# ANNEX E

## QUESTIONS AND ANSWERS

# ANNEX E-1

## RESPONSES OF CANADA TO QUESTIONS TO THE PARTIES FOLLOWING THE SUBSTANTIVE MEETING OF THE PANEL

2 December 2005

**QUESTIONS TO CANADA**

**1. In para. 9 of its closing statement, Canada asserts that "an investigating authority has an obligation to determine a "margin of dumping" for the product as a whole". Does the concept of "margin of dumping" have the same meaning throughout Article 2.4.2? Canada indicates in para. 15 of its closing statement that "the meaning of the term "margin of dumping" – and that of – "dumping" – cannot change in this single sentence" – presumably the first sentence of Article 2.4.2. Does Canada consider that the meaning of the term "margin of dumping" might differ between the first and second sentences of Article 2.4.2? Is the second sentence of Article 2.4.2 an exception to the requirement to determine a margin of dumping for a product as a whole? Please explain. Does Canada consider that the term "margin of dumping" has the same meaning throughout the whole AD Agreement?**

1. Yes. The concept of "margin of dumping" has the same meaning throughout Article 2.4.2. The term "margins of dumping" appears only once in Article 2.4.2; and the Appellate Body has interpreted this term for the purpose of this provision. Although Article 2.4.2, second sentence, does not use the term "margins of dumping", an investigating authority that uses the weighted-average-to-transaction methodology calculates a margin of dumping within the meaning of this term in this provision.

2. The Appellate Body observed that Article VI:2 of *GATT 1994* defines a "margin of dumping" as "… the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the GATT 1994]."[1] It then concluded on that basis that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of the product."[2] The Appellate Body also found that Article 2.4.2 applies to the aggregation of the results of intermediate values.[3] Therefore, a margin of dumping under Article 2.4.2 must represent the aggregation of all intermediate values performed for the product as a whole, regardless of the calculation methodology chosen.

3. This definition of "margins of dumping", therefore, applies to both calculation methodologies set out in the first sentence of Article 2.4.2. The grammatical construction of the first sentence also confirms this interpretation. [4]

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[1] *United States – Final Dumping Determination on Softwood Lumber from* Canada, Report of the Appellate Body, WT/DS264/AB/R, adopted 31 August 2004, at para. 95. ["Appellate Body Report"]

[2] *Ibid.*, at para. 96.

[3] *Ibid.*, at para. 98.

[4] Canada observes that both the majority and the dissenting Member of the original panel indicated that the same rule should be applicable to the weighted-average-to-weighted-average and transaction-to-transaction methodologies. See *United States – Final Dumping Determination on Softwood Lumber from* Canada, Report of the Panel, WT/DS264/R, adopted 31 August 2004, at paras. 7.119, footnote 361; and 9.10. ["Panel Report"] Canada also recalls that in the original proceeding the United States argued that "there is no basis for finding a

4. Canada does not consider that the meaning of the term "margins of dumping" might differ between the first and second sentence of Article 2.4.2. Although the term "margins of dumping" does not actually appear in the second sentence of Article 2.4.2, Canada sees nothing in the context of the second sentence that would change the meaning of the term for the purposes of this provision. The provision is an exception but that "exception" does not equate to an exception from the requirement to determine a margin of dumping for the product as a whole.

5. It is unclear whether the term "margins of dumping" has the same meaning throughout the *Anti-Dumping Agreement*. Moreover, this Panel does not need to address the interpretation of "margins of dumping" in every of the many instances in which it is used to resolve Canada's claims concerning the use of zeroing under the transaction-to transaction methodology. The Appellate Body has made clear that this term has the same meaning in Articles 2.4.2, 6.10 and 9.4 of the *Anti-Dumping Agreement*. Canada is of the view that the Appellate Body's interpretation of "margins of dumping" in these provisions will necessarily inform the interpretation of this term in other provisions of the *Anti-Dumping Agreement*.

**2. Does it necessarily follow from the argument that a margin of dumping must be found for a product as a whole that any export prices above the normal value must be fully reflected in the numerator of the dumping margin? Does not the inclusion of those export prices in the denominator, but not in the numerator, result in a margin of dumping for the product as a whole, given that the product as a whole is presumably the imported product whose prices are in question? Please explain?**

6. Yes, it follows from the argument (*i.e.*, that "margins of dumping" in Article 2.4.2 must be calculated for a product as a whole) that export prices above normal value must be fully reflected in the numerator of the dumping margin calculation. The Appellate Body has already explained in this dispute that zeroing violates Article 2.4.2 precisely because it "… does not take into account the *entirety* of the *prices* of *some* export transactions".[5]

7. The inclusion of "export prices" (here Canada reads "export prices" to mean the "sales value" of the relevant export transactions), in the denominator of an *ad valorem* margin of dumping calculation does nothing to cure the distortion that zeroing causes in the numerator of the calculation, and therefore does not result in a margin of dumping for the product as a whole. It is for this reason that the Appellate Body disagreed with the United States "that the results of the comparisons in which the weighted average normal value is less than the weighted average export price could be excluded in calculating a margin of dumping for the product under investigation as a whole."[6]

8. By "zeroing" (*i.e.*, not taking the actual export price fully into account in the numerator), the United States failed in this case to calculate a margin of dumping for the product as a whole as required under Article 2.4.2. Instead, it calculated a margin of dumping that only partially reflects the actual sales of that product. A margin of dumping for a product as a whole is calculated on the basis of the investigated facts for a given period of time with the actual results of any comparisons left unchanged. The United States changed the facts under investigation by manipulating the results of its transaction-to-transaction comparisons before aggregating them. It changed the outcome of comparisons to certain export transactions (those transactions resulting in negative values) to a fictitious "zero". The United States therefore created a margin of dumping that did not reflect actual dumping represented in the investigated transactions for the product as a whole.

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different rule applicable to the two principal methodologies under Article 2.4.2" See Appellant's Submission of the United States, at para. 48 (Exhibit CDA 4).

[5] Appellate Body Report, at para. 101. (Emphasis in original.)

[6] *Ibid*., at para. 103.

**3. Please comment on the US assertion that "it is not the case that a margin of dumping is established only when the price differences resulting from multiple transaction-to-transaction comparisons for a given product are aggregated" (US oral statement, para. 25).**

9. This US assertion concerning the transaction-to-transaction methodology and Article VI:2 of the *GATT 1994* ignores the Appellate Body's reasoning in *US – Softwood Lumber V*. In paragraphs 93-96 of its report, the Appellate Body already relied on Article VI:2, which includes a reference to price difference, as useful context in finding that: "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product."[7] As the first sentence of Article VI:2 indicates, the provision concerns "dumping" and "the margin of dumping" for the product as a whole ("in respect of such product"). The Appellate Body went on to confirm that aggregation of intermediate values was required to calculate a margin for the product as a whole:

> [T]he results of the multiple comparisons at the sub-group level are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole. [8]

**4. During the meeting with the parties, the United States suggested that if the term "margins of dumping" is understood to have the same meaning throughout the AD Agreement, including the Article 9 provisions concerning duty collection, this would result in non-dumped imports being set off against dumped imports at the duty collection phase. The United States noted that importers pay anti-dumping duties, not exporters. The United States argued that it would be unfair for an importer of dumped product, who has already benefited from a low export price, to further benefit from a credit determined on the basis of non-dumped imports by another importer. Please comment on this US argument, with particular focus on the prospective normal value duty collection system applied by Canada. In particular, how would Canada interpret the term "margins of dumping" at the duty collection phase, and would Canada provide offsets at that phase?**

10. Canada has explained its position on the meaning of the term "margins of dumping" in response to Question 1 above. Canada has two additional general comments to make in response to the US argument.

11. First, this Panel does not need to determine the meaning of "margins of dumping" throughout the *Anti-Dumping Agreement* in order to resolve Canada's claims, set out in the Panel's terms of reference, concerning the consistency of zeroing under the transaction-to-transaction methodology in an original investigation.

12. Canada's arguments in this compliance proceeding relate to the interpretation of "margins of dumping" in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The Appellate Body has found that the ordinary meaning of "margins of dumping" in this sentence relates to the product as a whole.[9] Article 2.4.2, therefore, requires the aggregation of intermediate values to arrive at "margins of dumping" for each exporter or producer. The grammatical construction of this provision

[7] *Ibid*., at para. 96.
[8] *Ibid*., at para. 97.
[9] *Ibid*., at para. 96.

also confirms that "margins of dumping" cannot carry more than one meaning in the first sentence of Article 2.4.2.[10]

13. Second, Canada observes that a prospective normal value system does not employ the practice of zeroing. An investigating authority zeros when it changes intermediate values resulting from sub-group or transaction-to-transaction comparisons to zero before aggregating these values into a margin. A prospective normal value assessment system, however, assesses anti-dumping duties as imports occur through a comparison between the export price and the prospective normal value. An investigating authority assesses anti-dumping duties when the export price is lower than the weighted-average normal value, but applies no anti-dumping duties to non-dumped transactions when the opposite is true. It is not the same as the practice of zeroing, *i.e.*, the changing of the results of intermediate values prior to their aggregation into a margin of dumping. Moreover, Article 9.4(ii) of the *Anti-Dumping Agreement* specifically contemplates the use of such an assessment system. There is no language in Article 2.4.2 that allows an investigating authority to disregard the results of intermediate values. The prospective normal value assessment system is not the same as zeroing and the operation of such an assessment system cannot be relied on to support zeroing.

**5. Please explain Canada's understanding (oral statement, para. 30) of how the targeted dumping methodology might operate in practice, without zeroing. For example, assume there is evidence of targeted dumping by a specific exporter into a specific region of a Member. Further assume that the relevant exporter also sells into other regions of the same Member, without dumping. How might the targeted dumping methodology apply in this case? How might any margins of dumping be calculated? What role would the non-dumped imports play in this process? Would anti-dumping duties only be applied on imports destined for the region for which there was evidence of targeted dumping? How would any resultant anti-dumping duties differ from those applicable as a result of a weighted average–to–weighted average comparison in respect of the totality of imports into the Member's territory? How would the resulting anti-dumping duties comport with the first sentence of Article 6.10 in the case in which the exporter had sales outside the targeted region?**

14. Canada observes that the first sentence of this question implies that the targeted dumping methodology requires or depends on the use of zeroing for its meaning. There is no basis in the text of the *Anti-Dumping Agreement* for such an assumption.

15. It is the United States who asserts that zeroing is permitted because a broad prohibition on its use would render the targeted dumping methodology inutile. Therefore, the United States, and not Canada, has the burden of establishing this argument and it has not done so. Canada notes that: (1) the United States has offered no textual basis in Article 2.4.2 first sentence for its argument that the use of zeroing is permitted under the transaction-to transaction methodology; and (2) the United States has not responded to, let alone tried to refute, Canada's argument, that there is no language in this provision that permits an investigating authority to disregard the results of intermediate values – something it must do to zero.

16. Canada has never applied the targeted dumping methodology. A WTO Member could approach such an analysis in the manner outlined below – or by other possible means –depending on the facts of a given case.

17. After examining the export transactions, an investigating authority might identify a pattern of lower export prices for the particular region in question. If the targeted dumping was significant or the non-dumped transactions "masked" the targeted dumping, the investigating authority might conclude that the weighted-average-to-weighted-average and the transaction-to-transaction

[10] Oral Statement of Canada, at para. 14.

methodologies were not suitable to address the situation. It could then commence a targeted dumping analysis through the application of the weighted-average-to-transaction methodology.

18. Canada considers that an investigating authority would then have a choice. It could either continue its anti-dumping investigation into export transactions to other parts of the country or it could terminate the investigation outside the targeted region. As the example in the question provides that transactions to other regions were not dumped, Canada assumes that the investigating authority would terminate its investigation into the non-targeted regions and continue the investigation with respect to transactions to the targeted region only.

19. The investigating authority could then calculate the amount of dumping to the targeted region and place this value in the numerator. Canada is of the view that zeroing would not be permitted in the aggregation of any intermediate comparisons, just as it is not permitted in the two other methodologies found in the first sentence of Article 2.4.2. Similarly, the denominator would consist of the total value of dumped and non-dumped export transactions to the targeted region. The necessary injury analysis would also consider the same series or group of export transactions.

20. As this example resulted in the termination of the investigation outside the targeted region, anti-dumping duties would only be applied to imports into the targeted region. Were an investigating authority to use the targeted dumping methodology in this example, it necessarily would produce a different margin of dumping than the weighted-average-to-weighted average methodology which would be applied to all imports into a country because the latter methodology would necessarily examine a different data set (*i.e.*, all export transactions, rather than the subset of export transactions that make up transaction involving the targeted region).

21. Article 6.10 establishes the right of producers and exporters to obtain a margin of dumping that reflects their actual pricing behaviour. In the example at hand there would be only one duty applied – the duty applied to transactions into the targeted region as the investigation was terminated in the rest of the country or territory.

22. Having offered this hypothetical, which is consistent with the *Anti-Dumping Agreement*, Canada notes that the text of Article 6.10 does not necessarily restrict an investigating authority to calculating only a single margin of dumping.

23. Prior to the implementation of the Uruguay Round Agreements, investigating authorities frequently calculated and applied a single margin of dumping to all exports of the product from a particular country – without regard to whether one exporter dumped and another did not. Article 6.10 was intended to provide producers and exporters with the right to obtain a company-specific margin of dumping that reflects their actual pricing behaviour, rather than a margin of dumping that reflects the average pricing behaviour of several other exporters. As a consequence, this provision should not be interpreted to prevent investigating authorities from providing an exporter with *more than one* margin of dumping when this result would more accurately reflect the pricing behaviour of the exporter.

24. In *US – Softwood Lumber V*, the Appellate Body found that Article 6.10 refers to the "product" to mean the "product under investigation".[11] The Appellate Body's interpretation suggests that the term "margins of dumping" in this provision would apply to the product as a whole. As explained in the answer to Question 6, the "product as a whole" can refer to two different margins of dumping for the same exporter.

**6. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a**

[11] Appellate Body Report, at para. 94.

**margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.**

25. As was discussed at the oral hearing, Canada agrees that these three elements do not necessarily constitute all of the elements involved in the application of the weighted-average-to-transaction methodology in the second sentence of Article 2.4.2. Neither Canada nor the United States has practical experience with the application of this provision. As a consequence, the examples Canada has provided are hypothetical examples of how a WTO Member might apply the weighted-average-to-transaction methodology in these situations.

26. Take the purchaser situation first. An investigating authority would first examine the export transactions to determine whether a pattern of targeted dumping exists for a particular purchaser. If the investigating authority were to identify a pattern, it would have to provide an explanation as to why the targeted dumping could not be addressed through the use of the normal calculation methodologies (*e.g.*, the non-dumped transactions outside the targeted transactions would mask the targeted dumping to a purchaser using the other methodologies). An investigating authority could then conduct a weighted-average-to-transaction calculation and could apply that margin of dumping to the transactions involving that purchaser.

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

28. As explained in Question 5, Canada is of the view that there is nothing in Article 6.10 that prevents the application of more than one margin of dumping to an exporter. Moreover, the calculation of more than one margin of dumping is also consistent with the Appellate Body's reasoning in *US – Softwood Lumber V*, which used the phrase "product as a whole" to refer to the universe of transactions that would be aggregated to arrive at a margin of dumping. The Appellate Body's decision does not limit an importer to one margin of dumping. Rather it requires that whenever a margin of dumping is established it must include the full amount of all intermediate values that are aggregated to calculate a margin of dumping.

29. Turning to the regional "type" of targeted dumping, the answers would be similar. The necessary pattern presumably would result from an investigating authority reviewing all transactions for the product in question and noticing (or having brought to its attention) something about sales into a particular region within the country or territory that leads it to enquire further into transactions involving that region. Assuming that enquiry leads to discovery of the pattern and the investigating authority coming to a view that it can provide sufficient explanation for its use of Article 2.4.2 second sentence, the investigating authority would then calculate a margin for the transactions that apply to the pattern. The investigating authority would then apply that margin of dumping to those transactions.

30. The final "type" of targeted dumping occurs during a particular time period (*e.g.*, seasonal dumping). An investigating authority would presumably identify the necessary pattern after reviewing all transactions for the product in question and noticing (or having brought to its attention) something about sales within a particular timeframe within the period of investigation that leads it to enquire further into transactions involving that time period. Assuming that the investigating authority discovers a pattern of export prices and that it can provide sufficient explanation for its use of Article 2.4.2 second sentence, the investigating authority would then calculate a margin for the transactions that fall within the pattern. The investigating authority would then apply that margin of dumping to those transactions.

31. This would not lead to the application of two margins of dumping as in the other two cases discussed above. This is because only one margin of dumping would be applied at any particular point in time. If an import occurred within the period of time of the year in which targeted dumping was found, then the targeted dumping rate would be applied. If the import occurred at a point in time that was outside the targeted dumping time period, then the rate calculated for the balance of the year would be applied. Thus this example shows just as the other two show, but in a different way, how the targeted dumping provision can work without the use of zeroing.

**7. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:**

> **(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports (occurring during the remainder of the period of investigation or outside the region).**

32. Canada considers that any "non-dumped" transactions that related to the purchaser (the example in CDA-8 provided that all of the sales were dumped) or within the three month period could not be ignored (*i.e.*, zeroed). Instead, Article 2.4.2 requires an investigating authority to aggregate the non-dumped and dumped transactions that fall within the "pattern of export prices" to arrive at a margin of dumping. Article 2.4.2, second sentence, does not concern zeroing. Instead it is meant to allow an investigating authority to examine targeted dumping that could be masked under one of the normal calculation methodologies.

33. An investigating authority could also continue its anti-dumping investigation into export transactions outside the targeted purchaser or time period. As Canada has explained, an investigating authority could use one of the normal calculation methodologies to determine whether dumping occurs outside the targeted subset of transactions. As a consequence, the export transactions that fell outside the weighted-average-to-transaction calculation would be taken into consideration in these calculations.

> **(b) What legal / textual justification might permit such "zeroing"?**

34. As explained in (a), the examples provided by Canada do not contemplate the "form of zeroing" mentioned in the question. There is no legal or textual justification for zeroing under any of the calculation methodologies set out in Article 2.4.2.

> **(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does Canada agree with this argument? Please explain.**

35. Canada considers that use of a "pattern of export prices" in the calculation of the weighted-average-to-transaction methodology would not constitute a form of "zeroing" because intermediate results are not changed to zero in the calculation of the margin of dumping.

> **(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does Canada agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

36. Canada reiterates that focusing on the "pattern of export prices" is not equivalent to zeroing.

**(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does Canada agree? Please explain. If Canada does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?**

37. Canada agrees that the margin of dumping could constitute the amount of dumping for that period expressed as a percentage of the export price. Canada does not have experience applying the targeted dumping provision. Consequently, Canada would like to consider the response provided by the EC before deciding whether to comment further on this question.

**(f) Please show the operation of both hypothetical examples using numbers.**

38. In Exhibit CDA-8, Canada provided two hypothetical examples, the first of which involved the largest US purchaser of softwood lumber receiving a special deal (*i.e.*, targeted dumping) for the product under investigation. In this hypothetical example exporters also sell lumber to other purchasers at prices that are higher (though still at dumped prices).

39. Canada considers that an investigating authority could establish a margin of dumping for the targeted dumping to the largest US purchaser using the weighted-average-to-transaction methodology. Canada, to provide the simplest explanation, will limit its discussion to the calculation of the margin of dumping for a single exporter. Assume an investigating authority would examine all export transactions (dumped and non-dumped) within the targeted pattern (sales to the largest US purchaser) to arrive at a separate margin of dumping of 21 per cent. At the same time, the investigating authority could examine the sales from this exporter to all other purchasers using the weighted-average-to-weighted-average methodology, which hypothetically might yield a separate margin of dumping of 6 per cent. The investigating authority would have calculated a much different margin of dumping (*e.g.*, perhaps 10 per cent) had the weighted-average-to-weighted-average methodology been applied to all export transactions. The margin of dumping for sales to the "targeted" purchaser would be 21 per cent. In contrast the margin of dumping for sales to all other purchasers would be 6 per cent.

40. The second hypothetical example of a seasonal product would operate in a similar manner. An investigating authority would first identify a pattern of lower export prices for an exporter for the three month period with the seasonal dumping. Assume the investigating authority established such a pattern for this exporter and then calculated a margin of dumping of 25 per cent for this three-month period. It could then use the weighted-average-to-weighted-average methodology or transaction-to-transaction methodology to analyze the sales for the remainder of the year and to calculate a margin of dumping for the exporter for the remaining nine months of the year (*e.g.*, again perhaps 10 per cent). The margin of dumping for the three month period of targeted dumping would be 25 per cent. Similarly, the margin of dumping would be 10 per cent for sales in the balance of the year.

**(g) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?**

41. Canada considers that investigating authorities would use all export transactions from the "pattern of export prices" in the calculation, regardless of whether these transactions were dumped or non-dumped. See Canada's answer to Questions 5 and 6.

**8. The EC has stated that, in its view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written**

**Submission at para. 6). Does Canada agree. Could Canada explain what, in its view, is a normal value for purposes of a transaction-to-transaction analysis? How would Canada expect that an investigating authority would determine the appropriate normal values for comparison purposes in the context of such an analysis?**

42. Canada does not share the EC's view. Canada understands that "normal value" is a synonym for home-market prices of the "like product" in the WTO Member exporting the product under investigation. Canada considers that a "normal value" can consist of individual home market sales for the purpose of the transaction-to-transaction methodology which envisages comparisons of individual normal values to export prices. Article 2.4.2 would then require the aggregation of these transaction-to-transaction comparisons to arrive at the margin of dumping for the product as a whole for each exporter or producer under investigation. An investigating authority may not zero when aggregating these intermediate values.

43. In this compliance proceeding, Canada did not challenge the US Department of Commerce's (USDOC) method of selecting normal value transactions (*i.e.*, home market sales) for comparison to individual export prices in its Section 129 Determination. As selection in the abstract is not at issue in this dispute, Canada has nothing further to add on this point.

**9. Is the "weighted average normal value" referred to in the first sentence of Article 2.4.2 the same as the "normal value established on a weighted average basis" referred to in the second sentence of that provision?**

44. Yes. Canada understands these terms to both refer to an aggregate weighted-average normal value for the "like product".

**10. Under the approach proposed by New Zealand (para. 3.09 of New Zealand's written submission), a higher margin of dumping would be attributed to a lower volume of dumped imports, with the remaining imports being treated as non-dumped. Could this reduce the likelihood of dumped imports being shown to cause of material injury? If so, might this bring into question the assumption that failure to offset will necessarily lead to a less favourable result for exporters?**

45. No. Although New Zealand's proposed application of the transaction-to-transaction methodology would reduce the "volume of dumped imports", it would also inflate the "magnitude of the margin of dumping" which contributes to material injury under Article 3.4 of the *Anti-Dumping Agreement*. As a consequence, the proposed application of this methodology might or might not produce more favourable results for exporters in an injury analysis depending on the facts of a given investigation.

**11. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Canada reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

46. Canada considers that this question is no longer a "proposition" and there is nothing to "reconcile" given that the Appellate Body found that "[i]t is clear from the texts of [Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by an investigating authority."[12] The Appellate Body determined that the term "product" is used to refer to the "product under investigation" in a consistent manner in several provisions including Article VI:2 of the *GATT 1994* and Article 6.10 and 9.2 of the *Anti-*

[12] *Ibid.*, at para. 93.

*Dumping Agreement*.[13] The Appellate Body properly concluded that "product under investigation" referred to the "product" defined at the outset of an investigation.

47. The Appellate Body also relied on the Article VI:2 definition of a "margin of dumping" as the "price difference" to conclude that dumping margins must be calculated for the product as a whole. The Appellate Body observed that Article VI:2 defined "margin of dumping" quoting the text of this provision that provides that the "margin of dumping is the price difference".[14] It then determined that "'margins of dumping' refers to the magnitude of dumping … [and] can be found only for the product under investigation as a whole."[15] The Appellate Body has thus also connected the "price difference" to the "magnitude of dumping" for the entire product under investigation.

48. As a final matter, the Appellate Body uses the phrase "product as a whole" to refer to *all of the exports of the product under investigation* made by a particular exporter or producer (*i.e.*, the "universe" transactions that are aggregated to arrive at a margin of dumping). An exporter or producer may not sell all of the product-types of the product under investigation. A softwood lumber producer, for example, might not produce or export "finger-jointed flangestock". If the USDOC investigates that particular exporter, its export transactions might consist of all of the other product-types except "finger-jointed flangestock". It follows that as a practical matter the "product as a whole" for that exporter or producer will consist of the "universe" of the product-types it exports in the ordinary course of trade (except in the exceptional case of a targeted dumping investigation where it is further limited to a specific pattern of export transactions). It is these transactions and the comparisons developed on the basis of these transactions that have to be treated in a consistent manner or as a "whole" in the calculation of a margin of dumping.

**QUESTIONS TO BOTH PARTIES**

**21. Would the parties please describe, in detail, how, under their respective anti-dumping systems, the processes of duty assessment and duty collection are carried out by their authorities.**

49. Anti-dumping duties in Canada are assessed under the authority of the *Special Import Measures Act* (SIMA).

50. The Canada Border Services Agency (CBSA) is responsible for the assessment and collection of anti-dumping duties. The CBSA establishes prospective normal values for goods that are subject to an anti-dumping finding. Generally, all known exporters of subject goods are advised of the normal values applicable to their goods in advance of importation.

51. When goods are imported into Canada, the CBSA determines whether the goods are subject to an anti-dumping finding. If they are, the CBSA then determines whether the goods are priced at or above the applicable prospective normal value at the time of importation. If so, no anti-dumping duties are levied. However, when the export price is below the normal value, anti-dumping duties equal to the difference by which the normal value exceeds the export price are levied. When there are no prospective normal values in place at the time of importation for a particular exporter or product, the amount of anti-dumping duty payable will be based on a rate reflecting the use of facts available.

52. The initial assessment of anti-dumping duties is made within thirty days after the goods are imported into Canada. This assessment is considered final and conclusive unless the importer requests a re-determination of the anti-dumping duties, which may result in a refund of duties that were paid in excess of the correct amount payable. As well, the CBSA can undertake a re-

[13] *Ibid*., at para. 94.
[14] *Ibid*., 95.
[15] *Ibid*., at para. 96.

determination on its own initiative to adjust the amount of anti-dumping duties payable on the importation which can result in a request to the importer for the payment of additional duties or in a refund of duties paid.

53. Assessment reviews (also known as "re-investigations") are normally conducted by the CBSA on an annual basis in order to establish or update prospective normal values. Exporters may also request assessment reviews because of changes in market conditions that impact on normal values or for purposes of establishing normal values for new products. The new prospective normal values are made known to exporters at the conclusion of the review and are then applied to subsequent importations. Exporters are advised to notify the CBSA of substantial changes in domestic prices, market conditions and production costs that may affect the accuracy of their prospective normal values.

**22. If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?**

54. Canada considers that this panel does not need to resolve this question in order to determine whether Article 2.4.2 prohibits zeroing under the transaction-to-transaction methodology. However, Canada would like to make the following general comments concerning the "fair comparison" requirement.

55. Article 2.4 establishes a "fair comparison" requirement that prohibits zeroing under all of the calculation methodologies under Article 2.4.2 of the *Anti-Dumping Agreement*. The "fair comparison" requirement prohibits the practice of "zeroing" because it is inconsistent with the substantive rules and concepts concerning the calculation of "margins of dumping" under Article 2.4.2 of the *Anti-Dumping Agreement*. Although the recent panel in *US – Zeroing* did not determine whether the "fair comparison" requirement prohibits zeroing in investigations, it did find that:

> [T]o determine what is 'fair' under the *AD Agreement* in relation to the calculation of margins of dumping, we must take into account substantive rules and concepts in the *AD Agreement* relevant to the issue of the determination of margins of dumping. In particular, our analysis must take into account Article 2.4.2 of the *AD Agreement*, which is the only provision of the *AD Agreement* that specifically addresses the subject methods of determining margins of dumping. [16]

56. It follows that the concept of "fairness" relates to the substantive rules concerning the calculation of margins of dumping under the methodologies found in Article 2.4.2 – rules which prohibit zeroing when aggregating intermediate comparisons. Canada also believes that the practice of zeroing creates an "inherent bias" that is inconsistent with this provision.

**23. The first sentence of Article 2.4.2 provides:**

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

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[16] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, Report of the Panel, WT/DS294/R, circulated 31 October 2005, at para. 7.262.

**(a) Would the parties agree that what is referred to as the WA to WA methodology is set out in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" and what is referred to at the T to T methodology is set out in the phrase "by a comparison of normal value and export prices on a transaction to transaction basis"?**

57. Canada agrees, and notes that the word "basis" is used in the descriptions of both methodologies.

**(b) Could the parties comment on the significance, if any, of the difference between the use of the phrase "on the basis of a comparison" and "by a comparison".**

58. There is no significance in the difference between the use of the phrase "on the basis of a comparison" and the phrase "by a comparison". As noted in the response to the first part of this question, Article 2.4.2 describes both methodologies using the word "basis". Both phrases therefore provide that a margin of dumping is to be established using either of the described methodologies. The original panel confirmed this interpretation: "Article 2.4.2 establishes that, subject to the requirement of a fair comparison, dumping margins should normally be established on the basis of a comparison between a weighted-average export price to a weighted-average normal value, or on the basis of a transaction-to-transaction comparison."[17] It also interpreted the term "basis", in this context, to refer to the "underlying support for a process" or using, as in "using" the weighted-average-to-weighted-average methodology or "using" the transaction-to-transaction methodology.[18]

**24. It can be argued that a methodology cannot be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down. In this respect, what are the comments of the parties on the observations of the Appellate Body in EC –Bed Linen and in US - Corrosion-Resistant Steel Sunset Review that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?**

59. Canada agrees with the Appellate Body that the use of zeroing is "inherently biased towards inflating the margin of dumping" because it changes negative intermediate comparison results to "zero". A "zeroed" result does not reflect the actual comparison made. The margin of dumping is therefore changed without justification, and inflated in relation to the calculation that would be performed under an unbiased comparison. Such an arbitrary inflation of the margin of dumping is not "fair" under any meaning of that term in Article 2.4.

**25. Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"? Is the "fair comparison" requirement limited in scope to what is addressed in paragraph 4? Please explain.**

60- Article 2.4.2 begins with the introductory clause "[s]ubject to the provisions governing a fair comparison in paragraph 4". The ordinary meaning of "[s]ubject to" in this context is "… **2.** Foll. By *to:* under the control or influence of, subordinate to… ".[19] In addition, the plural of "provisions" indicates that the balance of this clause refers not just to the "fair comparison" requirement in the first sentence, but also to all the requirements found in this provision (*e.g.*, the requirement to ensure price comparability).

[17] Panel Report, at para. 7.199.

[18] *Ibid*., at para. 7.210, footnote 355.

[19] L. Brown, Ed., *The New Shorter Oxford English Dictionary*, Vol. II (Oxford: The Clarendon Press, 1993), at 3118. (Exhibit CDA-9)

61. The phrase "subject to the provisions governing fair comparison in paragraph 4" modifies the first sentence of Article 2.4.2 setting out the relationship between these two provisions. As a consequence, the first sentence of Article 2.4.2 cannot be interpreted to impose a limitation on the scope of Article 2.4 of the *Anti-Dumping Agreement*.

**26. In the second sentence of Article 5.8, does the term "margin of dumping" relate to the margin of dumping calculated for each exporter, or to a margin of dumping calculated for the country as a whole?**

62. As explained in Canada's response to Question 1, these compliance proceedings concern the interpretation of the term "margins of dumping" in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. Therefore, the Panel need not address the interpretation of the second sentence of Article 5.8 to resolve the issue that is before it. Canada implemented the provisions of Article 5.8 in Canadian law to mean "margin of dumping" for a country. However, Canada notes that the Appellate Body has recently found that "margin of dumping" within the meaning of Article 5.8 refers to the margins of dumping of an individual exporter.[20] Canada is reviewing the Appellate Body report in question, in the context of the facts of that case, and will be reflecting on its implications, if any, for Canadian anti-dumping duty law.

