BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Final Dumping Determination on Softwood Lumber from Canada

Recourse to Article 21.5 of the DSU by Canada

(AB-2006-3)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

June 12, 2006

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SERVICE LIST

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Original Panel Report	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004
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Article 21.5 Panel Report	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, circulated 3 April 2006
EC – Audio Tapes	Committee on Anti-Dumping Practices, Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, issued 28 April 1995 (unadopted)
EC – Bed Linen (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001
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EC – Cotton Yarn	Committee on Anti-Dumping Practices, Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995
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US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Adopted 20 May 1996
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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This appeal presents the Appellate Body with a question not addressed in any prior dispute: in an original antidumping investigation in which the investigating authority (the United States Department of Commerce ("Commerce")) established the existence of margins of dumping based on transaction-to-transaction comparisons, was it required to treat the results of comparisons in which export price exceeded normal value (non-dumped transactions) as offsets against the results of comparisons in which export price was less than normal value (dumped transactions)? In particular, did Article 2.4.2 or 2.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") impose such an obligation on the investigating authority?

2. Canada would have the Appellate Body believe that, in effect, it already has answered this question, that the answer is a necessary consequence of "past reasoning and interpretations of the Appellate Body."[1] This is not correct. More significantly, Canada ignores the only source of rights and obligations under the AD Agreement which, of course, is the text of the AD Agreement itself.

3. Canada relies almost exclusively on the original Appellate Body report in this dispute and the report in *US – Zeroing (EC)*, neither of which dealt with the question presented here. Canada mistakenly assumes that the logic in those reports must extend to the context of the present dispute. At a high level of generality, both the original dispute and the present dispute deal with the issue of how an investigating authority aggregates the results of multiple normal value-to-export price comparisons. But, the similarities end there. At issue in the original dispute was the aggregation of the results of comparisons between weighted average normal

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[1] Canada Appellant Submission, para. 5.

values and weighted average export prices for multiple sub-groups of the product "softwood lumber." At issue in the present dispute is the aggregation of the results of comparisons between individual normal value and export transactions. Canada assumes, without any basis, that what the Appellate Body said about the aggregation of certain types of numbers (*i.e.*, average-to-average comparisons) in the original dispute necessarily applies with equal force to the aggregation of other types of numbers (*i.e.*, specific price differences).[2]

4. Context makes no difference, according to this argument. It is irrelevant, Canada suggests, that the Appellate Body in the original dispute "emphasize[d]" that the terms "margins of dumping" and "all comparable export transactions" "should be interpreted in an integrated manner."[3] It also is irrelevant, under this line of reasoning, that the Appellate Body in the original dispute expressly declined to consider the transaction-to-transaction methodology as relevant context precisely because doing so would have required it to make a finding about aggregation of the results of multiple comparisons under that methodology.[4]

5. Canada simply ignores the fact that the Appellate Body's care in not addressing the transaction-to-transaction methodology in the original report would have been entirely unnecessary if the implications of that report were as general and sweeping as Canada claims. In any event, even if, in the abstract, the "past reasoning and interpretations of the Appellate Body" *could* be generalized as Canada proposes, they *should not* be so generalized where the question at issue is posed not in the abstract but against the backdrop of actual treaty text. Put another

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[2] Canada Appellant Submission, paras. 28-29.
[3] Original AB Report, para. 85.
[4] Original AB Report, para. 105.

way, past reasoning and interpretations must not be extended if they are not supported by the text. For this reason, as the United States will show, the Appellate Body should not extend past reasoning and interpretations in the manner Canada proposes.

6. The Panel in this dispute found that Commerce's establishment of the existence of margins of dumping on a transaction-to-transaction basis was not inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement.[5] Specifically, the Panel found that the text of Article 2.4.2 did not require the aggregation of transaction-specific comparisons "without zeroing."[6] Indeed, the Panel found that broader contextual considerations demonstrated that the application of the Appellate Body's concept of the "product as a whole" outside of the context of the average-to-average comparison methodology would lead to absurd results, including negation of the methodology for addressing so-called "targeted dumping" and fundamental alteration of prospective normal value duty assessment systems.[7]

7. With respect to Article 2.4, the Panel warned that the highly general and subjective standard inherent in the "fair comparison" test should be approached with caution by treaty interpreters.[8] In determining whether a comparison is "fair," a treaty interpreter must refer to the text and context of the AD Agreement. Whether a comparison is "fair" should not be determined according to whether a given methodology may or may not produce a higher margin of dumping than another.[9]

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[5] Article 21.5 Panel Report, para. 6.1.
[6] Article 21.5 Panel Report, para. 5.65.
[7] Article 21.5 Panel Report, para. 5.65.
[8] Article 21.5 Panel Report, para. 5.74.
[9] Article 21.5 Panel Report, para. 5.74.

8. Canada argues that the Panel erred because: (1) the "price difference" to which Article VI:2 of the GATT 1994 refers must be interpreted to require investigating authorities to give full effect to non-dumped transaction-specific comparison results; (2) the term "product" must refer to the "product as a whole;" (3) the Panel incorrectly concluded that the Appellate Body's reasoning in its original report did not apply to the transaction-to-transaction comparison methodology; and (4) the Panel's reliance on "broader contextual considerations" is misplaced.[10]

9. The United States will demonstrate that Canada's appeal should be rejected because the AD Agreement does not require the provision of offsets for non-dumped transactions when aggregating the results of multiple transaction-to-transaction comparisons in an investigation. Our argument will address each of Canada's four principal arguments in turn. We then will address the additional arguments Canada makes with respect to Article 2.4 (which overlap substantially with its Article 2.4.2 arguments). We will show that the Appellate Body should decline Canada's invitation simply to extend the reasoning of its prior reports here. Instead of simply following a line of reasoning that has evolved away from the text itself, the Appellate Body should ground its findings firmly in the text, just as the Panel did.

II. BACKGROUND

10. At issue in the underlying dispute was Commerce's final determination in its original antidumping investigation of certain softwood lumber from Canada.[11] In that determination,

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[10] Canada Appellant Submission, para. 33.

[11] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (April 2, 2002) (*Final Determination*) and accompanying Issues and Decision Memorandum. Following an affirmative threat of injury determination by the United States International Trade Commission, Commerce amended its final determination and published an antidumping duty order on May 22, 2002. *See Notice of*

Commerce used the average-to-average comparison methodology provided for in Article 2.4.2 of the AD Agreement. The original panel found that Commerce's application of the average-to-average comparison methodology was inconsistent with Article 2.4.2 of the AD Agreement.[12] The Appellate Body upheld that result.[13]

11. Following the DSB's adoption of the Original AB Report, the United States came into compliance with its obligations under the AD Agreement through a new proceeding by Commerce resulting in a new determination (known as the "Section 129 Determination"). Commerce established the existence of margins of dumping for softwood lumber from Canada by employing transaction-to-transaction comparisons of United States export prices (or constructed export prices) of certain softwood lumber to identical or similar normal value transactions in Canada. Commerce compared each export transaction to the most appropriate normal value transaction, based on the Department's matching criteria, to determine whether it was sold at less than normal value. For comparisons for which the U.S. sale was made at less than normal value, the results were aggregated and divided by the total of the respondent company's U.S. sales to determine whether the dumping margin for that respondent was above the *de minimis* level.

12. On May 19, 2005, the United States informed the DSB that it had come into compliance with the recommendations and rulings of the DSB.

Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36,068 (May 22, 2002). These documents were exhibits before the panel in the underlying proceeding (specifically, exhibits CDA-1, CDA-2, and CDA-3).

[12] Original Panel Report, para. 7.224.

[13] Original AB Report, para. 117.

13. At the DSB meeting on June 1, 2005, Canada informed the DSB that it considered the United States not to have complied with the DSB's recommendations and rulings, and therefore was seeking recourse to Article 21.5 of the DSU. Specifically, Canada contended that the Section 129 Determination was inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement.

14. On April 3, 2006, the Panel established pursuant to DSU Article 21.5 circulated its report. The Panel concluded that Commerce's Section 129 Determination was not inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement.[14] The Panel therefore considered that the United States had implemented the DSB recommendations and rulings and had brought its measure into conformity with its obligations under the AD Agreement.[15] The United States will discuss particular findings in the Panel's Article 21.5 report as they are relevant to arguments set forth in this submission.

III. ARGUMENT

15. Canada argues that the Panel erred in four essential respects, by finding that:

(1) the term "product" as used in the AD Agreement need not always refer to the so-called "product as a whole";

(2) the term "margin of dumping" as used in the AD Agreement – a term that is defined with reference to a given product – need not always refer to a margin of dumping for the "product as a whole;"

(3) the Appellate Body report in the original dispute did not compel contrary findings with respect to construction of the terms "product" and "margin of dumping"; and

[14] Article 21.5 Panel Report, para. 6.1.
[15] Article 21.5 Panel Report, para. 6.2.

(4) its conclusions were supported by context – specifically, other provisions of the AD Agreement and of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

16. Concerning the third alleged error, Canada seeks additional support from the Appellate Body report in *US – Zeroing (EC)*, which was issued after the Panel circulated the report presently on appeal.

