WORLD TRADE ORGANISATION

Third Party Submission to the Panel

UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

Recourse to Article 21.5 of the DSU by Canada

(WT/DS264)

THIRD PARTY SUBMISSION OF NEW ZEALAND

14 July 2005

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I INTRODUCTION

1.01 The interpretation and application of the provisions of Article VI of the *General Agreement on Tariffs and Trade 1994* (GATT) has long been a concern of WTO Members. The approach to anti-dumping has sustained interest and controversy through successive negotiating Rounds, leading to the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* 1994 ("*Anti-Dumping Agreement*"). This dispute, like the original proceedings brought by Canada against the United States, deals with the application of anti-dumping duties on softwood lumber from Canada. The original investigation subject to these proceedings was conducted using a weighted average-to-weighted average methodology for the determination of dumping margins which incorporated the practice of "zeroing".[1] The Appellate Body ruled that this was inconsistent with the *Anti-Dumping Agreement* and the United States was asked to bring its measure into conformity.[2] In order to achieve this the United States changed to a transaction-to-transaction methodology, the use of which is now the subject of these proceedings.

1.02 New Zealand has joined this dispute because of our systemic interests in ensuring that the balance of rights and obligations set out in the WTO Agreements, including the *Anti-Dumping Agreement*, is maintained. More particularly, New Zealand has an interest in the use of the transaction-to-transaction methodology in the calculation of dumping margins and in ensuring that the negotiating history of the Agreement is given adequate consideration when considering the interpretation of the Agreement.

1.03 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

[1] Canadian First Written Submission, paragraph 6.
[2] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R.

of the exporting country. New Zealand considers that it is a fair methodology which targets more precisely the dumping taking place and is the easiest from an administrative viewpoint for small and developing countries. New Zealand is concerned to ensure that in interpreting the provisions of the *Anti-Dumping Agreement*, the transaction-to-transaction methodology is preserved. It is this systemic interest and the desire to explain the use of the transaction-to-transaction methodology as a more accurate representation of the extent of any dumping that lies behind this submission.

1.04 This submission will therefore explain the basis for the use of the transaction-to-transaction methodology, and place this methodology in the context of the *Anti-Dumping Agreement*, considering the Agreement as a whole. The negotiating history of the Uruguay Round is helpful in clarifying this context. New Zealand will use this to support the view that it is permissible to take only dumped transactions into account in the calculation of the existence of a dumping margin. Under the transaction-to-transaction methodology non-dumped transactions are considered when completing the injury analysis as required by Article 3.5 of the *Anti-Dumping Agreement*.

1.05 New Zealand wishes to note that much of what will be discussed in this submission is based on what we see as being permissible under the *Anti-Dumping Agreement*. None of the three primary methods[3] of determining margins of dumping using the transaction-to-transaction methodology are prohibited. Nor is the practice of "zeroing" a necessary element of the transaction-to-transaction methodology. New Zealand's purpose in making this submission is to assist in obtaining some clarity on the interpretation of the *Anti-Dumping Agreement* with respect to the use of the transaction-to-transaction methodology.

[3] See paragraphs 3.04-3.05 of this submission.

II TRANSACTION-TO-TRANSACTION METHODOLOGY

2.01 The history of the Tokyo Anti-Dumping Code and the *Anti-Dumping Agreement* is well documented. As part of the development of the Kennedy Round code, a Group of Experts on Anti-Dumping and Countervailing Duties met in Geneva from 13 to 17 April, 1959. The Group discussed in their report 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 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]

This firmly sets out that transaction-to-transaction was seen as the preferred methodology to establish margins of dumping in anti-dumping investigations.

2.02 The issue of which methodologies could be used to establish the existence of dumping margins caused controversy during the Uruguay negotiations. As the negotiations progressed, Article 2.4.2 of the *Anti-Dumping Agreement* emerged. That Article lays down three methodologies that may be used: weighted average-to-weighted average;[6] transaction-to-transaction;[7] and weighted average-to-transaction.[8]

[4] Exhibit NZ-: Basic Instruments and Selected Documents (BISD) 8/145: Report adopted on 13 May 1959 (L/978), February 1960.
[5] Ibid, paragraph 9.
[6] A comparison of the weighted average normal value with a weighted average of export prices.
[7] A comparison of normal value and export prices on a transaction-to-transaction basis.
[8] A comparison of normal value established on a weighted average basis to prices of individual export transactions.

