Article VI of the GATT defines dumping as the process by which "*products* of one country are introduced into the commerce of another country at less than the normal value of the products".[6] Article VI: and Article VI:2 consistently emphasize dumping is to be determined on the basis of a *product*, not selected transactions in a product.

9. Third, Article 2.1 of the ADA refers to a "product" and notes that a product is said to be dumped when "the export price of the product" is less than the comparable price "for the like product".

10. Thus, Article VI of the GATT 1994 and Article 2.1 of the ADA envisage the eventual determination of the margin of dumping for the product at issue by comparing an aggregate export price for that product with an aggregate normal value. This can be achieved by using different methodologies to determine margins at a sub-group level, be it an average-to-average or transaction-to-transaction methodology. But it cannot be achieved if some of the transactions at issue are not properly reflected in the determination of the overall export price and normal value. As the Appellate Body has stated, the investigating authority must aggregate *all* these 'intermediate values' in order to "establish margins of dumping for the product under investigation as a whole".[7]

11. By not fully taking into account all transaction-to-transaction comparisons in determining the aggregate dumping margin "in respect of such product", the United States imposes an anti-dumping duty greater in amount than the actual margin of dumping in respect of such product, calculated on the basis of all relevant transactions in that product.

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[5] First Written Submission of the United States, 7 July 2005 ("US First Submission"), para. 2.
[6] GATT 1994, Article VI:1 (emphasis added).
[7] Appellate Body Report, *US – Softwood Lumber V*, para. 97 (emphasis in original).

III. CONCLUSION

12. Thailand trusts that these views will assist the Panel in its consideration of these issues. Thailand will be happy to respond to any questions the Panel may have. Again, we thank you for this opportunity to present our views.

ANNEX D-9

CLOSING STATEMENT OF CANADA

17 November 2005

1. Mr. Chairman, Members of the Panel, Canada takes this opportunity to thank you once again for your time and diligent work on this case.

2. We also take this opportunity to revisit with you the one issue that is in dispute here: zeroing under the transaction-to-transaction methodology.

3. We are here because the United States, confronted with the need to bring itself into compliance, chose to zero again in the Section 129 Determination. This choice resulted in the United States acting in a manner inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

4. I would first like to set out what is meant by "zeroing" in the context of this dispute. I will then briefly comment on the discussion we have had surrounding Article 2.4 and finally turn to our arguments regarding Article 2.4.2.

5. So what is "zeroing"? In the original investigation, the United States calculated "margins of dumping" using a weighted-average-to-weighted-average methodology. The United States made multiple separate comparisons for various product sub-groups. It then aggregated the intermediate results of these multiple comparisons. However, before it did so, the United States changed to zero all negative results. This manipulation of the negative results – that is, the action of "zeroing" – inflated the "margins of dumping". And the United States was found to have acted inconsistently with its WTO obligations on this basis.

6. The United States did the same thing in its new transaction-to-transaction methodology. It made multiple comparisons on a transaction-to-transaction basis. And this method too produced intermediate values. The United States then aggregated these intermediate results – something that is no different from what it was required to do in its weighted-average-to-weighted-average methodology. Again, however, in doing so, the United States changed all negative results to zero.

7. With respect to the question of whether Article 2.4 prohibits zeroing under the transaction-to-transaction methodology, the United States claims, in rebuttal, that the fair comparison requirement in Article 2.4 is limited to adjustments affecting price comparability. However, the fair comparison requirement in the first sentence of Article 2.4 is a separate and distinct obligation from the requirement to ensure price comparability in the second sentence of the Article. As we have demonstrated, the US interpretation of the first sentence would render it redundant. And it also contradicts the Appellate Body's clear statements on this issue.

8. The United States also argues that zeroing must be permissible because, otherwise the targeted dumping methodology would produce a mathematically equivalent result to the result that would be obtained in the weighted-average-to-weighted-average methodology. The burden is on the United States to show that the targeted dumping provision could not have meaning or utility without zeroing. It has failed to satisfy this burden. It is not enough to say that US municipal law does not permit a different application. Canada, as well as the EC, Japan and Thailand have all provided hypothetical examples of how the targeted dumping provision could be applied in particular cases,

without zeroing.[1] Nothing the United States has said changes the fact that zeroing causes an "inherent bias" in the calculation of "margins of dumping," and is therefore prohibited by the "fair comparison" requirement of Article 2.4.

9. Turning now to Article 2.4.2., as you have heard, the United State dislikes the term "zeroing". Instead of acknowledging that some intermediate values are negative, the United States persists in referring to those negative values as "offsets" and argues it has no obligation to recognize these negative values and offset positive values. But this is just plainly wrong. An investigating authority has an obligation to determine a "margin of dumping" for the product as a whole. And that obligation includes respecting all the results, not changing the results of intermediate values to zero when they are aggregated.

10. I want to take you back to the text that is at issue in this dispute – Article 2.4.2, first sentence. This provision requires the United States to ensure that the results of its comparisons reflect the full value of the transactions analyzed (that is, the "product as a whole"). This obligation results from a textual interpretation of the provision, which we have set out in our submissions to you.[2]

11. The Appellate Body, when it interpreted the very same provision, upheld the original panel's findings on zeroing through the following reasoning. It first addressed the phrase "all comparable export transactions", which the United States suggested was the key to the Appellate Body's reasoning. The Appellate Body determined that the "zeroing" issue did not turn on this phrase.[3] Next, the Appellate Body interpreted the term "margins of dumping" and "dumping" in the first sentence of Article 2.4.2. The Appellate Body found that:[4]

- These terms relate to the product under investigation as a whole – not a type, model or category of that product;

- The requirement to calculate "margins of dumping" means that multiple comparisons at the sub-group level are only intermediate values – not "margins of dumping"; and

- The calculation of "margins of dumping" requires the aggregation of intermediate values at the sub-group level to arrive at a margin of dumping for the product as a whole.

12. The Appellate Body concluded that when aggregating these intermediate values, the United States was not permitted to change negative values to zero. The Appellate Body also found that Article 2.4.2 contains no express language that permits disregarding the true value of a comparison result when such values are aggregated to arrive at the "margin of dumping" for the product as a whole.[5] And the United States can point to no language in the text of Article 2.4.2, first sentence, that permits them to disregard the negative results of intermediate comparisons.

13. Let's come back again to what is before you in these implementation proceedings. The only question is whether, in the light of this legal reasoning and the recommendations and rulings of the DSB, did the United States bring its measure into conformity when it continued to zero under the transaction-to-transaction methodology. When an investigating authority aggregates the results of multiple comparisons it must fully reflect those results in coming to a "margin of dumping"? The United States did not do what it was required to do, when it treated negative results as zero.

[1] See Exhibit CDA-8.

[2] First Written Submission of Canada, at paras. 21-27. Second Written Submission of Canada, at paras 8-15.

[3] Appellate Body Report, at paras. 86-90.

[4] *Ibid*., at paras. 97-98.

[5] *Ibid*. at para. 100.

Therefore, its use of zeroing under the transaction-to-transaction methodology must be found to be inconsistent with Article 2.4.2.

14. The United States argues that nothing in the text of Article 2.4.2 prohibited it from doing so. Specifically, the United States argues that it may change the meaning of "dumping" and "margins of dumping" in the first sentence of Article 2.4.2 and ignore the Appellate Body's reasoning. Why? Because, according to the United States, the meaning of "margins of dumping" has now changed and has become the result of any of the tens of thousands of comparisons in its transaction-to-transaction methodology. The United States also claims that the Appellate Body's prior reasoning does not apply in this case because the reasoning is the result of the phrase "all comparable export transactions" and that phrase does not attach to the transaction-to-transaction methodology.

15. However, the meaning of the term "margins of dumping" – and that of "dumping" – cannot change in this single sentence. That is, these terms prohibit the United States from changing the underlying facts of a case. Negative intermediate comparison results are negative intermediate comparison results. They are not "margins of dumping". Negative results are <u>not</u> positive results, nor are they zero. To establish "margins of dumping" within the meaning of Article 2.4.2, the intermediate results of those multiple transaction-specific comparisons must be aggregated for the product as a whole. And the term "margins of dumping", as confirmed by the Appellate Body in this very case, prohibits the United States from changing negative values to "zero".

16. For all these reasons, there is no question that the United States has failed to comply with the DSB's rulings, and its recommendation to bring its measures into conformity with its WTO obligations. Canada therefore requests that this Panel find that the use of zeroing by the United States under the transaction-to-transaction methodology in the Section 129 Determination is inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

17. Mr. Chair, members of the Panel, we are appreciative of your continued attention and hard work on this dispute. And Canada thanks you.

ANNEX D-10

CLOSING STATEMENT OF THE UNITED STATES AT THE SUBSTANTIVE MEETING OF THE PANEL

17 November 2005

1. Mr. Chairman, Members of the Panel, in closing, the United States would like to thank you again for agreeing to serve on this Panel. We appreciate the time you have taken out of your busy schedules to address this important matter. We would also like to thank the members of the Secretariat for all of their hard work on this matter.

2. Our closing statement is very brief. In many respects, the comments that we offered after the third party session and in the further questions and answers this morning captured the two most important legal issues before you: the interpretation of "margins of dumping" and the nullification of the targeted dumping methodology.

3. With respect to the term "margins of dumping," you will recall that the United States' argument is that the term must be interpreted in its relevant context. That is precisely what the Appellate Body did in the underlying proceeding, interpreting it in an integrated manner with "all comparable export transactions." It is neither illogical nor surprising that, when interpreting that term in the context of comparisons between normal value and export price on a transaction-to-transaction basis, we arrive at a different interpretation. As we discussed yesterday, it is Canada's position that margins of dumping must be interpreted in the same way throughout the Anti-Dumping Agreement that does not withstand scrutiny – whether in the context of Article 9.3, where Canada's approach would offset one importer's dumping duties with another importer's non-dumped prices, Article 2.2 which we discussed this morning, or elsewhere in the AD Agreement.

4. With respect to the nullification of the targeted dumping methodology, we had a very interesting discussion of hypotheticals – with Christmas turkeys passing through, and Canada even suggesting that, in order to prevail, the United States must rebut "unstated assumptions" that Canada had not even thought of. If we can move from hypotheticals to reality for a moment, we should return to the text of the second sentence of Article 2.4.2. As mentioned earlier, that text, in a narrative form, is a classic "if – then" provision. It simply provides that *if* certain conditions exist, *then* authorities may make comparisons between normal value and export price on an average-to-transaction basis. It provides no exception to any other provision of the AD Agreement, nor does any other provision of the AD Agreement suggest that, when the conditions of the second sentence of Article 2.4.2 exist, the requirements of that other provision do not apply. Mr. Chairman, that is the reality of the agreement. The targeted dumping comparison methodology is just an exception to the average-to-average or transaction-to-transaction comparison methodologies. As the United States demonstrated in its Exhibit US-4, Canada's approach would nullify that exception by mathematically requiring the same result as from the average-to-average comparison methodology.

5. Because the United States has brought its measure into conformity with its Anti-Dumping Agreement obligations, the Panel should dismiss Canada's complaint.

6. Mr. Chairman, Members of the Panel, this concludes our closing statement. Thank you.

ANNEX E

QUESTIONS AND ANSWERS

ANNEX E-1

RESPONSES OF CANADA TO QUESTIONS TO THE PARTIES FOLLOWING THE SUBSTANTIVE MEETING OF THE PANEL

2 December 2005

QUESTIONS TO CANADA

1. In para. 9 of its closing statement, Canada asserts that "an investigating authority has an obligation to determine a "margin of dumping" for the product as a whole". Does the concept of "margin of dumping" have the same meaning throughout Article 2.4.2? Canada indicates in para. 15 of its closing statement that "the meaning of the term "margin of dumping" – and that of – "dumping" – cannot change in this single sentence" – presumably the first sentence of Article 2.4.2. Does Canada consider that the meaning of the term "margin of dumping" might differ between the first and second sentences of Article 2.4.2? Is the second sentence of Article 2.4.2 an exception to the requirement to determine a margin of dumping for a product as a whole? Please explain. Does Canada consider that the term "margin of dumping" has the same meaning throughout the whole AD Agreement?

1. Yes. The concept of "margin of dumping" has the same meaning throughout Article 2.4.2. The term "margins of dumping" appears only once in Article 2.4.2; and the Appellate Body has interpreted this term for the purpose of this provision. Although Article 2.4.2, second sentence, does not use the term "margins of dumping", an investigating authority that uses the weighted-average-to-transaction methodology calculates a margin of dumping within the meaning of this term in this provision.

2. The Appellate Body observed that Article VI:2 of *GATT 1994* defines a "margin of dumping" as "… the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the GATT 1994]."[1] It then concluded on that basis that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of the product."[2] The Appellate Body also found that Article 2.4.2 applies to the aggregation of the results of intermediate values.[3] Therefore, a margin of dumping under Article 2.4.2 must represent the aggregation of all intermediate values performed for the product as a whole, regardless of the calculation methodology chosen.

3. This definition of "margins of dumping", therefore, applies to both calculation methodologies set out in the first sentence of Article 2.4.2. The grammatical construction of the first sentence also confirms this interpretation. [4]

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[1] *United States – Final Dumping Determination on Softwood Lumber from* Canada, Report of the Appellate Body, WT/DS264/AB/R, adopted 31 August 2004, at para. 95. ["Appellate Body Report"]

[2] *Ibid.*, at para. 96.

[3] *Ibid.*, at para. 98.

[4] Canada observes that both the majority and the dissenting Member of the original panel indicated that the same rule should be applicable to the weighted-average-to-weighted-average and transaction-to-transaction methodologies. See *United States – Final Dumping Determination on Softwood Lumber from* Canada, Report of the Panel, WT/DS264/R, adopted 31 August 2004, at paras. 7.119, footnote 361; and 9.10. ["Panel Report"] Canada also recalls that in the original proceeding the United States argued that "there is no basis for finding a

4. Canada does not consider that the meaning of the term "margins of dumping" might differ between the first and second sentence of Article 2.4.2. Although the term "margins of dumping" does not actually appear in the second sentence of Article 2.4.2, Canada sees nothing in the context of the second sentence that would change the meaning of the term for the purposes of this provision. The provision is an exception but that "exception" does not equate to an exception from the requirement to determine a margin of dumping for the product as a whole.

5. It is unclear whether the term "margins of dumping" has the same meaning throughout the *Anti-Dumping Agreement*. Moreover, this Panel does not need to address the interpretation of "margins of dumping" in every of the many instances in which it is used to resolve Canada's claims concerning the use of zeroing under the transaction-to transaction methodology. The Appellate Body has made clear that this term has the same meaning in Articles 2.4.2, 6.10 and 9.4 of the *Anti-Dumping Agreement*. Canada is of the view that the Appellate Body's interpretation of "margins of dumping" in these provisions will necessarily inform the interpretation of this term in other provisions of the *Anti-Dumping Agreement*.

2. Does it necessarily follow from the argument that a margin of dumping must be found for a product as a whole that any export prices above the normal value must be fully reflected in the numerator of the dumping margin? Does not the inclusion of those export prices in the denominator, but not in the numerator, result in a margin of dumping for the product as a whole, given that the product as a whole is presumably the imported product whose prices are in question? Please explain?

6. Yes, it follows from the argument (*i.e.*, that "margins of dumping" in Article 2.4.2 must be calculated for a product as a whole) that export prices above normal value must be fully reflected in the numerator of the dumping margin calculation. The Appellate Body has already explained in this dispute that zeroing violates Article 2.4.2 precisely because it "… does not take into account the *entirety* of the *prices* of *some* export transactions".[5]

7. The inclusion of "export prices" (here Canada reads "export prices" to mean the "sales value" of the relevant export transactions), in the denominator of an *ad valorem* margin of dumping calculation does nothing to cure the distortion that zeroing causes in the numerator of the calculation, and therefore does not result in a margin of dumping for the product as a whole. It is for this reason that the Appellate Body disagreed with the United States "that the results of the comparisons in which the weighted average normal value is less than the weighted average export price could be excluded in calculating a margin of dumping for the product under investigation as a whole."[6]

8. By "zeroing" (*i.e.*, not taking the actual export price fully into account in the numerator), the United States failed in this case to calculate a margin of dumping for the product as a whole as required under Article 2.4.2. Instead, it calculated a margin of dumping that only partially reflects the actual sales of that product. A margin of dumping for a product as a whole is calculated on the basis of the investigated facts for a given period of time with the actual results of any comparisons left unchanged. The United States changed the facts under investigation by manipulating the results of its transaction-to-transaction comparisons before aggregating them. It changed the outcome of comparisons to certain export transactions (those transactions resulting in negative values) to a fictitious "zero". The United States therefore created a margin of dumping that did not reflect actual dumping represented in the investigated transactions for the product as a whole.

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different rule applicable to the two principal methodologies under Article 2.4.2" See Appellant's Submission of the United States, at para. 48 (Exhibit CDA 4).

[5] Appellate Body Report, at para. 101. (Emphasis in original.)

[6] *Ibid*., at para. 103.

3. Please comment on the US assertion that "it is not the case that a margin of dumping is established only when the price differences resulting from multiple transaction-to-transaction comparisons for a given product are aggregated" (US oral statement, para. 25).

9. This US assertion concerning the transaction-to-transaction methodology and Article VI:2 of the *GATT 1994* ignores the Appellate Body's reasoning in *US – Softwood Lumber V*. In paragraphs 93-96 of its report, the Appellate Body already relied on Article VI:2, which includes a reference to price difference, as useful context in finding that: "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product."[7] As the first sentence of Article VI:2 indicates, the provision concerns "dumping" and "the margin of dumping" for the product as a whole ("in respect of such product"). The Appellate Body went on to confirm that aggregation of intermediate values was required to calculate a margin for the product as a whole:

> [T]he results of the multiple comparisons at the sub-group level are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole. [8]

4. During the meeting with the parties, the United States suggested that if the term "margins of dumping" is understood to have the same meaning throughout the AD Agreement, including the Article 9 provisions concerning duty collection, this would result in non-dumped imports being set off against dumped imports at the duty collection phase. The United States noted that importers pay anti-dumping duties, not exporters. The United States argued that it would be unfair for an importer of dumped product, who has already benefited from a low export price, to further benefit from a credit determined on the basis of non-dumped imports by another importer. Please comment on this US argument, with particular focus on the prospective normal value duty collection system applied by Canada. In particular, how would Canada interpret the term "margins of dumping" at the duty collection phase, and would Canada provide offsets at that phase?

10. Canada has explained its position on the meaning of the term "margins of dumping" in response to Question 1 above. Canada has two additional general comments to make in response to the US argument.

11. First, this Panel does not need to determine the meaning of "margins of dumping" throughout the *Anti-Dumping Agreement* in order to resolve Canada's claims, set out in the Panel's terms of reference, concerning the consistency of zeroing under the transaction-to-transaction methodology in an original investigation.

12. Canada's arguments in this compliance proceeding relate to the interpretation of "margins of dumping" in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The Appellate Body has found that the ordinary meaning of "margins of dumping" in this sentence relates to the product as a whole.[9] Article 2.4.2, therefore, requires the aggregation of intermediate values to arrive at "margins of dumping" for each exporter or producer. The grammatical construction of this provision

[7] *Ibid*., at para. 96.
[8] *Ibid*., at para. 97.
[9] *Ibid*., at para. 96.

also confirms that "margins of dumping" cannot carry more than one meaning in the first sentence of Article 2.4.2.[10]

13. Second, Canada observes that a prospective normal value system does not employ the practice of zeroing. An investigating authority zeros when it changes intermediate values resulting from sub-group or transaction-to-transaction comparisons to zero before aggregating these values into a margin. A prospective normal value assessment system, however, assesses anti-dumping duties as imports occur through a comparison between the export price and the prospective normal value. An investigating authority assesses anti-dumping duties when the export price is lower than the weighted-average normal value, but applies no anti-dumping duties to non-dumped transactions when the opposite is true. It is not the same as the practice of zeroing, *i.e.*, the changing of the results of intermediate values prior to their aggregation into a margin of dumping. Moreover, Article 9.4(ii) of the *Anti-Dumping Agreement* specifically contemplates the use of such an assessment system. There is no language in Article 2.4.2 that allows an investigating authority to disregard the results of intermediate values. The prospective normal value assessment system is not the same as zeroing and the operation of such an assessment system cannot be relied on to support zeroing.

5. Please explain Canada's understanding (oral statement, para. 30) of how the targeted dumping methodology might operate in practice, without zeroing. For example, assume there is evidence of targeted dumping by a specific exporter into a specific region of a Member. Further assume that the relevant exporter also sells into other regions of the same Member, without dumping. How might the targeted dumping methodology apply in this case? How might any margins of dumping be calculated? What role would the non-dumped imports play in this process? Would anti-dumping duties only be applied on imports destined for the region for which there was evidence of targeted dumping? How would any resultant anti-dumping duties differ from those applicable as a result of a weighted average–to–weighted average comparison in respect of the totality of imports into the Member's territory? How would the resulting anti-dumping duties comport with the first sentence of Article 6.10 in the case in which the exporter had sales outside the targeted region?

14. Canada observes that the first sentence of this question implies that the targeted dumping methodology requires or depends on the use of zeroing for its meaning. There is no basis in the text of the *Anti-Dumping Agreement* for such an assumption.

15. It is the United States who asserts that zeroing is permitted because a broad prohibition on its use would render the targeted dumping methodology inutile. Therefore, the United States, and not Canada, has the burden of establishing this argument and it has not done so. Canada notes that: (1) the United States has offered no textual basis in Article 2.4.2 first sentence for its argument that the use of zeroing is permitted under the transaction-to transaction methodology; and (2) the United States has not responded to, let alone tried to refute, Canada's argument, that there is no language in this provision that permits an investigating authority to disregard the results of intermediate values – something it must do to zero.

16. Canada has never applied the targeted dumping methodology. A WTO Member could approach such an analysis in the manner outlined below – or by other possible means –depending on the facts of a given case.

17. After examining the export transactions, an investigating authority might identify a pattern of lower export prices for the particular region in question. If the targeted dumping was significant or the non-dumped transactions "masked" the targeted dumping, the investigating authority might conclude that the weighted-average-to-weighted-average and the transaction-to-transaction

[10] Oral Statement of Canada, at para. 14.

methodologies were not suitable to address the situation. It could then commence a targeted dumping analysis through the application of the weighted-average-to-transaction methodology.

18. Canada considers that an investigating authority would then have a choice. It could either continue its anti-dumping investigation into export transactions to other parts of the country or it could terminate the investigation outside the targeted region. As the example in the question provides that transactions to other regions were not dumped, Canada assumes that the investigating authority would terminate its investigation into the non-targeted regions and continue the investigation with respect to transactions to the targeted region only.

19. The investigating authority could then calculate the amount of dumping to the targeted region and place this value in the numerator. Canada is of the view that zeroing would not be permitted in the aggregation of any intermediate comparisons, just as it is not permitted in the two other methodologies found in the first sentence of Article 2.4.2. Similarly, the denominator would consist of the total value of dumped and non-dumped export transactions to the targeted region. The necessary injury analysis would also consider the same series or group of export transactions.

20. As this example resulted in the termination of the investigation outside the targeted region, anti-dumping duties would only be applied to imports into the targeted region. Were an investigating authority to use the targeted dumping methodology in this example, it necessarily would produce a different margin of dumping than the weighted-average-to-weighted average methodology which would be applied to all imports into a country because the latter methodology would necessarily examine a different data set (*i.e.*, all export transactions, rather than the subset of export transactions that make up transaction involving the targeted region).

21. Article 6.10 establishes the right of producers and exporters to obtain a margin of dumping that reflects their actual pricing behaviour. In the example at hand there would be only one duty applied – the duty applied to transactions into the targeted region as the investigation was terminated in the rest of the country or territory.

22. Having offered this hypothetical, which is consistent with the *Anti-Dumping Agreement*, Canada notes that the text of Article 6.10 does not necessarily restrict an investigating authority to calculating only a single margin of dumping.

23. Prior to the implementation of the Uruguay Round Agreements, investigating authorities frequently calculated and applied a single margin of dumping to all exports of the product from a particular country – without regard to whether one exporter dumped and another did not. Article 6.10 was intended to provide producers and exporters with the right to obtain a company-specific margin of dumping that reflects their actual pricing behaviour, rather than a margin of dumping that reflects the average pricing behaviour of several other exporters. As a consequence, this provision should not be interpreted to prevent investigating authorities from providing an exporter with *more than one* margin of dumping when this result would more accurately reflect the pricing behaviour of the exporter.

24. In *US – Softwood Lumber V*, the Appellate Body found that Article 6.10 refers to the "product" to mean the "product under investigation".[11] The Appellate Body's interpretation suggests that the term "margins of dumping" in this provision would apply to the product as a whole. As explained in the answer to Question 6, the "product as a whole" can refer to two different margins of dumping for the same exporter.

6. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a

[11] Appellate Body Report, at para. 94.

margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.

25. As was discussed at the oral hearing, Canada agrees that these three elements do not necessarily constitute all of the elements involved in the application of the weighted-average-to-transaction methodology in the second sentence of Article 2.4.2. Neither Canada nor the United States has practical experience with the application of this provision. As a consequence, the examples Canada has provided are hypothetical examples of how a WTO Member might apply the weighted-average-to-transaction methodology in these situations.

26. Take the purchaser situation first. An investigating authority would first examine the export transactions to determine whether a pattern of targeted dumping exists for a particular purchaser. If the investigating authority were to identify a pattern, it would have to provide an explanation as to why the targeted dumping could not be addressed through the use of the normal calculation methodologies (*e.g.*, the non-dumped transactions outside the targeted transactions would mask the targeted dumping to a purchaser using the other methodologies). An investigating authority could then conduct a weighted-average-to-transaction calculation and could apply that margin of dumping to the transactions involving that purchaser.

27. This procedure would result in two margins of dumping being applied to an exporter or producer who has some sales to the purchaser to which the targeted dumping methodology was applied and other sales to other purchasers that were not subject to the targeted dumping methodology.

28. As explained in Question 5, Canada is of the view that there is nothing in Article 6.10 that prevents the application of more than one margin of dumping to an exporter. Moreover, the calculation of more than one margin of dumping is also consistent with the Appellate Body's reasoning in *US – Softwood Lumber V*, which used the phrase "product as a whole" to refer to the universe of transactions that would be aggregated to arrive at a margin of dumping. The Appellate Body's decision does not limit an importer to one margin of dumping. Rather it requires that whenever a margin of dumping is established it must include the full amount of all intermediate values that are aggregated to calculate a margin of dumping.

29. Turning to the regional "type" of targeted dumping, the answers would be similar. The necessary pattern presumably would result from an investigating authority reviewing all transactions for the product in question and noticing (or having brought to its attention) something about sales into a particular region within the country or territory that leads it to enquire further into transactions involving that region. Assuming that enquiry leads to discovery of the pattern and the investigating authority coming to a view that it can provide sufficient explanation for its use of Article 2.4.2 second sentence, the investigating authority would then calculate a margin for the transactions that apply to the pattern. The investigating authority would then apply that margin of dumping to those transactions.

30. The final "type" of targeted dumping occurs during a particular time period (*e.g.*, seasonal dumping). An investigating authority would presumably identify the necessary pattern after reviewing all transactions for the product in question and noticing (or having brought to its attention) something about sales within a particular timeframe within the period of investigation that leads it to enquire further into transactions involving that time period. Assuming that the investigating authority discovers a pattern of export prices and that it can provide sufficient explanation for its use of Article 2.4.2 second sentence, the investigating authority would then calculate a margin for the transactions that fall within the pattern. The investigating authority would then apply that margin of dumping to those transactions.

31. This would not lead to the application of two margins of dumping as in the other two cases discussed above. This is because only one margin of dumping would be applied at any particular point in time. If an import occurred within the period of time of the year in which targeted dumping was found, then the targeted dumping rate would be applied. If the import occurred at a point in time that was outside the targeted dumping time period, then the rate calculated for the balance of the year would be applied. Thus this example shows just as the other two show, but in a different way, how the targeted dumping provision can work without the use of zeroing.

7. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:

> **(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports (occurring during the remainder of the period of investigation or outside the region).**

32. Canada considers that any "non-dumped" transactions that related to the purchaser (the example in CDA-8 provided that all of the sales were dumped) or within the three month period could not be ignored (*i.e.*, zeroed). Instead, Article 2.4.2 requires an investigating authority to aggregate the non-dumped and dumped transactions that fall within the "pattern of export prices" to arrive at a margin of dumping. Article 2.4.2, second sentence, does not concern zeroing. Instead it is meant to allow an investigating authority to examine targeted dumping that could be masked under one of the normal calculation methodologies.

33. An investigating authority could also continue its anti-dumping investigation into export transactions outside the targeted purchaser or time period. As Canada has explained, an investigating authority could use one of the normal calculation methodologies to determine whether dumping occurs outside the targeted subset of transactions. As a consequence, the export transactions that fell outside the weighted-average-to-transaction calculation would be taken into consideration in these calculations.

> **(b) What legal / textual justification might permit such "zeroing"?**

34. As explained in (a), the examples provided by Canada do not contemplate the "form of zeroing" mentioned in the question. There is no legal or textual justification for zeroing under any of the calculation methodologies set out in Article 2.4.2.

> **(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does Canada agree with this argument? Please explain.**

35. Canada considers that use of a "pattern of export prices" in the calculation of the weighted-average-to-transaction methodology would not constitute a form of "zeroing" because intermediate results are not changed to zero in the calculation of the margin of dumping.

> **(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does Canada agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

36. Canada reiterates that focusing on the "pattern of export prices" is not equivalent to zeroing.

(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does Canada agree? Please explain. If Canada does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?

37. Canada agrees that the margin of dumping could constitute the amount of dumping for that period expressed as a percentage of the export price. Canada does not have experience applying the targeted dumping provision. Consequently, Canada would like to consider the response provided by the EC before deciding whether to comment further on this question.

(f) Please show the operation of both hypothetical examples using numbers.

38. In Exhibit CDA-8, Canada provided two hypothetical examples, the first of which involved the largest US purchaser of softwood lumber receiving a special deal (*i.e.*, targeted dumping) for the product under investigation. In this hypothetical example exporters also sell lumber to other purchasers at prices that are higher (though still at dumped prices).

39. Canada considers that an investigating authority could establish a margin of dumping for the targeted dumping to the largest US purchaser using the weighted-average-to-transaction methodology. Canada, to provide the simplest explanation, will limit its discussion to the calculation of the margin of dumping for a single exporter. Assume an investigating authority would examine all export transactions (dumped and non-dumped) within the targeted pattern (sales to the largest US purchaser) to arrive at a separate margin of dumping of 21 per cent. At the same time, the investigating authority could examine the sales from this exporter to all other purchasers using the weighted-average-to-weighted-average methodology, which hypothetically might yield a separate margin of dumping of 6 per cent. The investigating authority would have calculated a much different margin of dumping (*e.g.*, perhaps 10 per cent) had the weighted-average-to-weighted-average methodology been applied to all export transactions. The margin of dumping for sales to the "targeted" purchaser would be 21 per cent. In contrast the margin of dumping for sales to all other purchasers would be 6 per cent.

40. The second hypothetical example of a seasonal product would operate in a similar manner. An investigating authority would first identify a pattern of lower export prices for an exporter for the three month period with the seasonal dumping. Assume the investigating authority established such a pattern for this exporter and then calculated a margin of dumping of 25 per cent for this three-month period. It could then use the weighted-average-to-weighted-average methodology or transaction-to-transaction methodology to analyze the sales for the remainder of the year and to calculate a margin of dumping for the exporter for the remaining nine months of the year (*e.g.*, again perhaps 10 per cent). The margin of dumping for the three month period of targeted dumping would be 25 per cent. Similarly, the margin of dumping would be 10 per cent for sales in the balance of the year.

(g) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?

41. Canada considers that investigating authorities would use all export transactions from the "pattern of export prices" in the calculation, regardless of whether these transactions were dumped or non-dumped. See Canada's answer to Questions 5 and 6.

8. The EC has stated that, in its view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written

Submission at para. 6). Does Canada agree. Could Canada explain what, in its view, is a normal value for purposes of a transaction-to-transaction analysis? How would Canada expect that an investigating authority would determine the appropriate normal values for comparison purposes in the context of such an analysis?

42. Canada does not share the EC's view. Canada understands that "normal value" is a synonym for home-market prices of the "like product" in the WTO Member exporting the product under investigation. Canada considers that a "normal value" can consist of individual home market sales for the purpose of the transaction-to-transaction methodology which envisages comparisons of individual normal values to export prices. Article 2.4.2 would then require the aggregation of these transaction-to-transaction comparisons to arrive at the margin of dumping for the product as a whole for each exporter or producer under investigation. An investigating authority may not zero when aggregating these intermediate values.

43. In this compliance proceeding, Canada did not challenge the US Department of Commerce's (USDOC) method of selecting normal value transactions (*i.e.*, home market sales) for comparison to individual export prices in its Section 129 Determination. As selection in the abstract is not at issue in this dispute, Canada has nothing further to add on this point.