17. We will address each of Canada's four principal arguments in turn. Additionally, we will address Canada's reliance on *US – Zeroing (EC)*. Specifically, we will show that the Appellate Body should reject Canada's invitation to extend the reasoning of that report and instead adopt an analysis – like that of the Panel – that is firmly rooted in the relevant text. Finally, we will demonstrate that the Panel correctly found Canada's claim that Commerce's methodology amounted to a breach of the "fair comparison" requirement in Article 2.4 of the AD Agreement to be without any basis.

A. The Panel Correctly Found That "Product" Does Not Always Mean the Entire Universe of Exported Product Subject to an Anti-dumping Investigation

1. The term "product" is used in a transaction-specific sense in Article VI of the GATT 1994

18. Central to Canada's argument before the Panel was the proposition that a margin of dumping can be established only with respect to a "product as a whole," a concept that Canada understood to mean "the summed results, fully reflecting negative and positive results, of all comparisons concerning the product under investigation."[16] The Panel rejected that proposition

[16] Article 21.5 Panel Report, para. 5.22.

based on a review of the use of the term "product" in Article VI of the GATT 1994. It noted several instances in which that term is used in a manner that refers to a single import transaction, as opposed to "the entire universe of exported product subject to an anti-dumping investigation."[17] It also considered Canada's arguments based on Articles 6.10 and 9.2 of the AD Agreement and found no support there for the proposition that the term "product" must always refer to Canada's concept of the "product as a whole."[18]

19. Canada's cursory response to the Panel's finding is that, with respect to the provisions the Panel cited as using the term "product" to refer to a single import transaction, "[t]he Panel . . . provided no explanation as to why these provisions had to be able to be interpreted as referring to the application of a duty on a single import transaction."[19] In fact, the Panel's explanation plainly rests on the ordinary meaning of the terms in the relevant provisions. Those provisions refer to "levy[ing]" a duty on "the importation of any product," which suggests transaction-specific events.

20. The term "levy" is defined in footnote 12 of the AD Agreement as "the definitive or final legal assessment or collection of a duty or tax." In antidumping assessment systems such as the prospective normal value system, the final antidumping duty is collected, or levied, on individual import transactions at the time of entry. Accordingly, the Panel correctly found that these provisions, which clearly refer to the duties collected on imports, cannot be understood as

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[17] Article 21.5 Panel Report, para. 5.23.
[18] Article 21.5 Panel Report, paras. 5.24-26.
[19] Canada Appellant Submission, para. 43.

invariably supporting a "product as a whole" interpretation of the word "product" in Article VI of the GATT 1994.[20]

21. As the Panel correctly noted, the alternative to understanding those provisions as referring to a single import transaction is understanding them as always and without exception referring to "the entire universe of investigated export transactions," which is not plausible, given the transaction-specific nature of the concept of levying a duty on an importation.[21] The Panel found further support for its conclusion in Article VII:3 of the GATT 1994, which refers to "the value for customs purposes of any imported product," a concept that necessarily is transaction specific.[22] Canada makes no attempt to respond to this point.

22. There is further support for the Panel's conclusion in Article II of the GATT 1994. Article II:2(b) specifically uses the term "product" in relation to "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI." If, as Canada argues, the term "product" for purposes of Article VI means "product as a whole," then the term "product" for purposes of Article II would also mean "product as a whole." Yet that reading, if product as a whole in fact requires an examination of multiple transactions, simply does not work.

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[20] *See* Article 21.5 Panel Report, para. 5.23. Canada contends that the Panel did not explain why Article VI:6 of the GATT 1994 must be capable of referring to a single import transaction. Canada, Appellant Submission, para. 43. As the complaining party, however, it was incumbent upon Canada to demonstrate that the term "product" may only be understood to refer to a "product as a whole" – a phrase that appears nowhere in the GATT 1994 nor in the AD Agreement.

[21] Article 21.5 Panel Report, para. 5.23.

[22] Article 21.5 Panel Report, para. 5.23, n.36.

23. "Product" is used several places in Article II. Canada's proposed reading would mean, for example, that for purposes of the other two items listed in paragraph 2 of Article II – "a charge equivalent to an internal tax" and "fees or other charges commensurate with the cost of services rendered" – each Member would need to consider the "product as a whole." In other words, a Member would average the charges or fees applied to all the entries of a product to determine if the charge was equivalent to an internal tax or commensurate with the cost of services rendered. The result would be even more striking for the tariff treatment of a "product." Again, since for Canada "product" means "product as a whole," and if "product as a whole" *requires* consideration of multiple transactions, then in determining if a Member has abided by its tariff bindings, it would be necessary to consider the "product as a whole." It would be permissible to impose a tariff in excess of the bound rate of duty on particular entries so long as it was "offset" by the tariff on other entries such that the tariff for the "product as a whole" does not exceed the bound rate. To say the least, that result would be extremely surprising to WTO Members.

2. Canada distorts the phrase "product as a whole" beyond the sense in which it was articulated and thereby deprives the term "product" of an important aspect of its ordinary meaning

24. More fundamentally, Canada's equation of the term "product" with the concept of the product as a whole in the sense of "the summed results, fully reflecting negative and positive results, of all comparisons concerning the product under investigation" is misplaced and ignores the sense in which the Appellate Body originally used the phrase "product as a whole." It bears recalling that the phrase "product as a whole" does not appear anywhere in the AD Agreement or

in the GATT 1994. As we will discuss momentarily, that phrase originated in a very specific context in the *EC – Bed Linen* dispute. Canada in effect has adapted the phrase to its own purposes, separating it from its original context, and investing it with a significance as if it were in fact treaty text.[23]

25. It is helpful to recall the origins of the phrase "product as a whole," which has gained much currency in WTO disputes concerning "zeroing," even though it appears nowhere in the AD Agreement or in Article VI of the GATT 1994. The phrase "product as a whole" was originally coined by the EC in its *defense* of "zeroing" in *EC – Bed Linen*. There, the EC argued that it calculated dumping margins for sub-products and then determined an overall margin for the "product as a whole" – *i.e.*, all of the sub-products.[24] In its report in *EC – Bed Linen*, the Appellate Body adopted the EC's terminology, but focused on the fact that the EC "of its own accord" identified bed linen as the "product" under investigation,[25] concluding that, "[h]aving defined the product at issue . . . the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product . . . were so different from each other that these types of models were not 'comparable.'"[26] Therefore, the Appellate Body used a concept that the EC had articulated – "product as a whole" – merely to emphasize the point that when an authority chooses to undertake average-to-average comparisons in an investigation for a product, the ultimate result must reflect that same product "as a whole."

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[23] *See, e.g.*, Canada Appellant Submission, paras. 6, 24, 25, 26, 32, 33, 37, 42, 45.
[24] *EC – Bed Linen (AB)*, para. 47.
[25] *EC – Bed Linen (AB)*, paras. 53, 57.
[26] *EC – Bed Linen (AB),* para. 58.

26. In *Softwood Lumber,* the Appellate Body again used the phrase "product as a whole" to reinforce the view expressed in *Bed Linen* – that, "having defined the product under investigation," the investigating authority must arrive at a result that reflects the product "as a whole." It is not sufficient for each of the individual sub-product comparisons to include "all comparable export transactions" if the aggregation of those sub-product comparisons does not continue to fully include "all comparable export transactions."[27] The Appellate Body was, as in *Bed Linen*, examining the treatment of "sub-products" in the aggregation stage for purposes of construing the phrase "all comparable export transactions" in Article 2.4.2.

27. In sum, in the first two disputes in which the Appellate Body considered "zeroing," it used the phrase "product as a whole" for the purpose of distinguishing a product from a sub-product. The Panel in the present dispute took note of this. It observed:

> In light of the Appellate Body's own description of 'the product as a whole', we believe that the Appellate Body simply used the phrase 'product as a whole' to emphasise the difference between establishing a margin of dumping for a single model of the product under investigation on the one hand, and establishing a margin of dumping for the product under investigation writ large, in all its types, models or categories.[28]

28. Canada's use of the phrase "product as a whole" represents a dramatic departure from the original sense in which the Appellate Body used the phrase. As just noted, the Appellate Body originally adopted the phrase to distinguish the margin of dumping for a "product" from dumped amounts found to exist for individual sub-products based on multiple average-to-average comparisons. It does not follow, however, that the term "product" can never refer to the good

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[27] Original AB Report, para. 99.

[28] Article 21.5 Panel Report, para. 5.22, n.33 (emphasis in original).

that is the object of a single transaction. Yet, that is precisely the conclusion that Canada would like to draw. Canada would take a concept articulated in the context of distinguishing "the product under investigation writ large" from sub-groups of the product and generalize it, such that the term "product" as used in the AD Agreement and GATT 1994 must always, without exception, refer to "the entire universe of exported product subject to an anti-dumping investigation."