2.03 This Article was the subject of contentious negotiations during the Uruguay Round. Two main issues were at the centre of the negotiations on this paragraph: how to ensure a consistent methodology in comparing normal values and export prices; and how to treat "negative dumping", in particular, how the practice of "zeroing" (not taking into account negative dumping margins but taking into account volumes associated with those negative margins) should be treated when establishing margins of dumping. Various proposals were tabled by proponents during the negotiation in an effort to constrain the recourse to anti-dumping, including proposals to limit the methodology for establishing dumping margins to a comparison of weighted average normal values to weighted average export prices, and to require that negative dumping margins be included in the calculations.[9]

2.04 The proposals met with resistance. The various draft texts demonstrate that there was consideration given to the idea that dumping margin calculations be made on a comparable basis, but the final text included not only the weighted average-to-weighted average and the transaction-to-transaction methodologies but also the weighted average-to-transaction methodology.[10] While curbs were placed on the situations in which the latter methodology might be used, these were not applied to the other two methodologies. In particular, the ability to use the transaction-to-transaction methodology was preserved and has equal status to the weight average-to-weighted average methodology under the *Anti-Dumping Agreement*.

2.05 The various draft texts, however, are less clear on the extent to which negative dumping margins should be included in the overall calculation of dumping. The Dunkel draft made one significant addition to the earlier New Zealand texts on which much of the Dunkel draft was based. In the case of a comparison of weighted average normal values and weighted average export prices, the comparison had to be of "all comparable export transactions". This has been interpreted by the Appellate Body to preclude the application of the practice of "zeroing" in the weighted average-to-weighted average

[9] Exhibit NZ-2: Terence P. Stewart, Ed, *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law and Taxation Publishers 1993, pages 1537 – 1543, at pages 1539-1540.
[10] Exhibit NZ-2: at page 1541.

methodology.[11] However in relation to the transaction-to-transaction methodology, there is no corresponding obligation to include "all comparable export transactions" in the establishment of dumping margins. The WTO consistency of the practice of zeroing using the transaction-to-transaction methodology was left unanswered by the Appellate Body. This issue is examined in the following section of this submission.

[11] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, paragraph 86-90. See also the decision of the Appellate Body in *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/AB/R.

III LEGAL ANALYSIS

A The interpretation of the *Anti-Dumping Agreement* must be seen in its entire context

1 Dumping is to be condemned if it causes or threatens material injury to an established industry

3.01 New Zealand wishes to recall the genesis of the *Anti-Dumping Agreement*. Article VI of GATT provided Members with the right to take action against unfair trade. The first sentence of Article VI.1 provides that the contracting parties recognise that "dumping … is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry". The purpose of the imposition of dumping duties therefore is to provide a remedy to redress the unfair pricing practices of private companies. It is aimed against unfair competition.

2 The application of an anti-dumping remedy is the culmination of a process from the determination of dumping, to an injury analysis, to establishing a causal link that the dumped goods are causing injury, to the application of a remedy

3.02 The *Anti-Dumping Agreement* details the procedures for how Members are to go about determining whether dumping has taken place and whether a remedy may be applied. It lays out the elements that must be met to enable a remedy to be applied to address dumping that is causing or threatening to cause material injury. There must therefore be a determination of whether dumping has occurred. An analysis must also be undertaken of whether there is material injury to the domestic industry. If these elements are met, there must be a causal analysis of the effect of the dumped imports, and the effect of other factors, including non-dumped imports, on the domestic industry. If it is established that the dumped imports are causing material injury or threat thereof to the domestic industry, a remedy may be applied to the dumped imports. The level of the remedy cannot exceed the dumping margin but can be at a lesser level if that removes the injury caused by the dumped imports.

3.03 This process from beginning to end has relevance when one is assessing the validity of certain actions taken by a Member in applying a remedy to redress dumping. It means that how dumping margins are calculated has to be considered along side the determination of material injury, the causation analysis, and the remedy that may or may not be applied. In New Zealand's view, a proper interpretation of the *Anti-Dumping Agreement* must take a holistic perspective that takes into account all these elements of the anti-dumping regime.

