BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Final Dumping Determination On Softwood Lumber from Canada

(AB-2004-2)

APPELLANT'S SUBMISSION OF THE UNITED STATES OF AMERICA

May 24, 2004

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Final Dumping Determination
On Softwood Lumber from Canada

(AB-2004-2)

SERVICE LIST

APPELLEE

H.E. Mr. Sergio Marchi, Permanent Mission of Canada

THIRD PARTIES

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. K.M. Chandrasekhar, Permanent Mission of India
H.E. Mr. Shotaro Oshima, Permanent Mission of Japan

Table of Cases Cited in This Submission

Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted July 30, 1997
EC-Audio Tapes	GATT Panel Report, *European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, April 28, 1995, para. 356 (unadopted).
EC – Bed Linen	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, DSR 2001:VI, 2319
EC – Cotton Yarn	GATT Panel Report, *EC – Imposition of Anti-dumping Duties on Imports of Cotton Yarn From Brazil*, ADP/137, adopted by the ADP Committee October 30, 1995
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted June 22, 1998.
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
US – Atlantic Salmon	GATT Panel Report, *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway*, SCM/153, 41S/576, adopted April 28, 1994.
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R, adopted Jan. 9, 2004
U.S. – Cotton Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted Feb. 25, 1997
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
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
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States is appealing an issue of law and legal interpretation in the report of the Panel on *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*Lumber Panel Report*"),[1] concerning the methodology used to calculate the overall margin of dumping that provided the basis for the imposition of antidumping duties on softwood lumber from Canada.

2. In determining that certain Canadian companies made sales of lumber in the United States at less than normal value, the United States examined transactions involving thousands of individual lumber products sold at multiple levels of trade in the United States and Canada. In accordance with Article 2.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), in order to ensure a fair comparison between the normal values and export prices,[2] the United States either made comparisons between normal values and export prices for identical types of lumber sold in the two markets at the same level of trade or, where such identical comparisons were not possible, the United States used the most similar transactions, with due allowance (to the extent that the proper allowance was established) for the differences in physical characteristics and levels of trade.

3. The measure in question is the final determination of dumping resulting from the investigation phase involving softwood lumber from Canada; therefore, Article 2.4.2 of the AD Agreement, which applies during the investigation phase, is applicable. Consistent with the

---

[1] WT/DS264/R, circulated April 13, 2004.

[2] Distinctions between export price and constructed export price are not relevant to this dispute; therefore, throughout this submission, the United States refers only to export price for ease of reference. The arguments presented here are equally applicable to constructed export price situations.

provisions of Article 2.4.2, in order to insure a fair comparison between export price and normal value, the United States compared weighted average normal values to weighted average export prices for each set of identical or similar (with appropriate allowances for differences) transactions in the two markets.

4. The United States then aggregated the results of these comparisons in order to determine the overall margin of dumping. The United States performed this aggregation in a manner that insured that the results were equivalent to what the results would have been if the United States had based the imposition of dumping duties on each set of comparisons for which the weighted average export price was less than its comparable weighted average normal value. If the weighted average export price was greater than its comparable weighted average normal value, the particular export transactions in that comparison were not dumped, and the United States would have imposed no duties based on that comparison. Under no circumstances would the United States have been obligated to pay money to the importers for the amount by which export price exceeded the normal value and, consistent with that approach, the United States did not apply this excess as an offset to the dumping found on other comparisons.

5. The Panel unanimously found that the United States properly distinguished individual types of lumber sold at distinct levels of trade and made comparisons on that basis.[3] To this end, the Panel correctly distinguished between the scope of a "like" *product* under Article 2.1 and "comparable" *transactions* under Article 2.4.2, noting that transactions involving like products may not be comparable in light of distinguishing factors articulated in Article 2.4 (*e.g.*, level of

[3] *See Lumber Panel Report*, paras. 7.207, 9.4 (majority and dissenting opinions, respectively).

trade, physical characteristics, terms and conditions of sale, *etc.*). The Panel also unanimously found that the United States properly performed comparisons on a weighted-average-to-weighted-average basis between comparable export transactions and normal value transactions.[4] Indeed, Canada did not challenge the United States' methodology of performing multiple comparisons based on variables such as product type and level of trade.[5]

6. A majority of the Panel (hereafter "Panel majority"), however, found that Article 2.4.2 contains obligations that extend beyond the comparison between the export prices and normal values of groups of comparable transactions and continue into the aggregation of the results of those comparisons.[6] It is in this respect that the Panel majority erred, and it is this aspect of the *Lumber Panel Report* that the United States appeals. The Panel majority erroneously found that in aggregating the results of multiple comparisons, the United States was required to offset the amount of dumping found on certain average-to-average comparisons with amounts by which export price exceeded normal value for distinct average-to-average comparisons, even though the transactions involved in these non-dumped comparisons would not be comparable to the transactions in the dumped comparisons.

7. As set forth in this submission, the Panel majority's finding was erroneous for several reasons:

a. The Panel majority's finding that Article 2.4.2 applies to the aggregation of the results of multiple comparisons between export price and normal value has no

---

[4]*See Lumber Panel Report*, paras. 7.206 - 7.211, 9.4 (majority and dissenting opinions, respectively).

[5]*See Lumber Panel Report*, para. 7.202 (noting Canada's concession of this point).

[6]*Lumber Panel Report*, paras. 7.214 - 7.217.

basis in the text. The Panel majority exceeded its role in an attempt to fill a lacuna in the text of the AD Agreement.

b. The Panel majority's reasoning is internally inconsistent. The Panel majority's finding of an offset requirement cannot be reconciled with its finding that multiple comparisons are permissible pursuant to Article 2.4.2. Essentially, the Panel majority would have an investigating authority compare transactions that, earlier in its analysis, they had acknowledged to be non-comparable. An offset requirement would, therefore, render the multiple comparisons superfluous and would deprive the term "comparable" of any meaning, because it would require the results of the aggregation to be identical to the results of comparing all export transactions to a single average normal value. Thus, an offset requirement would nullify the adjustments made pursuant to the "fair comparison" requirement of Article 2.4.

c. The Panel majority's interpretation was inconsistent with the context of the provision on which it relied. While the Panel majority appeared to agree that average-to-average and transaction-to-transaction comparisons logically should be subject to the same rule with respect to aggregation, the text on which it relied in finding a rule applicable to the first methodology has no equivalent for the second methodology.

d. The Panel majority ignored relevant supplementary means of interpretation, which confirm that Article 2.4.2 does not create any offset obligation with respect to the aggregation of margins of dumping.

8. Resolving the issue in this appeal has a broader significance than might, at first glance, be suggested by the technical nature of the question presented. Requiring an offset to dumping for non-dumped comparisons requires recognition of so-called "negative dumping margins." The logical implications of recognizing that concept lead to absurd results. For example, that logic would appear to require Members to make payments to, or otherwise credit, importers who pay more than normal value for any imports subject to an antidumping measure. However, in more than 50 years of international trade regulation and GATT Article VI practice, the relevant agreements have never recognized the concept of "negative dumping." An obligation to pay importers based on "negative dumping"clearly would add to the obligations provided in the AD Agreement.