29. Because Canada's argument depends so critically on expansion of the concept "product as a whole," it is worth underscoring this point. Depending on context, the term "product" can have either a collective meaning or an individual meaning. For example, Article 2.6 of the AD Agreement – which defines the term "like product" in relation to "the product under consideration" – plainly uses the term "product" in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense. Where the relevant context is "product" in the collective sense (*e.g.*, "softwood lumber"), a particular model, type, or category of the product (*e.g.*, Southern Yellow Pine) does not constitute "the product"; in this context, it constitutes a sub-group of "the product." It does not logically follow from this observation that, *in a different context*, the object of a particular transaction (*e.g.*, a sale involving a specific quantity of 2X4s) cannot be considered "the product." Yet, that is the very conclusion that Canada proposes to draw. Canada would deprive the term "product" of one essential aspect of its ordinary meaning.

3. Experience applying Article VI of the GATT 1947 contradicts Canada's argument that a margin of dumping can be established only for the "product as a whole" and not for a single transaction

30. As discussed above, the Panel correctly found that the term "product" as used in Article VI of the GATT 1994 "need not necessarily be interpreted as 'product as a whole', in the sense that Canada posits."[29] The Panel's finding is supported by expert commentary and dispute settlement panel findings concerning the application of identical text in the GATT 1947 (as well as corresponding text in the Tokyo Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "Antidumping Code"), the predecessor to the AD Agreement). At a minimum, this background undermines Canada's suggestion that the interpretation set forth by the Panel in this dispute (which, like the panels in the Antidumping Code disputes, consisted of independent, impartial reviewers with extensive experience in the trade remedies area) is impermissible. As a permissible interpretation, it must be upheld, according to the applicable standard of review under Article 17.6(ii) of the AD Agreement.

31. The text of Article VI did not change as a result of the Uruguay Round agreements.[30] Therefore, if, as Canada asserts, the term "product" in Article VI of the GATT 1994 must be interpreted to mean "product as a whole" in the sense of the entire universe of exported product subject to an antidumping investigation, then the same term in Article VI of the GATT 1947

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[29] Article 21.5 Panel Report, para. 5.22.

[30] Relatedly, the text of Article 2.1 of the AD Agreement (which concerns the definition of "dumping," as discussed in more detail, below) mirrors the text of the Tokyo Round Antidumping Code.

must have had the same meaning. The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.[31]

32. However, expert commentary and dispute settlement panel findings under the GATT 1947 and Antidumping Code show that Canada's proposed interpretation of "product" and "margin of dumping" has *not* been accepted, while that proposed by the United States has been found reasonable and clearly permissible not only by the Panel in this dispute, but by other impartial experts as well.

a. 1960 Group of Experts report adopted by the Contracting Parties

33. Evidence that the U.S. understanding of "product" and "margin of dumping" is at least reasonable includes a 1960 study of Article VI of the GATT 1947 that was adopted by the Contracting Parties. Well before the recent debate about "zeroing" or "offsets," a Group of Experts convened to consider numerous issues with respect to the application of Article VI of the GATT 1947. Its report included language relevant to whether Article VI of the GATT 1947 provides for the calculation of margins of dumping only for a "product as a whole," or whether margins of dumping may be understood to exist with respect to individual import transactions.

34. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect

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[31] Instructive in this regard is *US – Underwear (AB)*, p. 15, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissible." The corollary, however, is that when a provision is not changed, there is a presumption that behavior that previously was permissible remains permissible.

of each single importation of the product concerned."[32] While the Group further considered the practical aspects of such an approach to dumping administration, at no place in its report is there any suggestion that this "ideal method" was inconsistent with its understanding of the term "product" as used in Article VI of the GATT 1947. In fact, it is difficult to conceive of a method being described as "ideal" while, at the same time, being at odds with the fundamental obligation being addressed. Indeed, the Panel properly considered this history and found that "the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping."[33]

b. Pre-WTO panels

35. Additional evidence that the Panel has made a reasonable and clearly permissible interpretation of the terms "product" and "margin of dumping" comes from reports by dispute settlement panels convened under the Antidumping Code. Notably, two panels rejected challenges to "zeroing," thus necessarily rejecting the proposition that the term "product" must refer to the "product as a whole" such that a margin of dumping cannot be established on a transaction-specific basis. In *EC – Cotton Yarn*, the panel rejected an argument by Brazil that the EC's failure to make due allowances for negative margins was inconsistent with the Antidumping Code.[34] In *EC – Audio Tapes*, the panel rejected a claim by Japan that the EC's "zeroing of negative margins" was inconsistent with Article 2.1 of the Antidumping Code.[35] In

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[32] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

[33] *See* Article 21.5 Panel Report, para. 5.64.

[34] Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yar from Brazil*, ADP/137, adopted 30 October 1995, para. 502.

[35] Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Audiocassettes Originating in Japan*, ADP/136, circulated 28 April 1995 (unadopted), para. 360.

view of these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted in what would become the WTO agreements.[36]

36. Significantly, neither the defending party nor either of the complaining parties in the disputes at issue considered Article VI of the GATT 1947 to contain a "product as a whole" obligation that might in any way be relevant to recognition of an obligation to provide an offset for non-dumped transactions.[37]

c. Uruguay Round negotiations

37. Finally, it bears recalling that the AD Agreement was negotiated against the background of the Antidumping Code and the antidumping investigation methodologies of individual Contracting Parties under the Code. It was common among major users of antidumping measures at the time of the AD Agreement negotiations to aggregate the results of individual comparisons without providing an offset based on comparisons for which export price exceeded normal value.[38]

38. The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be

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[36] *See, e.g., Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein "negative dumping margins, i.e., the amount be which export price exceeds normal value, are ignored."

[37] 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.

[38] *See*, *e.g.*, *EC – Audio Tapes*; *EC – Cotton Yarn*. *See also* Original Panel Report, para. 9.11 (stating that multiple averaging was the norm under the Antidumping Code and that the negotiators should have been fully aware of the zeroing issue).

consistent with the Antidumping Code. At the same time, this approach, referred to as the "zeroing" issue, was being discussed by negotiators of the AD Agreement.[39]

39. Thus, as relevant to the present question, during the Uruguay Round negotiations: (a) it was widely recognized that the major users of antidumping measures under Article VI of the GATT 1947 did not provide offsets (*i.e.*, they "zeroed"); (b) while some Contracting Parties objected to this approach, it was found to be consistent with the Antidumping Code; and (c) some of those same Contracting Parties argued that it was necessary to establish an obligation to provide offsets (or prohibit "zeroing") in the AD Agreement. There is absolutely no evidence, and it is completely inconsistent with these historical facts, to suggest that any Contracting Party or negotiator believed that *without any modification to Article VI*, the word "product" in that provision as carried into the GATT 1994 effectively would require offsets for non-dumped transactions.

40. In view of the foregoing background, it hardly can be claimed that the understanding of the terms "product" and "margin of dumping" urged by the United States and supported by the Panel in the present dispute is impermissible.[40] Even if the Appellate Body were to find that this

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[39] *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.

[40] The United States notes that the view that a margin of dumping may be established on a transaction-specific basis is a view held not only by the authors of the 1960 Group of Experts Report and the members of the two Antidumping Code panels noted above. It is a view also held by the independent, impartial members of the Panel in the present dispute, as well as the members of the panel in the *US – Zeroing (EC)* dispute, many of whom have extensive

permissible interpretation is not the only permissible interpretation, that would not be a basis for reversing the Panel's findings, under the applicable standard of review in Article 17.6(ii) of the AD Agreement.

B. The Panel Correctly Found That a Margin of Dumping May be Established on a Transaction-Specific Basis, Rather Than on the Basis of the "Product as a Whole" as Canada Defines That Concept

41. In its argument to the Panel, Canada contended that since the term "product" as used in the AD Agreement and Article VI of the GATT 1994 must encompass "the entire universe of exported product subject to an anti-dumping investigation," and since a margin of dumping must be established with respect to a "product," therefore a margin of dumping can be established only with respect to "the entire universe of exported product subject to an anti-dumping investigation." Having rejected Canada's argument concerning the term "product," the Panel rejected its related argument concerning the term "margin of dumping." The Panel based its finding firmly in the text of Article VI of the GATT 1994. After reviewing paragraph 1 of Article VI in particular, the Panel explained:

> In other words, there is dumping when the export 'price' is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase 'price difference', it would be permissible for a Member to interpret the 'price difference' referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that 'price difference' as the 'margin of dumping'.[41]

42. Canada makes three principal arguments for the proposition that this finding amounted to error. First, it argues that in establishing a margin of dumping, an investigating authority must

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experience in the trade remedies area.

[41] Article 21.5 Panel Report, para. 5.27 (internal citation omitted).

"take into account the full value of all intermediate comparison results, be they positive or negative, so that the calculation of the final margin of dumping fully reflects the 'product as a whole.'"[42] It purports to base this proposition on the Appellate Body's report in the original dispute. However, as already discussed above (and as we will discuss in more detail in part C, below), this argument is based on a gross distortion of the concept "product as a whole" – a concept not found anywhere in the AD Agreement or in GATT 1994 – from the meaning it was given when originally articulated.