3.04 Article 2 of the *Anti-Dumping Agreement* provides the framework for the determination of the existence of dumping. The purpose of the transaction-to-transaction methodology is to compare export prices in each transaction with the prices in comparable normal value transactions to determine the transactions that have been dumped. There are three primary methods of determining margins of dumping using a transaction-to-transaction methodology. First, all individual transactions, whether dumped or non-dumped, are included in the determination of any dumping margins. Second, only dumped transactions are included in the determination and if dumping does not exist in relation to a particular transaction it is disregarded on the grounds that there is no dumping. Third, the zeroing method is used where all the negative dumping margins are brought to zero and the volumes of the goods are incorporated into the determination of any dumping margins.

3.05 Using the transaction-to-transaction methodology as is permitted under the *Anti-dumping Agreement* does not necessarily dictate that any one of the above three methods be used. The application of the methodology is a matter of interpretation of the *Anti-Dumping Agreement* and variations on the above three calculation methods using the transaction-to-transaction methodology may exist. In all three calculations, the non-dumped transactions are considered when completing the injury analysis under Article 3.5 of the Agreement.[12]

[12] Where all transactions are included in the calculation, the volumes of the goods with negative or *de minimis* dumping margins are incorporated into the volume of non-dumped goods for the purpose of

3.06 Based on its ordinary meaning, Article 3 requires a determination of injury to be based on positive evidence and involve an objective examination of the "volume of dumped imports" and the effect of the dumped imports on prices in the domestic market for like products, and the "consequent impact of these imports" on domestic producers of such products.[13] Article 3.2 addresses the considerations the investigating authorities take into account in examining the volume of dumped imports and the effect of the dumped imports on prices. Article 3.4 sets out the factors which have to be taken into account in an examination of the impact of the dumped imports on the domestic industry. Among these factors is "the magnitude of the margin of dumping".[14] Further, the investigating authority must demonstrate that the dumped imports, through the effects of dumping, are causing or threatening to cause material injury to the domestic industry. According to Article 3.5, the demonstration of this causal relationship between dumped imports and injury to the domestic industry shall be based on "all relevant evidence". In the analysis of factors other than dumped imports which may be causing injury, explicit mention is made of "the volume and prices of imports not sold at dumping prices".

3.07 Following a determination of the existence of dumping and that such dumping has caused or threatened to cause material injury to the domestic industry, Article 9 sets out the requirements for the imposition of anti-dumping duties.[15] Under Article 9.1 certain discretion is given to authorities of importing Members in deciding whether or not to impose anti-dumping duties, and the amount of such duty. However such discretion is not unlimited but must be read in light of the other requirements in that

assessing other causes of injury to the domestic industry. In this sense the volume of the non-dumped imports is included in the establishment of any dumping margins as well as in other causes of injury. This potentially mitigates the effect of the dumped transactions twice. Where non-dumped transactions are disregarded in the calculation of dumping margins, or if a "zeroing" method is used, the non-dumped transactions are considered in the assessment of the effects of non-dumped imports as an "other cause of injury to the domestic industry" in accordance with Article 3.5.

[13] *Anti-Dumping Agreement*, Article 3.1.

[14] *Anti-Dumping Agreement*, Article 3.4.

[15] For the purpose of this analysis, no account is taken of provisional measures under Article 7, or price undertakings under Article 8 of the A*nti-Dumping Agreement*. However, New Zealand considers that the same requirement for consistency would apply.

Article. In particular Article 9.2 provides that anti-dumping duties are to be collected on a non-discriminatory basis on imports of such product "from all sources found to be dumped and causing injury". Furthermore, Article 9.3 provides that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. In this way Article 9 establishes a direct link between the determination of dumping in accordance with Article 2 and the imposition and collection of anti-dumping duties in accordance with Article 9.

3.08 In New Zealand's view there should be a symmetry between the manner in which the existence of dumping is established, the injury analysis under Article 3, the causal relationship between the dumping and material injury or threat thereof, and how the anti-dumping remedy is applied. There is support for this in the context of the *Anti-Dumping Agreement* as a whole. Article 3 makes a distinction between the effect of dumped imports on prices, and the impact of non-dumped imports on producers. Article 9 makes it plain that anti-dumping duties are to be applied only to dumped imports, and at a level no greater than the margin of dumping.[16]