**27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?**

63. Yes. Canada considers that a margin of dumping can be calculated for a single export transaction when an investigation involves only one transaction (*i.e.*, the "universe" of all export transactions during the period of investigation is this one transaction). The "cases" described above are situations where this might occur. Canada submits that in these rare circumstances, a lone transaction may represent the only comparison that will produce an intermediate value and thus the comparison derived from this transaction will represent the product as a whole upon which a margin of dumping can be calculated. Article 2.4.2 makes clear, however, that where there is more than a single export transaction, all the export transactions must be aggregated to arrive at "margins of dumping" for an exporter or producer.

**28. Could the parties indicate whether, in their view, in a targeted dumping analysis under the second sentence of Article 2.4.2, an investigating authority may utilize a comparison method other than one in which "a normal value established on a weighted average basis may be compared to prices of individual export transactions".**

64. Article 2.4.2 permits an investigating authority to apply a targeted dumping analysis against a pattern of export transactions that relate to a particular region, time period or purchaser. Although Canada has never applied this calculation methodology, Canada submits that investigating authorities might also be able to examine the remaining non-targeted export transactions (*i.e.*, the transactions that are not part of the "pattern") using one of the two normal calculation methodologies (*i.e.*, weighted-average-to-weighted-average or transaction-to-transaction).

[20] *Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*," WT/DS295/AB/R, circulated 29 November 2005, at in particular, paras. 216-218.

**29. Could the parties address the argument of the EC that if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping methodology redundant, this is sufficient to demonstrate that the United States' argument in this regard is without merit? Specifically, is it enough to posit that such a methodology could be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members?**

65. Canada understands the United States' "mathematical equivalence" argument to be that "zeroing" must be permitted under the targeted dumping methodology, otherwise the methodology is redundant due to its mathematical equivalence in the example provided by the United States. Canada notes that any use or implementation of the targeted dumping methodology is not at issue in this proceeding and is only relevant to Canada's claim under Article 2.4 of the *Anti-Dumping Agreement*.

66. Canada agrees with the EC that the US "mathematical equivalence" argument fails if the targeted dumping methodology can be applied in a different manner than that suggested by the United States in its written submissions (something that US regulations achieve in and of themselves).

67. Canada observes that the second question seems to ask whether the municipal practice of some Members should be used to interpret the provisions of the *Anti-Dumping Agreement.* As Canada explained in oral argument, Article 18.4 provides that Members are required to ensure the conformity of their "laws, regulations and administrative procedures" with the provisions of the *Anti-Dumping Agreement* – not the other way around.

**30. Article 2.1 refers to "the export price of the product exported" and "the comparable price ... for the like product" in the home market of the exporting Member. Do these references to "price" relate to the price of the product as a whole, i.e. an aggregated or average price? Please explain. Do the references to "prices" in the transaction-to-transaction and weighted average-to-transaction provisions of Article 2.4.2 relate to the product as a whole? Please explain.**

68. Yes, the references in Article 2.1 to "price" should be interpreted to relate to the price of the product as a whole because the references are used in a description of the concept of "dumping", which is defined in relation to a product as a whole.[21] In contrast, the references to "prices" in Article 2.4.2, first sentence, do not relate to the price of the product as a whole because the weighted-average-to-weighted-average and transaction-to-transaction methodologies contemplate multiple comparisons of export prices to "normal value". A Member, however, must still aggregate the results of such multiple comparisons to establish "margins of dumping" within the meaning of Article 2.4.2, first sentence, which is for the product as a whole.[22]

**TO ALL PARTIES AND THIRD PARTIES**

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

[21] Appellate Body Report, at para. 93 ("It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority.").

[22] *Ibid*., at para. 96 ("As with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.").

69. Article 2.2 provides that investigating authorities calculate a "margin of dumping" through a comparison to either a constructed normal value or sales to a third country where there are few or no home-market sales of the "like product" in the ordinary course of trade. If an investigating authority established that there were few or no sales in the ordinary course of trade then this provision would permit it to replace all of these sales with a constructed normal value or sales of a "like product" from a third country.

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

**47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:**

**(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")**

71. To the extent that the EC has argued that an exporter could be given one margin of dumping for transactions covered by the targeted dumping analysis and another margin of dumping for transactions not subject to this analysis; Canada agrees that this is one potential method of applying the targeted dumping methodology.

72. As Canada explained in its response to Question 5, Article 6.10 does not restrict investigating authorities to calculating only one margin of dumping.

**(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

73. Article 9.2 provides that the "… anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources …". Article 9.2 prohibits investigating authorities from discrimination in the *collection* of anti-dumping duties – whether between exporters or exporters from different countries (or "sources"). An

investigating authority, for example, that calculates identical margins of dumping for several exporters is not permitted to discriminate between these exporters and collect a greater amount from some of them.

74. The EC's application of a disaggregated analysis relates to the *calculation* of the margin of dumping, which occurs before the *collection* of these anti-dumping duties. If an investigating authority calculates a margin of dumping under the targeted dumping methodology for a specific region, time period, or purchaser(s), the collection of these amounts would not constitute discrimination – whether or not these amounts differed from other margins of dumping. An investigating authority does not discriminate in the collection of anti-dumping duties if it applies the properly calculated amount of a margin of dumping.

75. As the EC may clarify what it said in answer to the question put to it at the hearing, Canada would like to consider the response provided by the EC before deciding whether to comment further on this question.

**48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?**

76. Article 2.4.2 expressly contemplates different degrees of accuracy resulting from the use of either the weighted-average-to-weighted-average or transaction-to-transaction methodology. However, contrary to what New Zealand argues, the difference in "accuracy" between the two methodologies resides in the comparisons made (comparisons of weighted averages versus comparisons of transaction-specific values) rather than in a so-called "targeting of dumped goods". Zeroing is prohibited under either methodology because it manipulates intermediate results in a manner which violates Article 2.4.2.

77. Moreover, the "fair comparison" obligation under Article 2.4 stands on its own regardless of the methodology employed under Article 2.4.2. A "fair" comparison is one that is "just, unbiased, equitable, impartial, legitimate, in accordance with the rules or standards".[23] Either methodology may produce results to a different degree of accuracy (again, in terms of the comparisons made), but either methodology must involve a "fair comparison". A comparison is not "fair" when it is inaccurate and the inaccuracy is the result of an arbitrary manipulation of intermediate values or results. Zeroing under even the most "accurate" of methodologies violates the obligation to make a "fair comparison" under Article 2.4.

78. In this case, therefore, it is irrelevant which methodology generates the most accurate results. What is relevant is that, prior to aggregating the intermediate results of its multiple comparisons, the United States once again impermissibly changed some of those results from their actual negative value to a fictitious "zero".

**49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).**

79. See Canada's answer to Question 8.

**50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article**

[23] See Second Written Submission of Canada, at para. 30; Exhibit CDA-5.

**2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.**

80. Canada has not contested the USDOC's selection of the transaction-to-transaction methodology in the Section 129 Determination.[24] Canada considers that Article 2.4.2 normally provides investigating authorities calculating "margins of dumping" with the discretion to choose the weighted-average-to-weighted-average or transaction-to-transaction calculation methodologies, subject to the "fair comparison" requirement.

**51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?**

81. The issue before the Panel in this case concerns the US determination of dumping and establishment of margins of dumping using the transaction-to-transaction methodology and "zeroing" the intermediate results of transaction-to-transaction comparisons. The Appellate Body in this case has interpreted the term "margins of dumping" in Article 2.4.2 as relating to the "product as a whole". In doing so, it referred to Article 9.2 concerning the imposition and collection of anti-dumping duties. The Appellate Body also upheld the original panel's conclusion that the determination of the existence of margins of dumping "on the basis of a methodology incorporating the practice of 'zeroing'" violates Article 2.4.2. The proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different has no implications for the interpretation of "margins of dumping" in Article 2.4.2 for the purpose of resolving the dispute in this case.

[24] As US law expresses a clear preference for the use of the weighted-average-to-weighted-average calculation methodology, the Canadian respondents have challenged the selection of the transaction-to-transaction methodology under US law.

# ANNEX E-2

## ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS OF 18 NOVEMBER

2 December 2005

**Table of Reports**

| **Short Form** | **Full Citation** |
|---|---|
| *EC – Cotton Yarn* | Committee on Anti-Dumping Practices, Panel Report, *EC – Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995 |
| *EC – Bed Linen (AB)* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001 |
| *Mexico – Rice (AB)* | Appellate Body Report, *Mexico – Definite Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R (circulated 29 November 2005) |
| *US – Atlantic Salmon* | GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway*, ADP/87, adopted 27 April 1994 |
| *US – Corrosion-Resistant Steel AD Sunset Review (Panel)* | Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R |
| *US – "Zeroing" (Panel) (EC Complainant)* | Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, (circulated 31 October 2005) |
| *US – Gasoline (AB)* | Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 |
| *US – Softwood Lumber (Panel)* | Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R |
| *US – Softwood Lumber (AB)* | Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004 |

**Questions For Parties and Third Parties**

**To the United States:**

**12. Is it the view of the US that the first sentence of Article 2.4 means something over and above what is set out in the second sentence and what comes thereafter, or does the remainder of Article 2.4 exhaust the meaning of the word "fair" used in the first sentence? If not, why does the first sentence of Article 2.4 exist?**

1. The first sentence of Article 2.4 does not mean something over and above taking into account differences in comparability, as set out in the second sentence and what comes thereafter. The first sentence of Article 2.4 states a general obligation for Members to make appropriate adjustments to ensure that export prices and normal values are comparable before margin calculations are undertaken. The first sentence cannot be read separately from the remainder of Article 2.4, as the remainder of Article 2.4 illustrates the types of adjustments that a Member must make in pursuit of price comparability. This list, however, is not exhaustive. The language of the second through fifth sentences of Article 2.4 does not preclude additional adjustments outside of those described. This is evident, for example, from the use of the word "including" in the third sentence. The word "including" signals that the list of "differences" that follows is not an exhaustive list of all conceivable "differences which affect price comparability" for which due allowance must be made.

2. Article 2.4 of the AD Agreement is mandatory. It requires Members to make a fair comparison and instructs them on how to do it. Thus it begins with the following statements:

> A fair comparison shall be made between the export price and the normal value. *This comparison* shall be made at the same level of trade. . . ." (Emphasis added).

The phrase "this comparison" in the second sentence of Article 2.4 establishes a link to the first sentence. It makes clear that the criteria defined in the second and subsequent sentences are an elaboration on what constitutes a "fair comparison," as initially identified in the first sentence. It is clear from the use of the term "this comparison" that the second through fifth sentences illustrate what makes the comparison referred to in the first sentence a "fair" one.

3. Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2, which refers to "the provisions governing fair comparison in paragraph 4". The plural term "provisions," as well as the reference to "paragraph 4," rather than "the first sentence of paragraph 4", make clear that "the provisions governing fair comparison" are the provisions set forth in the entirety of Article 2.4.

4. In sum, there is no basis for reading the first sentence in Article 2.4 as meaning something over and above taking into account differences in comparability, as set forth in the second and subsequent sentences. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market. By requiring due allowance for all factors affecting price comparability, Article 2.4 assures that the prices used to establish dumping in Article 2.1 are "comparable".

5. With respect to the second part of the Panel’s question, the first sentence in Article 2.4 need not mean something over and above the second and subsequent sentences for it to be meaningful. This is evident from the illustrative nature of the second and subsequent sentences. Article 2.4 recognizes that a Member may make due allowance for differences other than those expressly identified. The first sentence makes clear that any such due allowances should be made to the end of achieving a fair comparison between export price and normal value. It thus provides context for the rest of the paragraph.

**13. Please comment on Canada's argument (oral statement, para. 16) that, if transaction-to-transaction comparisons were to constitute "margins of dumping", DOC would have had to assess whether each transaction-specific "margin of dumping" was *de minimis* in accordance with Article 5.8 of the *AD Agreement.***

6. Canada's argument rests on the assumption that the term "margin of dumping" must have the same meaning throughout the AD Agreement. The United States has pointed out that the term "margin of dumping" must be interpreted in light of its context.[1] The term "margin of dumping" occurs at various places throughout the AD Agreement and the context (and therefore the interpretation) is not uniform across all of the various uses.

7. The term "margin of dumping" as used in Article 5.8 has a different context from the term "margins of dumping" as used in the part of Article 2.4.2 that refers to transaction-to-transaction comparisons. Article 5.8 requires a Member to determine an overall margin of dumping for each exporter or producer subject to an anti-dumping duty investigation. A Member must determine whether the overall margin of dumping for an exporter or producer is *de minimis*. If the margin is *de minimis*, the Member must terminate the anti-dumping duty investigation with respect to that exporter or producer. Because investigations occur with respect to exporters' and producers' sales of the product under consideration collectively, and not simply with respect to individual transactions, Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer.

8. This interpretation has been confirmed by the Appellate Body in *Mexico – Rice*.[2] There, in a final anti-dumping duty determination, Mexico determined that the margin of dumping for each of two US producers was zero per cent. However, after that final determination, Mexico issued an order establishing the anti-dumping duties that included the two US producers. As Mexico had failed to terminate the investigation with respect to these two producers, the Appellate Body found that it acted inconsistently with Article 5.8.[3]

9. The Appellate Body specifically rejected Mexico's argument that the use of the term "margin of dumping" in Article 3.3 provided relevant context for interpreting the same term in Article 5.8.[4] Article 3.3 allows for the cumulation of imports from countries simultaneously subject to an anti-dumping duty investigation to assess injury, if "the margin of dumping established in relation to the imports from each country" is greater than *de minimis*. The Appellate Body noted that the phrase "margin of dumping established in relation to the imports from each country" is missing from Article 5.8.[5] In rejecting Mexico's contextual argument based on Article 3.3, the Appellate Body implicitly accepted that "margin of dumping" need not be interpreted in the same way throughout the AD Agreement and that the context in which the term "margin of dumping" is used is relevant to determine its meaning.

**14. The US argues that an interpretation of Article 2.4 that requires a general offset obligation would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 a nullity (US second written submission, para. 24). Would a generalized application of Canada's interpretation of the phrase "margins of dumping" in Article 2.4.2 also render the average-to-transaction methodology redundant? Is the US argument confined to Canada's Article 2.4 claim, or does it also apply in the context of Canada's Article 2.4.2 claim? Please explain.**

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[1] United States – Final Dumping Determination on Softwood Lumber from Canada, recourse to Article 21.5 of the DSU by Canada (WT/DS264), Second Written Submission of the United States, paras. 27-28 (25 July 2005) ("United States Second Written Submission (21.5)").

[2] *Mexico – Rice (AB)*, paras. 216, 217, 221.

[3] *Mexico – Rice (AB)*, para. 219.

[4] *Mexico – Rice (AB)*, para. 220.

[5] *Mexico – Rice (AB)*, para. 220.

10. A generalized application of Canada's interpretation of the phrase "margins of dumping" in Article 2.4.2 would render the average-to-transaction methodology redundant with the average-to-average methodology. For this reason, in addition to the other reasons set forth in the US submissions and statements, Canada's interpretation of Article 2.4.2 is incorrect.

11. Canada understands the phrase "margins of dumping" to have the same meaning throughout Article 2.4.2, regardless of context. In Canada's view, "margins of dumping" as used in Article 2.4.2 always refers to margins of dumping for the product under consideration as a whole. Therefore, according to this view, in establishing a margin of dumping, an investigating authority must always aggregate the results of *all* export-price-to-normal-value comparisons, even to the extent that the results of particular comparisons indicate an absence of dumping. Canada's argument makes no distinctions according to whether those comparisons were made on an average-to-average, transaction-to-transaction, or average-to-transaction basis.

12. Since Canada's understanding of the phrase "margins of dumping" does not differentiate according to comparison methodology, its Article 2.4.2 argument leads to the same result as its Article 2.4 argument. Under both arguments, the aggregation of comparison results must include offsets regardless of the comparison methodology used. Thus, as with Canada's Article 2.4 argument, its Article 2.4.2 argument would impermissibly render the average-to-transaction methodology redundant with the average-to-average methodology.

13. Moreover, as discussed in response to Questions 18 and 47, Canada also has failed to establish any reasonable interpretation of the second sentence of Article 2.4.2 under which "margins of dumping" has the same meaning as it has in the context of the average-to-average provision in the first sentence, *and* the result is distinct from that achieved using the average-to-average comparison methodology. For this reason, too, the US argument regarding Canada's effective nullification of the second sentence of Article 2.4.2 is not limited to Canada's Article 2.4 claim, but also applies to Canada's Article 2.4.2 claim.

**15. At para. 64 of its written submission, the EC suggests that zeroing might be permissible in certain circumstances in the context of a targeted dumping analysis. In particular, the EC argues that the zeroing could take the form of an allowance for a difference affecting price comparability. Please comment on this EC argument.**

14. The EC's reading of Article 2.4.2 finds no support in the text of that provision or in the "fair comparison" requirement of Article 2.4. The EC essentially confuses two concepts that have nothing to do with one another: (1) differences in prices in the export market between regions, purchasers and time-periods; and (2) differences which affect price comparability between export price and normal value.

15. The EC starts with the proposition that the AD Agreement does not say that Members cannot "zero" when using the targeted dumping comparison methodology. It then contends that it is appropriate to make an adjustment to export price in a targeted dumping situation because whatever difference exists in the export market that justifies the targeted dumping methodology also affects the price comparability between the export market and the home market. In other words, the EC theorizes, without any basis, that differences *within the export market* among purchasers, regions, or time periods equate to differences *between export prices and normal values* that affect price comparability within the meaning of Article 2.4.

16. The EC's theory simply cannot be reconciled with the terms of the second sentence of Article 2.4.2. As stated therein, the targeted dumping methodology may be applicable when there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ". It has nothing to do with differences between export prices and normal values. To get

around the inconvenient fact that the second sentence of Article 2.4.2 refers to differences within a single importing country market rather than to differences between two markets (the exporting and importing countries), the EC avoids reference to "different purchasers, regions or time periods" and refers instead to hypothetical different "markets".[6] In other words, to establish a link to the fair comparison in Article 2.4, the EC discusses targeted dumping in terms of differences between markets, even though that is not the language actually used in the second sentence of Article 2.4.2.

17. If, instead of referring to different "markets," the EC's argument referred to the actual text in the second sentence of Article 2.4.2, it could be paraphrased as follows:

> Assume that export sales only occurred at the very beginning and the very end of the time period and, therefore, the targeted dumping methodology is justified because of time period differences. Because the dumped sales that occurred at the end of the period cannot be averaged with the non-dumped sales that occurred at the beginning of the period, there is a difference that affects price comparability between those beginning-of-the-period-export-sales and the normal value sales (made throughout the period), that justifies an adjustment to those export prices to "zero" any negative dumping amount.

18. Alternatively, the EC's argument could be framed in terms of export prices which differ significantly among different regions. In that case, instead of "beginning-of-the-period-export-sales" one could substitute "non-dumped sales to Germany," and instead of "end-of-the-period-export-sales" one could substitute "dumped sales to Spain". Again, the EC would argue that the differences between regions of the export market that justify the use of the targeting methodology somehow create a difference that affects price comparability between the export sales and the normal value sales.

19. This analysis makes little sense and finds no support in the text of Article 2.4.2 or Article 2.4. The targeted dumping methodology is an exception to the comparison methodologies in the first sentence of Article 2.4.2, but is not an exception to the fair comparison requirement of Article 2.4. Therefore, if "zeroing" is considered "unfair," without language in the AD Agreement actually permitting what the EC argues, it would be "unfair" and equally impermissible to "zero" when using the targeted dumping methodology.

20. The EC provided much the same argument before the Panel in *US – Zeroing (EC Complainant)* and the panel, in its recently circulated report, found that the argument "reflects a misinterpretation of the very concept of price comparability as used in Article 2.4 of the AD Agreement".[7] The panel rejected the EC's argument, stating that "the existence of differences in prices in the export market between regions, purchasers and time-periods is conceptually wholly irrelevant to, and outside the scope of, Article 2.4 because such differences have nothing to do with whether or not export sales and domestic sales are comparable with regard to factors such as level of trade, taxation, quantities, etc.".[8]

**16. Please comment on Canada's argument that "[t]he targeted dumping methodology, ... by definition, would not be applied to all export transactions" (oral statement, para. 29). Is this statement true in the context of US law?**

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[6] United States – Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada (WT/DS264), Third Party Submission by the European Communities, paras. 64-67 (14 July 2005) ("EC Third Party Submission").

[7] *US – "Zeroing" (Panel) (EC Complainant)*, para. 7.279.

[8] *US – "Zeroing" (Panel) (EC Complainant)*, paras. 7.279 and 7.280.

21. Commerce's regulation implementing the targeted dumping methodology provides that if targeted dumping is found, Commerce will normally "limit the application of the average-to-transaction method" to those sales that make up the pricing pattern.[9] This does not, however, mean that other export sales are ignored. As Commerce explained in the Preamble to its proposed regulations, "the average-to-average method would [still] be applied to the remaining sales".[10] (There were no changes relevant to this discussion in Commerce's final regulations.)

22. By applying the average-to-transaction methodology to the sales that make up the targeted dumping pattern, and the average-to-average methodology to all other sales, all of the sales made during the period of investigation would be included in the dumping analysis. Moreover, even with this combination of comparison methodologies, if offsets were required for non-dumped comparisons, the result would be the same as if all comparisons were made using the average-to-average comparison methodology with offsets for non-dumped sales. Thus, regardless of whether the average-to-transaction methodology is applied to some or all export transactions, if Canada's interpretation of "margins of dumping" in Article 2.4.2 is accepted as requiring a margin of dumping for the product as a whole, with offsets for non-dumped comparisons, then the second sentence of Article 2.4.2 would be rendered without effect.

23. In this regard it should be noted that the second sentence of Article 2.4.2 merely describes the situation in which an average-to-transaction methodology may be used. It does not establish a set of circumstances under which a Member may select a subset of export transactions that indicate the greatest amount of dumping and base the entire anti-dumping investigation on that subset. There are other provisions of the AD Agreement that explicitly provide for Members to consider only a subset of export transactions.

24. Article 6.10, for example, addresses the circumstances in which a Member may so limit its examination. Article 6.10 provides that "where the number of exporters, producers, importers or types of products involved is so large" a Member may limit its examination based on a statistically valid sample, or the largest percentage of volume of exports that can be reasonably investigated. Nothing in the text of the second sentence of Article 2.4.2 indicates that a Member may conduct an entire anti-dumping investigation based on only a subset of export transactions, as Canada's argument seems to suggest.

**17. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.**

25. To date, the United States has not applied the targeted dumping methodology and cannot speak from actual experience. Nonetheless, the second sentence of Article 2.4.2 merely establishes a condition precedent that, if met, would lead to the application of the average-to-transaction comparison methodology. That is, if the investigating authorities find a pattern of export prices that differ significantly with respect to purchasers, regions or time periods, and if such differences cannot be taken into account by using the comparison methodologies of the first sentence of Article 2.4.2, then the investigating authorities may use the average-to-transaction comparison methodology.

26. With respect to Commerce's potential application of the targeted dumping methodology, Commerce's regulations require it to analyze the evidence submitted during the course of the

[9] 19 CFR _ 351.414(f)(2).

[10] Anti-Dumping Duties; Countervailing Duties, 61 Fed. Reg. 7308, 7350 (27 February 1996) (Notice of Proposed Rulemaking and Request for Public Comments) (Exhibit US-5).

investigation, and determine whether a targeted pattern of export prices exists.[11] As anticipated by the text of the AD Agreement, Commerce might find that prices have differed significantly over a certain period of time, that the price of certain products exported to a particular region differ significantly from other regions, or that certain purchasers pay prices that differ significantly from other purchasers. In the preamble to the regulations, Commerce states, "We do not believe that targeted dumping exists where the price differences are simply random or spurious price fluctuations. In our view, targeting means that, within the industry under consideration, the price differences suggest a meaningful pattern."[12] Accordingly, Commerce's regulations presently require the use of standard and appropriate statistical techniques to determine the existence of targeted dumping.[13]

27. Next, having found a pattern, Commerce would determine whether that pattern could be taken into account using either the average-to-average or transaction-to-transaction methodologies.[14] If Commerce determined that the pattern could not be taken into account using either of those comparison methodologies, it would explain the basis for that determination.[15] Commerce would then apply the average-to-transaction comparison methodology to those transactions that constitute the targeted dumping.[16] Commerce would apply the average-to-average comparison methodology to all other transactions occurring during the period of investigation, and aggregate all of the results to determine a single weighted average margin of dumping for each exporter or producer.[17]

28. If offsets were required for non-dumped comparisons under this combination of comparison methodologies, the result would be the same as if all comparisons were made using the average-to-average comparison methodology with offsets. Thus, the second sentence of Article 2.4.2 would still be rendered without effect, as the average-to-transaction methodology provided for in that sentence would be redundant with the average-to-average methodology provided for in the first sentence.

29. Moreover, the result would be the same even if the second sentence of Article 2.4.2 were read as requiring application of the average-to-transaction comparison methodology to all export transactions occurring during the period of investigation if targeted dumping exists. In that case, if offsets were required, all of the sales made during the period of investigation would ultimately be included in the final calculation of the margin of dumping, and the results of the application of the average-to-transaction comparison methodology would still be the same as the results of the application of the average-to-average comparison methodology.

30. With respect to the application of an anti-dumping measure resulting from an investigation involving targeted dumping, there would be no difference from any other anti-dumping measure. The single weighted average margin of dumping for each exporter or producer would be applied as the cash deposit rate for all imports from that exporter or producer going forward.

**18. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:**

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[11] *See* 19 C.F.R. _ 351.414(f)(1)(i).

[12] *Anti-Dumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (17 February 1996) (Exhibit US-5).

[13] 19 C.F.R. _ 351.414(f)(1)(i).

[14] 19 C.F.R. _ 351.414(f)(1)(ii).

[15] 19 C.F.R. _ 351.414(f)(1)(ii).

[16] 19 C.F.R. _ 351.414(f)(2).

[17] *Anti-Dumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (17 February 1996) (Exhibit US-5).

31. In order to address the Panel's sub-questions in the most efficient manner, the United States addresses sub-questions (a) and (c) together and sub-questions (b) and (d) together.

> **(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports.**
>
> **(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does the United States agree with this argument? Please explain.**

32. Canada has argued that Article 2.4.2 requires a Member to establish the existence of margins of dumping for the product as a whole and that, in so doing, it is necessary to reduce the total amount of dumping found based on non-dumped transactions. Nevertheless, Canada's hypothetical examples meet neither of these supposed AD Agreement obligations.

33. In its hypothetical examples in Exhibit CDA-8, Canada proposed subdividing the "product as a whole" and establishing multiple margins of dumping for any given producer/exporter. Canada failed to explain how it would combine these multiple margins so as to establish an individual margin of dumping for each producer/exporter that could be tested against the *de minimis* standard, for purposes of Article 5.8. To the extent that Canada would not combine them and, instead, treat the margin based on the subset of targeted sales as the relevant margin for purposes of Article 5.8, this approach does not seem to differ significantly from the so-called "zeroing" methodology about which Canada complains. "Zeroing", under Canada's argument, entails the aggregation of multiple transaction-to-transaction comparison results, with results involving no dumping *not* offsetting results involving dumping. That is precisely what occurs in both of the hypotheticals set out in Exhibit CDA-8.

34. The EC's argument that this would not constitute zeroing, as no adjustment is made to the export prices is not consistent with the EC's own logic. In the EC's view, "zeroing" may be characterized as "an 'allowance' or 'adjustment' within the meaning of Article 2.4", the effect of which is "to reduce the value of certain [*i.e.*, non-dumped] export transactions".[18] Not providing an offset in the course of aggregation, according to the EC, amounts to reducing the export price in each non-dumped transaction-to-transaction comparison such that export price is made to equal normal value. If one were to accept that characterization (which the United States does not), then one could conclude that Canada's hypothetical examples entail zeroing. There is no principled basis for asserting that aggregation of multiple comparisons with "zeroing" effectively constitutes an adjustment to non-dumped export prices in some cases, but not in those cases in which the *dumped* exports manifest a targeted pattern. In other words, the EC fails to explain its basis for asserting that the characterization of aggregation without offsets for non-dumped transactions depends on whether dumped transactions exhibit a targeted pattern.

> **(b) What legal / textual justification might permit such zeroing?**
>
> **(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does the United States agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

35. There is no legal or textual support for Canada's and the EC's arguments that a Member may calculate multiple margins of dumping for a particular exporter/producer under the targeted dumping

[18] EC Third Party Submission, para. 59.

provision as posited in their hypothetical examples. For a further discussion of the US position in this regard, please refer to the answers to Questions 16 and 47.

36. With regard to the EC's argument that the "due allowance" provision of Article 2.4 might provide a legal or textual basis for its hypothetical example, please refer to the answer to Question 15.

> **(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does the United States agree? Please explain. If the United States does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?**

37. The United States is uncertain as to what the EC means when it states that the actual amount of dumping for a three-month period would be expressed as a percentage of export price. Canada has argued that the term "margin of dumping" must be applied to a "product as a whole". The "product as a whole" would cover imports for the entire year, not just three months. It is not clear whether the EC accepts Canada's hypothesis, in which case, the export price used as the denominator would be the total of export prices for the entire year, or whether the EC takes a different view, in which case, the export price used as the denominator would be the total of export prices for the three-month "targeting" period only.

38. If the EC is suggesting that the export price would be the aggregate of all export sales for the entire year, then, assuming that other "non-seasonal" export sales would be excluded from the numerator, the EC's hypothetical would indeed be comparable to the so-called "zeroing" methodology, because non-dumped sales would not be factored into the calculation of the numerator. Alternatively, if the EC is suggesting limiting the denominator to export sales during the seasonal period, it would not be establishing the existence of a margin of dumping with regard to all transactions. Such an approach would suffer from the problems identified in response to sub-questions (a) and (c) above.

> **(f) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?**

39. There is no obligation in the AD Agreement to offset dumped export transactions with non-dumped sales when applying the targeted dumping provision. However, a Member must nonetheless "take account" of these sales in the denominator of its calculations when calculating an overall margin of dumping for a producer/exporter, consistent with Article 6.10 and for purposes of applying the *de minimis* provision of Article 5.8.

**19. New Zealand suggests that the transaction-to-transaction methodology should be symmetrical, in the sense that the margin of dumping should be based only on dumped transactions, with non-dumped transactions being included in the analysis of the volume and prices of "imports not sold at dumping prices" (Article 3.5). Would the US treat imports where export price is not less than normal value as "imports not sold at dumping prices" in the meaning of Article 3.5 of the *AD Agreement*?**

40. In calculating an overall margin of dumping, the United States fairly reflects the total quantity of all imports of the product under consideration by including both dumped and non-dumped transactions in the denominator of its calculations. In this manner, the amount of dumping found is

diluted by the inclusion of the non-dumped sales in the denominator. It is this fully diluted margin of dumping that the United States tests against the *de minimis* standard for the purposes of the injury analysis. For any producer/exporter found not to have engaged in dumping, the United States treats all imports from such producer/exporter as "imports not sold at dumping prices" for purposes of Article 3.5. On the other hand, if the United States determines that a producer/exporter has engaged in dumping, it will treat all of that producer/exporter's imports as dumped in its injury determination.

41. Were the United States to further adjust its calculations to account for non-dumped sales in its injury determination, the result would be "double counting" of these non-dumped transactions. There is nothing in the text of Article 3.5 of the AD Agreement, or any other provision of the AD Agreement or GATT 1994, that would require the United States to double count non-dumped sales in any of its calculations.

**20. Could the US comment on the argument that "product" in Article VI of GATT 1994 must be equated with "product as a whole", in particular the question of reconciling the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

42. In its second submission, the United States discussed its views with respect to the terms "product" and "price difference" in Article VI of the GATT 1994.[19] Notably, the phrase "product as a whole" appears nowhere in Article VI, nor, for that matter, does the phrase appear in the AD Agreement.

43. In *US – Softwood Lumber (AB)*, the Appellate Body considered the use of the word "product" with reference to the term "dumping" in Article 2.1 of the AD Agreement.[20] The Appellate Body found that when an investigating authority uses the average-to-average comparison methodology, the results of any comparisons involving subgroups of export transactions were not themselves "margins of dumping", but intermediate results.[21] According to the Appellate Body, the investigating authority must aggregate all of these intermediate results in order to determine a margin of dumping for "the product as a whole" (*i.e.*, reflecting all comparable export transactions).[22] This finding of the Appellate Body, however, was made in a particular context that was different from the context of the present dispute. It does not support the conclusion that every use of the term "margin of dumping" in the AD Agreement must refer to "the product as a whole".