9. Is the "weighted average normal value" referred to in the first sentence of Article 2.4.2 the same as the "normal value established on a weighted average basis" referred to in the second sentence of that provision?

44. Yes. Canada understands these terms to both refer to an aggregate weighted-average normal value for the "like product".

10. Under the approach proposed by New Zealand (para. 3.09 of New Zealand's written submission), a higher margin of dumping would be attributed to a lower volume of dumped imports, with the remaining imports being treated as non-dumped. Could this reduce the likelihood of dumped imports being shown to cause of material injury? If so, might this bring into question the assumption that failure to offset will necessarily lead to a less favourable result for exporters?

45. No. Although New Zealand's proposed application of the transaction-to-transaction methodology would reduce the "volume of dumped imports", it would also inflate the "magnitude of the margin of dumping" which contributes to material injury under Article 3.4 of the *Anti-Dumping Agreement*. As a consequence, the proposed application of this methodology might or might not produce more favourable results for exporters in an injury analysis depending on the facts of a given investigation.

11. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Canada reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

46. Canada considers that this question is no longer a "proposition" and there is nothing to "reconcile" given that the Appellate Body found that "[i]t is clear from the texts of [Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by an investigating authority."[12] The Appellate Body determined that the term "product" is used to refer to the "product under investigation" in a consistent manner in several provisions including Article VI:2 of the *GATT 1994* and Article 6.10 and 9.2 of the *Anti-*

[12] *Ibid.*, at para. 93.

Dumping Agreement.[13] The Appellate Body properly concluded that "product under investigation" referred to the "product" defined at the outset of an investigation.

47. The Appellate Body also relied on the Article VI:2 definition of a "margin of dumping" as the "price difference" to conclude that dumping margins must be calculated for the product as a whole. The Appellate Body observed that Article VI:2 defined "margin of dumping" quoting the text of this provision that provides that the "margin of dumping is the price difference".[14] It then determined that "'margins of dumping' refers to the magnitude of dumping … [and] can be found only for the product under investigation as a whole."[15] The Appellate Body has thus also connected the "price difference" to the "magnitude of dumping" for the entire product under investigation.

48. As a final matter, the Appellate Body uses the phrase "product as a whole" to refer to *all of the exports of the product under investigation* made by a particular exporter or producer (*i.e.*, the "universe" transactions that are aggregated to arrive at a margin of dumping). An exporter or producer may not sell all of the product-types of the product under investigation. A softwood lumber producer, for example, might not produce or export "finger-jointed flangestock". If the USDOC investigates that particular exporter, its export transactions might consist of all of the other product-types except "finger-jointed flangestock". It follows that as a practical matter the "product as a whole" for that exporter or producer will consist of the "universe" of the product-types it exports in the ordinary course of trade (except in the exceptional case of a targeted dumping investigation where it is further limited to a specific pattern of export transactions). It is these transactions and the comparisons developed on the basis of these transactions that have to be treated in a consistent manner or as a "whole" in the calculation of a margin of dumping.

QUESTIONS TO BOTH PARTIES

21. Would the parties please describe, in detail, how, under their respective anti-dumping systems, the processes of duty assessment and duty collection are carried out by their authorities.

49. Anti-dumping duties in Canada are assessed under the authority of the *Special Import Measures Act* (SIMA).

50. The Canada Border Services Agency (CBSA) is responsible for the assessment and collection of anti-dumping duties. The CBSA establishes prospective normal values for goods that are subject to an anti-dumping finding. Generally, all known exporters of subject goods are advised of the normal values applicable to their goods in advance of importation.

51. When goods are imported into Canada, the CBSA determines whether the goods are subject to an anti-dumping finding. If they are, the CBSA then determines whether the goods are priced at or above the applicable prospective normal value at the time of importation. If so, no anti-dumping duties are levied. However, when the export price is below the normal value, anti-dumping duties equal to the difference by which the normal value exceeds the export price are levied. When there are no prospective normal values in place at the time of importation for a particular exporter or product, the amount of anti-dumping duty payable will be based on a rate reflecting the use of facts available.

52. The initial assessment of anti-dumping duties is made within thirty days after the goods are imported into Canada. This assessment is considered final and conclusive unless the importer requests a re-determination of the anti-dumping duties, which may result in a refund of duties that were paid in excess of the correct amount payable. As well, the CBSA can undertake a re-

[13] *Ibid*., at para. 94.
[14] *Ibid*., 95.
[15] *Ibid*., at para. 96.

determination on its own initiative to adjust the amount of anti-dumping duties payable on the importation which can result in a request to the importer for the payment of additional duties or in a refund of duties paid.

53. Assessment reviews (also known as "re-investigations") are normally conducted by the CBSA on an annual basis in order to establish or update prospective normal values. Exporters may also request assessment reviews because of changes in market conditions that impact on normal values or for purposes of establishing normal values for new products. The new prospective normal values are made known to exporters at the conclusion of the review and are then applied to subsequent importations. Exporters are advised to notify the CBSA of substantial changes in domestic prices, market conditions and production costs that may affect the accuracy of their prospective normal values.

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

54. Canada considers that this panel does not need to resolve this question in order to determine whether Article 2.4.2 prohibits zeroing under the transaction-to-transaction methodology. However, Canada would like to make the following general comments concerning the "fair comparison" requirement.

55. Article 2.4 establishes a "fair comparison" requirement that prohibits zeroing under all of the calculation methodologies under Article 2.4.2 of the *Anti-Dumping Agreement*. The "fair comparison" requirement prohibits the practice of "zeroing" because it is inconsistent with the substantive rules and concepts concerning the calculation of "margins of dumping" under Article 2.4.2 of the *Anti-Dumping Agreement*. Although the recent panel in *US – Zeroing* did not determine whether the "fair comparison" requirement prohibits zeroing in investigations, it did find that:

> [T]o determine what is 'fair' under the *AD Agreement* in relation to the calculation of margins of dumping, we must take into account substantive rules and concepts in the *AD Agreement* relevant to the issue of the determination of margins of dumping. In particular, our analysis must take into account Article 2.4.2 of the *AD Agreement*, which is the only provision of the *AD Agreement* that specifically addresses the subject methods of determining margins of dumping. [16]

56. It follows that the concept of "fairness" relates to the substantive rules concerning the calculation of margins of dumping under the methodologies found in Article 2.4.2 – rules which prohibit zeroing when aggregating intermediate comparisons. Canada also believes that the practice of zeroing creates an "inherent bias" that is inconsistent with this provision.

23. The first sentence of Article 2.4.2 provides:

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

[16] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, Report of the Panel, WT/DS294/R, circulated 31 October 2005, at para. 7.262.

(a) Would the parties agree that what is referred to as the WA to WA methodology is set out in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" and what is referred to at the T to T methodology is set out in the phrase "by a comparison of normal value and export prices on a transaction to transaction basis"?

57. Canada agrees, and notes that the word "basis" is used in the descriptions of both methodologies.

(b) Could the parties comment on the significance, if any, of the difference between the use of the phrase "on the basis of a comparison" and "by a comparison".

58. There is no significance in the difference between the use of the phrase "on the basis of a comparison" and the phrase "by a comparison". As noted in the response to the first part of this question, Article 2.4.2 describes both methodologies using the word "basis". Both phrases therefore provide that a margin of dumping is to be established using either of the described methodologies. The original panel confirmed this interpretation: "Article 2.4.2 establishes that, subject to the requirement of a fair comparison, dumping margins should normally be established on the basis of a comparison between a weighted-average export price to a weighted-average normal value, or on the basis of a transaction-to-transaction comparison."[17] It also interpreted the term "basis", in this context, to refer to the "underlying support for a process" or using, as in "using" the weighted-average-to-weighted-average methodology or "using" the transaction-to-transaction methodology.[18]

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

59. Canada agrees with the Appellate Body that the use of zeroing is "inherently biased towards inflating the margin of dumping" because it changes negative intermediate comparison results to "zero". A "zeroed" result does not reflect the actual comparison made. The margin of dumping is therefore changed without justification, and inflated in relation to the calculation that would be performed under an unbiased comparison. Such an arbitrary inflation of the margin of dumping is not "fair" under any meaning of that term in Article 2.4.

25. Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"? Is the "fair comparison" requirement limited in scope to what is addressed in paragraph 4? Please explain.

60- Article 2.4.2 begins with the introductory clause "[s]ubject to the provisions governing a fair comparison in paragraph 4". The ordinary meaning of "[s]ubject to" in this context is "… **2.** Foll. By *to:* under the control or influence of, subordinate to… ".[19] In addition, the plural of "provisions" indicates that the balance of this clause refers not just to the "fair comparison" requirement in the first sentence, but also to all the requirements found in this provision (*e.g.*, the requirement to ensure price comparability).

[17] Panel Report, at para. 7.199.
[18] *Ibid*., at para. 7.210, footnote 355.
[19] L. Brown, Ed., *The New Shorter Oxford English Dictionary*, Vol. II (Oxford: The Clarendon Press, 1993), at 3118. (Exhibit CDA-9)

61. The phrase "subject to the provisions governing fair comparison in paragraph 4" modifies the first sentence of Article 2.4.2 setting out the relationship between these two provisions. As a consequence, the first sentence of Article 2.4.2 cannot be interpreted to impose a limitation on the scope of Article 2.4 of the *Anti-Dumping Agreement*.

26. In the second sentence of Article 5.8, does the term "margin of dumping" relate to the margin of dumping calculated for each exporter, or to a margin of dumping calculated for the country as a whole?

62. As explained in Canada's response to Question 1, these compliance proceedings concern the interpretation of the term "margins of dumping" in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. Therefore, the Panel need not address the interpretation of the second sentence of Article 5.8 to resolve the issue that is before it. Canada implemented the provisions of Article 5.8 in Canadian law to mean "margin of dumping" for a country. However, Canada notes that the Appellate Body has recently found that "margin of dumping" within the meaning of Article 5.8 refers to the margins of dumping of an individual exporter.[20] Canada is reviewing the Appellate Body report in question, in the context of the facts of that case, and will be reflecting on its implications, if any, for Canadian anti-dumping duty law.

27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?

63. Yes. Canada considers that a margin of dumping can be calculated for a single export transaction when an investigation involves only one transaction (*i.e.*, the "universe" of all export transactions during the period of investigation is this one transaction). The "cases" described above are situations where this might occur. Canada submits that in these rare circumstances, a lone transaction may represent the only comparison that will produce an intermediate value and thus the comparison derived from this transaction will represent the product as a whole upon which a margin of dumping can be calculated. Article 2.4.2 makes clear, however, that where there is more than a single export transaction, all the export transactions must be aggregated to arrive at "margins of dumping" for an exporter or producer.

28. Could the parties indicate whether, in their view, in a targeted dumping analysis under the second sentence of Article 2.4.2, an investigating authority may utilize a comparison method other than one in which "a normal value established on a weighted average basis may be compared to prices of individual export transactions".

64. Article 2.4.2 permits an investigating authority to apply a targeted dumping analysis against a pattern of export transactions that relate to a particular region, time period or purchaser. Although Canada has never applied this calculation methodology, Canada submits that investigating authorities might also be able to examine the remaining non-targeted export transactions (*i.e.*, the transactions that are not part of the "pattern") using one of the two normal calculation methodologies (*i.e.*, weighted-average-to-weighted-average or transaction-to-transaction).

[20] *Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*," WT/DS295/AB/R, circulated 29 November 2005, at in particular, paras. 216-218.

29. Could the parties address the argument of the EC that if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping methodology redundant, this is sufficient to demonstrate that the United States' argument in this regard is without merit? Specifically, is it enough to posit that such a methodology could be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members?

65. Canada understands the United States' "mathematical equivalence" argument to be that "zeroing" must be permitted under the targeted dumping methodology, otherwise the methodology is redundant due to its mathematical equivalence in the example provided by the United States. Canada notes that any use or implementation of the targeted dumping methodology is not at issue in this proceeding and is only relevant to Canada's claim under Article 2.4 of the *Anti-Dumping Agreement*.

66. Canada agrees with the EC that the US "mathematical equivalence" argument fails if the targeted dumping methodology can be applied in a different manner than that suggested by the United States in its written submissions (something that US regulations achieve in and of themselves).

67. Canada observes that the second question seems to ask whether the municipal practice of some Members should be used to interpret the provisions of the *Anti-Dumping Agreement.* As Canada explained in oral argument, Article 18.4 provides that Members are required to ensure the conformity of their "laws, regulations and administrative procedures" with the provisions of the *Anti-Dumping Agreement* – not the other way around.

30. Article 2.1 refers to "the export price of the product exported" and "the comparable price ... for the like product" in the home market of the exporting Member. Do these references to "price" relate to the price of the product as a whole, i.e. an aggregated or average price? Please explain. Do the references to "prices" in the transaction-to-transaction and weighted average-to-transaction provisions of Article 2.4.2 relate to the product as a whole? Please explain.

68. Yes, the references in Article 2.1 to "price" should be interpreted to relate to the price of the product as a whole because the references are used in a description of the concept of "dumping", which is defined in relation to a product as a whole.[21] In contrast, the references to "prices" in Article 2.4.2, first sentence, do not relate to the price of the product as a whole because the weighted-average-to-weighted-average and transaction-to-transaction methodologies contemplate multiple comparisons of export prices to "normal value". A Member, however, must still aggregate the results of such multiple comparisons to establish "margins of dumping" within the meaning of Article 2.4.2, first sentence, which is for the product as a whole.[22]

TO ALL PARTIES AND THIRD PARTIES

46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2 permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

[21] Appellate Body Report, at para. 93 ("It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority.").

[22] *Ibid*., at para. 96 ("As with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.").

69. Article 2.2 provides that investigating authorities calculate a "margin of dumping" through a comparison to either a constructed normal value or sales to a third country where there are few or no home-market sales of the "like product" in the ordinary course of trade. If an investigating authority established that there were few or no sales in the ordinary course of trade then this provision would permit it to replace all of these sales with a constructed normal value or sales of a "like product" from a third country.

70. Canada understands that most investigating authorities, including CBSA, examine whether there are sufficient "like product" sales in the ordinary course of trade for a particular sub-group or model when these authorities conduct a weighted-average-to-weighted-average calculation. Canada does not believe that this practice is problematic – investigating authorities are simply conducting a more detailed analysis to ensure that the "margin of dumping" is calculated in a more accurate manner. If investigating authorities failed to conduct such an analysis it could lead to less accurate sub-group calculations with the weighted-average export price being compared to a weighted-average normal value that is comprised of a handful of normal value transactions. The Appellate Body found that the general language of Article 2.4.2 permitted the use of "multiple averaging" or "model matching" provided that the intermediate values are properly aggregated. Article 2.2 also uses general language that should be interpreted in a permissive manner. Article 2.2 provides a conceptual description of the practice of using constructed normal values or third country sales. It should not be interpreted to prohibit a more detailed form of this analysis that increases the accuracy of the calculation methodology.

47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:

(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")

71. To the extent that the EC has argued that an exporter could be given one margin of dumping for transactions covered by the targeted dumping analysis and another margin of dumping for transactions not subject to this analysis; Canada agrees that this is one potential method of applying the targeted dumping methodology.

72. As Canada explained in its response to Question 5, Article 6.10 does not restrict investigating authorities to calculating only one margin of dumping.

(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).

73. Article 9.2 provides that the "… anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources …". Article 9.2 prohibits investigating authorities from discrimination in the *collection* of anti-dumping duties – whether between exporters or exporters from different countries (or "sources"). An

investigating authority, for example, that calculates identical margins of dumping for several exporters is not permitted to discriminate between these exporters and collect a greater amount from some of them.

74. The EC's application of a disaggregated analysis relates to the *calculation* of the margin of dumping, which occurs before the *collection* of these anti-dumping duties. If an investigating authority calculates a margin of dumping under the targeted dumping methodology for a specific region, time period, or purchaser(s), the collection of these amounts would not constitute discrimination – whether or not these amounts differed from other margins of dumping. An investigating authority does not discriminate in the collection of anti-dumping duties if it applies the properly calculated amount of a margin of dumping.

75. As the EC may clarify what it said in answer to the question put to it at the hearing, Canada would like to consider the response provided by the EC before deciding whether to comment further on this question.

48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?

76. Article 2.4.2 expressly contemplates different degrees of accuracy resulting from the use of either the weighted-average-to-weighted-average or transaction-to-transaction methodology. However, contrary to what New Zealand argues, the difference in "accuracy" between the two methodologies resides in the comparisons made (comparisons of weighted averages versus comparisons of transaction-specific values) rather than in a so-called "targeting of dumped goods". Zeroing is prohibited under either methodology because it manipulates intermediate results in a manner which violates Article 2.4.2.

77. Moreover, the "fair comparison" obligation under Article 2.4 stands on its own regardless of the methodology employed under Article 2.4.2. A "fair" comparison is one that is "just, unbiased, equitable, impartial, legitimate, in accordance with the rules or standards".[23] Either methodology may produce results to a different degree of accuracy (again, in terms of the comparisons made), but either methodology must involve a "fair comparison". A comparison is not "fair" when it is inaccurate and the inaccuracy is the result of an arbitrary manipulation of intermediate values or results. Zeroing under even the most "accurate" of methodologies violates the obligation to make a "fair comparison" under Article 2.4.

78. In this case, therefore, it is irrelevant which methodology generates the most accurate results. What is relevant is that, prior to aggregating the intermediate results of its multiple comparisons, the United States once again impermissibly changed some of those results from their actual negative value to a fictitious "zero".

49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).

79. See Canada's answer to Question 8.

50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article

[23] See Second Written Submission of Canada, at para. 30; Exhibit CDA-5.

2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.

80. Canada has not contested the USDOC's selection of the transaction-to-transaction methodology in the Section 129 Determination.[24] Canada considers that Article 2.4.2 normally provides investigating authorities calculating "margins of dumping" with the discretion to choose the weighted-average-to-weighted-average or transaction-to-transaction calculation methodologies, subject to the "fair comparison" requirement.

51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?

81. The issue before the Panel in this case concerns the US determination of dumping and establishment of margins of dumping using the transaction-to-transaction methodology and "zeroing" the intermediate results of transaction-to-transaction comparisons. The Appellate Body in this case has interpreted the term "margins of dumping" in Article 2.4.2 as relating to the "product as a whole". In doing so, it referred to Article 9.2 concerning the imposition and collection of anti-dumping duties. The Appellate Body also upheld the original panel's conclusion that the determination of the existence of margins of dumping "on the basis of a methodology incorporating the practice of 'zeroing'" violates Article 2.4.2. The proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different has no implications for the interpretation of "margins of dumping" in Article 2.4.2 for the purpose of resolving the dispute in this case.

[24] As US law expresses a clear preference for the use of the weighted-average-to-weighted-average calculation methodology, the Canadian respondents have challenged the selection of the transaction-to-transaction methodology under US law.

ANNEX E-2

ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS OF 18 NOVEMBER

2 December 2005

Table of Reports

Short Form	**Full Citation**
EC – Cotton Yarn	Committee on Anti-Dumping Practices, Panel Report, *EC – Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definite Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R (circulated 29 November 2005)
US – Atlantic Salmon	GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway*, ADP/87, adopted 27 April 1994
US – Corrosion-Resistant Steel AD Sunset Review (Panel)	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R
US – "Zeroing" (Panel) (EC Complainant)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, (circulated 31 October 2005)
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Softwood Lumber (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
US – Softwood Lumber (AB)	Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004

Questions For Parties and Third Parties

To the United States:

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

1. The first sentence of Article 2.4 does not mean something over and above taking into account differences in comparability, as set out in the second sentence and what comes thereafter. The first sentence of Article 2.4 states a general obligation for Members to make appropriate adjustments to ensure that export prices and normal values are comparable before margin calculations are undertaken. The first sentence cannot be read separately from the remainder of Article 2.4, as the remainder of Article 2.4 illustrates the types of adjustments that a Member must make in pursuit of price comparability. This list, however, is not exhaustive. The language of the second through fifth sentences of Article 2.4 does not preclude additional adjustments outside of those described. This is evident, for example, from the use of the word "including" in the third sentence. The word "including" signals that the list of "differences" that follows is not an exhaustive list of all conceivable "differences which affect price comparability" for which due allowance must be made.

2. Article 2.4 of the AD Agreement is mandatory. It requires Members to make a fair comparison and instructs them on how to do it. Thus it begins with the following statements:

> A fair comparison shall be made between the export price and the normal value. *This comparison* shall be made at the same level of trade. . . ." (Emphasis added).

The phrase "this comparison" in the second sentence of Article 2.4 establishes a link to the first sentence. It makes clear that the criteria defined in the second and subsequent sentences are an elaboration on what constitutes a "fair comparison," as initially identified in the first sentence. It is clear from the use of the term "this comparison" that the second through fifth sentences illustrate what makes the comparison referred to in the first sentence a "fair" one.

3. Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2, which refers to "the provisions governing fair comparison in paragraph 4". The plural term "provisions," as well as the reference to "paragraph 4," rather than "the first sentence of paragraph 4", make clear that "the provisions governing fair comparison" are the provisions set forth in the entirety of Article 2.4.

4. In sum, there is no basis for reading the first sentence in Article 2.4 as meaning something over and above taking into account differences in comparability, as set forth in the second and subsequent sentences. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market. By requiring due allowance for all factors affecting price comparability, Article 2.4 assures that the prices used to establish dumping in Article 2.1 are "comparable".

5. With respect to the second part of the Panel's question, the first sentence in Article 2.4 need not mean something over and above the second and subsequent sentences for it to be meaningful. This is evident from the illustrative nature of the second and subsequent sentences. Article 2.4 recognizes that a Member may make due allowance for differences other than those expressly identified. The first sentence makes clear that any such due allowances should be made to the end of achieving a fair comparison between export price and normal value. It thus provides context for the rest of the paragraph.

13. Please comment on Canada's argument (oral statement, para. 16) that, if transaction-to-transaction comparisons were to constitute "margins of dumping", DOC would have had to assess whether each transaction-specific "margin of dumping" was *de minimis* in accordance with Article 5.8 of the *AD Agreement.*

6. Canada's argument rests on the assumption that the term "margin of dumping" must have the same meaning throughout the AD Agreement. The United States has pointed out that the term "margin of dumping" must be interpreted in light of its context.[1] The term "margin of dumping" occurs at various places throughout the AD Agreement and the context (and therefore the interpretation) is not uniform across all of the various uses.

7. The term "margin of dumping" as used in Article 5.8 has a different context from the term "margins of dumping" as used in the part of Article 2.4.2 that refers to transaction-to-transaction comparisons. Article 5.8 requires a Member to determine an overall margin of dumping for each exporter or producer subject to an anti-dumping duty investigation. A Member must determine whether the overall margin of dumping for an exporter or producer is *de minimis*. If the margin is *de minimis*, the Member must terminate the anti-dumping duty investigation with respect to that exporter or producer. Because investigations occur with respect to exporters' and producers' sales of the product under consideration collectively, and not simply with respect to individual transactions, Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer.

8. This interpretation has been confirmed by the Appellate Body in *Mexico – Rice*.[2] There, in a final anti-dumping duty determination, Mexico determined that the margin of dumping for each of two US producers was zero per cent. However, after that final determination, Mexico issued an order establishing the anti-dumping duties that included the two US producers. As Mexico had failed to terminate the investigation with respect to these two producers, the Appellate Body found that it acted inconsistently with Article 5.8.[3]

9. The Appellate Body specifically rejected Mexico's argument that the use of the term "margin of dumping" in Article 3.3 provided relevant context for interpreting the same term in Article 5.8.[4] Article 3.3 allows for the cumulation of imports from countries simultaneously subject to an anti-dumping duty investigation to assess injury, if "the margin of dumping established in relation to the imports from each country" is greater than *de minimis*. The Appellate Body noted that the phrase "margin of dumping established in relation to the imports from each country" is missing from Article 5.8.[5] In rejecting Mexico's contextual argument based on Article 3.3, the Appellate Body implicitly accepted that "margin of dumping" need not be interpreted in the same way throughout the AD Agreement and that the context in which the term "margin of dumping" is used is relevant to determine its meaning.

14. The US argues that an interpretation of Article 2.4 that requires a general offset obligation would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 a nullity (US second written submission, para. 24). Would a generalized application of Canada's interpretation of the phrase "margins of dumping" in Article 2.4.2 also render the average-to-transaction methodology redundant? Is the US argument confined to Canada's Article 2.4 claim, or does it also apply in the context of Canada's Article 2.4.2 claim? Please explain.

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[1] United States – Final Dumping Determination on Softwood Lumber from Canada, recourse to Article 21.5 of the DSU by Canada (WT/DS264), Second Written Submission of the United States, paras. 27-28 (25 July 2005) ("United States Second Written Submission (21.5)").

[2] *Mexico – Rice (AB)*, paras. 216, 217, 221.

[3] *Mexico – Rice (AB)*, para. 219.

[4] *Mexico – Rice (AB)*, para. 220.

[5] *Mexico – Rice (AB)*, para. 220.

10. A generalized application of Canada's interpretation of the phrase "margins of dumping" in Article 2.4.2 would render the average-to-transaction methodology redundant with the average-to-average methodology. For this reason, in addition to the other reasons set forth in the US submissions and statements, Canada's interpretation of Article 2.4.2 is incorrect.

11. Canada understands the phrase "margins of dumping" to have the same meaning throughout Article 2.4.2, regardless of context. In Canada's view, "margins of dumping" as used in Article 2.4.2 always refers to margins of dumping for the product under consideration as a whole. Therefore, according to this view, in establishing a margin of dumping, an investigating authority must always aggregate the results of *all* export-price-to-normal-value comparisons, even to the extent that the results of particular comparisons indicate an absence of dumping. Canada's argument makes no distinctions according to whether those comparisons were made on an average-to-average, transaction-to-transaction, or average-to-transaction basis.

12. Since Canada's understanding of the phrase "margins of dumping" does not differentiate according to comparison methodology, its Article 2.4.2 argument leads to the same result as its Article 2.4 argument. Under both arguments, the aggregation of comparison results must include offsets regardless of the comparison methodology used. Thus, as with Canada's Article 2.4 argument, its Article 2.4.2 argument would impermissibly render the average-to-transaction methodology redundant with the average-to-average methodology.

13. Moreover, as discussed in response to Questions 18 and 47, Canada also has failed to establish any reasonable interpretation of the second sentence of Article 2.4.2 under which "margins of dumping" has the same meaning as it has in the context of the average-to-average provision in the first sentence, *and* the result is distinct from that achieved using the average-to-average comparison methodology. For this reason, too, the US argument regarding Canada's effective nullification of the second sentence of Article 2.4.2 is not limited to Canada's Article 2.4 claim, but also applies to Canada's Article 2.4.2 claim.

15. At para. 64 of its written submission, the EC suggests that zeroing might be permissible in certain circumstances in the context of a targeted dumping analysis. In particular, the EC argues that the zeroing could take the form of an allowance for a difference affecting price comparability. Please comment on this EC argument.

14. The EC's reading of Article 2.4.2 finds no support in the text of that provision or in the "fair comparison" requirement of Article 2.4. The EC essentially confuses two concepts that have nothing to do with one another: (1) differences in prices in the export market between regions, purchasers and time-periods; and (2) differences which affect price comparability between export price and normal value.

15. The EC starts with the proposition that the AD Agreement does not say that Members cannot "zero" when using the targeted dumping comparison methodology. It then contends that it is appropriate to make an adjustment to export price in a targeted dumping situation because whatever difference exists in the export market that justifies the targeted dumping methodology also affects the price comparability between the export market and the home market. In other words, the EC theorizes, without any basis, that differences *within the export market* among purchasers, regions, or time periods equate to differences *between export prices and normal values* that affect price comparability within the meaning of Article 2.4.

16. The EC's theory simply cannot be reconciled with the terms of the second sentence of Article 2.4.2. As stated therein, the targeted dumping methodology may be applicable when there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ". It has nothing to do with differences between export prices and normal values. To get

around the inconvenient fact that the second sentence of Article 2.4.2 refers to differences within a single importing country market rather than to differences between two markets (the exporting and importing countries), the EC avoids reference to "different purchasers, regions or time periods" and refers instead to hypothetical different "markets".[6] In other words, to establish a link to the fair comparison in Article 2.4, the EC discusses targeted dumping in terms of differences between markets, even though that is not the language actually used in the second sentence of Article 2.4.2.

17. If, instead of referring to different "markets," the EC's argument referred to the actual text in the second sentence of Article 2.4.2, it could be paraphrased as follows:

> Assume that export sales only occurred at the very beginning and the very end of the time period and, therefore, the targeted dumping methodology is justified because of time period differences. Because the dumped sales that occurred at the end of the period cannot be averaged with the non-dumped sales that occurred at the beginning of the period, there is a difference that affects price comparability between those beginning-of-the-period-export-sales and the normal value sales (made throughout the period), that justifies an adjustment to those export prices to "zero" any negative dumping amount.

18. Alternatively, the EC's argument could be framed in terms of export prices which differ significantly among different regions. In that case, instead of "beginning-of-the-period-export-sales" one could substitute "non-dumped sales to Germany," and instead of "end-of-the-period-export-sales" one could substitute "dumped sales to Spain". Again, the EC would argue that the differences between regions of the export market that justify the use of the targeting methodology somehow create a difference that affects price comparability between the export sales and the normal value sales.

19. This analysis makes little sense and finds no support in the text of Article 2.4.2 or Article 2.4. The targeted dumping methodology is an exception to the comparison methodologies in the first sentence of Article 2.4.2, but is not an exception to the fair comparison requirement of Article 2.4. Therefore, if "zeroing" is considered "unfair," without language in the AD Agreement actually permitting what the EC argues, it would be "unfair" and equally impermissible to "zero" when using the targeted dumping methodology.

20. The EC provided much the same argument before the Panel in *US – Zeroing (EC Complainant)* and the panel, in its recently circulated report, found that the argument "reflects a misinterpretation of the very concept of price comparability as used in Article 2.4 of the AD Agreement".[7] The panel rejected the EC's argument, stating that "the existence of differences in prices in the export market between regions, purchasers and time-periods is conceptually wholly irrelevant to, and outside the scope of, Article 2.4 because such differences have nothing to do with whether or not export sales and domestic sales are comparable with regard to factors such as level of trade, taxation, quantities, etc.".[8]

16. Please comment on Canada's argument that "[t]he targeted dumping methodology, ... by definition, would not be applied to all export transactions" (oral statement, para. 29). Is this statement true in the context of US law?

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[6] United States – Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada (WT/DS264), Third Party Submission by the European Communities, paras. 64-67 (14 July 2005) ("EC Third Party Submission").

[7] *US – "Zeroing" (Panel) (EC Complainant)*, para. 7.279.

[8] *US – "Zeroing" (Panel) (EC Complainant)*, paras. 7.279 and 7.280.

21. Commerce's regulation implementing the targeted dumping methodology provides that if targeted dumping is found, Commerce will normally "limit the application of the average-to-transaction method" to those sales that make up the pricing pattern.[9] This does not, however, mean that other export sales are ignored. As Commerce explained in the Preamble to its proposed regulations, "the average-to-average method would [still] be applied to the remaining sales".[10] (There were no changes relevant to this discussion in Commerce's final regulations.)

22. By applying the average-to-transaction methodology to the sales that make up the targeted dumping pattern, and the average-to-average methodology to all other sales, all of the sales made during the period of investigation would be included in the dumping analysis. Moreover, even with this combination of comparison methodologies, if offsets were required for non-dumped comparisons, the result would be the same as if all comparisons were made using the average-to-average comparison methodology with offsets for non-dumped sales. Thus, regardless of whether the average-to-transaction methodology is applied to some or all export transactions, if Canada's interpretation of "margins of dumping" in Article 2.4.2 is accepted as requiring a margin of dumping for the product as a whole, with offsets for non-dumped comparisons, then the second sentence of Article 2.4.2 would be rendered without effect.

23. In this regard it should be noted that the second sentence of Article 2.4.2 merely describes the situation in which an average-to-transaction methodology may be used. It does not establish a set of circumstances under which a Member may select a subset of export transactions that indicate the greatest amount of dumping and base the entire anti-dumping investigation on that subset. There are other provisions of the AD Agreement that explicitly provide for Members to consider only a subset of export transactions.

24. Article 6.10, for example, addresses the circumstances in which a Member may so limit its examination. Article 6.10 provides that "where the number of exporters, producers, importers or types of products involved is so large" a Member may limit its examination based on a statistically valid sample, or the largest percentage of volume of exports that can be reasonably investigated. Nothing in the text of the second sentence of Article 2.4.2 indicates that a Member may conduct an entire anti-dumping investigation based on only a subset of export transactions, as Canada's argument seems to suggest.

17. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.

25. To date, the United States has not applied the targeted dumping methodology and cannot speak from actual experience. Nonetheless, the second sentence of Article 2.4.2 merely establishes a condition precedent that, if met, would lead to the application of the average-to-transaction comparison methodology. That is, if the investigating authorities find a pattern of export prices that differ significantly with respect to purchasers, regions or time periods, and if such differences cannot be taken into account by using the comparison methodologies of the first sentence of Article 2.4.2, then the investigating authorities may use the average-to-transaction comparison methodology.