9. While the United States expects that – as before the Panel – Canada will insist that the analysis in this dispute begin with the Appellate Body report in *EC – Bed Linen*, that report is not determinative here. This dispute is between two different Members, about a different measure, and with different arguments, which were not addressed in *EC – Bed Linen*. For example, in this dispute, it was uncontested that multiple comparisons are consistent with Article 2.4.2, and the Panel unanimously agreed. Indeed, this finding by the Panel and the reasoning that led to it substantially depart from the Appellate Body's reasoning in *EC – Bed Linen*.[7] The United States respectfully requests that the Appellate Body decline any suggestion to import wholesale into this dispute the findings and reasoning of *EC – Bed Linen*.

[7]*See Lumber Panel Report*, paras. 7.203, 7.206 - 7.211, 9.5, 9.14 - 9.24 (majority and dissenting opinions, respectively).

10. Finally, in the event that the Appellate Body reaches the question of whether the aggregation methodology applied by the United States is consistent with Article 2.4 of the AD Agreement, the concept of a "fair comparison" under that provision should be interpreted as referring to a comparison done in accordance with the specific rules set out in that provision. Canada has identified no alternative standard for applying the term and, indeed, none exists in the Agreement. An offset need not be made in order to achieve a "fair comparison" between export price and normal value. Instead, a "fair comparison" is ensured by making separate comparisons of product types with distinct physical characteristics and/or sold at distinct levels of trade, and, to that end, the United States unquestionably made a fair comparison in this investigation.

II. ARGUMENT

A. The Panel Majority Erred in Interpreting Article 2.4.2 of the AD Agreement to Require Members to Offset or Reduce, Based on Non-Comparable Transactions, Dumping Found to Have Occurred on Other Transactions.

1. Based on a Proper Textual and Contextual Analysis of Article 2.4.2, a Unanimous Panel *Correctly* Found that Multiple Comparisons of Weighted Average Normal Values and Weighted Average Export Prices Were Permissible Under that Provision.

11. Article 2.4 of the AD Agreement requires that a fair comparison be made between export transactions and normal value and provides detailed guidance as to how that fair comparison is to be made. In particular, Article 2.4 recognizes that a product subject to an antidumping investigation may come in a variety of types and models, which may be sold at different levels of trade and under different terms and conditions that may affect price. In order to ensure a fair comparison between export transactions and normal value, Article 2.4 requires that "due allowance" be made for these differences, when they have been demonstrated to affect price

comparability.[8] The result should be to render particular transactions "comparable" to one another.

12. The ordinary meaning of "comparable" includes not only "able to be compared" but also "worthy" of comparison or "fit" to be compared.[9] The latter meaning is the most relevant to an interpretation of Article 2.4, because the comparison being undertaken has a particular purpose, *i.e.*, to determine if a transaction involves dumping. To make that determination, the transactions to which it is compared must be "fit" for that purpose. Thus, Article 2.4 ensures that, when an export price transaction is compared to a normal value, any price differences should reflect the presence or absence of dumping,[10] as opposed to the effects of other variables.[11]

13. Article 2.4.2 of the AD Agreement, the provision at issue in this appeal, contains additional rules, applicable during the investigation phase, for establishing the existence of margins of dumping based upon comparable transactions (*i.e.*, "[s]ubject to the provisions governing fair comparison in [Article 2.4]"). Article 2.4.2 provides three methodologies for comparing export prices to normal values in an investigation: (1) weighted-average-to-weighted-average comparisons; (2) transaction-to-transaction comparisons; and, (3) under certain

---

[8]Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157.

[9]New Shorter Oxford English Dictionary, p. 457 (1993).

[10]Dumping is defined in Article 2.1 of the AD Agreement as the export price being "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

[11]For example, the price differences between a 19-inch television set and a 25-inch television set may reflect differences in the cost of production, shipping costs, and customer demand for the respective models. Moreover, if the 19-inch television sets are sold at a different level of trade (*e.g.*, retail) than the 25-inch television sets (*e.g.*, distributor), there may be numerous other factors reflected in the price differences (*e.g.*, different terms of sale, including warranties, technical service, *etc.*).

circumstances, weighted-average-to-transaction comparisons. In most circumstances, each of these methodologies will result in multiple comparisons. This is self-evident with respect to the second and third methodologies, as neither one is limited to the extremely rare circumstance of investigations involving only one export transaction. Under these methodologies, each export transaction will result in a separate comparison.

14. As explicitly stated in Article 2.4, there are many factors, involving not only the product's physical characteristics, but also the conditions and terms of sale, that may affect price comparability and, therefore, must be accounted for in order to make a fair comparison. Even if the physical characteristics of the particular models are identical, other factors, such as the levels of trade at which they are sold, may render transactions involving those models non-comparable. Given the nature and extent of those factors, establishing discrete groups of transactions is often the most accurate and reliable means of taking account of such differences. Thus, even the first methodology will often result in multiple comparisons between export price and normal value.

15. Consistent with this analysis, the Panel explained that the inclusion of the term "comparable" in Article 2.4.2 indicates that making allowances for all differences is not the only means by which an authority may ensure price comparability. In fact, the Panel correctly found that, from a practical perspective, making allowances for all differences may be problematic and even undesirable when the complexity and uncertainty of the allowances are considered. The Panel stated:

> It is therefore not surprising that many investigating authorities – and respondent exporters – prefer to limit to the extent possible the need for such adjustments by performing their comparisons on the basis of groups of transactions sharing common characteristics. Thus, we consider that the use of multiple averaging is

> consistent with the overall objective of Article 2.4, which is to ensure a fair comparison when comparing export price to normal value.[12]

16. In reaching this conclusion, the Panel examined the relationship between "comparable" *transactions* for purposes of Article 2.4.2 and "like" *product* as referred to in Article 2.1 of the AD Agreement.[13] Consistent with the context in which the two terms are separately used and the interpretive requirement to "give meaning and effect to all the terms of the treaty,"[14] the Panel correctly considered that the word "comparable" in this phrase, which was added towards the end of the negotiation of the AD Agreement, supports the use of multiple comparisons.[15] Otherwise, the Panel noted, the word "would serve no purpose in the text."[16]

17. The Panel further reasoned that not all transactions involving the same like product will necessarily be comparable transactions, particularly if those transactions involve different types or models of the like product.[17] The Panel supported this interpretation through its analysis of the context of Article 2.4.2 – in this case, Article 2.4, the provision to which Article 2.4.2 is expressly made subject:

> [T]he fact that Article 2.4 explicitly provides for due allowances to be made for differences that affect price comparability means to us that, in the absence of such adjustments, certain transactions may not be comparable. In other words, the very reason due allowance may be necessary is precisely because the transactions

---

[12] *Lumber Panel Report*, para. 7.207.

[13] *Lumber Panel Report*, para. 7.206.

[14] Appellate Body Report, *U.S. – Gasoline*, p. 23.

[15] *Lumber Panel Report*, para. 7.203 and note 349 (noting that the insertion of the word "comparable" into Article 2.4.2 was the only change to the provision from the *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991).

[16] *Lumber Panel Report*, para. 7.203.

[17] *Lumber Panel Report*, para. 7.206.