43. Canada's concept of "product as a whole" lacks any connection to the relationship between various types, models, or categories and the "product" of which those types, models, or categories constitute subsets. This is evident from its use of the invented phrase: "all intermediate comparison results." Canada has generalized from the specific proposition that a "product" (in the collective sense) is the sum of all types, models, or categories to the more abstract proposition that a "product" is the sum of "all intermediate comparison results," thus ruling out the possibility that the object of a single transaction-to-transaction comparison may be a "product" (in the individual sense). To put it another way, while the results of sub-product average-to-average comparisons may be considered "intermediate" *vis-à-vis* the relevant Article 2.4.2 provision – in particular, the phrase "all comparable export transactions" – the results of transaction-to-transaction comparisons are not "intermediate" *vis-à-vis* the Article 2.4.2 provision that pertains to such comparisons. This extension from the specific to the abstract dismisses the ordinary meaning of the term "product," finds no support in the AD Agreement or

[42] Canada Appellant Submission, para. 37.

the GATT 1994, and misconstrues the very Appellate Body reasoning on which it purports to rely (as we will discuss in part C, below).

44. Second, Canada argues that the grammatical construction of the first sentence of Article 2.4.2 of the AD Agreement means that the term "margins of dumping" must have the same meaning with respect to transaction-to-transaction comparisons as it has with respect to average-to-average comparisons.[43] That is, according to Canada, since the term " margin of dumping" appears only once in the sentence at issue, if it pertains to the "product as a whole" in the latter case, then it must pertain to the product as a whole in the former case.

45. Like its first argument, this argument suffers from the flaw of distortion of the concept of "product as a whole." It assumes that this is a generic concept, equally applicable to different comparison methodologies, even though the Appellate Body articulated it with reference to the relationship between sub-groups of a product and the product writ large. As already discussed, there simply is no basis for Canada's assumption. Nor does Canada explain why, as a matter of grammar, the term "margin of dumping" must have an identical meaning with respect to the two different methodologies provided for in Article 2.4.2 of the AD Agreement. Canada posits an alternative formulation that the drafters might have used to indicate that "margin of dumping" may have different meanings according to the comparison methodology being used. But this alternative formulation is not the only conceivable way of expressing that proposition. As the Panel explained:

> Since 'margins of dumping' may therefore be established in different ways, using different methodologies, it is entirely possible that the nature of the resultant

[43] Canada Appellant Submission, paras. 39-40.

> 'margins of dumping' may also differ, in order to reflect the nature of the comparison methodology at issue.[44]

46. Third, Canada argues that the Panel's construction of "margin of dumping" is erroneous because of the absence in Article 2.4.2 of "express language that permits the use of zeroing in the calculation of 'margins of dumping.'"[45] Supposedly relying on a prior Appellate Body finding (for which it provides no citation), Canada asserts without any explanation that so-called "zeroing" is prohibited because it is not expressly permitted.

47. There are at least two problems with this argument. First, it effectively invents an obligation found nowhere in the text. What Canada regards as a lack of express language permitting "zeroing" may also be regarded as a lack of express language requiring an offset to dumped transactions for other transactions sold at greater than normal value (*i.e.*, non-dumped transactions). Canada would impermissibly impose that requirement, notwithstanding silence in Article 2.4.2 on this issue.

48. Second, Canada's reliance on an unidentified prior Appellate Body finding is misplaced. As noted above, until now, no dispute has presented the Appellate Body with the question at issue here: whether an investigating authority calculating margins of dumping on a transaction-to-transaction basis must treat the results of comparisons in which export price exceeds normal value (non-dumped transactions) as offsets against the results of comparisons in which export price was less than normal value (dumped transactions). Therefore, it is impossible that "[t]he Appellate Body has already found" the proposition on which Canada relies.

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[44] Article 21.5 Panel Report, para. 5.20, n.28.

[45] Canada Appellant Submission, para. 41.

49. Finally, Canada seeks support in Article 6.10 of the AD Agreement for the proposition that a margin of dumping can be established only with respect to a product as a whole. Thus it asserts, "Article 6.10 provides that investigating authorities should determine a 'margin of dumping' for the 'product under investigation.'"[46] Like its other arguments, this one too is fatally flawed.

50. The first sentence of Article 6.10 reads, "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." The remainder of Article 6.10 elaborates on this basic rule. Canada reads a significance into this provision that is not supported by the text.

51. Article 6.10 simply provides that a Member must calculate a margin of dumping for each individual exporter or producer – as opposed to one margin for all exporters or producers (or, as it was described in *Mexico – Rice,* a "company-specific" as opposed to a "country-wide" margin).[47] Article 6.10 says nothing about whether the margin must be based on more than one transaction, and it does not prohibit the calculation of a margin of dumping on a transaction-specific basis.[48]

52. Nothing prevents a margin of dumping from being calculated on both a transaction-specific basis *and* an exporter-specific basis. This understanding of Article 6.10 is confirmed by the Spanish text of that article, which provides that the investigating authority must determine a margin of dumping "que corresponda a cada exportador" or "that corresponds to each exporter."

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[46] Canada Appellant Submission, para. 26.
[47] *Mexico – Rice,* paras. 208, 217.
[48] *See* Article 21.5 Panel Report, para. 5.25.

A margin may correspond to an exporter while being based on one transaction – as long as that transaction is the exporter's.

C. Canada's Reliance on Prior Appellate Body Reports is Misplaced

1. Canada's reliance on the Appellate Body Report in the original *Softwood Lumber* dispute is misplaced

53. Canada's argument to the Panel essentially urged the Panel to separate the reasoning of the original Appellate Body report from the context in which it was articulated and apply it to the different context of the present dispute.[49] It stated its main thesis quite succinctly in its first written submission to the Panel: "Both methodologies [*i.e.*, both average-to-average and transaction-to-transaction] involve multiple comparisons. The Appellate Body has held that an investigating authority, including DOC, necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."[50] Thus, Canada's argument hinged crucially on expanding the concept of average-to-average comparisons within each of multiple sub-groups of a product under consideration to the generic concept of "multiple comparisons," sweeping in transaction-to-transaction comparisons. It assumed, without explanation, that it was appropriate to make this leap from the specific to the generic.

54. The Panel rejected Canada's argument, observing that "[t]he Appellate Body's *ratio decidendi* were necessarily limited to the legal issues before it."[51] In particular, the Panel

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[49] *See, e.g.*, Canada First Written Submission, paras. 25-27; Canada Second Written Submission, paras. 2, 8-15; Canada Oral Statement, paras. 4, 7-11.

[50] Canada First Written Submission, para. 26.

[51] Article 21.5 Panel Report, para. 5.20.

recalled the Appellate Body's decision not to address the United States' argument that the transaction-to-transaction and average-to-transaction methodologies provided for under Article 2.4.2 lend contextual support to the construction of the average-to-average methodology the United States advocated in that appeal. The Appellate Body found that reaching this contextual argument would have required it to "'examin[e] first *whether zeroing is permitted under those methodologies*.'"[52] As the Panel correctly found, refraining from reaching this issue would have been unnecessary if the Appellate Body's reasoning were as sweeping as Canada now argues it was.[53]

55. The Panel also noted that "the Appellate Body explicitly 'emphasize[d]'" that the terms "all comparable export transactions" and "margins of dumping" "'should be interpreted in an integrated manner.'"[54] In light of this emphasis, the Panel found it inappropriate simply to apply the Appellate Body's construction of the term "margins of dumping" in a context – *i.e.*, the provision on the transaction-to-transaction methodology – where the term "all comparable export transactions" does not appear.[55]

56. In its appellant submission, Canada once again relies extensively on the Appellate Body report in the original dispute.[56] In response to the Panel's finding that "[t]he Appellate Body's *ratio decidendi* were necessarily limited to the legal issues before it," Canada makes three

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[52] Article 21.5 Panel Report, para. 5.20 (quoting Original Appellate Body Report, para. 105 (emphasis supplied in Panel Report)).

[53] Article 21.5 Panel Report, para. 5.20.

[54] Article 21.5 Panel Report, para. 5.21 (quoting Original Appellate Body Report, para. 85).

[55] Article 21.5 Panel Report, para. 5.21.

[56] *See, e.g.*, Canada Appellant Submission, paras. 3, 6, 25-29.

arguments. First, Canada asserts that the Appellate Body's emphasis on the integrated manner in which the terms "all comparable export transactions" and "margins of dumping" should be interpreted is set out in the introduction to the Appellate Body's analysis of Article 2.4.2, rather than in the analysis itself. It suggests that this placement somehow gives the statement less significance.[57]

57. This argument is not well founded for at least two reasons. First, even though the statement at issue occurs under a sub-heading entitled "introduction," that sub-heading occurs under a heading entitled "Interpretation of Article 2.4.2." The organization of the discussion thus makes clear that the introduction is part of, rather than separate from, the analysis. Second, Canada offers no support for its unusual proposition that the significance of a principle "emphasize[d]" by the Appellate Body somehow turns on whether it occurs under a sub-heading entitled "Introduction" or some other sub-heading. Prior Appellate Body findings suggest that the organization of a discussion does not dictate the significance of particular statements in that discussion.[58] Indeed, it may well be appropriate to read a statement "emphasize[d]" at the outset of an analysis as having *greater* rather than lesser significance, inasmuch as it frames the entire discussion that it introduces.

58. Canada's second argument is that the term "all comparable export transactions" was not relevant to the Appellate Body's analysis, because the parties did not disagree over the meaning

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[57] Canada Appellant Submission, para. 48.

