ANNEX D

ORAL STATEMENTS, 1ST/2ND MEETINGS

ANNEX D-1

ORAL STATEMENT OF CANADA

15 November 2005

I. INTRODUCTION

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

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

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

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

II. LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

[4] *Ibid*.

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

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

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

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

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

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

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

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

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[5] Appellate Body Report, at 100.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[19] *EC –Bed Linen*, at para. 59.

[20] *Ibid*.

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

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

[23] *US –Zeroing*, at para. 7.262.

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

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

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

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

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

III. CONCLUSION

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

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

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

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

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

ANNEX D-2

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

15 November 2005

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

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

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

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

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

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

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

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

Standard of Review

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

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

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

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

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

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[3] Canada Second Written Submission, paras. 5-7.

[4] Canada Second Written Submission, para. 5.

[5] Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, para. 7.341 (adopted 19 May 2003).

[6] Canada Second Written Submission, para. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[12] Canada Second Written Submission, para. 16.

[13] *US - Softwood Lumber (AB)*, para. 85.

[14] *See US - Softwood Lumber (AB)*, para. 86.

[15] Canada Appellee's Submission (Exhibit US-1), para. 22; *see also* Canada Second Written Submission (Original) (Exhibit US-3), paras. 141-42.

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

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

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

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

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

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

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

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

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

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

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

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

The Section 129 Determination is Consistent With Article 2.4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

ANNEX D-3

ORAL STATEMENT OF THE PEOPLE'S REPUBLIC OF CHINA

16 November 2006

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

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

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

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

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

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

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

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

ANNEX D-4

THIRD PARTY ORAL SUBMISSION BY THE EUROPEAN COMMUNITIES

16 November 2005

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I. INTRODUCTION

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

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

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

III. CONSISTENCY BETWEEN ARTICLES 2 AND 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. TARGETED DUMPING

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

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

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

V. SINGLE TRANSACTION ALLEGEDLY CAUSING INJURY

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

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

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

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

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

VI. NEGOTIATING HISTORY

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

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

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

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

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

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

VII. COMMENTS ON THE SECOND WRITTEN SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

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

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

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

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

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

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

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

ANNEX D-5

ORAL STATEMENT BY INDIA

16 November 2005

Mr. Chairman, Members of the Panel,

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

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

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

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

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

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

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

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

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

ANNEX D-6

ORAL STATEMENT OF JAPAN AT THE THIRD PARTY SESSION

16 November 2005

I. INTRODUCTION

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

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

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

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

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

> Our view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an antidumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole …[2]

[1] Appellate Body Report, *US – Softwood Lumber V*, para. 93. *See also* paras. 96, 97, 98, 99 and 102; Appellate Body Report, *EC – Bed Linen*, para. 53, following Panel Report, *EC – Bed Linen*, para. 6.118.

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

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

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

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

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

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

10. *Third*, the United States asserts that the use of the plural "margins of dumping" in Article 2.4.2 means that there can be multiple margins for each T-to-T comparison result. The United States is simply recycling an argument it has advanced, and lost, in the original proceedings in this dispute[6].

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[3] United States' Rebuttal Submission, paras. 26 and 27.

[4] *See, for example,* United States' Rebuttal Submission, paras. 31 and 35.

[5] United States' Rebuttal Submission, para. 31.

[6] Rejecting this interpretation, the Appellate Body held: "'margins of dumping' is in the plural because a single investigation may involve establishing margins of dumping for a number of exporters or producers, and may relate to more than one country." Appellate Body Report, *Softwood Lumber V*, para. 115.

11. In fact, nothing in the text of Article 2.4.2 supports the United States' view. The term "margins of dumping" in that provision refers to the "magnitude of dumping".[7] Because Article 2.1 states that "dumping" exists only for the "product" as whole, the measurement of the amount of that "dumping" can also be calculated only for the "product" as a whole. Furthermore, as the opening clause of Article 2.1 indicates, the definitions of margin of dumping set forth in Article 2.1, and the "margin of dumping", apply "to the entire Agreement, which includes, of course, Article 2.4.2".[8] The United States also argues that Article 9.3 confirms its views that the "margin of dumping" can be determined, for purpose of duty assessment, for a single export transaction. However, Article 9.3 refers to "margins of dumping" and expressly states that margins calculated for purposes of reviews must be established consistently with Article 2. Thus, the definition of "dumping" in Article 2.1 governs the determination of dumping margins in reviews in Article 9.3.

12. The United States argues incorrectly that the Appellate Body's interpretation of the term "margins of dumping" in the underlying proceeding is limited to situations involving the W-to-W comparison under the first sentence of Article 2.4.2 of the *Agreement*.[9] However, the structure of the Appellate Body's analysis involved separate consideration of the phrase "all comparable export transactions" in Article 2.4.2, and of the terms "dumping" and "margins of dumping". The Appellate Body noted that there was "no basic disagreement among the participants"[10] regarding the phrase "all comparable export transactions". It therefore shifted its analysis to the terms "dumping" and "margins of dumping" in Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*. It relied primarily on the definition of the term "dumping" in Article 2.1 and Article VI, that "applies to the entire"[11] *Anti-Dumping Agreement*. Moreover, in concluding that "dumping" and "margins of dumping" are determined for the product, the Appellate Body never referred to the phrase "all comparable export transactions". Thus, the United States ignores entirely the detailed structure of the Appellate Body's reasoning in order to reach a conclusion not supported by that reasoning.

