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

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[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*.