[58] *Cf. US – FSC (Article 21.5)(II) (AB)*, para. 67 (finding that "assessment of the panel request should not be confined to the content of its section 2 entitled "The Subject of the Dispute").

of that term.[59] Once again, Canada propounds an unusual thesis without offering any support. In its original report, the Appellate Body referred to "all comparable export transactions" as an element of context within which the term at issue – "margins of dumping" – should be construed. The United States is not aware of any rule of treaty interpretation that deems an element of context to be irrelevant if it is not itself the subject of disagreement.

59. Canada's third argument is that, notwithstanding the emphasis at the outset of its analysis that the terms "all comparable export transactions" and "margins of dumping" should be interpreted in an integrated manner, the Appellate Body's reasoning did not suggest that the former phrase modified its interpretation of the latter.[60] It is not clear in what sense Canada would have expected one term to "modif[y]" the other. What is clear is that throughout its analysis of the term "margin of dumping," the Appellate Body made repeated reference to the determination of dumping amounts for particular type, model, or category sub-groups of the product under consideration, reflecting an unmistakable attention to the context in which the term at issue was being examined.[61]

60. Finally, Canada dismisses the significance of the Appellate Body's decision to refrain from reaching the argument in the original appeal concerning the transaction-to-transaction and average-to-transaction methodologies as context. According to Canada, the Appellate Body

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[59] Canada Appellant Submission, para. 48.

[60] Canada Appellant Submission, para. 48.

[61] *See, e.g.*, Original Appellate Body Report, paras. 96-99. Canada also observes that the Appellate Body's analysis in *US – Zeroing (EC)* does not depend on the term "all comparable export transactions" as context. We turn to the analysis in that report in the next section.

"was confining its legal findings, as opposed to its reasoning, to the matter before it."[62] This understanding of the original Appellate Body report misses the point entirely. If, as Canada contends, the Appellate Body's reasoning applied to all aggregations of "multiple comparisons," regardless of context, then addressing the contextual argument advanced by the United States would have been simple. As the Panel observed, "there would have been no need for the Appellate Body to first examine 'whether zeroing is permitted' under the T-T methodology."[63]

2. Canada's reliance on the Appellate Body report in *US – Zeroing (EC)* is misplaced

61. In addition to relying heavily on a mis-reading of the original Appellate Body report in this dispute, Canada seeks support from the recently issued Appellate Body report in *US – Zeroing (EC)*.[64] That reliance, too, is misplaced. Fundamentally, the report in *US – Zeroing (EC)* is not relevant, inasmuch as the Appellate Body was not presented with the question at issue here: whether Commerce, in calculating margins of dumping on a transaction-to-transaction basis, was required to treat the results of comparisons in which export price exceeded normal value (non-dumped transactions) as offsets against the results of comparisons in which export price was less than normal value (dumped transactions).[65] For the additional reasons set forth below, the Appellate Body should decline Canada's suggestion that it simply apply its findings from *US – Zeroing (EC)*.

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[62] Canada Appellant Submission, para. 50.

[63] Article 21.5 Panel Report, para. 5.20.

[64] *See, e.g.*, Canada Appellant Submission, paras. 25-29, 57.

[65] Indeed, the Appellate Body expressly stated that it was making no finding with respect to the transaction-to-transaction comparison methodology. *US – Zeroing (EC) (AB)*, para. 203.

62. In *US – Zeroing (EC)*, the Appellate Body found the U.S. application of "zeroing" in certain assessment reviews (as distinct from original investigations) to be inconsistent with the AD Agreement. It based that finding on an understanding of the term "dumping" derived from Article VI of the GATT 1994 and Article 2.1 of the AD Agreement.[66] Canada relies on this finding as a generalization of the proposition that a "margin of dumping" means a margin of dumping for the "product as a whole," even outside the context of the average-to-average methodology provision in Article 2.4.2.[67] There are several problems with this line of reasoning.

63. We already have alluded to the first problem in our discussion of the GATT 1947 and Antidumping Code. The text of Article VI relevant to the Appellate Body's finding in *US – Zeroing (EC)* has existed unchanged since the conclusion of the GATT 1947. If "product" in Article VI of the GATT 1994 necessarily means "product as a whole," then "product" in Article VI of the GATT 1947 necessarily had the same meaning. However, as discussed above, the evidence does *not* show this to have been the commonly accepted view under either the GATT 1947 or the GATT 1994. Quite to the contrary, the 1960 Group of Experts Report adopted by the Contracting Parties and the findings of independent, impartial reviewers (many with extensive trade remedies experience) in both Antidumping Code disputes and WTO disputes evidence a clear, well reasoned articulation of the opposite view.

64. A second problem with Canada's reasoning is that the finding from the *US – Zeroing (EC)* report on which it principally relies appears to be based on a misinterpretation of a finding

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[66] *See US – Zeroing (EC) (AB)*, paras. 125-26 (referring to Article VI:2 of the GATT 1994 and Article 2.1 of the AD Agreement as the basis for defining dumping in relation to the product as a whole).

[67] Canada Appellant Submission, para. 49.

of the original Appellate Body report in the present dispute. As already discussed, the concept of "product as a whole" in the original report in this dispute, as in *EC – Bed Linen*, was articulated in the context of contrasting a particular model, type, or category of a product to the "product" writ large of which it forms a part. Thus, where multiple averaging is performed for different models, types, or categories of a product, the individual results before aggregation do not represent margins of dumping for the "product" that includes "all comparable export transactions."

65. In *US – Zeroing (EC)*, the concept of "product as a whole" was inexplicably broadened from the *multiple averaging* context to the context of "*multiple comparisons*" more generally, such that if multiple comparisons are undertaken, "zeroing" is prohibited.[68] The difficulty with this generalization of the "product as a whole" concept is particularly evident when it is recalled that the Appellate Body has stated that Members have a choice as to whether to use "multiple comparisons" in calculating the margin of dumping.[69] If "product" necessarily means the entire universe of exported product subject to an antidumping investigation, regardless of context – as the Appellate Body in *US – Zeroing (EC)* suggested is the case under Article 6.10 of the AD Agreement – then this choice is entirely illusory. Under this reasoning, a Member *must* aggregate transactions in order to calculate a margin of dumping.

66. A third problem with Canada's reasoning based on the report in *US – Zeroing (EC)* is that it effectively makes redundant or "inutile" the phrase "all comparable export transactions,"

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[68] *Compare US – Zeroing (EC) (AB)*, para. 126, *with* Original AB Report, para. 97.

[69] *US – Zeroing (EC) (AB)*, para. 126 (emphasis added) (citing Original AB Report, para. 97).

which pertains only to the average-to-average methodology provided for in Article 2.4.2 of the AD Agreement. That is, if there is a general obligation to establish the margin of dumping for the "product as a whole," regardless of the comparison methodology used, then the establishment of that margin must include the aggregation of all comparable export transactions occurring during the period of investigation. This would be true whether the investigating authority used the average-to-average comparison methodology, the transaction-to-transaction methodology, or the average-to-transaction methodology. However, the phrase "all comparable export transactions" is used in Article 2.4.2 only with reference to the average-to-average methodology. A general obligation to establish the margin of dumping for the product as a whole renders that phrase without meaning, contrary to the customary rules of treaty interpretation.[70]

67. In this section, we have examined the principal points on which Canada has taken statements from prior Appellate Body reports, separated them from their context, and urged the Appellate Body in the present dispute to reverse findings by the Panel on the authority of those statements. In contrast to the arguments Canada makes, the Panel in this dispute made a point of grounding its analysis firmly in the relevant treaty text, in context, and in light of the object and purpose of the AD Agreement. It rejected the approach that Canada effectively advocates of eschewing the text and instead starting with the "past reasoning and interpretations of the Appellate Body" on the theory that these impliedly point in the direction of an absolute rejection of "zeroing" in all contexts. Moreover, the Panel confirmed its finding through a thorough analysis of context, as we discuss in the following section.

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[70] *See US – Gasoline*, p. 23.

D. Context Within Article VI of the GATT 1994 and the AD Agreement Confirms That There is no General Obligation to Establish a Margin of Dumping for the Product as a Whole Regardless of Comparison Methodology

68. In its review of context, the Panel correctly found that "simply extending the findings" from the original Appellate Body report in this dispute as Canada proposed would result in "a number of difficulties."[71] In this section, we discuss those difficulties, which include rendering treaty text inutile and creating internal inconsistencies within the covered agreements. The contextual difficulties with Canada's argument are an additional reason for upholding the Panel's findings.

1. Article VI:6 and the Note Ad Article VI of the GATT 1994

69. Canada's argument that the term "product" in Article VI of the GATT 1994 necessarily refers to the entire universe of exported product subject to an antidumping investigation hinges importantly on the use of that term in paragraphs (1) and (2) of Article VI.[72] However, other paragraphs in Article VI undercut this interpretation. As we discussed above, the Panel correctly observed that references in paragraphs 6(a) and (b) to "levy[ing]" a duty on the "importation of any product" cannot be understood as supporting a "product as a whole" interpretation of the word "product" in Article VI of the GATT 1994.[73]

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[71] Article 21.5 Panel Report, para. 5.31.