13. *Fourth*, and finally, contrary to the United States' contention, there was no "subsequent practice" under the GATT 1947 indicating that the GATT Contracting Parties agreed that the term "margin of dumping" referred to transaction-specific margins.[12] As the Appellate Body stated, "[t]he purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty".[13] The practices of some of the Contracting Parties to the GATT 1947, or their action or inaction that the United States claims to be the "circumstance of the conclusions of the GATT 1994 and the Anti-Dumping Agreement"[14] cannot qualify as such, because they hardly "help[] to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision"[15], in this case, the meaning of the term "margin of dumping". The United States' arguments regarding adopted GATT panel reports[16] are also misplaced because they do not establish "subsequent practice" under the GATT 1947 and they are not binding in WTO law.[17]

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[7] Appellate Body Report, *US – Softwood Lumber V*, para. 96.
[8] Appellate Body Report, *US – Softwood Lumber V*, para.93..
[9] United States Rebuttal Submission, para. 37..
[10] Appellate Body Report, *US – Softwood Lumber V*, para. 90.
[11] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[12] The exacting legal standard for establishing the existence of subsequent practice under the WTO agreements and the GATT 1947 is set forth in Appellate Body Report, *US – Gambling Services*, paras. 191 and 192. *See also* Appellate Body Report, *EC-Chicken Classification*, paras. 256 – 258.
[13] Appellate Body Report, *EC – Computer Equipment*, para. 93 (emphasis original).
[14] See United States Rebuttal Submission, para. 34.
[15] Appellate Body Report, *EC – Chicken Classification*, para. 289.
[16] United States' Rebuttal Submission, para. 34.
[17] Appellate Body Report, *Japan – Alcoholic Beverages II*, page 13.

14. Mr. Chairman, Japan will now turn to New Zealand's arguments on this issue. New Zealand appears to recognize that dumping margins must be determined for the product as a whole. Indeed, it states explicitly that the T-to-T methodology must involve a selection of transactions "which are representative of the 'product as a whole'."[18]

15. However, New Zealand does not accept the logic of its own arguments. Elsewhere in the submission, it sets forth three alternative methods of conducting a T-to-T comparison, two of which involve the systematic disregard of all negative T-to-T comparison results. Specifically, under New Zealand's second T-to-T method, it says, "only dumped transactions are included in the determination". And, under the third method, zeroing is used to eliminate negative results from the calculation of the total amount of dumping.[19]

16. New Zealand's approach is tantamount to a determination that the excluded export transactions do not form part of the "product". However, the export transactions producing negative and positive comparison results are all part of the "product" and all comparison results must be included in the overall determination.

17. New Zealand also argues that the way a dumping margin is calculated must be understood in light of the way an injury determination is conducted.[20] For New Zealand, in an injury determination, "*only those transactions found to be dumped are taken into account*".[21] In consequence, it says, "to preserve symmetry, the determination of the margin of dumping may be based only on those dumped transactions so taken into account".[22]

18. However, contrary to these arguments, injury determinations are *not* based solely on transactions found to be dumped. As noted above, in *US – Softwood Lumber V*, the Appellate Body ruled that the "determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping" all relate to the product as a whole.[23]

19. New Zealand also argues that "there should be a symmetry" between the determination of dumping, injury, the causal relationship, and the imposition of anti-dumping duties. However, without making a product-wide determination, it is not clear how New Zealand's approach could ensure symmetry or consistency because duties are applied to the product as a whole.[24] New Zealand's approach effectively severs the link between subjects of the determination of dumping and the imposition of anti-dumping duties.[25] However, the *Anti-Dumping Agreement* requires that a product-wide margin determination provide the basis for the product-wide imposition of duties.

20. The United States' Section 129 Determination fails to meet the requirement to determine a margin for the product because negative comparison results were excluded from the calculation of the total amount of dumping. The Determination is, therefore, inconsistent with Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, as well as with Article VI of the GATT 1994.

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[18] New Zealand's Third Party Submission, para. 3.22.
[19] New Zealand's Third Party Submission, para. 3.04.
[20] New Zealand's Third Party Submission, para. 3.03.
[21] New Zealand's Third Party Submission, para. 3.09.
[22] New Zealand's Third Party Submission, para. 3.09.
[23] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 99.
[24] Appellate Body Report, *U.S. – Softwood Lumber V*, para. 94.
[25] The Appellate Body found that "import transactions attributable to a particular producer or exporter need not be separated into two categories – dumped and non-dumped transactions." Appellate Body Report, *EC – Bed Linen (Article 21.5)*, footnote 177.