44. Article VI of the GATT 1947 permitted Contracting Parties to establish margins of dumping by comparing weighted average normal values with transaction-specific export prices.[23] It was only with the adoption of the AD Agreement and, in particular, Article 2.4.2, that Members accepted more precise obligations as to how the prices (whether for normal value or export price) would be established for comparison purposes (*i.e.*, whether on a transaction-specific or weighted-average basis). In Article 2.4.2, the Members agreed that, during the investigation phase of an anti-dumping proceeding, they normally would establish price differences, as referred to in Article VI of the GATT 1994, on either an average-to-average or transaction-to-transaction basis.[24] By permitting transaction-to-transaction comparisons and, in certain circumstances, average-to-transaction

[19] United States Second Written Submission, paras. 30-39.
[20] *See US – Softwood Lumber (AB)*, paras 92-93.
[21] *US – Softwood Lumber (AB)*, para. 97.
[22] *US – Softwood Lumber (AB)*, para. 98.
[23] *See US – Atlantic Salmon*, para. 486; *see also EC – Cotton Yarn*, paras. 499, 501 (finding EC was under no obligation to make due allowances for the effects of its zeroing methodology which involved the comparison of an average normal value to individual export transactions).
[24] In interpreting the extent of that agreement with respect to the average-to-average basis, the Appellate Body found that while multiple comparisons were permitted, only an aggregation of the results of those multiple comparisons would reflect all comparable export transactions and, therefore, be consistent with Article 2.4.2. Once again, however, this finding cannot be separated from the context in which it was made.

comparisons of prices, the drafters preserved the ability to establish transaction-specific price differences and, thereby, transaction-specific margins of dumping for purposes of Article VI of the GATT 1994 and Article 2.4.2 of the AD Agreement.

**To both parties:**

**21. Would the parties please describe, in detail, how, under their respective anti-dumping systems, the processes of duty assessment and duty collection are carried out by their authorities.**

45. The United States employs a retrospective duty assessment system. Under this system, the United States first determines, through an investigation, whether margins of dumping exist, and whether dumped imports cause or threaten to cause material injury to a domestic industry. If injurious dumping is found, Commerce issues an anti-dumping measure, called an anti-dumping duty order. In this order, Commerce indicates an *ad valorem* cash deposit rate for producers/exporters individually investigated, as well as an "all-others" rate applicable to any other producers/exporters.

46. Pursuant to the anti-dumping duty order, importers must post a cash deposit of estimated anti-dumping duties for each import transaction. This cash deposit is based on the overall margin of dumping found for the exporter or producer during the investigation phase.

47. Every twelve months, during the anniversary month of the anti-dumping duty order, importers, exporters, producers, and domestic interested parties have the opportunity to request that Commerce undertake an assessment review (often referred to as an "administrative review" or "annual review") of the import transactions that occurred in the prior year.

48. During that review, Commerce analyzes all of the import transactions for the period of review (*i.e.*, the prior 12 months) to determine the actual difference between the export price and the normal value for each import transaction. Where export price is greater than normal value, Commerce determines that there is no dumping with respect to that transaction. Where export price is less than normal value, Commerce determines that the transaction was dumped and includes that difference in the amount to be finally assessed. For each importer, there may well be transactions involving multiple producers and exporters. A separate calculation is performed for a given importer's imports from each producer/exporter. In each such calculation, Commerce sums the amount of dumping duties to be assessed and divides this amount by the total value of all import transactions by that importer from that producer/exporter to establish an *ad valorem* assessment rate. As explained during the meeting with the Panel, this approach to assessment minimizes the burden on all parties (producers/exporters, importers, Commerce and Customs) as contrasted to linking each import transaction to each customs entry, as had previously been the case. Under either assessment methodology, the total amount of duties collected from an importer will be the same; only the administrative burden differs.

49. The final levying (or collection) of duties is performed by customs authorities pursuant to the assessment rates provided by Commerce. The customs authorities apply the assessment rate to the value of each import to determine the amount of final liability. The cash deposit made with respect to each entry is compared with the amount of final liability. If the cash deposit exceed the duties, a refund, with interest, is made. Alternatively, any liability not met by the cash deposit is collected from the importer, with interest.

50. In addition to establishing the assessment rates for each combination of producer/exporter and importer, Commerce also aggregates the results on a producer/exporter basis for purposes of updating the cash deposit rate for each producer/exporter. This new *ad valorem* cash deposit rate will be applied to future imports from the producer/exporter. Commerce analyzes all of the import transactions of each producer/exporter subject to the review to calculate a new margin of dumping for

those producers/exporters and applies that margin of dumping as the new cash deposit rate going forward.

**22. If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?**

51. It is difficult to anticipate all the practical consequences associated with a determination that "zeroing" is unfair and thus prohibited. However, the United States makes the following observations concerning the most significant consequences.

52. First, if "zeroing" were considered *per se* unfair, the ramifications would reach beyond Article 2.4 of the AD Agreement and, indeed, beyond Article 2.4.2. Implicit in such a finding would be an assumption that the "fair comparison" requirement in Article 2.4 has a broader application than simply providing for proper comparisons between export price and normal value, with adjustments as appropriate pursuant to the provisions of Article 2.4. That is, since "zeroing" has no relevance to the adjustments provided for in Article 2.4 itself, a finding that "zeroing" is inherently "unfair" assumes that there is a generic fairness obligation that applies to other aspects of an anti-dumping proceeding in which "zeroing" might be relevant. The question then is where this hypothetical generic requirement ends. Canada's argument does not suggest an answer to that question.

53. In particular, Canada's argument suggests no principled reason why a generic finding that "zeroing" is unfair would not apply to assessment proceedings provided for in Article 9.3 of the AD Agreement. In that context, such a generic finding would have truly anomalous consequences. For example, a finding that "zeroing" is unfair in all circumstances would be tantamount to a recognition that where export price exceeds normal value, the result constitutes a "negative margin". Article 9.3 provides that an anti-dumping duty may not exceed the margin of dumping. As a duty of zero would exceed the "negative margin" where export price exceeds normal value, it would seem to be impermissible where "zeroing" is considered *per se* unfair. In that case, Article 9.3 would seem to require that a Member actually compensate importers for non-dumped imports.[25]

54. The foregoing anomalous consequence would occur if duties were assessed on an import-by-import basis. But, the consequences would be equally anomalous if duties were assessed on an aggregated basis. Here, it should be recalled that Article 9.3 contains no aggregation requirement. Nor does it contain any provision concerning the time period to be covered in an assessment proceeding. A Member may conduct an assessment proceeding on an import-specific basis, on the basis of imports over a six-month period, a one-year period, or a multi-year period (or some other time period).

55. Under the zeroing-is-unfair hypothesis, the results of an assessment proceeding would vary according to the degree of aggregation. Consider, for example, a case in which there is more non-dumping than dumping in the first six months of the year, and more dumping than non-dumping in the second six months of the year. Assume that a Member is under no obligation to compensate an importer for the amount by which export price exceeds normal value on each non-dumped transaction.[26] In this case, if the Member conducts assessment on the basis of imports over a six-

[25] *Cf. US – Zeroing (Panel) (EC Complainant)*, paras. 7.286 to 7.288 (finding that the United States did not act inconsistently with Article 9.3 of the AD Agreement through its use of the "zeroing method used in the calculation of margins of dumping").

[26] In this scenario, it also is assumed that there is no "carry-over" requirement. That is, if non-dumping exceeded dumping in a given assessment period, there would be no requirement to carry the excess "negative dumping" margin into the next assessment period. Canada has not argued for such a carry-over requirement.

month period, it may collect no anti-dumping duties for the first six months of the year, but it may collect anti-dumping duties for the second six months of the year. On the other hand, if it conducts assessments on the basis of imports over the entire year, the hypothesized requirement to offset (*i.e.*, to not "zero") may result in the collection of no anti-dumping duties at all.

56. In sum, under the zeroing-is-unfair hypothesis, a Member's obligations would differ in a significant, substantive fashion depending solely upon whether and how the Member aggregates imports for assessment purposes. However, there is no legal basis for such differentiation.

**23. The first sentence of Article 2.4.2 provides:**

> **"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."**
>
> **(a) Would the parties agree that what is referred to as the WA to WA methodology is set out in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" and what is referred to at the T to T methodology is set out in the phrase "by a comparison of normal value and export prices on a transaction-to-transaction basis"?**
>
> **(b) Could the parties comment on the significance, if any, of the difference between the use of the phrase "on the basis of a comparison" and "by a comparison".**

57. With respect to part (a) of the Panel's question, the United States agrees that the weighted-average-to-weighted-average comparison methodology is set out in Article 2.4.2 in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices for all comparable export transactions". The United States also agrees that the transaction-to-transaction comparison methodology is set out in Article 2.4.2 in the phrase "by a comparison of normal value and export prices on a transaction-to-transaction basis".

58. With respect to part (b) of the Panel's question, the terms "on the basis of a comparison" and "by a comparison" are not the same. Under customary rules of interpretation of public international law, this difference in drafting should be accorded significance.[27] The ordinary meaning of the phrase "*on the basis of* a comparison" indicates that the comparison at issue is an intermediate step – *i.e.*, a "basis" – for establishing something else – *i.e.*, "the existence of margins of dumping". By contrast, the ordinary meaning of the phrase "*by* a comparison" indicates that the comparison at issue is not an intermediate step but, rather, the instrument for obtaining a result that is itself the thing being established – *i.e.*, "the existence of margins of dumping".

59. In the underlying proceeding, the panel explained that the ordinary meaning of "basis" in the term "on the basis of a comparison" in Article 2.4.2 means "the underlying support for a process".[28] The panel stated, "This suggests to us that, while the determination of the existence of margins of dumping must be based on weighted average-to-weighted average comparisons, Article 2.4.2 was not intended to spell out in detail all elements of that calculation."[29] The United States understands that, consistent with the Appellate Body's interpretation of the average-to-average comparison methodology in Article 2.4.2 in the underlying proceeding, the term "on the basis of a comparison"

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[27] *See US – Gasoline (AB)*, p. 23.

[28] *US – Softwood Lumber (Panel)* at n. 355 (citing The Concise Oxford Dictionary of Current English (Clarendon Press, 1995), p. 113).

[29] *Id.* at n. 355.

denotes that an investigating authority must use the results of the multiple comparisons as the foundation for the calculated margins, but that the results of those average-to-average comparisons, in and of themselves, may not be considered margins of dumping.

60. On the other hand, the term "by" is defined (as relevant here) to mean "[i]ndicating agency, means, cause, attendant circumstance, conditions, manner, effects".[30] Accordingly, where the "existence of margins of dumping" is established "by" a particular type of comparison, that comparison is the "agency" or "means" for establishing the existence of margins of dumping. In other words, the comparison is an operation that yields a result that may itself constitute a margin of dumping.

61. In sum, the different phrases that precede the two different comparison methodologies referred to in the first sentence of Article 2.4.2 should be understood to have the following significance: Where an investigating authority performs average-to-average comparisons, the results amount to a foundation; it is the performance of additional operations following the establishment of that foundation that leads to the establishment of the existence of margins of dumping. Where an investigating authority performs transaction-to-transaction comparisons, the results of those comparisons themselves may establish the existence of margins of dumping.

**24. It can be argued that a methodology cannot be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down. In this respect, what are the comments of the parties on the observations of the Appellate Body in *EC – Bed Linen* and in *US – Corrosion-Resistant Steel Sunset Review* that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?**

62. In *EC – Bed Linen*, the Appellate Body based its finding with respect to the EC's application of the average-to-average comparison methodology on Article 2.4.2.[31] The Appellate Body made no finding concerning Article 2.4. Indeed, while the Appellate Body report contains a conclusory sentence regarding the "fair comparison" requirement, the report contains no textual analysis of the "fair comparison" requirement nor any explanation as to how or why the EC's methodology was unfair.[32] The basis for the Appellate Body's finding was limited to the need for the EC's investigating authority to use "all comparable export transactions" in the application of the average-to-average comparison methodology.[33]

63. In *US – Corrosion-Resistant Steel AD Sunset Review*, first, the Appellate Body expressly stated that it was "unable to rule" on whether the United States acted inconsistently with Article 2.4 and Article 11.3 in the context of the sunset review before it.[34] Thus, the Appellate Body's statement that a methodology that included "zeroing" would "tend to inflate the margins calculated"[35] was not necessary to resolve the issue in that dispute and is mere *obiter dictum*. Second, the Appellate Body did not provide any textual analysis of the AD Agreement, let alone of Article 2.4, to support that statement. Third, it should be noted that all the Appellate Body said was that the denial of offsets would tend to inflate margins; it drew no conclusion as to whether that effect itself (if accurate) would render the denial of an offset impermissible under the AD Agreement.

64. Finally, in *US – Corrosion-Resistant Steel AD Sunset Review*, the Appellate Body made a specific reference to "a zeroing methodology such as that examined in *EC – Bed Linen*".[36] In *EC –*

[30] The New Shorter Oxford Dictionary, Vol. I, p. 310 (definition 5) (1993).
[31] *EC – Bed Linen (AB)*, paras. 66, 86(1).
[32] *EC – Bed Linen (AB)*, para. 55.
[33] *EC – Bed Linen (AB)*, paras. 55-60.
[34] *US – Corrosion-Resistant Steel AD Sunset Review*, para. 138.
[35] *US – Corrosion-Resistant Steel AD Sunset Review*, para. 135.
[36] *US – Corrosion-Resistant Steel AD Sunset Review*, para. 135.

*Bed Linen*, the Appellate Body examined the European Communities' use of the average-to-average comparison methodology to determine the existence of margins of dumping during the investigation phase, pursuant to Article 2.4.2. Thus, this statement by the Appellate Body refers only to the use of the average-to-average comparison methodology during the investigation phase. It does not address the use of any other comparison methodology, in any other phases of an anti-dumping proceeding, such as the use of transaction-to-transaction comparison methodology, or the use of an average-to-transaction comparison methodology during an Article 9.3 assessment proceeding.

65. In order to give meaning to the obligation to make a "fair comparison" in Article 2.4, it is necessary to consider the context in which the term is used. The panel in the recently circulated report in *US – "Zeroing" (Panel) (EC Complaint)* agreed.[37] That panel stated, "The fairness of the methodology logically cannot be divorced from the underlying conception of what dumping means."[38] Thus, the standard for determining whether a particular comparison methodology is fair must be found within the text of the AD Agreement. A finding that a particular comparison methodology yields a higher margin of dumping than another methodology is in and of itself insufficient to determine whether that first comparison methodology involves a "fair comparison". Rather, the analysis must focus on whether the text of the AD Agreement prohibits that comparison methodology.[39]

66. Put another way, the proposition that a methodology is "unfair" because it is "inherently biased towards inflating the margin of dumping" is logically flawed because it assumes its own conclusion. That is, it assumes without basis that there is some notionally "correct" margin of dumping that must be obtained without "zeroing" and that, therefore, "zeroing" is "unfair" inasmuch as it causes that notionally correct margin of dumping to go up. This argument fails to explain why the notionally correct margin of dumping is the one obtained without "zeroing".

**25. Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"? Is the "fair comparison" requirement limited in scope to what is addressed in paragraph 4? Please explain.**

67. Please see the US response to Question 12 wherein the United States addresses the meaning of these phrases.

**26. In the second sentence of Article 5.8, does the term "margin of dumping" relate to the margin of dumping calculated for each exporter, or to a margin of dumping calculated for the country as a whole?**

68. The term "margin of dumping" in the second sentence of Article 5.8 relates to the margin of dumping calculated for each exporter or producer. Article 5.8 does not create an obligation to calculate an overall margin of dumping for a country (*i.e.*, combining the results for all exporters and producers). As relevant here, the determination required by the second sentence of Article 5.8 is a determination as to whether the margin of dumping is *de minimis*. If an investigating authority makes such a determination, it must terminate its investigation immediately. Because investigations occur with respect to exporters' and producers' sales of the product under consideration, Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer.

69. In another context – Article 3.3 – the AD Agreement does make reference to a margin of dumping for a country as a whole. Article 3.3 establishes the conditions under which the effect of dumped imports from multiple countries may be cumulated for injury purposes. Specifically, the

[37] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260.
[38] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260.
[39] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260.

effects of dumped imports from multiple countries may be cumulated where, *inter alia*, "the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5." While Article 3.3 appears to speak to a margin of dumping "from each country", the reference to the *de minimis* standard in Article 5.8 indicates that Article 3.3 may properly be understood to be applicable when, for each country, there is at least one exporter or producer with a non-*de minimis* single, overall margin of dumping.

70. As discussed in response to Question 13, this understanding of the use of the term "margin of dumping" and the relevance of the context in which the term is used was recently addressed by the Appellate Body in *Mexico – Rice*.[40]

**27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?**

71. As the United States has previously explained, Article VI of the GATT 1994 and the AD Agreement envision that a margin of dumping can be calculated for a single export transaction.[41] Accordingly, when a Member investigates the importation of large capital goods, or specially designed/manufactured goods, should there be only one import transaction during the period of investigation, that Member may properly calculate a margin of dumping based on that single transaction. Similarly, if the Member is a small economy, and there is but one import of subject merchandise during the period of investigation, that Member may calculate the margin of dumping based on that single transaction. In each of these examples, a transaction-to-transaction analysis generates a margin of dumping.

72. By logical extension, in other cases in which an investigating authority performs a transaction-to-transaction analysis, where export price is less than normal value, the result is a margin of dumping. There is no distinction between the cases posited in this question and other cases in which a transaction-to-transaction analysis may be used.

**28. Could the parties indicate whether, in their view, in a targeted dumping analysis under the second sentence of Article 2.4.2, an investigating authority may utilize a comparison method other than one in which "a normal value established on a weighted average basis may be compared to prices of individual export transactions".**

73. The second sentence of Article 2.4.2 provides the criteria pursuant to which the "targeted dumping" methodology may be used and specifies the methodology that may be applied. If the relevant criteria are met, Article 2.4.2 states that "normal value established on a weighted average basis may be compared to prices of individual export transactions". The text provides for no other alternative comparison methodologies. The use of this targeted dumping methodology is, however, permissive. Even if the criteria for the use of the methodology are met, a Member need not use the average-to-transaction comparison methodology. The alternative, however, would be to utilize one of the two comparison methodologies provided in the first sentence of Article 2.4.2.

**29. Could the parties address the argument of the EC that if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping**

[40] *Mexico – Rice (AB)*, paras. 216, 217, 220, 221.
[41] *See* United States Second Written Submission, paras. 29-39.

**methodology redundant, this is sufficient to demonstrate that the United States' argument in this regard is without merit? Specifically, is it enough to posit that such a methodology could be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members?**

74. As a preliminary matter, it is telling that neither Canada, nor the EC, has been able to come up with a single hypothetical situation that would *not* render the targeted dumping methodology redundant, if the language of Article 2.4 or 2.4.2 requires offsets for non-dumped transactions. On this point, the United States refers the Panel to its answers to Questions 18.

75. Beyond this point, it is difficult to approach the issues in dispute on the basis of non-existent hypothetical examples, as was illustrated by Canada's inability to come up with a plausible hypothetical during the Panel meeting. In this case, for a hypothetical to demonstrate that a general prohibition on zeroing does not render the targeted dumping methodology redundant, it would have to reflect a reasonable interpretation of the second sentence of Article 2.4.2 in context, and in light of the object and purpose of the AD Agreement. In other words, it is not appropriate to posit an obscure hypothetical and then construe the second sentence of Article 2.4.2 in an unreasonable manner to meet the demands of that hypothetical. An appropriate hypothetical would have to address all three types of targeted dumping referred to in Article 2.4.2 (*i.e.*, purchasers, regions, and time periods), take account of the ordinary meaning of the terms of the second sentence of Article 2.4.2, and be compatible with other relevant provisions of the AD Agreement. Canada has not even come close to positing such a hypothetical, as discussed in the US responses to Question 18 and (with regard to the EC hypotheticals) Question 15.

76. As explained in the US response to Question 23, the second sentence of Article 2.4.2 establishes the criteria under which a Member may apply the average-to-transaction comparison methodology. That sentence provides no exception to any other provision of the AD Agreement, nor does any other provision of the AD Agreement suggest that, when the conditions of the second sentence of Article 2.4.2 exist, the requirements of that other provision do not apply. As discussed in response to Questions 18, the hypothetical situations that Canada posits suffer from the fatal flaw that each gives rise to an incompatibility with some other provision of the AD Agreement.

**30. Article 2.1 refers to "the export price of the product exported" and "the comparable price ... for the like product" in the home market of the exporting Member. Do these references to "price" relate to the price of the product as a whole, i.e. an aggregated or average price? Please explain. Do the references to "prices" in the transaction-to-transaction and weighted average-to-transaction provisions of Article 2.4.2 relate to the product as a whole? Please explain.**

77. As discussed in response to Question 20, Article 2.4.2 provides the bases on which prices can be determined for purposes of comparing normal values and export prices during the investigation phase of an anti-dumping proceeding. The references in Article 2.1 to "the export price of the product exported" and "the comparable price . . . for the like product" must be interpreted in the context of the particular Article 2.4.2 comparison methodology being used. Depending on the comparison methodology used, the price may be either a transaction-specific price or a weighted average price. The Appellate Body developed the phrase "product as a whole" and applied it only with respect to the use of weighted average prices in the context of the average-to-average comparison methodology.

**<u>To all parties and third parties</u>:**

**46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to**

**determine normal value on one single basis for all models, or would the parties consider that Article 2.2.permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?**

78. The United States considers that Article 2.2 permits Members, in the situation described in the question, to determine normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others. The text of Article 2.2 does not require Members to establish normal value on one and only one basis for all export transactions that are being examined. In fact, as a practical matter, such a reading of Article 2.2 would mean that in most cases home market sales could not form the basis for normal value. However, such a result clearly would be inconsistent with Article VI:1 of the GATT 1994, which provides a preference for using sales in the exporting country as the basis for normal value.

**47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:**

> **(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")**
>
> **(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

79. First, we would refer the Panel to our response to Questions 15 and 18, in which we address the EC's arguments with respect to targeted dumping. As explained in that response, there is no textual support in Article 2.4.2 for the EC's argument that a Member may calculate an anti-dumping duty margin to apply to a subset of an exporter or producer's export transactions, and then a second margin to apply to all other export transactions. Moreover, Article 6.10 of the AD Agreement states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". By contrast, where the drafters of the AD Agreement intended to permit an investigating authority to consider a subset of transactions separately, they made that intention explicit. This is illustrated by the "respondent selection" language of the remaining text of Article 6.10, as well as Articles 4.1(ii) and 4.2, which deal with regional industries and dumping.

80. The EC also did not explain how its approach could be reconciled with Article 9.2 of the AD Agreement. Article 9.2 states that an "anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports . . . from all sources found to be dumped and causing injury . . . ". The EC's approach would require a Member to discriminate between imports of a particular product on the basis of time, purchaser, or region and, to this end, the EC has failed to address this apparent inconsistency with Article 9.2.

81. On a practical note, the EC has not addressed the very real implications for duty collection that would arise in the case of export sales to and through affiliated parties. If the drafters intended

the second sentence of Article 2.4.2 to be applied as suggested by the EC, what would prevent an affiliated importer in the future from importing product to a warehouse in another region, thereby avoiding the payment of the "regional" anti-dumping duty? With respect to targeted dumping during a time period, a measure put in place that applied only to imports during that time period would be largely ineffective if an exporter shipped to an affiliated importer large quantities of the product outside the time period, for storage until the relevant period commenced. Finally, with regard to a purchaser-specific anti-dumping margin, in order to avoid the payment of duties, an exporter might avoid direct sales to a customer, but instead sell its product through an affiliated party without identifying any particular import to any particular customer until after commingling it in a warehouse.

82. The EC's interpretation of Article 2.4.2 leads to impractical results. More fundamentally, the text of Article 2.4.2 does not support that interpretation, and that interpretation cannot be reconciled with other Agreement provisions. Therefore, the EC's proposed interpretation of the second sentence of Article 2.4.2 should be rejected.

**48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?**

83. As explained in our response to Question 24, to the extent that the AD Agreement is interpreted as requiring that any particular aspect of an anti-dumping proceeding be conducted in a manner that is fair, a determination of what is fair in that context must be made pursuant to a discernible standard of appropriateness or rightness within the four corners of the Agreement, which would provide a basis for reliably judging whether there has been an unfair departure from that standard.[42] Thus, for example, the second through fifth sentences of Article 2.4 clearly provide for price adjustments which could be applied to price comparisons in order for those comparisons to be considered "fair."

84. The same observation can be made with respect to determining whether results are "accurate". Like a determination of what is fair, a determination of what is accurate must be made pursuant to a discernible standard. However, unlike the concept of what is fair – for which there is a discernible standard in the context of Article 2.4 – the AD Agreement does not provide a discernible standard for determining when results are accurate. Absent a discernible standard in the AD Agreement, it is unclear how the accuracy of results could be objectively determined. For example, Article 2.4.2 provides for two comparison methodologies and does not state a preference for either. It stands to reason, however, that in making average-to-average comparisons and transaction-to-transaction comparisons, based on the same facts, a Member could establish the existence of different margins of dumping. This does not mean, however, that only one of these comparison methodologies can be considered "accurate" or "fair". It is simply a recognition that, in allowing Members the flexibility to deal with the many different factual situations with which they may be presented, the drafters of the AD Agreement did not envision that an analysis of any given set of data could yield only one "correct" result.

**49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).**

85. Within the context of the AD Agreement and GATT 1994, a "normal value", is established relative to a particular export transaction or weighted average group of export transactions. In other words, the purpose of determining a "normal value" is to derive a comparison with the export

[42] *US – "Zeroing" (Panel) (EC Complaint)*, para. 7.260 (footnotes omitted).

transaction(s) being examined. Thus, the "normal value" selected, whether based on a transaction in the exporting country, a third country transaction, or constructed value, is dependent on the nature of the export transaction(s) at issue. To state it another way, a particular transaction within the exporting country, *when considered in isolation*, would not be considered a "normal value" until it is selected for comparison with an export price.[43]

86. However, the EC's argument extends beyond this basic notion. First, the EC asserts that the value selected for comparison to a single export transaction cannot be considered a "normal value".[44] Next, the EC appears to suggest that while a Member may make a number of transaction-to-transaction comparisons, after making those comparisons there must be "a subsequent step of the calculation" that involves "'a comparison' (that is, a single comparison) of 'normal value' (also in the singular) and export prices. . . ."[45] This argument takes terms out of the contexts in which they appear but makes no link to the text of Article 2.4.2.

87. The error in the EC's contention that a value selected for comparison to a single export transaction cannot be considered a "normal value" is explained in the US response to Question 27. As noted there, the text of the AD Agreement clearly anticipates that a "margin of dumping" may be calculated for a single export transaction pursuant to a comparison with normal value on a transaction-to-transaction basis. This means that for purposes of each comparison, the value selected for comparison purposes is, by definition, a "normal value". Thus, the United States disagrees with the EC's assertion that a single, exporting country transaction, when selected for comparison to an export price transaction, cannot be considered a "normal value".

88. The EC's contention that only when "intermediate results are finally combined, in a second stage of the calculation," can a margin of dumping, and therefore a normal value, be determined[46] is equally flawed. In particular, this proposition begs the questions of (1) how the process of *aggregating the results* of multiple transaction-to-transaction comparisons converts the individual exporting country transactions into "normal value" under the EC's theory, and (2) when, exactly, the comparison between normal value and export price occurred. If a value becomes recognizable as a "normal value" only at the aggregation stage, as the EC posits, then what were the values that were being compared at the initial, pre-aggregation stage of the process? The EC's reasoning gives no answer. The EC also provides no textual support for its claim that a "normal value" can only be defined as an aggregate of values that have, individually, already been compared to export transactions.

89. In short, as the EC's assertions as to the meaning of "normal value" find no support in text or logic, they should be rejected.

**50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.**

[43] In any given case, there may be sales in the exporting country of the product under consideration that are not used as the normal value for any export transaction. (A simple example would be a situation in which a producer/exporter sold model A and model B widgets in the exporting country, but only made sales of model A widgets in the export market. All other things being equal, the sales of model B widgets in the exporting country market would not be used as the normal value.)

[44] EC Third Party Submission, para. 6.

[45] EC Written Submission, para. 6.

[46] EC Written Submission, para. 15 (footnote omitted).

90. There is no textual basis for concluding that there is any limitation on Members to choose between the average-to-average or the transaction-to-transaction comparison methodology in Article 2.4.2. As we stated at the meeting with the Panel, pursuant to Article 12.2.1(iii), Members are required to provide "a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2" in their preliminary and final determinations. However, this duty to explain the basis for selecting a particular methodology does not include any substantive standards for evaluating the selection. In any case, the United States also notes that Canada has not challenged the basis for the US use of the transaction-to-transaction comparison methodology and confirmed this during the meeting with the Panel.

**51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?**

91. The determination of dumping and establishment of margins of dumping are distinct from the assessment and collection of anti-dumping duties.[47] Generally speaking, the determination of dumping and the establishment of margins of dumping occur during the investigation phase, while the assessment and collection of anti-dumping duties occur subsequent to the investigation phase. The United States notes that the Appellate Body, in *EC – Bed Linen (AB)*, agreed, finding that the determination of the existence of dumping and injury caused by dumped imports is distinct from the collection of the anti-dumping duty.[48]

92. This difference confirms the importance of considering the context in which the term "margin of dumping" is being used in order to properly understand its meaning. In certain contexts in the AD Agreement, such as Article 5.8 (applicable to the investigation phase), the term "margin of dumping" refers to an overall margin of dumping determined for an exporter or producer. From context, it is plain that whether a "margin of dumping" is *de minimis* and the investigation must therefore be immediately terminated is a determination that focuses on all transactions involving a particular exporter or producer. On the other hand, in the context of Article 9.3 (applicable with respect to the collection and assessment of anti-dumping duties), the term cannot be similarly limited to a single overall margin for an exporter or producer. Here, the focus is on the importer and its liability for an anti-dumping duty, which may not exceed the "margin of dumping."

93. There are practical reasons for such distinctions. When it comes to investigations, practices among users of the anti-dumping instrument are relatively similar. All Members conduct investigations by examining a prior period in order to establish the existence of margins of dumping and material injury caused by dumped imports. By contrast, there is much less similarity among Members with respect to the collection and assessment of duties. Members maintain diverse duty assessment systems, generally referred to as (but not limited to) prospective *ad valorem*, prospective normal value, and retrospective systems.

94. While Article 9.3 contains the term "margin of dumping", the applicability of that term to the diverse duty assessment systems cannot be reconciled with an interpretation of that term as referring only to "the product as a whole". Because anti-dumping duties are paid by importers and largely depend on the prices paid by importers, many Members logically and reasonably provide for importer-specific assessment proceedings. As was discussed during the meeting with the Panel, Members did not agree to adopt an exporter-oriented approach to assessment proceedings. In fact, the implication of an exporter-oriented focus on the "product as a whole" could be that an importer would be required to pay anti-dumping duties in an amount greater than the difference between its particular

[47] *See generally US – "Zeroing" (Panel) (EC Complaint)*, paras. 7.142 to 7.213.
[48] *EC – Bed Linen (AB)*, para. 62, fn. 30.

imports and their corresponding normal values, a proposition that makes no sense under the AD Agreement.[49]

[49] Article 9.1 permits a Member to impose an anti-dumping duty equal to the full margin of dumping. Article 9.3 requires that an anti-dumping duty not exceed the margin of dumping. If "margin of dumping" were construed as requiring an exporter-oriented focus to reflect "the product as a whole," an anomalous consequence could be that an importer would have to pay anti-dumping duties greater than the difference between the prices it paid for exports and normal values. This would occur in the following scenario: Assume that Exporter's exports are split between two importers (A and B) and, on average, Importer A paid 5 per cent less than normal value and Importer B paid 15 per cent less than normal value. If "margin of dumping" refers only to a margin of dumping for the product as a whole, the Member in this example would be entitled to collect (pursuant to Article 9.1) and be limited to collecting (pursuant to Article 9.3) anti-dumping duties of 10 per cent from both importers. Thus, Importer A could be required to pay 10 per cent anti-dumping duties even though its imports were priced only 5 per cent below normal value.