> might not otherwise be comparable. This lack of comparability could be due to differences in physical characteristics – a basis for allowance that is specifically identified in Article 2.4 – but Article 2.4 tells us that non-comparability could also arise from differences in conditions and terms of sale, levels of trade, quantities and other unspecified differences.[352] Thus, we do not believe that the significance of the reference to "comparable" export prices can simply be discounted on the grounds that the products/transactions must "necessarily be comparable".[353]
>
> [352]We are also of the view that the authorization in Article 6.10 of the *AD Agreement* to use certain sampling techniques where "the number of (...) types of products" is too large, confirms our interpretation that there may be differences in physical characteristics between products being compared, and should dispel those doubts entirely.
>
> [353]Appellate Body Report, *EC – Bed Linen*, para. 58.[18]

Thus, the Panel explicitly reconsidered and disagreed with a fundamental basis for the Appellate Body's finding in *EC – Bed Linen*. The term "like product" does not appear in Article 2.4.2, and to find that "[a]ll types or models falling within the scope of a 'like' product must necessarily be 'comparable'"[19] would deny meaning to the word "comparable" in the phrase "all comparable export transactions," to the use of the word "transactions" (rather than "product") in that same phrase, and to the due allowance provisions of Article 2.4.[20]

18. The use of multiple comparisons is, therefore, entirely consistent with the text of Article 2.4.2. The comparison that Article 2.4.2 directs an investigating authority to make is not a comparison of a weighted average normal value with a weighted average of "all export transactions" or a weighted average of all comparable products. Rather, the comparison is

---

[18]*Lumber Panel Report*, para. 7.206 (citations omitted); *see also Lumber Panel Report* at footnote 352 (wherein the Panel noted that Article 6.10 of the AD Agreement, permitting sampling when "the number of [...] types of products" is too large further supports their analysis that there may be many different types of product).

[19]Appellate Body Report, *EC – Bed Linen*, para. 58.

[20]*Lumber Panel Report*, para. 7.206.

explicitly limited to "all *comparable* export *transactions*." That phrase recognizes that, consistent with Article 2.4, for any given weighted average normal value, there may be export transactions that are not comparable.

19. The result of the comparability requirement in the average-to-average methodology, and the practicalities of making a wide variety of transactions comparable, are that, in any given investigation, there are likely to be multiple weighted average normal values, each associated with a distinct set of weighted average export prices. Each average-to-average pairing will be distinguished by a common set of variables establishing comparability (*e.g.*, model, level of trade, and/or terms of sale). Each group of export transactions, however, contains *all* "comparable transactions," *i.e.*, all transactions fit to be compared under the rules set out in Article 2.4. Under the average-to-average methodology, therefore, the use of multiple comparisons is consistent with *both* the phrase "all comparable export transactions" and the phrase "[s]ubject to the provisions governing fair comparison in [Article 2.4]."

20. The relationship between multiple comparisons under the average-to-average methodology and the fair comparison requirement of Article 2.4 is further explained in the dissenting opinion to the *Lumber Panel Report*:

> While these differences [inter alia, physical differences, differences in level of trade, or date of sale] may in principle be taken into account through adjustments, in many cases it simply will not be possible to identify and quantify their precise effects on price comparability. Further, there are a variety of different ways to get at the issue of price comparability and the making of adjustments. In the case of a wide variety of types or dates of sale, for example, even identifying which of the many groups should represent the standard towards which adjustments should aim

> will be unclear. Multiple averaging eliminates the need to consider such adjustments, thus reducing the influence of subjective judgment on outcomes.[21]

21. The Panel found additional support for the permissibility of multiple comparisons in the context of the other methodologies provided for in Article 2.4.2, itself. Since Article 2.4.2 provides for margins to be calculated on a transaction-to-transaction basis as well as an average-to-average basis, the Panel found it unlikely that the drafters would have prohibited multiple average-to-average comparisons:

> We consider it unlikely that the drafters would have agreed to allow comparisons only at the most aggregated level (a single weighted-average-to-weighted-average comparison) or the most disaggregated level (transaction-to-transaction) while disallowing the intermediate approach of multiple averaging."[22]

Rather, the Panel reasonably and correctly interpreted Article 2.4.2 in light of the well-known, pre-Uruguay Round margin calculation methodology, concluding that the intent of the drafters of Article 2.4.2 "was to make clear that a weighted-average-to-transaction approach – a methodology that was widely used before the current AD Agreement came into effect – was only permitted in the limited circumstances specified in the second sentence of Article 2.4.2."[23] In fact, as discussed further below, in paragraphs 49-54, this historical context confirms that Article 2.4.2 was intended to address this issue of symmetry in the comparison methodology and not the issue of the methodology for aggregating the results of multiple comparisons.

22. Evaluating the permissibility of multiple comparisons is critical to the interpretation of Article 2.4.2 and was the starting point for the Appellate Body's analysis in *EC – Bed Linen*.[24] If

---

[21] *Lumber Panel Report*, para. 9.4 (dissenting opinion).

[22] *Lumber Panel Report*, para. 7.208.

[23] *Lumber Panel Report*, para. 7.208.

[24] Appellate Body Report, *EC – Bed Linen*, para. 53.

multiple comparisons are permissible pursuant to Article 2.4.2, then there is no textual basis for interpreting Article 2.4.2 as requiring offsets for non-dumped comparisons. Put another way, an offset requirement would force an investigating authority to compare non-comparable transactions. This can be demonstrated by a simple example. Assume that in one set of all comparable transactions there is dumping, and in another set of all comparable transactions there is no dumping. An offset requirement would require that these two distinct sets of comparable transactions be averaged together. An offset requirement thus requires that these two sets of non-comparable transactions nevertheless be compared to determine if there is dumping. Article 2.4.2 refers, in relevant part, to the existence of "margins of dumping" established on the basis of a comparison of a weighted average normal value with a weighted average of prices of "all comparable export transactions." Interpreting Article 2.4.2 as permitting multiple comparisons is consistent with the ordinary meaning of the terms of Article 2.4.2, in context, and gives meaning to both "margins of dumping" and "all comparable export transactions." Under that interpretation, "all" *comparable* export *transactions* are accounted for in each comparison group. For the comparisons in which the normal value exceeds the export price, the results constitute "margins of dumping." This is plainly a permissible interpretation of Article 2.4.2: it gives meaning to all the terms of the provision and, contrary to the Panel majority's interpretation discussed below, would not require a given term to take a different meaning, depending on the context in which it is applied.

23. Thus, on the basis of this reasoned analysis of the text of Article 2.4.2, including the context provided by Article 2.4, the Panel correctly concluded, and Canada did not dispute, that the United States' use of multiple comparisons of weighted average export prices to weighted

average normal values was permitted under the AD Agreement.[25] As discussed below, after correctly finding that multiple comparisons were permissible pursuant to Article 2.4.2, the Panel majority nevertheless found that Article 2.4.2 contained obligations relating to the aggregation of the results of those multiple comparisons. This finding, by the Panel majority, is based on a subsequent erroneous interpretation of Article 2.4.2.

2. The Panel Majority Erroneously Found that Article 2.4.2 Prescribes an Offset Requirement When Aggregating the Results of Multiple Comparisons.