III. A MARGIN OF DUMPING MUST BE BASED ON A FAIR COMPARISON OF NORMAL VALUE AND EXPORT PRICE

21. Mr. Chairman, Japan has set forth, in detail, in its Third Party Submission that Article 2.4 imposes a general obligation for the investigating authorities to conduct a fair comparison of normal value and export price. Rather than repeat those submissions, Japan will address certain arguments made by the United States and New Zealand.

22. It is worth recalling at the outset that the Appellate Body has twice ruled that zeroing does not meet the requirements of a fair comparison.[26] It held that zeroing is "inherently biased" because it "inflates" the margin of dumping by the value of the excluded negative intermediate comparison results. And zeroing may even create a margin of dumping that would not otherwise exist. Because the United States disagrees with these findings, it invites the Panel to pretend that they were never made.

23. The United States contends that zeroing occurs *after* the comparison of normal value and export has happened, whereas Article 2.4 applies solely to price adjustments made *before* the comparison is performed.[27] The Unites States is wrong that Article 2.4 applies only to pre-comparison price adjustments. The word "comparison" refers to the process by which the authorities calculate the margin of dumping for the product. That process necessarily includes the way that the authorities aggregate and disaggregate the product for purposes of the comparison.[28] The authorities cannot structure that comparison in a manner that systematically prejudices the interests of foreign producers and exporters.

24. Further, the United States' argument that the first sentence of Article 2.4 refers only to a duty to make price adjustments renders that sentence redundant, because the duty to make adjustments is already set forth in the remainder of Article 2.4. The first sentence of the provision would, therefore, add nothing to the rest.

25. The United States' interpretation would also nullify the disciplines in Articles 2.2, 2.3 and 6.6 of the *Agreement* on calculation and verification of normal value and export price. After carefully calculating and confirming these values, authorities would be permitted to structure the comparison process in such a way that, irrespective of the normal value and export price, dumping is found.

26. The United States interpretation produces absurd results. On the United States' view, Article 2.4, on the one hand, requires authorities to make "pre-comparison" adjustments that promote fairness and, on the other hand, permits them to make any "post-comparison" adjustments they see fit. Nothing in the text supports the view that the Article requires the authorities to give with one hand to ensure fairness that which they can simply remove with the other to deny it.

27. New Zealand suggests a "fair" methodology is one that targets the "*dumped goods*" through the exclusion of negative comparison results.[29] Mr. Chairman, New Zealand turns the idea of fairness on its head. The purpose of the comparison is to ascertain *whether or not there is dumping*. Yet, because only the positive comparison results are aggregated on New Zealand's approach, dumping will almost certainly be found. As a result, as shown by New Zealand's reference to a methodology that targets "dumped goods", an objective inquiry becomes a self-fulfilling prophecy. But as the

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[26] Appellate Body Report, *EC – Bed Linen*, paras. 55 and 59; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, paras. 134 and 135.

[27] United States' Rebuttal Submission, para. 11.

[28] *See* Japan's Third Party Submission, para. 16.

[29] New Zealand's Third Party Submission, paras. 3.12 and 3.14.

Appellate Body said in *EC – Bed Linen (Article 21.5 – India)*, the "result" of the authorities' investigation cannot be "predetermined by the methodology itself".[30]

28. Mr. Chairman, the Section 129 Determination involves just such an unfair comparison. By systematically excluding all negative comparison results, the United States made a finding of dumping considerably more likely and it also inflated the amount of the margin. The unfair comparison involves bias that operates exclusively to benefit the United States' own lumber industry and systematically to the detriment of Canadian producers and exports. This constitutes a violation of Article 2.4.

IV PROHIBITION OF ZEROING UNDER ARTICLE 2.4 DOES NOT NULLIFY THE THIRD COMPARISON METHOD IN ARTICLE 2.4.2 OF THE *ANTI-DUMPING AGREEMENT*

29. The United States argues that a prohibition of zeroing would nullify the W-to-T comparison in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.[31]

30. It asserts that in mathematical terms, the W-to-W and W-to-T comparisons would produce identical results, absent zeroing. However, this assumes wrongly that all other things are treated equally. In particular, the argument presupposes that the same basis for calculating the weighted average normal value *must always* be used for the W-to-W and W-to-T comparison method. However, nothing in the text of Article 2.4.2 or any other provisions precludes the Member from using a different calculation basis for normal value. Even in US domestic law, there are differences in the ways that the USDOC conducts W-to-W and W-to-T comparisons that ensure that the results of the two comparisons would *not* be the same. For example, the US statute itself prescribes that the weighted average normal value is to be calculated using different time periods (and hence different pools of transactions) in W-to-W comparisons in original investigations and in W-to-T comparisons in periodic reviews.[32] As a result, the weighted average normal values will differ in the two situations, and the comparisons of those different normal values with export prices mathematically will *not* collapse into the same outcome.