# ANNEX E-3

## ANSWERS TO QUESTIONS FOR PARTIES AND THIRD PARTIES OF THE PEOPLE'S REPUBLIC OF CHINA

2 December 2005

**To China**

**Could China indicate the textual basis for the view, expressed in para. 10 of its written submission, that taking into account "all comparable export transactions" in the process of determining the existing of dumping of the product should not be limited only to the weighted average to weighted average comparison methodology?**

Answer

China believes that Article 2.4.2 supports this conclusion.

China thinks that "margins of dumping" acts as textual basis in analyzing whether the T-to-T methodology should be subject to the requirement of considering all comparable export transactions. China recalls that in the appeal process of the original proceeding of this case, the disputing parties are in disagreement as to the proper interpretation of the term "margins of dumping" as used in Article 2.4.2. The disagreement lies on whether that term applies to the product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken. On this issue, the Appellate Body stated that: "Our view that "dumping" and "margins of dumping" can only be established **for the product under investigation as a whole** is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that product as a whole for, *inter alia* , the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping."[1] *(Emphasis added)*.

The clarification of the term of margins of dumping does not apply only to the first method of comparison, but through the Agreement. Therefore, exclusion of certain export transactions in T-T method can by no means be regarded as establishing margins of dumping for the product under investigation as a whole

Article 2.4.2 continues with "the existence of margins of dumping during the investigation phase shall normally be established……by a **comparison** of normal value and export prices on a transaction-to-transaction basis".*(emphasis added)*. China thinks that a singular form for the word "comparison" may tell us that simply transaction-to-transaction comparisons can not be regarded as establishing the margins of dumping for the subject product as a whole. For the purpose of establishing the margins of dumping for a product as a whole through T-T methodology, two steps may be needed: the first one is creating intermediate results of a series of transaction-to-transaction juxtapositions, the second one is combining the intermediate results and calculate the margin of

[1] *US- Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/AB/R, Para. 99

dumping through the comparison of normal value and export prices for a specific exporter. At the aggregation stage, an investigating authority should not disregard any intermediate results.

Further, China notes that article 2.4.2 starts with the phrase "Subject to the provisions governing fair comparison in paragraph 4...", which indicates that the requirement of fair comparison covers all the methodologies of establishing margins of dumping and none of them can be rule out of this discipline. Zeroing in either W-W method or T-T method by ignoring certain comparable export transactions is of "inherent bias" against the fair comparison requirement., which "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping".[2]

[2] *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, Para. 135.

# ANNEX E-4

## EUROPEAN COMMUNITIES RESPONSES TO THE PANEL'S QUESTIONS

2 December 2005

**Introduction**

**The following questions should not be taken to reflect any views of the Panel. Either party may respond to or comment on any question addressed to the other party or any third party. Each third party may respond to or comment on any question addressed to either party or any other third party.**

General comment by the EC. The EC refers first to its responses to the questions addressed to it and to the third parties generally. The EC has also commented on the other questions, particularly where those other questions relate to additional matters, including matters covered in the written and oral pleadings of the EC.

The EC believes that many of the questions posed go beyond what is strictly required for this Panel to make the findings necessary to settle the dispute. In particular, for example, the EC does not believe that this Panel needs to write a general theory of the targeted dumping provisions for the purposes of this case. However, the EC generally recognises and applauds the Panel's desire to reach a balanced view, which reasonably takes into account the text, context, object and purpose and intent of all the Members – in short, to take a sensible and balanced view of the system as a whole – and this is reflected in the EC's endeavours to respond to the Panel's questions.

**To Canada**

**1. In para. 9 of its closing statement, Canada asserts that "an investigating authority has an obligation to determine a "margin of dumping" for the product as a whole". Does the concept of "margin of dumping" have the same meaning throughout Article 2.4.2? Canada indicates in para. 15 of its closing statement that "the meaning of the term "margin of dumping" – and that of – "dumping" – cannot change in this single sentence" – presumably the first sentence of Article 2.4.2. Does Canada consider that the meaning of the term "margin of dumping" might differ between the first and second sentences of Article 2.4.2? Is the second sentence of Article 2.4.2 an exception to the requirement to determine a margin of dumping for a product as a whole? Please explain. Does Canada consider that the term "margin of dumping" has the same meaning throughout the whole AD Agreement?**

The EC refers to its response to question 32. Article VI:2 of the GATT 1994 and the ADA are an inseparable package of rights and obligations. The term "margin of dumping" is defined in Article VI:2 of the GATT 1994 and implemented in the whole of Article 2 of the ADA. In principle, it has the same meaning throughout Article VI:2 of the GATT 1994 and the ADA, subject to the targeted dumping provisions. We agree with Canada that if there is targeted dumping by purchaser, region or time, an investigating authority is entitled – for example - to calculate the dumped amount relating to a purchaser, region or time so identified. The second sentence of Article 2.4.2 is an exception to the first sentence of Article 2.4.2; thus, similarly, the targeted dumped amount may, subject to the conditions provided for in the second sentence of Article 2.4.2, be expressed as a

percentage of export price, or characterized as a "margin of dumping". Rather than expressing this in terms of the second sentence of Article 2.4.2 constituting an exception to the general requirement to calculate a margin of dumping for the product as a whole, the EC would say that the targeted dumping provisions provide for a specific methodology to determine such margin in exceptional circumstances.

**2. Does it necessarily follow from the argument that a margin of dumping must be found for a product as a whole that any export prices above the normal value must be fully reflected in the numerator of the dumping margin? Does not the inclusion of those export prices in the denominator, but not in the numerator, result in a margin of dumping for the product as a whole, given that the product as a whole is presumably the imported product whose prices are in question? Please explain?**

Within the relevant data set, it necessarily follows that all the export prices must be fully reflected in the numerator. The inclusion of export prices in the denominator, but at the same time the omission of part of the export prices from the numerator, means that the export prices are not fully included. Anything less than all the relevant export prices in full in the numerator does not result in the calculation of a margin of dumping for the product as a whole. This is confirmed, notably, by the Appellate Body Reports in *EC-Bed Linen* and *US-Softwood Lumber V*.

**3. Please comment on the US assertion that "it is *not* the case that a margin of dumping is established only when the price differences resulting from multiple transaction-to-transaction comparisons for a given product are aggregated" (US oral statement, para. 25).**

This argument is inconsistent with the general requirement to calculate a margin of dumping for the product as a whole; inconsistent with the fact that an investigating authority may not *assume* that a single transaction, taken in isolation, is always a normal value, in particular where other domestic transactions are also used in the comparison; and inconsistent with the term "basis" as twice used in the first sentence of Article 2.4.2. The utility of the transaction-to-transaction method is that, if justified by all the circumstances of the case, it effectively reduces the need to make adjustments for differences in, for example, physical characteristics (because transactions can be directly matched). Because it effectively permits the use of a representative sample, it may lead to a result that is different from, although similar to, the result arrived at by the use of the weighted average-to-weighted average method.

**4. During the meeting with the parties, the United States suggested that if the term "margins of dumping" is understood to have the same meaning throughout the *AD Agreement*, including the Article 9 provisions concerning duty collection, this would result in non-dumped imports being set off against dumped imports at the duty collection phase. The United States noted that importers pay anti-dumping duties, not exporters. The United States argued that it would be unfair for an importer of dumped product, who has already benefited from a low export price, to further benefit from a credit determined on the basis of non-dumped imports by another importer. Please comment on this US argument, with particular focus on the prospective normal value duty collection system applied by Canada. In particular, how would Canada interpret the term "margins of dumping" at the duty collection phase, and would Canada provide offsets at that phase?**

The EC would like to stress that the *Anti-Dumping Agreement* contains specific obligations that determine the manner in which an investigating authority must establish the margin of dumping and the total dumped amount, and that determination must be fair towards the exporter concerned. When it comes to the distribution of that total dumped amount among importers, Article 9.3 makes it clear that the dumped amount must not exceed the margin of dumping, as established under Article 2. Whatever municipal law may or may not provide with respect to such matters, an investigating authority is still required to ensure that the dumped amount and the margin of dumping are established

in accordance with Article 2, in a manner that is fair to the exporter. In any event, the EC considers that there are methodologies available to allocate to importers in a "fair" manner the total dumped amount found to exist for the exporter concerned. Contrary to what the US suggests, there is no conflict between the two requirements.

If there is no significant pattern of export prices among different purchasers (or importers), that is, if low and high priced transactions are more or less equally distributed between different importers, then each importer will be treated equally. If there is one exporter and two importers, and no significant pattern, high and low priced transactions being roughly equally distributed in equal measure between the two importers, each importer will pay about half of the dumped amount. The total dumped amount will correspond to the dumped amount associated with the margin of dumping of the exporter. If, on the other hand, there is a significant pattern of high priced imports to one importer, and low priced imports to the other, then, consistent with the second sentence of Article 2.4.2 the investigating authority is entitled to conduct a targeted dumping analysis and to distribute the dumped amount between the two importers in order to reflect that. The assessment rate associated with the importer that purchased at a high price will be low and the dumped amount will be low. The assessment rate associated with the importer that purchased at a low price will be high and the dumped amount will also be high. However, consistent with Article 9.3, the total dumped amount collected from both importers will not exceed the margin of dumping of the exporter.

An amount collected under Article 9.4(ii) (or any similar amount) is not an actual margin of dumping or an actual dumped amount. It is not a margin of dumping because it does not relate to the product as a whole, as required by Article 2.1; and it does not result from the application of the exceptional provisions relating to targeted dumping. Furthermore, it is not actual, because it is based on a prospective normal value (that is, one derived from historical data, particularly the data collected during the original proceeding). Article 9.4(ii) does not detract from an investigating authority's obligation under Article 9.3.2, in the prospective system, to investigate and calculate the actual margin of dumping (once the relevant period is closed) at the request of an importer. An actual margin of dumping is based on a contemporaneous normal value and export price. It must be calculated in a manner consistent with all of Article 2.4.

A variable duty is possible in the prospective system because in a prospective system final liability under Article 9.3.2 can only go down, at the request of an importer. In the retrospective system, by contrast, final liability can go up, at the request of any interested party, including the domestic industry. The initial use of a variable duty in the prospective system allows an investigating authority fearful of targeted dumping to initially collect an amount that will cover any targeted dumping that might occur. If there is no targeted dumping, and some exports above normal value, the importer will get a refund, on request. It is an error to transpose this provision from the initial part of the prospective system, to final assessment under the retrospective system.

**5. Please explain Canada's understanding (oral statement, para. 30) of how the targeted dumping methodology might operate in practice, without zeroing. For example, assume there is evidence of targeted dumping by a specific exporter into a specific region of a Member. Further assume that the relevant exporter also sells into other regions of the same Member, without dumping. How might the targeted dumping methodology apply in this case? How might any margins of dumping be calculated? What role would the non-dumped imports play in this process? Would anti-dumping duties only be applied on imports destined for the region for which there was evidence of targeted dumping? How would any resultant anti-dumping duties differ from those applicable as a result of a weighted average–to–weighted average comparison in respect of the totality of imports into the Member's territory? How would the resulting anti-dumping duties comport with the first sentence of Article 6.10 in the case in which the exporter had sales outside the targeted region?**

The EC refers to its responses to question 33 and 35(a).

**6. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.**

The EC refers to its response to question 33.

**7. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:**

**(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports (occurring during the remainder of the period of investigation or outside the region).**

**(b) What legal / textual justification might permit such "zeroing"?**

**(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does Canada agree with this argument? Please explain.**

**(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does Canada agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

**(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does Canada agree? Please explain. If Canada does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?**

**(f) Please show the operation of both hypothetical examples using numbers.**

**(g) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?**

The EC refers to its response to question 35.

**8. The EC has stated that, in its view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para. 6). Does Canada agree. Could Canada explain what, in its view, is a normal value for purposes of a transaction-to-transaction analysis? How would Canada expect**

**that an investigating authority would determine the appropriate normal values for comparison purposes in the context of such an analysis?**

The EC refers to its response to question 37.

**9. Is the "weighted average normal value" referred to in the first sentence of Article 2.4.2 the same as the "normal value established on a weighted average basis" referred to in the second sentence of that provision?**

Yes, except that in the second sentence it may also refer to a normal value calculated by reference to the sub-set of transactions within the pattern identified by the investigating authority, as indicated by Canada.

**10. Under the approach proposed by New Zealand (para. 3.09 of New Zealand's written submission), a higher margin of dumping would be attributed to a lower volume of dumped imports, with the remaining imports being treated as non-dumped. Could this reduce the likelihood of dumped imports being shown to cause of material injury? If so, might this bring into question the assumption that failure to offset will necessarily lead to a less favourable result for exporters?**

The EC agrees that a targeting dumping analysis is likely to have implications for the injury analysis. However, we fail to see the relevance of this question to the specific legal question of how a margin of dumping must be calculated. In any event, we do not see that reducing the volume of dumped imports, but inflating the margin of dumping, would necessarily make an injury finding less likely. Nor do we see that the objective quantitative requirements of how to calculate a margin of dumping and a volume of dumped imports should be displaced by the more qualitative requirements of a causation and non-attribution analysis.

**11. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Canada reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

The EC refers to its response to question 32.

**<u>To the United States</u>**

**12. Is it the view of the US that the first sentence of Article 2.4 means something over and above what is set out in the second sentence and what comes thereafter, or does the remainder of Article 2.4 exhaust the meaning of the word "fair" used in the first sentence? If not, why does the first sentence of Article 2.4 exist?**

The EC considers that the fair comparison requirement is overarching and independent : it is not exhausted by the remaining provisions of Article 2.4.

**13. Please comment on Canada's argument (oral statement, para. 16) that, if transaction-to-transaction comparisons were to constitute "margins of dumping", DOC would have had to assess whether each transaction-specific "margin of dumping" was *de minimis* in accordance with Article 5.8 of the *AD Agreement.***

The Appellate Body has recently indicated that the term "margin of dumping" in Article 5.8 is exporter-specific rather than country-specific (Appellate Body Report, *Mexico-Beef and Rice*, paras 215 to 221), also referring in the process to the term "margins of dumping" in Article 2.4.2. This is

consistent with the view that an investigating authority must determine a margin of dumping for the exporter; which is in turn consistent with the view that the results of intermediate comparisons are not margins of dumping. If they would be, the implication would be that suggested by Canada. See, in similar vein, Appellate Body Report, *EC-Bed Linen*, para 125.

**14. The US argues that an interpretation of Article 2.4 that requires a general offset obligation would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 a nullity (US second written submission, para. 24). Would a generalized application of Canada's interpretation of the phrase "margins of dumping" in Article 2.4.2 also render the average-to-transaction methodology redundant? Is the US argument confined to Canada's Article 2.4 claim, or does it also apply in the context of Canada's Article 2.4.2 claim? Please explain.**

The EC refers to its response to question 33. It does not agree with the US argument based on alleged necessary mathematical equivalence.

**15. At para. 64 of its written submission, the EC suggests that zeroing might be permissible in certain circumstances in the context of a targeted dumping analysis. In particular, the EC argues that the zeroing could take the form of an allowance for a difference affecting price comparability. Please comment on this EC argument.**

The EC refers to its response to questions 35(a) and (c).

**16. Please comment on Canada's argument that "[t]he targeted dumping methodology, ... by definition, would not be applied to all export transactions" (oral statement, para. 29). Is this statement true in the context of US law?**

The EC believes that to be the case.

**17. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.**

The EC refers to its response to question 33.

**18. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:**

**(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports.**

**(b) What legal / textual justification might permit such zeroing?**

**(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Does the United States agree with this argument? Please explain.**

**(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Does the United States agree with this argument? Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

**(e) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Does the United States agree? Please explain. If the United States does agree, what export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?**

**(f) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?**

The EC refers to its response to question 35.

**19. New Zealand suggests that the transaction-to-transaction methodology should be symmetrical, in the sense that the margin of dumping should be based only on dumped transactions, with non-dumped transactions being included in the analysis of the volume and prices of "imports not sold at dumping prices" (Article 3.5). Would the US treat imports where export price is not less than normal value as "imports not sold at dumping prices" in the meaning of Article 3.5 of the *AD Agreement?***

The EC refers to its response to question 10.

**20. Could the US comment on the argument that "product" in Article VI of GATT 1994 must be equated with "product as a whole", in particular the question of reconciling the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

The EC refers to its response to question 32.

**<u>To both parties</u>**

**21. Would the parties please describe, in detail, how, under their respective anti-dumping systems, the processes of duty assessment and duty collection are carried out by their authorities.**

This question requires no further comment from the EC.

**22. If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?**

The EC refers to its response to question 35(a) : it may help to resolve the dispute if there is precision about what exactly is meant by "zeroing" in different circumstances. We also refer to our response to question 33. It is not a question of compensation. It just means that, once a representative

sample has been used as the basis for the calculation, duties are collected in conformity with the margin calculated on the basis of the representative sample.

**23. The first sentence of Article 2.4.2 provides:**

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

**(a) Would the parties agree that what is referred to as the WA to WA methodology is set out in the phrase "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" and what is referred to at the T to T methodology is set out in the phrase "by a comparison of normal value and export prices on a transaction-to-transaction basis"?**

Yes, subject to the provisions of Article 2.4.

**(b) Could the parties comment on the significance, if any, of the difference between the use of the phrase "on the basis of a comparison" and "by a comparison".**

Given the word "basis" at the end of the sentence, and the repeated use of "normal value" in the singular, there is no significance.

**24. It can be argued that a methodology cannot be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down. In this respect, what are the comments of the parties on the observations of the Appellate Body in *EC –Bed Linen* and in *US - Corrosion-Resistant Steel Sunset Review* that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?**

The zeroing methodology systematically has this effect, and is not therefore consistent with the obligation to make an objective and even-handed analysis. See also Appellate Body Report, *US-Hot-Rolled Steel*, paras 144, 145, 148, 154 and 158.

**25. Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"? Is the "fair comparison" requirement limited in scope to what is addressed in paragraph 4? Please explain.**

The provisions governing fair comparison include the third to fifth sentences of Article 2.4. In case of conflict between these provisions and the provisions of Article 2.4.2, the former provisions prevail. Article 2.4.2 cannot be interpreted in a manner that conflicts with the third to fifth sentences of Article 2.4.

**26. In the second sentence of Article 5.8, does the term "margin of dumping" relate to the margin of dumping calculated for each exporter, or to a margin of dumping calculated for the country as a whole?**

The EC refers to its response to question 13.

**27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?**

The EC refers to its response to question 38 as regards use of the transaction-to-transaction method. Similar reasoning might apply to case (c). It would all depend on the parameters of the investigation and the circumstances of the case. If, during the investigation period, one single export transaction had been made, then it might be legitimate to calculate the margin of dumping on that basis, if that export transaction is representative, for instance in respect of volume. If, however, the investigation period contains several export transactions, then the export price during the investigation period consists of the aggregation of all the representative export transactions. The requirement to respect the parameters of the investigation has been clearly stated by the Appellate Body in *EC-Bed Linen* and *US-Softwood Lumber*. Thus, it may be permissible to conduct intermediate comparisons (per model or per transaction). However, what would not be possible would be to zero when aggregating the intermediate results.

**28. Could the parties indicate whether, in their view, in a targeted dumping analysis under the second sentence of Article 2.4.2, an investigating authority may utilize a comparison method other than one in which "a normal value established on a weighted average basis may be compared to prices of individual export transactions".**

The EC refers to its response to question 33.

**29. Could the parties address the argument of the EC that if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping methodology redundant, this is sufficient to demonstrate that the United States' argument in this regard is without merit? Specifically, is it enough to posit that such a methodology could be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members?**

One hypothetical or example in which there is not necessarily mathematical equivalence is sufficient to rebut the US argument. It is not necessary that Canada's method would be generally susceptible of application by all Members. The EC refers in this respect to its response to question 33.

**30. Article 2.1 refers to "the export price of the product exported" and "the comparable price ... for the like product" in the home market of the exporting Member. Do these references to "price" relate to the price of the product as a whole, i.e. an aggregated or average price? Please explain. Do the references to "prices" in the transaction-to-transaction and weighted average-to-transaction provisions of Article 2.4.2 relate to the product as a whole? Please explain.**

The EC refers to its response to question 32.

**<u>To China</u>**

**31. Could China indicate the textual basis for the view, expressed in para. 10 of its written submission, that taking into account "all comparable export transactions" in the process of**

**determining the existing of dumping of the product should not be limited only to the weighted average to weighted average comparison methodology?**

The obligation to which China refers is derived from the basic requirement to calculate a margin of dumping for the product as a whole. The EC refers to its response to question 32.

**To the EC**

**32. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would the EC reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

The words "as a whole", for example in para 93 of the Appellate Body Report in *US-Softwood Lumber V*, simply serve to emphasise that "the product" is "the product" as defined by the investigating authority at the outset of the original proceeding, and not some type, model or category of that product. Thus, if the investigating authority has itself, at the outset of its investigation, selected a product with certain physical characteristics – that is, if it has identified the "market" within the meaning of Article 2.2 in terms of physical characteristics – then it is at least bound to follow a consistent analysis. It cannot subsequently break-down that product definition into separate product types and opine that these are no longer comparable within the meaning of Article 2.4.2 simply because the results of certain intermediate comparisons are negative. Precisely the same is true with respect to any other parameters of the investigation.

This is confirmed by Article II.2(b) of the GATT 1994, according to which nothing in Article II shall prevent any contracting party from imposing anti-dumping duties consistent with the provisions of Article VI. Article II of the GATT 1994 concerns schedules of concessions, which relate in abstract terms to products, as opposed to a specific incidence of importation of a specific product by a particular company. Consequently, the concept of "product" in the context of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* must, in principle, be understood in these same abstract terms.

As indicated in its oral statement, the EC does not consider that "price" is necessarily always a transaction-specific concept; rather it is a market specific concept. Article VI of the GATT 1994 and the *Anti-Dumping Agreement* constitute an inseparable package of rights and obligations. The introduction of the targeted dumping provisions in the Uruguay Round *Anti-Dumping Agreement* reflects a recognition by the Members that, in a market economy, permanent dumping becomes increasingly difficult to sustain and unlikely if import duties are reduced; subsidies disciplines introduced; and anti-trust laws developed (see generally, Jacob Viner, *A Memorandum on Dumping*, 1926). Hence the weighted average-to-weighted average comparison rule. At the same time, targeted dumping may still occur, and may still require remedial action. Hence the targeted dumping provisions, if certain conditions are met. To apply the transaction-to-transaction method as the US has done in the measure taken to comply deprives the targeted dumping provisions of all utility. The utility of the transaction-to-transaction method, without zeroing, has been explained by the EC in its written and oral submissions to the panel, and in the response to these questions. It permits the use of a representative sample; and avoids the need to quantify adjustments for differences affecting price comparability, if sufficient comparable transactions can be directly matched.

**33. The application of targeted dumping comprises at least three elements (a) the identification of a pattern of pricing indicating targeted dumping, (b) the calculation of a margin of dumping and (c) the translation of that calculated margin to the application of an anti-dumping measure. Please explain how each of these three elements would operate in the**

**circumstances of the three types of targeted dumping identified in the second sentence of Article 2.4.2.**

For example, during a one year period used as the investigation period in an original proceeding we assume: one country, exporter and importer; 1 domestic transaction per week at a value of 100; and 1 export transaction per week. In region A there are 25 export transactions at 90 and 1 at 110; in region B, 25 export transactions at 110 and 1 at 90.

A single *weighted average-to-weighted average* comparison would result in a dumped amount and margin of dumping of zero. Proceeding directly to the unjustified use of "*simple zeroing*", that is, comparing a weighted average normal value of 100 with each export transaction during the period, "zeroing" any negative intermediate results, but including all export prices in full in the denominator, would result in a dumped amount of (26 x 10) = 260 and a dumping margin of (260/(26 x 90) + (26 x 110)) x 100 = 5 %.

In cases in which domestic prices would vary, the result of using the *transaction-to-transaction* method would depend on which transactions were included in the representative sample, and which were matched. If the sample is representative, and no zeroing is used, the result should be close to that obtained using the weighted average-to-weighted average method. If zeroing is used, the result might be close to the result achieved using the simple zeroing method.

However, an analysis of the export transactions, in the light of domestic prices, would reveal a significant pattern of *targeted dumping* to region A. Having identified such a pattern, and having provided the required explanation, an investigating authority would be entitled to proceed with a targeted dumping analysis. Article 2.4.2 does not identify in every detail how investigating authorities may address targeted dumping.

For example, the investigating authority could focus on the set of transactions in region A. Within region A, it could make a weighted average-to-weighted average comparison, resulting in a dumped amount of (25 x 10) – (1 x 10) = 240. This dumped amount could be expressed as a dumping margin (for example, (240/(25 x 90) + (1 x 110)) x 100 = 10.17%. That anti-dumping duty of 10.17% could, for example, be imposed on the products consigned for final consumption to region A, when the domestic industry has been interpreted as referring to the producers in region A consistent with Article 4.2. Consistent with Articles 9.3 and 2.4, the same approach would then apply at the stage of final assessment or refund proceedings. We assume the exporter's behaviour is unchanged during a subsequent annual period. Once that period is closed, final assessment under Article 9.3.1 would lead to the assessment of a dumped amount of 240 (consistent with a dumping margin of 10.17 %) – cash deposits would simply be liquidated. A refund proceeding under Article 9.3.2 would not result in any refund. The panel may note that this result is not mathematically equivalent to the result of using simple zeroing : the targeted margin of dumping is higher; but the dumped amount is lower.

In cases in which domestic prices would vary, the result of using the *transaction-to-transaction* method within the sub-group would depend on which transactions were included in the representative sample, and which were matched. If the sample is representative, and no zeroing is used, the result could be close to 10.17%. Even with zeroing, given the pattern, the result may not be significantly different.

Alternatively, having identified targeting dumping by region, the investigating authority could calculate, for both regions together, a dumped amount of 260 and a dumping margin of 5%, using the same method at that outlined in the second paragraph of this response. An anti-dumping duty of 5% could then be imposed on all products entering the country (both region A and region B). If targeting dumping continues, the same method could be used during final assessment or refund proceedings, leading, if the exporter's behaviour is unchanged, to the collection of the same dumped amount (260).

This could, for example, be the case if the domestic industry has not been interpreted as referring to the producers in a certain area (see Article 4.2) or if the constitutional law of the importing Member does not permit the anti-dumping duty to be levied only on the products consigned to region A. The panel may note that this result is mathematically equivalent to the result of using "simple zeroing". However, the two methodologies are not the same or comparable, because the second is justified by the targeted dumping provisions, whilst the first is not.

The analysis is analogous with respect to both time and purchasers, if we replace region A with the final six months of the year, or with purchaser A (as opposed to purchaser B). Duties could be similarly collected either with respect to the targeted period or targeted purchaser, or collected at an *ad valorem* rate applied to all purchasers or with respect to the period as a whole.

For the purposes of deciding on the claims before it in this case the panel does not need to decide all the interpretative issues that might arise in the context of the operation of the targeted dumping provisions. It is sufficient to make two observations. First, it is not necessarily the case that there is always mathematical equivalence between the result obtained by directly using "simple zeroing" or transaction-to-transaction with zeroing and the targeted dumping provisions. Thus, finding that zeroing as applied by the US in this case is unfair does not nullify the targeted dumping provisions. Second, the possible operation of the targeted dumping provisions described above cannot, even in the case of mathematical equivalence, be considered the same as or comparable to simple zeroing, because the former is justified by the identification of a pattern of targeted dumping, whilst the latter is not.

**34. Could the EC please explain its understanding of the meaning of the term "price comparability" as used in Article 2.4.**

Price comparability refers to the question of whether or not prices are comparable. Prices are comparable if due adjustment has been made for all differences affecting price comparability. Prices may not be comparable if, for example, there are differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and so forth. In other words, dumping may be masked or created if, for example, a normal value would be compared with export prices at a different level of trade : such prices are not comparable and a level of trade adjustment may be necessary. Similarly, a normal value may not be comparable with a global export price if that global export price masks targeted dumping by purchaser, region or time. In such circumstances, there may be a difference that affects "price comparability".

**35. Exhibit CDA-8 contains two hypothetical examples purporting to demonstrate how the second sentence of Article 2.4.2 might be applied without zeroing. With reference to those hypotheticals:**

**(a) Please comment on whether or not the calculation of separate rates for (1) transactions relating to the largest purchaser and (2) transactions in the three month period might be treated as a form of zeroing, in the sense that the focus is on dumped (or more dumped) imports, without any offset for non-dumped (or less dumped) imports.**

The EC considers that clarification of the term "a form of zeroing" may help to resolve the dispute. The word "zeroing" is not used in the ADA, and it appears that there may not always be complete precision about what exactly is meant when that term is used. The EC observes that what the US did in the measure taken to comply (transaction-to-transaction zeroing) is not the same as what may be done in a targeted dumping analysis, as outlined in CDA-8. In the opinion of the EC, focusing on a *pattern* of transactions, which may be viewed as a whole precisely because the identification of the pattern, in terms of purchaser, region or time, establishes a link between those transactions, is one thing. And selecting certain transactions because they are made at a relatively low

price is something entirely different. The targeted dumping provisions do not permit an investigating authority to identify a pattern of export prices *just because* they happen to differ significantly – they must differ significantly among different *purchasers*, *regions* or *time* periods. Low priced export transactions, in themselves, are not a relevant pattern for the purposes of a targeted dumping analysis. In short, even if a targeted dumping analysis would be considered to necessarily involve a "form of zeroing" (which the EC would contest), that "form of zeroing" is not the same as the "form of zeroing" before the panel in this case. The "form of zeroing" before the panel in this case is unfair and involves an adjustment other than for a difference affecting price comparability. The "form of zeroing" that might arise in a targeted dumping analysis is justified by the circumstances; and fair; and, to the extent it involves any "adjustment", such adjustment is due or warranted. A semantic identity of these two different things under the common heading "zeroing", without distinguishing between them, would constitute a legal error.

**(b) What legal / textual justification might permit such zeroing?**

The EC believes that it results clearly from the text of the second sentence of Article 2.4.2 that, if there is a pattern, and the necessary explanation is given, a targeted dumping analysis is possible. The EC agrees that a reference to the weighted average-to-transaction method reflects the fact that a completely disaggregated comparison is a means of identifying whether or not there is a pattern. The EC further agrees that the possibility to be fully asymmetrical contains within it the possibility to be partially asymmetrical, as outlined in our response to question 33, just as the possibility to make either a weighted average-to-weighted average or a transaction-to-transaction comparison contains within it the possibility to make comparisons by averaging groups.

**(c) The EC argued that this would not constitute zeroing, as no adjustment is made to the export prices. Please explain.**

The EC refers to our response to question 35 (a). Our position is that what is described in CDA-8 is not the same as what the US did in the measure taken to comply. Either it is not to be characterized as an "adjustment" to export price at all, because what changes when the targeted dumping pattern has been identified is simply the parameter by reference to which an investigating authority is entitled to calculate the margin of dumping. Or, even if that would be construed as an adjustment, it is due or warranted, since made for a difference affecting price comparability.

**(d) The EC also argued that, even if there could be deemed to be an adjustment of export prices, such adjustment would constitute a "due allowance" under Article 2.4. Please explain, with particular reference to the concept of "differences which affect price comparability" as set out in Article 2.4.**

If, as in our example in response to question 33, a targeted dumping analysis has identified a pattern of dumped prices to region A, but not region B, then there is a difference between regions A and B. This difference has affected the comparability of all the data – if a single weighted average-to-weighted average comparison is made, the dumping amount and margin will be zero. But this would mask the targeted dumping in region A. There is therefore a difference affecting price comparability; so the investigating authority is entitled to make an adjustment. That adjustment could consist of calculating a margin of dumping for region A, as outlined in CDA-8.

**(d) The EC also stated (in respect of the seasonal product hypothetical) that the margin of dumping would be the actual amount of dumping (for the three-month period) expressed as a percentage of export price. Please explain. What export price would be used as the denominator? If it would be the total of all export sales, does this constitute a form of zeroing?**

We refer to our response to question 33. In a targeted dumping analysis, either approach would be possible. If the investigating authority follows the first approach, the denominator would be the total export price during the three month period. If all export prices would be included in the denominator, the result would be that a lower margin of dumping would be calculated. In either case, if what is described would be a "form of zeroing", it is not the same as what the US did in the measure at issue, and it would be justified by the fact that the investigating authority had identified a relevant pattern of exports and provided the necessary explanation.

