WORLD TRADE ORGANISATION

Third Participant Submission to the 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*)*

THIRD PARTICIPANT SUBMISSION OF NEW ZEALAND

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I EXECUTIVE SUMMARY

1.01 New Zealand has joined this dispute because of our systemic interests in the interpretation of the *Anti-Dumping Agreement* as it relates to transaction-to-transaction methodology. New Zealand prefers to use this methodology in anti-dumping investigations due to the relatively small number of shipments into the New Zealand domestic market. It is, in our view, an appropriate methodology for small and developing countries.

1. There are two primary methodologies for determining the existence of "dumping"

1.02 Central to the concept of "dumping" is a comparison between two things - "export price" on the one hand and "normal value" on the other. Under Article 2.1, to determine whether dumping has occurred it is necessary to compare "the export price" with "the comparable price" in the home market of the exporter.

1.03 Article 2.4.2 sets out the two primary methods by which the central comparison between export price and home market price can be made. One is a weighted average methodology (WA-WA). The other is a transaction-specific methodology (T-T). These two methodologies were fully debated during the Uruguay Round and were given equal status under the *Anti-Dumping Agreement*.

1.04 Under the T-T methodology the comparison is between "normal value" and "export price" on a transaction to transaction basis. Under this methodology, an investigating authority assesses individual export transactions against comparable individual sales of the like product sold on the exporter's home market. Dumping, in terms of Article 2.1, occurs where the "export price" (in this case the price of the individual export transaction) is less than the "*comparable price*" (in this case the price of the comparable sale of the like

product in the home market). Unlike WA-WA methodology, the T-T methodology does not rely on averages. Rather it focuses on particular transactions.

2. T-T methodology does not involve "making multiple comparisons at an intermediate stage"

1.05 Canada claims that T-T involves the aggregation of "intermediate results" which do not in themselves constitute "margins of dumping". But it is clear from Article 2.1, read together with Article 2.4.2, that under transaction-to-transaction methodology dumping is examined on a transaction-specific basis. It does not involve making "multiple comparisons" producing a number of "intermediate values or results".

1.06 The reasoning relied on by Canada was developed in the context of WA-WA methodology. In that context it makes sense. Averaging, by nature, involves offsetting "unders" and "overs" to arrive at a middle value. But T-T is not an averaging methodology. Canada's interpretation would amount to rewriting the relevant part of Article 2.4.2 to require "a comparison of <u>the weighted-average</u> normal value and <u>weighted-average</u> export prices on a transaction-to-transaction basis."

3. T-T methodology does not "inflate" or "distort" the margin of dumping

1.07 The reason the Appellate Body has characterised dumping margins as "inflated" in past cases is that the methodologies it was examining treated "export prices as if they were less than what they actually were". New Zealand believes that interpreting Article 2.4.2 to allow transaction-specific dumping margins does not, in and of itself, have this "inflationary" effect.

1.08 New Zealand believes that it is permissible under the T-T methodology to focus on those imports that are shown, on a transaction-specific basis, to have been dumped. Under this approach, when a dumping margin is calculated for an individual exporter, that dumping margin only relates to the volume of imports that have actually been dumped by that exporter. Undumped imports are treated as exactly that - undumped imports. They are not assigned a notional dumping margin based on averaging out normal values and export prices. Thus, with respect to the volume of goods found to have been dumped, there is no inflation of the dumping margin.

1.09 The focus of an anti-dumping investigation is to determine whether there has been *injurious* dumping. Article 3.1 of the *Anti-Dumping Agreement* requires an "investigation of the *volume* of *dumped imports*" and "the consequent impact of *these imports* on the domestic producers of such products". By focusing on dumped transactions only, the T-T methodology outlined above allows for exactly this analysis. Unlike under the zeroing methodologies considered in previous cases, the prices of non-dumped imports are not "treated as if they were less than what they actually are." Rather, the volumes and prices of such non-dumped imports are fully taken into account in the non-attribution analysis required under Article 3.5 for "imports not sold at dumping prices".

1.10 When T-T is understood in this way, Canada's concern that a transaction-specific methodology inflates dumping margins is not warranted. Where the focus throughout the investigation is on the effects of the volume of goods actually found to be dumped (where, in short, there is symmetry or parallelism between the dumping investigation and the injury/causation investigation) there is no distortion. There is no artificial inflation of dumping margins because the dumping margin is not artificially assigned to the entire volume of imports.