31. Second, and more importantly, the text of the second sentence of Article 2.4.2 suggests that a W-to-T comparison can be conducted in a way that would not produce the same result as a W-to-W comparison. Article 2.4.2 provides for three methods of comparison. The first two are "symmetrical" methods that compare normal value and export price on the same basis, either on a W-to-W or a T-to-T basis. Article 2.4.2 does not provide restrictions or conditions for using either symmetrical comparison method.

32. The third method of comparison is the "asymmetrical" W-to-T method of comparison set forth in the second sentence of Article 2.4.2. Unlike the symmetrical comparisons, the investigating authorities are entitled to use this method of comparison exclusively in exceptional circumstances.

33. According to the text, the circumstances justifying the use of the exception arise where the investigating authorities find that there is "a *pattern*" of "*export prices which differ significantly*" among purchasers, regions or time periods. According to its ordinary meaning, a pricing "pattern"

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[30] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

[31] United States' Rebuttal Submission, paras. 19–25.

[32] *Compare* Section 777A(d)(1)(A) of the Act, which, in original investigations, authorizes the calculation of a weighted average of the normal values (impliedly over the entire period investigated) *with* Section 777A(d)(2), which, in periodic reviews, provides for the calculation of weighted average normal value over "a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."

exists where, among all export transactions, there is discernible configuration of prices by purchasers, time periods or regions.

34. The second requirement for recourse to the third methodology is that the authorities must explain why the significant pricing differences could not be "taken into account appropriately" by use of either of the symmetrical methods of comparison. Thus, although Article 2.4.2 does not indicate exactly how the W-to-T comparison is different from the other two methods of comparison, the distinguishing features of the third method must be rooted in the exceptional circumstances that justify its use. In consequence, the third methodology must enable authorities to focus the comparison on the export transactions making up the pricing "pattern". If the authorities do not focus on those transactions, they would fail to take "appropriate account" of the pricing differences discernible in those transactions.

35. To enable the authorities to focus on the transactions in the "pattern", the text supports a methodology that includes the targeted selection of particular export transactions (i.e. those in the pattern) for comparison with normal value. By selecting certain transactions for comparison, and excluding others, authorities can focus on the transactions making up the pricing pattern. This targeted selection of export transactions enables the authorities to address properly targeted dumping.

36. Conversely, if the comparison under the third methodology were to include *all* export transactions (or a fully representative sample), the methodology would not address the transactions in the pricing pattern and would, therefore, *not* "take into account appropriately" the significant pricing differences in that pattern, as required by the text of Article 2.4.2.

37. When a pricing pattern has been identified, the authorities must conduct a fair comparison that takes into account all transactions making up the pattern. The existence of an export pricing "pattern" does not mean that there is dumping, targeted or otherwise. Instead, like the other methodologies, the third methodology under second sentence of Article 2.4.2 is intended to enable authorities to determine whether there is dumping and to calculate the dumping margin.

38. Because the universe of transactions used in a W-to-T comparison comprises only the transactions in the pricing pattern, the results of this comparison will be different from comparisons under the symmetrical methods in the first sentence of Article 2.4.2. There is, therefore, no basis for the United States concerns that a prohibition on zeroing would nullify the W-to-T comparison in the second sentence of Article 2.4.2.

V. THE NEGOTIATING HISTORY DOES NOT SUPPORT THE UNITED STATES

39. New Zealand argues that, although not entirely clear, the negotiating history of the *Anti-Dumping Agreement* indicates that zeroing is permitted.[33] Because the ordinary meaning of the *Agreement* under Article 31 of the *Vienna Convention* is neither ambiguous nor absurd, it is not necessary for the Panel to examine the negotiating history.

40. In any event, in the original proceedings in this dispute, the Appellate Body examined the negotiating history of the *Anti-Dumping Agreement* and concluded that it did not support the view that zeroing is permissible.[34] It added that, when the drafters intended to permit Members to exclude certain elements from their determinations, they did so expressly. It noted, though, that there is no

[33] New Zealand's Third Party Submission, paras. 2.01–2.05.
[34] Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 107 and 108.

express authority to exclude negative comparison results.[35] The documents that New Zealand has submitted, purportedly as negotiating history, do not alter these conclusions.[36]

VI. CONCLUSION

41. Mr. Chairman, by continuing to apply its zeroing procedures in the Section 129 Determination, the United States disregards the findings of this Panel and the Appellate Body. The Section 129 Determination is tainted by the same flaws as the original determination in this dispute. In making both determinations, the United States failed to reach conclusions for the "product" under investigation and it failed to conduct a fair comparison. These failures result in violations of Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. And the consequence is that the advantages the United States' industry derives from zeroing are prolonged, as is the prejudice to Canadian producers and exporters.

42. Mr. Chairman, members of the Panel, staff of the Secretariat, Japan thanks you for your attention.

[35] Appellate Body Report, *US – Softwood Lumber V*, para. 100.
[36] Exhibits NZ-1 and NZ-2.