24. Having found that multiple comparisons are consistent with Article 2.4.2, the Panel then examined the consistency with Article 2.4.2 of the United States' methodology for aggregating the results of those multiple comparisons. In so doing, the Panel majority incorrectly assumed that Article 2.4.2 contains an obligation with respect to the aggregation of multiple comparisons. In fact, Article 2.4.2 it is silent on this question, and the Panel majority erred in finding an obligation where none existed.[26]

25. As noted above, the United States aggregated the results of the multiple comparisons so that the outcome would be equivalent to the outcome if each of the comparisons performed had been treated separately and an antidumping duty imposed, as appropriate, on the basis of each of those comparisons. That is, if each comparison had been treated separately, then for a comparison that showed dumping, the difference could be imposed as an antidumping duty, while for a comparison that showed no dumping, no additional antidumping duties would be

---

[25] *Lumber Panel Report*, para. 7.211.

[26] *See generally* DSU, Article 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

imposed. The net result would have been the sum of the margins of dumping for all of the comparisons that showed dumping. The United States' aggregation methodology achieves the same result.

26. To understand how the United States aggregated the multiple average-to-average comparisons, it is useful to consider a simple example. Assume a company only made export price and normal value sales as follows:

	weighted-average normal value	weighted- average export price	export quantity	total dumping duty that may be imposed
"stud wood" (2"x4"x8' SPF) sold to builders (end users)	$1.00	$0.80	1000	$200
"cedar decking" (1"x6"x10' cedar) sold to distributors	$1.95	$2.00	1000	-0-

Using these comparisons, the United States would have found that the "stud wood" sold at the end user level of trade was dumped by $0.20 per unit, for a total dumping liability of $200. For the cedar decking sold at the distributor level of trade, the export price was greater than the normal value, so there was no dumping margin.

27. While the stud wood is "like" the cedar decking to the extent that they are both types of softwood lumber, their prices are not directly comparable without making allowances, as appropriate, for the differences in physical characteristics and levels of trade at which the sales were made. Consequently, when aggregating the results of these comparisons, the United States would have divided $200 in dumping liability (without any offset or reduction to it to reflect the

non-comparable export price of the cedar decking) by $2800 (the aggregate of all export price sales[27]) for an overall margin of 7.14 percent.[28]

28. Article 2.4.2 simply does not address the issue of aggregating the results of multiple comparisons. While it provides three separate methodologies for making comparisons between export transactions and normal value and, as the Panel correctly noted, in most cases, all three of these methodologies will lead to multiple comparisons between export transactions and normal values, Article 2.4.2 does not provide any guidance as to how the results of those comparisons are to be aggregated to determine a single overall margin. In fact, Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all. The existence of a single, overall margin is relevant only elsewhere in the AD Agreement.[29]

29. Despite the lack of any obligation in Article 2.4.2 to calculate an overall margin of dumping, the Panel majority erroneously concluded that the United States had acted inconsistently with Article 2.4.2 in the methodology it used to aggregate the results of the multiple comparisons.

a. The Panel Majority Improperly Sought to Fill a Lacuna in the Text.

30. The only explicit rationale offered by the Panel majority for its conclusion that Article 2.4.2 applies to the aggregation of the results of multiple comparisons was the following:

---

[27]($0.80 x 1000) + ($2.00 x 1000) = $2800

[28]Under this methodology, total duties deposited equal the absolute amount of dumping found with respect to the product under consideration.

[29]The need to establish an overall level of dumping for a producer/exporter results from, for example, Article 5.8 of the AD Agreement (application of the *de minimis* standard).

> We are of the view that, if the drafters had intended that Article 2.4.2 applies only to the first stage of the process, they would have made this clear. The United States has not advanced any argument explaining why an interpretation that Article 2.4.2 is applicable to the pre-aggregation stage should be accepted by us, apart from the argument that the AD Agreement does not contain any requirements as to the second stage of the process. We find this argumentation of the United States not convincing.[30]

In short, the Panel majority simply was unconvinced that the drafters deliberately had left a lacuna in the text. They believed that if such a lacuna had been intended, the drafters would have made it clear.

31. This interpretive approach was inconsistent with the role of a panel in WTO dispute settlement proceedings. A panel is not competent to fill gaps in the Agreement text.[31] Moreover, with respect to the text of the AD Agreement specifically, when faced with text that a panel acknowledges is susceptible to multiple interpretations, its role is not to select among those multiple interpretations – even if one of those interpretations suggests a gap in the text.[32] Article 17.6(ii) of the AD Agreement instead requires panels to recognize that a given provision of the AD Agreement may be susceptible to multiple permissible interpretations, and to find a Member's actions consistent with its obligations if those actions are based on one of those permissible interpretations. Here, the Panel majority failed to follow the standard of review in

---

[30]*Lumber Panel Report*, para. 7.216.

[31]DSU, Article 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."); *see also* Appellate Body Report*, EC – Tube or Pipe Fittings*, para. 99 note 94 (where AD Agreement has detailed provisions, Appellate Body concludes it should not find reference to term "implied when such reference is not expressly stated").

[32]*See US – Steel Plate*, para. 7.7 (under Art. 17.6(ii) of AD Agreement, if "process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity if it is based on that permissible interpretation.").

Article 17.6(ii). It found that the United States' methodology of making multiple comparisons under the average-to-average approach was based on a permissible interpretation of Article 2.4.2, but then went on to identify another interpretation of Article 2.4.2 when it comes to aggregation, and faulted the United States for not aggregating the results of the multiple comparisons in accordance with that interpretation.[33]

32. Rather than acknowledge that it was interpreting the text so as to fill a lacuna, the Panel majority asserted that Article 2.4.2 provides for a "coherent process" of determining an overall margin of dumping."[34] The Panel majority described this "coherent process" as:

> [starting] with the determination of the normal value, and it continues with the establishment of the export price. Both prices are subsequently adjusted in order to ensure a "fair comparison", as required by Article 2.4. Finally, these two values – normal value and export price – are compared, for the purpose of computing the overall margin of dumping.

33. This description misleadingly conflates the comparison between normal value and export price for each group of comparable transactions, and the computation of the overall margin of dumping. While both of these steps may be part of the process of determining an overall margin of dumping, that does not mean that both are addressed in Article 2.4.2 of the AD Agreement.

34. In its discussion of the permissibility of using multiple comparisons, the Panel acknowledged that the term "margins of dumping" in Article 2.4.2 may be plural "precisely because multiple averaging produces a dumping margin for each category of product/transaction compared . . . ."[35] Thus, the Panel effectively acknowledged that it was permissible to interpret

---

[33] *Lumber Panel Report*, paras. 7.214-7.217.

[34] *Lumber Panel Report*, para. 7.214.

[35] *Lumber Panel Report*, para. 7.210.

Article 2.4.2 as addressing only the manner in which comparisons between export price and normal value are to be made. If they had applied the standard of review of Article 17.6(ii) of the AD Agreement, the Panel majority's analysis of Article 2.4.2 would have ended with this acknowledgment.

35. The Panel majority's error is further evident in its articulation of the question before it, stating:

> [W]e are of the view that the question before us is whether an investigating authority is allowed to partially exclude from the aggregation process those results of comparing types or models for which the weighted-average-normal-value was determined to be less than the weighted-average-export-price in the aggregation process.[36]

36. The simple answer to the Panel majority's question should be "yes" because, as discussed above, Article 2.4.2 is silent on the subject of aggregating the results of what the Panel correctly found are permissible multiple comparisons. The Panel majority formulated the question, however, in a manner that presumes that Article 2.4.2 in fact addresses what must be included in, or excluded from, the aggregation process. The flawed premise in the Panel majority's question resulted in an incorrect answer that has no basis in Article 2.4.2.