3.09 When using any of the three primary methods under the transaction-to-transaction methodology, only those transactions found to be dumped are taken into account in the analysis of the volume and price effects and consequent economic impact on the domestic industry of dumped imports. Therefore, in order to preserve symmetry, the determination of the margin of dumping may be based only on those dumped transactions so taken into account. In the same way, symmetry is preserved by taking into account those transactions found to be non-dumped in the analysis of the volume and prices of imports not sold at dumping prices. This ensures "consistent treatment" and "even-handedness" in the anti-dumping investigation.[17]

[16] The margin of dumping can therefore be seen as an upper limit for the calculation of anti-dumping duties.
[17] See the reference to the need for "consistent treatment" by the Appellate Body in *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS64/AB/R, paragraph 99, and the reference to "even-handedness" in the approach of the Appellate Body in relation to the treatment of sales to affiliates in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, paragraphs 149 and 154.

B Determination of the existence of dumping

3.10 Article 2.1 sets out the basic definitional concept of "dumping" and lays the foundation for the rest of the Article.

> For the purpose of this Agreement, a product is to be considered as being dumped, ie introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for the consumption in the exporting country.

The purpose of Article 2 as a whole is to provide a methodology for determining whether a product is dumped, ie whether the export price is less than the normal value.[18]

1 Fair comparison under Article 2.4

3.11 The calculation of dumping margins must also meet the requirements of Article 2.4 which provides: "A fair comparison shall be made between the export price and the normal value". The Appellate Body has indicated that this is a general obligation that informs all of Article 2, but applies in particular to Article 2.4.2.[19] Article 2.4 imposes specific requirements including, *inter alia*, to make comparisons at the same level or trade and at as nearly as possible at the same time, and to make due allowance for differences affecting price comparability. These requirements condition the selection of individual transactions which are used for the determination of the existence of dumping.

3.12 The obligation to make a fair comparison applies regardless of the methodology used. The negotiating history referred to earlier reveals that the Group of Experts thought that a weighted average-to-weighted average approach would not always

[18] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, paragraphs 6.134-6.135.
[19] Appellate Body Report, in *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/41/AB/R, paragraph 59.

produce the most accurate, and therefore the most fair, results.[20] In terms of allowing for a fair comparison between the export price and the normal value, the transaction-to-transaction methodology is the most accurate approach as it targets the dumped goods.

3.13 By their very nature, targeted dumping margins directly address the material injury or threat thereof. The weighted average-to-weighted average methodology is not as targeted and may not reflect the range of dumping margins in an investigation. The end result may not fully address the material injury being caused or threatened by the dumped imports. The dumping margin applied under a weighted average-to-weighted average approach may not therefore produce the desired result of removing or neutralising the unfair trade.

3.14 The calculation of dumping margins using the transaction-to-transaction methodology is inherently a "fair comparison" in terms of Article 2.4 of the Agreement. This applies irrespective of the method used to calculate dumping margins using the transaction-to-transaction methodology. Whatever calculation method is used, a "fair" methodology is one which targets the dumping that is occurring and takes into account the impact of dumped and non-dumped imports on the domestic industry.

2 Determination of the existence of dumping margins under Article 2.4.2 using transaction-to-transaction methodology

3.15 Article 2.4.2 provides that subject to the provisions of Article 2.4 concerning fair comparison, dumping margins should normally be established on the basis of a weighted average-to-weighted average basis, or on the basis of a transaction-to-transaction comparison. Based on its ordinary meaning, Article 2.4.2 enables the existence of dumping margins to be determined on the basis of a comparison of individual transactions where the transaction-to-transaction methodology is used. The comparison of the individual domestic sales transactions to export sales transactions leads to the determination of whether dumping of the product under investigation exists.

[20] See Exhibit NZ-1, paragraph 9.

3.16 Canada argues in its First Written Submission that the Appellate Body has indicated that the practice of zeroing, including when using the transaction-to-transaction methodology, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[21] However, this gives the decision of the Appellate Body wider application than is the case.

3.17 The Appellate Body in *United States – Final Dumping Determination on Softwood Lumber from Canada* upheld the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in "determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing'".[22] The Appellate Body expressly confined the issue in that case to the weighted average-to-weighted average methodology, not the transaction-to-transaction methodology.[23]

3.18 The Appellate Body in *US-Softwood Lumber* based its reasoning on the particular wording of Article 2.4.2 as it relates to the weighted average-to-weighted average methodology. In particular, the Appellate Body interpreted the phrase "all comparable transactions" as requiring the results of *all* comparisons to be taken into account including the results of all multiple comparisons of product types.[24] The words "all comparable transactions", however, are <u>not</u> found in connection with comparisons on a transaction-to-transaction basis. The omission of a phrase in respect of one methodology, where it is used in relation to another, must be given weight.