**(f) Please show the operation of both hypothetical examples using numbers.**

We refer to our response to question 33.

**(g) Assume that during the period of targeted dumping, or in the region of targeted dumping, not all export sales are made at a price below normal value, but that the finding of a pattern of export prices is not vitiated by the existence of these sales. Would the calculation of a dumping margin for the sales during the period for which the pattern was found, or to the region for which the pattern was found have to take account of these transactions? How?**

We refer to our response to question 33. We agree with Canada that the investigating authority could make a weighted average-to-weighted average comparison for the entire sub-set, thus taking the above normal value export prices into account. This is not, however, the only possibility.

**36. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. Could the EC explain how such an analysis comports with the second sentence of Article 2.4.2, which provides that "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods", "a normal value established on a weighted average basis may be compared to prices of individual export transactions"**

The EC's position is that it might be possible, simply by looking at export prices, to discern a "pattern", but this would necessarily have to be done in a disaggregated way – that is, each export transaction would have to be considered individually. Viewing a single weighted average export price would not, by definition, reveal any pattern in the export prices incorporated within that single weighted average. Furthermore, what is really of interest to the investigating authority is a pattern of "dumped" export prices. Thus, in practice, what an investigating authority will typically do is to compare a weighed average normal value with each export transaction, looking for patterns of export transactions, by purchaser, region or time, at prices less than normal value.

The EC's position is that an investigating authority could so proceed, not that it should. We refer to our response to questions 33 and 35(b).

The EC's position is that this does not involve "the form of zeroing" before the panel in this case (please see our response to question 35(a)); and that even if it would be considered to involve "a form of zeroing", it would be fair, and a due or warranted adjustment.

The EC agrees that the possibility to be fully asymmetrical contains within it the possibility to be partially asymmetrical, as outlined in our response to question 33, just as the possibility to make either a weighted average-to-weighted average or a transaction-to-transaction comparison contains within it the possibility to make comparisons by averaging groups.

**37. The EC has stated that, in its view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6). Could the EC explain what, in its view, is a normal value for purposes of a transaction-to-transaction analysis? How would the EC expect that an investigating authority determine the appropriate normal values for comparison purposes in the context of such an analysis?**

Our position is that the investigating authority may not *assume* that each individual domestic transaction is a normal value. As outlined in our written and oral statements to the panel, in effect, we consider that the investigating authority must ensure that the domestic transactions it uses to constitute normal value are representative. It is unnecessary for the purposes of this panel to review all the issues arising from the selection of the domestic transactions to be compared to the export transactions. It is sufficient to observe that zeroing negative intermediate amounts that result when a specific export price is subtracted from a specific lower domestic price is not permitted.

**38. Assuming the EC is correct that it is inappropriate for an investigating authority to assume that the price at which a single domestic transaction is concluded is always equivalent to a normal value, (EC written submission at para. 11) would the EC consider that the price at which a single domestic transaction is concluded can ever be equivalent to a normal value? If so, could the EC indicate what criteria might be relevant to distinguish such a case from those where the price at which a single domestic transaction is concluded is not equivalent to a normal value?**

It would depend on all the circumstances of the case. However, the EC could envisage that, for example, in the case of large capital goods, especially if made to order, the fact that there would be only one domestic sale during the period of investigation would not necessarily preclude the investigating authority from determining a normal value on the basis of that one transaction.

**39. Para. 15 of the EC's written submission seems to suggest that the transaction to transaction juxtapositions do not involve comparisons of normal values. The EC then indicates that when the results of these juxtapositions are combined, a dumping margin can be calculated. Could the EC indicate where, in this analysis, normal value is determined and compared with export price?**

One of the utilities of the transaction-to-transaction method is precisely that it may eliminate the need to make adjustments for differences affecting price comparability, adjustments that may be difficult to quantify, because it allows the matching of directly comparable domestic and export transactions. Thus, at the second aggregation stage, a margin of dumping is calculated, which, as a matter of law, economics and mathematics, is based on a comparison between (representative) normal value and export price, even if an investigating authority does not consider it necessary to isolate and give precise numerical expression to the underlying normal value for the product as a whole. That would be possible. But it is unnecessary.

To assist the Panel further on this point, the EC offers the following examples. In order to avoid unnecessary complications, it is assumed that the product under investigation is homogeneous (i.e. one single model). In the first example, the transaction-to-transaction method is applied without expressing the overall normal value and export price as two single figures. In the second example, both normal value and export price are expressed as two single figures.

In the first example, export transactions are compared with the comparable domestic transactions. The intermediate results are then aggregated into the total amount of dumping, i.e. 80.

| Domestic | | Export | | Comparison |
|---|---|---|---|---|
| Quantity | Price | Price | Quantity | |
| 1 | 130 (not used) | | | |
| 1 | 100 | 90 | 1 | 10 |
| 2 | 110 | 115 | 2 | -10 |
| 3 | 120 | 120 | 3 | 0 |
| 4 | 130 | 110 | 4 | 80 |
| | | | Dumping | 80 |

In the second example, the normal value and the export price are determined as follows. The individual domestic and export transaction prices are weighted by the quantity of the relevant export transaction. Then, the two values are compared in order to produce the total dumped amount, i.e. 80. The comparison is still made on a transaction-to-transaction basis, since each export transaction is matched with a comparable export transaction - but no intermediate result is produced. Instead, the final dumping amount is determined immediately.

- normal value **1200** = (100*1)+(110*2)+(120*3)+(130*4)
- export price **1120** = (90*1)+(115*2)+(120*3)+(110*4)

This is not equivalent to a weighted average-to-weighted average calculation since (1) not all domestic sales are used and (2) no weighted average normal value within the meaning of the first sentence of Article 2.4.2 is expressed (i.e. by multiplying the domestic price by the domestic quantity). Instead, the domestic transaction used for the comparison is weighted against the quantity of the matching export transaction in order to give each export transaction (and intermediate result) its actual weight in the calculation. The same operation is performed in the first example above, but at a later stage of the calculation.

| Domestic | | Export | |
|---|---|---|---|
| Quantity | Price | Price | Quantity |
| 1 | 130 (not used) | | |
| 1 | 100 | 90 | 1 |
| 2 | 110 | 115 | 2 |
| 3 | 120 | 120 | 3 |
| 4 | 130 | 110 | 4 |

| Normal value | Export price | Dumping |
|---|---|---|
| 1200 | 1120 | 80 |

A weighted average-to-weighted average comparison would have produced a total dumped amount of **90** (weighted average normal value of 121 minus weighted average export price of 112 equals 9 multiplied by the total export quantity of 10, equals **90**).

**40. At para. 11 of the EC's written submission, the EC asserts that an isolated, transaction-specific home market value is not necessarily equivalent to normal value. The EC asserts that one could only establish a normal value using "a fair and balanced consideration that takes into account the appropriate data populating the relevant set" (rather than relying on an individual home market transaction price). Please give an example of how such "consideration" might**

**work in practice. Is the EC suggesting that some form of weighted average normal value might need to be determined? If so, what would be the difference between this methodology and the comparison methodology provided for in the second sentence of Article 2.4.2?**

What would be used would, for example, have to be representative. Thus, if an investigating authority matches each export transaction to a domestic transaction, but observes that it has used a very small percentage of total domestic transactions, or that in some way the domestic transactions it has used are not representative (perhaps they all relate to one small region within the domestic market), then it might conclude that the transactions used were not representative, and that the transaction-to-transaction method was therefore inappropriate.

**To Japan**

**41. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Japan reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

The EC refers to its answer to question 32.

**42. Japan argues, at para 8 of its written submission, that the terms "dumping" and "margin of dumping" have uniform meanings throughout the AD agreement. Could Japan address the implications of this view in the context of duty assessment procedures under an prospective normal value system? Specifically, could Japan address the proposition that, in such a system, in the face of a prohibition on zeroing, duties may be assessed on entries of product at a price below the established minimum normal value, and that rebates must be given on entries of product at a price above the established minimum normal value?**

The EC refers to its response to question 4. The prohibition of zeroing does not require giving rebates on entries of products at a price above the established minimum normal value because the variable duty that might be initially applied under the prospective system is subject always to a refund request under Article 9.3.2. In that refund request, the actual margin of dumping for the relevant period will be established and must be consistent with all of Article 2.4. If collection of duties on entries at a price below the established minimum normal value and non-collection of duties on entries at a price above the established minimum normal value has led to collecting a total amount of duty higher than the actual margin of dumping, the difference will be refunded.

This also allows an investigating authority to initially collect an amount that will cover any targeted dumping that might take place. This reflects the fact that in the prospective system only a refund is possible – liability cannot increase; and only an importer can request a refund – as opposed to the domestic industry under the retrospective system. It is legally erroneous to transpose these provisions from the initial part of the prospective system to the final step in the retrospective system.

**43. Could Japan address the proposition that, in conducting a "targeted dumping" analysis under the second sentence of Article 2.4.2, the investigating authority may establish dumping margins on the basis of a comparison involving only the subset of entries that form the "pattern" leading to the need for such analysis? In the context of such an analysis, could Japan indicate how the assessment of duty would be carried out, and the level of duty that would be applied.**

The EC refers to its response to question 33.

**44. Japan argues, at para. 30 of its oral statement, that the argument that, in mathematical terms, the WA-to-WA and WA-to-T comparisons would produce identical results, absent zeroing, assumes wrongly that all other things are treated equally. Does Japan acknowledge that if all other things are treated equally, these two comparison methodologies would necessarily produce the same results, absent zeroing? Does Japan mean to suggest that a WA to T comparison must entail some other method of calculating normal value than the calculation of a weighed average of all normal values? Could Japan explain the textual basis for such a view, given that Article 2.4.2 does not address the calculation of normal value, but the comparison of normal value and export price in the establishment of margins of dumping.**

The EC refers to its response to questions 33 and 35(a). There are at least two alternatives. However, even in the case of "mathematical equivalence", one "form of zeroing" cannot be compared to the other : what happens under a targeted dumping analysis being justified, fair and due or warranted.

**To Thailand**

**45. Thailand suggested that there is a wide range of practical ways in which an investigating authority might conduct a targeted dumping margin calculation without recourse to zeroing. Please provide examples.**

The EC understood Thailand's remarks to relate to the manner in which anti-dumping duties might possibly be imposed and finally assessed in relation to a specific region in which targeted dumping had been identified. The EC refers in this respect to its response to question 33 and Article 4.2, which in its view clearly envisages that such an approach is practicable or feasible.

**To all parties and third parties**

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

If an investigating authority would determine "normal values" by model, for the purposes of multiple comparisons at the first stage, it would still not be allowed to "zero" at the second aggregation stage. Even if the normal value for the product as whole is never precisely calculated and stated by the investigating authority, it could in theory be calculated, and is reflected, as a matter of law, economics and mathematics, in the calculation of the margin of dumping for the product as a whole.

The EC considers that it is permissible to use a mix of domestic prices and constructed normal values on a model by model basis. This might be an efficient means of making intermediate comparisons between various model types. However, the normal value for the product as a whole would be the average of all the actual domestic prices and constructed domestic prices of the models concerned, in the same manner that the normal value for the product as a whole in the case where there are reliable domestic sales for all models consists of the average of all the model weighted average values.

**47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not**

**determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:**

The EC refers to its response to question 36.

**(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each known exporter or producer")**

This approach is consistent with the first sentence of Article 6.10, for the reasons set out above. In the case of targeted dumping, an investigating authority would be entitled to proceed in the manner outlined in CDA-8. Thus, there will always be one overall margin of dumping for each exporter, which corresponds to a given dumped amount. In the case of targeted dumping, this dumped amount could, for example, be distributed over the transactions in the targeted sub-set, and could also be expressed as an *ad valorem* rate, such as the assessment rate used by the US in retrospective final assessments. Such an assessment rate is not, however, the margin of dumping of the exporter.

**(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

Article 9.2 refers to imposition and collection on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except where price undertakings have been accepted. The EC refers to its response to question 33, which is consistent with this proposition. If the set of dumped imports is identified as those made in respect of a particular purchaser, region or time, then duties could be imposed and finally assessed on the same basis, without that constituting unjustified discrimination.

**48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?**

The word "accurate" begs the question. Absent targeted dumping, the use of a weighted average-to-weighted average comparison accurately measures whether or not there is, in truth, international price discrimination between different markets. Myopically focussing on individual transactions, without any reason, and zeroing, does not accurately measure what is really happening in the market place. It simply ignores the fact that the forces of supply and demand are operating across the whole of the defined market to affect all prices, that being the very essence of a market definition.

**49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).**

This question does not require any further comment by the EC at this stage, other than to specify that the EC's position is that the investigating authority may not *assume* this to be the case.

**50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.**

Just because the *Anti-Dumping Agreement* is silent on some specific detail, it is well established that that does not mean that an investigating authority is entirely free to do as it pleases. Members may have a certain latitude when it comes to deciding what approach they will follow, but once they have made their choice, they must apply the rule in an objective, even-handed and non-discriminatory way, and explain all the reasons for their determinations, consistent with Article 12. For example, if there are two exporters with identical behaviour and data, an investigating authority would not be entitled to apply the weighted average-to-weighted average method to one of them, and the transaction-to-transaction method to the other, arriving at significantly different conclusions, unless it provided a valid explanation for its determinations.

**51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of ant-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?**

It is correct that there are five different types of anti-dumping proceeding expressly referred to in the text of the *Anti-Dumping Agreement* : original *proceedings* (see, for example, Article 5.9); changed circumstances *proceedings* (see, for example, Article 9.5 "normal … review proceedings"); sunset *proceedings* (see, for example, Article 9.5 "normal … review proceedings"); and assessment or refund *proceedings* (see, for example, Article 9.5 "normal … review proceedings"). Assessment proceedings under Article 9.3.1 or refund proceedings under Article 9.3.2 are therefore to be distinguished from original proceedings under Article 5. These different types of proceeding have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*. However, all of these proceedings generally involve an investigation into something. In the case of Article 5, an investigation into the existence, degree an effect of any alleged dumping; in the case of Article 9.5 an investigation into the new comer's margin of dumping; in the case of Article 11.2, an investigation into whether or not changed circumstances warrant a variation of the duty; in the case of Article 11.3, an investigation into whether or not expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury; and in the case of Article 9.3, an investigation into the actual (contemporaneous) margin of dumping and final liability for payment of duties. Consistent with the definition of the term "margin of dumping" in Article VI:2 of the GATT 1994, as implemented in all of Article 2, and the cross-reference in Article 9.3 to all of Article 2, whenever an authority investigates or relies on a "margin of dumping" in any of these anti-dumping proceedings, that margin of dumping must be calculated in a manner consistent with Article 2, that is, *for the product as a whole*.

# ANNEX E-5

## REPLIES OF JAPAN TO THE QUESTIONS FROM THE PANEL

2 December 2005

**To both parties**

**Q22. If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?**

1. The latter part of this question suggests that the prohibition of zeroing in a T-to-T situation gives rise to a choice of either recognizing that the *Anti-Dumping Agreement* requires the aggregation of the comparisons for individual export transactions "into a single margin", or, alternatively, obliging administrators to "compensate" importers for "negative margins" on individual transactions. Japan submits that the first of these two options is based on a correct reading of the text of the *Agreement*, while the second is not.

2. The second option confuses two fundamentally distinct concepts – "margins of dumping" and "intermediate comparison results" (or "intermediate values")[1] – that must be considered separately to obtain a proper understanding of the obligations established by the *Agreement*. The "intermediate results" are the mathematical output of the individual comparisons of export price and normal value under the comparison methodology used in any particular anti-dumping proceeding. Those results can be either positive (for those individual comparisons in which export price is less than normal value), negative (for those individual comparisons in which export price exceeds normal value) or zero (where the two values are equal). But those intermediate results are *not* "margins of dumping".

3. Japan recalls that the measure at issue involves an original investigation in which, pursuant to Article 6.10, an individual margin is calculated for each producer and exporter. As explained more fully in reply to Question 41, a margin of dumping must be established for the product under investigation, not for individual transactions relating to the product. To calculate a margin for the product, the comparison must involve a volume of home and export market transactions that is representative of the product. Accordingly, the mathematical result of a single T-to-T comparison does not constitute a "margin of dumping" but merely an intermediate value. Intermediate values for comparisons between home and export market sales must be aggregated to produce a margin of dumping for the product.

4. There is, therefore, no question of "compensating" producers, exporters or importers for "negative margins". Instead, under Article 2.4.2, the negative intermediate values form an integral part of the data-set that must be taken into account in determining "the existence of margins of dumping" for producers and exporters.

[1] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

**Q24. It can be argued that a methodology cannot be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down. In this respect, what are the comments of the parties on the observations of the Appellate Body in *EC –Bed Linen* and in *US - Corrosion-Resistant Steel Sunset Review* that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?**

5. Although Article 2.4.2 provides for three basic methods of comparison, Members enjoy a degree of discretion in designing the details of the precise comparison methodology to be used to determine the existence of dumping margins in individual cases. For example, they can determine the relevant types or models of the product under investigation; they can determine the time base on which they compare the types or models; they can specify the methods used to identify "similarity" of non-identical comparison models of the product; they can determine the methods of assigning or allocating costs and expenses to individual transactions; and, they can determine whether sampling is necessary, and if so, how it should be undertaken. Each of these choices will likely have an impact on the magnitude of dumping, if any, that is found to exist.

6. Article 2.4, among others, limits the authorities' discretion in these matters by requiring a fair comparison. Given that the structure of the methodology bears directly on the magnitude of dumping that may be found to exist, the impact of the authorities' choices on the existence or magnitude of dumping is a relevant consideration in assessing the fairness of a given comparison methodology. This is entirely appropriate because the existence and magnitude of dumping is a decisive factor in a Member's right to impose anti-dumping duties, and also in fixing the maximum amount of those duties. The significance of the magnitude of dumping in determining the fairness of margin calculation methodology is illustrated by the procedural disciplines set out in Article 5.8, which requires that the authorities immediately terminate investigations if they find the magnitude of dumping to be *de minimis*. Thus by determining that the magnitude of dumping is greater than *de minimis*, the authorities are entitled to continue the investigation and may, eventually, impose anti-dumping duties.

7. This conclusion is also confirmed by the Appellate Body's statements in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*. In these Reports, the Appellate Body noted that the zeroing methodology was not fair because, among others, it makes a dumping determination more likely; it inflates any margin of dumping found to exist; and, it distorts the prices subject to comparison. Such a methodology is unfair because the comparison methodology is so designed and structured that exporters *inevitably and systematically* suffer prejudice. In other words, the lack of fairness does not stem from a *possibility* that the methodology *might* produce a higher margin *in some circumstances*; rather, the methodology is unfair because it *necessarily* produces such an outcome *in all circumstances*.

8. In this regard, an analogy may be drawn with the Appellate Body's findings in *US – Hot-Rolled Steel*. Under the measure at issue in that dispute, the United States selected among home market transactions to include in the determination of normal value, and hence in the comparison with export price. Specifically, to determine normal value, the United States applied a "99.5 percent test" that excluded a "great range" of low-priced sales, and an "aberrationally high price" test that excluded a "far smaller range" of high-priced sales.[2]

9. The Appellate Body held that the combination of these two tests "operated *systematically* to *raise normal value*" which "disadvantaged exporters".[3] The Appellate Body noted that these tests "would make a finding of dumping *more* likely and would also *raise* the amount of any margin of

[2] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144, 150 and 151.
[3] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 155. Emphasis added.

dumping, all to the *disadvantage* of the exporter".[4] It explained that, although Members enjoy discretion in establishing a methodology for determining normal value, "the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation".[5] The Appellate Body concluded that the consequences of the United States' two tests deprived the United States' approach of the even-handedness and fairness required by the Agreement.

10. In the same way, the United States' zeroing methodology involves a selection from among the universe of export transactions that are deemed by the United States to be comparable. In short, after conducting an initial T-to-T comparison, the United States *excludes* all of the relatively higher-priced export transactions that produce a negative price difference. In sharp contrast, the United States *includes* all of the relatively lower-priced export transactions. Like the methodologies in *US – Hot-Rolled Steel*, the combination of these approaches "operates systematically" to "make a finding of dumping *more* likely and also […] *raise[s]* the amount of any margin of dumping, all to the *disadvantage* of the exporter."[6] This is not even-handed or "fair" within the meaning of Article 2.4.

**Q27. Could the parties address the proposition that a dumping margin can be calculated for a single export transaction? Please consider specifically cases concerning (a) the import of large capital goods, (b) the import of specially designed/manufactured goods) and (c) the import of few shipments to small economies. If your view is that a dumping margin cannot be calculated for a single export transaction in any of these contexts, please explain how a margin of dumping could be established in such a case. If in any of these contexts, a single export transaction can generate a dumping margin, why is it not permissible to conclude that each comparison in a transaction-to-transaction analysis generates a dumping margin?**

11. As explained in reply to Question 41, a margin of dumping must be established for the product under investigation, not for individual transactions relating to the product. It is, of course, for the investigating authorities to determine the scope of the subject and like products at issue. In consequence, under the T-to-T comparison method, the margin of dumping must be established on the basis of the entire universe of home and export market transactions during the time period covered by the investigation, or a representative sample of those transactions. These rules apply to all WTO Members in the same way, whether the Member is large or small; developing or developed.

12. Depending on the product determination made by the authorities, in the case of large capital goods or specially designed/manufactured goods, there may only be a single export transaction for the product under investigation during the time period covered by the investigation. In that event, a margin of dumping for the product can be established on the basis of that transaction.

**To Japan**

**Q41. Please explain the precise textual basis for the proposition that "product" in Article VI of GATT 1994 must be equated with "product as a whole". How would Japan reconcile the concept of "product as a whole" with the definition of dumping in Article VI:2 of GATT 1994 in terms of a "price difference".**

13. The textual basis for the Appellate Body's conclusion that "dumping" and "margins of dumping" are determined for the "product" as a whole is Article VI of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. According to the definition of "margin of dumping" in Article VI:2 of the GATT 1994, and the definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1

[4] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144.
[5] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 148. Underlining added.
[6] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 144 and 155.

of the *Anti-Dumping Agreement*, the existence and magnitude of dumping are determined for the product as a whole.

14. The second sentence of Article VI:2 states that the margin of dumping is "the price difference" determined in accordance with Article VI:1. Although this sentence refers to a "price difference", it does not state what the price difference in question measures. To ascertain the price difference being measured, the context provided by Article VI:1, as well as by the first sentence of Article VI:2, must be examined. These provisions demonstrate that "the price difference" in question is the price difference for the "product", not for individual transactions.

15. Article VI:1 sets forth a definition of dumping. Significantly, it defines dumping by reference to "a product". It states that "a product" is dumped "if the [export] price of the product" is less than the comparable domestic price "for the like product", or less than "the cost of production of the product". Each one of these textual indications in Article VI:1 shows that dumping is determined for the product as a whole and that the determination is based on a comparison of prices for the product. There is nothing in the text to suggest that dumping is determined for individual transactions or groups of transactions.

16. The text of Article VI:1 is reflected, of course, in the text of Article 2.1 of the *Anti-Dumping Agreement*, which also refers to the dumping of "a product" and also provides that the determination is based on a comparison of "the export price of the product" and "the comparable price … for the like product". The Appellate Body interpreted the term "product" to mean the entire product under investigation. The Appellate Body found that "[i]t is clear from the texts of [Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to *a product as a whole* as defined by the investigating authority."[7]

17. The interpretation of the term "price difference" in the second sentence of Article VI:2 as referring to the "product" is further confirmed by the immediate context provided in the first sentence of that provision. The first sentence states that "an anti-dumping duty" levied on "any dumped product" shall not exceed "the margin of dumping *in respect of such product*".

18. Thus, the text of Article VI:2 explicitly refers both to a dumped "product" and to the margin of dumping determined "in respect of such product". The text also refers to a single margin of dumping – "the margin" – that is determined for the product. Like Articles 6.10, 6.10.2 and 9.5 of the *Anti-Dumping Agreement*, this sentence provides strong textual support for the view that a single, "individual margin of dumping" is determined for the product. Further contextual support is provided by Articles 7.2, 8.1, 9.1 and 9.3. Each of these provisions contains obligations in connection with the maximum level of the remedy that can be imposed on imports of the dumped product. In each case, the remedy is limited by "the margin of dumping".

19. Thus, the *Agreement* consistently envisages a single margin of dumping that is established for the product. This means that there cannot be multiple margins of dumping, one for each transaction or each group of transactions. In fact, it is difficult to see how the drafters of the text could have been any more explicit that dumping and the margin of dumping are determined for the product.

20. The requirement to determine a margin of dumping for the product is consistent with the fact that the existence of "an individual margin of dumping" has several product-wide consequences, in particular: for the determination of the volume of dumped imports; the pursuit of the investigation; and the imposition and collection of duties.[8] If the price difference for an individual transaction were considered to constitute a margin, the result would be that product-wide consequences – including the

[7] Appellate Body report, *US – Softwood Lumber V*, para. 92-93.
[8] Japan's Opening Statement at the Second Meeting with the Panel, paras. 34-39.

imposition of duties on the product in excess of bound tariff rates – could be derived from the uncertain foundation of the price of a single export transaction.

21. The text of Article VI of the GATT 1994, as well as various provisions of the *Anti-Dumping Agreement* therefore, confirm that both dumping and margins of dumping are determined for the product as a whole, not for particular transactions.

**Q42. Japan argues, at para 8 of its written submission, that the terms "dumping" and "margin of dumping" have uniform meanings throughout the AD agreement. Could Japan address the implications of this view in the context of duty assessment procedures under an prospective normal value system? Specifically, could Japan address the proposition that, in such a system, in the face of a prohibition on zeroing, duties may be assessed on entries of product at a price below the established minimum normal value, and that rebates must be given on entries of product at a price above the established minimum normal value?**

22. The "proposition" the Panel describes in question 42 seems to confuse the distinct concepts of the "*amount* of anti-dumping *duty*" and the "*margin* of *dumping*" under Article 9.3 of the *Anti-Dumping Agreement*. In *EC – Bed Linen (Article 21.5)*, the Appellate Body found that "the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made. In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link."[9] The Appellate Body added that "the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties."[10] Accordingly, when the customs authorities impose and collect anti-dumping *duties* on individual entries, in either a prospective or a retrospective system, they are *not* calculating *margins of dumping* within the meaning of Article 2. Rather, the margins of dumping determined in original investigations or reviews constitute a ceiling on the amount of duties that can be imposed and collected by the customs authorities on individual entries.

23. The proposition in the Panel's question also assumes that in a prospective normal value, or PNV, system, the amount of duties imposed by customs authorities on each entry constitutes a margin of dumping, and that a "rebate" must be provided for the transactions with "negative" dumping margins. This assumption is erroneous. In a PNV system, to assess the amount of duties due, a comparison of prices is undertaken for each individual entry and, on the basis of that comparison, a variable duty is imposed on the individual export transaction concerned. The calculation and imposition of variable anti-dumping *duties* in this way – although permissible – does not involve the establishment of *margins of dumping* within the meaning of Article 2 of the *Anti-Dumping Agreement*. Instead, the customs authorities mechanically compare import prices with a reference price; they do not, and can not, undertake a comparison that respects the detailed procedural and substantive rules set forth in Article 2, for example, in Article 2.4.

24. In particular, because the PNV is established in an original investigation on the basis of transactions from the period of investigation, the comparison between the PNV and the price of imports is not contemporaneous. Also, the customs authorities do not inform the interested parties of the information they require to make a fair comparison because they do not make adjustments to the respective prices. The difference between a PNV and the import price cannot, therefore, constitute "the actual margin of dumping" within the meaning of Article 9.3.2 because the price comparison does not respect the rules in Article 2.4.

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[9] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123 (underlining added).
[10] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

25. Moreover, in a PNV system, at the request of an importer, the final liability for duties must be assessed in a review under Article 9.3.2. In that event, authorities conduct a review of past entries to establish whether duties were paid "in excess of the [actual] margin of dumping" to be calculated for the review period. In this setting, the word "actual" refers to the margin that is determined for the product on the basis of the transactions in the specified review period. The word "actual" is used to contrast the margin determined for the review period with the original margin calculated in the investigation, which formed the basis for the imposition of the duties subject to review. Thus, the duties paid on the basis of the original margin must be reviewed in light of "the actual margin" for the review period. If a refund is due, it is because the amount of duties initially paid on entries of the product are greater than the actual margin of dumping for the product for the review period. Further, there is no question of offsetting, compensating or rebating between positive and negative margins for individual entries because the results of individual W-to-T comparisons are not "margins of dumping" within the meaning of Articles 2 and 9.

26. If, as assumed by the Panel's proposition, under the PNV system, the difference between the transaction price and the reference price were itself the margin of dumping for the transaction, the amount of the variable duties imposed would *equal* the margin of dumping for the transaction. Yet, Article 9.3.2 *presupposes* that, in the prospective system, the amount of duties initially imposed and the margin of dumping are not necessarily equal. Indeed, if the price difference for each transaction were "the actual margin" for that transaction, there could be no refund and the refund procedure would, therefore, be redundant. The existence of a refund procedure for the prospective system demonstrates that the amount of variable duties initially imposed on each entry is *not* the margin of dumping for that entry.

27. In any event, the Panel must focus on the specific issues raised in this case and the particular features of the zeroing measures that are at issue. In the measure at issue, the USDOC used a zeroing method in calculating the overall margin of dumping on a T-to-T basis in an original investigation. The issue is whether that particular measure involves a "margin of dumping" calculated consistently with the first sentence of Article 2.4.2. As explained by Japan, "margins of dumping" within the meaning of that provision must be established for the product as a whole[11]. Therefore, Japan submits that an examination of the meaning of "margin of dumping" in the context of prospective or retrospective duty assessment is irrelevant for the purpose of resolving this dispute.

**Q43. Could Japan address the proposition that, in conducting a "targeted dumping" analysis under the second sentence of Article 2.4.2, the investigating authority may establish dumping margins on the basis of a comparison involving only the subset of entries that form the "pattern" leading to the need for such analysis? In the context of such an analysis, could Japan indicate how the assessment of duty would be carried out, and the level of duty that would be applied.**

28. The second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* sets forth an exceptional method of comparison. The Appellate Body explained in *EC – Bed Linen* that the second sentence of Article 2.4.2:

> allows Members, in structuring their anti-dumping investigations, to address three types of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.[12]

[11] Appellate Body Report, US – Softwood Lumber V, paras. 91-96.
[12] Appellate Body Report, *EC – Bed Linen*, para. 62.

The particular purpose of the second sentence of this provision, therefore, is to allow Members to combat targeted dumping that might be indicated through pricing patterns among different purchasers, regions or time periods.

29. This raises the issue of how an authority should structure the method of comparison to take "appropriate account" of those pricing patterns in calculating the dumping margin. By explicitly requiring the authorities to explain why a W-to-W or T-to-T comparisons will not take "appropriate account" of the prices differences, the second sentence of Article 2.4.2 presupposes that the W-to-T comparison methodology *will* enable the authorities to take appropriate account of those differences. Conversely, a comparison that compares the entire universe of export transactions cannot address pricing patterns, or the possibility of targeted dumping, confined to a certain group of transactions. Thus, as explained by Japan in its Opening Statement, the W-to-T comparison methodology permitted by the second sentence of Article 2.4.2 allows an authority that finds a pricing pattern to establish the existence of the margin of dumping on the basis of the specific transactions within the pricing pattern.[13]

30. Japan notes that its interpretation is consistent with the USDOC's "targeted dumping" regulation. This regulation provides that where:

> there is targeted dumping in the form of export prices . . . that differ significantly among purchasers, regions, or periods of time . . . the Secretary will normally limit the application of the average-to-transaction method to those sales that constitute targeted dumping.[14]

31. Thus, under the United States' own system, the application of the W-to-T method of comparison, in a targeted dumping situation, is confined to the transactions making up the pricing pattern. The transactions outside the pattern are *not* subject to the W-to-T comparison. In other words, the USDOC's own regulations are consistent with Japan's position that, pursuant to the second sentence of Article 2.4.2, the transactions included in the W-to-T comparison should be confined to those export transactions making up the pricing pattern, and does not extend to the entire universe of export transactions. Therefore, the existence of a dumping margin can be determined on the basis of those transactions.