4. "Product as a whole" refers to the scope of the investigation

1.11 Canada appears to equate "product as a whole" with the entire volume of the product under investigation that entered the commerce of the importing country during the period of investigation. But the phrase "product as a whole" as used by the Appellate Body in previous cases refers simply to the scope of the product subject to the investigation. The Appellate Body's concern was to ensure that margins of dumping were not established for sub-sets of the product under investigation as defined by the investigating authority.

1.12 Canada takes this concept of a "product as a whole" and grafts onto it a requirement to examine all imports of the product under investigation *over the duration of the investigation period* to establish a single margin of dumping. This amounts, in essence, to a claim that the requirement to examine the "product as a whole" is a requirement to examine the average pricing behaviour of an exporter throughout the period of investigation. While such an interpretation may make sense in the context of a WA-WA methodology, there is no basis for making this a requirement under T-T methodology. Canada's interpretation would reduce a transaction-specific methodology to an averaging methodology.

5. The real concern is "consistent treatment"

1.13 In New Zealand's view the real problem with "zeroing" is with the lack of symmetry, or parallelism, between the way goods are treated in the determination of dumping and the way they are treated subsequently – the idea that goods can be treated as "non-dumped" for one purpose and "dumped" for other purposes. This concern – for "consistent treatment" - appears to be at the heart of the Appellate Body's jurisprudence in previous "zeroing" cases. As demonstrated above, *in*consistent treatment is not the automatic consequence of allowing transaction-specific determinations of dumping, provided symmetry

is maintained. The T-T methodology can (and, in New Zealand's view should) be interpreted and applied in a way that ensures "consistent treatment" of the product under investigation.

6. Canada is wrong to dismiss broader contextual considerations

1.14 Canada dismisses the "broader contextual considerations" taken into account by the Panel as being "simply not before the Panel", or "not at issue". However the provisions of the *Anti-Dumping Agreement* work in an integrated fashion to provide relief for instances of injurious dumping. New Zealand would therefore like to see these broader contextual considerations being taken fully into account in this case.

II INTRODUCTION

2.01 New Zealand has joined this dispute because of our systemic interests in ensuring that the balance of rights and obligations set out in Article VI of the GATT and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)* as negotiated during the Uruguay Round is maintained. More particularly, New Zealand has an interest in the interpretation of the *Anti-Dumping Agreement* as it relates to transaction-to-transaction methodology.

2.02 New Zealand prefers to use the transaction-to-transaction methodology in anti-dumping investigations due to the relatively small number of shipments into the New Zealand domestic market. This approach allows the export price to be compared with the corresponding normal value for individual transactions in the domestic market of the exporting country. New Zealand considers that it is a fair methodology which targets precisely the dumping taking place and remedies the subsequent injury that this dumping has caused the domestic industry. For these reasons it is, in our view, an appropriate methodology to use particularly for small and developing countries.

2.03 It is worth clarifying at the outset that New Zealand's purpose in making this submission is not to defend "zeroing". Rather, it is to ensure that interpretations of the *Anti-Dumping Agreement* developed in the context of weighted-average to weighted-average methodology (WA-WA) are not applied in such a way as to prohibit permissible applications of the transaction-to-transaction (T-T) methodology.

2.04 As elaborated further in this submission, New Zealand understands the T-T methodology to allow WTO Members to determine dumping on a transaction-specific basis. In New Zealand's view, under the T-T methodology, it is permissible to focus on those transactions where dumping has actually

occurred. This accurately establishes the actual dumping margins of each transaction. This means that the causation and injury analysis mirrors the dumping analysis – that is, the causation analysis focuses only on the volume of goods actually dumped, while the undumped transactions are considered when assessing any other known factors causing material injury other than the dumped imports as required by Article 3.5.

III LEGAL ANALYSIS

Article 2.4.2 does not require all transaction-specific comparisons to be treated as "intermediate values" and aggregated, without zeroing, to arrive at a single margin of dumping for all product imported during the period of investigation

1 There are two primary methodologies for determining the existence of "dumping"

3.01 Central to the concept of "dumping" under the *Anti-Dumping Agreement* is a comparison between two things - "export price" on the one hand and "normal value" on the other. Normal value is the "price…for the like product when destined for consumption in the exporting country".