26. With respect to Commerce's potential application of the targeted dumping methodology, Commerce's regulations require it to analyze the evidence submitted during the course of the

[9] 19 CFR _ 351.414(f)(2).

[10] Anti-Dumping Duties; Countervailing Duties, 61 Fed. Reg. 7308, 7350 (27 February 1996) (Notice of Proposed Rulemaking and Request for Public Comments) (Exhibit US-5).

investigation, and determine whether a targeted pattern of export prices exists.[11] As anticipated by the text of the AD Agreement, Commerce might find that prices have differed significantly over a certain period of time, that the price of certain products exported to a particular region differ significantly from other regions, or that certain purchasers pay prices that differ significantly from other purchasers. In the preamble to the regulations, Commerce states, "We do not believe that targeted dumping exists where the price differences are simply random or spurious price fluctuations. In our view, targeting means that, within the industry under consideration, the price differences suggest a meaningful pattern."[12] Accordingly, Commerce's regulations presently require the use of standard and appropriate statistical techniques to determine the existence of targeted dumping.[13]

27. Next, having found a pattern, Commerce would determine whether that pattern could be taken into account using either the average-to-average or transaction-to-transaction methodologies.[14] If Commerce determined that the pattern could not be taken into account using either of those comparison methodologies, it would explain the basis for that determination.[15] Commerce would then apply the average-to-transaction comparison methodology to those transactions that constitute the targeted dumping.[16] Commerce would apply the average-to-average comparison methodology to all other transactions occurring during the period of investigation, and aggregate all of the results to determine a single weighted average margin of dumping for each exporter or producer.[17]

28. If offsets were required for non-dumped comparisons under this combination of comparison methodologies, the result would be the same as if all comparisons were made using the average-to-average comparison methodology with offsets. Thus, the second sentence of Article 2.4.2 would still be rendered without effect, as the average-to-transaction methodology provided for in that sentence would be redundant with the average-to-average methodology provided for in the first sentence.

29. Moreover, the result would be the same even if the second sentence of Article 2.4.2 were read as requiring application of the average-to-transaction comparison methodology to all export transactions occurring during the period of investigation if targeted dumping exists. In that case, if offsets were required, all of the sales made during the period of investigation would ultimately be included in the final calculation of the margin of dumping, and the results of the application of the average-to-transaction comparison methodology would still be the same as the results of the application of the average-to-average comparison methodology.

30. With respect to the application of an anti-dumping measure resulting from an investigation involving targeted dumping, there would be no difference from any other anti-dumping measure. The single weighted average margin of dumping for each exporter or producer would be applied as the cash deposit rate for all imports from that exporter or producer going forward.

18. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:

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[11] *See* 19 C.F.R. _ 351.414(f)(1)(i).

[12] *Anti-Dumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (17 February 1996) (Exhibit US-5).

[13] 19 C.F.R. _ 351.414(f)(1)(i).

[14] 19 C.F.R. _ 351.414(f)(1)(ii).

[15] 19 C.F.R. _ 351.414(f)(1)(ii).

[16] 19 C.F.R. _ 351.414(f)(2).

[17] *Anti-Dumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (17 February 1996) (Exhibit US-5).

31. In order to address the Panel's sub-questions in the most efficient manner, the United States addresses sub-questions (a) and (c) together and sub-questions (b) and (d) together.

> **(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports.**
>
> **(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does the United States agree with this argument? Please explain.**

32. Canada has argued that Article 2.4.2 requires a Member to establish the existence of margins of dumping for the product as a whole and that, in so doing, it is necessary to reduce the total amount of dumping found based on non-dumped transactions. Nevertheless, Canada's hypothetical examples meet neither of these supposed AD Agreement obligations.

33. In its hypothetical examples in Exhibit CDA-8, Canada proposed subdividing the "product as a whole" and establishing multiple margins of dumping for any given producer/exporter. Canada failed to explain how it would combine these multiple margins so as to establish an individual margin of dumping for each producer/exporter that could be tested against the *de minimis* standard, for purposes of Article 5.8. To the extent that Canada would not combine them and, instead, treat the margin based on the subset of targeted sales as the relevant margin for purposes of Article 5.8, this approach does not seem to differ significantly from the so-called "zeroing" methodology about which Canada complains. "Zeroing", under Canada's argument, entails the aggregation of multiple transaction-to-transaction comparison results, with results involving no dumping *not* offsetting results involving dumping. That is precisely what occurs in both of the hypotheticals set out in Exhibit CDA-8.

34. The EC's argument that this would not constitute zeroing, as no adjustment is made to the export prices is not consistent with the EC's own logic. In the EC's view, "zeroing" may be characterized as "an 'allowance' or 'adjustment' within the meaning of Article 2.4", the effect of which is "to reduce the value of certain [*i.e.*, non-dumped] export transactions".[18] Not providing an offset in the course of aggregation, according to the EC, amounts to reducing the export price in each non-dumped transaction-to-transaction comparison such that export price is made to equal normal value. If one were to accept that characterization (which the United States does not), then one could conclude that Canada's hypothetical examples entail zeroing. There is no principled basis for asserting that aggregation of multiple comparisons with "zeroing" effectively constitutes an adjustment to non-dumped export prices in some cases, but not in those cases in which the *dumped* exports manifest a targeted pattern. In other words, the EC fails to explain its basis for asserting that the characterization of aggregation without offsets for non-dumped transactions depends on whether dumped transactions exhibit a targeted pattern.

> **(b) What legal / textual justification might permit such zeroing?**
>
> **(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does the United States agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

35. There is no legal or textual support for Canada's and the EC's arguments that a Member may calculate multiple margins of dumping for a particular exporter/producer under the targeted dumping

[18] EC Third Party Submission, para. 59.

provision as posited in their hypothetical examples. For a further discussion of the US position in this regard, please refer to the answers to Questions 16 and 47.

36. With regard to the EC's argument that the "due allowance" provision of Article 2.4 might provide a legal or textual basis for its hypothetical example, please refer to the answer to Question 15.

> **(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does the United States agree? Please explain. If the United States does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?**

37. The United States is uncertain as to what the EC means when it states that the actual amount of dumping for a three-month period would be expressed as a percentage of export price. Canada has argued that the term "margin of dumping" must be applied to a "product as a whole". The "product as a whole" would cover imports for the entire year, not just three months. It is not clear whether the EC accepts Canada's hypothesis, in which case, the export price used as the denominator would be the total of export prices for the entire year, or whether the EC takes a different view, in which case, the export price used as the denominator would be the total of export prices for the three-month "targeting" period only.

38. If the EC is suggesting that the export price would be the aggregate of all export sales for the entire year, then, assuming that other "non-seasonal" export sales would be excluded from the numerator, the EC's hypothetical would indeed be comparable to the so-called "zeroing" methodology, because non-dumped sales would not be factored into the calculation of the numerator. Alternatively, if the EC is suggesting limiting the denominator to export sales during the seasonal period, it would not be establishing the existence of a margin of dumping with regard to all transactions. Such an approach would suffer from the problems identified in response to sub-questions (a) and (c) above.

> **(f) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?**

39. There is no obligation in the AD Agreement to offset dumped export transactions with non-dumped sales when applying the targeted dumping provision. However, a Member must nonetheless "take account" of these sales in the denominator of its calculations when calculating an overall margin of dumping for a producer/exporter, consistent with Article 6.10 and for purposes of applying the *de minimis* provision of Article 5.8.

19. New Zealand suggests that the transaction-to-transaction methodology should be symmetrical, in the sense that the margin of dumping should be based only on dumped transactions, with non-dumped transactions being included in the analysis of the volume and prices of "imports not sold at dumping prices" (Article 3.5). Would the US treat imports where export price is not less than normal value as "imports not sold at dumping prices" in the meaning of Article 3.5 of the *AD Agreement*?

40. In calculating an overall margin of dumping, the United States fairly reflects the total quantity of all imports of the product under consideration by including both dumped and non-dumped transactions in the denominator of its calculations. In this manner, the amount of dumping found is

diluted by the inclusion of the non-dumped sales in the denominator. It is this fully diluted margin of dumping that the United States tests against the *de minimis* standard for the purposes of the injury analysis. For any producer/exporter found not to have engaged in dumping, the United States treats all imports from such producer/exporter as "imports not sold at dumping prices" for purposes of Article 3.5. On the other hand, if the United States determines that a producer/exporter has engaged in dumping, it will treat all of that producer/exporter's imports as dumped in its injury determination.

41. Were the United States to further adjust its calculations to account for non-dumped sales in its injury determination, the result would be "double counting" of these non-dumped transactions. There is nothing in the text of Article 3.5 of the AD Agreement, or any other provision of the AD Agreement or GATT 1994, that would require the United States to double count non-dumped sales in any of its calculations.

20. Could the US comment on the argument that "product" in Article VI of GATT 1994 must be equated with "product as a whole", in particular the question of reconciling the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

42. In its second submission, the United States discussed its views with respect to the terms "product" and "price difference" in Article VI of the GATT 1994.[19] Notably, the phrase "product as a whole" appears nowhere in Article VI, nor, for that matter, does the phrase appear in the AD Agreement.

43. In *US – Softwood Lumber (AB)*, the Appellate Body considered the use of the word "product" with reference to the term "dumping" in Article 2.1 of the AD Agreement.[20] The Appellate Body found that when an investigating authority uses the average-to-average comparison methodology, the results of any comparisons involving subgroups of export transactions were not themselves "margins of dumping", but intermediate results.[21] According to the Appellate Body, the investigating authority must aggregate all of these intermediate results in order to determine a margin of dumping for "the product as a whole" (*i.e.*, reflecting all comparable export transactions).[22] This finding of the Appellate Body, however, was made in a particular context that was different from the context of the present dispute. It does not support the conclusion that every use of the term "margin of dumping" in the AD Agreement must refer to "the product as a whole".

44. Article VI of the GATT 1947 permitted Contracting Parties to establish margins of dumping by comparing weighted average normal values with transaction-specific export prices.[23] It was only with the adoption of the AD Agreement and, in particular, Article 2.4.2, that Members accepted more precise obligations as to how the prices (whether for normal value or export price) would be established for comparison purposes (*i.e.*, whether on a transaction-specific or weighted-average basis). In Article 2.4.2, the Members agreed that, during the investigation phase of an anti-dumping proceeding, they normally would establish price differences, as referred to in Article VI of the GATT 1994, on either an average-to-average or transaction-to-transaction basis.[24] By permitting transaction-to-transaction comparisons and, in certain circumstances, average-to-transaction

[19] United States Second Written Submission, paras. 30-39.
[20] *See US – Softwood Lumber (AB)*, paras 92-93.
[21] *US – Softwood Lumber (AB)*, para. 97.
[22] *US – Softwood Lumber (AB)*, para. 98.
[23] *See US – Atlantic Salmon*, para. 486; *see also EC – Cotton Yarn*, paras. 499, 501 (finding EC was under no obligation to make due allowances for the effects of its zeroing methodology which involved the comparison of an average normal value to individual export transactions).
[24] In interpreting the extent of that agreement with respect to the average-to-average basis, the Appellate Body found that while multiple comparisons were permitted, only an aggregation of the results of those multiple comparisons would reflect all comparable export transactions and, therefore, be consistent with Article 2.4.2. Once again, however, this finding cannot be separated from the context in which it was made.

comparisons of prices, the drafters preserved the ability to establish transaction-specific price differences and, thereby, transaction-specific margins of dumping for purposes of Article VI of the GATT 1994 and Article 2.4.2 of the AD Agreement.

To both parties:

21. Would the parties please describe, in detail, how, under their respective anti-dumping systems, the processes of duty assessment and duty collection are carried out by their authorities.

45. The United States employs a retrospective duty assessment system. Under this system, the United States first determines, through an investigation, whether margins of dumping exist, and whether dumped imports cause or threaten to cause material injury to a domestic industry. If injurious dumping is found, Commerce issues an anti-dumping measure, called an anti-dumping duty order. In this order, Commerce indicates an *ad valorem* cash deposit rate for producers/exporters individually investigated, as well as an "all-others" rate applicable to any other producers/exporters.

46. Pursuant to the anti-dumping duty order, importers must post a cash deposit of estimated anti-dumping duties for each import transaction. This cash deposit is based on the overall margin of dumping found for the exporter or producer during the investigation phase.

47. Every twelve months, during the anniversary month of the anti-dumping duty order, importers, exporters, producers, and domestic interested parties have the opportunity to request that Commerce undertake an assessment review (often referred to as an "administrative review" or "annual review") of the import transactions that occurred in the prior year.

48. During that review, Commerce analyzes all of the import transactions for the period of review (*i.e.*, the prior 12 months) to determine the actual difference between the export price and the normal value for each import transaction. Where export price is greater than normal value, Commerce determines that there is no dumping with respect to that transaction. Where export price is less than normal value, Commerce determines that the transaction was dumped and includes that difference in the amount to be finally assessed. For each importer, there may well be transactions involving multiple producers and exporters. A separate calculation is performed for a given importer's imports from each producer/exporter. In each such calculation, Commerce sums the amount of dumping duties to be assessed and divides this amount by the total value of all import transactions by that importer from that producer/exporter to establish an *ad valorem* assessment rate. As explained during the meeting with the Panel, this approach to assessment minimizes the burden on all parties (producers/exporters, importers, Commerce and Customs) as contrasted to linking each import transaction to each customs entry, as had previously been the case. Under either assessment methodology, the total amount of duties collected from an importer will be the same; only the administrative burden differs.

49. The final levying (or collection) of duties is performed by customs authorities pursuant to the assessment rates provided by Commerce. The customs authorities apply the assessment rate to the value of each import to determine the amount of final liability. The cash deposit made with respect to each entry is compared with the amount of final liability. If the cash deposit exceed the duties, a refund, with interest, is made. Alternatively, any liability not met by the cash deposit is collected from the importer, with interest.

50. In addition to establishing the assessment rates for each combination of producer/exporter and importer, Commerce also aggregates the results on a producer/exporter basis for purposes of updating the cash deposit rate for each producer/exporter. This new *ad valorem* cash deposit rate will be applied to future imports from the producer/exporter. Commerce analyzes all of the import transactions of each producer/exporter subject to the review to calculate a new margin of dumping for

those producers/exporters and applies that margin of dumping as the new cash deposit rate going forward.

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

51. It is difficult to anticipate all the practical consequences associated with a determination that "zeroing" is unfair and thus prohibited. However, the United States makes the following observations concerning the most significant consequences.

52. First, if "zeroing" were considered *per se* unfair, the ramifications would reach beyond Article 2.4 of the AD Agreement and, indeed, beyond Article 2.4.2. Implicit in such a finding would be an assumption that the "fair comparison" requirement in Article 2.4 has a broader application than simply providing for proper comparisons between export price and normal value, with adjustments as appropriate pursuant to the provisions of Article 2.4. That is, since "zeroing" has no relevance to the adjustments provided for in Article 2.4 itself, a finding that "zeroing" is inherently "unfair" assumes that there is a generic fairness obligation that applies to other aspects of an anti-dumping proceeding in which "zeroing" might be relevant. The question then is where this hypothetical generic requirement ends. Canada's argument does not suggest an answer to that question.

53. In particular, Canada's argument suggests no principled reason why a generic finding that "zeroing" is unfair would not apply to assessment proceedings provided for in Article 9.3 of the AD Agreement. In that context, such a generic finding would have truly anomalous consequences. For example, a finding that "zeroing" is unfair in all circumstances would be tantamount to a recognition that where export price exceeds normal value, the result constitutes a "negative margin". Article 9.3 provides that an anti-dumping duty may not exceed the margin of dumping. As a duty of zero would exceed the "negative margin" where export price exceeds normal value, it would seem to be impermissible where "zeroing" is considered *per se* unfair. In that case, Article 9.3 would seem to require that a Member actually compensate importers for non-dumped imports.[25]

54. The foregoing anomalous consequence would occur if duties were assessed on an import-by-import basis. But, the consequences would be equally anomalous if duties were assessed on an aggregated basis. Here, it should be recalled that Article 9.3 contains no aggregation requirement. Nor does it contain any provision concerning the time period to be covered in an assessment proceeding. A Member may conduct an assessment proceeding on an import-specific basis, on the basis of imports over a six-month period, a one-year period, or a multi-year period (or some other time period).

55. Under the zeroing-is-unfair hypothesis, the results of an assessment proceeding would vary according to the degree of aggregation. Consider, for example, a case in which there is more non-dumping than dumping in the first six months of the year, and more dumping than non-dumping in the second six months of the year. Assume that a Member is under no obligation to compensate an importer for the amount by which export price exceeds normal value on each non-dumped transaction.[26] In this case, if the Member conducts assessment on the basis of imports over a six-

[25] *Cf. US – Zeroing (Panel) (EC Complainant)*, paras. 7.286 to 7.288 (finding that the United States did not act inconsistently with Article 9.3 of the AD Agreement through its use of the "zeroing method used in the calculation of margins of dumping").

[26] In this scenario, it also is assumed that there is no "carry-over" requirement. That is, if non-dumping exceeded dumping in a given assessment period, there would be no requirement to carry the excess "negative dumping" margin into the next assessment period. Canada has not argued for such a carry-over requirement.

month period, it may collect no anti-dumping duties for the first six months of the year, but it may collect anti-dumping duties for the second six months of the year. On the other hand, if it conducts assessments on the basis of imports over the entire year, the hypothesized requirement to offset (*i.e.*, to not "zero") may result in the collection of no anti-dumping duties at all.

56. In sum, under the zeroing-is-unfair hypothesis, a Member's obligations would differ in a significant, substantive fashion depending solely upon whether and how the Member aggregates imports for assessment purposes. However, there is no legal basis for such differentiation.

23. The first sentence of Article 2.4.2 provides:

> **"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."**
>
> **(a) Would the parties agree that what is referred to as the WA to WA methodology is set out in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" and what is referred to at the T to T methodology is set out in the phrase "by a comparison of normal value and export prices on a transaction-to-transaction basis"?**
>
> **(b) Could the parties comment on the significance, if any, of the difference between the use of the phrase "on the basis of a comparison" and "by a comparison".**

57. With respect to part (a) of the Panel's question, the United States agrees that the weighted-average-to-weighted-average comparison methodology is set out in Article 2.4.2 in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices for all comparable export transactions". The United States also agrees that the transaction-to-transaction comparison methodology is set out in Article 2.4.2 in the phrase "by a comparison of normal value and export prices on a transaction-to-transaction basis".

58. With respect to part (b) of the Panel's question, the terms "on the basis of a comparison" and "by a comparison" are not the same. Under customary rules of interpretation of public international law, this difference in drafting should be accorded significance.[27] The ordinary meaning of the phrase "*on the basis of* a comparison" indicates that the comparison at issue is an intermediate step – *i.e.*, a "basis" – for establishing something else – *i.e.*, "the existence of margins of dumping". By contrast, the ordinary meaning of the phrase "*by* a comparison" indicates that the comparison at issue is not an intermediate step but, rather, the instrument for obtaining a result that is itself the thing being established – *i.e.*, "the existence of margins of dumping".

59. In the underlying proceeding, the panel explained that the ordinary meaning of "basis" in the term "on the basis of a comparison" in Article 2.4.2 means "the underlying support for a process".[28] The panel stated, "This suggests to us that, while the determination of the existence of margins of dumping must be based on weighted average-to-weighted average comparisons, Article 2.4.2 was not intended to spell out in detail all elements of that calculation."[29] The United States understands that, consistent with the Appellate Body's interpretation of the average-to-average comparison methodology in Article 2.4.2 in the underlying proceeding, the term "on the basis of a comparison"

[27] *See US – Gasoline (AB)*, p. 23.

[28] *US – Softwood Lumber (Panel)* at n. 355 (citing The Concise Oxford Dictionary of Current English (Clarendon Press, 1995), p. 113).

[29] *Id.* at n. 355.

denotes that an investigating authority must use the results of the multiple comparisons as the foundation for the calculated margins, but that the results of those average-to-average comparisons, in and of themselves, may not be considered margins of dumping.

60. On the other hand, the term "by" is defined (as relevant here) to mean "[i]ndicating agency, means, cause, attendant circumstance, conditions, manner, effects".[30] Accordingly, where the "existence of margins of dumping" is established "by" a particular type of comparison, that comparison is the "agency" or "means" for establishing the existence of margins of dumping. In other words, the comparison is an operation that yields a result that may itself constitute a margin of dumping.

61. In sum, the different phrases that precede the two different comparison methodologies referred to in the first sentence of Article 2.4.2 should be understood to have the following significance: Where an investigating authority performs average-to-average comparisons, the results amount to a foundation; it is the performance of additional operations following the establishment of that foundation that leads to the establishment of the existence of margins of dumping. Where an investigating authority performs transaction-to-transaction comparisons, the results of those comparisons themselves may establish the existence of margins of dumping.

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

62. In *EC – Bed Linen*, the Appellate Body based its finding with respect to the EC's application of the average-to-average comparison methodology on Article 2.4.2.[31] The Appellate Body made no finding concerning Article 2.4. Indeed, while the Appellate Body report contains a conclusory sentence regarding the "fair comparison" requirement, the report contains no textual analysis of the "fair comparison" requirement nor any explanation as to how or why the EC's methodology was unfair.[32] The basis for the Appellate Body's finding was limited to the need for the EC's investigating authority to use "all comparable export transactions" in the application of the average-to-average comparison methodology.[33]

63. In *US – Corrosion-Resistant Steel AD Sunset Review*, first, the Appellate Body expressly stated that it was "unable to rule" on whether the United States acted inconsistently with Article 2.4 and Article 11.3 in the context of the sunset review before it.[34] Thus, the Appellate Body's statement that a methodology that included "zeroing" would "tend to inflate the margins calculated"[35] was not necessary to resolve the issue in that dispute and is mere *obiter dictum*. Second, the Appellate Body did not provide any textual analysis of the AD Agreement, let alone of Article 2.4, to support that statement. Third, it should be noted that all the Appellate Body said was that the denial of offsets would tend to inflate margins; it drew no conclusion as to whether that effect itself (if accurate) would render the denial of an offset impermissible under the AD Agreement.

64. Finally, in *US – Corrosion-Resistant Steel AD Sunset Review*, the Appellate Body made a specific reference to "a zeroing methodology such as that examined in *EC – Bed Linen*".[36] In *EC –*

[30] The New Shorter Oxford Dictionary, Vol. I, p. 310 (definition 5) (1993).
[31] *EC – Bed Linen (AB)*, paras. 66, 86(1).
[32] *EC – Bed Linen (AB)*, para. 55.
[33] *EC – Bed Linen (AB)*, paras. 55-60.
[34] *US – Corrosion-Resistant Steel AD Sunset Review*, para. 138.
[35] *US – Corrosion-Resistant Steel AD Sunset Review*, para. 135.
[36] *US – Corrosion-Resistant Steel AD Sunset Review*, para. 135.

Bed Linen, the Appellate Body examined the European Communities' use of the average-to-average comparison methodology to determine the existence of margins of dumping during the investigation phase, pursuant to Article 2.4.2. Thus, this statement by the Appellate Body refers only to the use of the average-to-average comparison methodology during the investigation phase. It does not address the use of any other comparison methodology, in any other phases of an anti-dumping proceeding, such as the use of transaction-to-transaction comparison methodology, or the use of an average-to-transaction comparison methodology during an Article 9.3 assessment proceeding.

65. In order to give meaning to the obligation to make a "fair comparison" in Article 2.4, it is necessary to consider the context in which the term is used. The panel in the recently circulated report in *US – "Zeroing" (Panel) (EC Complaint)* agreed.[37] That panel stated, "The fairness of the methodology logically cannot be divorced from the underlying conception of what dumping means."[38] Thus, the standard for determining whether a particular comparison methodology is fair must be found within the text of the AD Agreement. A finding that a particular comparison methodology yields a higher margin of dumping than another methodology is in and of itself insufficient to determine whether that first comparison methodology involves a "fair comparison". Rather, the analysis must focus on whether the text of the AD Agreement prohibits that comparison methodology.[39]

66. Put another way, the proposition that a methodology is "unfair" because it is "inherently biased towards inflating the margin of dumping" is logically flawed because it assumes its own conclusion. That is, it assumes without basis that there is some notionally "correct" margin of dumping that must be obtained without "zeroing" and that, therefore, "zeroing" is "unfair" inasmuch as it causes that notionally correct margin of dumping to go up. This argument fails to explain why the notionally correct margin of dumping is the one obtained without "zeroing".

25. Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"? Is the "fair comparison" requirement limited in scope to what is addressed in paragraph 4? Please explain.

67. Please see the US response to Question 12 wherein the United States addresses the meaning of these phrases.

26. In the second sentence of Article 5.8, does the term "margin of dumping" relate to the margin of dumping calculated for each exporter, or to a margin of dumping calculated for the country as a whole?

68. The term "margin of dumping" in the second sentence of Article 5.8 relates to the margin of dumping calculated for each exporter or producer. Article 5.8 does not create an obligation to calculate an overall margin of dumping for a country (*i.e.*, combining the results for all exporters and producers). As relevant here, the determination required by the second sentence of Article 5.8 is a determination as to whether the margin of dumping is *de minimis*. If an investigating authority makes such a determination, it must terminate its investigation immediately. Because investigations occur with respect to exporters' and producers' sales of the product under consideration, Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer.

69. In another context – Article 3.3 – the AD Agreement does make reference to a margin of dumping for a country as a whole. Article 3.3 establishes the conditions under which the effect of dumped imports from multiple countries may be cumulated for injury purposes. Specifically, the

[37] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260.
[38] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260.
[39] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260.

effects of dumped imports from multiple countries may be cumulated where, *inter alia*, "the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5." While Article 3.3 appears to speak to a margin of dumping "from each country", the reference to the *de minimis* standard in Article 5.8 indicates that Article 3.3 may properly be understood to be applicable when, for each country, there is at least one exporter or producer with a non-*de minimis* single, overall margin of dumping.

70. As discussed in response to Question 13, this understanding of the use of the term "margin of dumping" and the relevance of the context in which the term is used was recently addressed by the Appellate Body in *Mexico – Rice*.[40]

27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?

71. As the United States has previously explained, Article VI of the GATT 1994 and the AD Agreement envision that a margin of dumping can be calculated for a single export transaction.[41] Accordingly, when a Member investigates the importation of large capital goods, or specially designed/manufactured goods, should there be only one import transaction during the period of investigation, that Member may properly calculate a margin of dumping based on that single transaction. Similarly, if the Member is a small economy, and there is but one import of subject merchandise during the period of investigation, that Member may calculate the margin of dumping based on that single transaction. In each of these examples, a transaction-to-transaction analysis generates a margin of dumping.

72. By logical extension, in other cases in which an investigating authority performs a transaction-to-transaction analysis, where export price is less than normal value, the result is a margin of dumping. There is no distinction between the cases posited in this question and other cases in which a transaction-to-transaction analysis may be used.

28. Could the parties indicate whether, in their view, in a targeted dumping analysis under the second sentence of Article 2.4.2, an investigating authority may utilize a comparison method other than one in which "a normal value established on a weighted average basis may be compared to prices of individual export transactions".

73. The second sentence of Article 2.4.2 provides the criteria pursuant to which the "targeted dumping" methodology may be used and specifies the methodology that may be applied. If the relevant criteria are met, Article 2.4.2 states that "normal value established on a weighted average basis may be compared to prices of individual export transactions". The text provides for no other alternative comparison methodologies. The use of this targeted dumping methodology is, however, permissive. Even if the criteria for the use of the methodology are met, a Member need not use the average-to-transaction comparison methodology. The alternative, however, would be to utilize one of the two comparison methodologies provided in the first sentence of Article 2.4.2.

29. Could the parties address the argument of the EC that if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping

[40] *Mexico – Rice (AB)*, paras. 216, 217, 220, 221.
[41] *See* United States Second Written Submission, paras. 29-39.

methodology redundant, this is sufficient to demonstrate that the United States' argument in this regard is without merit? Specifically, is it enough to posit that such a methodology could be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members?

74. As a preliminary matter, it is telling that neither Canada, nor the EC, has been able to come up with a single hypothetical situation that would *not* render the targeted dumping methodology redundant, if the language of Article 2.4 or 2.4.2 requires offsets for non-dumped transactions. On this point, the United States refers the Panel to its answers to Questions 18.

75. Beyond this point, it is difficult to approach the issues in dispute on the basis of non-existent hypothetical examples, as was illustrated by Canada's inability to come up with a plausible hypothetical during the Panel meeting. In this case, for a hypothetical to demonstrate that a general prohibition on zeroing does not render the targeted dumping methodology redundant, it would have to reflect a reasonable interpretation of the second sentence of Article 2.4.2 in context, and in light of the object and purpose of the AD Agreement. In other words, it is not appropriate to posit an obscure hypothetical and then construe the second sentence of Article 2.4.2 in an unreasonable manner to meet the demands of that hypothetical. An appropriate hypothetical would have to address all three types of targeted dumping referred to in Article 2.4.2 (*i.e.*, purchasers, regions, and time periods), take account of the ordinary meaning of the terms of the second sentence of Article 2.4.2, and be compatible with other relevant provisions of the AD Agreement. Canada has not even come close to positing such a hypothetical, as discussed in the US responses to Question 18 and (with regard to the EC hypotheticals) Question 15.

76. As explained in the US response to Question 23, the second sentence of Article 2.4.2 establishes the criteria under which a Member may apply the average-to-transaction comparison methodology. That sentence provides no exception to any other provision of the AD Agreement, nor does any other provision of the AD Agreement suggest that, when the conditions of the second sentence of Article 2.4.2 exist, the requirements of that other provision do not apply. As discussed in response to Questions 18, the hypothetical situations that Canada posits suffer from the fatal flaw that each gives rise to an incompatibility with some other provision of the AD Agreement.

30. Article 2.1 refers to "the export price of the product exported" and "the comparable price ... for the like product" in the home market of the exporting Member. Do these references to "price" relate to the price of the product as a whole, i.e. an aggregated or average price? Please explain. Do the references to "prices" in the transaction-to-transaction and weighted average-to-transaction provisions of Article 2.4.2 relate to the product as a whole? Please explain.

77. As discussed in response to Question 20, Article 2.4.2 provides the bases on which prices can be determined for purposes of comparing normal values and export prices during the investigation phase of an anti-dumping proceeding. The references in Article 2.1 to "the export price of the product exported" and "the comparable price . . . for the like product" must be interpreted in the context of the particular Article 2.4.2 comparison methodology being used. Depending on the comparison methodology used, the price may be either a transaction-specific price or a weighted average price. The Appellate Body developed the phrase "product as a whole" and applied it only with respect to the use of weighted average prices in the context of the average-to-average comparison methodology.

<u>To all parties and third parties</u>:

46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to

determine normal value on one single basis for all models, or would the parties consider that Article 2.2.permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

78. The United States considers that Article 2.2 permits Members, in the situation described in the question, to determine normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others. The text of Article 2.2 does not require Members to establish normal value on one and only one basis for all export transactions that are being examined. In fact, as a practical matter, such a reading of Article 2.2 would mean that in most cases home market sales could not form the basis for normal value. However, such a result clearly would be inconsistent with Article VI:1 of the GATT 1994, which provides a preference for using sales in the exporting country as the basis for normal value.

47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:

> **(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")**
>
> **(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

79. First, we would refer the Panel to our response to Questions 15 and 18, in which we address the EC's arguments with respect to targeted dumping. As explained in that response, there is no textual support in Article 2.4.2 for the EC's argument that a Member may calculate an anti-dumping duty margin to apply to a subset of an exporter or producer's export transactions, and then a second margin to apply to all other export transactions. Moreover, Article 6.10 of the AD Agreement states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". By contrast, where the drafters of the AD Agreement intended to permit an investigating authority to consider a subset of transactions separately, they made that intention explicit. This is illustrated by the "respondent selection" language of the remaining text of Article 6.10, as well as Articles 4.1(ii) and 4.2, which deal with regional industries and dumping.

80. The EC also did not explain how its approach could be reconciled with Article 9.2 of the AD Agreement. Article 9.2 states that an "anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports . . . from all sources found to be dumped and causing injury . . . ". The EC's approach would require a Member to discriminate between imports of a particular product on the basis of time, purchaser, or region and, to this end, the EC has failed to address this apparent inconsistency with Article 9.2.

81. On a practical note, the EC has not addressed the very real implications for duty collection that would arise in the case of export sales to and through affiliated parties. If the drafters intended

the second sentence of Article 2.4.2 to be applied as suggested by the EC, what would prevent an affiliated importer in the future from importing product to a warehouse in another region, thereby avoiding the payment of the "regional" anti-dumping duty? With respect to targeted dumping during a time period, a measure put in place that applied only to imports during that time period would be largely ineffective if an exporter shipped to an affiliated importer large quantities of the product outside the time period, for storage until the relevant period commenced. Finally, with regard to a purchaser-specific anti-dumping margin, in order to avoid the payment of duties, an exporter might avoid direct sales to a customer, but instead sell its product through an affiliated party without identifying any particular import to any particular customer until after commingling it in a warehouse.