32. Japan notes that the liability for duties imposed on the basis of a dumping determination under the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* is subject to review under either Article 9.3.1 or 9.3.2. In such circumstances, a question may arise whether authorities would be permitted to use the W-to-T method in review proceedings in the exceptional manner set forth in Article 2.4.2 (i.e. confined to a limited group of transactions). The answer to this question depends on the applicability of Article 2.4.2 to review proceedings.

33. Japan does not take, and need not take, any position on this issue in the present dispute. However, supposing for the sake of argument that Article 2.4.2 applies solely to original investigations, there would be no basis for Members to use the W-to-T method in the *exceptional* manner in reviews (i.e. according to which the comparison is limited to export transactions within the pricing pattern). The final liability for the payment of anti-dumping duties would have to be determined on the basis of a product-wide dumping margin determination, even if the third method in Article 2.4.2 had been used in the initial investigation to justify the imposition of duties on the basis of a comparison of a limited group of export transactions.

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[13] Japan's Opening Statement at the Third Party Meeting, paras. 31-38.
[14] 19 C.F.R. § 351.414(f)(2).

34. On the other hand, if Article 2.4.2 is applicable to review proceedings, and assuming that the conditions in the second sentence of that provision are met, the margin of dumping could also be determined in review proceedings on the basis of a comparison of a limited group of export transactions within a pricing pattern. In such cases, higher margins would likely result from the limited W-to-T comparison. However, these cases would be limited to the exceptional situations that meet the strict conditions set forth in the second sentence of Article 2.4.2. The confined comparison would be deemed to be a permissible response by Members to an attempt to hide dumping through a targeted pricing practice.

**Q44. Japan argues, at para. 30 of its oral statement, that the argument that, in mathematical terms, the WA-to-WA and WA-to-T comparisons would produce identical results, absent zeroing, assumes wrongly that all other things are treated equally. Does Japan acknowledge that if all other things are treated equally, these two comparison methodologies would necessarily produce the same results, absent zeroing? Does Japan mean to suggest that a WA to T comparison must entail some other method of calculating normal value than the calculation of a weighed average of all normal values? Could Japan explain the textual basis for such a view, given that Article 2.4.2 does not address the calculation of normal value, but the comparison of normal value and export price in the establishment of margins of dumping.**

35. The United States' argument of nullity places a very high burden on the United States. To show that the prohibition of zeroing "nullifies" the second sentence of Article 2.4.2, the United States must demonstrate, as a matter of law, that, without zeroing, Members are required to calculate margins in a manner that will *always* result in the same outcome for the two comparison methods. There is no nullity just because the two methods *may* produce the same outcome in some circumstances.

36. Japan is not suggesting that the W-to-T comparison *must* entail "some other method of calculating normal value than the calculation of a weighed average of all normal values". Conversely, however, the *Agreement* text does not suggest that a single or same method for calculating the weighted average normal value *must* be used under Article 2.4.2. The significant point is that the text of the Article itself does not *prohibit* a Member from using different methods for calculating the weighted average normal value in the two situations. In other words, Article 2.4.2 was crafted on the assumption that Members could choose to use different bases, or methods, for calculating the weighted average in the W-to-W and W-to-T comparisons. So long as Members are not prohibited from using different bases or methods (including different time periods) to calculate the "W" in the W-to-W and W-to-T comparisons, the outcomes of the comparisons will almost inevitably differ because the groups of transactions making up the weighted average normal value will differ.

37. This entirely undermines the United States' argument that the prohibition of zeroing would render the second sentence of Article 2.4.2 "superfluous" or a "nullity" because, without zeroing, the W-to-W and W-to-T comparisons will lead to the same results.

38. Simple examples demonstrate that, contrary to the United States' argument, the W-to-T methodology is not rendered a nullity – i.e., even without zeroing, the results of that comparison methodology are not necessarily the same as the outcomes yielded by the T-to-T or W-to-W methodologies. First, the T-to-T methodology will almost certainly never yield the same results as a W-to-T methodology, whether or not zeroing is employed. The reason for the difference in results is that the individual transactions that comprise normal value in a T-to-T comparison will almost certainly differ, in at least some instances, from the weighted average of the transactions that would function as the basis for normal value (the "W") in the W-to-T methodology. Thus, the overall comparison result will differ depending on whether the normal value is based on individual transactions (T) or a weighted average of transactions (W).

39. The following is a simple example, involving five home market transactions that form the basis of normal value, with three export transactions, and assuming that each transaction involves an equal quantity of merchandise.

| Home market transactions | Export transactions |
|---|---|
| 100 | 95 |
| 90 | 92 |
| 110 | – |
| 100 | 102 |
| 105 | – |

40. In a W-to-T comparison, the weighted average normal value of the five home market sales is 101. Comparison of the three export prices to this weighted average normal value leads to intermediate results of 6 + 9 + (-1) for the three individual export transactions. This produces a total margin of dumping of 14 which, divided by the total value of the export sales (289), produces a percentage margin of 4.84%, if zeroing is not used. If zeroing is used, it results in a total margin of dumping of 15 (because the -1 is converted to a zero) and a percentage margin of 5.19%.

41. In a T-to-T methodology, assuming that the appropriate home market and export transactions are listed adjacent to one another in the table above, the outcome is 5 + (-2) + (-2) for the three export transactions. Without zeroing, this results in a total margin of dumping of 1 which, divided by the total value of the export sales (289), produces a percentage margin of 0.35%. With zeroing, the total margin of dumping is 5 and the percentage margin equals 1.73%. As shown in the following table, both of these results, of course, are different from those derived from the W-to-T comparisons.

| Comparison Method | Percentage Result |
|---|---|
| W-to-T without Zeroing | 4.84% |
| W-to-T with Zeroing | 5.19% |
| T-to-T without Zeroing | 0.35% |
| T-to-T with Zeroing | 1.73% |

42. These different results are to be expected, except in the highly unusual situation in which the individual transactions in the home market used in the T-to-T methodology happen to have the same normal value as the weighted average normal value that is used in the W-to-T methodology. Thus, because the T-to-T and W-to-T methodologies produce different results, neither method is redundant.

43. Turning to the W-to-W methodology, again a simple example can show that it need not yield the same results as the W-to-T comparison methodology. In doing so, it is important to recall that authorities may calculate the "W" over different time periods in the W-to-W and W-to-T comparisons, thereby using different pools of home market transactions. Indeed, this difference is reflected in the United States' own anti-dumping statute, which provides that in original investigations, the weighted average normal values is generally to be calculated over the *entire period of investigation* (typically a full year); whereas for periodic reviews, the statute provides for the calculation of weighed average normal values over "a period *not exceeding the calendar month* that corresponds most closely to the calendar month of the individual export sale."[15]

44. Because of the calculation of different weighted average normal values, the outcome of the W-to-W and W-to-T comparisons using those different "W's" will necessarily differ, even if the export prices are identical in both cases. This conclusion would always hold, except in the highly

[15] *Compare* Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended, *with* Section 777A(d)(2).

unusual situation in which the weighted average normal values in each month happen to equal the weighted average normal value over the entire period of investigation.

45. The following is a simple example, assuming a three month period of investigation, with two export transactions, and assuming that each transaction involves an equal quantity of merchandise.

| Month | Home Market Transactions | Export Transactions |
|---|---|---|
| 1 | 100 | |
| | 101 | 96 |
| | 98 | |
| Month 1 Average | 99.67 | |
| 2 | 104 | |
| | 104 | |
| | 102 | |
| Month 2 Average | 103.33 | |
| 3 | 96 | 102 |
| | 98 | |
| | 100 | |
| Month 3 Average | 98.0 | |
| Overall Average | 100.33 | 99 |

46. Using the W-to-T comparison methodology, and calculating the "W" as the United States does in investigations (i.e. over the entire period of investigation), the intermediate comparison results for the two individual export transactions are 100.33 – 96, i.e. 4.33, and 100.33 – 102, i.e. (-1.67). Without zeroing, the total margin of dumping is 4.33 + (-1.67), i.e. 2.66, and the percentage margin is 1.34%. If zeroing is used, the total margin of dumping is 4.33 and the percentage margin is 2.18%.

47. Using the W-to-T comparison methodology, and calculating the "W" as the United States does in periodic reviews (i.e. on a monthly basis), the intermediate comparison results for the two individual export transactions are 99.67 – 96, i.e. 3.67, and 98 – 102, i.e. (-4.00). Without zeroing, the final result is 3.67 + (-4.00), i.e. (-0.33), which is negative, and the overall dumping margin is zero. If zeroing is used, the total margin of dumping is 3.67 and the percentage margin is 1.86%.

48. Finally, using the W-to-W comparison methodology, and calculating the "W" as the United States does in original investigations (i.e., over the entire period of investigation), the total margin of dumping is 100.33 – 99, i.e. 1.33, and the percentage margin is 1.34%.[16]

| Comparison Method | Percentage Result |
|---|---|
| W-to-T (Yearly without Zeroing) | 1.34% |
| W-to-T (Yearly with Zeroing) | 2.18% |
| W-to-T (Monthly without Zeroing) | 0 |
| W-to-T (Monthly with Zeroing) | 1.86% |
| W-to-W (Yearly) | 1.34% |

49. Thus, the W-to-W (yearly) and W-to-T (yearly without zeroing) outcomes are the same, as the United States has noted. But the significant point for the Panel's question is that the outcomes are different between the two methodologies, when the W-to-T methodology is based on a monthly

[16] Zeroing is irrelevant in this instance because there is a single comparison for the product as a whole and no "models" for sub-groupings of the product.

calculation of normal value, whether or not zeroing is used in aggregating the intermediate results to calculate the overall margins of dumping. Thus, the United States' own statutory structure establishes a system of W-to-W and W-to-T comparisons that do not yield identical results (or render the third methodology a "nullity", as the United States asserts) in the absence of zeroing. Therefore, applying a W-to-T comparison without regard to a pricing "pattern", the United States is incorrect to assert that a W-to-W and a W-to-T comparison necessarily yield the same results.[17]

50. Finally, it is possible, of course, that a Member *may* choose to use the same time bases to calculate the "W" in the two comparisons, in which case the same outcome might well arise (as seen in the example above, where the "W" is calculated on a yearly basis for both the W-to-W and W-to-T comparisons). But the fact that methods overlap in those circumstances does not nullify the third method because a Member *may* also choose to do otherwise, as the United States itself has done.

51. Accordingly, the United States cannot demonstrate that the W-to-W and W-to-T comparison methodologies result in the same outcome in all situations; indeed, the United States itself has adopted a system in which the different comparison methodologies will not generate the same outcomes. The United States, therefore, has failed to meet the demanding requirement imposed by its argument that Japan's interpretation of the *Agreement* renders the second sentence of Article 2.4.2 a nullity.

**To all parties and third parties**

**Q46. Would the parties, and third parties, please describe how their investigating authorities would apply the provisions of Article 2.2 in a case involving multiple allegedly dumped models of a product under consideration, where there are no sales in the home market of some of those models? Specifically, would the parties consider it obligatory, under that provision, to determine normal value on one single basis for all models, or would the parties consider that Article 2.2.permits the determination of normal value on, for instance, the basis of home market sales for some models, and constructed normal value for others?**

52. Article 2.2 of the *Anti-Dumping Agreement* requires that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country …, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

[17] The outcomes will also differ as between W-to-W and W-to-T comparisons for yet another reason – namely, fluctuations in currency exchange rates over the period of investigation. That is, in calculating margins of dumping, the authorities generally convert the prices and expenses incurred in the currency of the exporting country into their corresponding values in the currency of the importing Member. In a W-to-T situation, the currency conversion generally is performed at the exchange rate in effect on the date of the export transaction (i.e., the date of the "T"). In a W-to-W situation, on the other hand, an average exchange rate is calculated over all the dates of export transactions in the period of investigation of the relevant model (i.e., the period over which the export price "W" is determined). As a result, *even if (contrary to US practice) the normal value "W's" are calculated over the same time period*, the conversion of the data reported in the currency of the exporting country into the currency of the importing Member would almost certainly result in different normal values in the W-to-W and W-to-T situations, except in the unusual circumstance in which the average currency exchange rate over the period of investigation is identical to the rate in effect on the individual dates on which the export transactions occurred. The different normal values, in turn, would lead to different intermediate results when those normal values are compared to the export prices, and hence, different dumping margins.

53. In Japan's view, when there are multiple models of the product under investigation (e.g. Model A, B), and there are sales in the ordinary course for some of those models (e.g. Model A), but not for others (e.g. Model B), investigating authorities can determine normal value on the basis of home market sales for models with sales in the ordinary course (Model A), and can construct normal value for other models (Model B), in order to determine a margin of dumping for the product as a whole.

54. This interpretation does not conflict with the Appellate Body's ruling that the margin of dumping must be established for product as a whole. The results of the comparisons for each model are not "margins of dumping" within the meaning of Article 2.4.2. As the Appellate Body notes, "those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation".[18] Accordingly, the difference between export price and constructed normal value for, for example, Model B does not constitute a "margin of dumping".

**Q47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:**

**(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")**

**(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

55. As explained in its Opening Statement and in reply to Questions 43 and 44, Japan also considers that, under the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, when investigating authorities find a pricing pattern based on purchasers, regions or time periods, they may confine the W-to-T comparison under that sentence to the transactions making up pattern. This enables the authorities to take appropriate account of the pricing differences disclosed by the pattern and to determine the existence and margin of targeted dumping. In support of that argument, Japan notes that the USDOC's Regulations provide that, where such a pricing pattern is found, the W-to-T comparison addressed in the second sentence of Article 2.4.2 is, indeed, confined to the export transactions making up the pricing pattern.

56. According to the text of Article 2.4.2, each of the three methods of comparison constitutes, on its own, a sufficient basis for determining "the existence of margins of dumping". Thus, the "individual margin of dumping"[19] established for an exporter or producer under any one of the three comparison methods[20], including the W-to-T comparison method, confined to the subset of

[18] Appellate Body report, *US – Softwood Lumber V*, para. 97.
[19] Article 6.10 of the *Anti-Dumping Agreement*.
[20] This assumes that, for the third methodology, the prerequisites in the second sentence of Article 2.4.2 have been satisfied.

transactions making up the pricing pattern (whether it is the pricing pattern among different purchasers, regions or time periods), constitutes a valid dumping determination on its own.[21] The imposition of duties based on an individual margin for a given producer or exporter to all imports from that producer or exporter does not give rise to any discrimination under Article 9.2.

57. With respect to duty assessment, Japan notes that, according to the Appellate Body, "the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties."[22] In order to impose anti-dumping duties, Article 9.1 of the *Anti-Dumping Agreement* requires that Members first make "the determination of dumping, injury, and causation under Articles 2 and 3".[23] For purposes of the dumping determination in an investigation, Article 2.4.2 prescribes the comparison methodologies that are to be used. The prior determination of the existence of a (more than *de minimis*) dumping margin, using any one of these methodologies, pursuant to Article 2, permits the imposition of duties under Article 9 on all entries of the product into the territory of the importing Member, provided that the authorities also make affirmative injury and causation determinations under Article 3. In other words, where all the prerequisites relating to "the existence of a dumping margin, injury, and a causal link" "have been fulfilled", the Members are consequently conferred "the rights to impose anti-dumping duties under Article 9" on all imports of the product.[24] The amount of duties initially collected under Articles 9.1 and 9.2 is subject to review under Article 9.3.

**Q48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?**

58. Nothing in the text of the GATT 1994 or the *Anti-Dumping Agreement* supports the view that a supposed concept of "accuracy" is the determinative element in deciding whether a particular comparison methodology is "fair" under Article 2.4 in establishing the existence of margins of dumping. New Zealand assumes that the T-to-T comparison is "the most accurate approach".[25] However, the text of the *Anti-Dumping Agreement* does not suggest that one of the symmetrical comparison methods is more accurate or "fairer" than the other; nor is there any hierarchy between the W-to-W and T-to-T comparison methods. Authorities have discretion to use either one of the methods. Furthermore, there is no basis in the *Agreement* for assessing the "accuracy" of a comparison method because each constitutes a valid and sufficient basis for determining "the existence of margins of dumping".

59. To support its view, New Zealand refers the negotiating history. However, the terms "accurate" or "accuracy" are not used in the document referred to by New Zealand. The document refers to "a more *direct* method of establishing the normal domestic price"[26], but it does not mention "a more *accurate* method". The reference in this document to a perceived "more direct" comparison does not inject into the *Anti-Dumping Agreement* a legal hierarchy between the W-to-W and T-to-T comparison methods. Moreover, as Japan noted in its Oral Statement, "[b]ecause the ordinary

[21] Japan believes that, in situations in which the W-to-T methodology is used to calculate the margin of dumping on the export sales that comprise the "pricing pattern", the *Anti-Dumping Agreement* does not preclude Members from conducting a separate symmetrical comparison for the export transactions that do not form part of the pattern (although it does not compel the Member to do so).

[22] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

[23] *Id*., para. 123.

[24] Id.

[25] New Zealand's Third Party Submission, paras. 3.12

[26] Exhibit NZ-1, para.9. Emphasis added.

meaning of the *Agreement* under Article 31 of the Vienna Convention is neither ambiguous nor absurd, it is not necessary for the Panel to examine the negotiating history".[27]

60. New Zealand suggests a "fair" methodology is one that produces most "accurate" results by targeting the "*dumped goods*" through the exclusion of negative comparison results.[28] New Zealand's approach is predicated on the assumption that the margin of dumping can be established for each individual export transaction. However, this approach overlooks that the result of the individual price comparison for each transaction is merely an intermediate value that must be aggregated with other intermediate values to establish the "margin of dumping" for the product as a whole. Thus, the purpose of the comparison is to ascertain *whether or not there is dumping for the product*, not for each transaction. Yet, because only the *positive* comparison results are aggregated on New Zealand's approach, dumping will almost certainly be found. As a result, as shown by New Zealand's goal of selecting a methodology that targets "dumped goods", an objective inquiry becomes a self-fulfilling prophecy. But as the Appellate Body said in *EC – Bed Linen (Article 21.5 – India)*, the "result" of the authorities' investigation cannot be "predetermined by the methodology itself".[29]

**Q49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).**

61. Japan agrees with the EC's statement that "the price at which a transaction in the home market of the exporting country is concluded, considered in isolation" is not "equivalent to a 'normal value'" because Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 define the "margin of dumping" in terms of the price difference between "the export price of the product" and "the comparable price … for the like product", i.e. normal value for the product. Japan has elaborated fully on this issue in response to Question 41.

62. Therefore, in terms of the definition of the term "margin of dumping" under *Anti-Dumping Agreement* and Article VI of the GATT 1994, a "normal value" is determined for the product, not each transaction in the home market of the exporting country.

**Q50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.**

63. Nothing in the text of Article 2.4.2 suggests that there is a hierarchy between the W-to-W and T-to-T comparison methodologies. Accordingly, a Member has freedom to choose between these two methodologies, "subject to the provisions governing fair comparison in paragraph 4". See the reply to Question 48.

**Q51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of ant-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?**

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[27] Japan's Oral Statement, para.39
[28] New Zealand's Third Party Submission, paras. 3.12 and 3.14.
[29] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

64. As Japan stated in response to Question 47, the Appellate Body has held that "the rules on the determination of the margin of dumping are distinct and separate from the rules on the imposition and collection of anti-dumping duties"[30], and where all prerequisites to determine "the existence of dumping margin, injury, and a causal link" "have been fulfilled", the Members are consequently conferred "the rights to impose anti-dumping duties under Article 9".[31]

65. Accordingly, when a Member's customs authorities assess and collect anti-dumping duties, they are not calculating "margins of dumping" within the meaning of Article VI of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*. Rather, the margins of dumping have already been determined by the investigating authorities, on the basis of Article 2, in investigations or reviews. In terms of Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*, these margins constitute a ceiling on the amount of duties that can be imposed and collected by the customs authorities.

66. Thus, under Articles 9.1 and 9.2, in both the retrospective and prospective systems, the authorities impose anti-dumping duties on imports of a product in appropriate amounts that cannot exceed the margin of dumping previously determined for the product. Under both Articles 9.3.1 and 9.3.2, the authorities may conduct a review to assess whether the total amount of duties initially paid on imports exceed the margin of dumping for the product for the review period. Additionally, in the case of Article 9.3.1, the review may assess whether the amount of duty (or duty deposit) initially paid was less than this margin of dumping. Thus, in light of the determination of the dumping margin for the product conducted in the Article 9.3 review, definitive duties are levied on the product.

[30] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.
[31] Id.

# ANNEX E-6

## NEW ZEALAND'S RESPONSES TO QUESTIONS BY THE PANEL TO THE THIRD PARTIES

2 December 2005

To Third Parties

**Question 46:**

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

Under Article 2.1 of the Anti-Dumping Agreement a product is to be considered as being dumped "if the export price … is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.2 provides for the situation where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when such sales do not permit a proper comparison. In such circumstances the margin of dumping may be determined by a comparison of the export price with a comparable and representative price of the "like product" when exported to an appropriate third country, or with the constructed normal value.

Article 2.2 contains an element of flexibility to allow an investigating authority some discretion in the method it selects to determine normal value. It provides that an investigating authority may use an alternative method to using the home market sales "…when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison". The focus of investigating authorities will generally be home market sales. However, New Zealand considers that in appropriate situations Article 2.2 allows some scope for determining normal value based on home market sales for some models, and constructed normal value for others. An example of this could be the situation that the Panel refers to, i.e. where there are no sales in the home market of some models.

Consideration must also be given in this regard to Article 2.4, which provides that "[a] fair comparison shall be made between the export price and the normal value". The Appellate Body has indicated that this is a general obligation that informs all of Article 2.[1] New Zealand considers that in certain situations, a fair comparison may only be possible if the normal value for a product is assessed on the basis of home market sales for some models, and an alternative method for other models.

[1] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/41/AB/R, paragraph 59.

**Question 47:**

**The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:**

**(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")**

**(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

While this question does not engage New Zealand's systemic interest in this dispute, New Zealand nonetheless considers that the EC is incorrectly distorting the operation of the weighted average-to-transaction methodology. The EC is, in effect, attempting to transform this methodology into a form of weighted average-to-weighted average methodology by suggesting that there is a need to compare weighted average normal values for the transactions forming the "pattern". This interpretation of Article 2.4.2 adds a requirement to this provision that simply is not in the text, and is not there for good reason. The purpose of this method is to allow comparisons of a normal value established on the basis of a weighted average with individual export transactions in appropriate circumstances, and not an average of a number of transactions. The EC's interpretation would substantially alter the operation of the weighted average-to-transaction methodology, an outcome that cannot have been the intention of drafters.

Articles 6.10 and 9.2 do not affect this interpretation. The first sentence of Article 6.10 is simply a requirement that, as a rule, an individual margin of dumping be determined for each known exporter or producer. Article 9.2 concerns the collection of duties. Neither provision impacts on the actual determination of the margin of dumping under Article 2.

**Question 48:**

**Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?**

As New Zealand noted in its Third Party Submission (paras 3.12 and 3.14) a "fair" methodology is one which targets or addresses the dumped imports that are causing injury.[2] Non-

[2] New Zealand notes the observations of the EC in relation to "targeted" dumping in paras 14-16 of its Third Party Oral Statement. The EC appears to misinterpret the New Zealand submission. The core aspect of any dumping investigation must be that it addresses or "targets" the dumping that is occurring. This is not the same as "targeted dumping" which is provided for in the second sentence of Article 2.4.2.

dumped imports should be considered in the injury analysis as one of the "known factors other than the dumped imports". Imports that are not dumped cannot cause injury. It is this approach to each individual transaction that New Zealand believes means the transaction-to-transaction methodology only addresses or targets the dumped imports and therefore produces a fair and accurate result.

**Question 49:**

**Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para 6).**

New Zealand does not support the EC argument that the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value". The EC argument is illogical. It appears to be arguing that the transaction-to-transaction methodology is a comparison of an aggregated normal value in the home market of the exporting country with export prices for individual transactions. This is inconsistent with the EC's own interpretation of the meaning of "transaction" as a "deal".[3] Rather, the transaction-to-transaction methodology requires in normal circumstances the comparison of a "deal" in the export market with a comparable "deal" in the home market of the export country.

By requiring a comparison of the aggregated normal value with export prices for individual transactions, the EC interpretation would equate the transaction-to-transaction methodology with the methodology set out in the second sentence of Article 2.4.2 – the comparison of the normal value established on a weighted average basis with prices of individual export transactions. The text of Article 2.4.2 clearly sets out three methodologies which may be used to establish the existence of margins of dumping – not two methodologies, with one being in the guise of another.

**Question 50:**

**Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.**

Article 2.4.2 of the *Anti-Dumping Agreement* in its first sentence, provides:

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

In New Zealand's view, the use of the term "shall normally be established" in the first sentence of Article 2.4.2 means that one of the two methodologies provided for in that sentence should normally be the methodology used. There is no limitation placed on the freedom of a Member to choose between the two methodologies in establishing the existence of margins of dumping. Both methodologies are "subject to the provisions governing fair comparison in paragraph 4" of Article 2.

[3] EC Third Party Written Submission, paragraph 3.

**Question 51:**

**Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of ant-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?**

The determination of dumping and a margin of dumping is different to the assessment and collection of anti-dumping duties. They are linked to the extent that the provisions of Article 9 restrict the amount of duty that may be collected to no more than the margin of dumping. However, authorities have a discretion within that parameter to collect duties at a lesser rate.

# ANNEX E-7

## THAILAND'S RESPONSES TO THE PANEL'S QUESTION FOR PARTIES AND THIRD PARTIES

2 December 2005

1. Thailand hereby responds to the questions posed by the Panel to parties and third parties following the Panel's meeting with the third parties on 16 November 2005. Thailand has reproduced below the Panel's questions for it and the other third parties, followed by Thailand's response, if any. Thailand appreciates this opportunity to present its views and trusts that these views will assist the Panel in its deliberations.

**To Thailand**

**45. Thailand suggested that there is a wide range of practical ways in which an investigating authority might conduct a targeted dumping margin calculation without recourse to zeroing. Please provide examples.**

2. Thailand considers that there are a number of practical ways in which an investigating authority could conduct a targeted dumping margin calculation without recourse to zeroing. Before discussing these, and providing examples, Thailand considers it important to point out that there is nothing inherent in the zeroing methodology that suggests that zeroing is necessary, or even relevant, to an analysis of targeted dumping. For example, the United States uses zeroing in exactly the same manner with each type of comparison, including weighted average to weighted average ("W to W") (as in the measure before this Panel in the original proceeding), transaction to transaction ("T to T") (as in the measure now before the Panel), or weighted average to transaction ("W to T") (as in the United States' practice in annual reviews). In each instance, the purpose and effect of the zeroing methodology is to reduce the export price used in determining the overall margin of dumping for the product under investigation. Since the methodology is used with all comparison methodologies, it cannot be argued that this methodology plays a special role in making effective the targeted dumping margin calculation under the targeted dumping provision of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

3. Similarly, nothing in the language of the targeted dumping provision suggests that zeroing is either necessary to make the provision effective or even permitted at all. The second sentence of Article 2.4.2 states that "A normal value established on a weighted-average basis may be compared to prices of individual export transactions" in certain circumstances. Nothing in this language contemplates a downward adjustment to the "prices of individual export transactions" that happen to exceed normal value as is done under the zeroing methodology. The targeted dumping provision may be used in circumstances where export prices differ significantly among different "purchasers, regions, or time periods." As used by the United States, the zeroing methodology is applied to all comparisons and does not differentiate among purchasers, regions, or time periods. In Thailand's view, therefore, there is no basis to suppose that the targeted dumping provision is in any way dependent for its effectiveness on the use of the zeroing methodology.

4. Turning to the practical application of the targeted dumping provision, Thailand notes that the investigating authority must first establish a "pattern of export prices" that differ significantly according to purchaser, region or time period. It is important to note that the reference to a pattern of

export prices, rather than a pattern of dumping, suggests that the process of identifying a pattern of export prices is a precursor to the process of actually determining the dumping margins. Once the investigating authority has properly identified a pattern of export prices that differ significantly among purchasers, regions, or time periods, the practical ways in which this provision could be implemented differ according to each circumstance.

5. Starting with significant differences among export prices for different time periods, Thailand notes that the investigating authority could implement the targeted dumping provision simply by splitting the period of investigation into two portions representing the different patterns of export prices. The investigating authority could then use the W to T methodology for sales within the portion of the period of investigation in which targeted dumping is suspected (*i.e.* the portion of the period of investigation with a pattern of significantly lower export prices), while continuing to use either the W to W or T to T comparison methodology for export sales during the other portion of the period of investigation. The investigating authority may then calculate an overall margin of dumping for the product and exporter under investigation based on the results of these two intermediate steps. This margin of dumping gives practical effect to the targeted dumping provision in that it enables the investigating authority to isolate the transactions that may reflect "targeted dumping" and to analyse these transactions differently in the process of determining overall dumping margins.

6. Thailand notes that in *US – Stainless Steel*, the panel concluded that the use of multiple averaging periods to address variations in normal value caused by currency depreciations was inconsistent with Article 2.4.2.[1] The panel's finding was based on an analysis of the first, rather than the second, sentence of Article 2.4.2, and, accordingly, the second sentence of Article 2.4.2 may be read as an exception to the prohibition on the use of multiple averaging periods identified by the panel in the first sentence of that Article.

7. Thailand also notes that the use of transaction-specific export prices, and different average normal values, for a portion of the period of investigation will necessarily result in different intermediate outcomes than the W to W or T to T methods, *unless* variables such as the prices and quantities of domestic sales used to determine average normal values and currency conversion rates remain constant throughout the entire period of investigation. Thus, the panel in *US – Stainless Steel* noted that the mere use of multiple comparison periods could affect the outcome of the calculation of dumping margins.[2]

8. This effect would be increased where different comparison methodologies were used for transactions within the different comparison periods. If a W to T methodology is used for one period, and a W to W or T to T methodology for another, export sales prices in the different periods will be compared to different normal values, with different quantities and perhaps different currency conversion rates.[3]

9. Even without the use of the zeroing methodology, therefore, an investigating authority can readily give practical effect to the targeted dumping provision where patterns of export prices differ significantly among time periods. Accordingly, the sole purpose and effect of the use of the zeroing methodology in these situations is to further affect the outcome by failing to take fully into account the results of individual intermediate comparisons in determining the overall margin of dumping.

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[1] Panel Report, *US – Stainless Steel*, para. 6.125.

[2] Panel Report, *US – Stainless Steel*, para. 6.123 and n. 126.

[3] The W to W methodology would rely on average currency conversion rates; whereas the W to T or T to T methodologies would use currency rates in effect on the date of the export transaction. Depending how currency rates fluctuate, this may have a significant effect on the comparison between export price and normal value under the different approaches.

10. Similar considerations apply to patterns of export prices that differ significantly among purchasers or regions. Thailand notes that the investigating authority could readily address this by using different comparison methodologies for an exporter's sales either to particular importers or indeed to particular customers (and thereby also capturing targeted dumping by region). In situations in which there is no relationship between the exporter and the importer within the meaning of Article 2.3 of the Anti-Dumping Agreement, the importer and purchaser will be the same entity. If exporter A sells to importers B, C, D, and E, and the investigating authority finds a significantly different pattern of export prices to importer E, the investigating authority may use the W to T methodology for sales to importer E while using the W to W or T to T methodologies for the other importers. Similarly, if there is a significant difference in the pattern of export prices for importers D and E in the same region, the investigating authority may use the W to T methodology for sales to importers D and E in that region while using the W to W or T to T methodologies for the other importers.

11. The same approach is also possible in situations in which there is a relationship between the exporter and importer within the meaning of Article 2.3. For example, exporter/producer A may export to importer B, who re-sells to purchasers C, D, and E, and to importer F, who re-sells to purchasers G, H, and I. If the investigating authority considers that there is targeted dumping to purchasers G, H, and I, the investigating authority could conduct a separate comparison for all sales to importer F using the W to T methodology. Again, this can also be applied to purchasers or importers in different regions.