3.02 Article 2.1 of the *Anti-Dumping Agreement* provides that a product is to be considered "dumped":

> …if the export price of the product exported from one country to another is less than *the comparable price*, in the ordinary course of trade, for the like product when destined for consumption in the exporting country (emphasis added).

3.03 Thus, under Article 2.1, to determine whether dumping has occurred it is necessary to compare "the export price" with "the comparable price" in the home market of the exporter. The *Anti-Dumping Agreement* sets out a number of rules to ensure that this home market price is truly *comparable* with the export price. One of the key provisions in this regard is Article 2.4.2.

3.04 Article 2.4.2 provides, in part, that:

> … the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a

> weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. (emphasis added)

3.05 Article 2.4.2 therefore sets out the two primary methods by which the central comparison between export price and home market price can be made. One is a weighted average methodology (WA-WA). The other is a transaction-specific methodology (T-T). These two methodologies were fully debated during the Uruguay Round and were given equal status under the *Anti-Dumping Agreement*. The *Anti-Dumping Agreement* provides for flexibility in the choice of methodologies – flexibility the Appellate Body has been careful to preserve in its analysis in past cases.

3.06 Under the WA-WA methodology the comparison made is between a "weighted average normal value", and a "weighted average of prices of all comparable export transactions". Rather than consider and compare every single transaction, it enables an investigating authority to average over the period of investigation, which is usually one year. In doing so, a single "margin of dumping" is established for all exports of the product under investigation.[1] This "margin of dumping" is an average. The reality in the market will invariably be that some export transactions were sold below the average normal value, and some above it. The "margin of dumping" under this methodology is, therefore, a notional value assigned to the product as a whole, as if all export transactions were made at this margin. In effect, it examines the average pricing behaviour of an exporter over the period of investigation.

3.07 Under the WA-WA methodology, "dumping", in terms of Article 2.1, occurs when the "export price" (in this case the weighted average export price) is less than the *"comparable price"* in the home market (in this case the

[1] In accordance with Article 6.10 of the *Anti-Dumping Agreement*, this is done, as a general rule, for each known exporter.

weighted average normal value). In order to ensure that a proper comparison is made with the *weighted average* normal value, "*all comparable export transactions"* must be considered when calculating the weighted average export price. This is made explicit in the text of Article 2.4.2, and has been confirmed by the Appellate Body.[2]

3.08 Under the T-T methodology, by contrast, the comparison is between "normal value" and "export price" on a transaction to transaction basis. Under this methodology, an investigating authority assesses individual export transactions against comparable individual sales of the like product sold on the exporter's home market.[3] Dumping, in terms of Article 2.1, occurs where the "export price" (in this case the price of the individual export transaction) is less than the "*comparable price*" (in this case the price of the comparable sale of the like product in the home market).

3.09 Unlike WA-WA methodology, the T-T methodology does not rely on averages. Rather it focuses on particular transactions. It has long been recognised that this better captures market realities. A Group of Experts on Anti-Dumping and Countervailing Duties reported in advance of the Kennedy Round on the problems that arose from the fact that rarely was there only one selling price of a product on the domestic market.[4] More often than not there was a range of domestic prices for a particular product. The Group agreed that:

> "despite the difficulties of determining the normal domestic price in the exporting country where these circumstances occurred, it would not be desirable to adopt a uniform system of averaging of relevant price quotations; such a system could in certain circumstances nullify attempts

[2] Appellate Body Report in *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS/141/AB/R, (*EC – Bed Linen)*, paragraph 55.
[3] Comparable normal value transactions will be those made on the same day as the export transaction or as close as possible to it. One of the requirements of "fair comparison" under Article 2.4 is that sales are made "at as nearly as possible the same time".
[4] See Exhibit NZ-1 to New Zealand's Third Party Submission to the Panel: Basic Instruments and Selected Documents (BISD) 8/145: Report adopted on 13 May 1959 (L/978), February 1960.