37. The only comparison results referred to in Article 2.4.2 are "margins of dumping." As the Panel majority acknowledged, a permissible interpretation of that phrase is that it refers to the results of comparing averages "for each category of product/transaction compared."[37] Accordingly, under that permissible interpretation, the only comparison results identified in Article 2.4.2 are the results ("margins of dumping") derived from the multiple comparisons of

---

[36] *Lumber Panel Report*, para. 7.214.

[37] *Lumber Panel Report*, para. 7.210.

the various groups of comparable transactions. There is, therefore, no basis to read into Article 2.4.2 a requirement for an *additional* result derived from aggregating those margins of dumping.

38. Furthermore, as explicitly defined in the AD Agreement, dumping exists only where "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."[38] Comparison results in which the weighted average export price *exceeds* the weighted average normal value are, by definition, *not* margins of dumping. The AD Agreement does not recognize a "negative dumping margin." In fact, after more than 50 years of international trade regulation and GATT Article VI practice, the relevant agreements have never recognized the concept of "negative dumping." As the Dissenting Opinion noted on this point, under Article 9.4 of the AD Agreement, when calculating a rate for exporters or producers that are not individually examined in an investigation, the investigating authority is not obligated to give credit for "negative" dumping margins of the individually examined exporters or producers.[39] Thus, even assuming, *arguendo*, that Article 2.4.2 could be read to implicitly require an aggregation, the only candidates for inclusion in that aggregation, by the Article's own terms, are margins of dumping. Under such a reading, Article 2.4.2 could not require the inclusion of comparison results in which the weighted average export price exceeds the weighted average normal value, because those results are not margins of dumping.

b. The Panel Majority's Interpretation Was Internally Inconsistent.

---

[38]AD Agreement, Article 2.1.

[39]*Lumber Panel Report*, para. 9.22 note 520 (dissenting opinion).

39. In addition to lacking any basis in the text or context of Article 2.4.2, the Panel majority's finding of a requirement to apply the results of certain comparisons as offsets to the results of other comparisons is inconsistent with its own finding that multiple comparisons are permissible. These two findings cannot logically coexist. An offset requirement is equivalent to a requirement to make comparisons "only at the most aggregated level (a single weighted-average-to-weighted-average comparison)," the very result the Panel majority considered, earlier in its analysis, to have been an "unlikely" intent of the AD Agreement drafters.[40] Put another way, an offset requirement amounts to a mandatory comparison of transactions already acknowledged to be non-comparable.

40. As the dissenting opinion explained:

> [the Panel majority] seem[s] to conclude that the ultimate result of the aggregation of multiple average to average comparisons must be the same as if [the United States] had conducted a single average to average comparison, or in any event that once it has performed multiple averages [the United States] is required to average those averages, using negative dumping margins to offset positive margins.[41]

41. An illustration demonstrates the internal inconsistency in the Panel majority's reasoning. Returning to the illustration set out in paragraphs 26 to 27, above, that illustration identified two distinct models of the same product sold at two separate levels of trade. For each model, there was a separate weighted average normal value and weighted average export price. The result is two discrete average-to-average comparisons. One of those comparisons established the existence of dumping. The other comparison established an absence of dumping (inasmuch as the average export price exceeded the average normal value). If each comparison were treated as

---

[40] *Lumber Panel Report*, para. 7.208.

[41] *Lumber Panel Report*, para. 9.9 (dissenting opinion).

a separate basis for the imposition of duties, the United States would impose $200 based on the first comparison and no duties based on the second. The United States' aggregation methodology mirrors that result. In this illustration, since the second comparison did not yield a dumping margin, it contributed nothing to the aggregation of the margins of dumping.

42. The Panel majority would require the dumping margin established in the first comparison to be offset by the extent to which the weighted average export price was greater than (not less than) the weighted average normal value in the second comparison. In this case, that offset would be $50 (*i.e.*, $.05 x 1000). The result of an aggregation including that offset would be an overall margin of 5.36 percent (($200 - $50)/$2800).

43. The same overall margin necessarily would result if the investigating authority were to forego multiple comparisons of comparable transactions, instead comparing a single average normal value to a single average export price. In that case, the investigating authority would establish a single weighted average normal value (in this case, $1.475) and a single weighted average export price (in this case, $1.40). The result of the comparison would be 5.36 percent (the difference between the average normal value ($1.475) and the average export price ($1.40), multiplied by the total volume of sales (2000), divided by the aggregate export price ($2800)).

44. In short, as a mathematical matter, a requirement to include in an aggregation – as offsets – the results of comparisons in which export price exceeds normal value would, in these circumstances, be equivalent to a requirement to perform a single, average-to-average comparison of all transactions. The offset requirement renders the comparisons between discrete groupings of comparable transactions meaningless. For this reason, requiring an offset when the comparison results are aggregated is inconsistent with the Panel majority's own acknowledgment

that multiple averaging is permissible under Article 2.4.2. It is a requirement to compare that which previously has been determined to be non-comparable. The result of requiring a comparison of non-comparable transactions is not only contrary to the text of Article 2.4.2, but also may serve to obscure instances where there is dumping. An interpretation that obscures dumping appears contrary to Article VI:1 of the GATT 1994, which explicitly condemns dumping if it causes or threatens material injury to an industry in the territory of the importing Member.

45. More fundamentally, an offset requirement is inconsistent with the express requirement in Article 2.4.2 to confine average-to-average comparisons to "all *comparable* export transactions." As the foregoing illustration demonstrates, an offset requirement is equivalent to a requirement that all transactions, regardless of comparability, be incorporated into a single average-to-average comparison. That result renders the word "comparable" a nullity, contrary to the requirement to "give meaning and effect to all the terms of the treaty."[42]

c. The Panel Majority Failed to Consider Relevant Context.

46. In its argument to the Panel, the United States observed that interpreting Article 2.4.2 as requiring an offset against dumping margins when using the average-to-average methodology would lead to an anomalous result. Specifically, the first comparison methodology (average-to-average) would be subject to additional rules not applicable to the two alternative methodologies under Article 2.4.2. This anomaly would be unavoidable, because there is no basis in the text for

[42]Appellate Body Report, *U.S. – Gasoline*, p. 23.

finding an offset requirement with respect to the transaction-to-transaction methodology (or, for that matter, with respect to the average-to-transaction methodology).[43]

47. There is no rational basis for an interpretation that assumes that Members intended to address aggregation of margins (in particular, offsets), but then only did so with respect to one out of three permissible methodologies. Perhaps that explains why the Panel majority chose to avoid this argument all together. The Panel majority dismissed the argument by stating:

> Canada has not raised any claim with regard to DOC's use of 'the other two methodologies'. Thus, it is not within the Panel's terms of reference to rule on whether zeroing can, or cannot, be used when determining the overall margin of dumping under the other comparison methodologies set forth in Article 2.4.2. . . .[44]

Thus, the Panel majority incorrectly treated the United States' argument as if it were a defense to a particular claim that was *not* made, as opposed to an explanation of context relevant to a claim that undeniably *was* made. Moreover, the Panel majority compounded its error. Despite finding that this issue was outside its terms of reference, in a footnote, the Panel majority proceeded to assert, without any analysis or textual support, that "the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*."[45]

48. That unsupported assertion by the Panel majority is telling for two reasons. First, the fact that the majority went out of its way to find that offsets are required when aggregating the results

---

[43]First Written Submission of the United States to the Panel, WT/DS264, May 12, 2003, paras. 158-159; Opening Statement of the United States, Second Meeting of the Panel, WT/DS264, Aug. 11, 2003, paras. 55-56.