ANNEX D-7

NEW ZEALAND'S ORAL STATEMENT

16 November 2005

1. Mr Chairman, Members of the Panel, New Zealand welcomes this opportunity to present its views to the Panel in this dispute. New Zealand has joined this dispute not only for systemic reasons, but also because we have an interest in the use of the transaction-to-transaction methodology in the calculation of dumping margins. Our submission is based on what we see as a permissible interpretation of the *Anti-Dumping Agreement* which is specifically preserved under Article 17.6 of that Agreement.

2. At the heart of this dispute is whether the practice of 'zeroing' is inconsistent with the WTO Agreement when used in conjunction with the transaction-to-transaction methodology in anti-dumping investigations. New Zealand notes that while the Appellate Body in *US-Softwood Lumber* has considered that the practice of zeroing is precluded in the weighted average-to-weighted average methodology, the question of whether zeroing is permissible when using the transaction-to-transaction methodology has not been addressed by the Appellate Body. In fact, the Appellate Body was very careful to note that its analysis applied to the weighted average-to-weighted average methodology only.

3. The purpose of the transaction-to-transaction methodology is to compare actual export prices for each shipment with the prices of comparable normal value transactions in the exporter's domestic market. New Zealand prefers to use this methodology due to the relatively small number of shipments entering the New Zealand domestic market. Consistent with the approach of the experts who worked on the development of the Tokyo Anti-Dumping Code, New Zealand considers that this is a fair methodology which targets more precisely the dumping taking place.

4. In considering the use of the transaction-to-transaction methodology, it is important to note that the determination of dumping cannot be seen in isolation from the other elements of the *Anti-Dumping Agreement*. Aside from a determination as to whether dumping has occurred, there must also be an analysis of whether there is material injury to the domestic industry. If these elements are met, there must be a causal analysis of the effect of the dumped imports, and the effect of other factors, including the volume and prices of imports not sold at dumping prices, on the domestic industry. This process has relevance when assessing the validity of certain actions taken by a Member in applying a remedy to redress dumping. How dumping margins are calculated must be considered alongside the determination of material injury, the causation analysis, and the remedy that may or may not be applied – in other words, a holistic approach must be taken.

5. Article 2 of the *Anti-Dumping Agreement* provides the framework for the determination of the existence of dumping. Under Article 2.4.2 three methodologies may be used to calculate dumping margins: weighted average-to-weighted average; transaction-to-transaction; and weighted average-to-transaction. While curbs were placed on the situations in which the latter methodology might be used, these were not applied to the other two methodologies.

6. New Zealand has indicated in its submission that in using the transaction-to-transaction methodology, there are three primary methods of determining margins of dumping, one of which involves zeroing. The *Anti-Dumping Agreement* does not necessarily dictate that any one of the three

methods be used. In all three ways of using the transaction-to-transaction methodology, the non-dumped transactions are considered when completing the injury and causation analysis under Article 3.5 of the Agreement.

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

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

9. New Zealand wishes to highlight two aspects related to the determination of the existence of dumping: "fair comparison" under Article 2.4; and the interpretation of "product" under Article 2.1.

10. The calculation of dumping margins must meet the "fair comparison" requirement of Article 2.4. This requirement should be interpreted in a way which has regard to the context in which it is used. This context includes the specific rules relating to anti-dumping investigations and the nature of the methodologies used to determine the existence of dumping margins that are expressly allowed by the Agreement.

11. The calculation of dumping margins using the transaction-to-transaction methodology is inherently a "fair comparison" as it targets the dumping that is occurring while still taking into account the impact of dumped and non-dumped imports on the domestic industry. This is the case irrespective of the particular method used to calculate dumping margins under the transaction-to-transaction methodology. By contrast, the weighted average-to-weighted average methodology is not as targeted, may not reflect the range of dumping margins in an investigation, and may not fully address the material injury being caused or threatened by the dumped imports.

12. Turning to the interpretation of the term "product" in Article 2.1 - the Appellate Body in the *EC-Bed Linen* case took into account this term when interpreting the margins of dumping referred to in Article 2.4.2. It considered that margins of dumping should be established for the "product as a whole". In comparing the normal value and the export price on a transaction-to-transaction basis, the individual transactions where dumping has been found to exist are compared to determine whether dumping is considered to exist for the product under investigation. In this way the transaction-to-transaction methodology targets the importation of the product that is being dumped. It does not attempt to calculate dumping on the basis of the averaging of transactions for <u>all</u> sales of the product.

13. The interpretation of "product" in Article 2.1 of the *Anti-Dumping Agreement* has to be seen in light of the context of Article 2.4.2. The term "product", when used in relation to the transaction-to-transaction methodology, must reflect the nature of that methodology. That methodology selects individual transactions for analysis which are representative of the "product as a whole". Therefore, in relation to the transaction-to-transaction methodology, the "dumping of a product" referred to in

Article 2.1 means the dumping established through the selection of comparable individual transactions representing the product which is the subject of the anti-dumping investigation. Comparisons must be made at the same level of trade and at as nearly as possible the same time, with due allowance being made for differences affecting price comparability. Any of the three methods which may be used to calculate the dumping margins using a transaction-to-transaction methodology can be used to establish that dumping exists.