> to deal with genuine dumping and could in other circumstances lead the importing country to conclude that there was a margin of dumping where in fact dumping had not occurred. The Group agreed that the use of weighted averages should be confined to cases where it was impossible to use a more direct method of establishing the normal domestic price."[5]

3.10 This highlights one of the advantages of the T-T methodology, and why it was considered desirable to preserve this methodology as part of the Uruguay Round outcomes.

2 T-T methodology does not involve "making multiple comparisons at an intermediate stage"

3.11 At the heart of Canada's argument is the contention that T-T involves the aggregation of "intermediate results" which do not in themselves constitute "margins of dumping".[6] Canada relies on previous Appellate Body jurisprudence developed with respect to WA-WA methodology to claim that where intermediate values are aggregated, the full value of all amounts, whether positive or negative, must be taken into account. Again drawing on words previously used by the Appellate Body in a different context, Canada claims that any other result would introduce an "inherent bias" and "inflate" the margin of dumping.

3.12 These arguments show the dangers of applying Appellate Body jurisprudence beyond the context in which it was originally developed. The Appellate Body itself has been at pains to expressly limit its previous findings and state explicitly that they do not apply to T-T methodology.[7] As shown above, it is clear from Article 2.1, read together with Article 2.4.2, that, under

[5] *Ibid*, paragraph 9.
[6] Canada's Appellant Submission, paragraphs 28 and 29.
[7] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, (*US – Softwood Lumber V)*, paragraph 63; see also paragraph 127 of the Appellate Body Report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS/294/AB/R.

transaction-to-transaction methodology dumping is examined on a transaction-specific basis.

3.13 Canada is therefore incorrect to characterise T-T methodology as involving making "multiple comparisons" producing a number of "intermediate values or results".[8] Rather, T-T methodology involves the establishment of dumping margins on a transaction-specific basis. If the "export price" is less than the "comparable price", dumping has occurred.

3.14 The Appellate Body developed and applied the reasoning relied on by Canada in the context of WA-WA methodology. And in that context it makes perfect sense. The WA-WA methodology compares average normal values with average export prices to arrive at an average dumping margin over the period of investigation. Averaging, by nature, involves offsetting "unders" and "overs" to arrive at a middle value.

3.15 But T-T is not an averaging methodology. In fact, a requirement to offset positive dumping margins with negative dumping margins under the T-T methodology would amount to rewriting the relevant part of Article 2.4.2 to require "a comparison of <u>the weighted-average</u> normal value and <u>weighted-average</u> export prices on a transaction-to-transaction basis." There is no textual basis for reading these words into the second part of the first sentence of Article 2.4.2. The treaty drafters knew how to express themselves when this was their intent. In both the WA-WA and the WA-T methodologies, explicit reference is made to averaging. The T-T methodology does not make any reference to averaging. The fact that the T-T methodology is sandwiched between the WA-WA and WA-T methodologies in the text of Article 2.4.2, makes this lack of a reference to averaging all the more striking.

[8] Canada's Appellant Submission, paragraph 29.

3.16 While it is true that, for the purposes of certain provisions of the *Anti-Dumping Agreement* it is necessary to establish margins of dumping on an exporter-specific basis,[9] this does not relegate the transaction-specific dumping margins to the status of "intermediate values".

3. T-T methodology does not "inflate" or "distort" the margin of dumping

3.17 Canada claims that the Panel's interpretation of Article 2.4.2 in this case "cannot be reconciled with the inflation and distortion of dumping margins that this practice causes".[10] However, it is important to recall that the reason the Appellate Body has characterised dumping margins as "inflated" in past cases is that the methodologies it was examining treated "export prices as if they were less than what they actually were".[11] New Zealand believes that interpreting Article 2.4.2 to allow transaction-specific dumping margins does not, in and of itself, have this "inflationary" effect. It is possible to apply T-T in a way that does not treat export prices as if they are less than they actually are.