[44]*Lumber Panel Report*, para. 7.219.

[45]*Lumber Panel Report*, note 361.

of transaction-to-transaction comparisons suggests an acknowledgment that there is no basis for finding a different rule applicable to the two principal methodologies under Article 2.4.2. Second, the absence of even a brief explanation for its summary conclusion – as well as the placement of this conclusion in a footnote – suggests the interpretive quandary in which the Panel majority found itself. The fact is, the words on which the majority relied in finding an offset requirement under the average-to-average methodology – "all comparable export transactions" – simply do not pertain to the transaction-to-transaction methodology. The foundation for the Panel majority's requirement of an offset with respect to the first methodology is completely absent from the second methodology. Finding a common rule despite this distinction defies logical explanation.[46] Perhaps aware of the anomaly of suggesting that the WTO Members had intended one rule for the first methodology and another for the second, and unable to establish a textual basis for the offset rule to apply to the second, the Panel majority simply asserted the rule's existence. In doing so, the Panel majority ignored the rules of treaty interpretation which it is bound to apply.

d. The Panel Majority Disregarded Relevant Historical Circumstances of the AD Agreement's Conclusion.

49. The propositions that (1) multiple weighted-average comparisons are permissible under Article 2.4.2, and (2) Article 2.4.2 does not prescribe any particular method for aggregating the resulting margins of dumping are supported by the historical circumstances of the AD Agreement's conclusion. Recourse to historical circumstances is appropriate in this case as a supplementary means of interpretation to confirm the meaning of Article 2.4.2 resulting from its

[46] *See Lumber Panel Report,* para. 9.10 (dissenting opinion).

interpretation in accordance with the ordinary meaning to be given to its terms in their context and in light of the AD Agreement's object and purpose.[47] Indeed, the Appellate Body on previous occasions has had recourse to historical circumstances to confirm its interpretation that, as here, a treaty provision was silent on a particular issue. For example, in *US – Carbon Steel*, the Appellate Body found that negotiating history confirmed that Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* does not include a *de minimis* standard.[48]

50. Article 32 of the *Vienna Convention on the Law of Treaties* refers to the circumstances of a treaty's conclusion as a supplementary means of interpretation in appropriate cases. In its report in *EC – Computer Equipment*, the Appellate Body explained that the circumstances of a treaty's conclusion may include "examination of the historical background against which the treaty was negotiated."[49] Similarly, in *US – Cotton Underwear*, the Appellate Body treated a comparison between the *Agreement on Textiles and Clothing* ("ATC") and its predecessor, the *Multifibre Arrangement* ("MFA"), as context for purposes of interpreting the apparent silence of the ATC as to an issue previously addressed in the MFA.[50] In this case, an examination of the historical background against which the AD Agreement was negotiated corroborates the interpretation set out in paragraphs 11-23, above.

51. What the historical circumstances show is that the AD Agreement was negotiated against the background of the GATT Antidumping Code and the practices of individual contracting

---

[47]*See Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, Article 32.

[48]Appellate Body Report, *US – Carbon Steel*, para. 90.

[49]Appellate Body Report, *EC – Computer Equipment*, para. 86.

[50]*See* Appellate Body Report, *US – Cotton Underwear*, pp. 16-17.

Parties under the Code. Two such practices are relevant here. First, as the Panel noted, major users of antidumping measures commonly made comparisons between individual export transactions and weighted average normal values in investigations. Because this practice entailed an average on one side of the comparison and a single transaction on the other side, it raised what negotiators referred to as an asymmetry issue. The second relevant practice, common among major users of antidumping measures at the time of the AD Agreement negotiations, is the practice at issue in this dispute. That is, in aggregating the results of individual comparisons, investigating authorities commonly did not provide an offset based on comparisons for which export price exceeded normal value.

52. As it happens, both practices were the subject of dispute settlement contemporaneous with the AD Agreement negotiations, and both practices were discussed in the negotiations. The practice of asymmetrical comparisons was examined by a GATT Panel in the *US – Atlantic Salmon* dispute and was found to be consistent with the GATT Antidumping Code.[51] At the same time, the practice was being discussed by negotiators of the AD Agreement.[52] The practice of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by a panel of the Antidumping Practices Committee in the *EC – Audio*

---

[51] *US – Atlantic Salmon,* paras. 474-86.

[52] *See, e.g., Submission of Japan on the Amendments to the Anti-Dumping Code*, MTN.GNG/NG8/W/48, at item IV (August 3, 1989) (arguing that a justification must be provided for comparing weighted average normal values to individual export prices); *Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55, at item II.E, Comment 16 (October 13, 1989)(*"Singapore Communication"*). It should be noted that there was a second and distinct "asymmetry" argument raised during the negotiations, relating to the fact that certain adjustments might only be made to normal value or to export price, but not both, depending on the circumstances of the case. The resolution of that issue is not relevant to the issue before the Appellate Body.

Tapes dispute and was found to be consistent with the GATT Antidumping Code.[53] At the same time, the practice, referred to as the "zeroing" issue, was being discussed by negotiators of the AD Agreement.[54]

53. Against this background, if the negotiators declined to adopt, or were unable to agree to, text on one of these issues, that decision would have been made with knowledge of how relevant text from the GATT Antidumping Code incorporated into the AD Agreement likely would be interpreted. As dispute settlement panels had found both practices to be consistent with the GATT Antidumping Code, it would have been reasonable (indeed, likely) for negotiators to expect that, absent modified text, these practices would continue to be found consistent with the GATT Antidumping Code's successor (*i.e.*, the AD Agreement).[55]

54. In the end, the AD Agreement negotiators did in fact address the asymmetry issue. They agreed to Article 2.4.2, which had no counterpart in the GATT Antidumping Code. That

---

[53]*EC – Audio Tapes*, para. 356. Also pending at the time of the AD Agreement negotiations was the *EC – Cotton Yarn* dispute, which raised the same issue. In that case, which was concluded after conclusion of the AD Agreement negotiations, the ADP Committee found the practice to be consistent with the GATT Antidumping Code. Panel Report, *EC – Imposition of Anti-dumping Duties on Imports of Cotton Yarn From Brazil*, ADP/137, adopted by the ADP Committee October 30, 1995, paras. 500-501 (finding the practice of "zeroing" not to be inconsistent with the GATT Antidumping Code).

[54]*See, e.g., Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins "'negative' dumping should be taken into account, i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value"); *Communication from the Delegation of Hong Kong,* MTN.GNG/NG8/W46 (July 3, 1989), at 7.