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

ANNEX D-8

ORAL STATEMENT OF THAILAND

16 November 2005

I. INTRODUCTION

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to present its views on this matter to the Panel today. In general, Thailand supports the arguments made by Canada in its first written submission.[1] Accordingly, Thailand will provide just a few additional views in today's proceeding.

II. THE ZEROING METHODOLOGY IS INCONSISTENT WITH ARTICLES 2.4 AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT

2. Thailand submits that the zeroing methodology is inconsistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement, regardless of what method is initially used to compare export prices to normal values. The fair comparison requirement of Article 2.4 imposes a fundamental obligation on the investigating authority to avoid biased and inaccurate determinations of dumping margins. The Appellate Body has confirmed that this obligation "informs all of Article 2,"[2] and hence includes Article 2.4.2 of the ADA.

3. Moreover, the Appellate Body has stated that "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping". ADA Article 2.4 thus prohibits the use of such an inherently distorted methodology to make a comparison between export price and normal value.

4. In addition, the Appellate Body has found that the reference to "margins of dumping" in Article 2.4.2 refers to the calculation of overall dumping margins for the product as a whole, rather than transaction- or model-specific comparisons. In the words of the Appellate Body in *US – Softwood Lumber V*, "the results of the multiple comparisons at the sub-group level are . . . not "margins of dumping" within the meaning of Article 2.4.2. . . . it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole."[3] The Appellate Body went on to find that the United States acted inconsistently with ADA Article 2.4.2 by "determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing".[4] In Thailand's view, the Appellate Body's finding neither differentiated between types of zeroing, nor suggested that the permissibility of zeroing was dependent on which methodology the United States used under Article 2.4.2 to make multiple comparisons at the sub-group level. Thus, the Appellate Body's reasoning applies equally in situations in which aggregate dumping margins are determined using the transaction-to-transaction comparison method.

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[1] First Written Submission of Canada, 22 June 2005.
[2] Appellate Body Report, *EC – Bed Linen*, para. 59.
[3] Appellate Body Report, *US – Softwood Lumber V*, para. 97 (emphasis in original).
[4] *Ibid.*, para. 117.

5. The United States attempts to portray Canada as seeking an "offset" to the results of individual comparisons "when aggregating the results of multiple transaction-to-transaction comparisons".[5] However, it is the United States, not Canada, that seeks to make such an offset by asserting the right to include the results of only some of the multiple comparisons in its aggregation. For other comparisons, the United States asserts the right to adjust the results of these comparisons so that the export price is no longer greater than the normal value for those comparisons. Therefore, the US practice constitutes an adjustment that is neither permitted under Article 2.4 of the ADA nor, by any definition of the term, can be considered fair.

6. The United States in effect argues that because the phrase "all comparable export transactions" in Article 2.4.2 does not refer to transaction-to-transaction comparisons, there is no prohibition on using the zeroing methodology in aggregating the results of such comparisons. However, it presumably would not be a fair comparison to make transaction-to-transaction comparisons and, in aggregating the results, simply to omit some of those results. If it would not be permissible simply to exclude these results, then *a fortiori* it is not permissible to exclude or adjust some of those results for the sole reason that the results of those comparisons are favourable to the exporters.

7. The text of Article VI of the GATT and of the ADA supports this position. First, the fair comparison requirement of Article 2.4 prohibits the use of zeroing following a transaction-to-transaction comparison.

8. Second, Article VI of the GATT defines dumping as the process by which "*products* of one country are introduced into the commerce of another country at less than the normal value of the products".[6] Article VI: and Article VI:2 consistently emphasize dumping is to be determined on the basis of a *product*, not selected transactions in a product.

9. Third, Article 2.1 of the ADA refers to a "product" and notes that a product is said to be dumped when "the export price of the product" is less than the comparable price "for the like product".

10. Thus, Article VI of the GATT 1994 and Article 2.1 of the ADA envisage the eventual determination of the margin of dumping for the product at issue by comparing an aggregate export price for that product with an aggregate normal value. This can be achieved by using different methodologies to determine margins at a sub-group level, be it an average-to-average or transaction-to-transaction methodology. But it cannot be achieved if some of the transactions at issue are not properly reflected in the determination of the overall export price and normal value. As the Appellate Body has stated, the investigating authority must aggregate *all* these 'intermediate values' in order to "establish margins of dumping for the product under investigation as a whole".[7]

11. By not fully taking into account all transaction-to-transaction comparisons in determining the aggregate dumping margin "in respect of such product", the United States imposes an anti-dumping duty greater in amount than the actual margin of dumping in respect of such product, calculated on the basis of all relevant transactions in that product.

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[5] First Written Submission of the United States, 7 July 2005 ("US First Submission"), para. 2.
[6] GATT 1994, Article VI:1 (emphasis added).
[7] Appellate Body Report, *US – Softwood Lumber V*, para. 97 (emphasis in original).

III. CONCLUSION

12. Thailand trusts that these views will assist the Panel in its consideration of these issues. Thailand will be happy to respond to any questions the Panel may have. Again, we thank you for this opportunity to present our views.

ANNEX D-9

CLOSING STATEMENT OF CANADA

17 November 2005

1. Mr. Chairman, Members of the Panel, Canada takes this opportunity to thank you once again for your time and diligent work on this case.

2. We also take this opportunity to revisit with you the one issue that is in dispute here: zeroing under the transaction-to-transaction methodology.

3. We are here because the United States, confronted with the need to bring itself into compliance, chose to zero again in the Section 129 Determination. This choice resulted in the United States acting in a manner inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

4. I would first like to set out what is meant by "zeroing" in the context of this dispute. I will then briefly comment on the discussion we have had surrounding Article 2.4 and finally turn to our arguments regarding Article 2.4.2.

5. So what is "zeroing"? In the original investigation, the United States calculated "margins of dumping" using a weighted-average-to-weighted-average methodology. The United States made multiple separate comparisons for various product sub-groups. It then aggregated the intermediate results of these multiple comparisons. However, before it did so, the United States changed to zero all negative results. This manipulation of the negative results – that is, the action of "zeroing" – inflated the "margins of dumping". And the United States was found to have acted inconsistently with its WTO obligations on this basis.

6. The United States did the same thing in its new transaction-to-transaction methodology. It made multiple comparisons on a transaction-to-transaction basis. And this method too produced intermediate values. The United States then aggregated these intermediate results – something that is no different from what it was required to do in its weighted-average-to-weighted-average methodology. Again, however, in doing so, the United States changed all negative results to zero.

7. With respect to the question of whether Article 2.4 prohibits zeroing under the transaction-to-transaction methodology, the United States claims, in rebuttal, that the fair comparison requirement in Article 2.4 is limited to adjustments affecting price comparability. However, the fair comparison requirement in the first sentence of Article 2.4 is a separate and distinct obligation from the requirement to ensure price comparability in the second sentence of the Article. As we have demonstrated, the US interpretation of the first sentence would render it redundant. And it also contradicts the Appellate Body's clear statements on this issue.

8. The United States also argues that zeroing must be permissible because, otherwise the targeted dumping methodology would produce a mathematically equivalent result to the result that would be obtained in the weighted-average-to-weighted-average methodology. The burden is on the United States to show that the targeted dumping provision could not have meaning or utility without zeroing. It has failed to satisfy this burden. It is not enough to say that US municipal law does not permit a different application. Canada, as well as the EC, Japan and Thailand have all provided hypothetical examples of how the targeted dumping provision could be applied in particular cases,

without zeroing.[1] Nothing the United States has said changes the fact that zeroing causes an "inherent bias" in the calculation of "margins of dumping," and is therefore prohibited by the "fair comparison" requirement of Article 2.4.

9. Turning now to Article 2.4.2., as you have heard, the United State dislikes the term "zeroing". Instead of acknowledging that some intermediate values are negative, the United States persists in referring to those negative values as "offsets" and argues it has no obligation to recognize these negative values and offset positive values. But this is just plainly wrong. An investigating authority has an obligation to determine a "margin of dumping" for the product as a whole. And that obligation includes respecting all the results, not changing the results of intermediate values to zero when they are aggregated.

10. I want to take you back to the text that is at issue in this dispute – Article 2.4.2, first sentence. This provision requires the United States to ensure that the results of its comparisons reflect the full value of the transactions analyzed (that is, the "product as a whole"). This obligation results from a textual interpretation of the provision, which we have set out in our submissions to you.[2]

11. The Appellate Body, when it interpreted the very same provision, upheld the original panel's findings on zeroing through the following reasoning. It first addressed the phrase "all comparable export transactions", which the United States suggested was the key to the Appellate Body's reasoning. The Appellate Body determined that the "zeroing" issue did not turn on this phrase.[3] Next, the Appellate Body interpreted the term "margins of dumping" and "dumping" in the first sentence of Article 2.4.2. The Appellate Body found that:[4]

- These terms relate to the product under investigation as a whole – not a type, model or category of that product;

- The requirement to calculate "margins of dumping" means that multiple comparisons at the sub-group level are only intermediate values – not "margins of dumping"; and

- The calculation of "margins of dumping" requires the aggregation of intermediate values at the sub-group level to arrive at a margin of dumping for the product as a whole.

12. The Appellate Body concluded that when aggregating these intermediate values, the United States was not permitted to change negative values to zero. The Appellate Body also found that Article 2.4.2 contains no express language that permits disregarding the true value of a comparison result when such values are aggregated to arrive at the "margin of dumping" for the product as a whole.[5] And the United States can point to no language in the text of Article 2.4.2, first sentence, that permits them to disregard the negative results of intermediate comparisons.