3.18 New Zealand believes that it is permissible under the T-T methodology to focus on those imports that are shown, on a transaction-specific basis, to have been dumped. Under this approach, when a dumping margin is calculated for an individual exporter, that dumping margin only relates to the volume of imports that have actually been dumped by that exporter. Undumped imports are treated as exactly that - undumped imports. They are not assigned a notional dumping margin based on averaging out normal values and export prices (as they are under a WA-WA methodology, or as they would be under

[9] *Anti-Dumping Agreement*, Article 6.10.
[10] Canada's Appellant Submission, paragraph 31.
[11] For example, at paragraph 55 of the Appellate Body Report in *EC – Bed Linen* the Appellate Body stated, "Instead, the European Communities treated those exports as if they were less than they actually were. This, in turn, inflated the results from the calculation of the margin of dumping." Again, at paragraph 101 of the Appellate Body Report in *US – Softwood Lumber V*, the Appellate Body stated, "Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are…Zeroing thus inflates the margin of dumping for the product as a whole".

Canada's interpretation of the T-T methodology). Thus, with respect to the volume of goods found to have been dumped, there is no inflation of the dumping margin. Table 1 provides an example of the T-T methodology while Table 2 is an example of WA-WA methodology.

Table 1 Transaction-to-Transaction

Quantity Exported (tonnes)	Export Price per Unit	Normal Value per Unit	Margin of Dumping	Margin of Dumping as % Export Price	Volume of Dumped Imports
100	900	1000	100	11%	100
105	1050	1000	-50	-5%	0
95	950	1000	50	5%	95
100	900	1000	100	11%	100
400					**295**

Table 2 Weighted Average-to-Weighted Average

Quantity Exported (tonnes)	Export Price per Unit	Normal Value per Unit	Weighting Applied to Export Price[12]	Weighting Applied to Normal Value[13]	WA Dumping Margin as % Export Price	Volume of Dumped Imports
100	900	1000	90000	100000		
105	1050	1000	110250	105000		
95	950	1000	90250	95000		
100	900	1000	90000	100000		
400			**380500**	**400000**	**5.1%**[14]	**400**

3.19 Under the T-T methodology illustrated above, 295 tonnes of product has been dumped with dumping margins ranging from 5 to 11 percent. This contrasts with the WA-WA methodology illustrated above for the same transactions where *all* transactions are taken as dumped and therefore 400

[12] Export price x quantity.
[13] Normal value x quantity.
[14] Total weighted normal value ($400,000) – Total weighted export price ($380,500) = $19,500. $19,500 as a percentage of the total weighted export price ($380,500) = 5.1%.

tonnes of product is said to have been dumped at a dumping margin of 5.1 percent.

3.20 Where it is necessary to establish a dumping margin on an exporter specific basis, then under the T-T methodology this would be calculated on the basis of the dumped transactions only, weighted according to the volume of the exports in each transaction. Assuming all the exports in Table 1 were made by one exporter, a dumping margin on an exporter-specific basis would be calculated as shown in Table 3 below.

Table 3 Calculation of Dumping Margin under T-T

Quantity Exported (tonnes)	Export Price per Unit	Normal Value per Unit	Weighting Applied to Export Price[15]	Weighting Applied to Normal Value[16]	Dumping Margin as % of Export Price
100	900	1000	90000	100000	
95	950	1000	90250	95000	
100	900	1000	90000	100000	
295			**270250**	**295000**	**9.2%**[17]

3.21 Under the Canadian interpretation of the T-T methodology, a single margin of dumping of 5.1 percent would be assigned to the entire 400 tonnes, even though it is clear that one of the transactions is undumped. From this it is can be seen that T-T does not "inflate" the dumping margin as regard the 295 tonnes of product that was actually dumped. Indeed, it could be said that Canada's interpretation of the T-T methodology creates a distortion by inflating the *volume* of dumped goods (and by *de*flating the dumping margin with respect to the volume of imports that have actually been dumped).[18] Thus when it

[15] Export price x quantity.
[16] Normal value x quantity.
[17] Total weighted normal value ($295,000) – total weighted export price ($270,250) = $24,750. $24,750 expressed as a percentage of total weighted export price ($270,250) = 9.2%.
[18] This difference in the volume of dumped imports could be relevant, for example, when calculating whether dumped imports are "negligible" in terms of Article 5.8 of the *Anti-Dumping Agreement*.

comes to assessing the known factors other than the dumped goods for the purposes of Article 3.5 in the injury analysis, because all the transactions (i.e. the total 400 tonnes) are considered dumped, no consideration of the "undumped" goods can be conducted.