82. The EC's interpretation of Article 2.4.2 leads to impractical results. More fundamentally, the text of Article 2.4.2 does not support that interpretation, and that interpretation cannot be reconciled with other Agreement provisions. Therefore, the EC's proposed interpretation of the second sentence of Article 2.4.2 should be rejected.

48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?

83. As explained in our response to Question 24, to the extent that the AD Agreement is interpreted as requiring that any particular aspect of an anti-dumping proceeding be conducted in a manner that is fair, a determination of what is fair in that context must be made pursuant to a discernible standard of appropriateness or rightness within the four corners of the Agreement, which would provide a basis for reliably judging whether there has been an unfair departure from that standard.[42] Thus, for example, the second through fifth sentences of Article 2.4 clearly provide for price adjustments which could be applied to price comparisons in order for those comparisons to be considered "fair."

84. The same observation can be made with respect to determining whether results are "accurate". Like a determination of what is fair, a determination of what is accurate must be made pursuant to a discernible standard. However, unlike the concept of what is fair – for which there is a discernible standard in the context of Article 2.4 – the AD Agreement does not provide a discernible standard for determining when results are accurate. Absent a discernible standard in the AD Agreement, it is unclear how the accuracy of results could be objectively determined. For example, Article 2.4.2 provides for two comparison methodologies and does not state a preference for either. It stands to reason, however, that in making average-to-average comparisons and transaction-to-transaction comparisons, based on the same facts, a Member could establish the existence of different margins of dumping. This does not mean, however, that only one of these comparison methodologies can be considered "accurate" or "fair". It is simply a recognition that, in allowing Members the flexibility to deal with the many different factual situations with which they may be presented, the drafters of the AD Agreement did not envision that an analysis of any given set of data could yield only one "correct" result.

49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).

85. Within the context of the AD Agreement and GATT 1994, a "normal value", is established relative to a particular export transaction or weighted average group of export transactions. In other words, the purpose of determining a "normal value" is to derive a comparison with the export

[42] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260 (footnotes omitted).

transaction(s) being examined. Thus, the "normal value" selected, whether based on a transaction in the exporting country, a third country transaction, or constructed value, is dependent on the nature of the export transaction(s) at issue. To state it another way, a particular transaction within the exporting country, *when considered in isolation*, would not be considered a "normal value" until it is selected for comparison with an export price.[43]

86. However, the EC's argument extends beyond this basic notion. First, the EC asserts that the value selected for comparison to a single export transaction cannot be considered a "normal value".[44] Next, the EC appears to suggest that while a Member may make a number of transaction-to-transaction comparisons, after making those comparisons there must be "a subsequent step of the calculation" that involves "'a comparison' (that is, a single comparison) of 'normal value' (also in the singular) and export prices. . . ."[45] This argument takes terms out of the contexts in which they appear but makes no link to the text of Article 2.4.2.

87. The error in the EC's contention that a value selected for comparison to a single export transaction cannot be considered a "normal value" is explained in the US response to Question 27. As noted there, the text of the AD Agreement clearly anticipates that a "margin of dumping" may be calculated for a single export transaction pursuant to a comparison with normal value on a transaction-to-transaction basis. This means that for purposes of each comparison, the value selected for comparison purposes is, by definition, a "normal value". Thus, the United States disagrees with the EC's assertion that a single, exporting country transaction, when selected for comparison to an export price transaction, cannot be considered a "normal value".

88. The EC's contention that only when "intermediate results are finally combined, in a second stage of the calculation," can a margin of dumping, and therefore a normal value, be determined[46] is equally flawed. In particular, this proposition begs the questions of (1) how the process of *aggregating the results* of multiple transaction-to-transaction comparisons converts the individual exporting country transactions into "normal value" under the EC's theory, and (2) when, exactly, the comparison between normal value and export price occurred. If a value becomes recognizable as a "normal value" only at the aggregation stage, as the EC posits, then what were the values that were being compared at the initial, pre-aggregation stage of the process? The EC's reasoning gives no answer. The EC also provides no textual support for its claim that a "normal value" can only be defined as an aggregate of values that have, individually, already been compared to export transactions.

89. In short, as the EC's assertions as to the meaning of "normal value" find no support in text or logic, they should be rejected.

50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.

[43] In any given case, there may be sales in the exporting country of the product under consideration that are not used as the normal value for any export transaction. (A simple example would be a situation in which a producer/exporter sold model A and model B widgets in the exporting country, but only made sales of model A widgets in the export market. All other things being equal, the sales of model B widgets in the exporting country market would not be used as the normal value.)

[44] EC Third Party Submission, para. 6.

[45] EC Written Submission, para. 6.

[46] EC Written Submission, para. 15 (footnote omitted).

90. There is no textual basis for concluding that there is any limitation on Members to choose between the average-to-average or the transaction-to-transaction comparison methodology in Article 2.4.2. As we stated at the meeting with the Panel, pursuant to Article 12.2.1(iii), Members are required to provide "a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2" in their preliminary and final determinations. However, this duty to explain the basis for selecting a particular methodology does not include any substantive standards for evaluating the selection. In any case, the United States also notes that Canada has not challenged the basis for the US use of the transaction-to-transaction comparison methodology and confirmed this during the meeting with the Panel.

51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?

91. The determination of dumping and establishment of margins of dumping are distinct from the assessment and collection of anti-dumping duties.[47] Generally speaking, the determination of dumping and the establishment of margins of dumping occur during the investigation phase, while the assessment and collection of anti-dumping duties occur subsequent to the investigation phase. The United States notes that the Appellate Body, in *EC – Bed Linen (AB)*, agreed, finding that the determination of the existence of dumping and injury caused by dumped imports is distinct from the collection of the anti-dumping duty.[48]

92. This difference confirms the importance of considering the context in which the term "margin of dumping" is being used in order to properly understand its meaning. In certain contexts in the AD Agreement, such as Article 5.8 (applicable to the investigation phase), the term "margin of dumping" refers to an overall margin of dumping determined for an exporter or producer. From context, it is plain that whether a "margin of dumping" is *de minimis* and the investigation must therefore be immediately terminated is a determination that focuses on all transactions involving a particular exporter or producer. On the other hand, in the context of Article 9.3 (applicable with respect to the collection and assessment of anti-dumping duties), the term cannot be similarly limited to a single overall margin for an exporter or producer. Here, the focus is on the importer and its liability for an anti-dumping duty, which may not exceed the "margin of dumping."

93. There are practical reasons for such distinctions. When it comes to investigations, practices among users of the anti-dumping instrument are relatively similar. All Members conduct investigations by examining a prior period in order to establish the existence of margins of dumping and material injury caused by dumped imports. By contrast, there is much less similarity among Members with respect to the collection and assessment of duties. Members maintain diverse duty assessment systems, generally referred to as (but not limited to) prospective *ad valorem*, prospective normal value, and retrospective systems.

94. While Article 9.3 contains the term "margin of dumping", the applicability of that term to the diverse duty assessment systems cannot be reconciled with an interpretation of that term as referring only to "the product as a whole". Because anti-dumping duties are paid by importers and largely depend on the prices paid by importers, many Members logically and reasonably provide for importer-specific assessment proceedings. As was discussed during the meeting with the Panel, Members did not agree to adopt an exporter-oriented approach to assessment proceedings. In fact, the implication of an exporter-oriented focus on the "product as a whole" could be that an importer would be required to pay anti-dumping duties in an amount greater than the difference between its particular

[47] *See generally US – "Zeroing" (Panel) (EC Complaint)*, paras. 7.142 to 7.213.
[48] *EC – Bed Linen (AB)*, para. 62, fn. 30.

imports and their corresponding normal values, a proposition that makes no sense under the AD Agreement.[49]

[49] Article 9.1 permits a Member to impose an anti-dumping duty equal to the full margin of dumping. Article 9.3 requires that an anti-dumping duty not exceed the margin of dumping. If "margin of dumping" were construed as requiring an exporter-oriented focus to reflect "the product as a whole," an anomalous consequence could be that an importer would have to pay anti-dumping duties greater than the difference between the prices it paid for exports and normal values. This would occur in the following scenario: Assume that Exporter's exports are split between two importers (A and B) and, on average, Importer A paid 5 per cent less than normal value and Importer B paid 15 per cent less than normal value. If "margin of dumping" refers only to a margin of dumping for the product as a whole, the Member in this example would be entitled to collect (pursuant to Article 9.1) and be limited to collecting (pursuant to Article 9.3) anti-dumping duties of 10 per cent from both importers. Thus, Importer A could be required to pay 10 per cent anti-dumping duties even though its imports were priced only 5 per cent below normal value.

ANNEX E-3

ANSWERS TO QUESTIONS FOR PARTIES AND THIRD PARTIES OF THE PEOPLE'S REPUBLIC OF CHINA

2 December 2005

To China

Could China indicate the textual basis for the view, expressed in para. 10 of its written submission, that taking into account "all comparable export transactions" in the process of determining the existing of dumping of the product should not be limited only to the weighted average to weighted average comparison methodology?

Answer

China believes that Article 2.4.2 supports this conclusion.

China thinks that "margins of dumping" acts as textual basis in analyzing whether the T-to-T methodology should be subject to the requirement of considering all comparable export transactions. China recalls that in the appeal process of the original proceeding of this case, the disputing parties are in disagreement as to the proper interpretation of the term "margins of dumping" as used in Article 2.4.2. The disagreement lies on whether that term applies to the product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken. On this issue, the Appellate Body stated that: "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. Thus, having defined the product under investigation, the investigating authority must treat that product as a whole for, *inter alia* , the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping."[1] *(Emphasis added)*.

The clarification of the term of margins of dumping does not apply only to the first method of comparison, but through the Agreement. Therefore, exclusion of certain export transactions in T-T method can by no means be regarded as establishing margins of dumping for the product under investigation as a whole

Article 2.4.2 continues with "the existence of margins of dumping during the investigation phase shall normally be established……by a **comparison** of normal value and export prices on a transaction-to-transaction basis".*(emphasis added)*. China thinks that a singular form for the word "comparison" may tell us that simply transaction-to-transaction comparisons can not be regarded as establishing the margins of dumping for the subject product as a whole. For the purpose of establishing the margins of dumping for a product as a whole through T-T methodology, two steps may be needed: the first one is creating intermediate results of a series of transaction-to-transaction juxtapositions, the second one is combining the intermediate results and calculate the margin of

[1] *US- Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/AB/R, Para. 99

dumping through the comparison of normal value and export prices for a specific exporter. At the aggregation stage, an investigating authority should not disregard any intermediate results.

Further, China notes that article 2.4.2 starts with the phrase "Subject to the provisions governing fair comparison in paragraph 4...", which indicates that the requirement of fair comparison covers all the methodologies of establishing margins of dumping and none of them can be rule out of this discipline. Zeroing in either W-W method or T-T method by ignoring certain comparable export transactions is of "inherent bias" against the fair comparison requirement., which "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping".[2]

[2] *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, Para. 135.

ANNEX E-4

EUROPEAN COMMUNITIES RESPONSES TO THE PANEL'S QUESTIONS

2 December 2005

Introduction

The following questions should not be taken to reflect any views of the Panel. Either party may respond to or comment on any question addressed to the other party or any third party. Each third party may respond to or comment on any question addressed to either party or any other third party.

General comment by the EC. The EC refers first to its responses to the questions addressed to it and to the third parties generally. The EC has also commented on the other questions, particularly where those other questions relate to additional matters, including matters covered in the written and oral pleadings of the EC.

The EC believes that many of the questions posed go beyond what is strictly required for this Panel to make the findings necessary to settle the dispute. In particular, for example, the EC does not believe that this Panel needs to write a general theory of the targeted dumping provisions for the purposes of this case. However, the EC generally recognises and applauds the Panel's desire to reach a balanced view, which reasonably takes into account the text, context, object and purpose and intent of all the Members – in short, to take a sensible and balanced view of the system as a whole – and this is reflected in the EC's endeavours to respond to the Panel's questions.

To Canada

1. In para. 9 of its closing statement, Canada asserts that "an investigating authority has an obligation to determine a "margin of dumping" for the product as a whole". Does the concept of "margin of dumping" have the same meaning throughout Article 2.4.2? Canada indicates in para. 15 of its closing statement that "the meaning of the term "margin of dumping" – and that of – "dumping" – cannot change in this single sentence" – presumably the first sentence of Article 2.4.2. Does Canada consider that the meaning of the term "margin of dumping" might differ between the first and second sentences of Article 2.4.2? Is the second sentence of Article 2.4.2 an exception to the requirement to determine a margin of dumping for a product as a whole? Please explain. Does Canada consider that the term "margin of dumping" has the same meaning throughout the whole AD Agreement?

The EC refers to its response to question 32. Article VI:2 of the GATT 1994 and the ADA are an inseparable package of rights and obligations. The term "margin of dumping" is defined in Article VI:2 of the GATT 1994 and implemented in the whole of Article 2 of the ADA. In principle, it has the same meaning throughout Article VI:2 of the GATT 1994 and the ADA, subject to the targeted dumping provisions. We agree with Canada that if there is targeted dumping by purchaser, region or time, an investigating authority is entitled – for example - to calculate the dumped amount relating to a purchaser, region or time so identified. The second sentence of Article 2.4.2 is an exception to the first sentence of Article 2.4.2; thus, similarly, the targeted dumped amount may, subject to the conditions provided for in the second sentence of Article 2.4.2, be expressed as a

percentage of export price, or characterized as a "margin of dumping". Rather than expressing this in terms of the second sentence of Article 2.4.2 constituting an exception to the general requirement to calculate a margin of dumping for the product as a whole, the EC would say that the targeted dumping provisions provide for a specific methodology to determine such margin in exceptional circumstances.

2. Does it necessarily follow from the argument that a margin of dumping must be found for a product as a whole that any export prices above the normal value must be fully reflected in the numerator of the dumping margin? Does not the inclusion of those export prices in the denominator, but not in the numerator, result in a margin of dumping for the product as a whole, given that the product as a whole is presumably the imported product whose prices are in question? Please explain?

Within the relevant data set, it necessarily follows that all the export prices must be fully reflected in the numerator. The inclusion of export prices in the denominator, but at the same time the omission of part of the export prices from the numerator, means that the export prices are not fully included. Anything less than all the relevant export prices in full in the numerator does not result in the calculation of a margin of dumping for the product as a whole. This is confirmed, notably, by the Appellate Body Reports in *EC-Bed Linen* and *US-Softwood Lumber V*.

3. Please comment on the US assertion that "it is *not* the case that a margin of dumping is established only when the price differences resulting from multiple transaction-to-transaction comparisons for a given product are aggregated" (US oral statement, para. 25).

This argument is inconsistent with the general requirement to calculate a margin of dumping for the product as a whole; inconsistent with the fact that an investigating authority may not *assume* that a single transaction, taken in isolation, is always a normal value, in particular where other domestic transactions are also used in the comparison; and inconsistent with the term "basis" as twice used in the first sentence of Article 2.4.2. The utility of the transaction-to-transaction method is that, if justified by all the circumstances of the case, it effectively reduces the need to make adjustments for differences in, for example, physical characteristics (because transactions can be directly matched). Because it effectively permits the use of a representative sample, it may lead to a result that is different from, although similar to, the result arrived at by the use of the weighted average-to-weighted average method.

4. During the meeting with the parties, the United States suggested that if the term "margins of dumping" is understood to have the same meaning throughout the *AD Agreement*, including the Article 9 provisions concerning duty collection, this would result in non-dumped imports being set off against dumped imports at the duty collection phase. The United States noted that importers pay anti-dumping duties, not exporters. The United States argued that it would be unfair for an importer of dumped product, who has already benefited from a low export price, to further benefit from a credit determined on the basis of non-dumped imports by another importer. Please comment on this US argument, with particular focus on the prospective normal value duty collection system applied by Canada. In particular, how would Canada interpret the term "margins of dumping" at the duty collection phase, and would Canada provide offsets at that phase?

The EC would like to stress that the *Anti-Dumping Agreement* contains specific obligations that determine the manner in which an investigating authority must establish the margin of dumping and the total dumped amount, and that determination must be fair towards the exporter concerned. When it comes to the distribution of that total dumped amount among importers, Article 9.3 makes it clear that the dumped amount must not exceed the margin of dumping, as established under Article 2. Whatever municipal law may or may not provide with respect to such matters, an investigating authority is still required to ensure that the dumped amount and the margin of dumping are established

in accordance with Article 2, in a manner that is fair to the exporter. In any event, the EC considers that there are methodologies available to allocate to importers in a "fair" manner the total dumped amount found to exist for the exporter concerned. Contrary to what the US suggests, there is no conflict between the two requirements.

If there is no significant pattern of export prices among different purchasers (or importers), that is, if low and high priced transactions are more or less equally distributed between different importers, then each importer will be treated equally. If there is one exporter and two importers, and no significant pattern, high and low priced transactions being roughly equally distributed in equal measure between the two importers, each importer will pay about half of the dumped amount. The total dumped amount will correspond to the dumped amount associated with the margin of dumping of the exporter. If, on the other hand, there is a significant pattern of high priced imports to one importer, and low priced imports to the other, then, consistent with the second sentence of Article 2.4.2 the investigating authority is entitled to conduct a targeted dumping analysis and to distribute the dumped amount between the two importers in order to reflect that. The assessment rate associated with the importer that purchased at a high price will be low and the dumped amount will be low. The assessment rate associated with the importer that purchased at a low price will be high and the dumped amount will also be high. However, consistent with Article 9.3, the total dumped amount collected from both importers will not exceed the margin of dumping of the exporter.

An amount collected under Article 9.4(ii) (or any similar amount) is not an actual margin of dumping or an actual dumped amount. It is not a margin of dumping because it does not relate to the product as a whole, as required by Article 2.1; and it does not result from the application of the exceptional provisions relating to targeted dumping. Furthermore, it is not actual, because it is based on a prospective normal value (that is, one derived from historical data, particularly the data collected during the original proceeding). Article 9.4(ii) does not detract from an investigating authority's obligation under Article 9.3.2, in the prospective system, to investigate and calculate the actual margin of dumping (once the relevant period is closed) at the request of an importer. An actual margin of dumping is based on a contemporaneous normal value and export price. It must be calculated in a manner consistent with all of Article 2.4.

A variable duty is possible in the prospective system because in a prospective system final liability under Article 9.3.2 can only go down, at the request of an importer. In the retrospective system, by contrast, final liability can go up, at the request of any interested party, including the domestic industry. The initial use of a variable duty in the prospective system allows an investigating authority fearful of targeted dumping to initially collect an amount that will cover any targeted dumping that might occur. If there is no targeted dumping, and some exports above normal value, the importer will get a refund, on request. It is an error to transpose this provision from the initial part of the prospective system, to final assessment under the retrospective system.

5. Please explain Canada's understanding (oral statement, para. 30) of how the targeted dumping methodology might operate in practice, without zeroing. For example, assume there is evidence of targeted dumping by a specific exporter into a specific region of a Member. Further assume that the relevant exporter also sells into other regions of the same Member, without dumping. How might the targeted dumping methodology apply in this case? How might any margins of dumping be calculated? What role would the non-dumped imports play in this process? Would anti-dumping duties only be applied on imports destined for the region for which there was evidence of targeted dumping? How would any resultant anti-dumping duties differ from those applicable as a result of a weighted average–to–weighted average comparison in respect of the totality of imports into the Member's territory? How would the resulting anti-dumping duties comport with the first sentence of Article 6.10 in the case in which the exporter had sales outside the targeted region?

The EC refers to its responses to question 33 and 35(a).

6. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.

The EC refers to its response to question 33.

7. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:

(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports (occurring during the remainder of the period of investigation or outside the region).

(b) What legal / textual justification might permit such "zeroing"?

(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does Canada agree with this argument? Please explain.

(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does Canada agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.

(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does Canada agree? Please explain. If Canada does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?

(f) Please show the operation of both hypothetical examples using numbers.

(g) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?

The EC refers to its response to question 35.

8. The EC has stated that, in its view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para. 6). Does Canada agree. Could Canada explain what, in its view, is a normal value for purposes of a transaction-to-transaction analysis? How would Canada expect

that an investigating authority would determine the appropriate normal values for comparison purposes in the context of such an analysis?

The EC refers to its response to question 37.

9. Is the "weighted average normal value" referred to in the first sentence of Article 2.4.2 the same as the "normal value established on a weighted average basis" referred to in the second sentence of that provision?

Yes, except that in the second sentence it may also refer to a normal value calculated by reference to the sub-set of transactions within the pattern identified by the investigating authority, as indicated by Canada.

10. Under the approach proposed by New Zealand (para. 3.09 of New Zealand's written submission), a higher margin of dumping would be attributed to a lower volume of dumped imports, with the remaining imports being treated as non-dumped. Could this reduce the likelihood of dumped imports being shown to cause of material injury? If so, might this bring into question the assumption that failure to offset will necessarily lead to a less favourable result for exporters?

The EC agrees that a targeting dumping analysis is likely to have implications for the injury analysis. However, we fail to see the relevance of this question to the specific legal question of how a margin of dumping must be calculated. In any event, we do not see that reducing the volume of dumped imports, but inflating the margin of dumping, would necessarily make an injury finding less likely. Nor do we see that the objective quantitative requirements of how to calculate a margin of dumping and a volume of dumped imports should be displaced by the more qualitative requirements of a causation and non-attribution analysis.

11. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Canada reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

The EC refers to its response to question 32.

<u>To the United States</u>

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

The EC considers that the fair comparison requirement is overarching and independent : it is not exhausted by the remaining provisions of Article 2.4.

13. Please comment on Canada's argument (oral statement, para. 16) that, if transaction-to-transaction comparisons were to constitute "margins of dumping", DOC would have had to assess whether each transaction-specific "margin of dumping" was *de minimis* in accordance with Article 5.8 of the *AD Agreement.*

The Appellate Body has recently indicated that the term "margin of dumping" in Article 5.8 is exporter-specific rather than country-specific (Appellate Body Report, *Mexico-Beef and Rice*, paras 215 to 221), also referring in the process to the term "margins of dumping" in Article 2.4.2. This is

consistent with the view that an investigating authority must determine a margin of dumping for the exporter; which is in turn consistent with the view that the results of intermediate comparisons are not margins of dumping. If they would be, the implication would be that suggested by Canada. See, in similar vein, Appellate Body Report, *EC-Bed Linen*, para 125.

14. The US argues that an interpretation of Article 2.4 that requires a general offset obligation would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 a nullity (US second written submission, para. 24). Would a generalized application of Canada's interpretation of the phrase "margins of dumping" in Article 2.4.2 also render the average-to-transaction methodology redundant? Is the US argument confined to Canada's Article 2.4 claim, or does it also apply in the context of Canada's Article 2.4.2 claim? Please explain.

The EC refers to its response to question 33. It does not agree with the US argument based on alleged necessary mathematical equivalence.

15. At para. 64 of its written submission, the EC suggests that zeroing might be permissible in certain circumstances in the context of a targeted dumping analysis. In particular, the EC argues that the zeroing could take the form of an allowance for a difference affecting price comparability. Please comment on this EC argument.

The EC refers to its response to questions 35(a) and (c).

16. Please comment on Canada's argument that "[t]he targeted dumping methodology, ... by definition, would not be applied to all export transactions" (oral statement, para. 29). Is this statement true in the context of US law?

The EC believes that to be the case.

17. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.

The EC refers to its response to question 33.

18. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:

(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports.

(b) What legal / textual justification might permit such zeroing?

(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does the United States agree with this argument? Please explain.

(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does the United States agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.

(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does the United States agree? Please explain. If the United States does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?

(f) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?

The EC refers to its response to question 35.

19. New Zealand suggests that the transaction-to-transaction methodology should be symmetrical, in the sense that the margin of dumping should be based only on dumped transactions, with non-dumped transactions being included in the analysis of the volume and prices of "imports not sold at dumping prices" (Article 3.5). Would the US treat imports where export price is not less than normal value as "imports not sold at dumping prices" in the meaning of Article 3.5 of the *AD Agreement?*

The EC refers to its response to question 10.

20. Could the US comment on the argument that "product" in Article VI of GATT 1994 must be equated with "product as a whole", in particular the question of reconciling the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

The EC refers to its response to question 32.

<u>To both parties</u>

21. Would the parties please describe, in detail, how, under their respective anti-dumping systems, the processes of duty assessment and duty collection are carried out by their authorities.

This question requires no further comment from the EC.

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

The EC refers to its response to question 35(a) : it may help to resolve the dispute if there is precision about what exactly is meant by "zeroing" in different circumstances. We also refer to our response to question 33. It is not a question of compensation. It just means that, once a representative

sample has been used as the basis for the calculation, duties are collected in conformity with the margin calculated on the basis of the representative sample.

23. The first sentence of Article 2.4.2 provides:

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

(a) Would the parties agree that what is referred to as the WA to WA methodology is set out in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" and what is referred to at the T to T methodology is set out in the phrase "by a comparison of normal value and export prices on a transaction-to-transaction basis"?

Yes, subject to the provisions of Article 2.4.

(b) Could the parties comment on the significance, if any, of the difference between the use of the phrase "on the basis of a comparison" and "by a comparison".

Given the word "basis" at the end of the sentence, and the repeated use of "normal value" in the singular, there is no significance.

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

The zeroing methodology systematically has this effect, and is not therefore consistent with the obligation to make an objective and even-handed analysis. See also Appellate Body Report, *US-Hot-Rolled Steel*, paras 144, 145, 148, 154 and 158.

25. Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"? Is the "fair comparison" requirement limited in scope to what is addressed in paragraph 4? Please explain.

The provisions governing fair comparison include the third to fifth sentences of Article 2.4. In case of conflict between these provisions and the provisions of Article 2.4.2, the former provisions prevail. Article 2.4.2 cannot be interpreted in a manner that conflicts with the third to fifth sentences of Article 2.4.

26. In the second sentence of Article 5.8, does the term "margin of dumping" relate to the margin of dumping calculated for each exporter, or to a margin of dumping calculated for the country as a whole?

The EC refers to its response to question 13.

27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?

The EC refers to its response to question 38 as regards use of the transaction-to-transaction method. Similar reasoning might apply to case (c). It would all depend on the parameters of the investigation and the circumstances of the case. If, during the investigation period, one single export transaction had been made, then it might be legitimate to calculate the margin of dumping on that basis, if that export transaction is representative, for instance in respect of volume. If, however, the investigation period contains several export transactions, then the export price during the investigation period consists of the aggregation of all the representative export transactions. The requirement to respect the parameters of the investigation has been clearly stated by the Appellate Body in *EC-Bed Linen* and *US-Softwood Lumber*. Thus, it may be permissible to conduct intermediate comparisons (per model or per transaction). However, what would not be possible would be to zero when aggregating the intermediate results.

28. Could the parties indicate whether, in their view, in a targeted dumping analysis under the second sentence of Article 2.4.2, an investigating authority may utilize a comparison method other than one in which "a normal value established on a weighted average basis may be compared to prices of individual export transactions".

The EC refers to its response to question 33.

29. Could the parties address the argument of the EC that if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping methodology redundant, this is sufficient to demonstrate that the United States' argument in this regard is without merit? Specifically, is it enough to posit that such a methodology could be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members?

One hypothetical or example in which there is not necessarily mathematical equivalence is sufficient to rebut the US argument. It is not necessary that Canada's method would be generally susceptible of application by all Members. The EC refers in this respect to its response to question 33.

30. Article 2.1 refers to "the export price of the product exported" and "the comparable price ... for the like product" in the home market of the exporting Member. Do these references to "price" relate to the price of the product as a whole, i.e. an aggregated or average price? Please explain. Do the references to "prices" in the transaction-to-transaction and weighted average-to-transaction provisions of Article 2.4.2 relate to the product as a whole? Please explain.

The EC refers to its response to question 32.

<u>To China</u>

31. Could China indicate the textual basis for the view, expressed in para. 10 of its written submission, that taking into account "all comparable export transactions" in the process of

determining the existing of dumping of the product should not be limited only to the weighted average to weighted average comparison methodology?

The obligation to which China refers is derived from the basic requirement to calculate a margin of dumping for the product as a whole. The EC refers to its response to question 32.

To the EC

32. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would the EC reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

The words "as a whole", for example in para 93 of the Appellate Body Report in *US-Softwood Lumber V*, simply serve to emphasise that "the product" is "the product" as defined by the investigating authority at the outset of the original proceeding, and not some type, model or category of that product. Thus, if the investigating authority has itself, at the outset of its investigation, selected a product with certain physical characteristics – that is, if it has identified the "market" within the meaning of Article 2.2 in terms of physical characteristics – then it is at least bound to follow a consistent analysis. It cannot subsequently break-down that product definition into separate product types and opine that these are no longer comparable within the meaning of Article 2.4.2 simply because the results of certain intermediate comparisons are negative. Precisely the same is true with respect to any other parameters of the investigation.

This is confirmed by Article II.2(b) of the GATT 1994, according to which nothing in Article II shall prevent any contracting party from imposing anti-dumping duties consistent with the provisions of Article VI. Article II of the GATT 1994 concerns schedules of concessions, which relate in abstract terms to products, as opposed to a specific incidence of importation of a specific product by a particular company. Consequently, the concept of "product" in the context of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* must, in principle, be understood in these same abstract terms.

As indicated in its oral statement, the EC does not consider that "price" is necessarily always a transaction-specific concept; rather it is a market specific concept. Article VI of the GATT 1994 and the *Anti-Dumping Agreement* constitute an inseparable package of rights and obligations. The introduction of the targeted dumping provisions in the Uruguay Round *Anti-Dumping Agreement* reflects a recognition by the Members that, in a market economy, permanent dumping becomes increasingly difficult to sustain and unlikely if import duties are reduced; subsidies disciplines introduced; and anti-trust laws developed (see generally, Jacob Viner, *A Memorandum on Dumping*, 1926). Hence the weighted average-to-weighted average comparison rule. At the same time, targeted dumping may still occur, and may still require remedial action. Hence the targeted dumping provisions, if certain conditions are met. To apply the transaction-to-transaction method as the US has done in the measure taken to comply deprives the targeted dumping provisions of all utility. The utility of the transaction-to-transaction method, without zeroing, has been explained by the EC in its written and oral submissions to the panel, and in the response to these questions. It permits the use of a representative sample; and avoids the need to quantify adjustments for differences affecting price comparability, if sufficient comparable transactions can be directly matched.

33. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the

circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.

For example, during a one year period used as the investigation period in an original proceeding we assume: one country, exporter and importer; 1 domestic transaction per week at a value of 100; and 1 export transaction per week. In region A there are 25 export transactions at 90 and 1 at 110; in region B, 25 export transactions at 110 and 1 at 90.

A single *weighted average-to-weighted average* comparison would result in a dumped amount and margin of dumping of zero. Proceeding directly to the unjustified use of "*simple zeroing*", that is, comparing a weighted average normal value of 100 with each export transaction during the period, "zeroing" any negative intermediate results, but including all export prices in full in the denominator, would result in a dumped amount of (26 x 10) = 260 and a dumping margin of (260/(26 x 90) + (26 x 110)) x 100 = 5 %.

In cases in which domestic prices would vary, the result of using the *transaction-to-transaction* method would depend on which transactions were included in the representative sample, and which were matched. If the sample is representative, and no zeroing is used, the result should be close to that obtained using the weighted average-to-weighted average method. If zeroing is used, the result might be close to the result achieved using the simple zeroing method.

However, an analysis of the export transactions, in the light of domestic prices, would reveal a significant pattern of *targeted dumping* to region A. Having identified such a pattern, and having provided the required explanation, an investigating authority would be entitled to proceed with a targeted dumping analysis. Article 2.4.2 does not identify in every detail how investigating authorities may address targeted dumping.

For example, the investigating authority could focus on the set of transactions in region A. Within region A, it could make a weighted average-to-weighted average comparison, resulting in a dumped amount of (25 x 10) – (1 x 10) = 240. This dumped amount could be expressed as a dumping margin (for example, (240/(25 x 90) + (1 x 110)) x 100 = 10.17%. That anti-dumping duty of 10.17% could, for example, be imposed on the products consigned for final consumption to region A, when the domestic industry has been interpreted as referring to the producers in region A consistent with Article 4.2. Consistent with Articles 9.3 and 2.4, the same approach would then apply at the stage of final assessment or refund proceedings. We assume the exporter's behaviour is unchanged during a subsequent annual period. Once that period is closed, final assessment under Article 9.3.1 would lead to the assessment of a dumped amount of 240 (consistent with a dumping margin of 10.17 %) – cash deposits would simply be liquidated. A refund proceeding under Article 9.3.2 would not result in any refund. The panel may note that this result is not mathematically equivalent to the result of using simple zeroing : the targeted margin of dumping is higher; but the dumped amount is lower.