13. Let's come back again to what is before you in these implementation proceedings. The only question is whether, in the light of this legal reasoning and the recommendations and rulings of the DSB, did the United States bring its measure into conformity when it continued to zero under the transaction-to-transaction methodology. When an investigating authority aggregates the results of multiple comparisons it must fully reflect those results in coming to a "margin of dumping"? The United States did not do what it was required to do, when it treated negative results as zero.

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[1] See Exhibit CDA-8.

[2] First Written Submission of Canada, at paras. 21-27. Second Written Submission of Canada, at paras 8-15.

[3] Appellate Body Report, at paras. 86-90.

[4] *Ibid*., at paras. 97-98.

[5] *Ibid*. at para. 100.

Therefore, its use of zeroing under the transaction-to-transaction methodology must be found to be inconsistent with Article 2.4.2.

14. The United States argues that nothing in the text of Article 2.4.2 prohibited it from doing so. Specifically, the United States argues that it may change the meaning of "dumping" and "margins of dumping" in the first sentence of Article 2.4.2 and ignore the Appellate Body's reasoning. Why? Because, according to the United States, the meaning of "margins of dumping" has now changed and has become the result of any of the tens of thousands of comparisons in its transaction-to-transaction methodology. The United States also claims that the Appellate Body's prior reasoning does not apply in this case because the reasoning is the result of the phrase "all comparable export transactions" and that phrase does not attach to the transaction-to-transaction methodology.

15. However, the meaning of the term "margins of dumping" – and that of "dumping" – cannot change in this single sentence. That is, these terms prohibit the United States from changing the underlying facts of a case. Negative intermediate comparison results are negative intermediate comparison results. They are not "margins of dumping". Negative results are <u>not</u> positive results, nor are they zero. To establish "margins of dumping" within the meaning of Article 2.4.2, the intermediate results of those multiple transaction-specific comparisons must be aggregated for the product as a whole. And the term "margins of dumping", as confirmed by the Appellate Body in this very case, prohibits the United States from changing negative values to "zero".

16. For all these reasons, there is no question that the United States has failed to comply with the DSB's rulings, and its recommendation to bring its measures into conformity with its WTO obligations. Canada therefore requests that this Panel find that the use of zeroing by the United States under the transaction-to-transaction methodology in the Section 129 Determination is inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

17. Mr. Chair, members of the Panel, we are appreciative of your continued attention and hard work on this dispute. And Canada thanks you.

ANNEX D-10

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

17 November 2005

1. Mr. Chairman, Members of the Panel, in closing, the United States would like to thank you again for agreeing to serve on this Panel. We appreciate the time you have taken out of your busy schedules to address this important matter. We would also like to thank the members of the Secretariat for all of their hard work on this matter.

2. Our closing statement is very brief. In many respects, the comments that we offered after the third party session and in the further questions and answers this morning captured the two most important legal issues before you: the interpretation of "margins of dumping" and the nullification of the targeted dumping methodology.

3. With respect to the term "margins of dumping," you will recall that the United States' argument is that the term must be interpreted in its relevant context. That is precisely what the Appellate Body did in the underlying proceeding, interpreting it in an integrated manner with "all comparable export transactions." It is neither illogical nor surprising that, when interpreting that term in the context of comparisons between normal value and export price on a transaction-to-transaction basis, we arrive at a different interpretation. As we discussed yesterday, it is Canada's position that margins of dumping must be interpreted in the same way throughout the Anti-Dumping Agreement that does not withstand scrutiny – whether in the context of Article 9.3, where Canada's approach would offset one importer's dumping duties with another importer's non-dumped prices, Article 2.2 which we discussed this morning, or elsewhere in the AD Agreement.

4. With respect to the nullification of the targeted dumping methodology, we had a very interesting discussion of hypotheticals – with Christmas turkeys passing through, and Canada even suggesting that, in order to prevail, the United States must rebut "unstated assumptions" that Canada had not even thought of. If we can move from hypotheticals to reality for a moment, we should return to the text of the second sentence of Article 2.4.2. As mentioned earlier, that text, in a narrative form, is a classic "if – then" provision. It simply provides that *if* certain conditions exist, *then* authorities may make comparisons between normal value and export price on an average-to-transaction basis. It provides no exception to any other provision of the AD Agreement, nor does any other provision of the AD Agreement suggest that, when the conditions of the second sentence of Article 2.4.2 exist, the requirements of that other provision do not apply. Mr. Chairman, that is the reality of the agreement. The targeted dumping comparison methodology is just an exception to the average-to-average or transaction-to-transaction comparison methodologies. As the United States demonstrated in its Exhibit US-4, Canada's approach would nullify that exception by mathematically requiring the same result as from the average-to-average comparison methodology.

5. Because the United States has brought its measure into conformity with its Anti-Dumping Agreement obligations, the Panel should dismiss Canada's complaint.

6. Mr. Chairman, Members of the Panel, this concludes our closing statement. Thank you.