3.22 This reflects an important point. Under the T-T methodology outlined above, the dumping margin calculated for an individual exporter only relates to the actual volume of goods found to have been dumped. Volumes of goods that cross the border during the period of investigation at undumped prices are not considered dumped product for the purposes of the subsequent material injury and causation analysis.

3.23 It goes without saying that an anti-dumping investigation does not stop with a finding that dumping has occurred. The key concern underlying the *Anti-Dumping Agreement* is not "dumping" *per se* but rather the *effect* of dumped product on a domestic industry. The focus of an anti-dumping investigation is to determine whether there has been *injurious* dumping.

3.24 In this regard, Article 3.1 of the *Anti-Dumping Agreement* very clearly requires an "investigation of the *volume* of *dumped imports* and the effect of the dumped imports on prices in the domestic market for the like products" and "the consequent impact of *these imports* on the domestic producers of such products". By focusing on dumped transactions only, the T-T methodology outlined above allows for exactly this analysis. Moreover, unlike under the zeroing methodologies considered in previous cases, the prices of non-dumped imports are not "treated as if they were less than what they actually are."[19] Rather, the volumes and prices of such non-dumped imports are fully taken into

[19] Appellate Body Report, *Softwood Lumber V*, paragraph 101.

account in the non-attribution analysis required under Article 3.5. for "imports not sold at dumping prices".[20]

3.25 When T-T is understood in this way, Canada's concern that a transaction-specific methodology inflates dumping margins is not warranted. Where the focus throughout the investigation is on the effects of the volume of goods actually found to be dumped (where, in short, there is symmetry or parallelism between the dumping investigation and the injury/causation investigation) there is no distortion. There is, to the contrary, an accurate reflection of what has occurred in the market place. Where the T-T methodology is applied in this way there is no artificial inflation of dumping margins because the dumping margin is not artificially assigned to the entire volume of imports.

4. "Product as a whole" refers to the scope of the investigation

3.26 According to Canada the Panel's "most important and erroneous conclusion" is its view that outside of a WA-WA methodology, a margin of dumping need not be established for the product as a whole.

3.27 But Canada appears to equate "product as a whole" in this context with the entire volume of the product under investigation that entered the commerce of the importing country during the period of investigation. New Zealand believes that there is no basis for interpreting this phrase in that way.

[20] In addition, when duties are collected on the basis of a prospective normal value (for example, using a reference price based on recent normal values set for each exporter), there would be no "inherent bias" against an exporter at the duty collection stage. The reference price is set at the level where the exporter is not dumping, and provided that exports are priced up to that level then no duties are collected. It becomes the choice of the exporter - take a higher price for the goods and not cause injury or price below the reference price and the importer will pay the difference between the import price and the reference price. In the majority of cases conducted by the New Zealand administration no duties are collected as the exporter chooses to price at the reference price and take more profit rather than impose a duty burden on the importer.

3.28 In the *EC - Bed Linen* case the Appellate Body said that there must be consistency between the definition of the product under investigation by an investigating authority and the treatment of that product thereafter in the investigation.[21] It concluded, therefore, that margins of dumping must be established for a product as a whole and not for "*types or models*" of the product under investigation.[22] Likewise in *US – Softwood Lumber V* the Appellate Body stated that "margins of dumping can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product."[23]

3.29 From this it is clear that the phrase "product as a whole" as used by the Appellate Body in those cases refers to the scope of the product subject to the investigation. The Appellate Body's concern was to ensure that margins of dumping were not established for sub-sets of the product under investigation as defined by the investigating authority (so called "model zeroing"). The same concern led to a finding of inconsistency by the Appellate Body in the original proceedings in this case. As New Zealand understands it, there is no suggestion of "model zeroing" in the current Article 21.5 proceedings. There is, therefore, no issue regarding the establishment of margins of dumping for the "product as a whole".

3.30 However, Canada takes this concept of a "product as a whole" and grafts onto it a temporal element that would require examining all imports of the product under investigation *over the duration of the investigation period* to establish a single margin of dumping. This amounts, in essence, to a claim that the requirement to examine the "product as a whole" is a requirement to examine the average pricing behaviour of an exporter throughout the period of investigation. While such an interpretation would appear to make sense in the context of a WA-WA methodology, there is no basis for making this a

[21] Appellate Body Report, *EC - Bed Linen*, paragraph 53.
[22] *Ibid*, paragraph 53.
[23] Appellate Body Report, *Softwood Lumber V*, paragraph 96.

requirement under T-T methodology. Canada's interpretation would reduce a transaction-specific methodology to an averaging methodology.