12. In response to the Panel's question, therefore, Thailand sees no practical impediment to implementing the targeted dumping provision without recourse to zeroing. The investigating authority may use the W to T methodology for sales within the identified pattern of significantly different prices while continuing to use the W to W or T to T methodology for other sales. This is consistent with the United States' anti-dumping regulations, which provide that the investigating authority will "normally limit the application of the average-to-transaction method to those sales that constitute targeted dumping".[4] The results of the comparisons for the sales within the identified pattern "are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation".[5]

13. Thailand also notes that since the zeroing methodology is applied *after* the investigating authority has identified the sales within the pattern and *after* it has made its W to T comparisons, the zeroing methodology does not serve any practical purpose of giving effect to the targeted dumping provision. Instead, it simply changes the outcome of the determination of overall dumping margins.[6]

14. Any dumping margin for a product that is based on the use of the W to T comparison for sales within the identified pattern will give sufficient effect to the targeted dumping provision without requiring a further downward adjustment to export prices for so-called zeroing. Thailand also notes

[4] See 19 CFR §351.414(f)(2).

[5] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[6] Thailand notes that if a W to T comparison is being used because a significantly different pattern of export prices by purchaser, region, or time period has been identified, the export prices to that purchaser, region, or period are likely to be *lower* than export prices to other purchasers, regions, or periods (the investigating authority would otherwise have little incentive to use the targeted dumping provisions for those purchasers, regions, or periods). If the investigating authority has properly identified the significantly different pattern of price differences, therefore, it may be assumed that the investigating authority is much more likely to find that the sales within the export pattern are dumped than sales outside the pattern. For this reason also, Thailand questions how it can be consistent with the fair comparison requirement to permit the investigating authority to apply an additional adjustment – in the form of zeroing – after the initial W to T comparison that has the effect of increasing the overall margin of dumping for the product.

that many Members may have discretion to collect duties at the point of importation on a regional, time, or purchaser-specific basis.[7] Since final liability for anti-dumping duties is normally determined on an importer-specific basis, any targeted dumping to a particular purchaser or region is also likely to be reflected in the determination of an importer's final liability for duties on imports during a given period.

15. As discussed above, there is no inherent reason why the W to T methodology cannot be used without zeroing. Moreover, to the extent that the purpose of the targeted dumping provision is to permit the use of an exceptional comparison methodology in analysing transactions that may fall within the definition of targeted dumping, the text of Article 2.4.2 provides only that that purpose may be achieved by the use of the W to T comparison methodology in analysing those transactions. Nothing in the text of that provision further addresses or permits the use of zeroing as part of that analysis. Thus, while the targeted dumping provision permits an "asymmetrical" comparison, that comparison remains subject to the fair comparison requirement of Article 2.4. The mere fact that this asymmetrical comparison is permitted does not, however, further mean that the investigating authority may introduce additional asymmetry into the determination of margins of dumping by subsequently adjusting the results of W to T comparisons using the zeroing methodology.

16. Finally, Thailand notes that to prevail on its argument that the zeroing methodology is necessary because W to T and W to W comparisons would otherwise lead to the same results, the United States would have to prove this mathematical equivalence would result *in every instance*. To the contrary, the evidence before the panel is that the W to W and T to W methodologies do not result in the same outcomes even without zeroing.

**To all parties and third parties**

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

17. In these situations, Thailand would normally calculate a constructed normal value for the models for which there were no home market sales, while using home markets sales as the basis of normal value for any models for which such comparable sales existed.

18. In other words, Thailand does not consider it obligatory to determine normal value on a single basis for all models. Thailand notes that in an investigation involving export sales of many models of a product, there may be various reasons why normal value may have to be determined on a different basis for different models. For example, some models may be sold above cost and others below in the domestic market. In that case, the investigating authority may have to use constructed normal value for the models sold below cost, while using the sales price as the basis for normal value for the models sold above cost.

[7] The United States is prohibited by its domestic laws from establishing different import duties on a regional basis. Nevertheless, the United States may, and does, collect different rates of anti-dumping duty on an importer by importer basis. As a practical matter, this will normally permit the United States to give effect to regional targeted dumping findings: an importer of cement from Mexico into the southwest United States is unlikely to ship those goods by land to the northeast United States.

19. Thailand notes that the results of the comparisons on a model by model basis do not constitute "margin[s] of dumping" with the meaning of Articles 2 and 9 of the Anti-Dumping Agreement. Instead, these results are, in the words of the Appellate Body, "only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation."[8]

**47. The EC suggested, in its answer to a question put by the Panel, that in undertaking a comparison under the methodology of the second sentence of Article 2.4.2, a Member can not determine whether there is a "pattern of export prices which differ significantly among different purchasers, regions or time periods" without conducting what the EC referred to as a disaggregated analysis. The EC then asserted that having found such a pattern on the basis of a disaggregated analysis the Member should then compare weighted average normal values for the transactions forming the "pattern" with weighted average export prices for those transactions. In the EC's view, this would be an application of the targeted dumping methodology that would not involve zeroing. With reference to each of the three types of targeted dumping identified in Article 2.4.2 – (significantly different export prices to different purchasers, regions, or time periods), could the parties, and third parties, please comment on the EC's argument:**

**(a) with specific reference to its consistency with the first sentence of Article 6.10 ("an individual margin of dumping for each know exporter or producer")**

**(b) with specific reference to its implications for duty collection under the first sentence of Article 9.2 (duty shall be collected in the appropriate amounts, on a non-discriminatory basis on imports).**

20. Please refer to Thailand's response to question 45 above and to question 51 below.

**48. Could the parties, and third parties, express their views regarding the proposition that the most "fair" methodology of establishing the existence of margins of dumping is that which produces the most accurate results? (see New Zealand's written submission at para. 3.12) In this case, how can one determine which methodology generates the most accurate results?**

21. Thailand does not consider that the Anti-Dumping Agreement imposes a standard of the "most fair" methodology. Instead, the Anti-Dumping Agreement sets out, in Article 2, certain methodologies that may be used to determine dumping margins. For example, Article 2.4.2 refers to both W to W and T to T comparison methodologies. Both are therefore permissible under the Anti-Dumping Agreement. However, both methodologies must be used in a manner that results in a fair comparison between normal value and export price within the meaning of the first sentence of Article 2.4. Thus, even where the Anti-Dumping Agreement does not specify a hierarchy among permissible methodologies, it nevertheless requires that any permitted methodology that is used to determine dumping margins must be used in a manner that results in a fair comparison. Thailand notes that the panel in *US – Stainless Steel* stated that the Anti-Dumping Agreement expresses no preference between the W to W or T to T methodologies.[9]

22. In Thailand's view, the question is not of the "most fair" methodology. It is that in every instance, under either a W to W or T to T comparison, the addition of the zeroing step in the process results in an unfair comparison whereby not all relevant export prices are taken into account. Paraphrasing the Appellate Body, the result of the comparison thereby becomes "predetermined by the methodology itself."[10] This is not a fair comparison.

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[8] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[9] Panel Report, *US – Stainless Steel Plate*, para. 6.122, n. 124.
[10] Appellate Body Report, *EC – Bed Linen (Article 21.5—India)*, para. 132.

**49. Could the parties, and third parties, express their views concerning the proposition set out in the EC's argument that, in the EC's view, the price at which a transaction in the exporting market is concluded, considered in isolation, is not equivalent to a "normal value" (EC Written Submission at para. 6).**

23. Thailand agrees that the price at which a transaction in the exporting market is concluded is not *per se* a "normal value" within the meaning of Article 2 of the Anti-Dumping Agreement. Instead, it is simply a starting point in the determination of normal value for that product. It may be discarded for the reasons contemplated in Article 2.2, or it may be adjusted for the reasons contemplated in Article 2.4, or it may be averaged together with prices for other transactions to determine the "comparable price, in the ordinary course of trade, *for the like product* when destined for consumption in the exporting country"[11] within the meaning of Article 2.1.other prices in accordance with Article 2.4.2. But the price for an individual transaction is not, in isolation, the "normal value," *i.e.*, the "comparable price, in the ordinary course of trade, *for the like product* when destined for consumption in the exporting country".

**50. Do the parties, and third parties, consider that there are any limitations on the freedom of a Member to choose between the two methodologies set out in the first sentence of Article 2.4.2 in establishing margins of dumping? If so, could you please indicate with precision the textual basis for this view, and further indicate what criteria are to be applied by a Member in choosing between the two methodologies in a given case.**

24. As noted in the response to question 48 above, the panel in *US – Stainless Steel* stated that the Anti-Dumping Agreement expresses no preference between the W to W or T to T methodologies.[12] Thailand notes that there may be circumstances in which one methodology is more suitable than the other. For example, the United States' authorities have stated that the T to T methodology "would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made".[13] In any event, both methodologies must be applied in a manner that results in a fair comparison within the meaning of Article 2.4.

**51. Could the parties, and third parties, express their views on the proposition that the determination of dumping and establishment of margins of dumping on the one hand, and the assessment and collection of anti-dumping duties on other hand, are different, and address the implications of this proposition for the interpretation of "margin of dumping" in the AD Agreement?**

25. Thailand considers that there are significant differences between (i) the determination of the margin of dumping, on the one hand, and (ii) the rules on the imposition and collection of duties on the other hand. This has been confirmed by the Appellate Body.[14]

26. In Thailand's view, there is some potential for confusion in the conflation of the terms "assessment and collection" of anti-dumping duties in how the Panel has stated the proposition in its question. To the extent that the term "assessment" refers to the process of collecting duties at the time

[11] Emphasis added.

[12] Panel Report, *US – Stainless Steel*, para. 6.122, n. 124.

[13] See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, 103d Cong. 2d Sess., House Document 103-316, Vol. 1, page 172. The US Administration went on to explain that "given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Administration expects that [the Department of] Commerce will use this methodology far less frequently than the average-to-average methodology." *Ibid.*, pages 172-173.

[14] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.

of importation, Thailand agrees with the proposition. However, to the extent that the term "assessment" may be interpreted to refer to any determination subsequent to importation – whether under a prospective or retrospective system – of the final liability for anti-dumping duties, Thailand disagrees with the proposition.

27. Thailand considers that there are three steps in the determination of anti-dumping duties on any importation of goods subject to an anti-dumping measure. First, there is the investigation, in which dumping is established for the product under investigation and the margin of dumping for that product is determined. This determination must be made in accordance with Article 2. Second, when the goods are imported, an anti-dumping duty is collected. Under Article 9.2, the amount of the duty to be collected must be "appropriate". However, this amount is not "the margin of dumping as established under Article 2" with respect to any particular importation. This is for practical reasons. No matter what system is used to collect anti-dumping duties, it is not practicable to establish, at the time of importation, the actual margin of dumping for the product being imported.

28. Accordingly, the Anti-Dumping Agreement permits that an "appropriate amount" of duty may be collected at the time of importation. However, Article 9.1 limits the amount of any duty to the margin of dumping. Article 9.3 likewise provides that amount "shall not exceed "the margin of dumping as established under Article 2". Because it is not possible at the time of importation to ensure that the amount collected at the time of importation does not exceed the margin of dumping established under Article 2, Articles 9.3.1-9.3.3 provide for a subsequent determination of the margin of dumping, done in accordance with Article 2, to ensure compliance with Article 9.1 and the chapeau of Article 9.3.

29. In this respect, there is no material difference between the collection of duties and subsequent review of margins of dumping under a prospective or retrospective system. In a retrospective system, such as the United States', an estimated duty amount, generally taken as a percentage of the import value, is collected at the time of importation. This amount is not a "margin of dumping" for that transaction. It has not been determined by calculating an export price or a normal value for the product. It is just an estimate, based on the margin of dumping for that product for the historical period of investigation and the actual value of the imported goods. The actual margin of dumping for that product is determined later, in the course of a review in which a margin of dumping is established based on all export sales and all comparable domestic sales of the product during the period under review. This determination must be made in accordance with Article 2 and, specifically, the fair comparison requirement of Article 2.4.

30. Similarly, under a prospective system such as that practiced by the EC, an estimated duty amount is also collected at the time of importation. In this system, the estimated duty amount is based on the difference between a prospective normal value (PNV) established during the investigation and the import price for each import transaction. Again, this amount is not a "margin of dumping" within the meaning of Article 9.3 or Article 2. It has not been determined by calculating an export price or a normal value for the product. As with the retrospective system, the difference between the PNV and the import price is just an estimate, also based on the margin of dumping for that product for the historical period of investigation and the actual value of the imported goods. And, once again, the actual margin of dumping for that product is determined later, in the course of a refund review in which a margin of dumping is established based on all export sales and all comparable domestic sales of the product during the period under review. This determination must also be made in accordance with Article 2 and Article 2.4.

31. Under both the prospective and retrospective system, the ultimate determination of the margin of dumping with respect to imports during a given period is made in a review that takes place after that period. Thus, under the EC's PNV system, the final margin of dumping is not the difference between the PNV and the value of the imported goods, but is determined based on "evidence, for a

representative period, of normal values and export prices to the Community for the exporter or producer to which the duty applies."[15] Similarly, under the United States' retrospective system, the final margin of dumping is based on the normal values and export prices for all relevant export transactions during the twelve-month period following each anniversary month of the imposition of the measure.[16] These determinations, not the amount collected on importation, constitute the margins of dumping within the meaning of Article 9.3. These margins must be calculated in accordance with Article 2. In doing so, under either a prospective or retrospective system, it is inconsistent with the fair comparison requirement of Article 2.4 to use the zeroing methodology to effectively reduce the export price for certain transactions.

**Table of Cases:**

| **Short Title** | **Full Case Title and Citation** |
|---|---|
| *EC – Bed Linen (Article 21.5 – India)* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003 |
| *US – Softwood Lumber V* | Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004 |
| *US – Stainless Steel* | Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295 |

[15] EC Regulation No. 384/96, Article 11(8).
[16] See section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. 1675(a).

# ANNEX E-8

## CANADA'S COMMENTS ON THE UNITED STATES' ANSWERS TO THE PANEL'S QUESTIONS

13 December 2005

(i) The Text of Article 2.4.2, First Sentence

(a) "Margins of Dumping"

In paragraph 6 of its answers, the United States now argues that "Canada's argument rests on the assumption that the term 'margins of dumping' must have the same meaning throughout the Anti-dumping Agreement."[1] As is clear from all of Canada's submissions to the Panel, Canada has not argued that the term "margins of dumping" must have the same meaning throughout the Agreement.[2] More importantly, the question before this panel is not whether the phrase "margins of dumping" has the same meaning throughout the Agreement but, rather, whether that phrase can have a different meaning when used only once within the same sentence, as the United States argues. The US defence of its "zeroing" practice in the Section 129 Determination is rooted entirely in the rejection of the meaning that the Appellate Body has already ascribed to "margins of dumping" in the first sentence of Article 2.4.2. Up until this Article 21.5 proceeding, the disputing parties and the original panel (including the dissenting panel Member) all agreed that the first sentence of Article 2.4.2 sets out a rule that is applicable to both the weighted-average-to-weighted-average and transaction-to-transaction methodologies without distinction.[3] The grammatical construction of the first sentence confirms this interpretation.

The consistent meaning of the phrase "margins of dumping" within Article 2.4.2 warrants emphasis. In paragraph 11 of its answers, the United States now argues that Canada "understands the phrase 'margins of dumping' to have the same meaning throughout Article 2.4.2, regardless of context." If by "context", the United States means regardless of which calculation methodology set out in Article 2.4.2 is being used, then Canada agrees.[4]

Canada has certain additional observations on US answers regarding the phrase "margins of dumping" and the Appellate Body's interpretation of this term as being for the "product as a whole".

In paragraph 7 of its answers,[5] the United States attempts to reconcile with the text of Article 5.8 its argument that "margins of dumping" are established for each transaction-to-transaction comparison. It states: "Because *investigations* occur with respect to exporters' and producers sales of the product under consideration *collectively,* and *not simply with respect to individual transactions*, Article 5.8 properly applies to a single, overall margin of dumping for each exporter or producer." (Emphases added.) Thus, as the United States' own argument makes clear, "margins of dumping",

[1] The US arguments in paragraph 9 regarding the cumulation requirements of Article 3.3 are irrelevant to anything at issue in this dispute. Aggregation of intermediate comparison results for a producer within a single country is wholly unrelated to cumulation of margins from more than one country.

[2] See, *e.g.*, Responses of Canada to Questions from the Panel, 2 December 2005, at para. 5.

[3] *Ibid.*, at para. 3, footnote 4.

[4] *Ibid.*, at paras. 10-12.

[5] Responses of the United States to Questions from the Panel, 2 December 2005, Question 13.

such as those at issue in this compliance proceeding, are calculated for individual exporters based on the numerous transactions involving a particular exporter, and do not exist for individual transaction-to-transaction comparisons.

In addition, in paragraphs 42-44, the United States attempts to evade the clear implications for this case of the Appellate Body's reasoning in *Softwood Lumber V*. In attempting to show how the words "price difference" in GATT Article VI:2 support its position, the United States ignores the fact that the Appellate Body specifically relied on this provision in defining the terms "dumping" and "margins of dumping."[6] It is not tenable to defend a position counter to the Appellate Body's clear findings when the Appellate Body has used the exact same provision and words to come to a conclusion that is exactly opposite of that urged on this Panel by the United States.[7]

(b) Aggregation Under the Transaction-to-Transaction Methodology

As is clear from its statements in paragraphs 58 and 71-72 of its answers,[8] the United States takes a position in this case that ignores the fact that the results of transaction-to-transaction comparisons are merely an intermediate step in the calculation of the margin of dumping. The Appellate Body found that Article 2.4.2 applies to the aggregation of the results of intermediate values and that the results of intermediate comparisons are *not* margins of dumping.[9] No US argument can change these findings. A margin of dumping under Article 2.4.2 must represent the aggregation of all intermediate values performed for the product as a whole, regardless of the calculation methodology chosen.

Moreover, the US argument by its own logic would mean that Commerce calculated a separate margin of dumping for every export transaction in this case. Such an argument is not credible because it would mean that Commerce would be applying tens of thousands of margins rather than the seven margins it established for the six mandatory respondents and an "all others rate" for the rest of Canadian exporters. If nothing else, Commerce's own application of margins in this case shows that this US argument must fail.

Finally, the argument of the United States, in paragraph 72 of its answers, that "[t]here is no distinction between cases [involving a single transaction] and other cases in which a transaction-to-transaction analysis may be used"[10] again flies in the face of the Appellate Body reasoning in this case. As the Appellate Body has found, "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of the product."[11] The margin of dumping is to be calculated for the universe of investigated transactions. Where there is more than a single transaction to investigate – the "other cases" the United States is referring to in paragraph 72 – there will be multiple intermediate comparison results that will require aggregation to arrive at a margin of dumping within the meaning of Article 2.4.2.[12] Such intermediate results are not, in and of themselves, margins of dumping.

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[6] Appellate Body Report, at para. 93-99. See in particular paras. 94-95 and 99.

[7] Canada has discussed this issue more fully in its submissions and in its answers to the Panel's Questions 1 and 11.

[8] Responses of the United States to Questions from the Panel, 2 December 2005, Questions 23(b) and 27, respectively.

[9] Appellate Body Report, at paras. 96 and 98.

[10] Responses of the United States to Questions from the Panel, 2 December 2005, at para. 72.

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

[12] Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Anti-Dumping Measures Concerning Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22,636, at 22,645 (Dep't Commerce 2 May 2005) (Exhibit CDA-1). See also Canada's Second Written Submission, at para. 23.

(c) "on the basis of a comparison"/"by a comparison of…on a transaction-to-transaction basis"

Turning to the new arguments of the United States in paragraphs 57-61 of its answers, it is clear that the use of the word "basis" in the description of both methodologies in the first sentence of Article 2.4.2 indicates that margins of dumping are normally to be established "using" either of the described methodologies.[13] The United States' arguments ignore entirely the existence of the second "basis" in the description of the transaction-to-transaction methodology.

The word "by" is defined as indicating a "means" or "manner" through which something is done.[14] The text of Article 2.4.2 confirms Canada's position that the use of either two methodologies must not involve zeroing. If Article 2.4.2 prohibits zeroing under one methodology, then it prohibits zeroing under the other methodology. Again, as Canada has consistently pointed out throughout this dispute, the United States has failed to address the fact that there is no language in Article 2.4.2, first sentence, that permits an investigating authority to disregard the results of intermediate values – something it must do to defend its use of zeroing in this case.[15]

(ii) Article 2.4

In paragraphs 1-3 of its answers, the United States offers new attempts at an interpretation of the first sentence of Article 2.4 that would tie it exclusively to the price comparability issues identified in the second through fifth sentences. [16] In the words of the United States, "[t]he first sentence of Article 2.4 does not mean something over and above taking into account differences in comparability, as set out in the second sentence and what comes thereafter." In other words, the United States argues that the first sentence is redundant.

However, as the United States itself argues elsewhere, "[a] provision of the AD Agreement should not be construed in a manner that would render another provision without effect".[17] Canada agrees, and the application of this principle of treaty interpretation alone is grounds for rejecting the US defence under Article 2.4.[18] Furthermore, US arguments ignore the numerous Appellate Body and panel findings that the first sentence of Article 2.4 goes beyond mere price comparability.[19] For these reasons, and for the reasons Canada has set out in its submissions, the Panel should decline the US invitation to interpret Article 2.4, first sentence, out of the text of the Agreement.

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[13] Responses of the United States to Questions from the Panel, 2 December 2005, Question 23.

[14] *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 2002) at 317 "indicating . . . means . . . conditions, manner . . . " (Exhibit CDA-10). See also, *The American Heritage Dictionary of the English Language*, Fourth Edition 2000 by Houghton Mifflin Company, online: Dictionary.com <http://dictionary.reference.com/search?q=by> ("with the use of, or help of; through").

[15] Appellate Body Report, at para. 100.

[16] Responses of the United States to Questions from the Panel, 2 December 2005, Question 12.

[17] Oral Statement of the United States, at para. 34.

[18] The US argument that the "fair comparison" requirement of the first sentence is limited to price comparability adjustments would, in particular, make that sentence redundant to the third sentence, which imposes the obligation to make adjustments – termed "due allowance" – including all adjustments needed for price comparability, not just those specifically enumerated in that sentence. The terms of a treaty must not be interpreted so as to make any of its provisions redundant.

[19] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted 12 March 2001, at para. 55; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, adopted 9 January 2004, at para. 134; *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R, adopted 1 October 2002, at paras. 7.333-7.334; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, Report of the Panel, WT/DS294/R, circulated 31 October 2005, at paras. 7.256, 7.262.

(iii) Article 2.4.2 Second Sentence

Canada concludes its comments by addressing the argument the United States has made concerning the targeted dumping methodology provided for under the second sentence of Article 2.4.2. The issue this Panel has been asked to resolve – whether the US use of zeroing under the transaction-to-transaction methodology in the Section 129 Determination is inconsistent with US WTO obligations – raises issues of interpretation regarding the *first* sentence of Article 2.4.2 and Article 2.4. Resolution of these issues does not require the Panel to opine on whether zeroing is required under the *second* sentence of Article 2.4.2 to make that separate provision effective. That said, Canada notes that the United States has itself now demonstrated the flaw in its own argument.

In paragraphs 25-27 of its answers, the United States undermines its own "mathematical equivalence" argument when it explains, for the first time, how US regulations implement the second sentence of Article 2.4.2.[20] The explanation given by the United States highlights the fact that the "preamble" to the US regulations contemplated no other way to properly implement the targeted dumping provision other than by: (1) using the targeted dumping provision for those sales fitting one of the three "types" of patterns set out in Article 2.4.2, second sentence; and (2) using a weighted-average-to-weighted-average comparison for sales outside the pattern.[21] The "preamble" contemplates only one way to use the targeted dumping provision notwithstanding: (a) the numerous examples to the contrary provided by Canada, the EC, Japan, and Thailand in submissions and answers to the panel's questions that show how the targeted dumping provision can work in any number of hypothetical scenarios[22], (b) that the "preamble" ignores the possibility of using the transaction-to-transaction methodology for addressing the remainder of non-targeted export transactions, which, in and of itself, would undoubtedly produce a different result than the mandated use of the weighted-average-to-transaction methodology[23], and (c) that the "preamble" seems to contemplate the application of only a single margin of dumping (by combining the margins calculated under the targeted and non-targeted analyses), even though the text of Article 6.10 does not restrict an investigating authority to calculating only a single margin of dumping. The US explanation therefore simply confirms that the "mathematical equivalence" argument is premised on a single – and to this point theoretical – way in which the targeted dumping provision might be implemented.[24]

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[20] Responses of the United States to Questions from the Panel, 2 December 2005, Question 17.

[21] The statement in paragraph 21 of the US answers that "the average-to-average method would [still] be applied to the remaining sales" is not contained in the text of Commerce's regulations. The statement comes solely from Commerce's "preamble" to its "proposed regulations." Commerce's regulations merely provide that Commerce "will limit the application of the average-to-transaction method to those sales that constitute targeted dumping". Those regulations say nothing about aggregating those results with results under the average-to-average method to calculate a single weighted-average margin. The citation at the end of paragraph 27 also is to the "preamble", and not to Commerce's regulations. The United States admits that it has no experience with the targeted dumping provision and provides no explanation as to why no approach other than the one it proposes in its answers, in any given case, would not meet the requirements of the Agreement.

[22] Canada notes that at paragraphs 37 and 38 of its answers, the United States incorrectly states that in Canada's hypothetical example involving a seasonal product the denominator in such a case would be exports for the entire year. Rather, as Canada has explained, the denominator for the margin calculated for the 3-month seasonal period would be composed of exports in that 3-month period, while the separate denominator for the margin calculated for the balance of the year would be exports in that 9-month period.

[23] In this regard, see in particular answer by Japan to the Panel's Question 44, which highlights differing results when the weighted-average-to-weighted-average methodology is replaced with a transaction-to-transaction methodology. The United States does not dispute that its "mathematical equivalence" argument must fail if there is a single situation in which the results without zeroing would not be mathematically equivalent.

[24] Canada notes that the United States' own regulations indicate that even the United States would not calculate targeted dumping margins in the manner indicated in its mathematical equivalence example. The US regulations state that in a targeted dumping investigation, Commerce "may apply the average-to-transaction

Canada, the Third Parties, and US regulations themselves, have all demonstrated that the premise to the US "mathematical equivalence" argument fails. So too, therefore, does the US argument itself.

We again thank the Panel for its efforts in contributing to the resolution of this dispute.

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methodology, as described in paragraph (e) of this section" and paragraph (e) states that Commerce "will limit the averaging of such prices [normal values] to sales incurred during the contemporaneous month." 19 C.F.R. section 351.414 (Exhibit CDA-6). Canada notes that paragraphs 45-48 of Japan's answers demonstrate that if monthly weight-averages of normal values are used, the resulting dumping calculation is not equivalent to the result calculated under the weight-average-to-weight-average methodology.

# ANNEX E-9

## COMMENTS OF THE UNITED STATES ON CANADA'S AND THE THIRD PARTIES RESPONSES TO THE PANEL'S QUESTIONS

13 December 2005

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| *US – Zeroing (Panel) (EC Complainant)* | Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, circulated 31 October 2005 |
| *US – Softwood Lumber (AB)* | Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004 |

1. The United States appreciates the opportunity to comment on the responses of Canada and the third parties to the questions of the Panel. In order to provide the most comprehensive set of comments in the most efficient manner possible, the United States has organized its comments according to the major themes that have been developed in this dispute. Within each theme, the United States addresses various new or different points made by Canada and the third parties in their responses to questions.

### I. MARGINS OF DUMPING

2. Canada's theory of the case is premised on its understanding of the term "margins of dumping" as it is used in Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). That understanding is based, in turn, on an understanding of the references to certain "price" differences in Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 2.1 of the AD Agreement. Canada's responses to a number of the Panel's questions reflect both internal inconsistencies in Canada's argumentation and inconsistencies between its construction of Articles 2.4.2 and 2.1 of the AD Agreement and Article VI:2 of the GATT 1994, on the one hand, and other AD Agreement articles, on the other hand.[1] In these comments, the United States will explore certain of the more glaring examples of these inconsistencies.

3. A central issue in this dispute is whether the term "margins of dumping" in Article 2.4.2 may be interpreted, in context, to refer to the results of transaction-to-transaction comparisons, or whether it can refer only to a single margin of dumping for a producer/exporter for the product as a whole. A number of the Panel's questions explored various aspects of this issue and, as discussed below, Canada was unable to reconcile its arguments with the ordinary meaning to be given to the terms of the AD Agreement in their context and in light of its object and purpose.

[1] Similar inconsistencies are evident in the response of third parties.

4. In its responses dealing with the issue of what constitutes a margin of dumping, Canada's general approach is to suggest that the meaning of the term "margins of dumping" may vary with context *outside of* Article 2.4.2 but may not do so *within* Article 2.4.2.[2] Canada offers no principled basis for this distinction. In response to Questions 3 and 11, Canada does explain why it believes that the term "margins of dumping" may only have one, unvarying meaning within Article 2.4.2. There, Canada seeks to rely on the Appellate Body's reasoning in the underlying dispute, (in the context of an analysis of the average-to-average methodology provided for in Article 2.4.2), which lead to the Appellate Body's conclusion that GATT 1994 Article VI:2 defines "margin of dumping" as relating to "the product as a whole".[3]

5. Canada denies the relevance of the fact that the Appellate Body's analysis there was in a context not at issue here. In other words, it dismisses entirely the "integrated manner" in which the Appellate Body analyzed the terms "margins of dumping" and "all comparable export transactions".[4] If Canada were correct – if the Appellate Body's analysis of the term "margins of dumping" was simply an abstract analysis with no connection to the context of the dispute – then Canada's argument that the Appellate Body's reasoning can be transposed to other contexts should apply *without limit*. In that case, the Appellate Body's interpretation of the term "margins of dumping" seemingly would apply throughout the AD Agreement, every single time that term is used. Not only would that extension of the Appellate Body's reasoning lead to absurd results in other contexts,[5] but it also would be inconsistent with a number of Canada's other responses.[6] Given the anomalies that would result from extending the Appellate Body's reasoning beyond the context in which it was developed, and the internal inconsistencies that would result in Canada's own argument, it must be concluded that the Appellate Body's analysis took into account the particular context in which it occurred, as the United States has argued.

6. The inconsistency between Canada's assertion that the reasoning of the Appellate Body in the underlying dispute should be extended without regard to context, on the one hand, and arguments Canada makes elsewhere in its submissions, on the other, is evident in its discussions of its own prospective normal value system. For example, in response to Question 4, Canada notes that in a prospective normal value system, the investigating authority assesses anti-dumping duties when the export price is less than the relevant normal value, "but applies no anti-dumping duties to non-dumped transactions when the opposite is true."[7] In response to Question 21, Canada makes similar assertions in explaining the operation of its own prospective normal value system.

7. Canada's statements about the assessment of anti-dumping duties in a prospective normal value system (including its own) amount to an acknowledgment that, in the assessment context, a margin of dumping may be determined with respect to an individual export transaction. It follows from this acknowledgment that the term "margin of dumping" as used in Article 9.3 of the AD Agreement (which concerns assessment) does not refer to a margin of dumping for the product as a whole. Here is an instance in which the Appellate Body's understanding of the term margin of dumping in the underlying dispute plainly cannot be extended from one context (the portion of

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[2] *Compare* Responses of Canada to Questions to the Parties Following the Substantive Meeting of the Panel ("Canada Responses"), paras. 1-3 (same meaning in Article 2.4.2) *with id.*, paras. 5 ("unclear" whether it has the same meaning throughout), 10-13, and 62 (Canada implemented Article 5.8 interpreting that use of "margin of dumping" as related to a country) (2 Dec. 2005).

[3] Canada Responses, paras. 9 and 47.

[4] *See US – Softwood Lumber (AB)*, para. 85.

[5] *See* Answers of the United States to the Panel's 18 November 2005, Questions ("US Answers"), paras. 51-56 (2 Dec. 2005).

[6] *See, e.g.*, Canada Responses, paras. 13, 18-20, 23, 28, 51-52, 62, 69-72, and 81.

[7] Canada Responses, para. 13.

Article 2.4.2 concerning the application of the average-to-average methodology) to another context (assessments as addressed in Article 9.3). Accordingly, even Canada's own statements demonstrate that context is, in fact, relevant in interpreting the term "margin of dumping". But, once it is shown that context is relevant to the interpretation of this term, Canada's theory that the Appellate Body's interpretation of "margin of dumping" in one context can be extended without regard to context necessarily falls apart.

8. The EC also posits an erroneous interpretation of the term margin of dumping, which gives rise to internal inconsistencies in its own argumentation. The problems in the EC's argument are evident from the EC's manipulation of key terms in the relevant AD Agreement articles. For example, in its response to Question 4, the EC addresses the US argument that an interpretation of the term margin of dumping as referring consistently to a margin for the product as a whole throughout the AD Agreement, without regard to context, would result in absurd results when it comes to assessments, as addressed in Article 9.3. In particular, the EC addresses the United States' argument that this interpretation would result in an importer paying anti-dumping duties bearing no relationship to the difference between export prices paid by the importer and normal values.

9. In attempting to counter the US argument, the EC ignores the term "anti-dumping duty" as used in Article 9.3. Instead, the EC develops its argument by referring to the concept of "the total dumped amount collected from both importers", a term not used in Article 9.3 or anywhere else in the AD Agreement.[8] By referring to "the total dumped amount" rather than the actual anti-dumping duty paid by either importer, the EC avoids reconciling its proposition that the term "margin of dumping" always means margin of dumping for the product as a whole (and, in that sense, is an exporter-oriented concept) with the reality that anti-dumping duties are paid by individual importers. Moreover, by focusing its discussion on "the total dumped amount", the EC glosses over the fact that in a situation involving purchaser-specific targeting, where a margin of dumping is established *for the product as a whole*, an importer that paid relatively high prices could also be required to pay relatively high anti-dumping duties if other importers paid relatively low prices.[9]

10. By taking an exporter-oriented approach to the subject of assessment, the EC ignores the terms of Article 9.3 of the AD Agreement. The point of an assessment proceeding is to determine the appropriate amount of anti-dumping duty to be paid by an importer. Article 9.3.2 requires an assessment proceeding when a request, "duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty".[10] Consistent with this language, Members with prospective normal value systems commonly limit the focus of any assessment proceeding to a particular importer, rather than expanding the focus to all importers of the product from a given producer/exporter.[11] Like Canada, the EC is unable to reconcile its position that "margin of dumping" can have only one, unvarying meaning throughout the AD Agreement (*i.e.*, that it must always refer to a margin for the product as a whole) with the consequences of that interpretation for Article 9 of the AD Agreement.

11. A second internal inconsistency in Canada's argumentation may be found in Canada's understanding of the "prices" to be compared in order to determine whether margins of dumping exist. The term "price" is central to Canada's argument with respect to "margin of dumping" because the definitions of both "dumping" in Article 2.1 and "margin of dumping" in Article VI:2 of the GATT 1994 use the term "price." Canada relies on the proposition that under the AD Agreement, "price" unvaryingly refers to the price of the product as a whole (as distinct from the price of a particular transaction). It follows from that premise, according to Canada, that a product is dumped only when

[8] EC Responses to Panel Questions ("EC Responses"), p. 3 (response to Question 4) (2 Dec. 2005).
[9] *See* US Answers, para. 94, n. 49.
[10] *See also* EC Responses, p. 19 (response to Question 42).
[11] *See, e.g.*, Canada Responses, para. 52.

the export price for the product as a whole is less than the comparable normal value for the product as a whole. If Canada's premise is wrong – if a "price" in fact can be associated with a single transaction – then the rest of Canada's argument does not hold up. Once it is established that a *price* may be transaction-specific, it follows, under the terms of the AD Agreement, that a *margin of dumping* may be transaction-specific. In fact, despite an initial assertion that "price" in the AD Agreement always refers to the price of a product as a whole, Canada goes on to contradict itself in a way that undermines its own argument.

12. According to Article 2.1 of the AD Agreement, "a product is to be considered as being dumped, i.e.[,] introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." In response to Question 30, Canada stated that the term "price" as used in that article "should be interpreted to relate to the price of the product as a whole."[12] In Canada's view, it does not matter whether normal value and export price are compared on an average-to-average basis or a transaction-to-transaction basis. In either case, "price" as used in Article 2.1 means price for the product as a whole, according to Canada.

13. When it comes to Article 2.2, however, Canada abandons the proposition that "price" necessarily means price for the product as a whole. Article 2.2 concerns situations in which a normal value may not be established based on sales in the home market. In such situations, Article 2.2 permits the use of "a comparable price of the like product when exported to an appropriate third country" as the normal value. Alternatively, it permits the use of a constructed normal value (*i.e.*, "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits").

14. In Question 46, the Panel posited the circumstance in which a product under consideration consists of several models, some of which are not sold in the domestic market. In its response, Canada acknowledged that for models not sold in the domestic market, a third-country or constructed normal value may be used pursuant to Article 2.2, whereas normal value must be based on domestic market sales for other models.[13] In other words, in this situation, Canada concedes, Article 2.2 may be read to permit more than one "comparable price" for the product as a whole. In Canada's view, this is not "problematic", because the use of multiple "comparable prices" permits "the 'margin of dumping' [to be] calculated in a more accurate manner".[14]

15. With that concession, however, the logic of Canada's argument falls apart. Once it is admitted that there is not necessarily one single price for a product as a whole, and that there may be distinct prices associated with different models or sub-groups of a product, then there is no logical basis for asserting that a price cannot be a transaction-specific concept. If that is true for Article 2.2, then it must also be true for Article 2.1. Those two provisions are closely inter-related. Article 2.1 establishes the basic proposition that a product is to be considered dumped "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course

[12] Canada Responses, para. 68; *see also* Replies of Japan to the Questions from the Panel ("Japan Responses"), para. 14 (2 Dec. 2005).

[13] Canada Responses, paras. 69-70.

[14] Canada Responses, para. 70. Similarly, the EC simply asserts that a mix of normal value "comparable price[s]" is permissible as "an efficient means of making intermediate comparisons". EC Responses, p. 20 (response to Question 46). Thailand does not consider the language of Article 2.2 to be obligatory to the extent that it is inconsistent with its views as to the term "margin of dumping" for purposes of this dispute. Thailand Responses to Panel Questions ("Thailand Responses"), paras. 17-18 (2 Dec. 2005). Like Thailand, Japan simply asserts that normal values may be established on different bases, but, without regard to the language of Article 2.2, asserts that comparisons using such normal values cannot constitute margins of dumping because they do not represent the product as a whole. Japan Responses, paras. 53-54.

of trade, for the like product when destined for consumption in the exporting country". Article 2.2 then establishes how the "comparable price of the like product" may be established in certain specified circumstances.

16. Since the "comparable price" may be a price associated with a single transaction then, under Article 2.1, a product may be considered to be dumped if the export price in a particular transaction is less than the comparable price for the like product in a particular transaction. Likewise, pursuant to Article VI:2 of the GATT 1994, the "margin of dumping" (*i.e.*, the difference between the export price and the comparable price for the like product) can be based on a transaction-to-transaction comparison.[15] Thus, consistent with the United States' understanding of Article 2.4.2, transaction-to-transaction comparisons of normal value and export price can yield results that are themselves margins of dumping. Since it is not the case that a margin of dumping can exist only for the product as a whole (and, therefore, only an aggregation of transaction-to-transaction comparisons can yield a margin of dumping), the argument that an offset for non-dumped transactions must be provided in the course of developing a margin of dumping when the transaction-to-transaction comparison methodology has been used must fail.

17. A third argument in the attempt to show that a margin of dumping may not be established on a transaction-specific basis is suggested by the EC. It contends that the price to which an export price is compared in a transaction-to-transaction comparison is not itself a normal value.[16] The EC's theory appears to be that since a margin of dumping is the result of a comparison between export price and normal value, if a single transaction cannot constitute a normal value, then a comparison with a single transaction cannot yield a margin of dumping. An insurmountable obstacle to that theory is the ordinary meaning of the terms of Article 2.4.2. That article permits a Member to establish the existence of margins of dumping "by a comparison of normal value and export prices on a transaction-to-transaction basis". As discussed in the US response to Question 23, the ordinary meaning of this language is that a transaction-to-transaction comparison is an operation that yields a result that may itself constitute a margin of dumping.

18. Nevertheless, the EC attempts to explain its theory by providing an example in response to Question 39.[17] As the United States understands it, this example tries to show how "the underlying normal value for the product as a whole" (in the EC's terms) can be discerned if, as the EC asserts, the individual transactions to which export prices are compared are not themselves normal values.

19. The EC's example assigns each home market transaction a weight based on the volume of the corresponding export transactions. It then totals the export-weighted home market transactions and compares that aggregate number to an aggregate of export prices. The principal flaw in this illustration is that it does not actually involve a transaction-to-transaction comparison. Rather, it is a comparison of aggregated home market prices with aggregated export transactions.

20. Weighted comparisons between normal value and export price are expressly provided for in the *first* comparison methodology described in Article 2.4.2. Similarly, in the second sentence of Article 2.4.2, the description of the targeted dumping methodology refers explicitly to weighting ("[a] normal value established on a weighted average basis"). Clearly, where the drafters of the AD Agreement intended a comparison to involve weighting, they understood how to indicate that in the text of Article 2.4.2.

21. As the transaction-to-transaction methodology set forth in Article 2.4.2 does not involve weighting, the EC's illustration is inapposite. It fails to overcome a critical flaw in the EC's theory –

[15] US Second Written Submission, paras. 29-39.
[16] EC Third Party Submission, para. 15.
[17] EC Responses, p. 18 (response to Question 39).

*i.e.*, the inability to identify the normal value component of a comparison that would yield a margin of dumping under the application of the transaction-to-transaction methodology.

22. For the foregoing reasons, as well as the reasons set forth in the prior US submissions and statements, the Panel should reject Canada's argument that the Appellate Body's reasoning in the underlying dispute should be extended without regard to context and that, therefore, the term "margins of dumping" should be interpreted everywhere it appears in the AD Agreement as referring to margins of dumping for the product as a whole.

## II. NULLIFICATION OF THE TARGETED DUMPING COMPARISON METHODOLOGY

23. Canada claims that the comparison methodology used by the United States in the Section 129 Determination is inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement because, when determining the overall margin of dumping, the United States did not apply an offset to the amount of dumping found. According to Canada, the United States should have applied such an offset, equal to the amount by which individual non-dumped transactions exceeded normal value. The United States responded that, among other flaws in this argument, if the Panel were to construe either Article 2.4.2 or Article 2.4 as Canada proposes, it would have the effect of nullifying the targeted dumping comparison methodology provided for in the second sentence of Article 2.4.2. That comparison methodology permits Members to make average-to-transaction comparisons when a pattern of differences in export prices exists among purchasers, regions, or time periods and such differences cannot be taken into account under either the average-to-average or transaction-to-transaction comparison methodology. If an investigating authority were required to make the offset that Canada proposes, the results of average-to-transaction comparisons would be mathematically indistinguishable from the results of average-to-average comparisons. It is in this sense that the second sentence of Article 2.4.2 would be rendered null.[18]

24. One panel has already found that if the "fair comparison" provision of Article 2.4 is construed to require an investigating authority to apply non-dumped amounts as an offset to dumped amounts, the effect will be nullification of the targeted dumping comparison methodology.[19] Evidently aware of this dilemma, Canada and certain third parties have sought to identify hypothetical scenarios in which the application of an offset under the targeted dumping comparison methodology would lead to results different from results under the average-to-average comparison methodology.

25. In considering these hypothetical scenarios, it is important to keep in mind Canada's argument (discussed above) that a "margin of dumping" necessarily, and without regard to context, relates to the "product as a whole". By Canada's reasoning, that conclusion is compelled by Article VI:2 of the GATT 1994 and does not depend on which comparison methodology is used to establish the existence of margins of dumping.[20]

26. As the United States discussed at the meeting with the Panel, the hypothetical scenarios that Canada posits in response to the US demonstration that an offset requirement would render the targeted dumping comparison methodology null are at odds with Canada's assertion that the term "margin of dumping" necessarily refers to a margin of dumping for the "product as a whole". Canada's responses to the Panel's questions have only confirmed this inconsistency. For example, in response to Question 5, Canada indicated that in a regional targeted dumping analysis, the investigating authority could simply choose to disregard non-dumped transactions outside of the

[18] US Second Written Submission, paras. 20-23.
[19] *US – Zeroing (EC Complainant)*, para. 7.266.
[20] *See, e.g.*, Canada Responses, para. 6; *see also* Japan Responses, paras. 11 and 13.

targeted region.[21] That statement plainly is irreconcilable with Canada's statement (also in reply to the Panel's questions) that a margin of dumping must be determined for "all of the exports of the product under investigation made by a particular exporter or producer".[22]

27. Moreover, if Canada accepts that "margin of dumping" does not always refer to a margin of dumping for the product as a whole – as it must in order for its hypothetical scenario to show what Canada wants it to show – then there is no principled basis for concluding that a margin of dumping can never be the result of a transaction-to-transaction comparison. Canada's argument relies critically on the absolute proposition that "margin of dumping" always and without exception means a margin of dumping for the product as a whole. Once it admits exceptions, it cannot defend the proposition that a transaction-to-transaction comparison may never be a margin of dumping. However, as just shown, Canada must admit exceptions in order to posit a hypothetical scenario in which the targeted dumping comparison methodology with offsets is not redundant with the average-to-average comparison methodology with offsets.

28. In short, either "margin of dumping" always refers to the product as a whole (in which case Canada cannot posit a hypothetical in which, under its asserted offset requirement, the targeted dumping methodology would not be rendered null), or "margin of dumping" may sometimes refer to a universe other than the product as a whole (in which case, there is no principled basis for finding that a transaction-to-transaction comparison may not be a margin of dumping). In either case, Canada's argument must fail.

29. A further problem with Canada's suggestion that when applying the targeted dumping methodology it is permissible to establish a margin of dumping for a mere subset of the product as a whole is that this argument ignores Article 6.10 of the AD Agreement. Article 6.10 addresses explicitly the circumstances in which less than all export transactions may be examined in an investigation. The existence of a case of targeted dumping is not one of those circumstances. Nor does Article 2.4.2 itself permit an investigating authority to examine less than all export transactions.

30. The EC, too, simply disregards the inconsistency within its own arguments. Like Canada, the EC tries to identify a hypothetical scenario in which the targeted dumping comparison methodology could be applied, with offsets for non-dumped amounts, but without yielding a result indistinguishable from application of the average-to-average comparison methodology with offsets.[23] Also like Canada, the EC argues that "margins of dumping" must refer to margins of dumping for the product as a whole, where "'the product' is 'the product' as defined by the investigating authority at the outset of the original proceeding".[24] According to the EC, determining a margin of dumping for the product as a whole requires applying non-dumped amounts as offsets to dumped amounts when aggregating comparison results. For the reasons just explained, the EC's "product as a whole" argument cannot logically co-exist with the EC's attempt to demonstrate a hypothetical scenario in which application of the targeted dumping comparison methodology with offsets is not redundant with the average-to-average comparison methodology.

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[21] *See, e.g.*, Canada Responses, paras. 18-20; *see also* EC Responses, p. 2 (response to Question 1); Japan Responses, para. 29.

[22] Canada Responses, para. 48. Canada parenthetically attempts to redefine this statement by suggesting that the "product under investigation" refers to the "'universe' of transactions that are aggregated to arrive at a margin of dumping". *Id.* Canada's self-serving redefinition, however, finds no support in the AD Agreement. *See also* EC Responses, p. 2 (response to Question 2), (attempting to redefine the "product as a whole" as the subset that is composed of "the relevant data set"); Japan Responses, para. 56 (asserting that a calculation limited to a subset of export transactions can constitute a valid dumping determination on its own).

[23] *See* EC Responses, pp. 12-13 (response to Question 33).

[24] EC Responses, p. 11 (response to Question 32).

31. In an effort to reconcile these two irreconcilable positions, the EC makes reference to Article 4.2 of the AD Agreement.[25] Article 4.2 concerns the special situation in which "the domestic industry has been interpreted as referring to the producers in a certain area" within a Member's territory. In that case, absent a constitutional impediment to doing so, anti-dumping duties are to be levied "only on the products in question consigned for final consumption to that area".

32. The EC reasons that since a particular region within the territory of a Member may be treated as a distinct market within the territory of a Member for purposes of Article 4.2, it also could be treated in that same distinct way for purposes of application of the targeted dumping methodology under Article 2.4.2. Thus, according to the EC, where the targeted region also is the region identified as a distinct market under Article 4.2, anti-dumping duties determined pursuant to the targeted dumping comparison methodology could be imposed exclusively on products consigned for final consumption to that region. The EC argues that this would be an instance in which the provision of offsets under the targeted dumping comparison methodology would not cause application of that methodology to be redundant with application of the average-to-average methodology.

33. The EC's argument relies on conflating a concept from Article 4.2 with a concept from Article 2.4.2 based on a superficial similarity (*i.e.*, the reference to "a certain area" in the former and to "regions" in the latter). The concept of a distinct "market" as referred to in Article 4.2 (and defined in Article 4.1(ii)), is not the same as the concept of a targeted "region" in Article 2.4.2. But the EC simply ignores that difference. Having done so, it then argues that the "product as a whole" may be considered to be the product as a whole with respect to that distinct market, which the EC equates with the regional targeted dumping. Following this line of reasoning, according to the EC, a Member could establish a separate margin of dumping for a targeted region (a result that would be different from the result under the average-to-average methodology), and this approach would not violate the principle that a margin of dumping may be established only for a product as a whole.

34. The basic premise of the EC's argument – that "market" as used in Article 4.2 equates to "region" as used in Article 2.4.2 and that, accordingly, a margin of dumping for a product as a whole may be a margin of dumping restricted to a particular region – is fatally flawed. In fact, Article 4.2 is relevant to the present analysis precisely in the way that it *differs* from Article 2.4.2.

35. Article 4.2 of the AD Agreement deals expressly with a situation in which a certain geographical area within a Member's territory constitutes a distinct market. If that situation exists, and if the injury determination was based on an examination of producers within that market, the Member ordinarily is *required* to focus anti-dumping duties on goods consigned to the geographical area at issue. However, in setting forth this requirement, the drafters of the AD Agreement recognized that for certain Members, as a matter of their constitutional law, it may be impossible to limit the imposition of anti-dumping duties to particular geographical regions within their territory. For these Members, therefore, Article 4.2 permits the imposition of anti-dumping duties without limitation, even though the determination of injury was focused on a distinct geographical market, provided that specified conditions are met.

36. In sum, what Article 4.2 shows is that when the drafters of the AD Agreement intended that a Member ordinarily treat a particular geographical area as a discrete market for certain purposes in the application of its anti-dumping law, they took into account the possible constitutional impediments to doing this facing some Members. They made special allowances to deal with those impediments. The fact that they did so strongly indicates that they would not have authorized Members to treat a particular geographical area as a discrete market without also providing for these special allowances.

[25] *See* EC Responses, p. 12 (response to Question 33).

37. Unlike Article 4.2, Article 2.4.2 does not make special allowances to deal with constitutional impediments to treating a particular geographical area as a discrete market. The absence of such allowances supports the conclusion that, contrary to the EC's argument, the drafters of the AD Agreement did not intend a Member to treat a particular geographical area within its territory as a distinct market for purposes of establishing a margin of dumping through application of the targeted dumping comparison methodology. Accordingly, the contrast between Article 4.2 and Article 2.4.2 further demonstrates that the EC's argument is wrong, and that in establishing a margin of dumping using the targeted dumping comparison methodology (or, for that matter, either of the other methodologies in Article 2.4.2) a Member may *not* focus exclusively on exports consigned to a particular region.

38. Alternatively, the EC argues that under the targeted dumping comparison methodology, margins of dumping may be established for the targeted region without applying non-dumped amounts from outside the targeted region as offsets, and that this is not the same as what it calls "simple zeroing".[26] In fact, what the EC is doing in this alternative argument is changing the label attached to the act of aggregating dumped amounts while not applying an offset for non-dumped amounts. Since it believes that refraining from applying an offset in this case is "justified by the identification of a pattern of targeted dumping", it argues, in essence, that the fact of not providing an offset should not bear the label "simple zeroing".[27]

39. This alternative argument defies logic. If, as the EC argues, so-called "zeroing" is always impermissible, it cannot become permissible simply by changing its name in a setting in which the EC believes it should be permissible. In sum, like Canada, the EC fails to reconcile its argument that a margin of dumping must always refer to a margin of dumping for the product as a whole (in which case "zeroing" must be impermissible) with its argument that the targeted dumping comparison methodology can be applied without "zeroing" in a way that would yield results different from the results of application of the average-to-average methodology. The two arguments cannot logically coexist.

40. In addition to its hypothetical scenario involving regional targeted dumping, Canada posits a second hypothetical scenario in which an investigating authority determines not one, but multiple margins of dumping for producers/exporters that have demonstrated the requisite pattern of targeted dumping.[28] Canada appears to recognize the need to reconcile this hypothetical with Article 6.10 of the AD Agreement, which states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". However, its argument amounts to nothing more than a rejection of the terms of Article 6.10.

41. Canada simply asserts that Article 6.10 "should not be interpreted to prevent investigating authorities from providing an exporter with more than one margin of dumping".[29] It argues that Article 6.10 should be read as a requirement to provide each producer/exporter with a company-specific margin, instead of a country-wide margin. Thus, according to this view, multiple margins of dumping could be determined for a single producer/exporter, as long as those margins were company-specific. The obligation in Article 6.10, however, is more precise. It refers to an individual margin of dumping for each producer/exporter concerned "of the product under investigation". The latter phrase

[26] EC Responses, p. 12-13, (response to Question 33).

[27] EC Responses, p. 13; *id.*, p. 19 (response to Question 44); *see also id.*, p. 14 (response to Question 35(a)), where the EC seeks to rely on its theory that the targeted dumping comparison methodology, justified by a pattern of *export* prices, constitutes a basis for a due allowance for a difference affecting price comparability *between the export price and the normal value*. The United States respectfully refers the Panel to the US Responses at paras. 14-20 for the US response to this theory.

[28] Canada Responses, paras. 22-23, 27.

[29] Canada Responses, para. 23; *see also id.* para. 72.

indicates that "margin of dumping" as used in the context of Article 6.10 refers to an *overall* margin of dumping for each producer/exporter.

42. The United States has explained that the term "margin of dumping" must be interpreted in its context and that in some contexts (as, for example, that part of Article 2.4.2 that provides for the transaction-to-transaction comparison methodology) it may be interpreted as referring to a margin of dumping with respect to individual transactions. In the particular context of Article 6.10, the United States recognizes that the reference to an "individual" margin of dumping for a producer/exporter "of the product under investigation" refers to a single, overall margin of dumping reflecting all of the exports of the product.[30] Interestingly, it is Canada – the party arguing that, pursuant to Article VI:2 of the GATT 1994, a "margin of dumping" may only be determined for the "product as a whole" – that would ignore the text of Article 6.10, asserting instead that the product as a whole may be sub-divided, such that multiple margins of dumping may be established for any particular producer/exporter.[31]

43. In discussing its multiple margin theory, Canada also ignores Article 5.8 of the AD Agreement. That provision requires immediate termination of an investigation where the authorities determine, *inter alia*, that "the margin of dumping is *de minimis*". Canada provides no indication of how the multiple margins of dumping would be combined to test "*the* margin of dumping" against the *de minimis* standard.[32] If Canada would provide offsets for the non-dumped transactions outside the pattern, it would arrive at a margin of dumping identical to that achieved using the average-to-average comparison methodology and thereby deny effect to the targeted dumping comparison methodology. Alternatively, Canada could deny an offset for such transactions. But, in doing so, it would have to identify a principled reason for refraining from an offset in that case while insisting that it is impermissible for the United States to refrain from offsetting when applying the transaction-to-transaction comparison methodology. It has thus far offered no such principled distinction.

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[30] The word "individual" is defined as: "1 One in substance or essence; indivisible. . . . 2 That cannot be separated; inseparable. . . . 3 Existing as a separate indivisible identity; numerically one; single, as distinct from others of the same kind; particular." *New Shorter Oxford English Dictionary*, p. 1352 (1993).

[31] In paragraph 24 of Canada's Responses, Canada indicates that it explains that "product as a whole" can refer to multiple margins of dumping for a producer/exporter in its response to Question 6. Presumably, Canada refers to paragraph 28, which provides no such explanation. There, without analysis, Canada simply asserts that "[t]he Appellate Body's decision does not limit an importer to one margin of dumping. Rather it requires that whenever a margin of dumping is established it must include the full amount of all intermediate values that are aggregated to calculate a margin of dumping." Canada's theory for why, in this context, a margin of dumping need not include all of the export sales of the product under investigation remains elusive.

[32] For example, in paragraphs 30-31 of its responses, Canada suggests that targeted dumping by time period might be addressed by using two distinct margins of dumping, each applicable to the respective time period for which it was calculated during the period of investigation. Notably, Canada presumes that non-*de minimis* dumping occurred throughout the year, but at different rates. If dumping did *not* occur outside the targeted period, or only occurred at a *de minimis* level, absent an aggregate analysis leading to termination of the investigation, Canada would be suggesting that the second sentence of Article 2.4.2 permits Members to construct anti-dumping measures that turn on and off with the seasons – a novel interpretation devoid of any support in the AD Agreement.

The United States also notes that this approach to time period targeting presumes that the comparison methodology was only intended to apply in a seasonal pricing context (such as the EC's example of "holiday turkeys"). Time period targeting could also be considered when a significant change in exchange rates would permit dumping after (or before) the change to be masked by "non-dumping" prior (or after) the change in rates, in which case, Canada's hypothetical would be inapposite.

Similarly, in paragraphs 39-40, Canada provides numerical examples in which all of the multiple margins of dumping are non-*de minimis* in order to avoid addressing the true implications of its hypothetical examples.

44. The responses of Canada and the third parties to Question 9 also are relevant to the question of whether application of the targeted dumping comparison methodology will necessarily achieve a result that is redundant with the result from application of the average-to-average comparison methodology. In its response, Canada accepts that the "weighted average normal value" referred to in the first sentence of Article 2.4.2 is the same as the "normal value established on a weighted average basis" referred to in the second sentence of that provision.[33] Having admitted that the two terms mean the same thing, Canada cannot escape the mathematical reality that, if all export prices are compared and offsets granted, it does not matter whether the export prices are compared on a transaction-to-transaction or average-to-average basis. The result will necessarily be the same. Some of the third parties, however, suggest that the different references to normal value in the first and second sentences of Article 2.4.2 may have different meanings, thus suggesting another way to achieve a result from application of the targeted dumping comparison methodology that differs from the result from application of the average-to-average comparison methodology.

45. In particular, the EC suggests that a pattern of *export* prices that varies according to purchaser, region, or time period might somehow be a basis for subdividing normal value transactions *occurring within the exporting country*.[34] However, nothing in the text of Article 2.4.2 supports such a leap from the treatment of prices in the export market to the treatment of prices in the normal value market. Moreover, there is no logic to the proposition that targeting in the export market according to purchaser, region, or time, which might justify special treatment of export prices, would also justify corresponding special treatment of normal value prices. That proposition assumes without any basis that the events that justify special treatment of prices in the export market also are occurring in the normal value market. Just because prices in the export market exhibit a targeted pattern with respect to purchaser, region or time does not mean that a corresponding targeted pattern is being exhibited in the normal value market.[35] Nor does the EC give any explanation to support the view that there should be such a corresponding pattern. In any event, as noted above, the text of Article 2.4.2 addresses how to deal with export prices in cases of targeted dumping and is entirely silent on the question of normal value in such situations. Therefore, the EC's argument on this point is unfounded.[36]

46. As a final comment with respect to this issue, the United States refers to Canada's response to the Panel's Question 29. There, the Panel asked about the EC's suggestion that "if there is one hypothetical situation in which a general prohibition on zeroing does not render the targeted dumping methodology redundant, that is sufficient to demonstrate that the United States' argument in this regard is without merit". Without elaboration, Canada replies that it is sufficient to show that "the

[33] Canada Responses, para. 44.

[34] EC Responses, p. 5 (response to question 9).

[35] For example, patterns in export prices by time period could be the result of a change in exchange rates, which may have no relevance to prices within the exporting country. Or, if the product is considered a seasonal product, the seasonal demand for the product could differ significantly between the exporting and importing countries. For example, if the seasonal demand is based on warm or cold weather, the seasonal demand would differ substantially if the exporting country is in the southern hemisphere and the importing country is in the northern hemisphere (or *vice versa*). That is, the time period in which demand is high in the exporting country would not be the same as the time period in which demand is high in the importing country. Transactions from the period of high demand in the exporting country could not be compared to transactions from the period of high demand in the importing country because that would be inconsistent with the requirement in Article 2.4 of the AD Agreement that comparisons be made "in respect of sales made at as nearly as possible the same time."

[36] Thailand and Japan make comments similar to the EC's regarding the subdivision of normal value transactions, and their comments suffer from the same errors as the EC's approach. *See* Thailand Responses, paras. 5-9; Japan Responses, paras. 36-51.

targeted dumping methodology can be applied in a different manner than that suggested by the United States".[37]

47. However, the issue identified in Question 29 was more specific. The Panel asked whether it was "enough to posit that such a methodology can be applied by some Members in some circumstances, or would it be necessary that such a methodology would be generally susceptible of application by all Members." Canada failed entirely to address this aspect of the question. Instead, it treated the Panel's question as asking "whether the municipal practice of some Members should be used to interpret the provisions of the *Anti-Dumping Agreement*," and answered that it should not.[38] However, as the United States understands it (especially in light of the discussion during the Panel meeting), this was not the thrust of the Panel's question. Rather, the United States understands the Panel to have been examining the issue of whether the hypothetical situations Canada posits must be realistic situations in order to support Canada's argument, or whether it is irrelevant that such hypothetical situations bear no relation to what actual investigating authorities of actual Members are able to do. As discussed in the US response to the same question, an appropriate hypothetical would have to address all three types of targeted dumping referred to in Article 2.4.2 (*i.e.*, purchasers, regions, and time periods), take account of the ordinary meaning of the terms of the second sentence of Article 2.4.2, and be compatible with other relevant provisions of the AD Agreement.[39] The hypothetical situations that Canada has posited do not come close to meeting that standard.

## III. FAIR COMPARISON

48. Many of the points discussed above, particularly with respect to the nullification of the targeted dumping comparison methodology, are relevant to both Canada's Article 2.4 argument and its Article 2.4.2 argument. As the argumentation in this dispute has evolved, it has become increasingly difficult to distinguish the former argument from the latter. At the outset, Canada devoted a total of six short paragraphs to its Article 2.4 argument in its two written submissions combined. In its interventions at the Panel meeting and its responses to the Panel's questions, Canada has failed to articulate how that argument is distinct from its Article 2.4.2 claim. The United States calls attention to this aspect of Canada's case because it now appears, in response to the Panel's Questions, that Canada has merged its Article 2.4 argument into its Article 2.4.2 argument.

49. Specifically, Canada's response to Question 22 indicates that Canada may now regard its claim pursuant to Article 2.4 as dependent upon its claim pursuant to Article 2.4.2. In response to Question 22, regarding the practical consequences of a finding that "zeroing would be considered unfair as such," Canada states that "[t]he 'fair comparison' requirement prohibits the practice of 'zeroing' because it is inconsistent with the substantive rules and concepts concerning the calculation of 'margins of dumping' under Article 2.4.2 of the *Anti-dumping Agreement*".[40] Canada then goes on to quote, favourably, a passage from the recently circulated report in *US – Zeroing (EC Complainant)*, where the panel indicated that a standard of fairness must take into account the "substantive rules and concepts in the AD Agreement relevant to the issue of the determination of margins of dumping".[41] In other words, the legal rationale that Canada has offered for its assertion that the United States has acted in a manner inconsistent with Article 2.4 is that the methodology employed is inconsistent with Article 2.4.2.[42] As discussed above and in prior US submissions, Canada has failed to establish that the United States' denial of offsets pursuant to the transaction-to-transaction comparison methodology

[37] Canada Responses, para. 66.
[38] Canada Responses, para. 67.
[39] US Answers, para. 75.
[40] Canada Responses, para. 55.
[41] Canada Responses, para. 55 (quoting *US – Zeroing (EC Complainant)*, para. 7.262).
[42] The only other support that Canada now offers for its Article 2.4 argument is statements by the Appellate Body in disputes that did not raise the issue now before this Panel. *See* Canada Responses, para. 59.

is inconsistent with Article 2.4.2. Accordingly, by the terms of Canada's own argument with respect to Article 2.4, its claim under that provision must fail as well.