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]

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[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

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[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.