In cases in which domestic prices would vary, the result of using the *transaction-to-transaction* method within the sub-group would depend on which transactions were included in the representative sample, and which were matched. If the sample is representative, and no zeroing is used, the result could be close to 10.17%. Even with zeroing, given the pattern, the result may not be significantly different.

Alternatively, having identified targeting dumping by region, the investigating authority could calculate, for both regions together, a dumped amount of 260 and a dumping margin of 5%, using the same method at that outlined in the second paragraph of this response. An anti-dumping duty of 5% could then be imposed on all products entering the country (both region A and region B). If targeting dumping continues, the same method could be used during final assessment or refund proceedings, leading, if the exporter's behaviour is unchanged, to the collection of the same dumped amount (260).

This could, for example, be the case if the domestic industry has not been interpreted as referring to the producers in a certain area (see Article 4.2) or if the constitutional law of the importing Member does not permit the anti-dumping duty to be levied only on the products consigned to region A. The panel may note that this result is mathematically equivalent to the result of using "simple zeroing". However, the two methodologies are not the same or comparable, because the second is justified by the targeted dumping provisions, whilst the first is not.

The analysis is analogous with respect to both time and purchasers, if we replace region A with the final six months of the year, or with purchaser A (as opposed to purchaser B). Duties could be similarly collected either with respect to the targeted period or targeted purchaser, or collected at an *ad valorem* rate applied to all purchasers or with respect to the period as a whole.

For the purposes of deciding on the claims before it in this case the panel does not need to decide all the interpretative issues that might arise in the context of the operation of the targeted dumping provisions. It is sufficient to make two observations. First, it is not necessarily the case that there is always mathematical equivalence between the result obtained by directly using "simple zeroing" or transaction-to-transaction with zeroing and the targeted dumping provisions. Thus, finding that zeroing as applied by the US in this case is unfair does not nullify the targeted dumping provisions. Second, the possible operation of the targeted dumping provisions described above cannot, even in the case of mathematical equivalence, be considered the same as or comparable to simple zeroing, because the former is justified by the identification of a pattern of targeted dumping, whilst the latter is not.

34. Could the EC please explain its understanding of the meaning of the term "price comparability" as used in Article 2.4.

Price comparability refers to the question of whether or not prices are comparable. Prices are comparable if due adjustment has been made for all differences affecting price comparability. Prices may not be comparable if, for example, there are differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and so forth. In other words, dumping may be masked or created if, for example, a normal value would be compared with export prices at a different level of trade : such prices are not comparable and a level of trade adjustment may be necessary. Similarly, a normal value may not be comparable with a global export price if that global export price masks targeted dumping by purchaser, region or time. In such circumstances, there may be a difference that affects "price comparability".

35. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:

(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports.

The EC considers that clarification of the term "a form of zeroing" may help to resolve the dispute. The word "zeroing" is not used in the ADA, and it appears that there may not always be complete precision about what exactly is meant when that term is used. The EC observes that what the US did in the measure taken to comply (transaction-to-transaction zeroing) is not the same as what may be done in a targeted dumping analysis, as outlined in CDA-8. In the opinion of the EC, focusing on a *pattern* of transactions, which may be viewed as a whole precisely because the identification of the pattern, in terms of purchaser, region or time, establishes a link between those transactions, is one thing. And selecting certain transactions because they are made at a relatively low

price is something entirely different. The targeted dumping provisions do not permit an investigating authority to identify a pattern of export prices *just because* they happen to differ significantly – they must differ significantly among different *purchasers*, *regions* or *time* periods. Low priced export transactions, in themselves, are not a relevant pattern for the purposes of a targeted dumping analysis. In short, even if a targeted dumping analysis would be considered to necessarily involve a "form of zeroing" (which the EC would contest), that "form of zeroing" is not the same as the "form of zeroing" before the panel in this case. The "form of zeroing" before the panel in this case is unfair and involves an adjustment other than for a difference affecting price comparability. The "form of zeroing" that might arise in a targeted dumping analysis is justified by the circumstances; and fair; and, to the extent it involves any "adjustment", such adjustment is due or warranted. A semantic identity of these two different things under the common heading "zeroing", without distinguishing between them, would constitute a legal error.

(b) What legal / textual justification might permit such zeroing?

The EC believes that it results clearly from the text of the second sentence of Article 2.4.2 that, if there is a pattern, and the necessary explanation is given, a targeted dumping analysis is possible. The EC agrees that a reference to the weighted average-to-transaction method reflects the fact that a completely disaggregated comparison is a means of identifying whether or not there is a pattern. The EC further agrees that the possibility to be fully asymmetrical contains within it the possibility to be partially asymmetrical, as outlined in our response to question 33, just as the possibility to make either a weighted average-to-weighted average or a transaction-to-transaction comparison contains within it the possibility to make comparisons by averaging groups.

(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Please explain.

The EC refers to our response to question 35 (a). Our position is that what is described in CDA-8 is not the same as what the US did in the measure taken to comply. Either it is not to be characterized as an "adjustment" to export price at all, because what changes when the targeted dumping pattern has been identified is simply the parameter by reference to which an investigating authority is entitled to calculate the margin of dumping. Or, even if that would be construed as an adjustment, it is due or warranted, since made for a difference affecting price comparability.

(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.

If, as in our example in response to question 33, a targeted dumping analysis has identified a pattern of dumped prices to region A, but not region B, then there is a difference between regions A and B. This difference has affected the comparability of all the data – if a single weighted average-to-weighted average comparison is made, the dumping amount and margin will be zero. But this would mask the targeted dumping in region A. There is therefore a difference affecting price comparability; so the investigating authority is entitled to make an adjustment. That adjustment could consist of calculating a margin of dumping for region A, as outlined in CDA-8.

(d) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Please explain. What export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?

We refer to our response to question 33. In a targeted dumping analysis, either approach would be possible. If the investigating authority follows the first approach, the denominator would be the total export price during the three month period. If all export prices would be included in the denominator, the result would be that a lower margin of dumping would be calculated. In either case, if what is described would be a "form of zeroing", it is not the same as what the US did in the measure at issue, and it would be justified by the fact that the investigating authority had identified a relevant pattern of exports and provided the necessary explanation.

(f) Please show the operation of both hypothetical examples using numbers.

We refer to our response to question 33.

(g) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?

We refer to our response to question 33. We agree with Canada that the investigating authority could make a weighted average-to-weighted average comparison for the entire sub-set, thus taking the above normal value export prices into account. This is not, however, the only possibility.

36. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. Could the EC explain how such an analysis comports with the second sentence of Article 2.4.2, which provides that "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods", "a normal value established on a weighted average basis may be compared to prices of individual export transactions"

The EC's position is that it might be possible, simply by looking at export prices, to discern a "pattern", but this would necessarily have to be done in a disaggregated way – that is, each export transaction would have to be considered individually. Viewing a single weighted average export price would not, by definition, reveal any pattern in the export prices incorporated within that single weighted average. Furthermore, what is really of interest to the investigating authority is a pattern of "dumped" export prices. Thus, in practice, what an investigating authority will typically do is to compare a weighed average normal value with each export transaction, looking for patterns of export transactions, by purchaser, region or time, at prices less than normal value.

The EC's position is that an investigating authority could so proceed, not that it should. We refer to our response to questions 33 and 35(b).

The EC's position is that this does not involve "the form of zeroing" before the panel in this case (please see our response to question 35(a)); and that even if it would be considered to involve "a form of zeroing", it would be fair, and a due or warranted adjustment.

The EC agrees that the possibility to be fully asymmetrical contains within it the possibility to be partially asymmetrical, as outlined in our response to question 33, just as the possibility to make either a weighted average-to-weighted average or a transaction-to-transaction comparison contains within it the possibility to make comparisons by averaging groups.

37. The EC has stated that, in its view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6). Could the EC explain what, in its view, is a normal value for purposes of a transaction-to-transaction analysis? How would the EC expect that an investigating authority determine the appropriate normal values for comparison purposes in the context of such an analysis?

Our position is that the investigating authority may not *assume* that each individual domestic transaction is a normal value. As outlined in our written and oral statements to the panel, in effect, we consider that the investigating authority must ensure that the domestic transactions it uses to constitute normal value are representative. It is unnecessary for the purposes of this panel to review all the issues arising from the selection of the domestic transactions to be compared to the export transactions. It is sufficient to observe that zeroing negative intermediate amounts that result when a specific export price is subtracted from a specific lower domestic price is not permitted.

38. Assuming the EC is correct that it is inappropriate for an investigating authority to assume that the price at which a single domestic transaction is concluded is always equivalent to a normal value, (EC written submission at para. 11) would the EC consider that the price at which a single domestic transaction is concluded can ever be equivalent to a normal value? If so, could the EC indicate what criteria might be relevant to distinguish such a case from those where the price at which a single domestic transaction is concluded is not equivalent to a normal value?

It would depend on all the circumstances of the case. However, the EC could envisage that, for example, in the case of large capital goods, especially if made to order, the fact that there would be only one domestic sale during the period of investigation would not necessarily preclude the investigating authority from determining a normal value on the basis of that one transaction.

39. Para. 15 of the EC's written submission seems to suggest that the transaction to transaction juxtapositions do not involve comparisons of normal values. The EC then indicates that when the results of these juxtapositions are combined, a dumping margin can be calculated. Could the EC indicate where, in this analysis, normal value is determined and compared with export price?

One of the utilities of the transaction-to-transaction method is precisely that it may eliminate the need to make adjustments for differences affecting price comparability, adjustments that may be difficult to quantify, because it allows the matching of directly comparable domestic and export transactions. Thus, at the second aggregation stage, a margin of dumping is calculated, which, as a matter of law, economics and mathematics, is based on a comparison between (representative) normal value and export price, even if an investigating authority does not consider it necessary to isolate and give precise numerical expression to the underlying normal value for the product as a whole. That would be possible. But it is unnecessary.

To assist the Panel further on this point, the EC offers the following examples. In order to avoid unnecessary complications, it is assumed that the product under investigation is homogeneous (i.e. one single model). In the first example, the transaction-to-transaction method is applied without expressing the overall normal value and export price as two single figures. In the second example, both normal value and export price are expressed as two single figures.

In the first example, export transactions are compared with the comparable domestic transactions. The intermediate results are then aggregated into the total amount of dumping, i.e. 80.

Domestic		Export		Comparison
Quantity	Price	Price	Quantity	
1	130 (not used)			
1	100	90	1	10
2	110	115	2	-10
3	120	120	3	0
4	130	110	4	80
			Dumping	80

In the second example, the normal value and the export price are determined as follows. The individual domestic and export transaction prices are weighted by the quantity of the relevant export transaction. Then, the two values are compared in order to produce the total dumped amount, i.e. 80. The comparison is still made on a transaction-to-transaction basis, since each export transaction is matched with a comparable export transaction - but no intermediate result is produced. Instead, the final dumping amount is determined immediately.

- normal value **1200** = (100*1)+(110*2)+(120*3)+(130*4)
- export price **1120** = (90*1)+(115*2)+(120*3)+(110*4)

This is not equivalent to a weighted average-to-weighted average calculation since (1) not all domestic sales are used and (2) no weighted average normal value within the meaning of the first sentence of Article 2.4.2 is expressed (i.e. by multiplying the domestic price by the domestic quantity). Instead, the domestic transaction used for the comparison is weighted against the quantity of the matching export transaction in order to give each export transaction (and intermediate result) its actual weight in the calculation. The same operation is performed in the first example above, but at a later stage of the calculation.

Domestic		Export	
Quantity	Price	Price	Quantity
1	130 (not used)		
1	100	90	1
2	110	115	2
3	120	120	3
4	130	110	4

Normal value	Export price	Dumping
1200	1120	80

A weighted average-to-weighted average comparison would have produced a total dumped amount of **90** (weighted average normal value of 121 minus weighted average export price of 112 equals 9 multiplied by the total export quantity of 10, equals **90**).

40. At para. 11 of the EC's written submission, the EC asserts that an isolated, transaction-specific home market value is not necessarily equivalent to normal value. The EC asserts that one could only establish a normal value using "a fair and balanced consideration that takes into account the appropriate data populating the relevant set" (rather than relying on an individual home market transaction price). Please give an example of how such "consideration" might

work in practice. Is the EC suggesting that some form of weighted average normal value might need to be determined? If so, what would be the difference between this methodology and the comparison methodology provided for in the second sentence of Article 2.4.2?

What would be used would, for example, have to be representative. Thus, if an investigating authority matches each export transaction to a domestic transaction, but observes that it has used a very small percentage of total domestic transactions, or that in some way the domestic transactions it has used are not representative (perhaps they all relate to one small region within the domestic market), then it might conclude that the transactions used were not representative, and that the transaction-to-transaction method was therefore inappropriate.

To Japan

41. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Japan reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

The EC refers to its answer to question 32.

42. Japan argues, at para 8 of its written submission, that the terms "dumping" and "margin of dumping" have uniform meanings throughout the AD agreement. Could Japan address the implications of this view in the context of duty assessment procedures under an prospective normal value system? Specifically, could Japan address the proposition that, in such a system, in the face of a prohibition on zeroing, duties may be assessed on entries of product at a price below the established minimum normal value, and that rebates must be given on entries of product at a price above the established minimum normal value?

The EC refers to its response to question 4. The prohibition of zeroing does not require giving rebates on entries of products at a price above the established minimum normal value because the variable duty that might be initially applied under the prospective system is subject always to a refund request under Article 9.3.2. In that refund request, the actual margin of dumping for the relevant period will be established and must be consistent with all of Article 2.4. If collection of duties on entries at a price below the established minimum normal value and non-collection of duties on entries at a price above the established minimum normal value has led to collecting a total amount of duty higher than the actual margin of dumping, the difference will be refunded.

This also allows an investigating authority to initially collect an amount that will cover any targeted dumping that might take place. This reflects the fact that in the prospective system only a refund is possible – liability cannot increase; and only an importer can request a refund – as opposed to the domestic industry under the retrospective system. It is legally erroneous to transpose these provisions from the initial part of the prospective system to the final step in the retrospective system.

43. Could Japan address the proposition that, in conducting a "targeted dumping" analysis under the second sentence of Article 2.4.2, the investigating authority may establish dumping margins on the basis of a comparison involving only the subset of entries that form the "pattern" leading to the need for such analysis? In the context of such an analysis, could Japan indicate how the assessment of duty would be carried out, and the level of duty that would be applied.

The EC refers to its response to question 33.

44. Japan argues, at para. 30 of its oral statement, that the argument that, in mathematical terms, the WA-to-WA and WA-to-T comparisons would produce identical results, absent zeroing, assumes wrongly that all other things are treated equally. Does Japan acknowledge that if all other things are treated equally, these two comparison methodologies would necessarily produce the same results, absent zeroing? Does Japan mean to suggest that a WA to T comparison must entail some other method of calculating normal value than the calculation of a weighed average of all normal values? Could Japan explain the textual basis for such a view, given that Article 2.4.2 does not address the calculation of normal value, but the comparison of normal value and export price in the establishment of margins of dumping.

The EC refers to its response to questions 33 and 35(a). There are at least two alternatives. However, even in the case of "mathematical equivalence", one "form of zeroing" cannot be compared to the other : what happens under a targeted dumping analysis being justified, fair and due or warranted.

To Thailand

45. Thailand suggested that there is a wide range of practical ways in which an investigating authority might conduct a targeted dumping margin calculation without recourse to zeroing. Please provide examples.

The EC understood Thailand's remarks to relate to the manner in which anti-dumping duties might possibly be imposed and finally assessed in relation to a specific region in which targeted dumping had been identified. The EC refers in this respect to its response to question 33 and Article 4.2, which in its view clearly envisages that such an approach is practicable or feasible.

To all parties and third parties

46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2.permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

If an investigating authority would determine "normal values" by model, for the purposes of multiple comparisons at the first stage, it would still not be allowed to "zero" at the second aggregation stage. Even if the normal value for the product as whole is never precisely calculated and stated by the investigating authority, it could in theory be calculated, and is reflected, as a matter of law, economics and mathematics, in the calculation of the margin of dumping for the product as a whole.

The EC considers that it is permissible to use a mix of domestic prices and constructed normal values on a model by model basis. This might be an efficient means of making intermediate comparisons between various model types. However, the normal value for the product as a whole would be the average of all the actual domestic prices and constructed domestic prices of the models concerned, in the same manner that the normal value for the product as a whole in the case where there are reliable domestic sales for all models consists of the average of all the model weighted average values.

47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not

determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:

The EC refers to its response to question 36.

(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each known exporter or producer")

This approach is consistent with the first sentence of Article 6.10, for the reasons set out above. In the case of targeted dumping, an investigating authority would be entitled to proceed in the manner outlined in CDA-8. Thus, there will always be one overall margin of dumping for each exporter, which corresponds to a given dumped amount. In the case of targeted dumping, this dumped amount could, for example, be distributed over the transactions in the targeted sub-set, and could also be expressed as an *ad valorem* rate, such as the assessment rate used by the US in retrospective final assessments. Such an assessment rate is not, however, the margin of dumping of the exporter.

(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).

Article 9.2 refers to imposition and collection on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except where price undertakings have been accepted. The EC refers to its response to question 33, which is consistent with this proposition. If the set of dumped imports is identified as those made in respect of a particular purchaser, region or time, then duties could be imposed and finally assessed on the same basis, without that constituting unjustified discrimination.

48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?

The word "accurate" begs the question. Absent targeted dumping, the use of a weighted average-to-weighted average comparison accurately measures whether or not there is, in truth, international price discrimination between different markets. Myopically focussing on individual transactions, without any reason, and zeroing, does not accurately measure what is really happening in the market place. It simply ignores the fact that the forces of supply and demand are operating across the whole of the defined market to affect all prices, that being the very essence of a market definition.

49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).

This question does not require any further comment by the EC at this stage, other than to specify that the EC's position is that the investigating authority may not *assume* this to be the case.

50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.

Just because the *Anti-Dumping Agreement* is silent on some specific detail, it is well established that that does not mean that an investigating authority is entirely free to do as it pleases. Members may have a certain latitude when it comes to deciding what approach they will follow, but once they have made their choice, they must apply the rule in an objective, even-handed and non-discriminatory way, and explain all the reasons for their determinations, consistent with Article 12. For example, if there are two exporters with identical behaviour and data, an investigating authority would not be entitled to apply the weighted average-to-weighted average method to one of them, and the transaction-to-transaction method to the other, arriving at significantly different conclusions, unless it provided a valid explanation for its determinations.

51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of ant-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?

It is correct that there are five different types of anti-dumping proceeding expressly referred to in the text of the *Anti-Dumping Agreement* : original *proceedings* (see, for example, Article 5.9); changed circumstances *proceedings* (see, for example, Article 9.5 "normal … review proceedings"); sunset *proceedings* (see, for example, Article 9.5 "normal … review proceedings"); and assessment or refund *proceedings* (see, for example, Article 9.5 "normal … review proceedings"). Assessment proceedings under Article 9.3.1 or refund proceedings under Article 9.3.2 are therefore to be distinguished from original proceedings under Article 5. These different types of proceeding have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*. However, all of these proceedings generally involve an investigation into something. In the case of Article 5, an investigation into the existence, degree an effect of any alleged dumping; in the case of Article 9.5 an investigation into the new comer's margin of dumping; in the case of Article 11.2, an investigation into whether or not changed circumstances warrant a variation of the duty; in the case of Article 11.3, an investigation into whether or not expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury; and in the case of Article 9.3, an investigation into the actual (contemporaneous) margin of dumping and final liability for payment of duties. Consistent with the definition of the term "margin of dumping" in Article VI:2 of the GATT 1994, as implemented in all of Article 2, and the cross-reference in Article 9.3 to all of Article 2, whenever an authority investigates or relies on a "margin of dumping" in any of these anti-dumping proceedings, that margin of dumping must be calculated in a manner consistent with Article 2, that is, *for the product as a whole*.

ANNEX E-5

REPLIES OF JAPAN TO THE QUESTIONS FROM THE PANEL

2 December 2005

To both parties

Q22. If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?

1. The latter part of this question suggests that the prohibition of zeroing in a T-to-T situation gives rise to a choice of either recognizing that the *Anti-Dumping Agreement* requires the aggregation of the comparisons for individual export transactions "into a single margin", or, alternatively, obliging administrators to "compensate" importers for "negative margins" on individual transactions. Japan submits that the first of these two options is based on a correct reading of the text of the *Agreement*, while the second is not.

2. The second option confuses two fundamentally distinct concepts – "margins of dumping" and "intermediate comparison results" (or "intermediate values")[1] – 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 *not* "margins of dumping".

3. Japan recalls that the measure at issue involves an original investigation in which, pursuant to Article 6.10, an individual margin is calculated for each producer and exporter. As explained more fully in reply to Question 41, a margin of dumping must be established for the product under investigation, not for individual transactions relating to the product. To calculate a margin for the product, the comparison must involve a volume of home and export market transactions that is representative of the product. Accordingly, the mathematical result of a single T-to-T comparison does not constitute a "margin of dumping" but merely an intermediate value. Intermediate values for comparisons between home and export market sales must be aggregated to produce a margin of dumping for the product.

4. There is, therefore, no question of "compensating" producers, exporters or importers for "negative margins". Instead, under Article 2.4.2, the negative intermediate values form an integral part of the data-set that must be taken into account in determining "the existence of margins of dumping" for producers and exporters.

[1] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

Q24. It can be argued that a methodology cannot be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down. In this respect, what are the comments of the parties on the observations of the Appellate Body in *EC –Bed Linen* and in *US - Corrosion-Resistant Steel Sunset Review* that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?

5. Although Article 2.4.2 provides for three basic methods of comparison, Members enjoy a degree of discretion in designing the details of the precise comparison methodology to be used to determine the existence of dumping margins in individual cases. For example, they can determine the relevant types or models of the product under investigation; they can determine the time base on which they compare the types or models; they can specify the methods used to identify "similarity" of non-identical comparison models of the product; they can determine the methods of assigning or allocating costs and expenses to individual transactions; and, they can determine whether sampling is necessary, and if so, how it should be undertaken. Each of these choices will likely have an impact on the magnitude of dumping, if any, that is found to exist.

6. Article 2.4, among others, limits the authorities' discretion in these matters by requiring a fair comparison. Given that the structure of the methodology bears directly on the magnitude of dumping that may be found to exist, the impact of the authorities' choices on the existence or magnitude of dumping is a relevant consideration in assessing the fairness of a given comparison methodology. This is entirely appropriate because the existence and magnitude of dumping is a decisive factor in a Member's right to impose anti-dumping duties, and also in fixing the maximum amount of those duties. The significance of the magnitude of dumping in determining the fairness of margin calculation methodology is illustrated by the procedural disciplines set out in Article 5.8, which requires that the authorities immediately terminate investigations if they find the magnitude of dumping to be *de minimis*. Thus by determining that the magnitude of dumping is greater than *de minimis*, the authorities are entitled to continue the investigation and may, eventually, impose anti-dumping duties.

7. This conclusion is also confirmed by the Appellate Body's statements in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*. In these Reports, the Appellate Body noted that the zeroing methodology was not fair because, among others, it makes a dumping determination more likely; it inflates any margin of dumping found to exist; and, it distorts the prices subject to comparison. Such a methodology is unfair because the comparison methodology is so designed and structured that exporters *inevitably and systematically* suffer prejudice. In other words, the lack of fairness does not stem from a *possibility* that the methodology *might* produce a higher margin *in some circumstances*; rather, the methodology is unfair because it *necessarily* produces such an outcome *in all circumstances*.

8. In this regard, an analogy may be drawn with the Appellate Body's findings in *US – Hot-Rolled Steel*. Under the measure at issue in that dispute, the United States selected among home market transactions to include in the determination of normal value, and hence in the comparison with export price. Specifically, to determine normal value, the United States applied a "99.5 percent test" that excluded a "great range" of low-priced sales, and an "aberrationally high price" test that excluded a "far smaller range" of high-priced sales.[2]

9. The Appellate Body held that the combination of these two tests "operated *systematically* to *raise normal value*" which "disadvantaged exporters".[3] The Appellate Body noted that these tests "would make a finding of dumping *more* likely and would also *raise* the amount of any margin of

[2] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144, 150 and 151.
[3] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 155. Emphasis added.

dumping, all to the *disadvantage* of the exporter".[4] It explained that, although Members enjoy discretion in establishing a methodology for determining normal value, "the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation".[5] The Appellate Body concluded that the consequences of the United States' two tests deprived the United States' approach of the even-handedness and fairness required by the Agreement.

10. In the same way, the United States' zeroing methodology involves a selection from among the universe of export transactions that are deemed by the United States to be comparable. In short, after conducting an initial T-to-T comparison, the United States *excludes* all of the relatively higher-priced export transactions that produce a negative price difference. In sharp contrast, the United States *includes* all of the relatively lower-priced export transactions. Like the methodologies in *US – Hot-Rolled Steel*, the combination of these approaches "operates systematically" to "make a finding of dumping *more* likely and also […] *raise[s]* the amount of any margin of dumping, all to the *disadvantage* of the exporter."[6] This is not even-handed or "fair" within the meaning of Article 2.4.

Q27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?

11. As explained in reply to Question 41, a margin of dumping must be established for the product under investigation, not for individual transactions relating to the product. It is, of course, for the investigating authorities to determine the scope of the subject and like products at issue. In consequence, under the T-to-T comparison method, the margin of dumping must be established on the basis of the entire universe of home and export market transactions during the time period covered by the investigation, or a representative sample of those transactions. These rules apply to all WTO Members in the same way, whether the Member is large or small; developing or developed.

12. Depending on the product determination made by the authorities, in the case of large capital goods or specially designed/manufactured goods, there may only be a single export transaction for the product under investigation during the time period covered by the investigation. In that event, a margin of dumping for the product can be established on the basis of that transaction.

To Japan

Q41. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Japan reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".

13. The textual basis for the Appellate Body's conclusion that "dumping" and "margins of dumping" are determined for the "product" as a whole is Article VI of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. According to the definition of "margin of dumping" in Article VI:2 of the GATT 1994, and the definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1

[4] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144.
[5] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 148. Underlining added.
[6] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144 and 155.

of the *Anti-Dumping Agreement*, the existence and magnitude of dumping are determined for the product as a whole.

14. The second sentence of Article VI:2 states that the margin of dumping is "the price difference" determined in accordance with Article VI:1. Although this sentence refers to a "price difference", it does not state what the price difference in question measures. To ascertain the price difference being measured, the context provided by Article VI:1, as well as by the first sentence of Article VI:2, must be examined. These provisions demonstrate that "the price difference" in question is the price difference for the "product", not for individual transactions.

15. Article VI:1 sets forth a definition of dumping. Significantly, it defines dumping by reference to "a product". It states that "a product" is dumped "if the [export] price of the product" is less than the comparable domestic price "for the like product", or less than "the cost of production of the product". Each one of these textual indications in Article VI:1 shows that dumping is determined for the product as a whole and that the determination is based on a comparison of prices for the product. There is nothing in the text to suggest that dumping is determined for individual transactions or groups of transactions.

16. The text of Article VI:1 is reflected, of course, in the text of Article 2.1 of the *Anti-Dumping Agreement*, which also refers to the dumping of "a product" and also provides that the determination is based on a comparison of "the export price of the product" and "the comparable price … for the like product". The Appellate Body interpreted the term "product" to mean the entire product under investigation. The Appellate Body found that "[i]t is clear from the texts of [Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to *a product as a whole* as defined by the investigating authority."[7]

17. The interpretation of the term "price difference" in the second sentence of Article VI:2 as referring to the "product" is further confirmed by the immediate context provided in the first sentence of that provision. The first sentence states that "an anti-dumping duty" levied on "any dumped product" shall not exceed "the margin of dumping *in respect of such product*".

18. Thus, the text of Article VI:2 explicitly refers both to a dumped "product" and to the margin of dumping determined "in respect of such product". The text also refers to a single margin of dumping – "the margin" – that is determined for the product. Like Articles 6.10, 6.10.2 and 9.5 of the *Anti-Dumping Agreement*, this sentence provides strong textual support for the view that a single, "individual margin of dumping" is determined for the product. Further contextual support is provided by Articles 7.2, 8.1, 9.1 and 9.3. Each of these provisions contains obligations in connection with the maximum level of the remedy that can be imposed on imports of the dumped product. In each case, the remedy is limited by "the margin of dumping".

19. Thus, the *Agreement* consistently envisages a single margin of dumping that is established for the product. This means that there cannot be multiple margins of dumping, one for each transaction or each group of transactions. In fact, it is difficult to see how the drafters of the text could have been any more explicit that dumping and the margin of dumping are determined for the product.

20. 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.[8] If the price difference for an individual transaction were considered to constitute a margin, the result would be that product-wide consequences – including the

[7] Appellate Body report, *US – Softwood Lumber V*, para. 92-93.
[8] Japan's Opening Statement at the Second Meeting with the Panel, paras. 34-39.

imposition of duties on the product in excess of bound tariff rates – could be derived from the uncertain foundation of the price of a single export transaction.

21. The text of Article VI of the GATT 1994, as well as various provisions of the *Anti-Dumping Agreement* therefore, confirm that both dumping and margins of dumping are determined for the product as a whole, not for particular transactions.

Q42. Japan argues, at para 8 of its written submission, that the terms "dumping" and "margin of dumping" have uniform meanings throughout the AD agreement. Could Japan address the implications of this view in the context of duty assessment procedures under an prospective normal value system? Specifically, could Japan address the proposition that, in such a system, in the face of a prohibition on zeroing, duties may be assessed on entries of product at a price below the established minimum normal value, and that rebates must be given on entries of product at a price above the established minimum normal value?

22. The "proposition" the Panel describes in question 42 seems to confuse the distinct concepts of the "*amount* of anti-dumping *duty*" and the "*margin* of *dumping*" under Article 9.3 of the *Anti-Dumping Agreement*. In *EC – Bed Linen (Article 21.5)*, the Appellate Body found 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. In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link."[9] The Appellate Body added that "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."[10] Accordingly, when the customs authorities impose and collect anti-dumping *duties* on individual entries, in either a prospective or a retrospective system, they are *not* calculating *margins of dumping* within the meaning of Article 2. Rather, the margins of dumping determined in original investigations or reviews constitute a ceiling on the amount of duties that can be imposed and collected by the customs authorities on individual entries.

23. The proposition in the Panel's question also assumes that in a prospective normal value, or PNV, system, the amount of duties imposed by customs authorities on each entry constitutes a margin of dumping, and that a "rebate" must be provided for the transactions with "negative" dumping margins. This assumption is erroneous. In a PNV system, to assess the amount of duties due, a comparison of prices is undertaken for each individual entry and, on the basis of that comparison, a variable duty is imposed on the individual export transaction concerned. The calculation and imposition of variable anti-dumping *duties* in this way – although permissible – does not involve the establishment of *margins of dumping* within the meaning of Article 2 of the *Anti-Dumping Agreement*. Instead, the customs authorities mechanically compare import prices with a reference price; they do not, and can not, undertake a comparison that respects the detailed procedural and substantive rules set forth in Article 2, for example, in Article 2.4.

24. In particular, because the PNV is established in an original investigation on the basis of transactions from the period of investigation, the comparison between the PNV and the price of imports is not contemporaneous. Also, the customs authorities do not inform the interested parties of the information they require to make a fair comparison because they do not make adjustments to the respective prices. The difference between a PNV and the import price cannot, therefore, constitute "the actual margin of dumping" within the meaning of Article 9.3.2 because the price comparison does not respect the rules in Article 2.4.

[9] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123 (underlining added).
[10] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

25. Moreover, in a PNV system, at the request of an importer, the final liability for duties must be assessed in a review under Article 9.3.2. In that event, authorities conduct a review of past entries to establish whether duties were paid "in excess of the [actual] margin of dumping" to be calculated for the review period. In this setting, the word "actual" refers to the margin that is determined for the product on the basis of the transactions in the specified review period. The word "actual" is used to contrast the margin determined for the review period with the original margin calculated in the investigation, which formed the basis for the imposition of the duties subject to review. Thus, the duties paid on the basis of the original margin must be reviewed in light of "the actual margin" for the review period. If a refund is due, it is because the amount of duties initially paid on entries of the product are greater than the actual margin of dumping for the product for the review period. Further, there is no question of offsetting, compensating or rebating between positive and negative margins for individual entries because the results of individual W-to-T comparisons are not "margins of dumping" within the meaning of Articles 2 and 9.

26. If, as assumed by the Panel's proposition, under the PNV system, the difference between the transaction price and the reference price were itself the margin of dumping for the transaction, the amount of the variable duties imposed would *equal* the margin of dumping for the transaction. Yet, Article 9.3.2 *presupposes* that, in the prospective system, the amount of duties initially imposed and the margin of dumping are not necessarily equal. Indeed, if the price difference for each transaction were "the actual margin" for that transaction, there could be no refund and the refund procedure would, therefore, be redundant. The existence of a refund procedure for the prospective system demonstrates that the amount of variable duties initially imposed on each entry is *not* the margin of dumping for that entry.

27. In any event, the Panel must focus on the specific issues raised in this case and the particular features of the zeroing measures that are at issue. In the measure at issue, the USDOC used a zeroing method in calculating the overall margin of dumping on a T-to-T basis in an original investigation. The issue is whether that particular measure involves a "margin of dumping" calculated consistently with the first sentence of Article 2.4.2. As explained by Japan, "margins of dumping" within the meaning of that provision must be established for the product as a whole[11]. Therefore, Japan submits that an examination of the meaning of "margin of dumping" in the context of prospective or retrospective duty assessment is irrelevant for the purpose of resolving this dispute.

Q43. Could Japan address the proposition that, in conducting a "targeted dumping" analysis under the second sentence of Article 2.4.2, the investigating authority may establish dumping margins on the basis of a comparison involving only the subset of entries that form the "pattern" leading to the need for such analysis? In the context of such an analysis, could Japan indicate how the assessment of duty would be carried out, and the level of duty that would be applied.

28. The second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* sets forth an exceptional method of comparison. The Appellate Body explained in *EC – Bed Linen* that the second sentence of Article 2.4.2:

> allows Members, in structuring their anti-dumping investigations, to address three types of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.[12]

[11] Appellate Body Report, US – Softwood Lumber V, paras. 91-96.
[12] Appellate Body Report, *EC – Bed Linen*, para. 62.

The particular purpose of the second sentence of this provision, therefore, is to allow Members to combat targeted dumping that might be indicated through pricing patterns among different purchasers, regions or time periods.

29. This raises the issue of how an authority should structure the method of comparison to take "appropriate account" of those pricing patterns in calculating the dumping margin. By explicitly requiring the authorities to explain why a W-to-W or T-to-T comparisons will not take "appropriate account" of the prices differences, the second sentence of Article 2.4.2 presupposes that the W-to-T comparison methodology *will* enable the authorities to take appropriate account of those differences. Conversely, a comparison that compares the entire universe of export transactions cannot address pricing patterns, or the possibility of targeted dumping, confined to a certain group of transactions. Thus, as explained by Japan in its Opening Statement, the W-to-T comparison methodology permitted by the second sentence of Article 2.4.2 allows an authority that finds a pricing pattern to establish the existence of the margin of dumping on the basis of the specific transactions within the pricing pattern.[13]

30. Japan notes that its interpretation is consistent with the USDOC's "targeted dumping" regulation. This regulation provides that where:

> there is targeted dumping in the form of export prices . . . that differ significantly among purchasers, regions, or periods of time . . . the Secretary will normally limit the application of the average-to-transaction method to those sales that constitute targeted dumping.[14]

31. Thus, under the United States' own system, the application of the W-to-T method of comparison, in a targeted dumping situation, is confined to the transactions making up the pricing pattern. The transactions outside the pattern are *not* subject to the W-to-T comparison. In other words, the USDOC's own regulations are consistent with Japan's position that, pursuant to the second sentence of Article 2.4.2, the transactions included in the W-to-T comparison should be confined to those export transactions making up the pricing pattern, and does not extend to the entire universe of export transactions. Therefore, the existence of a dumping margin can be determined on the basis of those transactions.

32. Japan notes that the liability for duties imposed on the basis of a dumping determination under the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* is subject to review under either Article 9.3.1 or 9.3.2. In such circumstances, a question may arise whether authorities would be permitted to use the W-to-T method in review proceedings in the exceptional manner set forth in Article 2.4.2 (i.e. confined to a limited group of transactions). The answer to this question depends on the applicability of Article 2.4.2 to review proceedings.

33. Japan does not take, and need not take, any position on this issue in the present dispute. However, supposing for the sake of argument that Article 2.4.2 applies solely to original investigations, there would be no basis for Members to use the W-to-T method in the *exceptional* manner in reviews (i.e. according to which the comparison is limited to export transactions within the pricing pattern). The final liability for the payment of anti-dumping duties would have to be determined on the basis of a product-wide dumping margin determination, even if the third method in Article 2.4.2 had been used in the initial investigation to justify the imposition of duties on the basis of a comparison of a limited group of export transactions.

[13] Japan's Opening Statement at the Third Party Meeting, paras. 31-38.
[14] 19 C.F.R. § 351.414(f)(2).

34. On the other hand, if Article 2.4.2 is applicable to review proceedings, and assuming that the conditions in the second sentence of that provision are met, the margin of dumping could also be determined in review proceedings on the basis of a comparison of a limited group of export transactions within a pricing pattern. In such cases, higher margins would likely result from the limited W-to-T comparison. However, these cases would be limited to the exceptional situations that meet the strict conditions set forth in the second sentence of Article 2.4.2. The confined comparison would be deemed to be a permissible response by Members to an attempt to hide dumping through a targeted pricing practice.

Q44. Japan argues, at para. 30 of its oral statement, that the argument that, in mathematical terms, the WA-to-WA and WA-to-T comparisons would produce identical results, absent zeroing, assumes wrongly that all other things are treated equally. Does Japan acknowledge that if all other things are treated equally, these two comparison methodologies would necessarily produce the same results, absent zeroing? Does Japan mean to suggest that a WA to T comparison must entail some other method of calculating normal value than the calculation of a weighed average of all normal values? Could Japan explain the textual basis for such a view, given that Article 2.4.2 does not address the calculation of normal value, but the comparison of normal value and export price in the establishment of margins of dumping.

35. The United States' argument of nullity places a very high burden on the United States. To show that the prohibition of zeroing "nullifies" the second sentence of Article 2.4.2, the United States must demonstrate, as a matter of law, that, without zeroing, Members are required to calculate margins in a manner that will *always* result in the same outcome for the two comparison methods. There is no nullity just because the two methods *may* produce the same outcome in some circumstances.

36. Japan is not suggesting that the W-to-T comparison *must* entail "some other method of calculating normal value than the calculation of a weighed average of all normal values". Conversely, however, the *Agreement* text does not suggest that a single or same method for calculating the weighted average normal value *must* be used under Article 2.4.2. The significant point is that the text of the Article itself does not *prohibit* a Member from using different methods for calculating the weighted average normal value in the two situations. In other words, Article 2.4.2 was crafted on the assumption that Members could choose to use different bases, or methods, for calculating the weighted average in the W-to-W and W-to-T comparisons. So long as Members are not prohibited from using different bases or methods (including different time periods) to calculate the "W" in the W-to-W and W-to-T comparisons, the outcomes of the comparisons will almost inevitably differ because the groups of transactions making up the weighted average normal value will differ.

37. This entirely undermines the United States' argument that the prohibition of zeroing would render the second sentence of Article 2.4.2 "superfluous" or a "nullity" because, without zeroing, the W-to-W and W-to-T comparisons will lead to the same results.

38. Simple examples demonstrate that, contrary to the United States' argument, the W-to-T methodology is not rendered a nullity – i.e., even without zeroing, the results of that comparison methodology are not necessarily the same as the outcomes yielded by the T-to-T or W-to-W methodologies. First, the T-to-T methodology will almost certainly never yield the same results as a W-to-T methodology, whether or not zeroing is employed. The reason for the difference in results is that the individual transactions that comprise normal value in a T-to-T comparison will almost certainly differ, in at least some instances, from the weighted average of the transactions that would function as the basis for normal value (the "W") in the W-to-T methodology. Thus, the overall comparison result will differ depending on whether the normal value is based on individual transactions (T) or a weighted average of transactions (W).

39. The following is a simple example, involving five home market transactions that form the basis of normal value, with three export transactions, and assuming that each transaction involves an equal quantity of merchandise.

Home market transactions	Export transactions
100	95
90	92
110	–
100	102
105	–

40. In a W-to-T comparison, the weighted average normal value of the five home market sales is 101. Comparison of the three export prices to this weighted average normal value leads to intermediate results of 6 + 9 + (-1) for the three individual export transactions. This produces a total margin of dumping of 14 which, divided by the total value of the export sales (289), produces a percentage margin of 4.84%, if zeroing is not used. If zeroing is used, it results in a total margin of dumping of 15 (because the -1 is converted to a zero) and a percentage margin of 5.19%.

41. In a T-to-T methodology, assuming that the appropriate home market and export transactions are listed adjacent to one another in the table above, the outcome is 5 + (-2) + (-2) for the three export transactions. Without zeroing, this results in a total margin of dumping of 1 which, divided by the total value of the export sales (289), produces a percentage margin of 0.35%. With zeroing, the total margin of dumping is 5 and the percentage margin equals 1.73%. As shown in the following table, both of these results, of course, are different from those derived from the W-to-T comparisons.

Comparison Method	Percentage Result
W-to-T without Zeroing	4.84%
W-to-T with Zeroing	5.19%
T-to-T without Zeroing	0.35%
T-to-T with Zeroing	1.73%

42. These different results are to be expected, except in the highly unusual situation in which the individual transactions in the home market used in the T-to-T methodology happen to have the same normal value as the weighted average normal value that is used in the W-to-T methodology. Thus, because the T-to-T and W-to-T methodologies produce different results, neither method is redundant.

43. Turning to the W-to-W methodology, again a simple example can show that it need not yield the same results as the W-to-T comparison methodology. In doing so, it is important to recall that authorities may calculate the "W" over different time periods in the W-to-W and W-to-T comparisons, thereby using different pools of home market transactions. Indeed, this difference is reflected in the United States' own anti-dumping statute, which provides that in original investigations, the weighted average normal values is generally to be calculated over the *entire period of investigation* (typically a full year); whereas for periodic reviews, the statute provides for the calculation of weighed average normal values over "a period *not exceeding the calendar month* that corresponds most closely to the calendar month of the individual export sale."[15]

44. Because of the calculation of different weighted average normal values, the outcome of the W-to-W and W-to-T comparisons using those different "W's" will necessarily differ, even if the export prices are identical in both cases. This conclusion would always hold, except in the highly

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

unusual situation in which the weighted average normal values in each month happen to equal the weighted average normal value over the entire period of investigation.

45. The following is a simple example, assuming a three month period of investigation, with two export transactions, and assuming that each transaction involves an equal quantity of merchandise.

Month	Home Market Transactions	Export Transactions
1	100	
	101	96
	98	
Month 1 Average	99.67	
2	104	
	104	
	102	
Month 2 Average	103.33	
3	96	102
	98	
	100	
Month 3 Average	98.0	
Overall Average	100.33	99

46. Using the W-to-T comparison methodology, and calculating the "W" as the United States does in investigations (i.e. over the entire period of investigation), the intermediate comparison results for the two individual export transactions are 100.33 – 96, i.e. 4.33, and 100.33 – 102, i.e. (-1.67). Without zeroing, the total margin of dumping is 4.33 + (-1.67), i.e. 2.66, and the percentage margin is 1.34%. If zeroing is used, the total margin of dumping is 4.33 and the percentage margin is 2.18%.

47. Using the W-to-T comparison methodology, and calculating the "W" as the United States does in periodic reviews (i.e. on a monthly basis), the intermediate comparison results for the two individual export transactions are 99.67 – 96, i.e. 3.67, and 98 – 102, i.e. (-4.00). Without zeroing, the final result is 3.67 + (-4.00), i.e. (-0.33), which is negative, and the overall dumping margin is zero. If zeroing is used, the total margin of dumping is 3.67 and the percentage margin is 1.86%.

48. Finally, using the W-to-W comparison methodology, and calculating the "W" as the United States does in original investigations (i.e., over the entire period of investigation), the total margin of dumping is 100.33 – 99, i.e. 1.33, and the percentage margin is 1.34%.[16]

Comparison Method	Percentage Result
W-to-T (Yearly without Zeroing)	1.34%
W-to-T (Yearly with Zeroing)	2.18%
W-to-T (Monthly without Zeroing)	0
W-to-T (Monthly with Zeroing)	1.86%
W-to-W (Yearly)	1.34%

49. Thus, the W-to-W (yearly) and W-to-T (yearly without zeroing) outcomes are the same, as the United States has noted. But the significant point for the Panel's question is that the outcomes are different between the two methodologies, when the W-to-T methodology is based on a monthly

[16] Zeroing is irrelevant in this instance because there is a single comparison for the product as a whole and no "models" for sub-groupings of the product.

calculation of normal value, whether or not zeroing is used in aggregating the intermediate results to calculate the overall margins of dumping. Thus, the United States' own statutory structure establishes a system of W-to-W and W-to-T comparisons that do not yield identical results (or render the third methodology a "nullity", as the United States asserts) in the absence of zeroing. Therefore, applying a W-to-T comparison without regard to a pricing "pattern", the United States is incorrect to assert that a W-to-W and a W-to-T comparison necessarily yield the same results.[17]

50. Finally, it is possible, of course, that a Member *may* choose to use the same time bases to calculate the "W" in the two comparisons, in which case the same outcome might well arise (as seen in the example above, where the "W" is calculated on a yearly basis for both the W-to-W and W-to-T comparisons). But the fact that methods overlap in those circumstances does not nullify the third method because a Member *may* also choose to do otherwise, as the United States itself has done.

51. Accordingly, the United States cannot demonstrate that the W-to-W and W-to-T comparison methodologies result in the same outcome in all situations; indeed, the United States itself has adopted a system in which the different comparison methodologies will not generate the same outcomes. The United States, therefore, has failed to meet the demanding requirement imposed by its argument that Japan's interpretation of the *Agreement* renders the second sentence of Article 2.4.2 a nullity.

To all parties and third parties

Q46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2.permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

52. Article 2.2 of the *Anti-Dumping Agreement* requires that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country …, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

[17] The outcomes will also differ as between W-to-W and W-to-T comparisons for yet another reason – namely, fluctuations in currency exchange rates over the period of investigation. That is, in calculating margins of dumping, the authorities generally convert the prices and expenses incurred in the currency of the exporting country into their corresponding values in the currency of the importing Member. In a W-to-T situation, the currency conversion generally is performed at the exchange rate in effect on the date of the export transaction (i.e., the date of the "T"). In a W-to-W situation, on the other hand, an average exchange rate is calculated over all the dates of export transactions in the period of investigation of the relevant model (i.e., the period over which the export price "W" is determined). As a result, *even if (contrary to US practice) the normal value "W's" are calculated over the same time period*, the conversion of the data reported in the currency of the exporting country into the currency of the importing Member would almost certainly result in different normal values in the W-to-W and W-to-T situations, except in the unusual circumstance in which the average currency exchange rate over the period of investigation is identical to the rate in effect on the individual dates on which the export transactions occurred. The different normal values, in turn, would lead to different intermediate results when those normal values are compared to the export prices, and hence, different dumping margins.

53. In Japan's view, when there are multiple models of the product under investigation (e.g. Model A, B), and there are sales in the ordinary course for some of those models (e.g. Model A), but not for others (e.g. Model B), investigating authorities can determine normal value on the basis of home market sales for models with sales in the ordinary course (Model A), and can construct normal value for other models (Model B), in order to determine a margin of dumping for the product as a whole.

54. This interpretation does not conflict with the Appellate Body's ruling that the margin of dumping must be established for product as a whole. The results of the comparisons for each model are not "margins of dumping" within the meaning of Article 2.4.2. As the Appellate Body notes, "those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation".[18] Accordingly, the difference between export price and constructed normal value for, for example, Model B does not constitute a "margin of dumping".

Q47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:

(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")

(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).

55. As explained in its Opening Statement and in reply to Questions 43 and 44, Japan also considers 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. 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. 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.

56. According to the text of Article 2.4.2, each of the three methods of comparison constitutes, on its own, a sufficient basis for determining "the existence of margins of dumping". Thus, the "individual margin of dumping"[19] established for an exporter or producer under any one of the three comparison methods[20], including the W-to-T comparison method, confined to the subset of

[18] Appellate Body report, *US – Softwood Lumber V*, para. 97.
[19] Article 6.10 of the *Anti-Dumping Agreement*.
[20] This assumes that, for the third methodology, the prerequisites in the second sentence of Article 2.4.2 have been satisfied.

transactions making up the pricing pattern (whether it is the pricing pattern among different purchasers, regions or time periods), constitutes a valid dumping determination on its own.[21] The imposition of duties based on an individual margin for a given producer or exporter to all imports from that producer or exporter does not give rise to any discrimination under Article 9.2.

57. With respect to duty assessment, Japan notes that, according to the Appellate Body, "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."[22] In order to impose anti-dumping duties, Article 9.1 of the *Anti-Dumping Agreement* requires that Members first make "the determination of dumping, injury, and causation under Articles 2 and 3".[23] For purposes of the dumping determination in an investigation, Article 2.4.2 prescribes the comparison methodologies that are to be used. The prior determination of the existence of a (more than *de minimis*) dumping margin, using any one of these methodologies, pursuant to Article 2, permits the imposition of duties under Article 9 on all entries of the product into the territory of the importing Member, provided that the authorities also make affirmative injury and causation determinations under Article 3. In other words, where all the prerequisites relating to "the existence of a dumping margin, injury, and a causal link" "have been fulfilled", the Members are consequently conferred "the rights to impose anti-dumping duties under Article 9" on all imports of the product.[24] The amount of duties initially collected under Articles 9.1 and 9.2 is subject to review under Article 9.3.

Q48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?

58. Nothing in the text of the GATT 1994 or the *Anti-Dumping Agreement* supports the view that a supposed concept of "accuracy" is the determinative element in deciding whether a particular comparison methodology is "fair" under Article 2.4 in establishing the existence of margins of dumping. New Zealand assumes that the T-to-T comparison is "the most accurate approach".[25] However, the text of the *Anti-Dumping Agreement* does not suggest that one of the symmetrical comparison methods is more accurate or "fairer" than the other; nor is there any hierarchy between the W-to-W and T-to-T comparison methods. Authorities have discretion to use either one of the methods. Furthermore, there is no basis in the *Agreement* for assessing the "accuracy" of a comparison method because each constitutes a valid and sufficient basis for determining "the existence of margins of dumping".

59. To support its view, New Zealand refers the negotiating history. However, the terms "accurate" or "accuracy" are not used in the document referred to by New Zealand. The document refers to "a more *direct* method of establishing the normal domestic price"[26], but it does not mention "a more *accurate* method". The reference in this document to a perceived "more direct" comparison does not inject into the *Anti-Dumping Agreement* a legal hierarchy between the W-to-W and T-to-T comparison methods. Moreover, as Japan noted in its Oral Statement, "[b]ecause the ordinary

[21] Japan believes that, in situations in which the W-to-T 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 for the export transactions that do not form part of the pattern (although it does not compel the Member to do so).

[22] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

[23] *Id*., para. 123.

[24] Id.

[25] New Zealand's Third Party Submission, paras. 3.12

[26] Exhibit NZ-1, para.9. Emphasis added.

meaning of the *Agreement* under Article 31 of the Vienna Convention is neither ambiguous nor absurd, it is not necessary for the Panel to examine the negotiating history".[27]

60. New Zealand suggests a "fair" methodology is one that produces most "accurate" results by targeting the "*dumped goods*" through the exclusion of negative comparison results.[28] New Zealand's approach is predicated on the assumption that the margin of dumping can be established for each individual export transaction. However, this approach overlooks that the result of the individual price comparison for each transaction is merely an intermediate value that must be aggregated with other intermediate values to establish the "margin of dumping" for the product as a whole. Thus, the purpose of the comparison is to ascertain *whether or not there is dumping for the product*, not for each transaction. Yet, because only the *positive* comparison results are aggregated on New Zealand's approach, dumping will almost certainly be found. As a result, as shown by New Zealand's goal of selecting a methodology that targets "dumped goods", an objective inquiry becomes a self-fulfilling prophecy. But as the Appellate Body said in *EC – Bed Linen (Article 21.5 – India)*, the "result" of the authorities' investigation cannot be "predetermined by the methodology itself".[29]

Q49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).

61. Japan agrees with the EC's statement that "the price at which a transaction in the home market of the exporting country is concluded, considered in isolation" is not "equivalent to a 'normal value'" because Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 define the "margin of dumping" in terms of the price difference between "the export price of the product" and "the comparable price … for the like product", i.e. normal value for the product. Japan has elaborated fully on this issue in response to Question 41.

62. Therefore, in terms of the definition of the term "margin of dumping" under *Anti-Dumping Agreement* and Article VI of the GATT 1994, a "normal value" is determined for the product, not each transaction in the home market of the exporting country.

Q50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.

63. Nothing in the text of Article 2.4.2 suggests that there is a hierarchy between the W-to-W and T-to-T comparison methodologies. Accordingly, a Member has freedom to choose between these two methodologies, "subject to the provisions governing fair comparison in paragraph 4". See the reply to Question 48.

Q51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of ant-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?

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[27] Japan's Oral Statement, para.39
[28] New Zealand's Third Party Submission, paras. 3.12 and 3.14.
[29] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

64. As Japan stated in response to Question 47, the Appellate Body has held that "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"[30], and where all prerequisites to determine "the existence of dumping margin, injury, and a causal link" "have been fulfilled", the Members are consequently conferred "the rights to impose anti-dumping duties under Article 9".[31]

65. Accordingly, when a Member's customs authorities assess and collect anti-dumping duties, they are not calculating "margins of dumping" within the meaning of Article VI of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*. Rather, the margins of dumping have already been determined by the investigating authorities, on the basis of Article 2, in investigations or reviews. In terms of Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*, these margins constitute a ceiling on the amount of duties that can be imposed and collected by the customs authorities.

66. Thus, under Articles 9.1 and 9.2, in both the retrospective and prospective systems, the authorities impose anti-dumping duties on imports of a product in appropriate amounts that cannot exceed the margin of dumping previously determined for the product. Under both Articles 9.3.1 and 9.3.2, the authorities may conduct a review to assess whether the total amount of duties initially paid on imports exceed the margin of dumping for the product for the review period. Additionally, in the case of Article 9.3.1, the review may assess whether the amount of duty (or duty deposit) initially paid was less than this margin of dumping. Thus, in light of the determination of the dumping margin for the product conducted in the Article 9.3 review, definitive duties are levied on the product.

[30] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.
[31] Id.

ANNEX E-6

NEW ZEALAND'S RESPONSES TO QUESTIONS BY THE PANEL TO THE THIRD PARTIES

2 December 2005

To Third Parties

Question 46:

Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2 permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

Under Article 2.1 of the Anti-Dumping Agreement a product is to be considered as being dumped "if the export price … is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.2 provides for the situation where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when such sales do not permit a proper comparison. In such circumstances the margin of dumping may be determined by a comparison of the export price with a comparable and representative price of the "like product" when exported to an appropriate third country, or with the constructed normal value.

Article 2.2 contains an element of flexibility to allow an investigating authority some discretion in the method it selects to determine normal value. It provides that an investigating authority may use an alternative method to using the home market sales "…when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison". The focus of investigating authorities will generally be home market sales. However, New Zealand considers that in appropriate situations Article 2.2 allows some scope for determining normal value based on home market sales for some models, and constructed normal value for others. An example of this could be the situation that the Panel refers to, i.e. where there are no sales in the home market of some models.

Consideration must also be given in this regard to Article 2.4, which provides that "[a] fair comparison shall be made between the export price and the normal value". The Appellate Body has indicated that this is a general obligation that informs all of Article 2.[1] New Zealand considers that in certain situations, a fair comparison may only be possible if the normal value for a product is assessed on the basis of home market sales for some models, and an alternative method for other models.

[1] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/41/AB/R, paragraph 59.

Question 47:

The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:

(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")

(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).

While this question does not engage New Zealand's systemic interest in this dispute, New Zealand nonetheless considers that the EC is incorrectly distorting the operation of the weighted average-to-transaction methodology. The EC is, in effect, attempting to transform this methodology into a form of weighted average-to-weighted average methodology by suggesting that there is a need to compare weighted average normal values for the transactions forming the "pattern". This interpretation of Article 2.4.2 adds a requirement to this provision that simply is not in the text, and is not there for good reason. The purpose of this method is to allow comparisons of a normal value established on the basis of a weighted average with individual export transactions in appropriate circumstances, and not an average of a number of transactions. The EC's interpretation would substantially alter the operation of the weighted average-to-transaction methodology, an outcome that cannot have been the intention of drafters.

Articles 6.10 and 9.2 do not affect this interpretation. The first sentence of Article 6.10 is simply a requirement that, as a rule, an individual margin of dumping be determined for each known exporter or producer. Article 9.2 concerns the collection of duties. Neither provision impacts on the actual determination of the margin of dumping under Article 2.

Question 48:

Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?

As New Zealand noted in its Third Party Submission (paras 3.12 and 3.14) a "fair" methodology is one which targets or addresses the dumped imports that are causing injury.[2] Non-

[2] New Zealand notes the observations of the EC in relation to "targeted" dumping in paras 14-16 of its Third Party Oral Statement. The EC appears to misinterpret the New Zealand submission. The core aspect of any dumping investigation must be that it addresses or "targets" the dumping that is occurring. This is not the same as "targeted dumping" which is provided for in the second sentence of Article 2.4.2.

dumped imports should be considered in the injury analysis as one of the "known factors other than the dumped imports". Imports that are not dumped cannot cause injury. It is this approach to each individual transaction that New Zealand believes means the transaction-to-transaction methodology only addresses or targets the dumped imports and therefore produces a fair and accurate result.

Question 49:

Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).

New Zealand does not support the EC argument that the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value". The EC argument is illogical. It appears to be arguing that the transaction-to-transaction methodology is a comparison of an aggregated normal value in the home market of the exporting country with export prices for individual transactions. This is inconsistent with the EC's own interpretation of the meaning of "transaction" as a "deal".[3] Rather, the transaction-to-transaction methodology requires in normal circumstances the comparison of a "deal" in the export market with a comparable "deal" in the home market of the export country.

By requiring a comparison of the aggregated normal value with export prices for individual transactions, the EC interpretation would equate the transaction-to-transaction methodology with the methodology set out in the second sentence of Article 2.4.2 – the comparison of the normal value established on a weighted average basis with prices of individual export transactions. The text of Article 2.4.2 clearly sets out three methodologies which may be used to establish the existence of margins of dumping – not two methodologies, with one being in the guise of another.

Question 50:

Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.

Article 2.4.2 of the *Anti-Dumping Agreement* in its first sentence, provides:

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

In New Zealand's view, the use of the term "shall normally be established" in the first sentence of Article 2.4.2 means that one of the two methodologies provided for in that sentence should normally be the methodology used. There is no limitation placed on the freedom of a Member to choose between the two methodologies in establishing the existence of margins of dumping. Both methodologies are "subject to the provisions governing fair comparison in paragraph 4" of Article 2.

[3] EC Third Party Written Submission, paragraph 3.

Question 51:

Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of ant-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?

The determination of dumping and a margin of dumping is different to the assessment and collection of anti-dumping duties. They are linked to the extent that the provisions of Article 9 restrict the amount of duty that may be collected to no more than the margin of dumping. However, authorities have a discretion within that parameter to collect duties at a lesser rate.

ANNEX E-7

THAILAND'S RESPONSES TO THE PANEL'S QUESTION FOR PARTIES AND THIRD PARTIES

2 December 2005

1. Thailand hereby responds to the questions posed by the Panel to parties and third parties following the Panel's meeting with the third parties on 16 November 2005. Thailand has reproduced below the Panel's questions for it and the other third parties, followed by Thailand's response, if any. Thailand appreciates this opportunity to present its views and trusts that these views will assist the Panel in its deliberations.

To Thailand

45. Thailand suggested that there is a wide range of practical ways in which an investigating authority might conduct a targeted dumping margin calculation without recourse to zeroing. Please provide examples.

2. Thailand considers that there are a number of practical ways in which an investigating authority could conduct a targeted dumping margin calculation without recourse to zeroing. Before discussing these, and providing examples, Thailand considers it important to point out that there is nothing inherent in the zeroing methodology that suggests that zeroing is necessary, or even relevant, to an analysis of targeted dumping. For example, the United States uses zeroing in exactly the same manner with each type of comparison, including weighted average to weighted average ("W to W") (as in the measure before this Panel in the original proceeding), transaction to transaction ("T to T") (as in the measure now before the Panel), or weighted average to transaction ("W to T") (as in the United States' practice in annual reviews). In each instance, the purpose and effect of the zeroing methodology is to reduce the export price used in determining the overall margin of dumping for the product under investigation. Since the methodology is used with all comparison methodologies, it cannot be argued that this methodology plays a special role in making effective the targeted dumping margin calculation under the targeted dumping provision of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

3. Similarly, nothing in the language of the targeted dumping provision suggests that zeroing is either necessary to make the provision effective or even permitted at all. The second sentence of Article 2.4.2 states that "A normal value established on a weighted-average basis may be compared to prices of individual export transactions" in certain circumstances. Nothing in this language contemplates a downward adjustment to the "prices of individual export transactions" that happen to exceed normal value as is done under the zeroing methodology. The targeted dumping provision may be used in circumstances where export prices differ significantly among different "purchasers, regions, or time periods." As used by the United States, the zeroing methodology is applied to all comparisons and does not differentiate among purchasers, regions, or time periods. In Thailand's view, therefore, there is no basis to suppose that the targeted dumping provision is in any way dependent for its effectiveness on the use of the zeroing methodology.

4. Turning to the practical application of the targeted dumping provision, Thailand notes that the investigating authority must first establish a "pattern of export prices" that differ significantly according to purchaser, region or time period. It is important to note that the reference to a pattern of

export prices, rather than a pattern of dumping, suggests that the process of identifying a pattern of export prices is a precursor to the process of actually determining the dumping margins. Once the investigating authority has properly identified a pattern of export prices that differ significantly among purchasers, regions, or time periods, the practical ways in which this provision could be implemented differ according to each circumstance.

5. Starting with significant differences among export prices for different time periods, Thailand notes that the investigating authority could implement the targeted dumping provision simply by splitting the period of investigation into two portions representing the different patterns of export prices. The investigating authority could then use the W to T methodology for sales within the portion of the period of investigation in which targeted dumping is suspected (*i.e.* the portion of the period of investigation with a pattern of significantly lower export prices), while continuing to use either the W to W or T to T comparison methodology for export sales during the other portion of the period of investigation. The investigating authority may then calculate an overall margin of dumping for the product and exporter under investigation based on the results of these two intermediate steps. This margin of dumping gives practical effect to the targeted dumping provision in that it enables the investigating authority to isolate the transactions that may reflect "targeted dumping" and to analyse these transactions differently in the process of determining overall dumping margins.

6. Thailand notes that in *US – Stainless Steel*, the panel concluded that the use of multiple averaging periods to address variations in normal value caused by currency depreciations was inconsistent with Article 2.4.2.[1] The panel's finding was based on an analysis of the first, rather than the second, sentence of Article 2.4.2, and, accordingly, the second sentence of Article 2.4.2 may be read as an exception to the prohibition on the use of multiple averaging periods identified by the panel in the first sentence of that Article.

7. Thailand also notes that the use of transaction-specific export prices, and different average normal values, for a portion of the period of investigation will necessarily result in different intermediate outcomes than the W to W or T to T methods, *unless* variables such as the prices and quantities of domestic sales used to determine average normal values and currency conversion rates remain constant throughout the entire period of investigation. Thus, the panel in *US – Stainless Steel* noted that the mere use of multiple comparison periods could affect the outcome of the calculation of dumping margins.[2]

8. This effect would be increased where different comparison methodologies were used for transactions within the different comparison periods. If a W to T methodology is used for one period, and a W to W or T to T methodology for another, export sales prices in the different periods will be compared to different normal values, with different quantities and perhaps different currency conversion rates.[3]

9. Even without the use of the zeroing methodology, therefore, an investigating authority can readily give practical effect to the targeted dumping provision where patterns of export prices differ significantly among time periods. Accordingly, the sole purpose and effect of the use of the zeroing methodology in these situations is to further affect the outcome by failing to take fully into account the results of individual intermediate comparisons in determining the overall margin of dumping.

[1] Panel Report, *US – Stainless Steel*, para. 6.125.

[2] Panel Report, *US – Stainless Steel*, para. 6.123 and n. 126.

[3] The W to W methodology would rely on average currency conversion rates; whereas the W to T or T to T methodologies would use currency rates in effect on the date of the export transaction. Depending how currency rates fluctuate, this may have a significant effect on the comparison between export price and normal value under the different approaches.

10. Similar considerations apply to patterns of export prices that differ significantly among purchasers or regions. Thailand notes that the investigating authority could readily address this by using different comparison methodologies for an exporter's sales either to particular importers or indeed to particular customers (and thereby also capturing targeted dumping by region). In situations in which there is no relationship between the exporter and the importer within the meaning of Article 2.3 of the Anti-Dumping Agreement, the importer and purchaser will be the same entity. If exporter A sells to importers B, C, D, and E, and the investigating authority finds a significantly different pattern of export prices to importer E, the investigating authority may use the W to T methodology for sales to importer E while using the W to W or T to T methodologies for the other importers. Similarly, if there is a significant difference in the pattern of export prices for importers D and E in the same region, the investigating authority may use the W to T methodology for sales to importers D and E in that region while using the W to W or T to T methodologies for the other importers.

11. The same approach is also possible in situations in which there is a relationship between the exporter and importer within the meaning of Article 2.3. For example, exporter/producer A may export to importer B, who re-sells to purchasers C, D, and E, and to importer F, who re-sells to purchasers G, H, and I. If the investigating authority considers that there is targeted dumping to purchasers G, H, and I, the investigating authority could conduct a separate comparison for all sales to importer F using the W to T methodology. Again, this can also be applied to purchasers or importers in different regions.

12. In response to the Panel's question, therefore, Thailand sees no practical impediment to implementing the targeted dumping provision without recourse to zeroing. The investigating authority may use the W to T methodology for sales within the identified pattern of significantly different prices while continuing to use the W to W or T to T methodology for other sales. This is consistent with the United States' anti-dumping regulations, which provide that the investigating authority will "normally limit the application of the average-to-transaction method to those sales that constitute targeted dumping".[4] The results of the comparisons for the sales within the identified pattern "are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation".[5]

13. Thailand also notes that since the zeroing methodology is applied *after* the investigating authority has identified the sales within the pattern and *after* it has made its W to T comparisons, the zeroing methodology does not serve any practical purpose of giving effect to the targeted dumping provision. Instead, it simply changes the outcome of the determination of overall dumping margins.[6]

14. Any dumping margin for a product that is based on the use of the W to T comparison for sales within the identified pattern will give sufficient effect to the targeted dumping provision without requiring a further downward adjustment to export prices for so-called zeroing. Thailand also notes

[4] See 19 CFR §351.414(f)(2).

[5] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[6] Thailand notes that if a W to T comparison is being used because a significantly different pattern of export prices by purchaser, region, or time period has been identified, the export prices to that purchaser, region, or period are likely to be *lower* than export prices to other purchasers, regions, or periods (the investigating authority would otherwise have little incentive to use the targeted dumping provisions for those purchasers, regions, or periods). If the investigating authority has properly identified the significantly different pattern of price differences, therefore, it may be assumed that the investigating authority is much more likely to find that the sales within the export pattern are dumped than sales outside the pattern. For this reason also, Thailand questions how it can be consistent with the fair comparison requirement to permit the investigating authority to apply an additional adjustment – in the form of zeroing – after the initial W to T comparison that has the effect of increasing the overall margin of dumping for the product.

that many Members may have discretion to collect duties at the point of importation on a regional, time, or purchaser-specific basis.[7] Since final liability for anti-dumping duties is normally determined on an importer-specific basis, any targeted dumping to a particular purchaser or region is also likely to be reflected in the determination of an importer's final liability for duties on imports during a given period.

15. As discussed above, there is no inherent reason why the W to T methodology cannot be used without zeroing. Moreover, to the extent that the purpose of the targeted dumping provision is to permit the use of an exceptional comparison methodology in analysing transactions that may fall within the definition of targeted dumping, the text of Article 2.4.2 provides only that that purpose may be achieved by the use of the W to T comparison methodology in analysing those transactions. Nothing in the text of that provision further addresses or permits the use of zeroing as part of that analysis. Thus, while the targeted dumping provision permits an "asymmetrical" comparison, that comparison remains subject to the fair comparison requirement of Article 2.4. The mere fact that this asymmetrical comparison is permitted does not, however, further mean that the investigating authority may introduce additional asymmetry into the determination of margins of dumping by subsequently adjusting the results of W to T comparisons using the zeroing methodology.

16. Finally, Thailand notes that to prevail on its argument that the zeroing methodology is necessary because W to T and W to W comparisons would otherwise lead to the same results, the United States would have to prove this mathematical equivalence would result *in every instance*. To the contrary, the evidence before the panel is that the W to W and T to W methodologies do not result in the same outcomes even without zeroing.

To all parties and third parties

46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2.permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?

17. In these situations, Thailand would normally calculate a constructed normal value for the models for which there were no home market sales, while using home markets sales as the basis of normal value for any models for which such comparable sales existed.

18. In other words, Thailand does not consider it obligatory to determine normal value on a single basis for all models. Thailand notes that in an investigation involving export sales of many models of a product, there may be various reasons why normal value may have to be determined on a different basis for different models. For example, some models may be sold above cost and others below in the domestic market. In that case, the investigating authority may have to use constructed normal value for the models sold below cost, while using the sales price as the basis for normal value for the models sold above cost.

[7] The United States is prohibited by its domestic laws from establishing different import duties on a regional basis. Nevertheless, the United States may, and does, collect different rates of anti-dumping duty on an importer by importer basis. As a practical matter, this will normally permit the United States to give effect to regional targeted dumping findings: an importer of cement from Mexico into the southwest United States is unlikely to ship those goods by land to the northeast United States.

19. Thailand notes that the results of the comparisons on a model by model basis do not constitute "margin[s] of dumping" with the meaning of Articles 2 and 9 of the Anti-Dumping Agreement. Instead, these results are, in the words of the Appellate Body, "only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation."[8]

47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:

(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")

(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).

20. Please refer to Thailand's response to question 45 above and to question 51 below.

48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?

21. Thailand does not consider that the Anti-Dumping Agreement imposes a standard of the "most fair" methodology. Instead, the Anti-Dumping Agreement sets out, in Article 2, certain methodologies that may be used to determine dumping margins. For example, Article 2.4.2 refers to both W to W and T to T comparison methodologies. Both are therefore permissible under the Anti-Dumping Agreement. However, both methodologies must be used in a manner that results in a fair comparison between normal value and export price within the meaning of the first sentence of Article 2.4. Thus, even where the Anti-Dumping Agreement does not specify a hierarchy among permissible methodologies, it nevertheless requires that any permitted methodology that is used to determine dumping margins must be used in a manner that results in a fair comparison. Thailand notes that the panel in *US – Stainless Steel* stated that the Anti-Dumping Agreement expresses no preference between the W to W or T to T methodologies.[9]

22. In Thailand's view, the question is not of the "most fair" methodology. It is that in every instance, under either a W to W or T to T comparison, the addition of the zeroing step in the process results in an unfair comparison whereby not all relevant export prices are taken into account. Paraphrasing the Appellate Body, the result of the comparison thereby becomes "predetermined by the methodology itself."[10] This is not a fair comparison.

[8] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[9] Panel Report, *US – Stainless Steel Plate*, para. 6.122, n. 124.
[10] Appellate Body Report, *EC – Bed Linen (Article 21.5—India)*, para. 132.

49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para. 6).

23. Thailand agrees that the price at which a transaction in the exporting market is concluded is not *per se* a "normal value" within the meaning of Article 2 of the Anti-Dumping Agreement. Instead, it is simply a starting point in the determination of normal value for that product. It may be discarded for the reasons contemplated in Article 2.2, or it may be adjusted for the reasons contemplated in Article 2.4, or it may be averaged together with prices for other transactions to determine the "comparable price, in the ordinary course of trade, *for the like product* when destined for consumption in the exporting country"[11] within the meaning of Article 2.1.other prices in accordance with Article 2.4.2. But the price for an individual transaction is not, in isolation, the "normal value," *i.e.*, the "comparable price, in the ordinary course of trade, *for the like product* when destined for consumption in the exporting country".

50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.

24. As noted in the response to question 48 above, the panel in *US – Stainless Steel* stated that the Anti-Dumping Agreement expresses no preference between the W to W or T to T methodologies.[12] Thailand notes that there may be circumstances in which one methodology is more suitable than the other. For example, the United States' authorities have stated that the T to T methodology "would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made".[13] In any event, both methodologies must be applied in a manner that results in a fair comparison within the meaning of Article 2.4.

51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?

25. Thailand considers that there are significant differences between (i) the determination of the margin of dumping, on the one hand, and (ii) the rules on the imposition and collection of duties on the other hand. This has been confirmed by the Appellate Body.[14]

26. In Thailand's view, there is some potential for confusion in the conflation of the terms "assessment and collection" of anti-dumping duties in how the Panel has stated the proposition in its question. To the extent that the term "assessment" refers to the process of collecting duties at the time

[11] Emphasis added.

[12] Panel Report, *US – Stainless Steel*, para. 6.122, n. 124.

[13] See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, 103d Cong. 2d Sess., House Document 103-316, Vol. 1, page 172. The US Administration went on to explain that "given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Administration expects that [the Department of] Commerce will use this methodology far less frequently than the average-to-average methodology." *Ibid.*, pages 172-173.

[14] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.

of importation, Thailand agrees with the proposition. However, to the extent that the term "assessment" may be interpreted to refer to any determination subsequent to importation – whether under a prospective or retrospective system – of the final liability for anti-dumping duties, Thailand disagrees with the proposition.

27. Thailand considers that there are three steps in the determination of anti-dumping duties on any importation of goods subject to an anti-dumping measure. First, there is the investigation, in which dumping is established for the product under investigation and the margin of dumping for that product is determined. This determination must be made in accordance with Article 2. Second, when the goods are imported, an anti-dumping duty is collected. Under Article 9.2, the amount of the duty to be collected must be "appropriate". However, this amount is not "the margin of dumping as established under Article 2" with respect to any particular importation. This is for practical reasons. No matter what system is used to collect anti-dumping duties, it is not practicable to establish, at the time of importation, the actual margin of dumping for the product being imported.

28. Accordingly, the Anti-Dumping Agreement permits that an "appropriate amount" of duty may be collected at the time of importation. However, Article 9.1 limits the amount of any duty to the margin of dumping. Article 9.3 likewise provides that amount "shall not exceed "the margin of dumping as established under Article 2". Because it is not possible at the time of importation to ensure that the amount collected at the time of importation does not exceed the margin of dumping established under Article 2, Articles 9.3.1-9.3.3 provide for a subsequent determination of the margin of dumping, done in accordance with Article 2, to ensure compliance with Article 9.1 and the chapeau of Article 9.3.

29. In this respect, there is no material difference between the collection of duties and subsequent review of margins of dumping under a prospective or retrospective system. In a retrospective system, such as the United States', an estimated duty amount, generally taken as a percentage of the import value, is collected at the time of importation. This amount is not a "margin of dumping" for that transaction. It has not been determined by calculating an export price or a normal value for the product. It is just an estimate, based on the margin of dumping for that product for the historical period of investigation and the actual value of the imported goods. The actual margin of dumping for that product is determined later, in the course of a review in which a margin of dumping is established based on all export sales and all comparable domestic sales of the product during the period under review. This determination must be made in accordance with Article 2 and, specifically, the fair comparison requirement of Article 2.4.

30. Similarly, under a prospective system such as that practiced by the EC, an estimated duty amount is also collected at the time of importation. In this system, the estimated duty amount is based on the difference between a prospective normal value (PNV) established during the investigation and the import price for each import transaction. Again, this amount is not a "margin of dumping" within the meaning of Article 9.3 or Article 2. It has not been determined by calculating an export price or a normal value for the product. As with the retrospective system, the difference between the PNV and the import price is just an estimate, also based on the margin of dumping for that product for the historical period of investigation and the actual value of the imported goods. And, once again, the actual margin of dumping for that product is determined later, in the course of a refund review in which a margin of dumping is established based on all export sales and all comparable domestic sales of the product during the period under review. This determination must also be made in accordance with Article 2 and Article 2.4.

31. Under both the prospective and retrospective system, the ultimate determination of the margin of dumping with respect to imports during a given period is made in a review that takes place after that period. Thus, under the EC's PNV system, the final margin of dumping is not the difference between the PNV and the value of the imported goods, but is determined based on "evidence, for a

representative period, of normal values and export prices to the Community for the exporter or producer to which the duty applies."[15] Similarly, under the United States' retrospective system, the final margin of dumping is based on the normal values and export prices for all relevant export transactions during the twelve-month period following each anniversary month of the imposition of the measure.[16] These determinations, not the amount collected on importation, constitute the margins of dumping within the meaning of Article 9.3. These margins must be calculated in accordance with Article 2. In doing so, under either a prospective or retrospective system, it is inconsistent with the fair comparison requirement of Article 2.4 to use the zeroing methodology to effectively reduce the export price for certain transactions.

Table of Cases:

Short Title	**Full Case Title and Citation**
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Stainless Steel	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295

[15] EC Regulation No. 384/96, Article 11(8).
[16] See section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. 1675(a).

ANNEX E-8

CANADA'S COMMENTS ON THE UNITED STATES' ANSWERS TO THE PANEL'S QUESTIONS

13 December 2005

(i) The Text of Article 2.4.2, First Sentence

(a) "Margins of Dumping"

In paragraph 6 of its answers, the United States now argues that "Canada's argument rests on the assumption that the term 'margins of dumping' must have the same meaning throughout the Anti-dumping Agreement."[1] As is clear from all of Canada's submissions to the Panel, Canada has not argued that the term "margins of dumping" must have the same meaning throughout the Agreement.[2] More importantly, the question before this panel is not whether the phrase "margins of dumping" has the same meaning throughout the Agreement but, rather, whether that phrase can have a different meaning when used only once within the same sentence, as the United States argues. The US defence of its "zeroing" practice in the Section 129 Determination is rooted entirely in the rejection of the meaning that the Appellate Body has already ascribed to "margins of dumping" in the first sentence of Article 2.4.2. Up until this Article 21.5 proceeding, the disputing parties and the original panel (including the dissenting panel Member) all agreed that the first sentence of Article 2.4.2 sets out a rule that is applicable to both the weighted-average-to-weighted-average and transaction-to-transaction methodologies without distinction.[3] The grammatical construction of the first sentence confirms this interpretation.

The consistent meaning of the phrase "margins of dumping" within Article 2.4.2 warrants emphasis. In paragraph 11 of its answers, the United States now argues that Canada "understands the phrase 'margins of dumping' to have the same meaning throughout Article 2.4.2, regardless of context." If by "context", the United States means regardless of which calculation methodology set out in Article 2.4.2 is being used, then Canada agrees.[4]

Canada has certain additional observations on US answers regarding the phrase "margins of dumping" and the Appellate Body's interpretation of this term as being for the "product as a whole".

In paragraph 7 of its answers,[5] the United States attempts to reconcile with the text of Article 5.8 its argument that "margins of dumping" are established for each transaction-to-transaction comparison. It states: "Because *investigations* occur with respect to exporters' and producers sales of the product under consideration *collectively,* and *not simply with respect to individual transactions*, Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer." (Emphases added.) Thus, as the United States' own argument makes clear, "margins of dumping",

[1] The US arguments in paragraph 9 regarding the cumulation requirements of Article 3.3 are irrelevant to anything at issue in this dispute. Aggregation of intermediate comparison results for a producer within a single country is wholly unrelated to cumulation of margins from more than one country.

[2] See, *e.g.*, Responses of Canada to Questions from the Panel, 2 December 2005, at para. 5.

[3] *Ibid.*, at para. 3, footnote 4.

[4] *Ibid.*, at paras. 10-12.

[5] Responses of the United States to Questions from the Panel, 2 December 2005, Question 13.

such as those at issue in this compliance proceeding, are calculated for individual exporters based on the numerous transactions involving a particular exporter, and do not exist for individual transaction-to-transaction comparisons.

In addition, in paragraphs 42-44, the United States attempts to evade the clear implications for this case of the Appellate Body's reasoning in *Softwood Lumber V*. In attempting to show how the words "price difference" in GATT Article VI:2 support its position, the United States ignores the fact that the Appellate Body specifically relied on this provision in defining the terms "dumping" and "margins of dumping."[6] It is not tenable to defend a position counter to the Appellate Body's clear findings when the Appellate Body has used the exact same provision and words to come to a conclusion that is exactly opposite of that urged on this Panel by the United States.[7]

(b) Aggregation Under the Transaction-to-Transaction Methodology

As is clear from its statements in paragraphs 58 and 71-72 of its answers,[8] the United States takes a position in this case that ignores the fact that the results of transaction-to-transaction comparisons are merely an intermediate step in the calculation of the margin of dumping. The Appellate Body found that Article 2.4.2 applies to the aggregation of the results of intermediate values and that the results of intermediate comparisons are *not* margins of dumping.[9] No US argument can change these findings. A margin of dumping under Article 2.4.2 must represent the aggregation of all intermediate values performed for the product as a whole, regardless of the calculation methodology chosen.

Moreover, the US argument by its own logic would mean that Commerce calculated a separate margin of dumping for every export transaction in this case. Such an argument is not credible because it would mean that Commerce would be applying tens of thousands of margins rather than the seven margins it established for the six mandatory respondents and an "all others rate" for the rest of Canadian exporters. If nothing else, Commerce's own application of margins in this case shows that this US argument must fail.

Finally, the argument of the United States, in paragraph 72 of its answers, that "[t]here is no distinction between cases [involving a single transaction] and other cases in which a transaction-to-transaction analysis may be used"[10] again flies in the face of the Appellate Body reasoning in this case. As the Appellate Body has found, "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of the product."[11] The margin of dumping is to be calculated for the universe of investigated transactions. Where there is more than a single transaction to investigate – the "other cases" the United States is referring to in paragraph 72 – there will be multiple intermediate comparison results that will require aggregation to arrive at a margin of dumping within the meaning of Article 2.4.2.[12] Such intermediate results are not, in and of themselves, margins of dumping.

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[6] Appellate Body Report, at para. 93-99. See in particular paras. 94-95 and 99.

[7] Canada has discussed this issue more fully in its submissions and in its answers to the Panel's Questions 1 and 11.

[8] Responses of the United States to Questions from the Panel, 2 December 2005, Questions 23(b) and 27, respectively.

[9] Appellate Body Report, at paras. 96 and 98.

[10] Responses of the United States to Questions from the Panel, 2 December 2005, at para. 72.

[11] Appellate Body Report, at para. 96.

[12] Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22,636, at 22,645 (Dep't Commerce 2 May 2005) (Exhibit CDA-1). See also Canada's Second Written Submission, at para. 23.

(c) "on the basis of a comparison"/"by a comparison of…on a transaction-to-transaction basis"

Turning to the new arguments of the United States in paragraphs 57-61 of its answers, it is clear that the use of the word "basis" in the description of both methodologies in the first sentence of Article 2.4.2 indicates that margins of dumping are normally to be established "using" either of the described methodologies.[13] The United States' arguments ignore entirely the existence of the second "basis" in the description of the transaction-to-transaction methodology.

The word "by" is defined as indicating a "means" or "manner" through which something is done.[14] The text of Article 2.4.2 confirms Canada's position that the use of either two methodologies must not involve zeroing. If Article 2.4.2 prohibits zeroing under one methodology, then it prohibits zeroing under the other methodology. Again, as Canada has consistently pointed out throughout this dispute, the United States has failed to address the fact that there is no language in Article 2.4.2, first sentence, that permits an investigating authority to disregard the results of intermediate values – something it must do to defend its use of zeroing in this case.[15]

(ii) Article 2.4

In paragraphs 1-3 of its answers, the United States offers new attempts at an interpretation of the first sentence of Article 2.4 that would tie it exclusively to the price comparability issues identified in the second through fifth sentences. [16] In the words of the United States, "[t]he first sentence of Article 2.4 does not mean something over and above taking into account differences in comparability, as set out in the second sentence and what comes thereafter." In other words, the United States argues that the first sentence is redundant.

However, as the United States itself argues elsewhere, "[a] provision of the AD Agreement should not be construed in a manner that would render another provision without effect".[17] Canada agrees, and the application of this principle of treaty interpretation alone is grounds for rejecting the US defence under Article 2.4.[18] Furthermore, US arguments ignore the numerous Appellate Body and panel findings that the first sentence of Article 2.4 goes beyond mere price comparability.[19] For these reasons, and for the reasons Canada has set out in its submissions, the Panel should decline the US invitation to interpret Article 2.4, first sentence, out of the text of the Agreement.

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[13] Responses of the United States to Questions from the Panel, 2 December 2005, Question 23.

[14] *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 2002) at 317 "indicating . . . means . . . conditions, manner . . . " (Exhibit CDA-10). See also, *The American Heritage Dictionary of the English Language*, Fourth Edition 2000 by Houghton Mifflin Company, online: Dictionary.com <http://dictionary.reference.com/search?q=by> ("with the use of, or help of; through").

[15] Appellate Body Report, at para. 100.

[16] Responses of the United States to Questions from the Panel, 2 December 2005, Question 12.

[17] Oral Statement of the United States, at para. 34.

[18] The US argument that the "fair comparison" requirement of the first sentence is limited to price comparability adjustments would, in particular, make that sentence redundant to the third sentence, which imposes the obligation to make adjustments – termed "due allowance" – including all adjustments needed for price comparability, not just those specifically enumerated in that sentence. The terms of a treaty must not be interpreted so as to make any of its provisions redundant.

[19] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted 12 March 2001, at para. 55; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, adopted 9 January 2004, at para. 134; *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R, adopted 1 October 2002, at paras. 7.333-7.334; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, Report of the Panel, WT/DS294/R, circulated 31 October 2005, at paras. 7.256, 7.262.

(iii) Article 2.4.2 Second Sentence

Canada concludes its comments by addressing the argument the United States has made concerning the targeted dumping methodology provided for under the second sentence of Article 2.4.2. The issue this Panel has been asked to resolve – whether the US use of zeroing under the transaction-to-transaction methodology in the Section 129 Determination is inconsistent with US WTO obligations – raises issues of interpretation regarding the *first* sentence of Article 2.4.2 and Article 2.4. Resolution of these issues does not require the Panel to opine on whether zeroing is required under the *second* sentence of Article 2.4.2 to make that separate provision effective. That said, Canada notes that the United States has itself now demonstrated the flaw in its own argument.

In paragraphs 25-27 of its answers, the United States undermines its own "mathematical equivalence" argument when it explains, for the first time, how US regulations implement the second sentence of Article 2.4.2.[20] The explanation given by the United States highlights the fact that the "preamble" to the US regulations contemplated no other way to properly implement the targeted dumping provision other than by: (1) using the targeted dumping provision for those sales fitting one of the three "types" of patterns set out in Article 2.4.2, second sentence; and (2) using a weighted-average-to-weighted-average comparison for sales outside the pattern.[21] The "preamble" contemplates only one way to use the targeted dumping provision notwithstanding: (a) the numerous examples to the contrary provided by Canada, the EC, Japan, and Thailand in submissions and answers to the panel's questions that show how the targeted dumping provision can work in any number of hypothetical scenarios[22], (b) that the "preamble" ignores the possibility of using the transaction-to-transaction methodology for addressing the remainder of non-targeted export transactions, which, in and of itself, would undoubtedly produce a different result than the mandated use of the weighted-average-to-transaction methodology[23], and (c) that the "preamble" seems to contemplate the application of only a single margin of dumping (by combining the margins calculated under the targeted and non-targeted analyses), even though the text of Article 6.10 does not restrict an investigating authority to calculating only a single margin of dumping. The US explanation therefore simply confirms that the "mathematical equivalence" argument is premised on a single – and to this point theoretical – way in which the targeted dumping provision might be implemented.[24]

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[20] Responses of the United States to Questions from the Panel, 2 December 2005, Question 17.

[21] The statement in paragraph 21 of the US answers that "the average-to-average method would [still] be applied to the remaining sales" is not contained in the text of Commerce's regulations. The statement comes solely from Commerce's "preamble" to its "proposed regulations." Commerce's regulations merely provide that Commerce "will limit the application of the average-to-transaction method to those sales that constitute targeted dumping". Those regulations say nothing about aggregating those results with results under the average-to-average method to calculate a single weighted-average margin. The citation at the end of paragraph 27 also is to the "preamble", and not to Commerce's regulations. The United States admits that it has no experience with the targeted dumping provision and provides no explanation as to why no approach other than the one it proposes in its answers, in any given case, would not meet the requirements of the Agreement.

[22] Canada notes that at paragraphs 37 and 38 of its answers, the United States incorrectly states that in Canada's hypothetical example involving a seasonal product the denominator in such a case would be exports for the entire year. Rather, as Canada has explained, the denominator for the margin calculated for the 3-month seasonal period would be composed of exports in that 3-month period, while the separate denominator for the margin calculated for the balance of the year would be exports in that 9-month period.

[23] In this regard, see in particular answer by Japan to the Panel's Question 44, which highlights differing results when the weighted-average-to-weighted-average methodology is replaced with a transaction-to-transaction methodology. The United States does not dispute that its "mathematical equivalence" argument must fail if there is a single situation in which the results without zeroing would not be mathematically equivalent.

[24] Canada notes that the United States' own regulations indicate that even the United States would not calculate targeted dumping margins in the manner indicated in its mathematical equivalence example. The US regulations state that in a targeted dumping investigation, Commerce "may apply the average-to-transaction

Canada, the Third Parties, and US regulations themselves, have all demonstrated that the premise to the US "mathematical equivalence" argument fails. So too, therefore, does the US argument itself.

We again thank the Panel for its efforts in contributing to the resolution of this dispute.

methodology, as described in paragraph (e) of this section" and paragraph (e) states that Commerce "will limit the averaging of such prices [normal values] to sales incurred during the contemporaneous month." 19 C.F.R. section 351.414 (Exhibit CDA-6). Canada notes that paragraphs 45-48 of Japan's answers demonstrate that if monthly weight-averages of normal values are used, the resulting dumping calculation is not equivalent to the result calculated under the weight-average-to-weight-average methodology.

ANNEX E-9

COMMENTS OF THE UNITED STATES ON CANADA'S AND THE THIRD PARTIES RESPONSES TO THE PANEL'S QUESTIONS

13 December 2005

Table of Reports

Short Form	Full Citation
US – Zeroing (Panel) (EC Complainant)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, circulated 31 October 2005
US – Softwood Lumber (AB)	Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004

1. The United States appreciates the opportunity to comment on the responses of Canada and the third parties to the questions of the Panel. In order to provide the most comprehensive set of comments in the most efficient manner possible, the United States has organized its comments according to the major themes that have been developed in this dispute. Within each theme, the United States addresses various new or different points made by Canada and the third parties in their responses to questions.

I. MARGINS OF DUMPING

2. Canada's theory of the case is premised on its understanding of the term "margins of dumping" as it is used in Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). That understanding is based, in turn, on an understanding of the references to certain "price" differences in Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 2.1 of the AD Agreement. Canada's responses to a number of the Panel's questions reflect both internal inconsistencies in Canada's argumentation and inconsistencies between its construction of Articles 2.4.2 and 2.1 of the AD Agreement and Article VI:2 of the GATT 1994, on the one hand, and other AD Agreement articles, on the other hand.[1] In these comments, the United States will explore certain of the more glaring examples of these inconsistencies.

3. A central issue in this dispute is whether the term "margins of dumping" in Article 2.4.2 may be interpreted, in context, to refer to the results of transaction-to-transaction comparisons, or whether it can refer only to a single margin of dumping for a producer/exporter for the product as a whole. A number of the Panel's questions explored various aspects of this issue and, as discussed below, Canada was unable to reconcile its arguments with the ordinary meaning to be given to the terms of the AD Agreement in their context and in light of its object and purpose.

[1] Similar inconsistencies are evident in the response of third parties.

4. In its responses dealing with the issue of what constitutes a margin of dumping, Canada's general approach is to suggest that the meaning of the term "margins of dumping" may vary with context *outside of* Article 2.4.2 but may not do so *within* Article 2.4.2.[2] Canada offers no principled basis for this distinction. In response to Questions 3 and 11, Canada does explain why it believes that the term "margins of dumping" may only have one, unvarying meaning within Article 2.4.2. There, Canada seeks to rely on the Appellate Body's reasoning in the underlying dispute, (in the context of an analysis of the average-to-average methodology provided for in Article 2.4.2), which lead to the Appellate Body's conclusion that GATT 1994 Article VI:2 defines "margin of dumping" as relating to "the product as a whole".[3]

5. Canada denies the relevance of the fact that the Appellate Body's analysis there was in a context not at issue here. In other words, it dismisses entirely the "integrated manner" in which the Appellate Body analyzed the terms "margins of dumping" and "all comparable export transactions".[4] If Canada were correct – if the Appellate Body's analysis of the term "margins of dumping" was simply an abstract analysis with no connection to the context of the dispute – then Canada's argument that the Appellate Body's reasoning can be transposed to other contexts should apply *without limit*. In that case, the Appellate Body's interpretation of the term "margins of dumping" seemingly would apply throughout the AD Agreement, every single time that term is used. Not only would that extension of the Appellate Body's reasoning lead to absurd results in other contexts,[5] but it also would be inconsistent with a number of Canada's other responses.[6] Given the anomalies that would result from extending the Appellate Body's reasoning beyond the context in which it was developed, and the internal inconsistencies that would result in Canada's own argument, it must be concluded that the Appellate Body's analysis took into account the particular context in which it occurred, as the United States has argued.

6. The inconsistency between Canada's assertion that the reasoning of the Appellate Body in the underlying dispute should be extended without regard to context, on the one hand, and arguments Canada makes elsewhere in its submissions, on the other, is evident in its discussions of its own prospective normal value system. For example, in response to Question 4, Canada notes that in a prospective normal value system, the investigating authority assesses anti-dumping duties when the export price is less than the relevant normal value, "but applies no anti-dumping duties to non-dumped transactions when the opposite is true."[7] In response to Question 21, Canada makes similar assertions in explaining the operation of its own prospective normal value system.

7. Canada's statements about the assessment of anti-dumping duties in a prospective normal value system (including its own) amount to an acknowledgment that, in the assessment context, a margin of dumping may be determined with respect to an individual export transaction. It follows from this acknowledgment that the term "margin of dumping" as used in Article 9.3 of the AD Agreement (which concerns assessment) does not refer to a margin of dumping for the product as a whole. Here is an instance in which the Appellate Body's understanding of the term margin of dumping in the underlying dispute plainly cannot be extended from one context (the portion of

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[2] *Compare* Responses of Canada to Questions to the Parties Following the Substantive Meeting of the Panel ("Canada Responses"), paras. 1-3 (same meaning in Article 2.4.2) *with id.*, paras. 5 ("unclear" whether it has the same meaning throughout), 10-13, and 62 (Canada implemented Article 5.8 interpreting that use of "margin of dumping" as related to a country) (2 Dec. 2005).

[3] Canada Responses, paras. 9 and 47.

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

[5] *See* Answers of the United States to the Panel's 18 November 2005, Questions ("US Answers"), paras. 51-56 (2 Dec. 2005).

[6] *See, e.g.*, Canada Responses, paras. 13, 18-20, 23, 28, 51-52, 62, 69-72, and 81.

[7] Canada Responses, para. 13.

Article 2.4.2 concerning the application of the average-to-average methodology) to another context (assessments as addressed in Article 9.3). Accordingly, even Canada's own statements demonstrate that context is, in fact, relevant in interpreting the term "margin of dumping". But, once it is shown that context is relevant to the interpretation of this term, Canada's theory that the Appellate Body's interpretation of "margin of dumping" in one context can be extended without regard to context necessarily falls apart.

8. The EC also posits an erroneous interpretation of the term margin of dumping, which gives rise to internal inconsistencies in its own argumentation. The problems in the EC's argument are evident from the EC's manipulation of key terms in the relevant AD Agreement articles. For example, in its response to Question 4, the EC addresses the US argument that an interpretation of the term margin of dumping as referring consistently to a margin for the product as a whole throughout the AD Agreement, without regard to context, would result in absurd results when it comes to assessments, as addressed in Article 9.3. In particular, the EC addresses the United States' argument that this interpretation would result in an importer paying anti-dumping duties bearing no relationship to the difference between export prices paid by the importer and normal values.

9. In attempting to counter the US argument, the EC ignores the term "anti-dumping duty" as used in Article 9.3. Instead, the EC develops its argument by referring to the concept of "the total dumped amount collected from both importers", a term not used in Article 9.3 or anywhere else in the AD Agreement.[8] By referring to "the total dumped amount" rather than the actual anti-dumping duty paid by either importer, the EC avoids reconciling its proposition that the term "margin of dumping" always means margin of dumping for the product as a whole (and, in that sense, is an exporter-oriented concept) with the reality that anti-dumping duties are paid by individual importers. Moreover, by focusing its discussion on "the total dumped amount", the EC glosses over the fact that in a situation involving purchaser-specific targeting, where a margin of dumping is established *for the product as a whole*, an importer that paid relatively high prices could also be required to pay relatively high anti-dumping duties if other importers paid relatively low prices.[9]

10. By taking an exporter-oriented approach to the subject of assessment, the EC ignores the terms of Article 9.3 of the AD Agreement. The point of an assessment proceeding is to determine the appropriate amount of anti-dumping duty to be paid by an importer. Article 9.3.2 requires an assessment proceeding when a request, "duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty".[10] Consistent with this language, Members with prospective normal value systems commonly limit the focus of any assessment proceeding to a particular importer, rather than expanding the focus to all importers of the product from a given producer/exporter.[11] Like Canada, the EC is unable to reconcile its position that "margin of dumping" can have only one, unvarying meaning throughout the AD Agreement (*i.e.*, that it must always refer to a margin for the product as a whole) with the consequences of that interpretation for Article 9 of the AD Agreement.

11. A second internal inconsistency in Canada's argumentation may be found in Canada's understanding of the "prices" to be compared in order to determine whether margins of dumping exist. The term "price" is central to Canada's argument with respect to "margin of dumping" because the definitions of both "dumping" in Article 2.1 and "margin of dumping" in Article VI:2 of the GATT 1994 use the term "price." Canada relies on the proposition that under the AD Agreement, "price" unvaryingly refers to the price of the product as a whole (as distinct from the price of a particular transaction). It follows from that premise, according to Canada, that a product is dumped only when

[8] EC Responses to Panel Questions ("EC Responses"), p. 3 (response to Question 4) (2 Dec. 2005).
[9] *See* US Answers, para. 94, n. 49.
[10] *See also* EC Responses, p. 19 (response to Question 42).
[11] *See, e.g.*, Canada Responses, para. 52.

the export price for the product as a whole is less than the comparable normal value for the product as a whole. If Canada's premise is wrong – if a "price" in fact can be associated with a single transaction – then the rest of Canada's argument does not hold up. Once it is established that a *price* may be transaction-specific, it follows, under the terms of the AD Agreement, that a *margin of dumping* may be transaction-specific. In fact, despite an initial assertion that "price" in the AD Agreement always refers to the price of a product as a whole, Canada goes on to contradict itself in a way that undermines its own argument.

12. According to Article 2.1 of the AD Agreement, "a product is to be considered as being dumped, i.e.[,] introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." In response to Question 30, Canada stated that the term "price" as used in that article "should be interpreted to relate to the price of the product as a whole."[12] In Canada's view, it does not matter whether normal value and export price are compared on an average-to-average basis or a transaction-to-transaction basis. In either case, "price" as used in Article 2.1 means price for the product as a whole, according to Canada.

13. When it comes to Article 2.2, however, Canada abandons the proposition that "price" necessarily means price for the product as a whole. Article 2.2 concerns situations in which a normal value may not be established based on sales in the home market. In such situations, Article 2.2 permits the use of "a comparable price of the like product when exported to an appropriate third country" as the normal value. Alternatively, it permits the use of a constructed normal value (*i.e.*, "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits").

14. In Question 46, the Panel posited the circumstance in which a product under consideration consists of several models, some of which are not sold in the domestic market. In its response, Canada acknowledged that for models not sold in the domestic market, a third-country or constructed normal value may be used pursuant to Article 2.2, whereas normal value must be based on domestic market sales for other models.[13] In other words, in this situation, Canada concedes, Article 2.2 may be read to permit more than one "comparable price" for the product as a whole. In Canada's view, this is not "problematic", because the use of multiple "comparable prices" permits "the 'margin of dumping' [to be] calculated in a more accurate manner".[14]

15. With that concession, however, the logic of Canada's argument falls apart. Once it is admitted that there is not necessarily one single price for a product as a whole, and that there may be distinct prices associated with different models or sub-groups of a product, then there is no logical basis for asserting that a price cannot be a transaction-specific concept. If that is true for Article 2.2, then it must also be true for Article 2.1. Those two provisions are closely inter-related. Article 2.1 establishes the basic proposition that a product is to be considered dumped "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course

[12] Canada Responses, para. 68; *see also* Replies of Japan to the Questions from the Panel ("Japan Responses"), para. 14 (2 Dec. 2005).

[13] Canada Responses, paras. 69-70.

[14] Canada Responses, para. 70. Similarly, the EC simply asserts that a mix of normal value "comparable price[s]" is permissible as "an efficient means of making intermediate comparisons". EC Responses, p. 20 (response to Question 46). Thailand does not consider the language of Article 2.2 to be obligatory to the extent that it is inconsistent with its views as to the term "margin of dumping" for purposes of this dispute. Thailand Responses to Panel Questions ("Thailand Responses"), paras. 17-18 (2 Dec. 2005). Like Thailand, Japan simply asserts that normal values may be established on different bases, but, without regard to the language of Article 2.2, asserts that comparisons using such normal values cannot constitute margins of dumping because they do not represent the product as a whole. Japan Responses, paras. 53-54.

of trade, for the like product when destined for consumption in the exporting country". Article 2.2 then establishes how the "comparable price of the like product" may be established in certain specified circumstances.

16. Since the "comparable price" may be a price associated with a single transaction then, under Article 2.1, a product may be considered to be dumped if the export price in a particular transaction is less than the comparable price for the like product in a particular transaction. Likewise, pursuant to Article VI:2 of the GATT 1994, the "margin of dumping" (*i.e.*, the difference between the export price and the comparable price for the like product) can be based on a transaction-to-transaction comparison.[15] Thus, consistent with the United States' understanding of Article 2.4.2, transaction-to-transaction comparisons of normal value and export price can yield results that are themselves margins of dumping. Since it is not the case that a margin of dumping can exist only for the product as a whole (and, therefore, only an aggregation of transaction-to-transaction comparisons can yield a margin of dumping), the argument that an offset for non-dumped transactions must be provided in the course of developing a margin of dumping when the transaction-to-transaction comparison methodology has been used must fail.

17. A third argument in the attempt to show that a margin of dumping may not be established on a transaction-specific basis is suggested by the EC. It contends that the price to which an export price is compared in a transaction-to-transaction comparison is not itself a normal value.[16] The EC's theory appears to be that since a margin of dumping is the result of a comparison between export price and normal value, if a single transaction cannot constitute a normal value, then a comparison with a single transaction cannot yield a margin of dumping. An insurmountable obstacle to that theory is the ordinary meaning of the terms of Article 2.4.2. That article permits a Member to establish the existence of margins of dumping "by a comparison of normal value and export prices on a transaction-to-transaction basis". As discussed in the US response to Question 23, the ordinary meaning of this language is that a transaction-to-transaction comparison is an operation that yields a result that may itself constitute a margin of dumping.

18. Nevertheless, the EC attempts to explain its theory by providing an example in response to Question 39.[17] As the United States understands it, this example tries to show how "the underlying normal value for the product as a whole" (in the EC's terms) can be discerned if, as the EC asserts, the individual transactions to which export prices are compared are not themselves normal values.

19. The EC's example assigns each home market transaction a weight based on the volume of the corresponding export transactions. It then totals the export-weighted home market transactions and compares that aggregate number to an aggregate of export prices. The principal flaw in this illustration is that it does not actually involve a transaction-to-transaction comparison. Rather, it is a comparison of aggregated home market prices with aggregated export transactions.

20. Weighted comparisons between normal value and export price are expressly provided for in the *first* comparison methodology described in Article 2.4.2. Similarly, in the second sentence of Article 2.4.2, the description of the targeted dumping methodology refers explicitly to weighting ("[a] normal value established on a weighted average basis"). Clearly, where the drafters of the AD Agreement intended a comparison to involve weighting, they understood how to indicate that in the text of Article 2.4.2.

21. As the transaction-to-transaction methodology set forth in Article 2.4.2 does not involve weighting, the EC's illustration is inapposite. It fails to overcome a critical flaw in the EC's theory –

[15] US Second Written Submission, paras. 29-39.
[16] EC Third Party Submission, para. 15.
[17] EC Responses, p. 18 (response to Question 39).

i.e., the inability to identify the normal value component of a comparison that would yield a margin of dumping under the application of the transaction-to-transaction methodology.

22. For the foregoing reasons, as well as the reasons set forth in the prior US submissions and statements, the Panel should reject Canada's argument that the Appellate Body's reasoning in the underlying dispute should be extended without regard to context and that, therefore, the term "margins of dumping" should be interpreted everywhere it appears in the AD Agreement as referring to margins of dumping for the product as a whole.

II. NULLIFICATION OF THE TARGETED DUMPING COMPARISON METHODOLOGY

23. Canada claims that the comparison methodology used by the United States in the Section 129 Determination is inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement because, when determining the overall margin of dumping, the United States did not apply an offset to the amount of dumping found. According to Canada, the United States should have applied such an offset, equal to the amount by which individual non-dumped transactions exceeded normal value. The United States responded that, among other flaws in this argument, if the Panel were to construe either Article 2.4.2 or Article 2.4 as Canada proposes, it would have the effect of nullifying the targeted dumping comparison methodology provided for in the second sentence of Article 2.4.2. That comparison methodology permits Members to make average-to-transaction comparisons when a pattern of differences in export prices exists among purchasers, regions, or time periods and such differences cannot be taken into account under either the average-to-average or transaction-to-transaction comparison methodology. If an investigating authority were required to make the offset that Canada proposes, the results of average-to-transaction comparisons would be mathematically indistinguishable from the results of average-to-average comparisons. It is in this sense that the second sentence of Article 2.4.2 would be rendered null.[18]

24. One panel has already found that if the "fair comparison" provision of Article 2.4 is construed to require an investigating authority to apply non-dumped amounts as an offset to dumped amounts, the effect will be nullification of the targeted dumping comparison methodology.[19] Evidently aware of this dilemma, Canada and certain third parties have sought to identify hypothetical scenarios in which the application of an offset under the targeted dumping comparison methodology would lead to results different from results under the average-to-average comparison methodology.

25. In considering these hypothetical scenarios, it is important to keep in mind Canada's argument (discussed above) that a "margin of dumping" necessarily, and without regard to context, relates to the "product as a whole". By Canada's reasoning, that conclusion is compelled by Article VI:2 of the GATT 1994 and does not depend on which comparison methodology is used to establish the existence of margins of dumping.[20]

26. As the United States discussed at the meeting with the Panel, the hypothetical scenarios that Canada posits in response to the US demonstration that an offset requirement would render the targeted dumping comparison methodology null are at odds with Canada's assertion that the term "margin of dumping" necessarily refers to a margin of dumping for the "product as a whole". Canada's responses to the Panel's questions have only confirmed this inconsistency. For example, in response to Question 5, Canada indicated that in a regional targeted dumping analysis, the investigating authority could simply choose to disregard non-dumped transactions outside of the

[18] US Second Written Submission, paras. 20-23.
[19] *US – Zeroing (EC Complainant)*, para. 7.266.
[20] *See, e.g.*, Canada Responses, para. 6; *see also* Japan Responses, paras. 11 and 13.

targeted region.[21] That statement plainly is irreconcilable with Canada's statement (also in reply to the Panel's questions) that a margin of dumping must be determined for "all of the exports of the product under investigation made by a particular exporter or producer".[22]

27. Moreover, if Canada accepts that "margin of dumping" does not always refer to a margin of dumping for the product as a whole – as it must in order for its hypothetical scenario to show what Canada wants it to show – then there is no principled basis for concluding that a margin of dumping can never be the result of a transaction-to-transaction comparison. Canada's argument relies critically on the absolute proposition that "margin of dumping" always and without exception means a margin of dumping for the product as a whole. Once it admits exceptions, it cannot defend the proposition that a transaction-to-transaction comparison may never be a margin of dumping. However, as just shown, Canada must admit exceptions in order to posit a hypothetical scenario in which the targeted dumping comparison methodology with offsets is not redundant with the average-to-average comparison methodology with offsets.

28. In short, either "margin of dumping" always refers to the product as a whole (in which case Canada cannot posit a hypothetical in which, under its asserted offset requirement, the targeted dumping methodology would not be rendered null), or "margin of dumping" may sometimes refer to a universe other than the product as a whole (in which case, there is no principled basis for finding that a transaction-to-transaction comparison may not be a margin of dumping). In either case, Canada's argument must fail.

29. A further problem with Canada's suggestion that when applying the targeted dumping methodology it is permissible to establish a margin of dumping for a mere subset of the product as a whole is that this argument ignores Article 6.10 of the AD Agreement. Article 6.10 addresses explicitly the circumstances in which less than all export transactions may be examined in an investigation. The existence of a case of targeted dumping is not one of those circumstances. Nor does Article 2.4.2 itself permit an investigating authority to examine less than all export transactions.

30. The EC, too, simply disregards the inconsistency within its own arguments. Like Canada, the EC tries to identify a hypothetical scenario in which the targeted dumping comparison methodology could be applied, with offsets for non-dumped amounts, but without yielding a result indistinguishable from application of the average-to-average comparison methodology with offsets.[23] Also like Canada, the EC argues that "margins of dumping" must refer to margins of dumping for the product as a whole, where "'the product' is 'the product' as defined by the investigating authority at the outset of the original proceeding".[24] According to the EC, determining a margin of dumping for the product as a whole requires applying non-dumped amounts as offsets to dumped amounts when aggregating comparison results. For the reasons just explained, the EC's "product as a whole" argument cannot logically co-exist with the EC's attempt to demonstrate a hypothetical scenario in which application of the targeted dumping comparison methodology with offsets is not redundant with the average-to-average comparison methodology.

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[21] *See, e.g.*, Canada Responses, paras. 18-20; *see also* EC Responses, p. 2 (response to Question 1); Japan Responses, para. 29.

[22] Canada Responses, para. 48. Canada parenthetically attempts to redefine this statement by suggesting that the "product under investigation" refers to the "'universe' of transactions that are aggregated to arrive at a margin of dumping". *Id.* Canada's self-serving redefinition, however, finds no support in the AD Agreement. *See also* EC Responses, p. 2 (response to Question 2), (attempting to redefine the "product as a whole" as the subset that is composed of "the relevant data set"); Japan Responses, para. 56 (asserting that a calculation limited to a subset of export transactions can constitute a valid dumping determination on its own).

[23] *See* EC Responses, pp. 12-13 (response to Question 33).

[24] EC Responses, p. 11 (response to Question 32).

31. In an effort to reconcile these two irreconcilable positions, the EC makes reference to Article 4.2 of the AD Agreement.[25] Article 4.2 concerns the special situation in which "the domestic industry has been interpreted as referring to the producers in a certain area" within a Member's territory. In that case, absent a constitutional impediment to doing so, anti-dumping duties are to be levied "only on the products in question consigned for final consumption to that area".

32. The EC reasons that since a particular region within the territory of a Member may be treated as a distinct market within the territory of a Member for purposes of Article 4.2, it also could be treated in that same distinct way for purposes of application of the targeted dumping methodology under Article 2.4.2. Thus, according to the EC, where the targeted region also is the region identified as a distinct market under Article 4.2, anti-dumping duties determined pursuant to the targeted dumping comparison methodology could be imposed exclusively on products consigned for final consumption to that region. The EC argues that this would be an instance in which the provision of offsets under the targeted dumping comparison methodology would not cause application of that methodology to be redundant with application of the average-to-average methodology.

33. The EC's argument relies on conflating a concept from Article 4.2 with a concept from Article 2.4.2 based on a superficial similarity (*i.e.*, the reference to "a certain area" in the former and to "regions" in the latter). The concept of a distinct "market" as referred to in Article 4.2 (and defined in Article 4.1(ii)), is not the same as the concept of a targeted "region" in Article 2.4.2. But the EC simply ignores that difference. Having done so, it then argues that the "product as a whole" may be considered to be the product as a whole with respect to that distinct market, which the EC equates with the regional targeted dumping. Following this line of reasoning, according to the EC, a Member could establish a separate margin of dumping for a targeted region (a result that would be different from the result under the average-to-average methodology), and this approach would not violate the principle that a margin of dumping may be established only for a product as a whole.

34. The basic premise of the EC's argument – that "market" as used in Article 4.2 equates to "region" as used in Article 2.4.2 and that, accordingly, a margin of dumping for a product as a whole may be a margin of dumping restricted to a particular region – is fatally flawed. In fact, Article 4.2 is relevant to the present analysis precisely in the way that it *differs* from Article 2.4.2.

35. Article 4.2 of the AD Agreement deals expressly with a situation in which a certain geographical area within a Member's territory constitutes a distinct market. If that situation exists, and if the injury determination was based on an examination of producers within that market, the Member ordinarily is *required* to focus anti-dumping duties on goods consigned to the geographical area at issue. However, in setting forth this requirement, the drafters of the AD Agreement recognized that for certain Members, as a matter of their constitutional law, it may be impossible to limit the imposition of anti-dumping duties to particular geographical regions within their territory. For these Members, therefore, Article 4.2 permits the imposition of anti-dumping duties without limitation, even though the determination of injury was focused on a distinct geographical market, provided that specified conditions are met.

36. In sum, what Article 4.2 shows is that when the drafters of the AD Agreement intended that a Member ordinarily treat a particular geographical area as a discrete market for certain purposes in the application of its anti-dumping law, they took into account the possible constitutional impediments to doing this facing some Members. They made special allowances to deal with those impediments. The fact that they did so strongly indicates that they would not have authorized Members to treat a particular geographical area as a discrete market without also providing for these special allowances.

[25] *See* EC Responses, p. 12 (response to Question 33).

37. Unlike Article 4.2, Article 2.4.2 does not make special allowances to deal with constitutional impediments to treating a particular geographical area as a discrete market. The absence of such allowances supports the conclusion that, contrary to the EC's argument, the drafters of the AD Agreement did not intend a Member to treat a particular geographical area within its territory as a distinct market for purposes of establishing a margin of dumping through application of the targeted dumping comparison methodology. Accordingly, the contrast between Article 4.2 and Article 2.4.2 further demonstrates that the EC's argument is wrong, and that in establishing a margin of dumping using the targeted dumping comparison methodology (or, for that matter, either of the other methodologies in Article 2.4.2) a Member may *not* focus exclusively on exports consigned to a particular region.

38. Alternatively, the EC argues that under the targeted dumping comparison methodology, margins of dumping may be established for the targeted region without applying non-dumped amounts from outside the targeted region as offsets, and that this is not the same as what it calls "simple zeroing".[26] In fact, what the EC is doing in this alternative argument is changing the label attached to the act of aggregating dumped amounts while not applying an offset for non-dumped amounts. Since it believes that refraining from applying an offset in this case is "justified by the identification of a pattern of targeted dumping", it argues, in essence, that the fact of not providing an offset should not bear the label "simple zeroing".[27]

39. This alternative argument defies logic. If, as the EC argues, so-called "zeroing" is always impermissible, it cannot become permissible simply by changing its name in a setting in which the EC believes it should be permissible. In sum, like Canada, the EC fails to reconcile its argument that a margin of dumping must always refer to a margin of dumping for the product as a whole (in which case "zeroing" must be impermissible) with its argument that the targeted dumping comparison methodology can be applied without "zeroing" in a way that would yield results different from the results of application of the average-to-average methodology. The two arguments cannot logically coexist.

40. In addition to its hypothetical scenario involving regional targeted dumping, Canada posits a second hypothetical scenario in which an investigating authority determines not one, but multiple margins of dumping for producers/exporters that have demonstrated the requisite pattern of targeted dumping.[28] Canada appears to recognize the need to reconcile this hypothetical with Article 6.10 of the AD Agreement, which states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". However, its argument amounts to nothing more than a rejection of the terms of Article 6.10.

41. Canada simply asserts that Article 6.10 "should not be interpreted to prevent investigating authorities from providing an exporter with more than one margin of dumping".[29] It argues that Article 6.10 should be read as a requirement to provide each producer/exporter with a company-specific margin, instead of a country-wide margin. Thus, according to this view, multiple margins of dumping could be determined for a single producer/exporter, as long as those margins were company-specific. The obligation in Article 6.10, however, is more precise. It refers to an individual margin of dumping for each producer/exporter concerned "of the product under investigation". The latter phrase

[26] EC Responses, p. 12-13, (response to Question 33).

[27] EC Responses, p. 13; *id.*, p. 19 (response to Question 44); *see also id.*, p. 14 (response to Question 35(a)), where the EC seeks to rely on its theory that the targeted dumping comparison methodology, justified by a pattern of *export* prices, constitutes a basis for a due allowance for a difference affecting price comparability *between the export price and the normal value*. The United States respectfully refers the Panel to the US Responses at paras. 14-20 for the US response to this theory.

[28] Canada Responses, paras. 22-23, 27.

[29] Canada Responses, para. 23; *see also id.* para. 72.

indicates that "margin of dumping" as used in the context of Article 6.10 refers to an *overall* margin of dumping for each producer/exporter.

42. The United States has explained that the term "margin of dumping" must be interpreted in its context and that in some contexts (as, for example, that part of Article 2.4.2 that provides for the transaction-to-transaction comparison methodology) it may be interpreted as referring to a margin of dumping with respect to individual transactions. In the particular context of Article 6.10, the United States recognizes that the reference to an "individual" margin of dumping for a producer/exporter "of the product under investigation" refers to a single, overall margin of dumping reflecting all of the exports of the product.[30] Interestingly, it is Canada – the party arguing that, pursuant to Article VI:2 of the GATT 1994, a "margin of dumping" may only be determined for the "product as a whole" – that would ignore the text of Article 6.10, asserting instead that the product as a whole may be sub-divided, such that multiple margins of dumping may be established for any particular producer/exporter.[31]

43. In discussing its multiple margin theory, Canada also ignores Article 5.8 of the AD Agreement. That provision requires immediate termination of an investigation where the authorities determine, *inter alia*, that "the margin of dumping is *de minimis*". Canada provides no indication of how the multiple margins of dumping would be combined to test "*the* margin of dumping" against the *de minimis* standard.[32] If Canada would provide offsets for the non-dumped transactions outside the pattern, it would arrive at a margin of dumping identical to that achieved using the average-to-average comparison methodology and thereby deny effect to the targeted dumping comparison methodology. Alternatively, Canada could deny an offset for such transactions. But, in doing so, it would have to identify a principled reason for refraining from an offset in that case while insisting that it is impermissible for the United States to refrain from offsetting when applying the transaction-to-transaction comparison methodology. It has thus far offered no such principled distinction.

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[30] The word "individual" is defined as: "1 One in substance or essence; indivisible. . . . 2 That cannot be separated; inseparable. . . . 3 Existing as a separate indivisible identity; numerically one; single, as distinct from others of the same kind; particular." *New Shorter Oxford English Dictionary*, p. 1352 (1993).

[31] In paragraph 24 of Canada's Responses, Canada indicates that it explains that "product as a whole" can refer to multiple margins of dumping for a producer/exporter in its response to Question 6. Presumably, Canada refers to paragraph 28, which provides no such explanation. There, without analysis, Canada simply asserts that "[t]he Appellate Body's decision does not limit an importer to one margin of dumping. Rather it requires that whenever a margin of dumping is established it must include the full amount of all intermediate values that are aggregated to calculate a margin of dumping." Canada's theory for why, in this context, a margin of dumping need not include all of the export sales of the product under investigation remains elusive.

[32] For example, in paragraphs 30-31 of its responses, Canada suggests that targeted dumping by time period might be addressed by using two distinct margins of dumping, each applicable to the respective time period for which it was calculated during the period of investigation. Notably, Canada presumes that non-*de minimis* dumping occurred throughout the year, but at different rates. If dumping did *not* occur outside the targeted period, or only occurred at a *de minimis* level, absent an aggregate analysis leading to termination of the investigation, Canada would be suggesting that the second sentence of Article 2.4.2 permits Members to construct anti-dumping measures that turn on and off with the seasons – a novel interpretation devoid of any support in the AD Agreement.

The United States also notes that this approach to time period targeting presumes that the comparison methodology was only intended to apply in a seasonal pricing context (such as the EC's example of "holiday turkeys"). Time period targeting could also be considered when a significant change in exchange rates would permit dumping after (or before) the change to be masked by "non-dumping" prior (or after) the change in rates, in which case, Canada's hypothetical would be inapposite.

Similarly, in paragraphs 39-40, Canada provides numerical examples in which all of the multiple margins of dumping are non-*de minimis* in order to avoid addressing the true implications of its hypothetical examples.

44. The responses of Canada and the third parties to Question 9 also are relevant to the question of whether application of the targeted dumping comparison methodology will necessarily achieve a result that is redundant with the result from application of the average-to-average comparison methodology. In its response, Canada accepts that the "weighted average normal value" referred to in the first sentence of Article 2.4.2 is the same as the "normal value established on a weighted average basis" referred to in the second sentence of that provision.[33] Having admitted that the two terms mean the same thing, Canada cannot escape the mathematical reality that, if all export prices are compared and offsets granted, it does not matter whether the export prices are compared on a transaction-to-transaction or average-to-average basis. The result will necessarily be the same. Some of the third parties, however, suggest that the different references to normal value in the first and second sentences of Article 2.4.2 may have different meanings, thus suggesting another way to achieve a result from application of the targeted dumping comparison methodology that differs from the result from application of the average-to-average comparison methodology.

45. In particular, the EC suggests that a pattern of *export* prices that varies according to purchaser, region, or time period might somehow be a basis for subdividing normal value transactions *occurring within the exporting country*.[34] However, nothing in the text of Article 2.4.2 supports such a leap from the treatment of prices in the export market to the treatment of prices in the normal value market. Moreover, there is no logic to the proposition that targeting in the export market according to purchaser, region, or time, which might justify special treatment of export prices, would also justify corresponding special treatment of normal value prices. That proposition assumes without any basis that the events that justify special treatment of prices in the export market also are occurring in the normal value market. Just because prices in the export market exhibit a targeted pattern with respect to purchaser, region or time does not mean that a corresponding targeted pattern is being exhibited in the normal value market.[35] Nor does the EC give any explanation to support the view that there should be such a corresponding pattern. In any event, as noted above, the text of Article 2.4.2 addresses how to deal with export prices in cases of targeted dumping and is entirely silent on the question of normal value in such situations. Therefore, the EC's argument on this point is unfounded.[36]

46. As a final comment with respect to this issue, the United States refers to Canada's response to the Panel's Question 29. There, the Panel asked about the EC's suggestion that "if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping methodology redundant, that is sufficient to demonstrate that the United States' argument in this regard is without merit". Without elaboration, Canada replies that it is sufficient to show that "the

[33] Canada Responses, para. 44.

[34] EC Responses, p. 5 (response to question 9).

[35] For example, patterns in export prices by time period could be the result of a change in exchange rates, which may have no relevance to prices within the exporting country. Or, if the product is considered a seasonal product, the seasonal demand for the product could differ significantly between the exporting and importing countries. For example, if the seasonal demand is based on warm or cold weather, the seasonal demand would differ substantially if the exporting country is in the southern hemisphere and the importing country is in the northern hemisphere (or *vice versa*). That is, the time period in which demand is high in the exporting country would not be the same as the time period in which demand is high in the importing country. Transactions from the period of high demand in the exporting country could not be compared to transactions from the period of high demand in the importing country because that would be inconsistent with the requirement in Article 2.4 of the AD Agreement that comparisons be made "in respect of sales made at as nearly as possible the same time."

[36] Thailand and Japan make comments similar to the EC's regarding the subdivision of normal value transactions, and their comments suffer from the same errors as the EC's approach. *See* Thailand Responses, paras. 5-9; Japan Responses, paras. 36-51.

targeted dumping methodology can be applied in a different manner than that suggested by the United States".[37]

47. However, the issue identified in Question 29 was more specific. The Panel asked whether it was "enough to posit that such a methodology can be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members." Canada failed entirely to address this aspect of the question. Instead, it treated the Panel's question as asking "whether the municipal practice of some Members should be used to interpret the provisions of the *Anti-Dumping Agreement*," and answered that it should not.[38] However, as the United States understands it (especially in light of the discussion during the Panel meeting), this was not the thrust of the Panel's question. Rather, the United States understands the Panel to have been examining the issue of whether the hypothetical situations Canada posits must be realistic situations in order to support Canada's argument, or whether it is irrelevant that such hypothetical situations bear no relation to what actual investigating authorities of actual Members are able to do. As discussed in the US response to the same question, an appropriate hypothetical would have to address all three types of targeted dumping referred to in Article 2.4.2 (*i.e.*, purchasers, regions, and time periods), take account of the ordinary meaning of the terms of the second sentence of Article 2.4.2, and be compatible with other relevant provisions of the AD Agreement.[39] The hypothetical situations that Canada has posited do not come close to meeting that standard.

III. FAIR COMPARISON

48. Many of the points discussed above, particularly with respect to the nullification of the targeted dumping comparison methodology, are relevant to both Canada's Article 2.4 argument and its Article 2.4.2 argument. As the argumentation in this dispute has evolved, it has become increasingly difficult to distinguish the former argument from the latter. At the outset, Canada devoted a total of six short paragraphs to its Article 2.4 argument in its two written submissions combined. In its interventions at the Panel meeting and its responses to the Panel's questions, Canada has failed to articulate how that argument is distinct from its Article 2.4.2 claim. The United States calls attention to this aspect of Canada's case because it now appears, in response to the Panel's Questions, that Canada has merged its Article 2.4 argument into its Article 2.4.2 argument.

49. Specifically, Canada's response to Question 22 indicates that Canada may now regard its claim pursuant to Article 2.4 as dependent upon its claim pursuant to Article 2.4.2. In response to Question 22, regarding the practical consequences of a finding that "zeroing would be considered unfair as such," Canada states that "[t]he 'fair comparison' requirement prohibits the practice of 'zeroing' because it is inconsistent with the substantive rules and concepts concerning the calculation of 'margins of dumping' under Article 2.4.2 of the *Anti-dumping Agreement*".[40] Canada then goes on to quote, favourably, a passage from the recently circulated report in *US – Zeroing (EC Complainant)*, where the panel indicated that a standard of fairness must take into account the "substantive rules and concepts in the AD Agreement relevant to the issue of the determination of margins of dumping".[41] In other words, the legal rationale that Canada has offered for its assertion that the United States has acted in a manner inconsistent with Article 2.4 is that the methodology employed is inconsistent with Article 2.4.2.[42] As discussed above and in prior US submissions, Canada has failed to establish that the United States' denial of offsets pursuant to the transaction-to-transaction comparison methodology

[37] Canada Responses, para. 66.
[38] Canada Responses, para. 67.
[39] US Answers, para. 75.
[40] Canada Responses, para. 55.
[41] Canada Responses, para. 55 (quoting *US – Zeroing (EC Complainant)*, para. 7.262).
[42] The only other support that Canada now offers for its Article 2.4 argument is statements by the Appellate Body in disputes that did not raise the issue now before this Panel. *See* Canada Responses, para. 59.

is inconsistent with Article 2.4.2. Accordingly, by the terms of Canada's own argument with respect to Article 2.4, its claim under that provision must fail as well.

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL –
DOCUMENT WT/DS264/16

WORLD TRADE ORGANIZATION

WT/DS264/16
20 May 2005

(05-2051)

Original: English

UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

Recourse to Article 21.5 of the DSU by Canada

Request for the Establishment of a Panel

The following communication, dated 19 May 2005, from the delegation of Canada to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 31 August 2004, the Dispute Settlement Body ("DSB") adopted the panel and Appellate Body Reports in *United States – Final Dumping Determination on Softwood Lumber from Canada*.[1] The panel and Appellate Body found that the United States acted "inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of dumping on the basis of a methodology incorporating the practice of 'zeroing'".[2] The panel and the Appellate Body recommended that the United States bring its measure into conformity with its obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("*Anti-Dumping Agreement*").

On 6 December 2004, Canada and the United States reached agreement pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*") on a "reasonable period of time" to comply with the recommendations and rulings of the DSB.[3] The United States confirmed in this agreement that it would complete implementation no later than 15 April 2005. Canada and the United States subsequently agreed to extend the "reasonable period of time" until 2 May 2005.[4]

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[1] Dispute Settlement Body, *Minutes of Meeting (31 August 2004)*, WT/DSB/M/175, 24 September 2004, at para. 4. Also see *United States – Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, adopted 31 August 2004; ["Appellate Body Report"] and *United States – Final Dumping Determination on Softwood Lumber from Canada*, Report of the Panel, WT/DS264/R, adopted 31 August 2004. ["Panel Report"]

[2] Appellate Body Report, at para. 183(a); and Panel Report, at para. 8.1(a)(i).

[3] *United States – Final Dumping Determination on Softwood Lumber from Canada, Agreement under Article 21.3(b) of the DSU*, WT/DS264/12, 8 December 2004.

[4] *United States – Final Dumping Determination on Softwood Lumber from Canada, Agreement under Article 21.3(b) of the DSU*, WT/DS264/15, 17 February 2005.

In November 2004 the United States commenced implementation proceedings in accordance with section 129(b) of the *Uruguay Round Agreements Act*.[5] On 15 April 2005, the US Department of Commerce ("Commerce") released its final section 129 determination, which purported to implement the recommendations and rulings of the DSB. In the final section 129 determination, Commerce again determined the existence of dumping on the basis of a methodology incorporating the practice of "zeroing".[6]

Canada considers that the United States has failed to comply with the recommendations and rulings of the DSB, as the use of "zeroing" under the section 129 determination is inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.[7] The following measures are at issue in these proceedings:

- *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products From Canada*; and[8]

- *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada*.[9]

As there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the rulings and recommendations of the DSB, Canada seeks recourse to Article 21.5 of the *DSU* in this matter. Accordingly, Canada requests that a special meeting of the DSB be held on 1 June 2005 to consider the following agenda item:

> *United States – Final Dumping Determination on Softwood Lumber from Canada*;
> *Recourse by Canada to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.*

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[5] 19 U.S.C. § 3538(b)(2).

[6] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22,636 (2 May 2005)

[7] *Ibid.*

[8] *Ibid*.

[9] 67 Fed. Reg. 36,068 (22 May 2002).