5. The real concern is "consistent treatment"

3.31 New Zealand can understand why there might be concern about a methodology where an average margin of dumping is calculated ignoring "negative" dumping margins, but is then assigned to the entire volume of import transactions during a period of investigation. But while New Zealand can see some logic to the proposition that – 'where an investigating authority chooses to calculate an average dumping margin it must not zero' - it cannot support the (very different) proposition that 'an investigating authority must calculate an average dumping margin and assign it to all imports in every case'.

3.32 The real underlying problem, as New Zealand sees it, is not related to the concepts of "product", "dumping", or "margins of dumping" in Article 2 of the *Anti-Dumping Agreement*, and is not resolved by automatically extending interpretations of those terms developed with respect to WA-WA methodology, and applying them to T-T methodology.

3.33 The real problem with "zeroing" is with the lack of symmetry, or parallelism, between the way goods are treated in the determination of dumping and the way they are treated subsequently – the idea that goods can be treated as "non-dumped" for one purpose and "dumped" for other purposes.[24] This concern – for "consistent treatment"[25] - appears to be at the heart of the Appellate Body's jurisprudence in previous "zeroing" cases. As demonstrated above, *in*consistent treatment is not the automatic consequence of allowing transaction-specific determinations of dumping, provided symmetry is maintained. The T-T methodology can (and, in New Zealand's view should) be

[24] Appellate Body Report, *US – Softwood Lumber V*, paragraph 99.
[25] *Ibid,* paragraph 99.

interpreted and applied in a way that ensures "consistent treatment" of the product under investigation.

6. Canada is wrong to dismiss broader contextual considerations

3.34 Canada dismisses the "broader contextual considerations" taken into account by the Panel as being "simply not before the Panel"[26], or "not at issue".[27] Canada goes so far as to say that the Panel's consideration of these issues "reflects the Panel's misguided effort to decide this case on the basis of provisions other than the one before it."[28]

3.35 New Zealand finds Canada's suggested approach to interpreting key concepts in the *Anti-Dumping Agreement* deeply troubling. The provisions of the *Anti-Dumping Agreement* work in an integrated fashion to provide relief for instances of injurious dumping. While it is true that the issue in this case focuses on the determination of "margins of dumping", this cannot be considered in isolation from the rest of the *Anti-Dumping Agreement*. New Zealand would therefore like to see these broader contextual considerations being taken fully into account in this case. In particular, New Zealand would like an explanation of the full implications of Canada's interpretation of "product" and "product as a whole" if applied throughout the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

[26] Canada's Appellant Submission, paragraph 53.
[27] *Ibid,* paragraph 58.
[28] *Ibid*, paragraph 58.

IV CONCLUSION

4.01 Canada's argument, in essence, amounts to asserting that T-T methodology requires all transaction-specific comparisons to be treated as "intermediate values" and aggregated, without zeroing, to arrive at a single margin of dumping for all product imported during the period of investigation. New Zealand does not agree that T-T methodology must (or even should) be applied in this way.

4.02 Canada's argument rests on the notion that zeroing inflates margins of dumping and creates an inherent bias. New Zealand agrees that "zeroing" (where negative dumping margins are treated as zero in determining an overall dumping margin, which is then assigned to the entire volume of imported product) may have this effect.

4.03 But it does not follow that T-T methodology necessarily has this effect. In particular, where there is symmetry between the goods determined to be dumped and the volume of dumped goods, there is no "inflation" of the margin of dumping or inherent bias. In this way, there is "consistent treatment" of the product under investigation for the purposes of the "determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to the domestic injury, and calculation of the margin of dumping."[29]

4.04 A concern for "consistent treatment" does not justify, or require, an interpretation of Article 2.4.2 and Article 2.1 that would essentially reduce what is a transaction-based methodology to an averaging methodology. Such an approach would be inconsistent with text, the context, and the object and purpose of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

[29] Appellate Body Report, *Canada – Softwood Lumber V*, paragraph 99.