3.19 New Zealand also wishes to draw the attention of the Panel to the dissenting opinion by a Member of the Panel in that dispute which drew no comment from the Appellate Body. The dissenting opinion referred to the notion of aggregating the results

[21] First Written Submission of Canada, paragraphs 18-27.
[22] WT/DS/263/AB/R, paragraph 117.
[23] WT/DS/264/AB/R, paragraph 63 and 104.
[24] WT/DS/264/AB/R, paragraphs 95-98. See also the decision of the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, (WT/DS/141/AB/R), paragraph 55.

of multiple comparisons using the weighted average-to-weighted average and the transaction-to-transaction methodologies. The opinion stated:

> "it is noteworthy that the *AD Agreement* is silent as to aggregation not only with respect to the first (average-to-average) comparison methodology. I note as a matter of relevant context that Article 2.4.2 is equally silent as to how to aggregate the results of transaction to transaction comparison under the second methodology set forth in that provision."[25]

New Zealand believes this dissenting opinion warrants close attention by the Panel in these proceedings.

3.20 An obligation found with respect to one methodology does not necessarily extend to another methodology. The interpreter must look at the textual basis for the requirement. There is no textual basis in Article 2.4.2 for a prohibition on the practice of zeroing when using the transaction-to-transaction methodology.

3 Dumping as it relates to the product under investigation

3.21 In examining the practice of zeroing adopted in calculating the existence of dumping margins on a weighted average-to-weighted average basis, the Appellate Body considered the term "product" in Article 2.1 when interpreting the margins of dumping referred to in Article 2.4.2. It considered that margins of dumping should be established for the "product as a whole".[26] In comparing the normal value and the export price on a transaction-to-transaction basis it is necessary to match the normal value and export price transactions if possible on the same day of sale, or as close as possible to the same day of sale for the product subject to the investigation.[27] The individual transactions where dumping has been found to exist are assessed to determine whether dumping is considered to exist for the product under investigation. In this way the transaction-to-

[25] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, paragraph 9.10.
[26] *European Communities – Anti-Dumping Duties of Imports of Cotton-Type Bed Linen from India*, (WT/DS/141/AB/R), paragraphs 50-51.
[27] Article 2.4, to which Article 2.4.2 is subject, specifically refers to "making comparisons at as nearly as possible at the same time".

transaction methodology targets the importation of the product that is being dumped. It does not attempt to calculate dumping on the basis of the averaging of transactions for all sales of the product.

3.22 The interpretation of "product" in Article 2.1 of the *Anti-Dumping Agreement* has to be seen in light of the context of Article 2.4.2. That Article specifically refers to the use of the transaction-to-transaction methodology, which is based on an assessment of individual transactions. The term "product" when referring to the transaction-to-transaction methodology must take into account the nature of that methodology. That methodology selects individual transactions for analysis which are representative of the "product as a whole".

3.23 It follows that in the context of Article 2.4.2, the "dumping of a product" within the terms of Article 2.1 means, in relation to the use of the transaction-to-transaction methodology, the dumping established through the selection of comparable individual transactions representing the product which is the subject of the anti-dumping investigation. Any of the three methods which may be used to calculate the dumping margins using a transaction-to-transaction methodology can be used to establish that dumping exists.

C A comparison of dumped transactions in the determination of the existence of dumping under Article 2.4.2 is a permissible interpretation in accordance with Article 17.6 of the *Anti-Dumping Agreement*

3.24 The standard of review that governs the work of Panels when examining whether a Member has violated the *Anti-Dumping Agreement* is set out in Article 17.6(ii). It provides in part: "Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

3.25 It has been argued earlier that it is permissible to interpret Article 2.4.2 as permitting a Member to take into account only dumped imports in establishing the

existence of dumping margins under Article 2 using the transaction-to-transaction methodology. New Zealand respectfully requests the Panel to find that the text of the *Anti-Dumping Agreement* does not exclude the possibility of taking only dumped transactions into account in establishing the dumping margin using a transaction-to-transaction methodology and that this is a permissible interpretation in accordance with Article 17.6

IV CONCLUSION

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