[55]Although GATT Panel Reports were not binding on future panels, the fact that when they were adopted it was through consensus suggests a reasonable likelihood that a legal interpretation, once adopted would be followed in future disputes.

provision established a requirement that, in the ordinary case, investigating authorities make symmetrical comparisons (*i.e.*, average-to-average or transaction-to-transaction), allowing asymmetrical comparisons (*i.e.*, transaction-to-average) only in specified circumstances. However, the negotiators did not address the offset issue. No provision was added, as compared with the GATT Antidumping Code, to require the offsetting of dumping margins by non-dumped sales.[56] These historical circumstances confirm the conclusion evident from an interpretation of the text and context of Article 2.4.2: The provision contains no obligation with respect to aggregation of the results of multiple comparisons.

B. The Appellate Body Report in *EC – Bed Linen* is not Dispositive of this Case.

55. The United States recognizes that the report of the Appellate Body in the *EC – Bed Linen* dispute likely will figure in this appeal, as it did in proceedings before the Panel. In large part, this is due to Canada's heavy reliance on that report, notwithstanding its concession of a proposition – that multiple comparisons are permissible under Article 2.4.2 – fundamentally at odds with an essential premise of that report. In the expectation that this appeal will engender a discussion of *EC – Bed Linen*, the United States addresses the relevance of the *EC – Bed Linen* report to this appeal.

---

[56]There is a limited degree of overlap between the "asymmetry" issue and the offsetting of dumping margins. That overlap occurs to the extent that there are multiple export price transactions involving the identical model at the same level of trade. If some of those individual export price transactions are sold at less than the weighted average normal value while other individual export price transactions involving the same model at the same level of trade are sold above the weighted average normal value, the higher priced export sales of the model increase the weighted average export price and, to that extent, offset dumping margins on the lower priced export sales of the same model at the same level of trade. However, by specifying a weighted average for "all *comparable* export transactions," the negotiators provided for such offsetting only within the universe of comparable transactions.

56. The report in *EC – Bed Linen* does not govern the present appeal. The United States was not a party to the *EC – Bed Linen* dispute, nor was a U.S. measure at issue in that dispute. Moreover, principles of *stare decisis* are not applicable to WTO dispute settlement. Article IX:2 of the *WTO Agreement* provides the only explicit basis for establishing authoritative interpretations of the WTO Agreements: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Consistent with this provision, the Appellate Body has found that dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute."[57]

57. While the Appellate Body also has said that adopted reports "should be taken into account where they are relevant to any dispute,"[58] the relevance of *EC – Bed Linen* to this dispute is limited to the extent that – as mentioned above – the United States was not a party to that dispute, and – contrary to Canada's assertions – neither the U.S. methodology nor a U.S. measure was at issue in that dispute. Notwithstanding Canada's assertions that the United States' and EC's methodologies are identical, the United States has never had access to the detailed calculations used by the EC in order to evaluate the significance of the differences. Furthermore, in the *EC – Bed Linen* dispute, the Appellate Body was not asked to, and therefore did not, address a number of the arguments advanced herein, including the relevant context provided in

---

[57]Appellate Body Report, *Japan – Alcoholic Beverages II*, at 14 (footnote omitted); *see also* Appellate Body Report, *US – Shrimp*, para. 107-09 (extending the reasoning of *Japan–Alcoholic Beverages II* to Appellate Body reports); Panel Report, *Argentina – Poultry*, para. 7.41 (not bound by rulings contained in adopted WTO panel reports).

[58]*Japan–Alcoholic Beverages II*, at 14.

Article 2.4.2 and the historical circumstances of the AD Agreement's conclusion, discussed herein.

58. Parties to a dispute cannot be expected to advance the interests of non-parties or to advocate in the same way that non-parties would if confronted with a similar issue. For that reason, although two disputes may raise similar issues, the involvement in a later dispute of different parties with different interests must lead to a fresh evaluation, rather than an evaluation constrained by the outcome of an earlier dispute. The present dispute represents the first direct challenge to the United States' methodology on aggregation of individual dumping margins to establish an overall dumping margin.[59] Accordingly, the United States respectfully requests that the Appellate Body give full consideration to the particular facts and arguments of this dispute, rather than – as Canada asked the Panel to do – import wholesale the findings and reasoning of the *EC – Bed Linen* report.

1. The Alternative Methodologies Set Out in Article 2.4.2 Are Context That Was Not Addressed in *EC – Bed Linen*.

59. Unlike *EC – Bed Linen*, in this dispute there has been extensive argument by the parties and discussion by the Panel (in both the majority and dissenting opinions) on the contextual bases for finding multiple comparisons permissible under Article 2.4.2. The substantial support for that finding developed in this case is critical. For the reasons discussed in paragraphs 39-45, above, the proposition that Article 2.4.2 permits multiple comparisons cannot logically coexist

[59]Compare Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 118 - 138.

with the proposition that Article 2.4.2 requires non-dumped amounts to be applied as offsets to dumped amounts in the aggregation process.

60. The agreement of both parties to this dispute and a unanimous Panel that Article 2.4.2 permits multiple comparisons is a fundamental departure from the premise of the report in *EC – Bed Linen.* There, the Appellate Body concluded that nothing in Article 2.4.2 or any other provision of the AD Agreement provided for the establishment of margins of dumping for individual types or models of the product under investigation. The Appellate Body found that the plural phrase "margins of dumping" in Article 2.4.2 referred to dumping of the product that is the subject of the investigation, not to dumping of discrete categories of that product.[60] That finding, however, did not address the immediate context of the methodologies other than the average-to-average methodology provided for in Article 2.4.2.

61. As discussed by the Panel in the present dispute, the "margins of dumping" to be established pursuant to Article 2.4.2 may be established by transaction-to-transaction comparisons or, in certain circumstances, by weighted-average-to-transaction comparisons, as well as by weighted-average-to-weighted-average comparisons. While there are some conditions to using the weighted-average-to-transaction methodology, nothing in Article 2.4.2 limits that methodology or the transaction-to-transaction methodology to circumstances in which there is only a single export transaction. Thus, any time there is more than one export transaction and either of these two methodologies is used, there is a possibility (indeed, a likelihood) that multiple margins of dumping will be established. Looking at the averaging methodology in that

[60]Appellate Body Report, *EC – Bed Linen*, para. 53.

context, the Panel in this case found support for its conclusion that multiple average-to-average comparisons are permissible. The Panel's contextual analysis provided essential support for the rest of its analysis of the multiple comparison issue and distinguishes the arguments before the Appellate Body in this case from the arguments addressed by the Appellate Body in *EC–Bed Linen.*

62. For the reasons discussed above, in paragraphs 39-45, the proposition that multiple comparisons are permissible pursuant to Article 2.4.2 is fundamentally at odds with any interpretation of Article 2.4.2 that requires comparisons found *not* to be dumped to be used to offset comparisons that result in a dumping margin. Therefore, the unanimous agreement of the Panel and the parties in this dispute that multiple comparisons are permissible, including through a close reading of relevant context, and its fundamental importance to the issue at hand before the Appellate Body are cause for giving fresh consideration to the legal issues and arguments presented in this dispute.