[72] Canada Appellant Submission, paras. 26, 27, 37, 38.

[73] *See* Article 21.5 Panel Report, para. 5.23. Canada contends that the Panel did not explain why Article VI:6 of the GATT 1994 must be capable of referring to a single import transactions. Canada, Appellant Submission, para. 43. As the complaining party, however, it was incumbent upon Canada to demonstrate that the term "product" may only be understood to refer to a "product as a whole" – a phrase that appears nowhere in the GATT 1994 nor in the AD Agreement.

70. Similar support is found in the Note Ad Article VI:1 of the GATT 1994, which provides:

> Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by the exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

71. This provision expressly refers to a particular type of export transaction – a sale through an associated importer – for which the margin of dumping may be calculated based on the price charged by the importer. If the term "margin of dumping," as used in the Note Ad Article VI:1, must refer to the margin of dumping as established for the product as a whole (as Canada's argument would suggest), then whenever an investigating authority established that the exporter makes a sale through an associated importer – even if it is only one sale among many – the investigating authority would be permitted to use the first sale by the importer as the basis of exporter price in all cases. Even sales made to unassociated importers would be subject to a calculation of exporter price based on the first sale by the importer. Clearly, this is not what was intended by the Note Ad Article VI:1. Rather, it was intended to permit an investigating authority to calculate the "margin of dumping" for any particular sale made through an associated importer based on the sale made subsequently by the importer. Thus, the term "margin of dumping," as used in the Note Ad Article VI:1, refers to a single export transaction and contradicts Canada's suggestion that a margin of dumping necessarily means a margin of dumping for the "product as a whole."

2. Article 2.2 of the AD Agreement

72. A second difficulty with Canada's interpretation of the term "margin of dumping" as referring invariably to a margin of dumping for a "product as a whole" concerns the manner in which Members use third country transactions or constructed normal value as alternatives to home market sales as the basis for normal value.[74]

73. Article 2.2 of the AD Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or 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 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 any other costs and for profits. (Footnote omitted).

74. The practice of many Members is to resort to constructed value on a model- or transaction-specific basis.[75] That is, if the home market sales of a particular model were not in the ordinary course of trade, the importing Member might resort to using a constructed normal value for that particular model; however, normal value for other models might still be based on

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[74] *See* Article 21.5 Panel Report, paras. 5.58 - 5.62. Canada takes issue with the Panel's reference to Article 2.2 as context, because "[t]his provision was not at issue in this case." Canada Appellant Submission, para. 58. Canada seems to suggest that a treaty interpreter may not consider context unless that context is itself "at issue." Of course, this unusual rule is not at all consistent with customary rules of treaty interpretation. Thus, Article 31 of the Vienna Convention provides that a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in light of its object and purpose." (Emphasis added.) *See* Appellate Body Report, *Japan – Alcohol Taxes*, pp. 11-12. As the Panel correctly found Article 2.2 of the AD Agreement, which uses the term "margin of dumping," provides relevant context for interpreting the treaty terms at issue in the present dispute.

[75] *See* Article 21.5 Panel Report, para. 5.60.

home market sales. For example, if there are 100 different export transactions of a product, and there are domestic market comparison sales for all but 25 of them (*e.g.*, because the comparison sales for the remaining 25 were not in the ordinary course of trade), a Member would use third country sales or constructed normal value to determine normal value only for those 25 comparisons. It would use the domestic market sales as the normal value for the remaining 75 comparisons.

75. If, however, the "margin of dumping" must refer, regardless of context, to the "product as whole," then, when the conditions of Article 2.2 have been met, an investigating authority would be required to use constructed value for the "product as a whole," not just for specific models or transactions of the product.[76] That is, the margin of dumping for the "product as a whole," and therefore for all comparisons, would have to be calculated using constructed normal value, even if the condition precedent for using Article 2.2 relates only to 25 of the 100 comparisons. This would be inconsistent with the principle that constructed normal value is to be used only in limited circumstances.[77] It also would increase the burden on respondents, who would be required to provide cost information for all models, rather than just those models for which the use of constructed value would be appropriate.[78]

3. The second sentence of Article 2.4.2 of the AD Agreement

76. A third difficulty with Canada's interpretation of the term "margin of dumping" as referring invariably to a margin of dumping for a "product as a whole" is that it in effect would

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[76] Article 21.5 Panel Report, para. 5.62.
[77] Article 21.5 Panel Report, para. 5.62.
[78] Article 21.5 Panel Report, para. 5.62.

render the second sentence of Article 2.4.2 of the AD Agreement a nullity. That sentence provides an exception to the comparison methodologies provided in the first sentence of Article 2.4.2. When certain conditions have been met, the exception permits comparisons of average normal values to transaction-specific export prices. The conditions include identifying a "pattern of export prices which differ significantly among different purchasers, regions or time periods," and explaining why neither of the other two comparison methodologies in Article 2.4.2 can appropriately take into account the significant price differences. The exceptional comparison methodology is specifically designed to produce a different result in situations commonly referred to as "targeted dumping."[79]

77. While the second sentence of Article 2.4.2 is an exception to the "normal" comparison methodologies set forth in the first sentence of that article, it is not an exception to any other obligation of the AD Agreement. Consequently, if, as Canada argues, there is a general obligation that a margin of dumping include the entire universe of export transactions of the product under investigation, that obligation must apply to the second sentence of Article 2.4.2 as well. That is, in order to establish a margin of dumping for the "product as a whole," offsets would be required even when the average-to-transaction comparison methodology is used. This, however, would nullify the second sentence of Article 2.4.2 because, as a matter of mathematics,

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[79] Canada argues that the application of the average-to-transaction comparison methodology was not before the Panel, and thus that its consideration of this issue is "curious." Canada Appellant Submission, para. 53; *see also id.*, para. 71. As was the case in its discussion of the Panel's reference to Article 2.2 of the AD Agreement as context, Canada seems to suggest the existence of a rule that a treaty interpreter may not give consideration to any treaty provision not in issue. This rule would negate the relevance of context and is, therefore, entirely contrary to customary rules of treaty interpretation. *See* Appellate Body Report, *Japan – Alcohol Taxes*, pp. 11-12.

the results of the average-to-average comparison methodology and the average-to-transaction comparison methodology will be the same. If offsets are required in both comparison methodologies, then all non-dumped sales (*i.e.*, negative values) will offset the dumping found on all of the dumped sales (*i.e.*, positive values). In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.[80]

78. This can seen from the following example:

Table 1

Model	NV	EP	Amount of Dumping Average-to-Average		Amount of Dumping Average-to-Transaction
			per unit	total by model	
A	10	10			0
A	10	8			2
A	10	7			3
Model A Average	**10**	**8.33**	**1.67**	**5**	
B	11	11			0
B	11	10			1
B	11	13			-2
Model B Average	**11**	**11.33**	**-0.33**	**-1**	
C	9	9			0
C	9	8			1
C	9	7			2
C	9	8			1
Model C Average	**9**	**8**	**1**	**4**	
	Total	91	Total Dumping with offsets	8	Total Dumping with offsets 8
			as a percentage	8.79%	8.79%

[80] *See* Article 21.5 Panel Report, para. 5.52.

79. During the Panel proceeding, Canada and many of the third parties attempted to identify hypothetical scenarios under which the targeted dumping methodology could be applied, with offsets, and result in a different margin of dumping from the margin of dumping resulting from application of the average-to-average comparison methodology. The Panel addressed these attempts, and correctly concluded that each failed to disprove the proposition that if a margin of dumping must always be established only for the product as a whole, the targeted dumping methodology becomes mathematically redundant with the average-to-average methodology.[81]

80. For example, Canada argued that an investigating authority could analyze only the subset of the export transactions during the period of investigation that corresponded to the particular pricing pattern at issue.[82] The second sentence of Article 2.4.2, however, merely describes the situation in which the average-to-transaction methodology may be used. That is, it establishes a condition precedent that, if met, would lead to the application of the average-to-transaction comparison methodology. It does *not* establish a set of circumstances under which a Member may select a subset of export transactions that indicates the greatest amount of dumping and base its entire antidumping investigation on that subset.

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[81] Canada contends that the Panel "ignored" examples it and some third parties provided on alternative ways of applying the targeted dumping provision. Canada Appellate Submission, para. 56. This is simply not true. As demonstrated in the following discussion, the Panel directly addressed each of the proposed alternatives and demonstrated the flaws in each of them. *See* Article 21.5 Panel Report, paras. 5.34-5.52.

The Panel's analysis on this point was consistent with that of the panel in *US – Zeroing (EC)*. *Compare* Article 21.5 Panel Report, paras. 5.31-5.52 *with US – Zeroing (EC) (Panel)*, paras. 7.266, 7.269.

[82] Article 21.5 Panel Report, para. 5.35.

81. In this regard, the Panel noted that Canada's proposal changed the parameters of the analysis under the average-to-average comparison methodology. That is, "Canada's arguments do not address the question of how a targeted dumping analysis based on a[n] [average-to-transaction] comparison without zeroing could yield a result different from a[n] [average-to-average] comparison, in a situation holding everything except the comparison methodology equal."[83]

82. Additionally, the Panel observed that limiting an investigating authority's analysis to a subset of targeted export transactions as Canada proposed would lead to problems under Article 9.2 of the AD Agreement. That article requires the collection of an antidumping duty "on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury." As the Panel found, "It is not clear that collection of duty only on imports into certain regions, to certain purchasers, or during certain time-periods, even if possible, would be consistent with this requirement."[84]

83. Moreover, limiting an investigating authority's analysis to a subset of targeted export transactions would pose a problem for Canada's interpretation of Article 6.10 of the AD Agreement. As discussed above, Canada's view is that Article 6.10 confirms that the result of a transaction-to-transaction comparison cannot be a margin of dumping because Article 6.10 requires an individual (in Canada's view, single) margin of dumping for the exporter. Applying two different margins of dumping, one for transactions falling within the pattern, and one for the

[83] Article 21.5 Panel Report, para. 5.38.
[84] Article 21.5 Panel Report, para. 5.38.

other transactions, would appear to be inconsistent with Canada's view of this obligation to determine an "individual" margin of dumping for an exporter or producer in an investigation.[85]

84. Similarly, Canada's suggestion that, in a targeted dumping scenario, an investigating authority could calculate one margin of dumping for the transactions falling within the specified pricing pattern and another for all other transactions, is inconsistent with its own "product as a whole" thesis. If, as Canada proposes, a margin of dumping can be established only for the "product as a whole," then the existence of two separate margins for distinct subsets of the "product as a whole" is an impossibility under the AD Agreement.[86]

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[85] *See* Article 21.5 Panel Report, para. 5.38. Contrary to Canada's argument, when the drafters of the AD Agreement intended to permit an investigating authority to consider a subset of transactions, 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.

[86] Article 21.5 Panel Report, para. 5.39. Some third parties argued that the targeted dumping methodology could be seen as an exception to the obligation to establish the margin of dumping for the product as a whole. However, nothing in the text of Article 2.4.2 supports a finding that the targeted dumping methodology is an exception to anything other than the obligation to use a symmetrical comparison methodology during the investigation phase. *See* Article 21.5 Panel Report, para. 5.42.

One third party argued that the denial of offsets when using the targeted dumping methodology would be an allowance or an adjustment to a difference affecting price comparability which is due pursuant to Article 2.4. The Appellate Body addressed and rejected a similar argument in its report in *US – Zeroing (EC)*, paras. 158-59. Specifically, the Appellate Body stated, "In our view, disregarding a result when the export price exceeds the normal value (zeroing) cannot be characterized as an allowance or an adjustment covered by the third sentence of Article 2.4 . . . ." *Id*., para. 158. The denial of offsets "is not undertaken to adjust to a difference relating to a characteristic of the export transaction in comparison with a domestic transaction." *Id*. Accordingly, it is not an adjustment that falls under Article 2.4 of the AD Agreement. *Id*.

Other third parties contended that the results of the average-to-average and the average-to-transaction comparison methodologies would not be the same, to the extent that the average normal value is calculated on different bases for the two methodologies. The Panel correctly concluded, however, that there is no reference to a pricing pattern in home market sales, and thus no basis to select a subset of normal value sales for the weighted average normal value. Article

85. Finally, an alternative to applying different margins of dumping to different transactions of the same exporter or producer would be to calculate a single margin using only the transactions that fell within the specified pricing pattern, and to apply that single margin to all export transactions. As the Panel noted, however, this could create a result which (from an importer's perspective) would be even worse than the establishment of a margin of dumping denying offsets.[87]

4. Prospective normal value assessment systems

86. A fourth difficulty with Canada's interpretation of the term "margin of dumping" as referring invariably to a margin of dumping for a "product as a whole" is that it cannot be reconciled with prospective normal value systems. Under a prospective normal value system, the liability for antidumping duties is determined at the time of importation, with the price of the import transaction being compared to a prospective normal value. To the extent that the specific export transaction is less than the prospective normal value, the Member levies an antidumping duty equal to that difference. If the export price of the export transaction is greater than the prospective normal value, the Member collects no antidumping duty. A Member applying a prospective normal value system does not give the importer a credit that it can apply against

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21.5 Panel Report, para. 5.51. Moreover, there is no textual support for the proposition that the weighted average normal value in the first sentence of Article 2.4.2 is different from the weighted average normal value in the second sentence. Article 21.5 Panel Report, para. 5.51. Indeed, Canada accepted 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. Canada Responses to the Panel's Questions, para. 44.

[87] Article 21.5 Panel Report, para. 5.38. Unsurprisingly, no parties argued for this alternative before the Panel. *Id*.

other export transactions when the export price exceeds normal value. Thus, the assessment is based on a single transaction. Put another way, the margin of dumping is determined on a transaction-specific basis. That a Member is entitled to calculate liability for antidumping duties on a prospective normal value basis is confirmed by Article 9.4(ii) of the AD Agreement.

87. A general obligation to establish the margin of dumping for the "product as a whole" would require a Member applying a prospective normal value system to take all export transactions into consideration in assessing antidumping duties. Thus, the antidumping duties owed by one importer would have to be determined based in part on the prices paid by other importers.

88. An illustration will help to make this point clear. Consider the situation in which the prospective normal value is $10. If the export price paid by importer A is $5, then importer A will be assessed an antidumping duty of $5, representing the difference between the export price of the transaction at issue and the prospective normal value. If the export price paid by importer B is $15, then importer B will pay no antidumping duty, because the export price exceeds the prospective normal value. Importer B will *not* receive a $5 credit (representing the amount by which export price exceeded normal value) to be applied against future imports.

89. Under this system, a margin of dumping is established for each export transaction. But, if a margin of dumping were required to be established for the "product as a whole," then the amount of dumping determined with respect to importer A would have to be offset by the amount of non-dumping determined with respect to importer B. In this example, instead of an antidumping duty of $5, importer A would be liable for *no* antidumping duty. The amount by

which export price exceeds normal value in importer B's transaction would completely offset the amount by which export price is below normal value in importer A's transaction, leading to a dumping margin of zero for the "product as a whole" as Canada understands that concept.

90. As the Panel observed:

> This is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage *vis-à-vis* other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, 'financed' by the higher prices paid by other importers clearing non-dumped, or even less dumped, transactions.[88]

91. Thus, the Panel concluded that requiring the establishment of the margin of dumping on an exporter/producer-specific basis in a prospective normal value system "makes no sense . . . because . . . the 'margin of dumping' at issue is a transaction-specific price difference calculated for a specific import transaction."[89]

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[88] Article 21.5 Panel Report, para. 5.54.

[89] Article 21.5 Panel Report, para. 5.57. The Appellate Body in *US – Zeroing (EC)* found that while antidumping duties could be assessed on a transaction- or importer-specific basis, the total amount of antidumping duties levied may not exceed the exporter's or producer's margin of dumping. Appellate Body Report, *US – Zeroing (EC)*, para. 131. The implications of the Appellate Body's reasoning extend beyond what appears to have been contemplated. The Appellate Body stated that its analysis does not mean that Members are prevented from using a prospective normal value system to calculate liability for payment. *Id*., para. 131, n.234. However, if the Appellate Body does not modify its analysis from *US – Zeroing (EC)*, and margins of dumping must be calculated on the basis of all of the exporter's transactions, then prospective normal value systems have been based on the erroneous premise that updating the normal value is an appropriate substitute for subsequent refund proceedings. Without such a proceeding, there would be no way to calculate the margin of dumping on the basis of all of the exporter's transactions. But *with* such a proceeding, the prospective normal value system would become indistinguishable from the U.S. retrospective assessment system. The only alternative is that prospective normal value systems are somehow exempt from the obligation to calculate a margin of dumping for "all" of the exporter's transactions. But if that is true, then prospective normal value systems are effectively permitted to "zero" – the result of which would be that prospective normal value systems are *permitted* to assess greater duties than other assessment systems are permitted to assess. Nothing in the text of the AD Agreement suggests that the

92. Under Canada's argument, when an investigating authority initially collected antidumping duties on the basis of single transactions to individual importers priced below the prospective normal value, it seemingly would have to take the subsequent step of aggregating those individual results along with any non-dumped export transactions from the exporter to any other importers to determine whether a refund was appropriate (since Article 9.3.2 of the AD Agreement requires provision under a prospective normal value system of "a prompt refund, upon request, of any duty paid in excess of the margin of dumping"). Yet, nowhere does the AD Agreement require the investigating authority in a prospective normal value system to take such a subsequent step. Indeed, the fact that Article 9.3.2 contemplates refunds being provided upon request by the *importer* is directly contrary to the proposition that Article 9 should be construed to require an exporter-oriented procedure to calculate a margin of dumping. Yet, the logical implication of Canada's argument for a prospective duty assessment system is precisely that export transactions must be aggregated to establish a margin of dumping for the "product as a whole." Curiously, though Canada is urging this logic upon the Appellate Body, in implementing its own prospective normal value system Canada does not aggregate export transactions to establish a margin of dumping for the "product as a whole."[90]

93. In sum, as the Panel showed through its thorough analysis, and as we have summarized here, not only is Canada's argument contradicted by the ordinary meaning of the relevant AD Agreement and GATT 1994 text, but its logical implications cannot be reconciled with other provisions of the AD Agreement, which provide relevant context for the provisions at issue.

Members intended to create such a disparity.

[90] *See generally* Article 21.5 Panel Report, n.77 & para. 5.53.

E. The Panel Correctly Concluded That the United States Did Not Act Inconsistently With Article 2.4 of the AD Agreement

94. Having demonstrated that the Panel correctly concluded that the Section 129 Determination was not inconsistent with Article 2.4.2 of the AD Agreement, we now turn to the Panel's conclusion that the measure also was not inconsistent with the "fair comparison" requirement of Article 2.4.[91]

95. Canada argues that the U.S. method of assessing antidumping duties is inherently biased, because it results in a higher margin of dumping than if the United States granted offsets for those export transactions that exceed normal value.[92] As such, Canada considers the methodology applied by the United States in the Section 129 Determination to be inconsistent with the fair comparison requirement of Article 2.4.[93] In this section, we will demonstrate that the Panel correctly rejected this argument.

1. The Panel properly found Commerce's methodology in the Section 129 Determination not inconsistent with the "fair comparison" requirement of Article 2.4 of the AD Agreement

96. Canada's Article 2.4 "fair comparison" argument, both before the Panel and on appeal can be stated simply: If a given comparison methodology yields a higher margin of dumping than another comparison methodology, then the first methodology is "unfair."[94] Thus, Canada contends that "zeroing inflates 'margins of dumping' and creates an 'inherent bias' in these

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[91] Article 21.5 Panel Report, paras. 5.74 to 5.78.

[92] *See* Canada Appellant Submission, paras. 31, 60, 61, 67. As demonstrated below, this is not necessarily true.

[93] *See* Canada Appellant Submission, paras. 7, 60, 61, 67.

[94] *See, e.g.*, Canada Appellant Submission, para. 67; Article 21.5 Panel Report, para. 5.68 (summarizing Canada's argument).

comparisons," implying that there always exists some presumptively correct, "fair" margin of dumping, and that when "zeroing" occurs, the presumptively correct margin is distorted in a way that is unfair.

97. The logical problem with Canada's argument is that it assumes its own conclusion. Only by insisting that a margin established without "zeroing" is "fair" is Canada able to claim that a margin established with "zeroing" is "inflated" and, therefore, "unfair." As the Panel put it, "[T]he fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard."[95] Canada's argument must fail, precisely because there is no basis for its fundamental assumption that "methodology B" – in this case, the establishment of margins of dumping without "zeroing" – is the only fair methodology.

98. Moreover, as the Panel correctly pointed out, if the establishment of margins without "zeroing" were the only fair methodology, then the very general "fair comparison" obligation would "trump the more specific provisions of Article 2.4.2," contrary to the principle of effective treaty interpretation.[96] Canada's only answer is to repeat its disagreement with the Panel's construction of Article 2.4.2 which, as we discussed above, was entirely correct.[97]

99. Given that the establishment of margins of dumping in original investigations using transaction-to-transaction comparisons without providing offsets for non-dumped amounts is permissible under Article 2.4.2, it cannot be deemed "unfair," and therefore impermissible under

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[95] Article 21.5 Panel Report, para. 5.74.
[96] Article 21.5 Panel Report, para. 5.75.
[97] *See* Canada Appellant Submission, para. 70.

Article 2.4, simply because it results in a margin of dumping higher than that which would be obtained if offsets were provided. Analogously, the panel in *EC – Bed Linen* considered a claim by India under Article 2.2 of the AD Agreement. In the antidumping investigation at issue in that dispute, the European Communities relied on constructed normal value, basing its calculation of administrative, selling and general costs and profit on the experience of another Indian producer. India argued that the amount used for administrative, selling and general costs and for profit was not "reasonable" as required by Article 2.2. The panel reasoned, however, that since the methodology used by the European Communities was consistent with Article 2.2.2(ii), the AD Agreement did not require a separate test for whether the results of using that methodology were reasonable.[98]

100. Similarly, Article 2.4.2 expressly permits a Member to use either an average-to-average comparison methodology or a transaction-to-transaction comparison methodology and does not express a preference for one over the other. If, as Canada suggests, the size of any resulting margin of dumping is the basis for determining whether the selection of a comparison methodology is "fair" during the investigation phase, authorities would have to determine at least two putative margins of dumping for each exporter, using each of the two comparison methodologies – and possibly a third putative margin of dumping, if the conditions of the second sentence of Article 2.4.2 had been alleged – and ultimately rely on the methodology that generated the lowest margin. The text of the AD Agreement imposes no such results-driven obligation.

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[98] *EC – Bed Linen (Panel)*, para. 6.101.

101. The Panel made the related point that characterizing "zeroing" as inherently and without exception "unfair" would render the second sentence of Article 2.4.2 of the AD Agreement redundant with the first. This is because, as it discussed in its analysis of Article 2.4.2, if offsets must be provided under the average-to-transaction comparison methodology (*i.e.*, if "zeroing" is prohibited), then that methodology would become mathematically identical to the average-to-average methodology.[99] Canada's answer is that "the Panel should not have considered the application of the [average-to-transaction] methodology in the absence of any evidence on which to basis its analysis."[100]

102. Once again, Canada inappropriately would put an obstacle in the way of the Panel's recourse to a basic element of treaty interpretation – *i.e.*, relevant context for the provision being interpreted. Canada would allow the Panel to refer to context – here, its understanding of the average-to-comparison methodology – only if presented with "evidence" about that context. Evidence typically is adduced to enable a panel to make factual findings. It is unclear why Canada believes that evidence was required here to enable the Panel to make a legal interpretation. In any event, in the proceeding before the Panel, there was substantial discussion of the meaning of the second sentence in Article 2.4.2, and the Panel's findings with respect to that sentence were largely informed by Canada's (and third parties') inability to rebut the showing by the United States that, without "zeroing," the methodology provided under that sentence is mathematically identical to the average-to-average methodology.[101]

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[99] Article 21.5 Panel Report, para. 5.76.
[100] Canada Appellant Submission, para. 71.
[101] Article 21.5 Panel Report, paras. 5.33 to 5.52.

103. The Panel further recognized that a finding of a general "fair comparison" obligation to offset non-dumped sales "would have profound implications for prospective normal value duty assessment procedures of the sort applied by Canada."[102] As discussed above, under such procedures, duty is assessed on a transaction-by-transaction basis. Requiring one importer's non-dumped transaction to offset another importer's dumped transaction in order to achieve a "fair comparison" would alter the very nature of prospective normal value duty assessment procedures. Canada fails to address this point in its appellant submission.

2. The Appellate Body reports on which Canada relies do not support its "fair comparison" argument

104. In arguing that the denial of offsets under the transaction-to-transaction comparison methodology is inconsistent with the fair comparison obligation of Article 2.4, Canada relies primarily on statements made by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*.[103] Neither this report nor the Appellate Body report in *EC – Bed Linen* supports Canada's argument.[104]

105. In its arguments to the Panel, Canada cited to statements in the *US – Corrosion-Resistant Steel Sunset Review* report regarding the "fair comparison requirement." These statements were

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[102] Article 21.5 Panel Report, para. 5.77. Canada contends that the effect of an interpretation of the terms "dumping" and "margins of dumping" on the application of a prospective normal value assessment system, like that employed by Canada, is not relevant to the proper interpretation of Article 2.4.2. Canada Appellant Submission, para. 72. However, as discussed above, customary rules of treaty interpretation require an interpreter to give effect to the ordinary meaning of the provisions of the treaty, in their context. *Japan – Alcohol Taxes*, pp. 11-12. Because Article 9.3 uses the term "margin of dumping," it provides appropriate context for considering the proper interpretation of that term.

[103] Article 21.5 Panel Report, para. 5.73; Canada Appellant Submission, paras. 67-68.

[104] *See* Article 21.5 Panel Report, para. 5.73.

made, however, without any analysis of the text of the AD Agreement, did not provide any reasoning beyond reference to the *EC – Bed Linen* report, and were made in the context of a dispute in which the Appellate Body was unable to "complete the analysis." In the end, the Appellate Body was "unable to rule" on whether the United States acted inconsistently with Article 2.4 and Article 11.3 of the AD Agreement.[105]

106. The Panel in this dispute rejected Canada's reliance on the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review*, due to the entirely different legal issue and context of that dispute.[106] In its appellant submission, Canada makes no attempt to demonstrate the report's relevance here, despite the Panel's finding. Likewise, although it continues to claim support for its "fair comparison" argument from the Appellate Body report in *EC – Bed Linen*, Canada makes no attempt to respond to the Panel's observation that "in the *EC – Bed Linen* case, none of the legal issues before the Appellate Body concerned Article 2.4 of the *AD Agreement*."[107]

IV. CONCLUSION

107. For the reasons set forth in this submission, the United States requests that the Appellate Body reject Canada's claims of error in their entirety and uphold the Panel's findings and conclusions.

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[105] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 138.
[106] Article 21.5 Panel Report, para. 5.73.
[107] Article 21.5 Panel Report, para. 5.73.