2. The Historical Circumstances of the AD Agreement's Conclusion Have Been Brought to Bear in this Dispute.

63. Moreover, the argumentation put forth in this dispute differs from that put forth in *EC – Bed Linen*, in that here it has been established that supplementary means of interpretation corroborate the meaning of Article 2.4.2 that is evident using the international rules of treaty interpretation. As discussed in paragraphs 49-54, above, the historical circumstances confirm that the AD Agreement negotiators considered two distinct issues: the "asymmetry" issue and the "zeroing" issue. Both issues were the subject of contemporaneous dispute settlement, and both were the subject of proposals during the negotiation. The addition of Article 2.4.2 to the original

text of the GATT Antidumping Code represented a consensus resolution of the asymmetry issue. The absence of any corresponding text to address "zeroing" demonstrates the negotiators' lack of consensus to alter the status quo under the Code. This confirms what is clear from the text, that neither Article 2.4.2 nor any other provision in the AD Agreement deals with the issue of aggregating the results of multiple comparisons.

C. The United States Made Fair Comparisons Between Export Price and Normal Value.

64. Before the Panel, Canada asserted that, in addition to violating Article 2.4.2, the United States' method for aggregating the results of the multiple average-to-average comparisons was inconsistent with the "fair comparison" requirement of Article 2.4. The Panel majority, having found the United States' actions inconsistent with Article 2.4.2 of the AD Agreement, found it "neither appropriate, nor necessary" to rule on Canada's Article 2.4 claim.[61] The dissenting opinion, on the other hand, found that Article 2.4.2 does not prohibit the United States' aggregation methodology and, therefore, considered it appropriate to address Canada's Article 2.4 claim. The dissenter found that the United States' methodology was not inconsistent with the "fair comparison" requirement.[62] Consistent with the approach taken in the dissenting opinion, should the Appellate Body agree that Article 2.4.2 permits an investigating authority to make multiple comparisons between export price and normal value and does not constrain the manner in which the results of those comparisons are aggregated, it may perceive a need to address

[61] *Lumber Panel Report*, para. 7.226.

[62] *Lumber Panel Report*, para. 9.24 (dissenting opinion).

Canada's claim under Article 2.4.[63] In anticipation of that possibility, the United States addresses the issue in this section.

65. In *EC – Bed Linen*, after finding the EC's methodology for combining the results of multiple comparisons to be inconsistent with Article 2.4.2 of the AD Agreement, the Appellate Body expressed the view that the methodology in question did not result in a "fair comparison," as required by Article 2.4 of the AD Agreement.[64] Notably, however, the Appellate Body's finding on the EC's methodology was limited to Article 2.4.2.[65] Similarly, in *U.S. – Corrosion-Resistant Steel Sunset Review*, although it made no findings with respect to Article 2.4, the Appellate Body referenced the view it had expressed in *EC – Bed Linen*, *i.e.*, that the so-called "zeroing" methodology would not be consistent with the "fair comparison" requirement of Article 2.4.[66] Neither report, however, provides a textual or contextual analysis of the "fair comparison" requirement.

66. The AD Agreement does not define the term "fair comparison." However, as the Panel noted, Article 2.4 does set out specific parameters for how such fair comparisons are to be made – with due allowance for differences demonstrated to affect price comparability including level

---

[63]Article 17.6 of the DSU limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel." In this case, the Panel majority made no findings and no interpretations regarding Article 2.4 of the AD Agreement. Nevertheless, the Appellate Body may find that the cross-reference from Article 2.4.2 to Article 2.4 creates a sufficiently close link between the provisions that it would be appropriate to complete the analysis in this case. *See, e.g.*, *Canada – Periodicals*, pp. 23-29.

[64]Appellate Body Report, *EC – Bed Linen*, para. 55.

[65]Appellate Body Report, *EC – Bed Linen*, paras. 66, 86(1).

[66]*US – Corrosion-Resistant Steel Sunset Review*, para.134.

of trade, physical characteristics and terms and conditions of sale.[67] These parameters are the sole textual basis for establishing the extent of the "fair comparison" requirement and are consistent with the ordinary meaning of "fair comparison."

67. The ordinary meaning of the term "fair" includes "just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards."[68] Of the alternative definitions of "fair," "in accordance with the rules or standards" would appear to be the most appropriate to the present context. Whereas a determination of the existence of "bias" can involve a highly subjective analysis, rules or standards are typically set to be applied in an objective manner. For instance, a calculation methodology, such as a deduction to export price for movement expenses, is not inherently "unfair" or "biased" simply because it will result in a lower export price and thus increase the antidumping margin. If the term "bias" is understood to refer to any methodology that results in an increase in an antidumping margin (or the ostensible "creation" of a margin), many of the detailed provisions of the AD Agreement would be reduced to inutility.

68. The only objective basis upon which to distinguish a methodology that is "fair" from one that is "unfair" is to examine whether the methodology comports with the rules and standards set forth in the AD Agreement. Article 2.4 sets forth specific parameters for a "fair comparison" of export price and normal value under the AD Agreement. To interpret the phrase "fair comparison" as referring to a benchmark other than those specific parameters is to introduce a subjective element to which WTO Members did not agree.

---

[67] *Lumber Panel Report*, para. 7.199.

[68] New Shorter Oxford English Dictionary, p. 907 (1993).

69. As the dissenting opinion discusses, the broad history of the issue of how multiple margins of dumping may be aggregated reflects two schools of thought regarding the concept of "dumping." One school views dumping as relating to the average pricing behavior of an exporter/producer over time. This school of thought would consider it appropriate to offset dumped comparisons with non-dumped comparisons to determine whether dumping occurred overall.[69]

70. Another school of thought considers that dumping occurs any time an exporter/producer makes export price sales at less than normal value. This school of thought would consider the aggregation of these distinct margins of dumping into an overall, single dumping margin as something done to make the antidumping regime more administrable.[70]

71. As the dissent correctly notes, "[t]he [AD] Agreement does not contain any preamble or statement of object and purpose," and there is no basis on which to conclude that the AD Agreement was premised on the adoption of one or the other school of thought.[71] In fact, there are provisions in the AD Agreement (*e.g.*, Article 9.4(ii), recognizing the use of "prospective normal values," also referred to as a "variable duty approach"), as well as historical methodological reports (the 1960 Group of Experts Report),[72] that indicate that the AD Agreement is not premised solely on the "average pricing behavior" school of thought. In light

---

[69]*Lumber Panel Report*, para. 9.19 (dissenting opinion).

[70]*Lumber Panel Report*, para. 9.19 (dissenting opinion).

[71]*Lumber Panel Report*, para. 9.22 (dissenting opinion).

[72]Anti-Dumping Duties and Countervailing Duties, Second Report of the Group Experts, adopted by the Contracting Parties, May 27, 1960, BISD 9th Supp., p. 194.

of this context, the only benchmark for assessing whether a comparison is a fair comparison is the specific rules set out in Article 2.4.

72. The United States made "fair comparisons" between export prices and normal values, consistent with Article 2.4. Where there were differences in physical characteristics, levels of trade, or other terms of sale that were demonstrated to have affected price comparability between export price and normal value, the United States made adjustments for them. As discussed above, both a textual and a contextual analysis support a finding that nothing more is required by the fair comparison language in Article 2.4. The United States submits that to impose additional requirements pursuant to Article 2.4 would "add to or diminish the rights and obligations provided in the covered agreements," contrary to Article 3.2 of the DSU.

III. CONCLUSION

73. For the reasons discussed above, the United States requests that the Appellate Body reverse the Panel majority's conclusion that the United States acted inconsistently with Article 2.4.2 of the AD Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing."