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UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA

REPORT OF THE PANEL

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Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
US – Anti-Dumping Methodologies (China)	Appellate Body Report, *United States – Certain methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R and Add.1, adopted 22 May 2017
US – Anti-Dumping Methodologies (China)	Panel Report, *United States – Certain methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Washing Machines	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

Short title	Full case title and citation
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
CONNUM	product control number
DPM	differential pricing methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Resolute	Resolute FP Canada Inc.
T-T	transaction-to-transaction
Tolko	Tolko Marketing and Sales Ltd.
USDOC	United States Department of Commerce
West Fraser	West Fraser Mills Ltd.
W-T	weighted-average-to-transaction
WTO	World Trade Organization
W-W	weighted-average-to-weighted-average

1 INTRODUCTION

1.1 Complaint by Canada

1.1. On 28 November 2017, Canada requested consultations with the United States pursuant to Articles 4 and 10.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), with respect to the US anti-dumping measures applying the differential pricing methodology (DPM) to softwood lumber products from Canada.[1]

1.2. Consultations were held on 17 January 2018. These consultations failed to settle the dispute.

1.2 Panel establishment and composition

1.3. On 15 March 2018, Canada requested the establishment of a panel.[2] At its meeting on 9 April 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Canada in document WT/DS534/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Canada in document WT/DS534/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 9 May 2018, Canada requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 22 May 2018, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Thinus Jacobsz
Members:	Ms María Valeria Raiteri Mr Guillermo Valles Galmés

1.6. Brazil, China, the European Union, Japan, Kazakhstan, the Republic of Korea, the Russian Federation, and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.[5]

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted on 20 June 2018 its Working Procedures[6], Additional Working Procedures on Business Confidential Information (BCI)[7], Additional Working Procedures on Open Meetings[8], and the timetable. The Panel revised its timetable on 7 December 2018 after consulting the parties.

1.8. The Panel held its first substantive meeting with the parties on 12 and 13 September 2018. The session with the third parties took place on 13 September 2018. The Panel held its second substantive meeting with the parties on 4 December 2018. On 29 January 2019, the Panel issued

[1] Request for consultations by Canada, WT/DS534/1-G/L/1206-G/ADP/D120/1 (Canada's consultations request).
[2] Request for the establishment of a panel by Canada, WT/DS534/2 (Canada's panel request).
[3] DSB, Minutes of Meeting held on 9 April 2018, WT/DSB/M/411.
[4] Constitution note of the Panel, WT/DS534/3.
[5] Constitution note of the Panel, WT/DS534/3.
[6] See the Panel's Working Procedures in Annex A-1.
[7] See the Panel's Additional Working Procedures on Business Confidential Information in Annex A-2.
[8] See the Panel's Additional Working Procedures on Open Meetings in Annex A-3.

the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 28 February 2019. The Panel issued its Final Report to the parties on 27 March 2019.

2 FACTUAL ASPECTS

2.1. This dispute concerns anti-dumping measures imposed by the United States Department of Commerce (USDOC) following an investigation on certain softwood lumber products from Canada (underlying investigation). In particular, Canada challenges certain aspects of the dumping determinations made by the USDOC using the DPM.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Canada requests the Panel to find as follows:

a. The USDOC acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement because by applying the DPM in the underlying investigation it[9]:

   i. failed to find "a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and

   ii. used zeroing under the weighted-average-to-transaction (W-T) methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

b. The USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the underlying investigation because as part of the DPM the USDOC used zeroing under the W-T methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.[10]

c. The USDOC acted inconsistently with Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994 in the underlying investigation as a consequence of its violations under Articles 2.4.2 and 2.4 in this investigation.[11]

3.2. The United States requests that the Panel reject Canada's claims in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 22 of the Working Procedures (see Annex B).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, China, the European Union, and Japan are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 25 of the Working Procedures (see Annex C).[12]

6 INTERIM REVIEW

6.1. On 28 February 2019, we issued our Interim Report to the parties. On 7 March 2019, the United States submitted a written request for the Panel to review precise aspects of the Interim Report. Canada did not make a written request to review precise aspects of the Interim Report but submitted on 13 March 2019 its comments on the United States' request for interim review.

[9] Canada's first written submission, para. 68; response to Panel question after the first meeting of the Panel No. 6, para. 17.

[10] Canada's first written submission, para. 68; response to Panel question after the first meeting of the Panel No. 6, para. 17.

[11] Canada's first written submission, para. 68.

[12] Kazakhstan, the Republic of Korea, the Russian Federation, and Viet Nam did not file a submission, nor did they make any statement.

6.2. The requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-5.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that agreement's provisions in accordance with the customary rules of interpretation of public international law.[13] The principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are generally accepted as such customary rules.

7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. 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.

7.3. Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute. The Appellate Body has explained that when a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.[14] In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation[15] and must take into account all such evidence submitted by the parties to the dispute.[16] At the same time, a panel must not simply defer to the

[13] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

[14] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

[15] Article 17.5(ii) requires a panel to examine the matter based on the facts made available to the authorities.

[16] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[17]

7.4. In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[18] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[19] If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[20]

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[21] Therefore, as the complaining party in this proceeding, Canada bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[22] Finally, it is generally for each party asserting a fact to provide proof thereof.[23]

7.2 The USDOC's dumping determinations in the underlying investigation

7.6. In the underlying investigation, the USDOC used the DPM to examine whether the export prices of the Canadian producers showed "a pattern of export prices which differ[ed] significantly among different purchasers, regions or time periods".[24] Finding that the export prices of Canadian producers Resolute FP Canada Inc. (Resolute), Tolko Marketing and Sales Ltd. (Tolko), and West Fraser Mills Ltd. (West Fraser) (three Canadian producers) showed such a pattern, the USDOC examined whether the weighted-average-to-weighted-average (W-W) methodology could take into account those price differences, and explained that it could not.[25] Thus, the USDOC decided not to apply the W-W methodology, and instead determined the margins of dumping of the three Canadian producers by comparing a normal value established on a weighted average basis with the prices of individual export transactions (i.e. the W-T methodology), which is the methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. The USDOC applied the W-T methodology to all export transactions of the three Canadian producers, and used zeroing when doing so.[26]

7.7. Canada challenges certain aspects of these determinations under the second sentence of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement, claiming, as noted in paragraph 3.1 above, that in applying the DPM in the underlying investigation the USDOC:

a. failed to identify a "pattern" consistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement thereby acting inconsistently with this second sentence; and

[17] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[18] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[19] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[20] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[21] Appellate Body Report, *US – Wool Shirts and Blouses*, p. DSR 1997:1, p. 337.
[22] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[23] Appellate Body Report, *US – Wool Shirts and Blouses*, p. DSR 1997:1, p. 337.
[24] Canada's first written submission, para. 22; United States' first written submission, para. 15.
[25] Canada's first written submission, paras. 23-24; United States' first written submission, para. 15. The USDOC did not explain why the T-T comparison could not take into account those price differences.
[26] Canada's first written submission, paras. 26-27; United States' first written submission, paras. 15 and 17.

b. used zeroing while applying the W-T methodology provided in the second sentence of Article 2.4.2, thereby acting inconsistently with this second sentence as well as Article 2.4 of the Anti-Dumping Agreement.

7.8. In addition, Canada claims that as a consequence of violations under the second sentence of Article 2.4.2 and Article 2.4 in the underlying investigation, the USDOC also acted inconsistently with Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994.[27]

7.9. We recall that the panel and the Appellate Body in *US − Washing Machines* examined similar sets of claims under the second sentence of Articles 2.4.2 and 2.4 brought by Korea against the United States. The panel and the Appellate Body upheld Korea's claims in that dispute and found that:

a. the DPM is, as such, inconsistent with Article 2.4.2 of the Anti-Dumping Agreement because it fails to find "a pattern" consistent with the pattern clause[28]; and

b. Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement do not permit zeroing under the W-T methodology.[29]

7.10. Canada relies on the findings of the Appellate Body in presenting its arguments, and asks us to reach the same conclusions that the Appellate Body did with respect to these two sets of claims.[30] The United States argues that the Appellate Body's findings in *US − Washing Machines* were incorrect, and asks us to not follow them.[31] We will first examine Canada's claims under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, followed by its claim under Article 2.4 of the Anti-Dumping Agreement and the consequential claims under Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994.

7.2.1 Second sentence of Article 2.4.2 of the Anti-Dumping Agreement

7.2.1.1 Provision at issue

7.11. Article 2 of the Anti-Dumping Agreement is titled "Determination of Dumping". Article 2.4.2 of the Anti-Dumping Agreement sets out the methodologies to determine the "margins of dumping" while Article 2.1 of the Anti-Dumping Agreement as well as Article VI:1 of the GATT 1994 define dumping.

7.12. Article 2.4.2 of the Anti-Dumping Agreement states:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why

[27] See para. 3.1(c) above.

[28] Panel Report, *US − Washing Machines*, para. 8.1(a)(ix); Appellate Body Report, *US − Washing Machines*, para. 6.3. One distinction between Canada's and Korea's claims is that in this dispute Canada makes "as applied", and not "as such", claims challenging the use of the DPM in the underlying investigation. (Canada's response to Panel question after the first meeting of the Panel No. 6, para. 17).

[29] Panel Report, *US − Washing Machines*, paras. 8.1(a)(xii), 8.1(a) (xiii), 8.1(a)(xiv), and 8.1(a)(xv); Appellate Body Report, *US − Washing Machines*, paras. 6.9-6.10. The panel in *US − Anti-Dumping Methodologies (China)* also found that the second sentence of Article 2.4.2 does not permit the use of zeroing under the W-T methodology. (Panel Report, *US − Anti-Dumping Methodologies (China)*, para. 7.220).

[30] Canada's first written submission, para. 3.

[31] See, e.g. United States' first written submission, paras. 10, 36-37, 69-73, 82-83, and 86-87.

> such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

7.13. Article 2.4.2 sets out three different methodologies to determine the margins of dumping (dumping margin[32]) of a foreign producer or exporter. The first sentence of Article 2.4.2 sets out the two methodologies that are normally used to determine such a margin. The first methodology, which we refer to as the W-W methodology, requires "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions". The second methodology requires "a comparison of normal value and export prices on a transaction-to-transaction basis". We refer to it as the T-T methodology.

7.14. The second sentence of Article 2.4.2 sets out the third methodology to determine the dumping margin. It states that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions" if the following two conditions are met by the investigating authority:

a. it finds "a pattern of export prices which differ significantly among different purchasers, regions or time periods" (we refer to this part of the second sentence of Article 2.4.2 as the pattern clause); and

b. it explains why "such differences cannot be taken into account appropriately by the use of a [W-W or T-T] comparison" (we refer to this part of the second sentence of Article 2.4.2 as the explanation clause).

7.15. The W-T methodology is considered an exception because its use is permitted only when these two conditions are met.[33] The function of the second sentence is to identify and unmask dumping targeted to certain purchasers, to certain regions, or in certain time periods.[34]

7.16. Irrespective of whether the dumping margin is determined under the first sentence or pursuant to the second sentence of Article 2.4.2, it must be determined consistent with the definition of "dumping" set out in Article 2.1 of the Anti-Dumping Agreement[35], which states[36]:

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

7.17. Article VI:1 of the GATT 1994 defines dumping in a similar manner, recognizing that dumping occurs when a product is introduced into the commerce of another country at less than the normal value. The Appellate Body has consistently held, relying in part on Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 as context, that dumping and margins of dumping must be determined for the *product as a whole*.[37]

7.18. What this means is that if in applying the W-W methodology, an investigating authority divides the product into multiple models, and calculates a model-specific weighted average normal value and a model-specific weighted average export price for each model, the "margins of dumping" are not the results of those multiple model-specific comparisons in which the model-specific normal

[32] An investigating authority is required to find a single overall dumping margin for a foreign producer or exporter. (Appellate Body Report, *US – Continued Zeroing*, para. 283).

[33] See e.g. Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.

[34] Appellate Body Reports, *EC – Bed Linen*, para. 62; *US – Washing Machines*, para. 5.17.

[35] Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92; *US – Softwood Lumber V*, para. 93; and *US – Zeroing (EC)*, para. 125.

[36] By virtue of the opening phrase of Article 2.1 ("[f]or the purpose of this Agreement"), the definition of dumping applies throughout the Anti-Dumping Agreement.

[37] See e.g. Appellate Body Reports, *US – Softwood Lumber V*, paras. 93-96; *EC – Bed Linen*, para. 53; and *US – Zeroing (EC)*, para. 126. The Appellate Body in *US – Washing Machines* recognized that a dumping margin determined pursuant to the second sentence of Article 2.4.2 must be a margin for the product as a whole. But it took the view that a dumping margin for the product as a whole is determined differently under this second sentence. (Appellate Body Report, *US – Washing Machines*, para. 5.104).

value exceed the model-specific export price.[38] Dumping and "margins of dumping" only exist for the product as a whole, and not for types, models, or categories of the product.[39] Therefore, an investigating authority can establish the dumping margin for the product as a whole only by aggregating *all* intermediate values generated on the basis of such model-specific comparison results.[40] The Appellate Body has stated in this regard that there is no textual basis under Article 2.4.2 to justify taking into account only *some* multiple comparison results (i.e. those results that are positive because the model-specific weighted average export price is lower than the model-specific weighted average normal value) to determine the dumping margin for the product as a whole.[41] If an investigating authority disregards, by treating as zero, those model-specific comparison results that are negative because the model-specific weighted average export price is higher than the model-specific weighted average normal value, it would fail to take into account the prices of "all" comparable export transactions, as is required under the W-W methodology described in the first sentence of Article 2.4.2.[42] It would also fail to determine the dumping margin for the product as a whole.

7.19. If an investigating authority applies the T-T methodology, the transaction-specific comparisons where the transaction-specific contemporaneous normal value exceed the transaction-specific export price are not the "margins of dumping" referred in Article 2.4.2.[43] Instead, an investigating authority can establish the dumping margin for the product as a whole only by aggregating all comparison results irrespective of whether the transaction-specific export price is higher or lower than the transaction-specific contemporaneous normal value.[44] In particular, when aggregating such results, an investigating authority is not permitted to disregard, by treating as zero, those comparison results that are negative because the transaction-specific export price is higher than the transaction-specific contemporaneous normal value.[45] In reaching this conclusion, the Appellate Body found the reference to "export prices" in the plural in the first sentence of Article 2.4.2, without further qualification, to suggest that *all* of the results of the transaction-specific comparisons generated under the T-T methodology need to be aggregated to determine the dumping margin.[46] It took the view that zeroing alters the real values of certain export transactions.[47] Further, it relied on contextual considerations, noting that the two "normal" methodologies provided in the first sentence, i.e. the W-W and T-T methodologies fulfil the same function.[48] Thus, according to the Appellate Body it would be illogical to interpret the T-T methodology in a manner that would lead to results that are systemically different from those obtained under the W-W methodology, which would be the case if zeroing is permitted under the T-T methodology (while it is precluded under the W-W methodology).[49] Thus, as reflected in the

[38] See e.g. Appellate Body Report, *US − Softwood Lumber V*, para. 97.
[39] Appellate Body Report, *US − Softwood Lumber V*, paras. 93 and 96.
[40] Appellate Body Report, *US − Softwood Lumber V*, para. 97.
[41] Appellate Body Report, *US − Softwood Lumber V*, para. 98.
[42] Appellate Body Report, *EC − Bed Linen*, para. 55.
[43] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 94.
[44] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, paras. 87 and 94. The Appellate Body found the reference to "export prices" in the plural in the first sentence to suggest that the comparison under the T-T methodology will generally involve multiple export transactions, and the reference to "a comparison" in the singular to suggest that this methodology requires an overall calculation exercise involving aggregation of those multiple transactions.
[45] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 88.
[46] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 88.
[47] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 88.
[48] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 93.
[49] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 93. The Appellate Body noted that while the W-W methodology, as described in the first sentence of Article 2.4.2, requires a comparison based on a weighted average of prices of "all" comparable export transactions, the first sentence does not use similar terms while describing the T-T methodology. However, the Appellate Body took the view that the phrase "all comparable export transactions" is used while describing the W-W methodology because under this methodology if an investigating authority makes comparisons based on groups or models, it must include in each group only those export transactions that are comparable, but must include all comparable export transactions corresponding to the group. Such a scenario does not arise under the T-T methodology, and thus the phrase "all comparable export transactions" is not pertinent in the context of the T-T methodology. Thus, it concluded that no inference could be drawn from the absence of this phrase in the description of the T-T methodology in the first sentence of Article 2.4.2. (Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 91).

findings in numerous panel and Appellate Body reports, zeroing is prohibited under the W-W and T-T methodologies.

7.20. Like under the T-T methodology, the application of the W-T methodology may yield multiple comparison results. How exactly these comparison results must be aggregated under the W-T methodology is a subject of dispute in this case, and thus separately discussed as part of our legal analysis below.

7.2.1.2 Factual overview

7.2.1.2.1 The USDOC's evaluation of the conditions for the use of the W-T methodology in the underlying investigation

7.21. Following the requirements under US law in the underlying investigation, the USDOC determined the dumping margin of the Canadian producers using the W-T methodology when it found "a pattern of export prices that differ[ed] significantly" and explained why the W-W methodology could not account for such differences.[50] The USDOC used the DPM to meet these requirements.

7.2.1.2.1.1 DPM

7.22. In the first stage of the DPM, the USDOC examined whether the export sales of an investigated producer or exporter showed a pattern of export prices that differed significantly among different purchasers, regions and time periods.[51] In the second stage of the DPM, the USDOC examined whether it could appropriately account for such differences using only the W-W methodology.[52] When it explained that it could not account for such differences using only the W-W methodology, it considered it appropriate to use the W-T methodology.[53]

7.23. To meet the pattern requirements in the first stage of the DPM, the USDOC used what it referred as the Cohen's d test and the ratio test. It used the Cohen's d test to examine whether the investigated producer's or exporter's prices of merchandise to a distinct purchaser, region or time period differed significantly from the prices of its comparable merchandise to all other purchasers, regions or time periods respectively.[54] The purpose of the Cohen's d test was not to evaluate whether a pattern existed.[55] Instead, the USDOC discerned the pattern under the ratio test based on the extent of the prices that differed significantly.[56]

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[50] USDOC, Issues and decision memorandum dated 1 November 2017 for the final affirmative determination of sales at less than fair value and affirmative final determination of critical circumstances of certain softwood lumber products from Canada (Final issues and decision memorandum), (Exhibit CAN-1), p. 55.

[51] USDOC, Decision memorandum dated 23 June 2017 for the preliminary determination in the antidumping duty investigation of certain softwood lumber products from Canada (Preliminary issues and decision memorandum), (Exhibit CAN-3), p. 14; United States' response to Panel question after the first meeting of the Panel No. 8(b), para. 30.

[52] Preliminary issues and decision memorandum, (Exhibit CAN-3), p. 14.

[53] Preliminary issues and decision memorandum, (Exhibit CAN-3), p. 15. To examine whether the W-W methodology could appropriately take into account such differences, the USDOC examined the difference between a dumping margin calculated under the W-W methodology (without zeroing) and a dumping margin calculated under the appropriate alternative methodology (described in paragraph 7.28 below), based on the results of the Cohen's d test and the ratio test. (Ibid. p. 14). The USDOC used zeroing under the W-T methodology when calculating the margin under the appropriate alternative methodology. When it found a meaningful difference between these two dumping margins it explained that the differences in prices could not be taken into account appropriately under the W-W methodology. Such a meaningful difference arose when (a) there was a 25% relative change in the dumping margin obtained under the W-W methodology and the dumping margin obtained under the appropriate alternative methodology, provided the dumping margins obtained under both methodologies were above *de minimis*; or (b) when the dumping margin under the W-W methodology was *de minimis* but under the appropriate alternative methodology was above *de minimis*. (Ibid. p. 15).

[54] Final issues and decision memorandum, (Exhibit CAN-1), p. 58.

[55] Final issues and decision memorandum, (Exhibit CAN-1), p. 58; United States' response to Panel question after the second meeting of the Panel No. 8(b), para. 30.

[56] Final issues and decision memorandum, (Exhibit CAN-1), p. 58.

7.24. Under the Cohen's d test, the USDOC compared the weighted average price to a specific purchaser (or specific region, or specific time period) with the weighted average price to all other purchasers (or all other regions, or all other time periods). This test was done on a model-by-model basis.[57] To illustrate, let us assume that Foreign Producer Z exports the product under investigation to four US purchasers, which are Purchasers A, B, C, and D. The USDOC would apply the Cohen's d test with respect to each of these four purchasers on a model basis. Thus, the USDOC would calculate the weighted average price (mean price) of all export transactions with respect to a particular model (CONNUM[58]) to Purchaser A.[59] This was the test group. The USDOC would also calculate a weighted average price of all export transactions *other than those made* to Purchaser A with respect to that particular model.[60] This was the comparison group.

7.25. The USDOC used the Cohen's d coefficient to consider whether the difference in the weighted average prices to the test group and the comparison group was significant.[61] In particular, to assess the magnitude of this difference, the USDOC calculated a Cohen's d coefficient using the following formula[62]:

$$d = \frac{(\text{weighted average export price})_{\underset{\text{group}}{\text{test}}} - (\text{weighted average export price})_{\underset{\text{group}}{\text{comparison}}}}{\sqrt{\frac{(\text{variance})_{\underset{\text{group}}{\text{test}}} - (\text{variance})_{\underset{\text{group}}{\text{comparison}}}}{2}}}$$

7.26. When the Cohen's d coefficient based on this formula was 0.8 or above, the USDOC found a significant difference in the weighted average export price to the test group and that to the comparison group.[63] The USDOC found such a significant difference irrespective of whether the weighted average price to the test group was significantly *higher* or significantly *lower* than that to the comparison group.[64] Thus, in our illustration above, irrespective of whether the weighted average price to Purchaser A in the test group met the 0.8 threshold because it was significantly higher or significantly lower than the weighted average price in the comparison group, the export prices to Purchaser A in the test group would *pass* the Cohen's d test. This exercise would be repeated for Purchasers B, C, and D. This exercise would also be repeated for different regions, and for different time periods.[65]

7.27. The export transactions of purchasers, regions and time periods that passed the Cohen's d test were set aside for separate consideration under the ratio test.[66] Under the ratio test, the USDOC aggregated the export transactions to purchasers, regions and time periods that passed the Cohen's d test to identify a single pattern.[67]

7.28. When the aggregate value of the export transactions to purchasers, regions and time periods that passed the Cohen's d test accounted for 66% or more of the value of all export transactions, the USDOC considered applying the W-T methodology to all export transactions.[68] When the aggregate value of the export transactions to purchasers, regions and time periods that passed the

[57] Canada's first written submission, para. 14; United States' first written submission, paras. 56-57.
[58] The USDOC uses the nomenclature CONNUM or control numbers to refer to different models of the product under investigation.
[59] United States' first written submission, paras. 57-58; Canada's first written submission, para. 16.
[60] Canada's first written submission, para. 16; United States' first written submission, para. 57.
[61] Final issues and decision memorandum, (Exhibit CAN-1), p. 55.
[62] United States' first written submission, para. 58.
[63] Preliminary issues and decision memorandum, (Exhibit CAN-3), p. 14.
[64] Canada's first written submission, paras. 17-18; United States' first written submission, para. 68.
[65] See, e.g. United States' first written submission, paras. 56-57. The USDOC would define time periods by quarter, i.e. three-month periods.
[66] In applying the Cohen's d test, the USDOC compared the export sales on a CONNUM basis for each purchaser, region and time period. If, for instance a particular CONNUM-specific export transaction did not pass the Cohen's d test for a given purchaser, that CONNUM-specific transaction was not included in the ratio test. (United States' response to Panel question after the second meeting of the Panel No. 1, paras. 1-2).
[67] In aggregating the results of the Cohen's d test, the USDOC did not double count export sales that passed the Cohen's d test for more than one category, i.e. by purchaser, region or time period. For example, if an export sale passed the Cohen's d test by purchaser and region, then the USDOC only counted the export sale once while aggregating the results of the Cohen's d test. (United States' response to Panel question after the first meeting of the Panel No. 1(b), para. 3).
[68] Preliminary issues and decision memorandum, (Exhibit CAN-3), p. 14.

Cohen's d test accounted for more than 33% but less than 66% of the value of all export transactions, the USDOC considered applying the W-T methodology to those export transactions that passed the Cohen's d test and the W-W methodology to those export transactions that did not pass the Cohen's d test.[69] When the aggregate value of the export transactions to purchasers, regions and time periods that passed the Cohen's d test accounted for 33% or less of the value of all export transactions, the USDOC applied the W-W methodology to all export transactions.[70]

7.29. Having met the pattern requirement through the Cohen's d test and the ratio test, the USDOC considered whether the W-W methodology could take into account appropriately the differences identified under the Cohen's d test. When it explained that it could not, the USDOC applied the W-T methodology to determine the dumping margin of the concerned foreign producer or exporter.

7.2.1.2.1.2 DPM's application in the underlying investigation

7.30. In the underlying investigation, the USDOC found that 73.56%, 72.69%, and 80.83% of Resolute's, Tolko's, and West Fraser's export transactions respectively passed the Cohen's d test.[71] These export transactions included sales to purchasers, regions and time periods that passed the Cohen's d test because they were found to be significantly *higher* than export prices to other purchasers, regions or time periods, as well as prices that passed the Cohen's d test because they were found to be significantly *lower* than export prices to other purchasers, regions or time periods.[72] These export transactions of Resolute, Tolko, and West Fraser also included transactions to multiple purchasers, regions and time periods.[73]

7.31. Thus, as the United States confirms, in the underlying investigation the USDOC found "a single pattern" of export prices "which differ[ed] significantly among different purchasers, regions *and* time periods".[74] The pattern included export prices to purchasers, regions and time periods that differed significantly because they were significantly *lower* than other prices, as well as those that differed significantly because they were significantly *higher* than other prices.[75]

7.2.1.2.2 The USDOC's application of the W-T methodology in the underlying investigation

7.32. The export transactions of Resolute, Tolko, and West Fraser that passed the Cohen's d test represented 66% or more of the respective value of all export transactions made by these three Canadian producers. Thus, after explaining why the W-W methodology could not take into account appropriately the identified differences in prices, following the DPM requirements the USDOC applied the W-T methodology to all export transactions of each of these producers.

7.33. In comparing the weighted average normal value with the price of an individual export transaction under the W-T methodology, the USDOC disregarded, by treating as zero, those comparison results that were negative because the price of the individual export transaction in question was higher than the relevant weighted average normal value.[76] The USDOC determined the dumping margin by aggregating the positive comparison results, i.e. those comparison results that were positive because the price of the individual export transaction was lower than the relevant

[69] Preliminary issues and decision memorandum, (Exhibit CAN-3), p. 14.
[70] Preliminary issues and decision memorandum, (Exhibit CAN-3), p. 14.
[71] United States' first written submission, para. 64; Canada's first written submission, para. 23.
[72] United States' response to Panel question after the first meeting of the Panel No. 1(a), para. 1.
[73] United States' response to Panel question after the first meeting of the Panel No. 1(b), para. 2.
[74] United States' response to Panel question after the first meeting of the Panel No. 8(b), para. 30 (emphasis added). See also Canada's response to Panel question after the first meeting of the Panel No. 1(b), para. 3.
[75] United States' response to Panel question after the first meeting of the Panel No. 1(a), para. 1; Canada's response to Panel question after the first meeting of the Panel No. 1(a), paras. 1-2; and Canada's first written submission, para. 17.
[76] United States' response to Panel question after the first meeting of the Panel No. 3(b), paras. 18-20. The USDOC used multiple averaging in the underlying investigation, meaning that the USDOC divided the product under consideration into different models or CONNUMs, and calculated a weighted average normal value for each CONNUM. It compared the weighted average normal value in the comparison market with US prices, and then aggregated the comparison results. (United States' response to Panel question after the first meeting of the Panel No. 3(a), para. 17).

weighted average normal value.[77] The dumping margin was expressed as a percentage of the total value of all US prices for each exporter.[78] Thus, the USDOC used zeroing under the W-T methodology in the underlying investigation.

7.2.1.3 Evaluation

7.34. We will first review Canada's claims under the second sentence of Article 2.4.2 concerning the USDOC's alleged failure to identify a pattern consistent with the pattern clause, and then turn to its claim on the use of zeroing under the W-T methodology. In making our findings with respect to these claims, we recall that Article 11 of the DSU obliges us to "make an objective assessment of the matter before [us], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Consistent with this obligation, as well as with Article 3.2 of the DSU and Article 17.6(ii) of the Anti-Dumping Agreement, we have set out in the sections below our interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. We have then examined whether Canada has established that the USDOC acted inconsistently with the second sentence of Article 2.4.2, as we have interpreted it. In interpreting this provision, we have taken into account the legal interpretations developed in the reports of WTO panels and the Appellate Body, including those set out in the panel and Appellate Body reports in *US − Washing Machines*.

7.35. We have found our understanding of the text of the second sentence of Article 2.4.2 in this regard to be consistent with certain aspects of the panel's and Appellate Body's interpretation of this sentence in *US − Washing Machines*. However, as noted below, we have found our understanding of this text to differ from certain aspects of the panel's and the Appellate Body's interpretation in *US − Washing Machines*. For the reasons set out in our report, we respectfully disagree with those aspects of the Appellate Body's and the panel's interpretation in *US − Washing Machines*.[79]

7.2.1.3.1 Identification of pattern under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

7.36. The parties agree, as stated in paragraph 7.31 above, that in the underlying investigation:

a. the USDOC found "a single pattern" of export prices "which differed significantly among different purchasers, regions *and* time periods"; and

b. this pattern included export prices to purchasers, regions or time periods that differed significantly because they were significantly *higher* than export prices to other purchasers, regions or time periods.

7.37. The parties disagree, however, on whether, as a matter of law, the pattern clause permits an investigating authority to find such a "pattern". Canada asks us to follow the Appellate Body's finding in *US − Washing Machines* that the pattern clause does not permit an investigating authority to find a "pattern" of the type set out in paragraph 7.36 above. The United States considers the Appellate Body's findings to be incompatible with the text of the second sentence of Article 2.4.2, and thus asks us to not follow these findings. We commence our analysis by examining the text of the pattern clause.

7.38. To comply with the pattern clause, an investigating authority must find:

a. a pattern;

b. *of* export prices which differ significantly among different purchasers, regions or time periods.

[77] United States' response to Panel question after the first meeting of the Panel No. 3(b), paras. 18-20.
[78] United States' response to Panel question after the first meeting of the Panel No. 3(a), para. 17.
[79] See para. 7.107 below. We also disagree for the same reason with the panel and the Appellate Body in *US − Anti-Dumping Methodologies (China)* to the extent the findings of the panel and the Appellate Body differ from the legal interpretation set out in this Report.

7.39. "Pattern" is defined as "a regular and intelligible form or sequence discernible in certain actions or situations".[80] Thus, if the export prices do not form "a regular and intelligible form or sequence discernible in certain actions or situations", they do not form "a pattern" consistent with the pattern clause. The pattern clause also specifies what type of pattern an investigating authority must find because it refers to a pattern "*of* export prices which differ significantly among different purchasers, regions or time periods". Thus, export prices which do not differ, or do not differ significantly, among different purchasers, regions or time periods, also do not form "a pattern" consistent with the pattern clause.

7.40. Further, the use of the singular form in the pattern clause ("a pattern") does not necessarily suggest that an investigating authority cannot find more than one pattern. If the text had used the plural form "patterns", an investigating authority may have been required to find more than one type of pattern to meet the pattern clause requirements.[81] But that is not the case. Thus, while the use of "a pattern" suggests that an investigating authority may comply with the pattern clause by identifying only one type of pattern, it on its face does not preclude an investigating authority from finding more than one type of pattern.

7.41. With these considerations in mind, we turn to examine whether the pattern clause permits an investigating authority to find a pattern of the type set out in paragraph 7.36 above.

7.2.1.3.1.1 Whether export price variations across purchasers, regions and time periods may be aggregated to find a *single* pattern of export prices which differ significantly among different purchasers, regions and time periods

7.42. The issue before us is whether the pattern clause permits an investigating authority to aggregate export price variations across purchasers, regions and time periods to find a *single* pattern of export prices which differ significantly among different purchasers, regions *and* time periods. The Appellate Body and the panel in *US − Washing Machines* concluded that it does not. Canada relies on these findings of the Appellate Body to contend that in the underlying investigation the USDOC failed to find a pattern among different purchasers, regions or time periods because it aggregated differences in prices across three unrelated categories, i.e. purchasers, regions and time periods.[82] The United States disagrees with Canada's arguments.

7.43. We note that an investigating authority must identify a pattern of "export prices which differ significantly among different purchasers, regions or time periods". The preposition "among" may be defined, *inter alia*, as "in relation to the rest of the group [it belongs to]"[83] or "*esp.* of things distinguished in kind from the rest of the group".[84] These definitions suggest, as the United States acknowledges, a relationship between one thing, i.e. purchasers, regions or time periods and other things of the same type, i.e. other purchasers, regions or time periods.[85] Thus, as the United States also acknowledges, the use of "among" in the pattern clause shows that an investigating authority may not compare prices between purchasers and regions because these two categories are not of the same type.[86] Instead, the comparisons must be made between export prices to different purchasers, or different regions, or different time periods, i.e. with respect to categories of the same type.[87]

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[80] The parties agree on this definition. (Canada's first written submission, para. 38; United States' first written submission, para. 44).

[81] See e.g. Panel Report, *US − Washing Machines*, para. 7.143. The panel considered that the use of the singular form may simply indicate that a finding of a pattern with respect to any of the three categories set out in the pattern clause could potentially be a sufficient basis to apply the W-T methodology.

[82] Canada's first written submission, paras. 34 and 41-42.

[83] Panel Report, *US − Washing Machines*, para. 7.142 (quoting McMillan Dictionary online, definition of "among"); Appellate Body Report, *US − Washing Machines*, para. 5.31. (emphasis omitted)

[84] Oxford Dictionaries online, definition of "among" http://www.oed.com/view/Entry/6524?redirectedFrom=among#eid (accessed 20 March 2019). See also United States' first written submission, para. 46.

[85] The United States appears to agree with this understanding based on the word "among". (United States' first written submission, para. 46).

[86] United States' response to Panel question after the first meeting of the Panel No. 7, para. 24.

[87] See, e.g. United States' response to Panel question after the first meeting of the Panel No. 7, para. 24.

7.44. However, the United States contends that such comparisons do not in and of themselves identify "a pattern".[88] Instead, in the United States' view, to identify a pattern among different purchasers, regions or time periods for the foreign producer or exporter, and the product as a whole, an investigating authority needs to examine the producer's or exporter's sales holistically, and in the aggregate.[89] The United States submits that the USDOC aggregated the differences in export prices identified under the Cohen's d test to determine the extent of those differences and consider the producer's overall pricing behaviour in the US market for the product as a whole.[90] The United States asserts that nothing in the text of the pattern clause suggests that significant differences among each category, i.e. purchasers, regions or time periods, cannot be considered together when assessing whether there exists "a pattern of export prices which differ significantly 'among different purchasers, regions or time periods'".[91] According to the United States, the text of the pattern clause on its face contemplates a pattern of export prices that transcends multiple purchasers, regions or time periods, noting that if the pattern clause prohibited the identification of such a single pattern, instead of using the preposition "among" only once, it would have used this preposition three times (as in among purchasers, or among regions, or among time periods).[92] We, however, disagree with the United States' arguments.

7.45. Nothing in the pattern clause suggests that having identified significant differences in export prices among different purchasers, or different regions, or different time periods, an investigating authority is permitted to aggregate those differences to find one single pattern. Instead, we agree with the Appellate Body in *US − Washing Machines* that a single "pattern" which comprises prices found to be significantly different from other prices across different categories would effectively be composed of prices that do not form a regular and intelligible sequence.[93] The use of the conjunction "or" in the specific context of the pattern clause, that is along with the use of the words "among" and "pattern" confirms that the identified pattern must be one of export prices which differ significantly among categories of the same type, i.e. different purchasers, different regions, or different time periods. We also disagree with the United States' argument that if the pattern clause prohibited the identification of a single pattern that aggregates differences in export prices across categories, it would have used the preposition "among" thrice. Instead, we, like the Appellate Body in *US − Washing Machines*, consider that the use of "among" thrice in the pattern clause would have been superfluous because it would have conveyed the same meaning as the existing text.[94]

7.46. Further, nothing in the pattern clause precludes an investigating authority from considering the extent of the price differences identified under the pattern clause. One would also expect an investigating authority to look at the overall pricing behaviour of a foreign producer or exporter to identify a pattern. But we do not consider that it is necessary for an investigating authority to, as the United States contends, aggregate the identified price differences across different categories to address those considerations.

7.47. In particular, as noted above, the pattern clause does not preclude an investigating authority from finding more than one pattern. Thus, having examined the totality of an exporter's or producer's export sales by purchaser, by region, and by time period, an investigating authority could find, consistent with the pattern clause, a pattern of export prices which differ significantly among different purchasers, a pattern of export prices which differ significantly among different regions, and a pattern of export prices which differ significantly among different time periods. The investigating authority is free to examine the extent of the price differences represented across the identified patterns.

7.48. Our interpretation is consistent with that of the Appellate Body in *US − Washing Machines*. The Appellate Body noted that its interpretation of the pattern clause did not exclude the possibility that a foreign producer or exporter could be practising more than one type of targeted dumping (that is dumping targeted to purchasers, regions and time periods), or that an investigating authority could find more than one type of pattern.[95] However, like us, the Appellate Body found that the text

[88] United States' response to Panel question after the first meeting of the Panel No. 8(b), para. 28.
[89] United States' response to Panel question after the first meeting of the Panel No. 8(b), para. 28.
[90] United States' response to Panel question after the first meeting of the Panel No. 7, para. 26.
[91] United States' first written submission, para. 79. (emphasis omitted)
[92] United States' first written submission, paras. 79 and 87.
[93] Appellate Body Report, *US − Washing Machines*, para. 5.32.
[94] Appellate Body Report, *US − Washing Machines*, para. 5.34.
[95] Appellate Body Report, *US − Washing Machines*, para. 5.35.

of the pattern clause did not support the United States' view that an investigating authority could find a single pattern of export prices, which includes variations in export prices across purchasers, regions and time periods. Therefore, we conclude that the pattern clause does not permit an investigating authority to find a single pattern that aggregates differences in export prices across purchasers, regions and time periods.

Conclusion

7.49. Based on the foregoing, we find that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the underlying investigation because in applying the DPM, and specifically under the ratio test, it aggregated differences in export prices across unrelated categories, i.e. purchasers, regions and time periods to identify a single pattern of export prices which differed significantly among different purchasers, regions and time periods.

7.2.1.3.1.2 Whether a pattern can include export prices to purchasers, regions or time periods that differ significantly because they are significantly higher relative to export prices to other purchasers, regions or time periods

7.50. We recall that a foreign producer or exporter's prices to a US purchaser pass the Cohen's d test when the weighted average price to that purchaser is found to differ significantly from the weighted average export price to all other purchasers (same with regions and time periods). Otherwise, those prices fail the Cohen's d test. But the weighted average export price to a specific purchaser (or a specific region, or a specific time period) that passes the Cohen's d test, may differ significantly because this price is significantly lower, or significantly higher, than the weighted average price to all other purchasers (or all other regions, or all other time periods).

7.51. Noting that in applying the Cohen's d test in the underlying investigation the USDOC identified both higher-priced and lower-priced export sales to purchasers, regions or time periods as part of the purported pattern[96], Canada asserts that export prices which differ significantly because they are significantly higher, as opposed to significantly lower, cannot form part of the pattern. Canada finds support for its view in the Appellate Body report in *US − Washing Machines*, where the Appellate Body concluded that the pattern must be limited to the export transactions to those purchasers, regions or time periods whose prices are found to differ significantly because they are significantly lower than export prices to other purchasers, regions or time periods.[97] Canada submits that this interpretation of the Appellate Body gives meaning to the word "pattern".[98] Further, considering the Anti-Dumping Agreement is focused on sales below normal value, and the second sentence of Article 2.4.2 is meant to address targeted dumping, an investigating authority must find a pattern of lower-priced, not higher-priced export sales.[99]

7.52. The United States disagrees with Canada's arguments as well as the Appellate Body's findings in *US − Washing Machines* on which these arguments are based. Noting that as part of the pattern requirements, the DPM, and specifically the Cohen's d test, looks for export prices to a purchaser, region or time period that are either significantly higher or significantly lower than export prices to other purchasers, regions or time periods, the United States asserts that the pattern clause does not require or foreclose a focus either on lower-priced or higher-priced sales.[100] Instead, a pattern of export prices which "differ significantly" would necessarily include in the United States' view both lower-priced and higher-priced export sales that differ significantly from each other.[101]

7.53. However, while observing that the Cohen's d test looks for export prices that are either significantly higher or significantly lower, the United States asserts that the relevant pattern is not limited to export transactions to those purchasers, regions or time periods that pass the Cohen's d test. Instead, the pattern could comprise the export transactions to purchasers, regions or time periods that pass the Cohen's d test as well as those that fail the Cohen's d test, which, we

[96] Canada's first written submission, para. 40.
[97] Canada's first written submission, para. 35 (referring to Appellate Body Report, *US − Washing Machines*, paras. 5.39-5.43); Appellate Body Report, *US − Washing Machines*, para. 5.29.
[98] Canada's response to Panel question after the first meeting of the Panel No. 10, para. 20.
[99] Canada's opening statement at the first meeting of the Panel, para. 20.
[100] United States' first written submission, para. 68.
[101] United States' first written submission, para. 70.

note, effectively means that the pattern could comprise all export transactions of the investigated producer or exporter.[102] The United States justifies this view by observing that under the Cohen's d test, the USDOC makes intermediate comparisons by comparing the export prices to each purchaser with that to all other purchasers (same with regions and time periods). For example, if the foreign producer or exporter has three US purchasers, A, B, and C, the USDOC would compare the weighted average export price to Purchaser A with the weighted average export price to Purchasers B and C; the weighted average export price to Purchaser B with the weighted average export price to Purchasers C and A; and the weighted average export price to Purchaser C with the weighted average export price to Purchasers A and B. The United States contends that if the weighted average export price to Purchaser A is significantly lower than the weighted average export price to the other purchasers, "logically" the weighted average export price to the other purchasers, here, Purchasers B and C, would be significantly higher.[103] Thus, per the United States, the pattern of export prices which differ significantly would comprise export transactions to Purchasers A and C as well as B.[104]

7.54. Canada challenges the USDOC's decision to identify as part of the pattern those export prices to a specific purchaser, region or time period that passed the Cohen's d test because they were significantly higher (as opposed to just significantly lower) relative to export prices to other purchasers, regions or time periods. Thus, the issue that we must resolve is whether "a pattern of export prices which differ significantly" could include export prices to purchasers, regions or time periods which differ significantly because they are significantly higher relative to export prices to other purchasers, regions or time periods. Our interpretation of the pattern clause suggests that it could.

7.55. Interpreting the pattern clause taking into account the function of the second sentence of Article 2.4.2 suggests that the focus of the pattern is on export prices which "differ significantly" and thus not on all export prices.[105] However, the pattern clause does not further qualify the export prices which "differ significantly" by requiring that they differ only because they are significantly lower, not significantly higher, relative to export prices to other purchasers, regions or time periods. Thus, the pattern clause is silent on this matter.

7.56. We recognize that this silence of the text is not dispositive.[106] Indeed, even assuming the phrase "export prices which differ significantly" could, in principle, cover export prices to purchasers, regions or time periods that are significantly lower as well as significantly higher, these export prices must collectively form a regular and intelligible sequence that is discernible in certain actions and is capable of being understood (i.e. they form "a pattern"). We recall that the panel in *US − Washing Machines* concluded, relying on the definition of pattern as a regular and intelligible form or sequence, that prices that are too high and prices that are too low do not belong in the same pattern.[107] The Appellate Body upheld this finding of the panel, while additionally noting that a pattern cannot comprise export prices that differ significantly because they are significantly higher.[108] However, our interpretation of the text leads us to a different conclusion than that reached by the panel and the Appellate Body in *US − Washing Machines*.

7.57. To us, the silence of the text on whether the export prices that differ significantly must do so because they are significantly lower or significantly higher is explained by the function of the second sentence of Article 2.4.2, which is to unmask dumping targeted to certain purchasers, regions or

[102] See e.g. United States' response to Panel question after the first meeting of the Panel No. 8(b), para. 30. Export transactions that pass the Cohen's d test, and those that fail the Cohen's d test, would make up the entire universe of export transactions of a foreign producer or exporter.

[103] United States' response to Panel question after the first meeting of the Panel No. 8(a), para. 27.

[104] If there are multiple export transactions to a purchaser that makes up the test group, the USDOC would calculate a single weighted average price to that purchaser. If there are multiple export transactions to the purchasers that make up the comparison group, the USDOC would calculate a single weighted average price to all these purchasers. Under the Cohen's d test, the USDOC would make its comparisons based on these weighted average prices. However, as explained above, when the weighted average price to the purchaser passes the Cohen's d test, the USDOC would consider the total value of all export transactions to this purchaser under the ratio test.

[105] Appellate Body Report, *US − Washing Machines*, para. 5.26.

[106] We are aware that the silence of a text is not necessarily dispositive, as it is possible that the requirement with respect to which the text is silent was intended to be included by implication. (Appellate Body Report, *US − Carbon Steel*, para. 65).

[107] Panel Report, *US − Washing Machines*, para. 7.144.

[108] Appellate Body Report, *US − Washing Machines*, paras. 5.36-5.37.

time periods. The text of the pattern clause supports the view that targeted dumping is masked when significantly lower prices to certain purchasers, or certain regions, or in certain time periods are masked by significantly higher export prices to certain other purchasers, or to certain other regions, or in certain other time periods. In particular, the text permits an investigating authority to find a pattern, which comprises export prices to purchasers, regions or time periods that are (a) significantly lower and thus *may be masked*; and (b) significantly higher and thus *may be masking those lower-priced export sales*. Having identified such a pattern, an investigating authority is permitted, as noted in paragraph 7.99 below, to unmask targeted dumping reflected in the pattern by applying the W-T methodology to those export transactions that fall within the pattern (while still being required to apply a normal W-W or T-T methodology to the non-pattern transactions).

7.58. To successfully unmask targeted dumping reflected in the pattern transactions, an investigating authority should be permitted to adopt a methodology that deals with such significantly higher-priced export sales, which may be masking the significantly lower-priced export sales, as well as those lower-priced sales, which may be masked. The second sentence permits an investigating authority to do so by applying the W-T methodology to a pattern that includes both these types of export sales. Thus, the silence of the text on whether export prices must "differ significantly" because they are significantly higher or significantly lower is explained by the function of the second sentence of Article 2.4.2.

7.59. We recall that the Appellate Body in *US − Washing Machines* relied primarily on contextual considerations in concluding that the pattern could only comprise export prices which differ significantly because they are significantly lower. The Appellate Body, after all, did recognize that the text of the second sentence does not expressly specify whether the export prices which differ significantly must do so because they are significantly higher or significantly lower.[109] We, however, disagree with these contextual considerations.

7.60. For instance, the Appellate Body found support for its view in the definition of dumping in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, noting that dumped prices refer to export prices that are *lower* than the normal value.[110] But we do not find this definition to offer specific guidance on the issue before us because low-priced export transactions may be higher or lower than the normal value, just as high-priced export transactions may be higher or lower than the normal value, especially considering that the pattern is not determined by reference to normal value. Further, the Appellate Body's finding was informed by its view that if an investigating authority determines the dumping margin under the second sentence of Article 2.4.2, it must apply the W-T methodology only to pattern transactions and exclude the non-pattern transactions.[111] However, as discussed in paragraphs 7.88-7.99 below, such a methodological approach is not consistent with Article 2.4.2 because this provision does not permit an investigating authority to exclude non-pattern transactions. Thus, we respectfully disagree with the contextual considerations relied on by the Appellate Body to the extent they are based on a methodological approach that in our view is not provided under the second sentence of Article 2.4.2.

7.61. We also disagree with the panel in *US − Washing Machines* insofar as it concluded that prices that are too high and prices that are too low do not belong in the same pattern.[112] The definition of pattern does not suggest that prices falling within a pattern need to differ in the same way, i.e. it need not comprise only lower-priced export sales, or only higher-priced export sales, to purchasers (or regions, or time periods). What is important is that the sequence of export prices should form a regular and intelligible sequence that is discernible in certain actions and capable of being understood. Export prices which "differ significantly" because they are significantly higher or significantly lower could form such a sequence. Such a sequence of significantly higher and significantly lower export prices to purchasers, regions or time periods would stand out relative to export prices to other purchasers, regions or time periods because they "differ significantly", and thus would be capable of being understood. Moreover, the word "pattern" should not be viewed in isolation from the other parts of the text that specify what type *of* pattern an investigating authority must find. In so specifying, the pattern clause only requires that the pattern be *of* export prices which differ significantly, and does not prescribe whether they should differ because they are

[109] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[110] See, e.g. Appellate Body Report, *US − Washing Machines*, para. 5.29.
[111] See para. 7.71 below.
[112] Panel Report, *US − Washing Machines*, para. 7.144.

significantly higher or significantly lower relative to export prices to other purchasers, regions or time periods. Therefore, the pattern clause does not preclude an investigating authority from finding that the pattern includes export prices to purchasers, regions or time periods that "differ significantly" because they are significantly higher relative to export prices to other purchasers, regions or time periods.

7.62. As we noted above, Canada's claim under the second sentence of Article 2.4.2 is based on its view that the pattern identified under the pattern clause cannot include export prices to purchasers, regions or time periods which differ significantly because they are significantly higher relative to export prices to other purchasers, regions or time periods. We disagree with this view based on the legal analysis set out above. Thus, we also disagree with Canada that the USDOC acted inconsistently with the pattern clause because export prices to certain purchasers, regions or time periods passed the Cohen's d test because they were significantly higher relative to export prices to other purchasers, regions or time periods.

7.63. Our findings with respect to the claim brought by Canada should not, however, be misunderstood to mean that a pattern would comprise all export transactions of a foreign producer or exporter.[113] The United States asserts, as noted above, that once an investigating authority finds that the weighted average export price to a particular purchaser (Purchaser A in the hypothetical discussed in paragraph 7.53) is significantly lower than the weighted average export price to all other purchasers (Purchasers B and C in the hypothetical), the weighted average export price to those other purchasers (i.e. Purchasers B and C) is significantly higher than the weighted average export price to Purchaser A. Thus, the pattern of export prices which "differ significantly" from each other per the United States includes all export transactions to Purchaser A (because the weighted average price to this purchaser is significantly lower) as well as all export transactions to Purchasers B and C (because the weighted average export price to these two purchasers is significantly higher).

7.64. We disagree with this argument of the United States because it works when one assumes that to meet the pattern clause requirements, an investigating authority must necessarily consider whether the weighted average export price to one purchaser differs significantly *from* the weighted average of the export prices to all other purchasers combined.[114] But this assumption is not grounded in the text of the pattern clause. The pattern clause does not prescribe how an investigating authority must find a pattern. But it does require an investigating authority to find a pattern of export prices which differ significantly among different purchasers. It does not state that an investigating authority must find whether the weighted average export price to one purchaser differs significantly *from* the weighted average of export prices to all other purchasers (with the same rationale applying to regions and time periods as well). Irrespective of the methodology used to identify a pattern, the pattern ultimately discerned, based on an evaluation of all export sales of the concerned foreign producer or exporter, cannot include export prices which do not differ significantly among different purchasers, regions or time periods.

7.65. Indeed, as noted in paragraph 7.55 above, we agree with the Appellate Body in *US − Washing Machines* that the focus of the pattern is on export prices which "differ significantly" and thus not on all export prices.[115] The text of the pattern clause does not suggest that the pattern comprises *any*

[113] The United States submits that the USDOC did not find in the underlying investigation that the pattern consisted of all export sales. (United States' response to Panel question after the second meeting of the Panel No. 4, para. 43). However, as noted earlier, it also contends that a pattern could comprise export transactions that pass the Cohen's d test as well as those that fail the Cohen's d test, which would effectively mean that the pattern would comprise all export transactions of a foreign producer or exporter, even though only export prices to certain purchasers, regions or time periods pass the Cohen's d test because they are found to "differ significantly". (United States' response to Panel question after the first meeting of the Panel No. 8(b), para. 30).

[114] The United States contends that the Appellate Body in *US − Washing Machines* rewrote the pattern clause by substituting "among" for "from" because the Appellate Body found that the distinguishing factor that would allow the authority to discern which prices form part of the pattern would be that the prices in the pattern differ significantly *from* prices not in the pattern. (United States' first written submission, para. 71). It appears to us, however, that it is the United States' interpretation of the pattern clause that replaces the word "among" with "from".

[115] Appellate Body Report, *US − Washing Machines*, para. 5.26. We also consider that a "pattern" that includes export prices to purchasers, regions or time periods which do not "differ significantly" would not form "a regular and intelligible form or sequence discernible in certain actions or situations". There would be no criteria based on which such a sequence could be discerned or be capable of being understood, and such a

lower- or higher-priced export transaction, or any export transaction priced above or below the normal value. The existence of such type of lower-priced and higher-priced export transactions would not be a sufficient basis to find a pattern because the pattern clause requires an investigating authority to find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and not significant differences or variations across the prices of all export transactions. It follows that if an investigating authority were to find that certain export prices do "differ significantly among different purchasers, regions or time periods" and form the relevant pattern, that would not present the investigating authority with a *carte blanche* to include other export prices that do not "differ significantly among different purchasers, regions or time periods" in the pattern. Thus, we consider that a pattern of export prices which "differ significantly" among different purchasers, regions or time periods necessarily excludes export prices which *do not* differ significantly among different purchasers, regions or time periods.

Conclusion

7.66. Based on the foregoing, we find that Canada has not established that in applying the DPM in the underlying investigation the USDOC acted inconsistently with the second sentence of Article 2.4.2 by including, in the pattern, export transactions to those purchasers, regions or time periods whose prices differed significantly because they were significantly higher relative to export prices to other purchasers, regions or time periods.

7.2.1.3.2 Zeroing under the W-T methodology

7.67. We observed in paragraph 7.20 above that the process of comparing a normal value established on a weighted average basis with the prices of individual export transactions may yield multiple intermediate comparison results. An intermediate comparison result is positive when the price of an individual export transaction is lower than the weighted average normal value. An intermediate comparison result is negative when the price of an individual export transaction is higher than the weighted average normal value. An investigating authority uses zeroing under the W-T methodology when, in aggregating the intermediate comparison results, it disregards by treating as zero the negative comparison results and considers only the positive comparison results. Considering that in dumping margin calculations the total dumped amount is presented in the numerator, the numerator reflects only the positive comparison results when zeroing is used (and the positive as well as the negative comparison results when zeroing is not used). The denominator comprises the value of all export transactions, including the value of export transactions that are disregarded while determining the total dumped amount. The formula for calculating a dumping margin under the W-T methodology (in percentage) is[116]:

$$\frac{\text{Total Dumped Amount (Numerator)}}{\text{Total Value of all export transactions (Denominator)}} \times 100$$

7.68. The issue in this dispute is whether the second sentence of Article 2.4.2 permits such type of zeroing under the W-T methodology. The panels in *US – Washing Machines* and *US – Anti-Dumping Methodologies (China)* and the Appellate Body in *US – Washing Machines* concluded that the second sentence of Article 2.4.2 does not permit the use of zeroing under the W-T methodology.[117] One Appellate Body Member in *US – Washing Machines*, however, dissented from the majority view and found zeroing to be permissible under the W-T methodology. While these panels and the Appellate Body found zeroing to be impermissible under the second sentence, they

sequence would not be regular or intelligible. Instead, they would be essentially random variations in prices. Thus, export prices to purchasers, regions or time periods which do not differ significantly relative to export prices to other purchasers, regions or time periods cannot form part of the pattern.

[116] Irrespective of whether the dumping margin is determined under the W-T methodology, the W-W methodology, or the T-T methodology, the numerator would reflect the total dumped amount. However, how exactly the total dumped amount is determined would vary based on the methodology used.

[117] The Appellate Body's findings were not based on the unanimous view of all three Appellate Body Members forming the Division. While the majority, i.e. two Members concluded that the second sentence of Article 2.4.2 prohibits zeroing under the W-T methodology, one Member disagreed with that conclusion and wrote a dissenting opinion. We refer to the findings of the majority as the Appellate Body findings in *US – Washing Machines*.

acknowledged that the W-T methodology is an exceptional methodology which is designed to unmask targeted dumping.[118] However, they concluded that the second sentence of Article 2.4.2 permits an investigating authority to unmask targeted dumping without using zeroing. This conclusion is based on their view on how an investigating authority is supposed to determine the dumping margin pursuant to the second sentence of Article 2.4.2.

7.69. These panels and the Appellate Body noted that when an investigating authority determines the dumping margin under the second sentence of Article 2.4.2 after meeting the conditions set out in this sentence, it is permitted to apply the W-T methodology only to those export transactions that fall within the relevant pattern.[119] Thus, they took the view that the second sentence does not permit an investigating authority to apply the W-T methodology to the non-pattern transactions. However, the panels and the Appellate Body reached different conclusions on how an investigating authority is supposed to treat such non-pattern transactions.

7.70. The panels in *US – Washing Machines* and *US – Anti-Dumping Methodologies (China)* did not preclude the application of any of the two normal methodologies, i.e. the W-W or the T-T methodology to the non-pattern transactions.[120] Thus, these panels did not preclude that an investigating authority could apply a mixed methodology wherein the W-T methodology is applied to pattern transactions (but without zeroing) and the W-W or T-T methodology is applied to non-pattern transactions (without zeroing).[121] When such a mixed methodology is used, the intermediate results calculated by applying the W-T methodology to pattern transactions and the W-W (or T-T) methodology to non-pattern transactions must be aggregated to calculate one overall dumping margin for the foreign producer or exporter. The panels observed that in aggregating these intermediate results, an investigating authority may systematically disregard the intermediate result calculated by applying the W-W or the T-T methodology to non-pattern transactions, when this intermediate result is negative.[122] When this intermediate result is positive, the investigating authority would add this result to the intermediate result obtained by applying the W-T methodology to pattern transactions.[123] This way, according to these panels, the W-T methodology could unmask targeted dumping by not letting negative dumping outside the pattern offset or "re-mask" the dumping within the pattern.[124]

7.71. However, unlike these two panels, the Appellate Body concluded that the second sentence of Article 2.4.2 does not permit the use of a mixed methodology, thereby disagreeing with the two

[118] See, e.g. Appellate Body Report, *US – Washing Machines*, paras. 5.17-5.18; Panel Reports, *US – Washing Machines*, para. 7.155; *US – Anti-Dumping Methodologies (China)*, fn 385.

[119] Appellate Body Report, *US – Washing Machines*, para. 5.55; Panel Reports, *US – Washing Machines*, para. 7.29; *US – Anti-Dumping Methodologies (China)*, para. 7.183.

[120] The panel in *US – Washing Machines* observed that one might take the view that the combined application of the W-T and W-W (or T-T) methodologies is not provided under the second sentence of Article 2.4.2. But considering the complainant did not make a claim to that effect, it assumed that the combined application of the two methodologies (i.e. W-T methodology to the pattern transactions and W-W or T-T methodology to the non-pattern transactions) is not precluded. (Panel Report, *US – Washing Machines*, para. 7.161). The panel in *US – Anti-Dumping Methodologies (China)* noted that to resolve the claim before it, it did not need to express a view on how an investigating authority should treat non-pattern transactions while determining the dumping margin for the product as a whole. But, it observed that an investigating authority may use another methodology with respect to the non-pattern transactions, provided it complies with Article 2.4.2 and other relevant provisions of the Anti-Dumping Agreement. It did not suggest that the non-pattern transactions must be excluded. (Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.182).

[121] In *US – Washing Machines*, the panel dealt with the use of a mixed methodology by the USDOC wherein the W-T methodology was applied to export transactions that passed the Cohen's d test and the W-W methodology was applied to export transactions that did not pass the Cohen's d test.

[122] Panel Reports, *US – Washing Machines*, paras. 7.162-7.164; *US – Anti-Dumping Methodologies (China)*, fn 385.

[123] So, to take an example, if the intermediate result calculated by applying the W-T methodology to pattern transactions is 500, and that calculated by applying the T-T methodology to non-pattern transactions is -500, an investigating authority would disregard the intermediate result based on non-pattern transactions resulting in a dumped amount of 500 (500 + 0). If the intermediate result calculated by applying the W-T methodology to pattern transactions is 500, and that calculated by applying the T-T methodology to non-pattern transactions is 150, the two results would be added to get a total dumped amount of 650 (500+150).

[124] Panel Reports, *US – Washing Machines*, para. 7.162; *US – Anti-Dumping Methodologies (China)*, fn 385.

panels on this point.[125] Instead, in determining the dumped amount pursuant to the second sentence an investigating authority would apply the W-T methodology only to the pattern transactions and exclude the non-pattern transactions.[126] Thus, the dumped amount represented in the numerator would be based only on results obtained by applying the W-T methodology to pattern transactions.[127] The denominator would reflect the value of all export transactions, i.e. the pattern and the non-pattern transactions.[128] This way, per the Appellate Body, an investigating authority can address targeted dumping that is represented in the pattern by comparing all export transactions identified in the pattern with the weighted average normal value.[129] Because the non-pattern transactions are excluded from the dumping margin calculations, the negative intermediate result based on such non-pattern transactions is not allowed to re-mask the targeted dumping identified in the pattern.[130] According to the Appellate Body, once the non-pattern transactions are excluded, there is nothing more that needs to be unmasked. Thus, per the Appellate Body zeroing is not permitted to unmask targeted dumping.

7.72. Relying primarily on these findings of the Appellate Body in *US − Washing Machines*, Canada contends that the second sentence of Article 2.4.2 does not permit the use of zeroing under the W-T methodology. The United States disputes Canada's submission and asks us not to follow the Appellate Body's findings in *US − Washing Machines*. Noting that the second sentence of Article 2.4.2 sets out an exceptional W-T methodology, which is designed to unmask targeted dumping, the United States asserts that if zeroing is prohibited under the W-T methodology, this methodology would no longer be exceptional, or provide the means to unmask targeted dumping.[131] The United States' assertion is based on its view that because the W-T methodology is an exceptional methodology, its use should result in a dumping margin that is systematically different from the dumping margin determined under the "normal" W-W or T-T methodology.[132] However, if zeroing is prohibited under the W-T methodology, this methodology per the United States will "as a mathematical certainty, *in every case*" yield a dumping margin that is identical to the dumping margin determined under the W-W methodology.[133] In particular, the United States submits that if zeroing is prohibited under the W-T methodology, there will be mathematical equivalence between the dumping margin determined under the W-W methodology, the W-T methodology, and a mixed methodology wherein the W-T methodology is applied to a subset of export transactions and the W-W methodology is applied to the remaining export transactions.[134] Such type of mathematical equivalence according to the United States will render the second sentence of Article 2.4.2 *inutile*.[135] Canada, however, disputes the United States' mathematical equivalence arguments on the grounds set out in paragraph 7.76 below.

7.73. In addition to disagreeing on whether zeroing is permissible under the second sentence of Article 2.4.2, the parties also disagree on whether the dumping margin determined under the W-W methodology provided in the first sentence of Article 2.4.2, and that determined pursuant to the second sentence of Article 2.4.2, will be mathematically equivalent in every case if zeroing is prohibited under the W-T methodology. We must ascertain whether the dumping margin determined under the W-W methodology provided in the first sentence of Article 2.4.2 will be mathematically equivalent "in every case" to the dumping margin determined pursuant to the second sentence of Article 2.4.2.[136] If we find that such type of mathematical equivalence arises in every case, and not just in a specific set of circumstances, we will consider the United States' mathematical equivalence

[125] Appellate Body Reports, *US − Washing Machines*, paras. 5.129-5.130; *US − Anti-Dumping Methodologies (China)*, para. 5.108.
[126] Appellate Body Report, *US − Washing Machines*, paras. 5.106 and 5.117.
[127] Appellate Body Report, *US − Washing Machines*, para. 5.114.
[128] Appellate Body Report, *US − Washing Machines*, para. 5.114.
[129] Appellate Body Report, *US − Washing Machines*, para. 5.155.
[130] Appellate Body Report, *US − Washing Machines*, para. 5.109.
[131] United States' first written submission, paras. 11 and 115.
[132] United States' first written submission, paras. 114-115.
[133] United States' first written submission, para. 121. (emphasis added)
[134] United States' first written submission, fn 177; response to Panel question after the second meeting of the Panel No. 2(a), paras. 13-31.
[135] United States' first written submission, paras. 5 and 159.
[136] The United States requests us to make factual findings confirming that dumping margins calculated under the W-W and W-T methodologies will be mathematically equivalent if zeroing is considered impermissible under the W-T methodology. (United States' first written submission, para. 160; second written submission, para. 74).

arguments as part of our assessment of whether zeroing is permissible under the W-T methodology.[137]

7.2.1.3.2.1 The assumptions underlying the United States' mathematical equivalence argument

7.74. The United States, as noted above, asserts that the dumping margin determined under the W-W methodology will be mathematically equivalent in every case to a dumping margin that is determined under[138]:

a. the W-T methodology, wherein this methodology is applied to all export transactions of a foreign producer or exporter; or

b. a mixed methodology, wherein the W-T methodology is applied to a subset of export transactions of that foreign producer or exporter and the W-W methodology is applied to the remaining export transactions.

7.75. Canada does not make a formal claim challenging the application of the W-T methodology to all export transactions, instead of only pattern transactions. However, in rebutting the United States' mathematical equivalence arguments, Canada asserts, relying on the Appellate Body report in *US − Washing Machines*, as follows:

a. The second sentence of Article 2.4.2 does not permit an investigating authority to apply the W-T methodology to all export transactions. Instead, this methodology must be limited to pattern transactions.[139]

b. The Anti-Dumping Agreement does not permit the use of a mixed methodology wherein the W-T methodology is applied to pattern transactions and the W-W (or T-T) methodology is applied to non-pattern transactions.[140] Instead, as the Appellate Body stated in *US − Washing Machines*, if an investigating authority applies the W-T methodology after meeting the conditions set out in the second sentence, it must apply this methodology only to pattern transactions.[141] Non-pattern transactions must be excluded when calculating the dumped amount. Therefore, neither the W-W nor the T-T methodology must be applied to these non-pattern transactions.

7.76. Canada submits that if the W-T methodology is applied correctly, consistent with the Appellate Body's interpretation of the second sentence of Article 2.4.2, i.e. if it is applied to pattern transactions alone, the resultant dumping margin will not be mathematically equivalent to the dumping margin determined under the W-W methodology (which must be applied to all export transactions).[142] In addition, while maintaining that the second sentence does not permit an investigating authority to use a mixed methodology, Canada nonetheless presents calculations showing that the dumping margin based on a W-W methodology will not be mathematically equivalent in all cases to a dumping margin based on a mixed methodology wherein the W-T methodology is applied to pattern transactions and the W-W methodology is applied to

[137] In *US − Softwood Lumber V (Article 21.5 − Canada)* the Appellate Body stated that "[o]ne part of a provision setting forth a methodology is not rendered *inutile* simply because, *in a specific set of circumstances*, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision". (Appellate Body Report, *US − Softwood Lumber V (Article 21.5 − Canada)*, para. 99 (emphasis added)). We agree with the Appellate Body that the second sentence of Article 2.4.2 is not rendered *inutile* if the dumping margin determined under the W-W methodology and that determined pursuant to the second sentence of Article 2.4.2 are mathematically equivalent only "in a specific set of circumstances".

[138] United States' first written submission, fn 177; response to Panel question after the second meeting of the Panel No. 2(a), para. 5.

[139] Canada's responses to Panel question after the first meeting of the Panel Nos. 5(a) and (b), paras. 12, 14, and 16.

[140] Canada's response to Panel question after the second meeting of the Panel No. 2(c), para. 1.

[141] Canada's response to Panel question after the first meeting of the Panel No. 5(a), para. 14.

[142] Canada's responses to Panel question after the first meeting of the Panel Nos. 5(a) and (b), paras. 12, 14, and 16.

non-pattern transactions.[143] In the calculations, Canada calculates the normal value under the W-W and W-T methodologies on different temporal bases.[144]

7.77. We note that both parties' arguments on mathematical equivalence are directly linked to the scope of application of the W-T methodology and to the treatment of non-pattern transactions. Thus, in making our findings on mathematical equivalence we find it necessary to set out our understanding on how an investigating authority is supposed to make dumping margin calculations when the conditions for the use of the W-T methodology provided in the second sentence of Article 2.4.2 are met.

Dumping determinations pursuant to the second sentence of Article 2.4.2

7.78. We consider, as past panels and the Appellate Body have, that the second sentence of Article 2.4.2 does not permit an investigating authority to apply the W-T methodology to all export transactions. Instead, this methodology may be applied only to pattern transactions. However, we disagree that non-pattern transactions may (or must) be excluded when an investigating authority makes dumping determinations pursuant to the second sentence. Instead, an investigating authority must apply the W-W or the T-T methodology to those non-pattern transactions. The intermediate result calculated by applying the W-T methodology to pattern transactions must be aggregated with the intermediate result calculated by applying the W-W or the T-T methodology to the non-pattern transactions. The intermediate result based on non-pattern transactions may not be excluded, irrespective of whether that result is positive or negative. We have reached these conclusions based on the legal analysis set out below.

Scope of application of the W-T methodology

7.79. The United States argues that if an investigating authority properly establishes the conditions for applying the W-T methodology, nothing in the Anti-Dumping Agreement would preclude it from determining the dumping margin by applying the W-T methodology to all export transactions.[145] Canada contends that the W-T methodology may only be applied to pattern transactions. Our interpretation of the text of the second sentence of Article 2.4.2 shows that this sentence does not permit the application of the W-T methodology to non-pattern transactions.

7.80. The second sentence of Article 2.4.2 does not state that in applying the W-T methodology an investigating authority must compare the normal value established on a weighted average basis with the prices of *all* export transactions. Reading the text of this sentence as a whole, taking into account in particular, the explanation clause, shows that this sentence does not envisage the application of the W-T methodology to all export transactions. Instead, this methodology must be limited to those export transactions that fall within the pattern that the investigating authority identifies under the pattern clause.

7.81. The explanation clause permits an investigating authority to apply the W-T methodology only when it explains why "such differences" cannot be taken into account appropriately by using a W-W or T-T comparison. "Such differences" refer to the "export prices which differ significantly" and therefore form the relevant pattern.[146] To comply with the explanation clause, an investigating authority must explain why the "export prices which differ significantly" and form the relevant pattern cannot be taken into account appropriately by the use of a W-W or T-T comparison. The explanation clause does not require an explanation as to why export prices outside the pattern cannot be taken into account appropriately using a W-W or T-T comparison, or simply an explanation of the reasons for using the W-T comparison (with respect to all export transactions). Indeed, the text of the explanation clause, which closely reflects the text of the Dunkel Draft from the Uruguay

[143] Canada's response to Panel question after the second meeting of the Panel No. 2(d), para. 4; Canada's dumping margin calculations under W-W and mixed W-T/W-W methodologies, (Exhibit CAN-33).

[144] Canada uses a mixed methodology wherein it calculates the normal value for the W-T methodology based on a quarterly period, and the normal value for the W-W methodology based on an annual period. (Canada's dumping margin calculations under W-W and mixed W-T/W-W methodologies, (Exhibit CAN-33)).

[145] United States' response to Panel question after the first meeting of the Panel No. 21, para. 74.

[146] Appellate Body Report, *US – Washing Machines*, para. 5.50. We consider that when the pattern clause and explanation clause are read together it becomes clear that "such differences" refer to the "pattern of export prices which differ significantly" among different purchasers, regions or time periods.

Round of negotiations, differs in this respect from earlier draft texts from the Uruguay Round, such as the New Zealand I text, the New Zealand II text, the New Zealand III text, and the Ramsauer text that permitted recourse to the W-T methodology provided, *inter alia*, "the authorities [gave] an explanation of the reasons for using such a comparison", i.e. the W-T comparison.[147] We consider that the agreed text of the second sentence of Article 2.4.2, and specifically the explanation clause is worded the way it is, and does not require an explanation with respect to export transactions falling outside the pattern because the second sentence does not contemplate the application of the W-T methodology outside the pattern.

7.82. If the W-T methodology was meant to be applied to non-pattern transactions, the need to explain why the W-W or T-T comparison could not take into account appropriately such transactions would perhaps be even more compelling. We stated above that the pattern identified under the pattern clause includes significantly high-priced export sales to purchasers, regions or time periods that may be masking significantly lower-priced export sales to other purchasers, regions or time periods and those lower-priced export sales, which may be masked. Thus, these export sales form part of the pattern transactions, and not the non-pattern transactions. In that sense, there is nothing abnormal about the non-pattern transactions. Just because such non-pattern transactions coexist with pattern transactions does not mean that the non-pattern transactions become abnormal. Instead, these are the sort of export transactions to which an investigating authority would apply a normal methodology in ordinary circumstances. Therefore, if the second sentence permitted an investigating authority to apply the W-T methodology to non-pattern transactions the text would have required an explanation (perhaps an even more compelling one) why the W-W or the T-T methodology could not appropriately take into account such non-pattern transactions. The reason it does not require such an explanation is because the second sentence does not contemplate the application of the W-T methodology to non-pattern transactions.[148]

7.83. We recognize, of course, that non-pattern transactions may be above the weighted average normal value and that disregarding comparison results based on them would lead to a higher overall dumping margin for the foreign producer or exporter. But we do not consider that the pattern clause or any other part of the second sentence of Article 2.4.2 permits an investigating authority to "unmask" non-pattern transactions above the weighted average normal value by applying the W-T methodology. Indeed, a foreign producer or exporter may make multiple export transactions within the period of investigation. Many of these export transactions may be higher than a weighted average normal value, while others may be lower than the weighted average normal value. The existence of such a higher-priced transaction is not a problem *per se* because if one were to apply the W-W methodology such higher-priced and lower-priced export transactions would be averaged out without the possibility to disregard any individual high-priced export transaction.[149] Similarly, if an investigating authority were to apply the T-T methodology, it would have to consider the real values of such high-priced and low-priced transactions, and not disregard comparison results based on either of them. Only when such higher-priced export transactions form part of a pattern of export prices which not only differ, but "differ significantly" "among different purchasers, regions or time periods", is an investigating authority permitted to unmask such higher-priced export sales to certain purchasers, regions or time periods that may be masking lower-priced export sales to other purchasers, regions or time periods. Permitting an investigating authority to "unmask" non-pattern transactions would undermine the prohibition on zeroing under the W-W or T-T methodology.

7.84. Thus, while we disagree with past panels and the Appellate Body on the nature of the export transactions that fall within the relevant pattern, we agree with them that the second sentence of Article 2.4.2 does not permit an investigating authority to apply the W-T methodology to export transactions falling outside the pattern. Based on the above, we conclude that the second sentence

[147] Draft working paper on anti-dumping discussed during the Uruguay Round (6 November 1990) (New Zealand I); Draft working paper on anti-dumping prepared during the Uruguay Round (15 November 1990) (New Zealand II); Draft working paper on anti-dumping prepared during the Uruguay Round (23 November 1990) (New Zealand III); and Draft working paper on anti-dumping prepared during the Uruguay Round (26 November 1991) (Ramsauer text).

[148] Panel Report, *US – Washing Machines*, paras. 7.23-7.24. The panel in *US – Washing Machines* expressed similar views, noting that an explanation is required with respect to pattern transactions because only pattern transactions should be subject to the W-T methodology.

[149] This averaging effect of the W-W methodology would not have been lost on the Uruguay Round negotiators, who would have known that higher-priced and lower-priced domestic and export transactions would be averaged out under the W-W methodology, and yet chose it as one of the methodologies that an investigating authority shall normally use.

of Article 2.4.2 does not permit an investigating authority to apply the W-T methodology to all export transactions. Instead, the W-T methodology may be applied only to pattern transactions.

Treatment of non-pattern transactions under the second sentence of Article 2.4.2

7.85. The W-T methodology may be applied only to pattern transactions. Does this mean that the non-pattern transactions must be simply excluded while calculating the total dumped amount pursuant to the second sentence of Article 2.4.2 (per the Appellate Body's methodological approach in *US − Washing Machines*)? Or does this mean that an investigating authority must apply either the W-W or the T-T methodology to the non-pattern transactions? If an investigating authority must apply either the W-W or the T-T methodology to the non-pattern transactions, the application of these normal methodologies would generate an intermediate result based on such non-pattern transactions that may be negative or positive. Is an investigating authority permitted to exclude this intermediate result when it is negative but add it (to the intermediate result based on pattern transactions) when it is positive? We must resolve these questions because the overall dumping margin determined under the W-W methodology and that determined pursuant to the second sentence of Article 2.4.2 will not be mathematically equivalent in every case if (a) non-pattern transactions are excluded under the W-T methodology[150], or (b) non-pattern transactions are excluded when the intermediate result based on them is negative.[151]

7.86. Canada contends that the explicit authorization under the second sentence of Article 2.4.2 to focus on pattern transactions also provides the basis for disregarding non-pattern transactions.[152] Thus, Canada asserts, relying on the Appellate Body Report in *US − Washing Machines*, that non-pattern transactions must be excluded when the dumping margin is determined under the second sentence of Article 2.4.2. But Canada submits that assuming Article 2.4.2 permits the use of a mixed methodology, an investigating authority cannot exclude the intermediate result based on non-pattern transactions when it is negative.[153]

7.87. The United States argues that a dumping margin determined pursuant to the second sentence of Article 2.4.2 by excluding non-pattern transactions "cannot credibly be called a margin of dumping for the 'product as a whole'".[154] The United States submits that "one of the major flaws" of this

[150] In rejecting the United States' mathematical equivalence arguments in *US − Washing Machines*, the Appellate Body noted that "[c]omparing normal value with 'pattern transactions' only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the W-W [ ] methodology to *all* export transactions". (Appellate Body Report, *US − Washing Machines*, para. 5.163 (emphasis original)). In addition, the Appellate Body considered that the mere fact that the application of the W-T methodology to pattern transactions may lead to a result that is equivalent to the result obtained by applying the W-W methodology to pattern transactions is neither relevant nor reads the W-T methodology out of the second sentence of Article 2.4.2. (Appellate Body Report, *US − Washing Machines*, para. 5.165).

[151] The panel in *US − Washing Machines* noted that when the non-pattern transactions are dumped (i.e. the intermediate result based on such transactions is positive), aggregating the result of the W-W methodology (without zeroing) for non-pattern transactions with the result of the W-T methodology (without zeroing) for pattern transactions would lead to the same margin of dumping as the application of the W-W methodology (without zeroing) to all export transactions. The margin of dumping changes, however, when the non-pattern transactions are not dumped (i.e. the intermediate result based on such transactions is negative), and when that amount of negative dumping outside the pattern is systematically disregarded while aggregating it with results of the W-T methodology. (Panel Report, *US − Washing Machines*, fn 299). The United States agrees that mathematical equivalence will not arise in this case. (United States' response to Panel question after the second meeting of the Panel No. 2(b), para. 33). However, the United States submits that this does not solve the problem of mathematical equivalence because the application of the W-W or the W-T methodology to the same set of export transactions without zeroing will yield mathematically equivalent results. (United States' response to Panel question after the second meeting of the Panel No. 2(b), para. 33). In our view, the relevant question is whether the overall dumping margin determined under the W-W methodology and that determined pursuant to the second sentence of Article 2.4.2 are mathematically equivalent. If we were to find that Article 2.4.2 permits an investigating authority to (a) apply the W-T methodology only to pattern transactions, or (b) exclude the intermediate result based on non-pattern transactions when it is negative, we would conclude that the overall dumping margin determined under the W-W methodology and that determined pursuant to the second sentence of Article 2.4.2 would not be mathematically equivalent in every case.

[152] Canada's response to Panel question after the first meeting of the Panel No. 15(a), para. 35.

[153] Canada's response to Panel question after the second meeting of the Panel No. 2(c), paras. 2-3.

[154] United States' first written submission, para. 95.

methodological approach is that it requires an investigating authority to disregard evidence of dumping from non-pattern transactions.[155] With respect to the use of a mixed methodology pursuant to the second sentence, the United States submits that the Anti-Dumping Agreement does not preclude such a methodology.[156] The United States also observes that the panel in *US − Washing Machines* stated that when the intermediate result based on non-pattern transactions is negative, it may be excluded so that negative dumping in respect of non-pattern transactions does not re-mask dumping in the pattern.[157]

7.88. We commence our analysis by noting that both sentences of Article 2.4.2 must be interpreted bearing in mind the context provided by Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, which define dumping. Article VI:2 of the GATT defines the margin of dumping as the difference between the normal value and the export price, and establishes the link between dumping and margin of dumping.[158] The margin of dumping reflects the magnitude of dumping.[159] The Appellate Body has, as noted above, relied on these provisions as context in concluding that dumping and margins of dumping must be determined for the product as a whole. The Appellate Body has stated that the notion that a product is introduced into the commerce of another country at less than its normal value, as provided in Article VI:1 of the GATT 1994, suggests that the exporter's dumping determination must be based on "the totality of an exporter's transactions" of the subject merchandise over the period of investigation.[160] Considering Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 inform our interpretation of not just the first sentence of Article 2.4.2, but also its second sentence, we consider that dumping determinations must be based on the totality of an exporter's transactions even when the conditions for the use of the W-T methodology under this second sentence are met.

7.89. Article 2.4.2, on its face, does not create any exceptional rule allowing an investigating authority to exclude the totality of an exporter's transactions or the pricing behaviour outside the identified pattern when the conditions set out in the second sentence of Article 2.4.2 are met. Is such a rule included by implication? Reading Article 2.4.2 in context and in light of the object and purpose of the Anti-Dumping Agreement suggests no. Instead, the absence of such a rule makes sense.

7.90. Let us consider the following questions. For the purpose of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, a product is considered dumped when it is introduced into the commerce of another country at less than its normal value. Could non-pattern transactions be priced below normal value? Yes, they could because export transactions outside the pattern may be priced below the normal value, just as they may be priced above it. Is an investigating authority permitted to exclude the pricing behaviour outside the pattern when it calculates the overall dumping margin of a foreign producer or exporter? Nothing in the Anti-Dumping Agreement would suggest so. Indeed, to properly assess the pricing behaviour of a foreign producer or exporter, and to determine whether it is in fact dumping the product under consideration, and if so, by what margin, it is obviously necessary to take into account the prices of all the export transactions of that foreign producer or exporter.[161] Otherwise, the magnitude of dumping, which is reflected in the margin of dumping, may be understated or overstated.

7.91. We are cognizant that in finding that an investigating authority must exclude non-pattern transactions while determining the dumped amount pursuant to the second sentence of Article 2.4.2, the Appellate Body stated that this sentence "says nothing about including transactions that are not part of the pattern in the comparison process that is required to establish margins of dumping".[162] However, what is relevant is not that the text says nothing about *including* transactions that are not part of the pattern, but that the text says nothing about *excluding* transactions that are not part of the pattern, when an investigating authority determines the dumping margin for the product as a whole. The silence of the text on this matter may be contrasted with other provisions of the

[155] United States' response to Panel question after the first meeting of the Panel No. 14(a), para. 50.
[156] United States' response to Panel question after the second meeting of the Panel No. 2(c), para. 35.
[157] United States' response to Panel question after the second meeting of the Panel No. 2(c), para. 35 (referring to Panel Report, *US − Washing Machines*, para. 7.162).
[158] See, e.g. Appellate Body Report, *US − Zeroing (Japan)*, para. 110.
[159] Appellate Body Report, *US − Zeroing (Japan)*, para. 110.
[160] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 98.
[161] Appellate Body Report, *US − Zeroing (Japan)*, para. 111.
[162] Appellate Body Report, *US − Washing Machines*, para. 5.109.

Anti-Dumping Agreement, including Articles 2.2.1, 2.2.2, and 2.3 of the Anti-Dumping Agreement, which set out specific rules on when an investigating authority may reject certain transactions or data.[163] The existence of such specific rules in other parts of the Anti-Dumping Agreement suggests that if the drafters of the Anti-Dumping Agreement had intended to allow an investigating authority to disregard non-pattern transactions, which could well be the majority of the export transactions of a foreign producer or exporter, they would have provided rules to this effect. Therefore, the silence of the text in this regard appears deliberate.

7.92. Further, while the Appellate Body took the view that the exclusion of non-pattern transactions ensures that targeted dumping identified in the pattern is not re-masked by comparison results based on non-pattern transactions, the purpose of the second sentence of Article 2.4.2 is to unmask targeted dumping through the application of the W-T methodology, and not by simply disregarding non-pattern transactions.[164] Otherwise, the text could have simply stated that an investigating authority is permitted to apply the W-W or T-T methodology to a limited set of export transactions that make up the pattern and disregard the non-pattern transactions.[165] Instead, we are concerned that in requiring an investigating authority to make its dumping determination based on pattern transactions alone, the Appellate Body's approach artificially limits or increases the total dumped amount, reflected in the numerator, while the denominator reflects the real value of all export transactions. Such a determination is not based on a proper evaluation of the evidence on record, and thus cannot be a method provided for in the second sentence of Article 2.4.2.

7.93. Our understanding of the text is also consistent with what the Appellate Body considered the object and purpose of the Anti-Dumping Agreement, which is to allow Members to deal with injurious dumping by allowing them to take anti-dumping measures to counteract injurious dumping and imposing disciplines on the use of such anti-dumping measures.[166] The Appellate Body's methodological approach of excluding non-pattern transactions frustrates this object and purpose of the Anti-Dumping Agreement because it does not allow an investigating authority to calibrate the anti-dumping measures to respond to the actual level of injurious dumping, as reflected in the totality of the pricing behaviour of a foreign producer or exporter.

7.94. We also disagree that the first sentence of Article 2.4.2 precludes the application of the W-W (or T-T) methodology to non-pattern transactions alone because this methodology must be applied to all export transactions, and not just a subset of those transactions, i.e. the non-pattern transactions.[167] Instead, reading the two sentences of Article 2.4.2 together, and in proper context, shows that neither the first sentence nor the second sentence permits an investigating authority to simply exclude non-pattern transactions.

[163] Article 2.3 of the Anti-Dumping Agreement for instance permits an investigating authority to reject the price of an export transaction and construct it instead where "it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party". Article 2.2.1 of the Anti-Dumping Agreement permits an investigating authority to disregard in determining normal value, when certain conditions are met, the sales of the like product in the domestic market of the exporting country or the sales to third countries, which are below per unit costs of production plus administrative, selling, and general costs. Articles 2.2.2(i)-(iii) of the Anti-Dumping Agreement provide alternative methods that an investigating authority must use when the amounts for administrative, selling, and general costs and for profits cannot be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the foreign producer or exporter under investigation.

[164] The Appellate Body's view was based on its finding that the pattern comprises export prices to purchasers, regions or time periods which "differ significantly" because they are significantly lower (and not significantly higher) than export prices to other purchasers, regions or time periods. We, for the reasons set out above, disagree with this finding. Therefore, we also disagree with the Appellate Body's view, which is informed by this finding.

[165] The dumping margin obtained by applying the W-T methodology (without zeroing) to pattern transactions will be mathematically equivalent to a dumping margin obtained by applying the W-W methodology to the same pattern transactions. Thus, we do not see why there would be the need to provide for the W-T methodology if the same result could be obtained simply by limiting the W-W methodology to pattern transactions.

[166] Appellate Body Report, *US – Washing Machines*, para. 5.52.

[167] Canada's response to Panel question after the second meeting of the Panel No. 2(c), para. 1; response to Panel question after the first meeting of the Panel No. 17, para. 38; and Appellate Body Report, *US – Washing Machines*, paras. 5.121-5.122.

7.95. Take the "normal" W-W methodology for instance. In setting out this methodology, the first sentence of Article 2.4.2 states that the margins of dumping under this methodology shall be based on a comparison of a weighted average normal value with a weighted average of "prices of *all comparable* export transactions".[168] The second sentence requires an investigating authority to explain why "such differences", i.e. the differences in the pattern identified by that authority, cannot be taken into account appropriately by the use of a W-W or T-T *comparison*. Once an investigating authority provides such an explanation, consistent with the explanation clause, it has proper basis to conclude that the universe of "all *comparable* export transactions" under the W-W methodology excludes those export transactions that fall within the pattern.

7.96. In such a situation, the universe of comparable export transactions under the W-W methodology is limited to the non-pattern transactions, but it includes *all* such comparable (non-pattern) transactions. Thus, an investigating authority would apply the W-W methodology to all non-pattern transactions. The intermediate result obtained by applying the W-W methodology must be aggregated with the intermediate result obtained by applying the W-T methodology to pattern transactions, to determine the overall dumping margin for the product as a whole. The same considerations apply when an investigating authority applies the T-T methodology to the non-pattern transactions.

7.97. However, an investigating authority is not permitted to disregard the intermediate result obtained by applying the W-W (or T-T) methodology to non-pattern transactions when the result is negative. The requirement to consider "all" comparable export transactions precludes an investigating authority from selectively excluding any comparable export transaction. It also precludes an investigating authority from collectively excluding all such comparable export transactions, which would be the case if an investigating authority disregards the comparison result based on non-pattern transactions because it is negative.

7.98. While the dumping margin may well be higher if an investigating authority excludes the negative intermediate result based on non-pattern transactions, the second sentence is designed to unmask targeted dumping, not ensure a higher dumping margin. Nothing in Article 2.4.2 suggests that whenever a pattern is found to exist, the overall dumping margin for the foreign producer or exporter shall be systemically higher than the dumped margin determined under the first sentence of Article 2.4.2.[169]

7.99. In sum, we conclude that if the conditions set out in the second sentence of Article 2.4.2 are met, an investigating authority is permitted to apply the W-T methodology to the pattern transactions, but must apply the W-W or T-T methodology to the non-pattern transactions. The first sentence of Article 2.4.2 does not cease to apply just because an investigating authority is permitted by the second sentence to apply the W-T methodology to the pattern transactions that cannot be taken into account appropriately under the W-W or T-T methodology. Instead, the W-W or the T-T methodology must be applied to the non-pattern transactions, which may be taken into account appropriately under these normal methodologies.

7.100. The dumping margin determined pursuant to the second sentence where the W-T methodology is applied to pattern transactions (without zeroing) and the W-W methodology is applied to non-pattern transactions (without zeroing) will *in every case* be mathematically equivalent to the dumping margin based on the application of the W-W methodology to all export transactions, provided the weighted average normal values used under the W-W and W-T methodologies are the same. We will consider below whether such type of mathematical equivalence affects the *effet utile* of the second sentence of Article 2.4.2.

7.2.1.3.2.2 Textual and contextual basis for a prohibition on zeroing under the second sentence

7.101. We have concluded that the W-T methodology may be applied only to the pattern transactions while a "normal" methodology must be applied to the non-pattern transactions. We have also concluded that the pattern transactions include export transactions to purchasers, regions

[168] Emphasis added.

[169] Other provisions of the Anti-Dumping Agreement, such as Annex II(7), provide that the results may be less favourable in the situations set out therein.

or time periods for which the export prices are found to "differ significantly" because (a) they are significantly higher (and thus *may* be *masking* the lower-priced export sales) or (b) they are significantly lower (and thus *may* be *masked* by higher-priced export sales). But higher-priced export transactions mask lower-priced export transactions only when they are above the normal value.[170] Thus, it is only by comparing "[a] normal value established on a weighted average basis" with the "prices of individual export transactions" that an investigating authority can ascertain whether the high-priced export transactions are indeed masking lower-priced export transactions. Once the investigating authority applies the W-T methodology it would be able to identify those export transactions that are being masked, and those export transactions that are masking them.

7.102. Having identified the higher-priced export transactions within the pattern that are masking lower-priced export transactions in that pattern, is an investigating authority permitted to unmask such higher-priced export transactions by treating their value as zero? The text of the second sentence does not explicitly state that an investigating authority is permitted to disregard, by treating as zero, those export transactions that are priced above the weighted average normal value.[171] However, again, the silence of the text on this matter is not dispositive. Instead, to determine whether an investigating authority is permitted to zero such higher-priced export transactions, we must interpret the text of the second sentence in context and in light of the function of the second sentence of Article 2.4.2.

7.103. The second sentence permits an investigating authority to compare a weighted average normal value with the prices of "individual" export transactions. Qualification of the term "export transactions" by "individual" rather than "all" suggests that the dumping margin under the W-T methodology need not be based on the comparison results of all export transactions.[172] Instead, interpreting the second sentence in light of its function, and taking into account the word "individual", which can be defined as "[e]xisting as a separate indivisible entity; numerically one; single, as distinct from others of the same kind; particular" or "single; separate"[173], suggests that an investigating authority may distinguish those individual export transactions that *mask* other export transactions from those individual export transactions that are *being masked*. It follows that the authority may treat these individual transactions differently when making its dumping determinations under the W-T methodology. In particular, having identified through the application of the W-T methodology the individual export transactions that mask other export transactions, and those individual export transactions that are being masked, an investigating authority is not required to re-mask the individual export transactions above the weighted average normal value but may instead treat them as zero.

7.104. Our view is supported by contextual elements. The W-T methodology is distinct from the "normal" methodologies provided in the first sentence of Article 2.4.2. It is an exception, and unlike the two normal methodologies, its function is to unmask targeted dumping. Thus, unlike the W-W and T-T methodologies, which as noted in paragraph 7.19 above, fulfil the same function and are meant to give systemically similar results, the W-T methodology fulfils a different function, and is

[170] Canada states that in the broadest sense of the term "mask", higher-priced sales to a particular purchaser, region or time period may mask lower-priced sales to others within the same category regardless of their relationship with normal value. (Canada's response to Panel question after the second meeting of the Panel No. 6, para. 12). Canada provides no explanation in support of this statement. In any case, we disagree with this statement for we do not see how higher-priced export sales would mask lower-priced sales when, for instance, both are above normal value. Thus, whether or not higher-priced sales are actually masking lower-priced sales can only be ascertained through the application of a methodology that takes into account the difference between the export price and normal value.

[171] In *US − Washing Machines*, the Appellate Body relied on the reference to "prices of individual export transactions" in the plural, which it noted was not qualified by any reference to normal value, to support its view that zeroing was impermissible under the second sentence of Article 2.4.2. (Appellate Body Report, *US − Washing Machines*, para. 5.154). However, we do not find the use of the plural form in the second sentence of Article 2.4.2 to suggest that zeroing is impermissible under this sentence. Instead, the phrase "a normal value established on a weighted average basis may be compared to prices of individual export transactions" is a description of the W-T methodology, which permits an investigating authority to compare a weighted average normal value with the prices of multiple export transactions.

[172] This view accords with that of the dissenting Member in *US − Washing Machines* who noted that the second sentence of Article 2.4.2 puts emphasis on the selection of individual export transactions. (Appellate Body Report, *US − Washing Machines*, para. 5.201).

[173] Appellate Body Report, *US − Washing Machines*, para. 5.49 (quoting the definitions of "individual" in Oxford Dictionaries online).

not meant to give results that are systemically similar to that obtained under either the W-W methodology or the T-T methodology.

7.105. However, if one of the two normal methodologies, i.e. the W-W methodology, systemically and in every case gives a result that is mathematically equivalent to the dumping margin determined pursuant to the second sentence of Article 2.4.2, this would suggest that the W-T methodology is unable to fulfil its function. We consider such type of mathematical equivalence to be a symptom of an underlying problem, which is the inability of the W-T methodology to unmask targeted dumping. Certain adjustments to the examined data may well *break* mathematical equivalence in some cases. For example, as Canada notes, if in using a mixed W-W and W-T methodology an investigating authority changes the temporal bases of the normal value used under the W-W and W-T methodologies respectively, the resultant overall dumping margin may be different from that calculated by applying the W-W methodology to all export transactions.[174] But Canada (or any third party) does not assert, and we do not consider, that the Anti-Dumping Agreement requires an investigating authority to change the normal value in this manner.[175] More to the point, we do not see, and Canada does not show, how such a change in the temporal basis for normal value calculations would allow an investigating authority to unmask targeted dumping. Thus, while adjustments of these types may well break mathematical equivalence, such type of adjustments would only make the symptom, rather than the underlying problem, disappear.

7.106. Considering the *raison d'être* of the W-T methodology is to unmask targeted dumping, the inability of this methodology to do so will render this methodology *inutile*. We recall that an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[176] Therefore, contextual considerations also support our view that the second sentence of Article 2.4.2 does not prohibit zeroing under the W-T methodology. Based on the above, we find that an investigating authority is permitted to use zeroing while applying the W-T methodology to the pattern transactions.[177]

7.107. We are aware that our conclusions in this Report differ from those of the panel and the Appellate Body in *US − Washing Machines* as well as the panel in *US − Anti-Dumping Methodologies (China)*.[178] This is the result of our objective assessment of the facts of this case, and the applicability of, and conformity with, the relevant covered agreements. We have carefully considered these reports of the panels and the Appellate Body, and found convincing or cogent reasons to arrive at conclusions different from those of the Appellate Body in *US − Washing Machines* as well as the panels in *US − Washing Machines* and *US − Anti-Dumping Methodologies (China)*.[179]

7.2.1.3.2.3 Conclusion

7.108. Based on the foregoing, we find that Canada has failed to establish that the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing under the W-T methodology in the underlying investigation.

[174] See, e.g. Canada's response to Panel question after the second meeting of the Panel No. 2(d), para. 4.

[175] Panel Report, *US − Washing Machines*, para. 7.165. The panel stated that there was no textual basis to conclude that the "normal value established on a weighted average basis", as referred in the second sentence of Article 2.4.2, is different from the "weighted average normal value", as referred in the first sentence of Article 2.4.2.

[176] Appellate Body Report, *US − Gasoline*, DSR 1996:I, p. 21.

[177] Considering we have concluded that the second sentence of Article 2.4.2 does not require an investigating authority to re-mask the individual export transactions in the pattern that are above the weighted average normal value, we do not consider that by using zeroing under the second sentence of Article 2.4.2 an investigating authority fails to make its dumping determinations based on the totality of an exporter's or foreign producer's export transactions. Instead, having considered the prices of all the export transactions of that foreign producer or exporter, an investigating authority is permitted to exclude, by treating as zero, those individual export transactions in the pattern that are above the weighted average normal value and thus masking the prices of other export transactions.

[178] See also paras. 7.62 and 7.88-7.99 above.

[179] See, e.g. Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 160.

7.2.2 Zeroing claims under Article 2.4 of the Anti-Dumping Agreement

7.109. Article 2.4 of the Anti-Dumping Agreement requires "[a] fair comparison … between the export price and the normal value". Canada contends that the use of zeroing under the second sentence of Article 2.4.2 is inconsistent with the "fair comparison" obligation because (a) zeroing inflates the dumping margin generated under the W-T methodology; and (b) zeroing ignores the actual export price of a transaction made above normal value and instead deems that the export price is equal to the normal value.[180] The United States notes that the text of Article 2.4 of the Anti-Dumping Agreement says nothing about whether zeroing is fair or unfair.[181] The United States also asserts that the Appellate Body has found zeroing to be unfair and inconsistent with Article 2.4 in previous disputes only when it has found zeroing to be inconsistent with other provisions of the Anti-Dumping Agreement.[182]

7.110. We recall that in *US − Washing Machines* the Appellate Body found zeroing under the W-T methodology to be inconsistent with Article 2.4 of the Anti-Dumping Agreement. The Appellate Body found that setting the value of intermediate negative comparison results to zero under the W-T methodology has the effect of inflating the magnitude of dumping, thus resulting in higher margins of dumping, while also making a positive determination of dumping more likely when the export prices above normal value exceed those that are below normal value.[183] However, the Appellate Body's finding under Article 2.4 was based on its finding that zeroing is prohibited under the second sentence of Article 2.4.2. For instance, in making its findings under Article 2.4 it noted that by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare "all" comparable export transactions that form the applicable "'universe of export transactions' [i.e. pattern transactions] as required under the second sentence of Article 2.4.2, thus failing to make a 'fair comparison' within the meaning of Article 2.4".[184] It also recalled while making its findings under Article 2.4 its earlier finding that zeroing under the second sentence of Article 2.4.2 is not required to identify and address targeted dumping.[185] Therefore, we consider the Appellate Body's findings under Article 2.4 to be dependent on its findings that zeroing is impermissible under the second sentence of Article 2.4.2.

7.111. We have already found that the second sentence of Article 2.4.2 permits zeroing under the W-T methodology to the extent this methodology is limited to pattern transactions. Thus, the Appellate Body's findings in *US − Washing Machines* offer us limited guidance on whether we should find zeroing under the W-T methodology to be inconsistent with Article 2.4. Instead, we must consider whether zeroing under the second sentence of Article 2.4.2 could be impermissible under Article 2.4 even if it is permissible under the second sentence of Article 2.4.2. Canada has not provided any independent basis for us to find that zeroing under the W-T methodology is inconsistent with the "fair comparison" obligation of Article 2.4 even if zeroing under this methodology is consistent with the second sentence of Article 2.4.2.[186]

7.112. Based on the foregoing, we find that Canada has not established that the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the underlying investigation because it used zeroing under the W-T methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

7.2.3 Consequential claims under Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994

7.113. Canada claims that as a consequence of the violations under the second sentence of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement, the USDOC acted inconsistently with

[180] Canada's first written submission, paras. 60-61.
[181] United States' first written submission, para. 193.
[182] United States' first written submission, para. 206.
[183] Appellate Body Report, *US − Washing Machines*, para. 5.180.
[184] Appellate Body Report, *US − Washing Machines*, para. 5.180.
[185] Appellate Body Report, *US − Washing Machines*, para. 5.181.
[186] See, e.g. Canada's first written submission, paras. 58-63. Canada relies on past reports of the Appellate Body that found zeroing to be impermissible under Article 2.4 only after finding that zeroing was inconsistent with other provisions of the Anti-Dumping Agreement. Thus, these reports are not directly relevant in assessing whether Article 2.4 prohibits the use of zeroing under the W-T methodology, even if zeroing is permissible under the second sentence of Article 2.4.2.

Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994 in the underlying investigation. We have concluded that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the underlying investigation because it identified a single pattern that aggregates differences in export prices across purchasers, regions and time periods, which the second sentence does not permit. We have rejected other aspects of Canada's claims under the second sentence of Article 2.4.2 as well as its claim under Article 2.4.

7.114. We consider our findings under the second sentence of Article 2.4.2 and under Article 2.4 to be sufficient to resolve this dispute. Therefore, we do not find it necessary to address Canada's claims under Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994.[187]

7.115. Based on the foregoing, we exercise judicial economy on Canada's claims under Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we find that in applying the DPM in the underlying investigation the United States acted inconsistently with:

a. Article 2.4.2 of the Anti-Dumping Agreement by aggregating differences in export prices across unrelated categories, i.e. purchasers, regions and time periods to identify a single pattern of export prices which differed significantly among different purchasers, regions and time periods.

8.2. For the reasons set forth in this Report, we find that Canada has failed to demonstrate that in applying the DPM in the underlying investigation the United States acted inconsistently with:

a. Article 2.4.2 of the Anti-Dumping Agreement by including, in the pattern, export transactions to those purchasers, regions or time periods whose prices differed significantly because they were significantly higher relative to export prices to other purchasers, regions or time periods.

b. Article 2.4.2 of the Anti-Dumping Agreement by using zeroing under the W-T methodology provided in the second sentence of Article 2.4.2.

c. Article 2.4 of the Anti-Dumping Agreement by using zeroing under the W-T methodology provided in the second sentence of Article 2.4.2.

8.3. For the reasons set forth in this Report, we do not need to address, and exercise judicial economy on, Canada's consequential claims under Articles 1 and 2.1 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent the measure at issue is inconsistent with the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Canada under this agreement.

8.5. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

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[187] Panels are not required to address each and every claim. Instead, a panel is only required to address those claims that are necessary to resolve a dispute. (Appellate Body Report, *Argentina – Import Measures*, para. 5.190).

WORLD TRADE ORGANIZATION

WT/DS534/R/Add.1

9 April 2019

(19-2216)

UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA (DS 534)

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS534/R.

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LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

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ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 20 June 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) The following procedures shall apply if the responding party asks for a ruling that certain measures or claims are not properly before the Panel:

If the United States considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or Canada's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. the United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Canada shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) The procedure set out in paragraph (1) is without prejudice to any of the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Canada should be numbered CAN-1, CAN-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered CAN-5, the first exhibit in connection with the next submission thus would be numbered CAN-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

    a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

    a. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 14 and 20 below.

Substantive meetings

10. The parties shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

    (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

    a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

    b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

    c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

    d. The Panel may subsequently pose questions to the parties.

    e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first. Before each

party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day prior to the meeting. In that case, Canada shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

Third party session

16. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

20. The third party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third party session

shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

22. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement, and where possible, its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission, its second oral statement, and where possible, its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.

23. Each integrated executive summary shall be limited to no more than 15 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

Interim review

26. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

27. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

28. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

29. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all submissions, exhibits, oral statements, responses to questions, comments on responses, comments on comments, comments on the descriptive part of the Panel report, and comments on the Interim Report of the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.

b. In case any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall send these documents by e-mail to DSRegistry@wto.org, WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding, the other party, and where appropriate, the third party by 6.00 pm. The uploading to the DDSR shall be made on the following working day.

c. Any request for technical assistance regarding the use of DDSR shall be addressed to DSRegistry@wto.org and ddsrsupport@wto.org (assistance available only during WTO working hours).

d. For all documents that were filed via DDSR, each party and third party shall file one paper copy of such documents with the DS Registry the working day following the electronic filing.

e. The Panel shall provide all documents and communications to the parties and the third parties via e-mail. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version shall constitute the official version for the purposes of the record of the dispute.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 20 June 2018

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the US Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the antidumping proceeding at issue in this dispute, entitled Softwood Lumber from Canada (A-122-857). In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation has agreed in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Canada and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information. Third parties' access to BCI shall be subject to the terms of these procedures.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit CAN-1 (BCI)).

7. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall

clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

9. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES ON OPEN MEETINGS

Adopted on 20 June 2018

1. The Panel will start substantive meetings with the parties (dates of substantive meetings provided for in its Timetable) with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").

2. At such sessions, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in the Working Procedures adopted by the Panel. The Panel may pose any questions or make any comments during such session. Such questions shall not include confidential information.

3. To the extent that the Panel or either of the parties considers it necessary, the Panel shall proceed to a closed session ("confidential session"), during which the parties will be allowed to make additional statements or comments and pose questions that involve confidential information. The Panel may also pose questions during the confidential session.

4. The Panel will start the third party session of its first substantive meeting with the parties by opening a portion of this session to the public ("non-confidential third party session"). At this portion of the third party session, no confidential information shall be referred to or disclosed. Each third party wishing to make its statement in the non-confidential third party session shall do so, but shall ensure that its statement does not include confidential information. After such third parties have made their statements, questions or comments from the parties or the Panel may be presented concerning these statements, as foreseen in the Working Procedures adopted by the Panel. Such questions or comments shall not include confidential information. To the extent that the Panel or any of the other third parties considers it necessary, the Panel shall then conclude this portion of the third party session and proceed to a third party closed session ("confidential third party session") during which other third parties shall make their statements.

5. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:

- Members of the Panel;
- Members of the delegations of the parties;
- Members of the delegations of the third parties throughout the third party session;
- WTO Secretariat staff assisting the Panel.

6. As set out below in paragraph 7, a live closed-circuit television broadcast of the Panel meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.

7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewings. No later than four weeks before the substantive meetings, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The date(s) of the deadline for public registration will be informed to the parties as soon as it has been established.

ANNEX A-4

TIMETABLE FOR THE PANEL PROCEEDINGS[1]

Adopted on 20 June 2018
Revised on 7 December 2018

Panel established on 9 April 2018
Panel composed on 22 May 2018

Description	Dates[2]
a. Receipt of first written submissions	
i. Canada	22 June 2018
ii. United States	24 July 2018
b. Receipt of third parties' written submissions	31 July 2018
c. First substantive meeting with the parties	12, 13 September 2018
Third party session	13 September 2018
d. Receipt of responses to questions posed by the Panel	27 September 2018
e. Receipt of integrated executive summaries of third parties Receipt of the first integrated executive summaries of the parties	4 October 2018
f. Receipt of written rebuttals of the parties	17 October 2018
g. Second substantive meeting with the parties	4 December 2018 (and 5 December if necessary)
h. Receipt of responses to questions posed by the Panel	19 December 2018
i. Receipt of comments on responses to questions posed by the Panel	10 January 2019
j. Receipt of second integrated executive summaries of parties	17 January 2019
k. Issuance of descriptive part of the report to the parties	29 January 2019

[1] The above timetable may be changed in the light of subsequent developments.
[2] The exact time of the deadline for receipt of documents are 5 p.m. of the date indicated in this column unless the Panel separately otherwise indicates.

	Description	Dates[2]
l.	Receipt of comments by the parties on the descriptive part of the report	8 February 2019
m.	Issuance of the interim report, including findings and conclusions to the parties	28 February 2019
n.	Deadline for parties to request review of part(s) of the report and to request interim review meeting	7 March 2019
o.	Interim review meeting, if requested – If no meeting requested, deadline for comments on requests for review	13 March 2019
p.	Issuance of final report to the parties	27 March 2019
q.	Circulation of the final report to the Members	9 April 2019

ANNEX A-5

INTERIM REVIEW

1. INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the comments received during the interim review process. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the United States. The paragraph and footnote numbers in the Final Report remain unchanged.

2. SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1. Paragraph 7.19

2.1. Noting that we observed in paragraph 7.19 of the Interim Report that it is "well established by now in WTO jurisprudence" that "zeroing is prohibited under the W-W and T-T methodologies", the United States contends that this sentence as drafted may suggest that WTO rights and obligations originate in WTO panel or Appellate Body reports, rather than the covered agreements.[1] Thus, the United States requests us to modify this sentence. Canada opposes the United States' request, asserting that this request is premised on a misinterpretation of Article 3.2 of the DSU and that interim review is not an appropriate time to reopen such an issue.[2]

2.2. We have made the modifications suggested by the United States because they do not change the meaning or scope of what is already stated in this paragraph of the Interim Report. We also do not share Canada's concerns with respect to the United States' request. In this regard, we note that the modifications made do not affect our own analysis or findings in this dispute.

2.2. Paragraph 7.25

2.3. The United States requests us to modify paragraph 7.25 of the Interim Report where we stated that the USDOC used "statistical analysis" to consider whether the difference in the weighted average prices to the test group and the comparison group was significant.[3] The United States submits that our description of the USDOC's actions is inaccurate because the USDOC did not assert that it was conducting formal "statistical analysis".[4] The United States requests that we remove the reference to the USDOC's use of "statistical analysis" and instead state that the USDOC used "the Cohen's d coefficient, which is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group".[5] Canada opposes the United States' request, noting that because it has not challenged the Cohen's d test, this test's precise nature is not an issue that is either before the Panel or that would be appropriate for the Panel to determine.[6]

2.4. We were not required to, and did not, express any view in these panel proceedings on whether the Cohen's d coefficient is a "generally recognized statistical measure". Making the drafting changes proposed by the United States may incorrectly suggest to the reader of our Report that we expressed such a view. Therefore, we decline to modify this paragraph in the manner proposed by the United States. Nonetheless, we have made certain changes to more accurately reflect the USDOC's description of the Cohen's d test.

[1] United States' request for interim review, para. 4.
[2] Canada's comments on the United States' request for interim review, para. 3.
[3] United States' request for interim review, para. 5.
[4] United States' request for interim review, para. 5.
[5] United States' request for interim review, para. 5. (emphasis omitted)
[6] Canada's comments on the United States' request for interim review, para. 5.

2.3. Paragraphs 7.28 and 7.32

2.5. The United States requests us to make certain changes in paragraphs 7.28 and 7.32 to accurately describe how the USDOC applied the DPM in the underlying investigation.[7] Canada does not comment on the United States' request.

2.6. We have made the changes requested by the United States.

2.4. Paragraph 7.36(b)

2.7. The United States requests us to modify this paragraph by noting that the pattern found by the USDOC in the underlying investigation included prices to purchasers, regions or time periods that differed significantly because they were significantly *lower* than export prices to other purchasers, regions or time periods.[8] Canada does not comment on the United States' request.

2.8. We decline to make the modifications requested by the United States. In paragraphs 7.36 and 7.37 we set out the issues that the parties disagree on as "a matter of law". The parties do not disagree that a pattern of export prices which differ significantly may include export prices that differ significantly because they are significantly *lower* than export prices to other purchasers, regions or time periods. Thus, the modifications proposed by the United States would affect the clarity of our Report. We also note that paragraph 7.31 of our Report already sets out the relevant facts in this regard.

2.5. Paragraph 7.46

2.9. The United States requests us to make certain changes to accurately reflect its arguments.[9] Canada does not comment on the United States' request.

2.10. We have made the changes requested by the United States.

2.6. Paragraph 7.83

2.11. The United States requests us to modify this paragraph to accurately reflect the text of the pattern clause.[10] Canada does not comment on the United States' request.

2.12. We have made the modification requested by the United States.

2.7. Paragraph 7.107

2.13. The United States opposes the reference to "cogent reasons" in this paragraph and asks us to make edits by removing this reference.[11] Canada opposes the United States' request, noting in this regard that interim review is not the appropriate stage for the United States to reopen this issue.[12]

2.14. We decline to make the changes suggested by the United States in interim review and consider that our Report adequately sets out the legal as well as factual basis for our conclusions in this dispute.

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[7] United States' request for interim review, paras. 6-7.
[8] United States' request for interim review, para. 8.
[9] United States' request for interim review, para. 9.
[10] United States' request for interim review, para. 10.
[11] United States' request for interim review, para. 11.
[12] Canada's comments on the United States' request for interim review, para. 4.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the continued improper application of the U.S. Differential Pricing Methodology ("DPM") − a measure that the Dispute Settlement Body has ruled to be "as such" inconsistent with Articles 2.4 and 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), when it adopted the Appellate Body and panel reports in *US − Washing Machines* on September 26, 2016.

2. On November 25, 2016, the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Petitioner") filed an anti-dumping petition concerning *Certain Softwood Lumber Products from Canada*. Commerce initiated an anti-dumping investigation on December 15, 2016. On January 27, 2017, Commerce selected Canfor Corporation, Canadian Forest Products Ltd. and Canfor Wood Products Marketing Ltd. ("Canfor"), Resolute FP Canada Inc. ("Resolute"), Tolko Marketing and Sales Ltd. ("Tolko"), and West Fraser Mills Ltd. ("West Fraser") as mandatory respondents.

3. On June 23, 2017, Commerce issued its preliminary determination and applied the DPM. The Governments of Canada, Ontario, and Québec as well as the British Columbia Lumber Trade Council, the Conseil de l'industrie forestière du Québec, and the Ontario Forest Industries Association filed a joint case brief on August 7, 2017, arguing that the Appellate Body Report in *US − Washing Machines* found the DPM to be "as such" inconsistent with the United States' WTO obligations and therefore argued that Commerce should not apply it in this case. Nonetheless, Commerce continued to apply the DPM its Final Determination, which it issued on November 1, 2017.

4. Following the U.S. International Trade Commission's final affirmative injury determination, Commerce published its anti-dumping duty order on January 3, 2018.

5. The DPM is a methodology that Commerce uses to bypass the regular methodologies for calculating a margin of dumping. Article 2.4.2 of the Anti-Dumping Agreement provides that margins of dumping shall normally be calculated using either the weighted-average-to-weighted-average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies. In order to have recourse to the exceptional weighted-average-to-transaction ("W-T") methodology, an investigating authority must meet the criteria set out in the second sentence of Article 2.4.2. Commerce applies the DPM in all cases, and, ignoring the criteria in Article 2.4.2, utilizes the DPM in an attempt to justify its frequent recourse to the exceptional W-T methodology.

6. Applying the DPM, and the W-T methodology to all transactions with zeroing, Commerce's final calculations yielded margins for Resolute, Tolko, and West Fraser of 3.20%, 7.22%, and 5.57%. The use of this methodology increased their respective margins from 0.00%, 4.07%, and 2.28%, under the default W-W methodology.

II. THE USE OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

7. Commerce erred when it applied the DPM in its investigation into *Certain Softwood Lumber Products from Canada*. Commerce's reliance on the DPM is contrary to the plain wording of Article 2.4.2 of the Anti-Dumping Agreement. Moreover, the application of the DPM in this investigation was the identical methodology the Appellate Body found "as such" inconsistent in *US - Washing Machines*.

8. Article 2.4.2 is a tool that allows Members to address targeted dumping and therefore permits an investigating authority to have recourse to the exceptional W-T methodology, albeit in very limited circumstances. Article 2.4.2 expressly requires that, before resorting to the W-T methodology, an investigating authority must identify a "pattern of export prices which differ significantly among different purchasers, regions or time periods."

9. The Appellate Body has confirmed that the ordinary meaning of the term "pattern" means that a pattern must constitute a regular and intelligible form or sequence discernible in certain actions or situations. The Appellate Body further confirmed that the use of the term "among" requires that each category be considered on its own. A "pattern" must therefore exist with respect to certain purchasers, to certain time periods, or to certain regions. Finally, when Article 2.4.2 is read in the context of its purpose of addressing targeted dumping, and in the wider context of the Anti-Dumping Agreement as a whole, it is clear that the relevant transactions for the purpose of identifying a pattern are low priced transactions.

10. The DPM, however, fails to identify a pattern of any kind. Instead, it compares all export transactions across the different categories, identifies both high and low priced transactions as part of the claimed pattern, and then aggregates the results from these unrelated categories. The plain language meaning of the term "pattern" simply cannot be reconciled with Commerce's approach of weighing the value of sales that happen to pass the DPM's statistical test with no assessment of whether there is regularity or a sequence to the export prices that have passed the test. The DPM merely identifies differences in price rather than a pattern of export prices.

11. In its investigation, Commerce improperly aggregated the results of its application of the Cohen's *d* test in the DPM for all categories (purchasers, regions, *and* time periods) before using this aggregated total to determine that the DPM's 66% threshold was met for each of the respondents. In applying the DPM, Commerce also improperly aggregated both high priced and low priced transactions and combined transactions that passed the Cohen's *d* test based on purchasers, regions, *and* time periods. The use of this process to justify the application of the exceptional W-T methodology was therefore improperly based on both high priced and low priced transactions *and* ignored the requirement set out in Article 2.4.2 to identify a pattern *among* purchasers, regions *or* time periods. One cannot have a "pattern" consisting of fundamentally different prices. This is contrary to the ordinary meaning of the word "pattern".

12. Consequently, on the basis of all of the above, Commerce acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement when it applied the exceptional W-T methodology to Resolute, Tolko, and West Fraser.

III. THE USE OF ZEROING AS PART OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

13. Commerce further erred when it applied zeroing as part of the DPM in its investigation. The Appellate Body has confirmed that the zeroing methodology is inconsistent with the Anti-Dumping Agreement when applying any of the three comparison methodologies permitted under Article 2.4.2. In *US − Washing Machines*, the Appellate Body expressly found that Commerce's reliance on the DPM to reintroduce zeroing through the W-T methodology was "as such" inconsistent with the United States' WTO obligations.

14. Despite clear guidance as to the WTO-inconsistency of zeroing in the DPM, Commerce nevertheless relied on the DPM to apply this same zeroing technique in its W-T methodology when calculating the dumping margins for Resolute, Tolko, and West Fraser. The use of zeroing as part of the DPM as applied in Commerce's investigation into *Certain Softwood Lumber Products from Canada* is necessarily WTO-inconsistent for at least three reasons.

15. First, zeroing is simply impermissible during the application of the W-T methodology. This is clear both from the text of Article 2.4.2 and from the Anti-Dumping Agreement as a whole. The concepts of "dumping" (as defined by Article 2.1) and "margins of dumping" are the same throughout the Anti-Dumping Agreement. This means that the previous interpretations related to these terms over some 18 years of WTO jurisprudence are equally applicable to the interpretation of the second sentence of Article 2.4.2. Intermediate transactions are not margins of dumping.

16. WTO panels and the Appellate Body have also consistently held that the zeroing methodology is inconsistent with the Anti-Dumping Agreement. This is because zeroing effectively alters certain transactions or treats them as less than their actual value.

17. Second, zeroing in the W-T methodology does not account for all of the purported "pattern" transactions in calculating the margin of dumping. As the Appellate Body confirmed in *US − Washing*

Machines, while export prices within an Article 2.4.2 "pattern" must differ significantly from other export prices, the pattern ultimately used in the W-T calculation must be composed of *all* the export prices to one or more particular purchasers, regions, or time periods, not just those export prices that are below normal value. The Appellate Body further determined, in that dispute, that there is no basis for excluding pattern transactions that are priced above normal value.

18. These Appellate Body findings are firmly rooted in the text of the Anti-Dumping Agreement. Article 2.4.2 allows an investigating authority to narrow the universe of export transactions. For the purposes of the numerator in a W-T comparison, this means that all of the export transactions in the relevant universe of sales under consideration must be considered. The second sentence of Article 2.4.2, with its emphasis on "individual export transactions", distinguishes the universe of sales under consideration for the W-T comparison process from the universe of export sales under consideration in the first sentence, which is all export sales. The text requires that, if an investigating authority chooses to use the W-T methodology, it is required to assess the *whole pattern*, and not only part of it. Zeroing within an identified pattern detaches the notion of "pattern" in the second sentence of Article 2.4.2 from the pattern to which the W-T comparison methodology is applied for establishing margins of dumping in order to address targeted dumping. Zeroing within the W-T methodology thus improperly considers only those transactions that fall below the normal value rather than, as required by Article 2.4.2, the *entire universe* of export transactions that fall within the pattern as properly identified. The narrowing of the universe of export transactions to *all* pattern transactions, and the inclusion of all transactions in the denominator, ensures that the resultant dumping margin is for the product as a whole.

19. Third, zeroing does not lead to a fair comparison of export prices as required by Article 2.4 of the Anti-Dumping Agreement. The *chapeau* of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value", while the introductory clause to Article 2.4.2 expressly provides that the dumping calculation methodologies set out in that Article are subject to the fair comparison obligation in Article 2.4.

20. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4. The ordinary meaning of "fair" requires impartiality and a lack of bias. The Appellate Body in *US − Corrosion-Resistant Steel Sunset Review* found that there is an inherent bias in the zeroing methodology as the methodology may inflate the magnitude of a dumping margin and may also distort a finding of the very existence of dumping itself.

21. In the context of zeroing in the W-T methodology, in *US − Washing Machines*, the Appellate Body confirmed that setting to zero intermediate negative comparison results inflates the magnitude of dumping and also makes positive determinations of dumping more likely where export prices above normal value exceed those below normal value. It also concluded that, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form Article 2.4.2's "universe of export transactions". Zeroing in applying the W-T methodology thus fails to make a fair comparison between export prices and normal value.

22. In this case, zeroing produced the unfair results foreseen by the Appellate Body. It not only inflated the margins of dumping for Tolko and West Fraser, but it also created a positive determination of dumping for Resolute where none otherwise existed. While Resolute's calculated margin of dumping was -2.61%, Commerce's use of zeroing in the W-T methodology ultimately inflated Resolute's margin of dumping by 5.81 percentage points. As a result, a company that on average sold for a price that was higher than normal value in the United States is subject to an anti-dumping order because of zeroing.

23. Despite all of the above, the United States argues that, without zeroing, all three of the comparison methodologies yield the same result, a concept it calls "mathematical equivalency". However, the Appellate Body expressly found in *US − Washing Machines* that mathematical equivalency is not determinative of the meaning of the text. Moreover, the United States itself acknowledged during the Appellate Body hearing for *US − Washing Machines* that calculating a margin of dumping focused only on pattern transactions would lead to a mathematically different result.

24. Canada further notes that, when the W-T and W-W methodologies are applied correctly, they yield mathematically different results. The W-T and the W-W methodologies, as described in the

Anti-Dumping Agreement, and when properly interpreted, cannot be applied to the same set of export transactions. In order to manipulate the W-T calculation to yield mathematically equivalent results to the W-W methodology, among other choices that would need to be made in the calculation, the W-T calculation would have to be applied to *all* export transactions. However, Article 2.4.2 clarifies that the W-T methodology may be applied only to "pattern" sales and not to *all* export transactions. Had Commerce correctly applied the W-W and W-T methodologies to Resolute, Tolko, and West Fraser, without zeroing, they would have yielded mathematically different results.

25. The United States also argues that the Panel should resort to the negotiating history of the Anti-Dumping Agreement to interpret this provision. However, as the meaning of the second sentence of Article 2.4.2 is clear, there is no need to resort to negotiating history to interpret it.

26. Consequently, on the basis of all of the above, when Commerce applied zeroing as part of the DPM in calculating the dumping margins using the W-T methodology for Resolute, Tolko, and West Fraser, it breached the United States' obligations under the second sentence of Article 2.4.2 and Article 2.4.

IV. PANELS ARE EXPECTED TO FOLLOW APPELLATE BODY REPORTS

27. Panels are expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system. The Appellate Body has repeatedly confirmed this principle, which arises directly from the provisions of the Dispute Settlement Understanding ("DSU").

28. The DSU specifies that the Appellate Body may, on appeal, uphold, modify or reverse the legal findings and conclusions of a panel. The DSU therefore clearly creates a hierarchical system. In all legal systems the decisions of a hierarchically superior court or tribunal are generally followed by subsidiary bodies. For this reason, while reports formally bind only the parties to a particular dispute, panels cannot disregard adopted Appellate Body decisions.

29. This is clear from the text of Article 3.2 of the DSU. In *US — Stainless Steel (Mexico)*, the Appellate Body confirmed that this Article informs a panel's function under the DSU. Article 3.2 states that the dispute settlement system "is a central element in providing security and predictability" and serves "to clarify" the provisions of the WTO agreements. Appellate Body oversight of panel decisions promotes security and predictability by ensuring the consistent interpretation of the WTO agreements. In *US — Stainless Steel (Mexico)*, the Appellate Body noted that the reference to clarification in Article 3.2 demonstrates that adopted reports are relevant beyond the application of a particular provision in a particular case and found that a panel that fails to follow the Appellate Body undermines the development of a coherent and predictable body of jurisprudence.

30. The Appellate Body in *US − Shrimp (Article 21.5 − Malaysia)* also confirmed that adopted reports are part of the WTO acquis and that these reports create legitimate expectations among the Members. For this reason, every panel and Appellate Body report cites to previous findings and Members repeatedly cite prior reports in their pleadings. The United States itself does this, including in the present dispute.

31. Finally, in *US — Oil Country Tubular Goods Sunset Reviews*, the Appellate Body expressly found that where a panel relies on the Appellate Body's conclusions with respect to the exact same issue, it will not have failed to make an objective assessment for the purposes of Article 11 of the DSU. To the contrary, it is appropriate for a panel to rely on the Appellate Body's conclusions.

32. In this dispute, however, the United States has gone so far as to expressly invite this Panel to ignore Appellate Body guidance. It has also suggested that Canada's position is contrary to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization. Jurisprudence addresses the relationship between this Article and adopted reports. The panel in *US − Countervailing and Anti-Dumping Measures (China)* considered that, if a multilateral interpretation under Article IX:2 conflicts with a prior Appellate Body interpretation, cogent reasons may exist for a panel to refuse to follow the Appellate Body. There is no multilateral interpretation relevant to this dispute, and there are no cogent reasons to depart from Appellate Body findings with respect to the DPM.

33. Consequently, this Panel must objectively assess whether the DPM is the same DPM that was at issue in *US – Washing Machines*. If it is, and it is, this Panel must follow the Appellate Body's decision in that dispute.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the continued improper application of the United States' Differential Pricing Methodology ("DPM") − a measure that the Dispute Settlement Body has ruled to be "as such" inconsistent with Articles 2.4 and 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), when it adopted the Appellate Body and panel reports in *US − Washing Machines* on September 26, 2016.

2. The DPM is a methodology that the United States Department of Commerce ("Commerce") uses to bypass the regular methodologies for calculating a margin of dumping. Article 2.4.2 of the Anti-Dumping Agreement provides that margins of dumping shall normally be calculated using either the weighted-average-to-weighted-average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies. In order to have recourse to the exceptional weighted-average-to-transaction ("W-T") methodology, an investigating authority must meet the criteria set out in the second sentence of Article 2.4.2. Commerce applies the DPM in all cases, and, ignoring the criteria in Article 2.4.2, utilizes the DPM in an attempt to justify its frequent recourse to the exceptional W-T methodology.

3. Applying the DPM, and the W-T methodology to all transactions with zeroing, Commerce's final calculations yielded margins for Resolute FP Canada Inc. ("Resolute"), Tolko Marketing and Sales Ltd. ("Tolko"), and West Fraser Mills Ltd. ("West Fraser") of 3.20%, 7.22%, and 5.57%. The use of this methodology increased their respective margins from 0.00%, 4.07%, and 2.28%, under the default W-W methodology.

II. THE USE OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

4. Commerce erred when it applied the DPM in its investigation into *Certain Softwood Lumber Products from Canada*. Commerce's reliance on the DPM is contrary to the plain wording of Article 2.4.2 of the Anti-Dumping Agreement. Moreover, the application of the DPM in this investigation was the identical methodology the Appellate Body found "as such" inconsistent in *US - Washing Machines*.

5. The second sentence of Article 2.4.2 is a tool that allows Members to unmask and address targeted dumping by an exporter. It permits an investigating authority to have recourse to the exceptional W-T methodology, albeit in very limited circumstances. Before resorting to the W-T methodology, an investigating authority must identify a "pattern of export prices which differ significantly among different purchasers, regions or time periods". The application of the Article therefore hinges on the identification and proper analysis of the requisite pattern.

6. The Appellate Body has confirmed that the ordinary meaning of the term "pattern" means that a pattern must constitute a regular and intelligible form or sequence discernible in certain actions or situations. The Appellate Body further confirmed that the use of the term "among" requires that each category be considered on its own. A "pattern" must therefore exist with respect to certain purchasers, to certain time periods, or to certain regions. This narrowing of the universe of export transactions is clearly provided for in the text. The text does not, however, create a relationship between the term "pattern" and normal value. Consequently, both pattern transactions and non-pattern transactions may be above or below normal value.

7. Once a pattern is identified, all the pattern transactions are part of the comparison. Finally, when Article 2.4.2 is read in the context of its purpose of addressing targeted dumping, and in the wider context of the Anti-Dumping Agreement as a whole, it is clear that the relevant transactions for the purpose of identifying a pattern are lower priced transactions.

8. The DPM, however, fails to identify a pattern of any kind. Instead, it compares all export transactions across the different categories, identifies both high and low priced transactions as part of the claimed pattern, and then aggregates the results from these unrelated categories. The plain

language meaning of the term "pattern" simply cannot be reconciled with Commerce's approach of weighing the value of sales that happen to pass the DPM's statistical test with no assessment of whether there is regularity or a sequence to the export prices that have passed the test. The DPM merely identifies differences in price rather than a pattern of export prices. It is therefore unsurprising that Commerce determined that all four respondents, Canadian Forest Products Ltd ("Canfor"), Resolute, Tolko, and West Fraser, had a "pattern" of export prices that differ significantly.[1]

9. While the United States initially asserted that Commerce undertook a "rigorous, holistic examination" to determine whether a pattern existed in this case[2], it subsequently admitted that Commerce had failed to identify specific transactions that formed part of the pattern.[3] This admission cannot be reconciled with the assertion that the USDOC determined that a pattern existed. It is inconceivable that an investigating authority would purport to have identified a pattern but not be able to specify what that pattern is. In this case, the Commerce did not identify a pattern because the DPM does not identify a pattern.

10. All Commerce did was apply its ratio test. This exclusive reliance on the ratio test is not consistent with the wording of the second sentence of Article 2.4.2. The ratio test is designed to sum the value of transactions that are identified by the Cohen's *d* test as differentially priced. The ratio test in no way determines whether there is a regular or intelligible sequence to the identified transactions, as required by the ordinary meaning of the term "pattern".

11. Commerce also improperly aggregated the results of its application of the Cohen's *d* test in the DPM for all categories (purchasers, regions, *and* time periods) and improperly aggregated both high priced and low priced transactions and combined transactions that passed the Cohen's *d* test based on purchasers, regions, *and* time periods. The United States defends the use of this process on the basis that a pattern would "transcend multiple purchasers, regions, or time periods".[4] This approach is nonsensical. There can be no regular and intelligible sequence that transcends the differences between purchasers, and the differences between regions, and the differences between time periods. Aggregating different types of transactions cannot identify the requisite regular or intelligible sequence. There is no relationship or similarity between these transactions grouped together and there is no "pattern" whatsoever.

12. The United States contends that a pattern could also consist of every transaction in an investigation.[5] This is incorrect. As the panel in *US − Anti-Dumping Methodologies (China)* found, the "export prices which form part of that discernible group form the relevant 'pattern' rather than the larger universe of export prices from which that group is discerned or distinguished".[6] The word "pattern" suggests a subset of export prices that is discernable from the larger universe of export prices. It is those export prices—which form part of the discernable group—that form the pattern, not the larger universe of export prices from which they differ.[7]

[1] For Resolute: US Department of Commerce, *Antidumping Duty Investigation of Certain Softwood Lumber Products: Analysis of Data Submitted by Resolute FP Canada, Inc. for the Final Determination* (A-122-857), November 1, 2017, Exhibit CAN-07 (BCI), p.7. For Tolko: *US Department of Commerce, Antidumping Duty Investigation of Certain Softwood Lumber Products: Analysis of Data Submitted by Tolko Marketing and Sales Ltd. and Tolko Industries Ltd for the Final Determination* (A-122-857), November 1, 2017, Exhibit CAN-08 (BCI), p.8. For West Fraser: US Department of Commerce, *Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by West Fraser Mills Ltd. for Final Determination* (A-122-857), November 1, 2017, Exhibit CAN-09 (BCI), p.7. For Canfor: US Department of Commerce, *Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd. for the Amended Final Determination* (A-122-857), December 4, 2017, Exhibit CAN-06, p.3.

[2] United States' second written submission, para. 21.

[3] United States' response to Panel question No. 4 in connection with the second substantive meeting, para. 43.

[4] United States' second written submission, para. 42.

[5] United States' first written submission, para. 62; United States' second written submission, para. 48; where the United States maintains that the pattern is the overall pricing behaviour of an exporter.

[6] Panel Report, *US − Anti-Dumping Methodologies (China)*, para. 7.178.

[7] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.31; see also Panel Reports, *US − Washing Machines*, para. 7.142, and *US − Anti-Dumping Methodologies (China)*, para. 7.178; Appellate Body Report, *US − Washing Machines*, para. 5.31.

13. The United States also asserts that aggregation is necessary to account for the product as a whole.[8] However, the United States offers no explanation as to why the correct approach, as discussed in the Appellate Body's report in *US − Washing Machines*, fails to account for the product as a whole. In fact, by searching for a pattern in only one category, all relevant transactions are considered. This permits an analysis of the product as a whole.

14. Finally, in an attempt to find textual support for its position, United States suggests that the word "among" would appear three times in Article 2.4.2 if that term was meant to limit the identification of a pattern to the consideration of transactions within a single category, e.g., before "purchasers", "regions", and "time periods".[9] At the second substantive meeting of the Panel, Canada demonstrated that this approach was misguided. The word "different" clearly qualifies each of the categories and yet it too occurs only once.

15. Consequently, on the basis of all of the above, Commerce acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement when it applied the exceptional W-T methodology to Resolute, Tolko, and West Fraser.

III. THE USE OF ZEROING AS PART OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

16. Commerce further erred when it applied zeroing as part of the DPM in its investigation. The Appellate Body has confirmed that the zeroing methodology is inconsistent with the Anti-Dumping Agreement when applying any of the three comparison methodologies permitted under Article 2.4.2. In *US − Washing Machines*, the Appellate Body expressly found that Commerce's reliance on the DPM to reintroduce zeroing through the W-T methodology was "as such" inconsistent with the United States' WTO obligations.

17. Despite clear guidance as to the WTO-inconsistency of zeroing in the DPM, Commerce nevertheless relied on the DPM to apply this same zeroing technique in its W-T methodology when calculating the dumping margins for Resolute, Tolko, and West Fraser. Canada has demonstrated that the use of zeroing as part of the DPM as applied in Commerce's investigation into *Certain Softwood Lumber Products from Canada* is necessarily WTO-inconsistent for at least three reasons.

18. First, zeroing is impermissible during the application of the W-T methodology. This is clear both from the text of Article 2.4.2 and from the Anti-Dumping Agreement as a whole. The concepts of "dumping" (as defined by Article 2.1 and Article VI:1 of the GATT 1994) and "margins of dumping" are the same throughout the Anti-Dumping Agreement. This means that the previous interpretations related to these terms over some 18 years of WTO jurisprudence are equally applicable to the interpretation of the second sentence of Article 2.4.2.[10] Intermediate comparison results are not margins of dumping. The second sentence of Article 2.4.2 cannot be used as a justification to depart from any other obligation. It cannot change the definition of dumping or transform an intermediate comparison result into a margin of dumping.

19. Second, zeroing in the W-T methodology does not account for all of the "pattern" transactions in calculating the margin of dumping. As the Appellate Body confirmed in *US − Washing Machines*, while export prices within an Article 2.4.2 "pattern" must differ significantly from other export prices, the pattern ultimately used in the W-T calculation must be composed of *all* the export prices to one or more particular purchasers, regions, or time periods, not just those export prices that are below normal value. The Appellate Body further determined, in that dispute, that there is no basis for excluding pattern transactions that are priced above normal value.

20. These Appellate Body findings are firmly rooted in the text of the Anti-Dumping Agreement. Article 2.4.2 allows an investigating authority to narrow the universe of export transactions in accordance with the text. For the purposes of the numerator in a W-T comparison, this means that all of the export transactions in the relevant universe of sales under consideration must be

[8] United States' response to Panel question No. 1 in connection with the second substantive meeting, para. 3.

[9] United States' first written submission, para. 86; United States' second written submission, para. 41; United States' opening statement at the first substantive meeting of the Panel, para. 27.

[10] WTO panels and the Appellate Body have also consistently held that the zeroing methodology is inconsistent with the Anti-Dumping Agreement. This is because zeroing effectively alters certain transactions or treats them as less than their actual value.

considered. The second sentence of Article 2.4.2, with its emphasis on "individual export transactions", distinguishes the universe of sales under consideration for the W-T comparison process from the universe of export sales under consideration in the first sentence, which is all export sales. The text requires that, if an investigating authority chooses to use the W-T methodology, it is required to assess the *whole pattern*, and not only part of it. As the Appellate Body clarified, "the 'targeted dumping' to be 'unmasked' corresponds to the properly identified 'pattern', and not to a set of sales below normal value within that pattern for which there exists neither a textual nor a contextual basis in the second sentence".[11] Zeroing within an identified pattern detaches the notion of "pattern" in the second sentence of Article 2.4.2 from the pattern to which the W-T comparison methodology is applied for establishing margins of dumping in order to address targeted dumping. Zeroing within the W-T methodology thus improperly considers only those transactions that fall below the normal value rather than, as required by Article 2.4.2, the *entire universe* of export transactions that fall within the pattern as properly identified.

21. The narrowing of the universe of export transactions to *all* pattern transactions, and the inclusion of all transactions in the denominator, ensures that the resultant dumping margin is for the product as a whole. By contrast, the Appellate Body has repeatedly found that zeroing fails to take into account the product as a whole. Indeed, zeroing arbitrarily manipulates the data such that they no longer reflect the underlying transactions.

22. Third, zeroing does not lead to a fair comparison of export prices as required by Article 2.4 of the Anti-Dumping Agreement. The *chapeau* of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value", while the introductory clause to Article 2.4.2 expressly provides that the dumping calculation methodologies set out in that Article are subject to the fair comparison obligation in Article 2.4.

23. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4. The ordinary meaning of "fair" requires impartiality and a lack of bias. The Appellate Body in *US − Corrosion-Resistant Steel Sunset Review* found that there is an inherent bias in the zeroing methodology as the methodology may inflate the magnitude of a dumping margin and may also distort a finding of the very existence of dumping itself.

24. In the context of zeroing in the W-T methodology, in *US − Washing Machines*, the Appellate Body confirmed that setting to zero intermediate negative comparison results inflates the magnitude of dumping and also makes positive determinations of dumping more likely where export prices above normal value exceed those below normal value. It also concluded that, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form Article 2.4.2's "universe of export transactions". Zeroing in applying the W-T methodology thus fails to make a fair comparison between export prices and normal value.

25. In this case, zeroing produced the unfair results foreseen by the Appellate Body. It not only inflated the margins of dumping for Tolko and West Fraser, but it also created a positive determination of dumping for Resolute where none otherwise existed. While Resolute's calculated margin of dumping was -2.61%, Commerce's use of zeroing in the W-T methodology ultimately inflated Resolute's margin of dumping by 5.81 percentage points. As a result, a company that on average sold for a price that was higher than normal value in the United States is subject to an anti-dumping order because of zeroing. Nonetheless, the United States asserts that both the Appellate Body's approach in *US − Washing Machines* and zeroing are "in reality and effect, essentially the same"[12], and therefore, zeroing cannot violate the fair comparison requirement.[13] This assertion is untrue. At the second substantive meeting of the Panel, Canada demonstrated that both approaches would produce different results for Resolute and that zeroing was actually necessary to manufacture a margin of dumping for that company.[14]

26. Despite all of the above, the United States attempts to support zeroing by arguing that, without zeroing, the comparison methodologies described in Article 2.4.2 and a so-called mixed

[11] Appellate Body Report, *US − Washing Machines*, para. 5.156.
[12] United States' second written submission, para. 83.
[13] United States' second written submission, paras. 84 and 85.
[14] Canada's opening statement at the second substantive meeting of the Panel, 4 December 2018, paras. 9-11; Resolute's Margin of Dumping, Exhibit CAN-13 (BCI); Alternative Margin Analysis, Resolute, Exhibit CAN-32 (BCI).

methodology (W-T and W-W) would "always yield" the same result[15], a concept it calls "mathematical equivalency". The United States' arguments concerning purported mathematical equivalency are not well founded.

27. First, any potential, and hypothetical, mathematical equivalency is not determinative of the correct interpretation of Article 2.4.2.[16]

28. Second, it would be incorrect to interpret the meaning of the Article based on the purported mathematical equivalency of the WTO-inconsistent mixed methodology. The Appellate Body has found that the use of two separate methodologies to calculate a margin of dumping is not permitted under the Anti-Dumping Agreement.[17] The three permissible methodologies are expressly set out in Article 2.4.2, which specifies that margins of dumping "shall normally be established" on the basis of the W-W or the T-T methodology, and then creates an exceptional methodology that may be used when the requirements of the second sentence are met. There is, however, no support in the text for the United States' proposed mixed comparison methodology. Conducting separate comparisons would undermine the purpose of the second sentence of Article 2.4.2, which is to unmask targeted dumping.[18] Moreover, the export transactions to which the W-T methodology would apply would merely re-assess a subset of the same transactions already captured by the W-W analysis, which necessarily compares all transactions.

29. Finally, Canada has concretely demonstrated that mathematical equivalence will not arise in every case. At the second substantive meeting of the Panel, Canada established that the correct application of the W-T methodology without zeroing[19] to Resolute's transactions in this case clearly yields mathematically different results when compared to the W-W methodology.[20] Similarly, in its responses to Panel questions in connection with the second substantive meeting, Canada calculated margins of dumping for a hypothetical set of transactions. For the mixed methodology example, the W-T calculation compared a quarterly weighted average normal value to each pattern transaction, while the W-W calculation compares annual weighted average prices. These comparisons yielded different margins of dumping.[21]

30. Relying on its highly problematic mathematical equivalency theory, the United States claims that zeroing is necessary to unmask evidence of dumping.[22] However, in so doing, the United States ignores that the purpose of Article 2.4.2 is to unmask *targeted* dumping. In *US – Washing Machines*, the Appellate Body clarified that the text narrows the universe of export transactions with references both to the "pattern" and "individual export transactions" (terms rooted in the text). Targeted dumping is properly unmasked by narrowing the universe of export transactions to the pattern transactions for the purpose of calculating the numerator, regardless of whether they are above or below normal value.[23] The Appellate Body's approach does not exclude from the numerator all sales above normal value, as zeroing does. Moreover, as mentioned above, zeroing finds no basis in the text whatsoever and actually alters certain intermediate comparison results based solely on their relationship to normal value.[24]

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[15] United States' response to Panel question No. 2(a) in connection with the second substantive meeting, para. 32.

[16] Appellate Body Reports, *US – Washing Machines*, para. 5.128, and *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

[17] Appellate Body Report, *US – Washing Machines*, para. 5.120.

[18] Appellate Body Report, *US – Washing Machines*, para. 5.122.

[19] Note that Canada's calculations below do not correct for errors in failing to identify a pattern.

[20] Effect of Comparison Methodology on Resolute's Margin of Dumping, Exhibit CAN-31.

[21] Mixed Methodology Calculation, Exhibit CAN-33. Canada also notes that the United States itself acknowledged during the Appellate Body hearing for *US – Washing Machines* that calculating a margin of dumping focused only on pattern transactions would lead to a mathematically different result.

[22] United States' response to Panel question No. 2(a) in connection with the second substantive meeting, para. 22.

[23] The United States asserts that the WTO-consistent manner of properly narrowing the universe of export transactions, as articulated by the Appellate Body, is simply the "findings of two Appellate Body Members" (United States' response to Panel question No. 8 in connection with the second substantive meeting, para. 55). This is wrong on its face as the findings in an Appellate Body report are the findings of that Body, as a whole. The United States' assertion is further undermined because the entire division agreed that the universe of export transactions should be narrowed.

[24] Appellate Body Report, *US – Washing Machines,* para. 5.170; Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.208.

31. The United States also argues that the Panel should resort to the negotiating history of the Anti-Dumping Agreement, including previous drafts, to interpret Article 2.4.2, at least in part because it alleges that the Appellate Body invented a new methodology for calculating margins of dumping that is unsupported by the text of the Article. This is incorrect for several reasons.

32. At the outset, it is not necessary to have recourse to the negotiating history to confirm the meaning of the second sentence of Article 2.4.2.[25] The Appellate Body did not invent an entirely new methodology. It merely clarified the WTO-consistent functioning of the W-T methodology with reference to the text of the Article. That clarification is consistent both with the approach taken by the panels in *US - Washing Machines* and in *US-Anti-Dumping Methodologies (China)*[26] and with the interpretation of the provision provided by the third parties in this dispute.[27] This common understanding of the meaning of the text suggests that the Appellate Body's interpretation was indeed contemplated by the Members. As the meaning of the second sentence of Article 2.4.2 is clear, there is no need to resort to negotiating history to interpret it.

33. Moreover, attempting to interpret the current text of Article 2.4.2 with reference to past drafts is problematic as those earlier texts did not contain some of the key terms that are crucial to understanding the different comparison methodologies. In particular, unlike previous drafts, the final text specifically indicates that the W-W methodology is a comparison of "all comparable export transactions", while the discussion of the exceptional weighted-average-to-transaction methodology in the second sentence of the final draft expressly does not contain a similar reference to "all" transactions. This demonstrates that the exceptional methodology, as adopted in the final text, is not meant to apply to the same universe of transactions.

34. An analysis of Article 2.4.2 demonstrates that it is the United States, and not the Appellate Body, that has invented a methodology that does not have a basis in the text.

35. Consequently, on the basis of all of the above, when Commerce applied zeroing as part of the DPM in calculating the dumping margins using the W-T methodology for Resolute, Tolko, and West Fraser, it breached the United States' obligations under the second sentence of Article 2.4.2 and Article 2.4.

IV. PANELS ARE EXPECTED TO FOLLOW APPELLATE BODY REPORTS

36. Panels are expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system. The United States continues to argue that there is no textual support for this principle[28], ignoring that it arises directly from the provisions of the Dispute Settlement Understanding ("DSU").

37. The DSU specifies that the Appellate Body may, on appeal, uphold, modify or reverse the legal findings and conclusions of a panel. The DSU therefore clearly creates a hierarchical system. In all legal systems the decisions of a hierarchically superior court or tribunal are generally followed by subsidiary bodies. For this reason, while reports formally bind only the parties to a particular dispute, panels cannot disregard adopted Appellate Body decisions.

38. This is confirmed by Article 3.2 of the DSU. In *US — Stainless Steel (Mexico)*, the Appellate Body determined that this Article informs a panel's function under the DSU. Article 3.2 states that the dispute settlement system "is a central element in providing security and predictability" and serves "to clarify" the provisions of the WTO agreements. Appellate Body oversight of panel decisions promotes security and predictability by ensuring the consistent interpretation of the WTO agreements. In *US — Stainless Steel (Mexico)*, the Appellate Body noted that the reference to clarification in Article 3.2 demonstrates that adopted reports are relevant beyond the application of a particular provision in a particular case.

39. The Appellate Body in *US − Shrimp (Article 21.5 − Malaysia)* also confirmed that adopted reports are part of the WTO *acquis* and that these reports create legitimate expectations among the

[25] Appellate Body Report, *US − Washing Machines*, para. 5.167.
[26] Panel Reports, *US − Washing Machines*, para. 7.160, and *US − Anti-Dumping Methodologies (China)*, para. 7.208.
[27] Brazil's third party statement, para. 13; European Union's third party submission, para. 22; Japan's third party submission, paras. 19-22.
[28] United States' second written submission, para. 12.

Members. For this reason, every panel and Appellate Body report cites to previous findings and Members repeatedly cite prior reports in their pleadings. The United States itself does this, including in the present dispute.

40. Finally, the Appellate Body expressly found that where a panel relies on the Appellate Body's conclusions with respect to the exact same issue, it will not have failed to make an objective assessment for the purposes of Article 11 of the DSU.[29] To the contrary, it is appropriate for a panel to rely on the Appellate Body's conclusions and that Body expects panels to accede to the hierarchical structure of WTO dispute settlement and to follow previous adopted Appellate Body reports.[30] The Appellate Body has also determined that a panel's decision to depart from these reports is of deep concern and has serious implications for the dispute settlement system.[31] In this dispute, however, the United States has gone so far as to expressly invite this Panel to ignore Appellate Body guidance.

41. The United States argues that Canada's position is contrary to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization. Jurisprudence addresses the relationship between this Article and adopted reports. If a multilateral interpretation under Article IX:2 conflicts with a prior Appellate Body interpretation, cogent reasons may exist for a panel to refuse to follow the Appellate Body. There is no multilateral interpretation relevant to this dispute, and there are no cogent reasons to depart from Appellate Body findings with respect to the DPM.

42. The United States also relies on an out-of-context statement by the Appellate Body in *Japan - Alcoholic Beverages II*.[32] This reliance is misplaced. First, the Appellate Body was considering whether adopted reports constituted either "subsequent practice" or other decisions of the Contracting Parties under the GATT.[33] These questions are not before this Panel. Moreover, in that report, the Appellate Body expressly acknowledged that adopted reports form part of the *acquis*, create legitimate expectations amongst the Members, and ought to be taken into account when they are relevant.[34] Second, in *US − Stainless Steel (Mexico)*, the Appellate Body cited its decision in *Japan − Alcoholic Beverages II* for the proposition that subsequent panels *are not free* to disregard the legal interpretations and findings in adopted Appellate Body reports.[35]

43. Consequently, this Panel must objectively assess whether the DPM is the same DPM that was at issue in *US − Washing Machines*. If it is, and it is, this Panel must follow the Appellate Body's decision in that dispute.

[29] Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, para. 188.
[30] Appellate Body Report, *US — Continued Zeroing*, paras. 362 and 365.
[31] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 162.
[32] United States' second written submission, para. 14.
[33] Appellate Body Report, *Japan − Alcoholic Beverages II*, p. 14.
[34] Appellate Body Report, *Japan − Alcoholic Beverages II*, p. 14.
[35] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 158.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, Canada challenges the determination of the U.S. Department of Commerce ("USDOC") in an antidumping investigation of softwood lumber from Canada. Specifically, Canada claims that the USDOC's determination is inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

2. Canada begins its first written submission by asserting that "this dispute is a profoundly simple one: the Panel must follow the [Dispute Settlement Body ("DSB")] rulings in *US – Washing Machines*" and find that the USDOC's application of a differential pricing analysis and its use of zeroing in the antidumping investigation of softwood lumber from Canada is inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement. Canada's portrayal of the role of the Panel in this dispute is fundamentally contrary to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the *Agreement Establishing the World Trade Organization* ("WTO Agreement").

3. To resolve this dispute, rather, the Panel will need to make an objective assessment of the matter before it and undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law. A WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute, rather than to interpret and apply the text of the covered agreements. And under the DSU, neither the Appellate Body nor any panel can issue, because the DSB has no authority to adopt, an authoritative interpretation of the covered agreements. That authority is reserved to the Ministerial Conference or the General Council acting under a special procedure.

4. Canada has not done anything to help the Panel accomplish the task it has been given under the DSU. Instead of presenting interpretive analyses of the AD Agreement applying customary rules of interpretation to support its claims, Canada simply refers to and relies on interpretations presented in prior Appellate Body reports. However, the interpretations for which Canada advocates cannot be reconciled with the customary rules of interpretation. When they are subjected to scrutiny, all of Canada's proposed interpretations of the AD Agreement simply are not supported by the ordinary meaning of the text of the AD Agreement, read in context, and in light of the object and purpose of the AD Agreement.

5. In fact, Canada's proposed interpretation of Article 2.4.2 of the AD Agreement effectively rewrites the second sentence of that provision and reads the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. In doing so, Canada's proposed interpretation effectively renders this provision *inutile* by failing to "give meaning and effect to all the terms of the treaty". Accordingly, all of Canada's legal claims lack merit, and should be rejected.

II. STANDARD OF REVIEW, RULES OF INTERPRETATION, AND BURDEN OF PROOF

6. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."

7. There is no provision in the DSU or any of the covered agreements that establishes a system of "case law" or "precedent," or that otherwise requires a panel to follow or be bound by the findings in previously adopted panel or Appellate Body reports. There is no provision in the DSU or the

covered agreements that refers to "cogent reasons" or that suggests that a panel must justify legal findings not consistent with the reasoning set out in prior reports.

8. To the contrary, Article 3.9 of the DSU expressly states that the DSU, including adoption of panel and Appellate Body reports by the DSB, is without prejudice to the procedure to obtain an authoritative interpretation by the Ministerial Conference or General Council. Article IX:2 of the WTO Agreement provides that "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Article IX:2 also sets out a special adoption procedure for those authoritative interpretations. Thus, the adoption by the DSB of reports from panels or the Appellate Body cannot constitute authoritative interpretations that a subsequent panel must follow.

9. Finally, it is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Canada must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.

III. CANADA'S CLAIMS RELATED TO THE USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT LACK MERIT

A. Introduction and Overview of Article 2.4.2 of the AD Agreement

10. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

11. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, should "lead to results that are systematically different" from the two "normal" comparison methodologies when the conditions for its use have been met.

12. Canada seeks to rewrite the second sentence of Article 2.4.2, and to read the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. Canada's proposed interpretation is erroneous and does not accord with the customary rules of interpretation of public international law.

B. Canada's Claims Regarding the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Lack Merit

13. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

14. In the antidumping investigation of softwood lumber from Canada, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information. Specifically, the USDOC applied a differential pricing analysis, in which it used the "Cohen's *d* test" to "evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise", and the USDOC also used the "ratio test" to "assess the extent of the significant price differences for all sales as measured by the Cohen's *d* test."

15. The USDOC undertook a rigorous, holistic examination of each respondent's export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as among different purchasers, regions or time periods. A proper interpretive analysis pursuant to the customary rules of interpretation of public international law reveals that that is precisely what the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to do. In addition to explaining its analytical approach in the preliminary decision memorandum and the final issues and decision memorandum, the USDOC addressed arguments raised by interested parties concerning the USDOC's analysis. Those memoranda provide a reasoned and adequate explanation of the USDOC's determination and demonstrate that the USDOC's application of a differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

16. Canada advances two main arguments. First, Canada argues that the USDOC's differential pricing analysis is inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 because it considers both high-priced and low-priced export sales transactions. Second, Canada contends that the USDOC's differential pricing analysis breaches the "pattern clause" because it aggregates transactions across purchasers, regions, and time periods and does not identify a pattern among purchasers, regions, or time periods. Each of Canada's arguments lacks merit.

i. The USDOC's Consideration of Both Low and High Prices Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

17. A differential pricing analysis seeks to identify a "pattern" by looking for export prices to a purchaser, region, or time period which are either significantly higher or significantly lower than the export prices to other purchasers, regions, or time periods. Such an analysis is consistent with the express terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which calls upon investigating authorities to find "export prices which differ significantly," but which does not require or foreclose a focus either on lower-priced or higher-priced export sales. Logically, any analysis pursuant to the "pattern clause" must examine <u>both</u> lower and higher export prices to establish the presence of export prices which differ significantly.

18. In *US − Washing Machines*, the Appellate Body found that "the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2 is comprised of the export prices to one or more particular purchasers which differ significantly from the prices to the other purchasers because they are *lower* than those other prices (with the same applying to regions and time periods, respectively)", and "the relevant 'pattern' … cannot be identified by considering prices that are higher than other prices." These findings, on which Canada relies, are not consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. A set of lower-priced export sales to a particular purchaser (or to a particular region or during a particular time period) is not "a pattern of export prices which differ significantly". It would be a pattern of export prices which are similar to one another, and which happen also to be lower than export prices to other purchasers (or regions or time periods). Additionally, a set of lower-priced export sales <u>to a particular purchaser</u> (or to a particular region or during a particular time period) is not "a pattern of export prices … <u>among different</u> purchasers, regions or time periods". It would be a pattern of export prices <u>to a particular purchaser</u> (or to a particular region or during a particular time period). In effect, the Appellate Body in *US − Washing Machines* rewrote the "pattern clause" of the second sentence of Article 2.4.2 by changing the word "among" to "from". The pattern described by the Appellate Body simply is a different pattern than that which is described in the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

19. The Appellate Body also explained that: "[w]e fail to see how an investigating authority could identify and address 'targeted dumping' by considering significantly higher export prices. If the prices found to differ significantly are higher than other export prices, the other (lower) export prices would not 'mask' the (higher) dumped prices found to form the pattern." This reasoning, too, makes no sense, and is inconsistent with other Appellate Body findings in *US − Washing Machines*. The Appellate Body explained that "an investigating authority would analyse the prices of <u>all export sales</u> made by the relevant exporter or producer to identify a pattern". Necessarily, an analysis of the prices of <u>all export sales</u> would entail <u>consideration</u> of <u>both</u> higher- and lower-priced sales. So, the Appellate Body's interpretation simultaneously requires and prohibits the consideration of lower-priced and higher-priced export sales transactions. That is a logical impossibility.

20. By comparing export prices to different purchasers, regions, and time periods, the differential pricing analysis seeks to identify both lower and higher export prices, because such export prices differ significantly, as expressly contemplated by the "pattern clause" of Article 2.4.2 of the AD Agreement.

ii. The USDOC's Aggregation of Price Differences Among Different Purchasers, Regions, or Time Periods Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

21. Although the second sentence of Article 2.4.2 of the AD Agreement has been described as a provision that addresses "targeting" or "targeted dumping," the United States agrees with the *US – Washing Machines* panel and most of the third parties to that dispute, including Canada, who indicated their understanding that "targeted dumping" is merely a shorthand reference to the terms of the second sentence of Article 2.4.2. However, the terms "targeting" and "targeted dumping" are not present in Article 2.4.2 nor anywhere else in the AD Agreement. As it is written, the second sentence of Article 2.4.2 provides that investigating authorities are to examine "export prices" to determine whether there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods." A "target" analysis is just one kind of analysis an investigating authority might undertake when searching for "a pattern of export prices which differ significantly among different purchasers, regions or time periods." Investigating authorities might take other approaches to analyzing a "pattern" that also are consistent with the terms of the "pattern clause."

22. When it applied a differential pricing analysis in the antidumping investigation of softwood lumber from Canada, the USDOC aggregated the results of the Cohen's *d* test as part of the ratio test to determine the extent of the export prices that were found to differ significantly among different purchasers, regions, or time periods. In other words, the USDOC aggregated the results of the Cohen's *d* test among different purchasers, regions, or time periods found to pass the Cohen's *d* test (without double counting those export sales that passed the Cohen's *d* test for more than one category, *i.e.*, by purchaser, region, or time period). The UDSOC aggregated the results of the Cohen's *d* test in this manner so that it could consider the exporter's pricing behavior in the United States market for the product as a whole, *i.e.*, whether "a pattern" exists of export prices which differ significantly. This accorded with the USDOC's understanding that the Cohen's *d* test results reflect different aspects of an exporter's overall pricing behavior, and it accords with prior Appellate Body findings regarding the concept of "product as a whole."

23. Contrary to Canada's assertion, the USDOC's differential pricing analysis did not aggregate random and unrelated price variations. A respondent's pricing behavior, which reflects its market strategies and corporate goals that logically follow economic principles in a market economy, cannot reasonably be described as "random." The results of the Cohen's *d* test by purchaser, region, or time period represented different aspects of the particular respondent's overall pricing behavior. Through the Cohen's *d* and ratio tests, the differential pricing analysis considered the pricing behavior of the respondent exporter in the United States market as a whole.

24. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among each category (*i.e.*, purchasers, regions, or time periods) cannot be considered together when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." To the contrary, the text of the "pattern clause," on its face, contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods. In particular, the "pattern clause" directs an investigating authority to consider whether there exists a pattern of export prices which differ significantly "among different purchasers, regions or time periods".

25. Rather than engage in its own textual analysis, Canada primarily relies on the Appellate Body's findings in *US – Washing Machines*. The Appellate Body reasoned that "a pattern involves export prices which differ significantly in relation to specified sub-groups, namely, 'among different purchasers, regions or time periods'", and "these terms determine how the relevant 'pattern' must be identified." The Appellate Body's analysis focused, in particular, on the words "or" and "among".

26. The Appellate Body's reading of the word "or" is exceedingly narrow. As the Appellate Body itself acknowledged, "depending on the context in which it is used, the conjunction 'or' can be

exclusive or inclusive." The presence of the word "or," and not the word "and," might just as likely indicate that it is possible for an investigating authority to find a pattern of export prices which differ significantly among different purchasers, different regions, or different time periods, or any combination of the above, but it is not necessary to find a pattern of export prices which differ significantly among all three, as would be suggested by the word "and". The Appellate Body's conclusion appears to have been colored by its misunderstanding of the relevant "pattern" as being limited to low-priced sales to a "target". That understanding is not consistent with the terms of the "pattern clause", nor is it logical.

27. The Appellate Body's understanding of the implications of the word "among" also appears to have been colored by its misunderstanding of the relevant "pattern." The Appellate Body observed that "the term 'among' refers to something *'in relation to the rest of the group [it belongs] to*'." Importantly, the differential pricing analysis applied by the USDOC involved comparisons of export prices to each purchaser with export prices to the other purchasers, export prices to each region with export prices to the other regions, and export prices during each time period with export prices during the other time periods. This is logical and consistent with the understanding of the word "among" articulated by the Appellate Body, in particular the Appellate Body's observation that "each category should be considered on its own".

28. The differential pricing analysis also sought to identify "a pattern" for an exporter and product as a whole by considering all of that exporter's export prices to discern whether significant differences in the export prices were exhibited collectively among different purchasers, or different regions, or different time periods. This approach is not inconsistent with the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which directs investigating authorities to consider whether there exists a pattern of export prices which differ significantly "among" different purchasers, regions, or time periods.

29. The term "among" is only used one time in the second sentence of Article 2.4.2 and it is placed before the identified groups of "purchasers, regions or time periods." Such usage suggests that those groups may be considered collectively in identifying a pattern of export prices which differ significantly. For the Appellate Body's reading of "among" to be correct, one would expect the term "among" to appear before the mention of each group, i.e., "among different purchasers, among different regions or among different time periods." That is not how the "pattern clause" is written.

30. The Appellate Body considered that such "repetition would have conveyed an identical meaning to that of the existing text." However, when the Appellate Body later summarized its own findings concerning the interpretation of the "pattern clause," it used the term "among" three times: "[w]e have found above that a pattern can only be found in prices which differ significantly either among purchasers, or among regions, or among time periods, not across these categories." This is yet another internal inconsistency in the *US − Washing Machines* Appellate Body report that demonstrates the incorrectness of the findings in that report and undermines the persuasiveness of that report.

31. A more plausible reading of the text of the "pattern clause" of the second sentence of Article 2.4.2 contemplates a holistic analysis of the exporter's pricing behavior for the product as a whole, which is consistent with the Appellate Body's guidance in prior reports that a dumping margin must be exporter-specific and determined for the product as a whole. That is what the USDOC sought to accomplish by applying a differential pricing analysis in the antidumping investigation of softwood lumber from Canada.

C. Canada's Claims that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement Lack Merit

32. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international law. This conclusion also accords with and is the logical extension of the Appellate Body's findings in previous disputes relating to the use of zeroing in connection with the comparison methodologies provided in the first sentence of Article 2.4.2 of the

AD Agreement. And this is the conclusion reached by one Appellate Body member in *US − Washing Machines*.

1. Canada's Arguments Against the Use of Zeroing in Connection with the Alternative, Average-to-Transaction Comparison Methodology Lack Merit

33. Canada does not present an interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement. Instead, Canada simply summarizes various findings in prior Appellate Body reports. In approaching this dispute as it has, Canada has failed to help the Panel discharge its function under Article 11 of the DSU, which requires the Panel to make its own "objective assessment of the matter before it". Such an objective assessment involves an objective assessment of "the applicability of and conformity with the relevant covered agreements," and necessarily includes an interpretive analysis of any of the provisions of the covered agreements that Canada claims the United States has breached.

34. More problematic, in presenting a selection of findings from prior reports, Canada has chosen to place emphasis on findings related to the concept of "product as a whole," a concept which the Appellate Body has developed in prior reports. The term "product as a whole," of course, is not present in the AD Agreement. Additionally, the Appellate Body majority in *US − Washing Machines* prescribed a new alternative methodology for addressing targeted dumping that explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." In the words of the Appellate Body majority: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', without having to take into account 'non pattern transactions'." Thus, the Appellate Body majority's approach literally requires that a margin of dumping be determined not for the product as a whole, and in a manner that explicitly does not take into account all export transactions.

35. Canada further argues that zeroing is impermissible in the context of the average-to-transaction comparison methodology because zeroing within an identified pattern fails to "further 'unmask' targeted dumping." In making this assertion, Canada again fails to engage in any interpretive analysis of the relevant text in Article 2.4.2 of the AD Agreement, and instead relies on the findings of two members of the Appellate Body in *US − Washing Machines*. The Appellate Body majority in *US − Washing Machines*, though, based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern." Those findings are erroneous.

36. The Appellate Body majority also stated that, in interpreting the text of Article 2.4.2, it found that the term "individual export transactions" "refers to the pattern of export prices identified by the investigating authority" that differ because they are the lower export prices. The Appellate Body majority indicated that it found "no such textual and contextual support to conclude that the term 'individual export transactions' in the second sentence of Article 2.4.2 refers only to those transactions that form part of the identified pattern but are priced below normal value." Elsewhere in the Appellate Body report, however, the Appellate Body considered that the word "individual" also delineates the scope of application of the alternative, average-to-transaction comparison methodology. Thus, in the Appellate Body majority's view, the word "individual" simultaneously reduces and expands the scope of transactions to be included in the average-to-transaction comparisons under the second sentence of Article 2.4.2 of the AD Agreement. These divergent conclusions about the meaning of the term "individual" are internally inconsistent, and neither conclusion is supported by the ordinary meaning of the term "individual," read in its context.

2. A Proper Application of the Customary Rules of Interpretation Reveals that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

a. Initial Comments on the Text and Context of the Second Sentence of Article 2.4.2 of the AD Agreement

37. When the Appellate Body found prohibitions on the use of zeroing in connection with the comparison methodologies described in the first sentence of Article 2.4.2 of the AD Agreement, its

interpretations were rooted in the text of that sentence. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis."

38. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been established.

39. Additional contextual analysis of the second sentence of Article 2.4.2 of the AD Agreement demonstrates that zeroing is permissible – and indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology provided for in the second sentence of Article 2.4.2 of the AD Agreement.

b. The Average-to-Transaction Comparison Methodology in the Second Sentence of Article 2.4.2 of the AD Agreement Is an Exception to the Comparison Methodologies in the First Sentence of Article 2.4.2 and Should Be Interpreted So that It May Yield Results that Are "Systematically Different" from the Comparison Methodologies "Normally" Applied

40. As an exception to the two symmetrical comparison methodologies that an investigating authority must use "normally," each of which logically, the Appellate Body has explained, should not "lead to results that are systematically different," the third comparison methodology, by logical extension, should "lead to results that are systematically different" from the "normal[]" comparison methodologies when the conditions for its use have been established. The Appellate Body also has found that this exceptional methodology provides a means by which Members can "unmask targeted dumping."

41. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law.

c. Mathematical Equivalence

42. If zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then both methodologies, when applied to the same set of transactions, will always yield identical results, with respect to the total amount of all comparison results, the total amount of dumping, and the weighted average dumping margin for an exporter for the product under investigation. This is true because, for both methodologies, the calculation of the margins of dumping is based on the same normal value and export sales data, but the mathematical operations simply are conducted in a different order.

d. The Appellate Body's Consideration of Mathematical Equivalence in Previous Disputes Does Not Compel Rejection of the Mathematical Equivalence Argument in this Dispute

43. The Appellate Body has considered the mathematical equivalence argument in previous disputes, including in *US – Washing Machines*. The findings concerning the mathematical equivalence argument in prior Appellate Body reports neither support nor compel the Panel's rejection of the mathematical equivalence argument in this dispute.

44. The Appellate Body majority in *US – Washing Machines* actually acknowledged the reality of mathematical equivalence, referring to "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern". The panels

in *US − Washing Machines* and *US − Anti-Dumping Methodologies (China)* also recognized the fact of mathematical equivalence. No WTO panel, nor the Appellate Body, has ever found that the United States is incorrect that the average-to-average comparison methodology (without zeroing) and the average-to-transaction comparison methodology (also without zeroing) yield the same mathematical result when applied to the same set of export transactions.

45. Even though it acknowledged the fact of mathematical equivalence, the Appellate Body majority evaded the U.S. argument in *US − Washing Machines*. The majority observed that "the United States' argument on mathematical equivalence is premised on its understanding of what constitutes the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2," but recalled that the Appellate Body had "concluded above that the 'pattern of export prices which differ significantly' within the meaning of the second sentence of Article 2.4.2 comprises only a subset of all the export transactions". The majority reasoned that "[c]omparing normal value with 'pattern transactions' only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the [average-to-average] comparison methodology to *all* export transactions."

46. As an initial matter, the Appellate Body's interpretation of the term "pattern" in the second sentence of Article 2.4.2 of the AD Agreement is erroneous and does not follow from a proper application of the customary rules of interpretation of public international law. Thus, the Appellate Body majority's finding concerning the mathematical equivalence argument, which rests on the Appellate Body's earlier flawed finding, is, as a consequence, itself flawed.

47. Even assuming, for the sake of argument, that the Appellate Body's interpretation of the term "pattern" is correct, the fact of mathematical equivalence, and the Appellate Body majority's recognition of that fact, undercuts the Appellate Body majority's conception of the operation of the alternative, average-to-transaction comparison methodology. The application of the average-to-average comparison methodology to any set of transactions (without zeroing) is mathematically equivalent to the application of the average-to-transaction comparison methodology to the same set of transactions (without zeroing). Thus, how the relevant "pattern" is defined under the second sentence of Article 2.4.2 of the AD Agreement is completely irrelevant to the mathematical equivalence argument.

48. This is because, by finding that the second sentence of Article 2.4.2 requires the application of the average-to-transaction comparison methodology to a subset of transactions while also prohibiting the use of zeroing, the Appellate Body majority found, in effect, that the application of the average-to-average comparison methodology to that subset of transactions (without zeroing) is what actually is contemplated by the second sentence of Article 2.4.2. The Appellate Body majority effectively rewrote the second sentence of Article 2.4.2, changing it from allowing the application of the average-to-transaction comparison methodology under certain circumstances to allowing the application of the average-to-average comparison methodology to a subset of transactions under certain circumstances. The Appellate Body majority invented an entirely new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2, and which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time after. Ultimately, the Appellate Body majority read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, contrary to the principle of effectiveness.

49. The Appellate Body majority noted the U.S. argument in this regard. The Appellate Body majority's reasoning is dismissive of − but not responsive to − the U.S. argument. Again, the Appellate Body majority recognized "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern". Thus, just as the United States contends, the Appellate Body majority rewrote the second sentence of Article 2.4.2 of the AD Agreement such that investigating authorities now are to address targeted dumping by applying what is, in effect, the average-to-average comparison methodology to a subset of transactions. That is not what the second sentence of Article 2.4.2 of the AD Agreement provides.

50. In a footnote, the Appellate Body majority also referred to earlier consideration of the mathematical equivalence argument in prior Appellate Body reports, including *US − Softwood Lumber V (Article 21.5 − Canada)*, *US − Stainless Steel (Mexico)*, and *US − Zeroing (Japan)*. Like the Appellate Body majority's findings in *US − Washing Machines*, the Appellate Body's consideration

of the mathematical equivalence argument in those earlier disputes neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

51. The Appellate Body first addressed the mathematical equivalence argument in *US − Softwood Lumber V (Article 21.5 − Canada)*. In that dispute, the Appellate Body "disagree[d] with the Panel's analysis of the 'mathematical equivalence' argument for several reasons." Some of the reasons the Appellate Body gave are distinguishable from the current situation, while others are instructive.

52. The Appellate Body disagreed with the panel in *US − Softwood Lumber V (Article 21.5 − Canada)* on the grounds that, "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average." In this dispute, the United States does not offer the mathematical equivalence argument to support a proposed interpretation of the transaction-to-transaction and average-to-average comparison methodologies in the first sentence of Article 2.4.2 of the AD Agreement. Rather, the mathematical equivalence argument is offered here to support the contextual argument that, as an exception, the alternative, average-to-transaction comparison methodology should not be interpreted in a way that would lead, invariably, to that comparison methodology yielding results that are identical or systematically similar to the results of the normal comparison methodologies. Nor should the second sentence of Article 2.4.2 be interpreted so as to rewrite that provision such that targeted dumping is addressed not by the application of the average-to-transaction comparison methodology but, in effect, by the application of the average-to-average comparison methodology to a subset of transactions.

53. The Appellate Body further observed in *US − Softwood Lumber V (Article 21.5 − Canada)* that "the United States' 'mathematical equivalence' argument assumes that zeroing is prohibited under the methodology set out in the second sentence of Article 2.4.2. The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases." The Appellate Body was correct, of course, that the mathematical equivalence argument is premised on the assumption, for the purpose of argument, that zeroing is prohibited under the average-to-transaction comparison methodology. The United States offers the mathematical equivalence argument here as an argument against finding that that is the case. That the Appellate Body suggested that the U.S. assumption in *US − Softwood Lumber V (Article 21.5 − Canada)* was a reason for its disagreement with the panel's analysis of the mathematical equivalence argument in that context suggests that the use of zeroing should not be prohibited in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

54. The Appellate Body also noted in *US − Softwood Lumber V (Article 21.5 − Canada)* that "there is considerable uncertainty regarding how precisely the third methodology should be applied." Similarly, in *US − Stainless Steel (Mexico)*, Mexico and the third participants argued that "the 'mathematical equivalence' argument works only under the assumption that the weighted average normal value used in the weighted average-to-transaction … comparison methodology is identical to that used in the [average-to-average] comparison methodology," and Mexico pointed out that that was "not the case under the United States' system."

55. In *US − Softwood Lumber V (Article 21.5 − Canada)* and *US − Stainless Steel (Mexico)*, as well as in *US − Zeroing (Japan)*, the Appellate Body signalled that it saw merit in the arguments of the participants and third participants described above. In *US − Stainless Steel (Mexico)*, the Appellate Body expressed the view that "the 'mathematical equivalence' argument works only under a specific set of assumptions, and … there is uncertainty as to how the [average-to-transaction] comparison methodology would be applied in practice."

56. Those prior disputes, however, did not involve an actual application of the average-to-transaction comparison methodology. In the softwood lumber antidumping investigation challenged here, and generally, the weighted average normal value used in the application of the average-to-average comparison methodology is no different from the weighted average normal value used in the application of the average-to-transaction comparison methodology.

57. The panel in *US − Washing Machines* "rejected Korea's argument that the use of different weighted average normal values could avoid mathematical equivalence." "Neither was the Panel

persuaded by Korea's argument that mathematical equivalence could be avoided if the investigating authority undertook a 'granular analysis' of the transactions involved in the [average-to-transaction] comparison methodology and a detailed approach to price adjustments, i.e. by rethinking the adjustments that might be necessary to ensure price comparability." In its discussion of mathematical equivalence, the Appellate Body majority noted Korea's argument on appeal that "the possibility of changing the normal value or the adjustments to export prices breaks mathematical equivalence." Aside from summarizing the panel's findings and Korea's arguments on appeal, though, the Appellate Body majority did not analyze − and did not reverse − the *US − Washing Machines* panel's findings in this regard.

58. Because of the different underlying factual situations in *US − Softwood Lumber V (Article 21.5 - Canada)*, *US − Stainless Steel (Mexico)*, and *US − Zeroing (Japan)*, as contrasted with the factual situation in this dispute, and because of the flaws in the reasoning of the Appellate Body majority in *US − Washing Machines*, the Appellate Body's consideration of the mathematical equivalence argument in those disputes does not compel rejection of the mathematical equivalence argument in this dispute.

e. The Negotiating History of the AD Agreement Confirms that Zeroing is Permissible when Applying the Asymmetrical Comparison Methodology Set Forth in the Second Sentence of Article 2.4.2 of the AD Agreement

59. The "asymmetrical" nature of the "third methodology," and the fact that it may be used "only in exceptional circumstances," when considered together with the negotiating history of the AD Agreement, confirms that zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

60. Of particular relevance are proposals from GATT Contracting Parties that sought changes to the Tokyo Round Antidumping Code to address concerns about certain investigating authorities that used an asymmetrical comparison methodology, in which "the 'negative' dumping margin by which the normal value falls below the export price in the value term will be treated as zero instead of being added to the other transactions to offset the dumping margin." It is clear from these proposals that the *demandeurs* viewed asymmetry and zeroing as one and the same problem.

61. The ultimate compromise agreed by the WTO Members is, of course, reflected in the text of Article 2.4.2 of the AD Agreement. Article 2.4.2 provides that "normally" a symmetrical comparison methodology must be used, but when certain conditions are met, an investigating authority "may" use an asymmetrical comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." The negotiating history documents confirm that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

3. Canada's Claim that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology is Inconsistent with Article 2.4 of the AD Agreement Lacks Merit

62. Canada claims that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4 of the AD Agreement. Canada's claim lacks merit.

63. The text of Article 2.4 of the AD Agreement requires that "[a] fair comparison shall be made between the export price and the normal value", and then goes on the describe how such a "fair comparison" is to be made, including specifying that "[t]he comparison shall be made at the same level of trade … and in respect of sales made at as nearly as possible the same time." Article 2.4 also describes various adjustments ("[d]ue allowance[s]") that an investigating authority must make to export price and normal value to ensure a "fair comparison". The text of Article 2.4 says nothing about whether zeroing is fair or unfair. As the panel in *US − Zeroing (Japan)* noted, the "precise meaning of" the fair comparison requirement "must be understood in light of the nature of the activity at issue." The panel concluded that "the 'fair comparison' requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context."

64. Canada once again seeks to support its claim not with a discussion of the terms of Article 2.4 of the AD Agreement, but instead by relying on findings in prior Appellate Body reports, including the findings of two Appellate Body members in *US − Washing Machines*. However, the findings of the majority in *US − Washing Machines* are internally inconsistent, and the Panel should not consider those findings persuasive.

65. The Appellate Body majority treated nearly identical factual situations differently, deeming one (zeroing) to be unfair while deeming another (the Appellate Body majority's own prescription for addressing targeted dumping) to be fair. There is no textual or logical support for the Appellate Body majority's finding.

66. Given the Appellate Body majority's inconsistent treatment of nearly identical factual situations, it appears that the Appellate Body majority's finding that the use of zeroing is inconsistent with Article 2.4 of the AD Agreement is, in reality, dependent on and follows directly from the finding that the use of zeroing is inconsistent with Article 2.4.2 of the AD Agreement. As demonstrated above, the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is not inconsistent with Article 2.4.2 of the AD Agreement.

67. Furthermore, there is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is in any way not "fair," or that it is inconsistent with any "fair comparison" obligation in Article 2.4 of the AD Agreement. Canada argues that the Appellate Body has interpreted the term "fair" under Article 2.4 of the AD Agreement as connoting "impartiality, even-handedness, or lack of bias." It does not follow from that Appellate Body finding, however, that Article 2.4 of AD Agreement prohibits the use of zeroing in connection with the alternative, "exceptional" average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 have been met.

68. As explained above, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping" in "exceptional" situations. It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased, as one Appellate Body member agreed in *US − Washing Machines*.

D. Canada's Consequential Claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 Lack Merit

69. Canada offers no support for its claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994. Canada does not even discuss its claims under those provisions except to assert in passing that breaches of those provisions purportedly follow as a consequence of alleged breaches of Articles 2.4 and 2.4.2 of the AD Agreement. As the United States has established, Canada's claims that the United States has acted inconsistently with Articles 2.4 and 2.4.2 of the AD Agreement lack merit. As a consequence, Canada's claims under under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are equally without merit.

IV. CONCLUSION

70. The United States respectfully requests that the Panel reject all of Canada's claims.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. The U.S. first written submission demonstrates why Canada's claims under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") fail. As the United States has shown, Canada's proposed interpretations of the AD Agreement are not supported by the ordinary meaning of terms of the AD Agreement, read in context, and in light of the object and purpose of the AD Agreement.

2. Canada's statements during the first substantive meeting and its responses to the Panel's questions have not improved Canada's case. Canada continues to refer to and rely on findings presented in prior Appellate Body reports without presenting interpretive analyses of the AD Agreement applying the customary rules of interpretation to support its claims. Where the United States has identified errors and inconsistencies in the Appellate Body findings on which Canada relies, Canada has ignored the U.S. arguments, simply repeating, for example, that the Panel "must follow the Appellate Body's decision" in *US − Washing Machines*.

3. Canada's understanding of the role of the Panel in this dispute remains fundamentally contrary to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the *Agreement Establishing the World Trade Organization* ("WTO Agreement"). To resolve this dispute, the Panel will need to make an objective assessment of the matter before it and undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law. Canada still has done nothing to help the Panel accomplish the task it has been given under the DSU.

II. CANADA MISUNDERSTANDS THE ROLE OF DISPUTE SETTLEMENT PANELS UNDER THE DSU

4. The U.S. first written submission discusses the role of WTO dispute settlement panels in disputes concerning antidumping measures. The role of panels in such disputes is established by Articles 3.2, 3.9, 11, 19.1, and 19.2 of the DSU and Article 17.6 of the AD Agreement.

5. In sum, the role of a WTO dispute settlement panel established by the DSB is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it", including an objective assessment of "the applicability of and conformity with the covered agreements". That assessment is one of conformity with the covered agreements − not prior reports adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".

6. Nevertheless, Canada maintains that WTO panels are "expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system." Canada asserts that the notion that WTO panels are "expected" to follow Appellate Body reports "arises directly from the provisions of the [DSU]". Canada is mistaken, and such a notion is directly contrary to the DSU and the WTO Agreement.

7. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements − and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation. Per Article IX:2 of the WTO Agreement, that authority is reserved to the Ministerial Conference or the General Council acting under a special procedure. And Article 3.9 of the DSU expressly states that the DSU, including adoption of panel and Appellate Body reports by the DSB, is without prejudice to the procedure to obtain an authoritative interpretation by the

Ministerial Conference or General Council. Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute.

8. This was the view expressed by the Appellate Body in one of its first reports, in *Japan – Alcoholic Beverages II*. The United States is not aware that the Appellate Body has ever disavowed this understanding, which is contained in a report adopted by the DSB.

9. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such customary rules. Article 31 of the Vienna Convention provides that "[a] treaty shall 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 the light of its object and purpose."

10. Ideally, WTO panels and the Appellate Body will apply the customary rules of interpretation correctly, and thus different adjudicators will consistently reach similar conclusions concerning the interpretation of the covered agreements. After a panel first applies the customary rules of interpretation itself and reaches its own preliminary conclusion concerning the interpretation of a covered agreement, it is appropriate for the panel to take into account the interpretive findings in prior panel and Appellate Body reports that have been adopted by the DSB. Where a panel's preliminary interpretive conclusion accords with the conclusion in a prior report, the panel can have greater confidence in the correctness of its own conclusion and reflect that in its own report. However, where a panel's preliminary interpretive conclusion differs from the conclusion in a prior report, it may be appropriate for the panel to further consider the matter, and assess whether the panel has erred in its own application of the customary rules of interpretation, or whether the panel considers that the interpretive finding in a prior report is erroneous. Such an approach would be consistent with the role of a WTO dispute settlement panel, as provided in the DSU, while also taking appropriate account of prior reports adopted by the DSB.

11. On the other hand, starting (and perhaps even ending) a so-called "interpretive analysis" with prior reports adopted by the DSB is not what WTO dispute settlement panels are "expected" to do, per the terms of the DSU. Taking such an approach would constitute a failure by a panel to fulfil its role under the DSU.

III. CANADA'S CLAIMS RELATED TO THE USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT LACK MERIT

A. Introduction

12. The U.S. first written submission demonstrates that the interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law.

13. Canada has declined to provide the Panel with an interpretive analysis of the AD Agreement based on the customary rules of interpretation, *i.e.*, a discussion of the ordinary meaning of the terms of the AD Agreement in their context and in light of the object and purpose of the AD Agreement. Instead, Canada insists that this dispute is "narrow" and incorrectly urges the Panel simply to "follow Appellate Body reports." As the United States has demonstrated, the Panel is not authorized by the DSU to take the approach Canada proposes.

14. Furthermore, aside from not being based on an application of the customary rules of interpretation, Canada's proposed interpretations are untenable because they would read the average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 out of the AD Agreement entirely.

15. As the United States has explained, the USDOC, through its application of a differential pricing analysis in the antidumping investigation of softwood lumber from Canada, undertook a rigorous, holistic examination to determine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods, and the USDOC did so in a manner

that gives effect to the "pattern clause" and the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement.

16. For the reasons given below, the United States continues to urge the Panel to engage in a thorough interpretive analysis in accordance with the customary rules of interpretation of public international law. The United States remains confident that doing so will lead the Panel to conclude that Canada's claims are without merit, and the USDOC's determination in the antidumping investigation of softwood lumber from Canada is not inconsistent with the AD Agreement or the GATT 1994.

B. Canada's Claims Regarding the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Lack Merit

17. The U.S. first written submission demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2 of the AD Agreement − the "pattern clause" − means a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. This is the interpretive conclusion that follows from a proper application of the customary rules of interpretation of public international law.

18. The U.S. first written submission further shows that the USDOC undertook a rigorous, holistic examination of each respondent's export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as among different purchasers, regions or time periods. In addition to explaining its analytical approach in the preliminary decision memorandum and the final issues and decision memorandum, the USDOC addressed arguments raised by interested parties concerning the USDOC's analysis. Those memoranda provide a reasoned and adequate explanation of the USDOC's determination and demonstrate that the USDOC's application of a differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

19. Finally, the U.S. first written submission explains that Canada's arguments regarding the meaning and application of the "pattern clause" lack merit. In its statements at the first substantive meeting and in its responses to the Panel's questions, Canada has done nothing to improve its deficient arguments against the USDOC's determination. Instead, Canada largely repeats arguments it made in its first written submission, and Canada continues to rely on findings in prior reports rather than on interpretive analyses pursuant to the customary rules of interpretation. Canada's arguments continue to lack merit.

1. The USDOC's Consideration of Both Low and High Prices Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

20. The U.S. first written submission demonstrates that the USDOC's consideration of both low and high prices is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

21. Canada asserts that "[t]he analysis must begin from the ordinary meaning of the term 'pattern.'" The United States agrees, and Canada's assertion is consistent with the customary rules of interpretation of public international law, as reflected in Article 31 of the Vienna Convention. The United States and Canada also are in agreement about the ordinary meaning of the term "pattern," which can be discerned from the dictionary definition of that term.

22. Canada, however, quoting the Appellate Body report in *US − Washing Machines*, contends that the use of the term "pattern" "means that the sales that are part of the pattern must demonstrate some similarities. One cannot have a 'pattern' consisting of fundamentally different prices." Canada's argument fails to account for the context in which the term "pattern" is used.

23. The relevant "pattern" within the meaning of the second sentence of Article 2.4.2 is "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" from one another. A set of lower-priced export sales to a particular purchaser, for example, is not "a

pattern of export prices which differ significantly". It would be a pattern of export prices which are similar to one another, and which happen also to be lower than export prices to other purchasers.

24. Canada further contends that its proposed interpretation is "consistent with the phrase 'differ significantly among different purchasers, regions or time periods,' because the sales in the pattern differ significantly from the sales to other purchasers, or other regions, or other time periods." The U.S. first written submission addresses this precise contention, but Canada has ignored the U.S. argument. A set of lower-priced export sales to a particular purchaser (or to a particular region or during a particular time period) is not "a pattern of export prices … among different purchasers, regions or time periods". It would be a pattern of export prices to a particular purchaser (or to a particular region or during a particular time period). Canada, like the Appellate Body in *US − Washing Machines*, in effect rewrites the "pattern clause" of the second sentence of Article 2.4.2 by changing the word "among" to "from". The "pattern clause" describes "a pattern of export prices which differ significantly among different purchasers, regions or time periods", not a pattern of export prices which differ significantly from different purchasers, regions or time periods. The pattern described by Canada and the Appellate Body simply is a different pattern than that which is described in the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

25. Finally, Canada argues that its proposed interpretation "is further reinforced when the Article is read in the light of the purpose of the second sentence of Article 2.4.2 and the Anti-Dumping Agreement as a whole." Canada's proposal that the Panel interpret the second sentence of Article 2.4.2 of the AD Agreement in light of the purpose of the second sentence itself is inconsistent with the customary rules of interpretation. The customary rules of interpretation do not contemplate reading the terms of a provision of a treaty in light of the purpose of the provision. Doing so would carry a high risk of engaging in circular reasoning. For example, one might incorrectly reason that the purpose of a provision is X, therefore the terms of the provision must mean X. But one cannot know what the purpose of a provision is prior to interpreting the provision. Applying the customary rules of interpretation, an adjudicator can discern the meaning (and the purpose) of a provision by interpreting the provision "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose." Canada's proposed interpretive approach is precisely backwards.

26. Canada asserts that "[t]he second sentence of Article 2.4.2 allows an investigating authority to focus on a more limited universe of export sales than under the normal comparison methodologies in order to address possible 'targeted dumping.'" Canada refers to paragraph 135 of the Appellate Body report in *US − Zeroing (Japan)* as support for the proposition that "'individual export transactions' refers to transactions that fall within the 'pattern'."

27. There is reason for the Panel to exercise caution when considering whether to draw guidance from paragraph 135 of the Appellate Body report in *US − Zeroing (Japan)*. That paragraph contains an error. The *US − Zeroing (Japan)* Appellate Body report misquotes the second sentence of Article 2.4.2 when it states that "[t]he emphasis in the second sentence of Article 2.4.2 is on a 'pattern', namely a 'pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods[]'". Where the Appellate Body report uses the term "differs," the second sentence of Article 2.4.2 uses the term "differ." The presence of the term "differs" would suggest that the "pattern" is what "differs" from something that is not the "pattern" − or the export prices in the "pattern" are what differs from export prices that are not in the "pattern". However, the terms of the second sentence of Article 2.4.2 provide that the relevant pattern is one that includes "export prices which differ significantly among different purchasers, regions or time periods." The brevity of the Appellate Body's discussion that follows the misquotation makes it difficult to determine whether the Appellate Body's reasoning follows from the misquotation and is thus itself also erroneous for that reason.

28. In *US − Washing Machines*, the Appellate Body addressed the U.S. argument. The United States does not agree that it is clear from paragraph 135 of the Appellate Body report in *US − Zeroing (Japan)* that the Appellate Body correctly understood the terms of the second sentence of Article 2.4.2 of the AD Agreement. Thus, the United States would caution the Panel against relying on the findings in that paragraph.

29. Concerning the object and purpose of the AD Agreement as a whole, the interpretation of the "pattern clause" proposed by the United States is consistent with and supports the object and purpose of the AD Agreement. Although the AD Agreement "does not contain a preamble or an

explicit indication of its object and purpose," guidance can be found in Article VI:1 of the GATT 1994, in which Members have recognized that injurious dumping "is to be condemned." Of course, the AD Agreement also provides detailed rules governing the application of antidumping measures, including procedural safeguards for interested parties and substantive rules on the calculation of a margin of dumping. The AD Agreement thus appears to be aimed at providing a balanced set of rights and obligations regarding the use of antidumping measures to remedy injurious dumping.

30. While the AD Agreement may be said to be concerned with injurious dumping and low-priced sales, there exists the possibility, as the parties and third parties appear to agree, that low-priced sales that would be evidence of dumping may be masked by higher-priced sales that would conceal the evidence of dumping. The Appellate Body, too, has observed that the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping" in "exceptional" situations. Interpreting the "pattern clause" as proposed by the United States – *i.e.,* as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as among different purchasers, regions, or time periods – serves the aim of the second sentence of Article 2.4.2, as described by the Appellate Body, and is consistent with the overall balance of rights and obligations struck in the AD Agreement. The interpretation proposed by the United States also is that which follows from a proper application of the customary rules of interpretation, as we have demonstrated.

2. The USDOC's Aggregation of Price Differences Among Different Purchasers, Regions, or Time Periods Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

31. The U.S. first written submission demonstrates that the USDOC's aggregation of price differences among different purchasers, regions, or time periods is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

32. Canada argues that the United States is asking the Panel "essentially to rewrite [the pattern clause] so that it allows amalgamation across purchasers, regions, and time periods." It is not the United States that asks the Panel to rewrite the "pattern clause". The United States has demonstrated that Canada's proposed interpretation would require rewriting the pattern clause, specifically by adding two more instances of the word "among" in places in which that term does not appear. The United States has demonstrated this by putting before the Panel an interpretive analysis of the text of the "pattern clause" undertaken in accordance with the customary rules of interpretation. Canada, for its part, continues to quote the findings in prior Appellate Body reports, but has steadfastly refused to set forth a fulsome interpretive analysis that engages seriously with the text of the second sentence of Article 2.4.2; nor has Canada responded to the arguments presented by the United States.

33. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among each category (*i.e.*, purchasers, regions, or time periods) cannot be considered together when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." To the contrary, the text of the "pattern clause," on its face, contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods. In particular, the "pattern clause" directs an investigating authority to consider whether there exists a pattern of export prices which differ significantly "<u>among different</u> purchasers, regions or time periods".

34. In response to a question from the Panel, Canada presents arguments based on the negotiating history of the AD Agreement. Canada's arguments are not well founded. The "pattern" described in the New Zealand III text, to which Canada points, is a different pattern than that described in the text to which Members ultimately agreed. Canada's proposed interpretation appears to be more similar to the pattern in the New Zealand III text, *i.e.*, a pattern "<u>to particular</u> customers", as opposed to the pattern described in the second sentence of Article 2.4.2 of the AD Agreement, *i.e.*, "a pattern of export prices which differ significantly <u>among different</u> customers, regions or time periods".

35. Canada also refers to the text of the Carlisle II draft. Once, again, Canada misunderstands the implication of the changes made from the draft text to the final text. The Carlisle II text was not

simply modified "to remove the repetitious and unnecessary 'or's", as Canada suggests. Also gone from the final text are the modifiers in "*specific* customers", "*different* regions", and "*certain* periods". While the Carlisle II text might have supported the interpretation Canada proposes − *i.e.*, that the relevant subset of transactions is limited to "*specific* customers", "*different* regions", or "*certain* periods" − that is not the text to which WTO Members ultimately agreed.

36. The evolution of the text of what eventually became the second sentence of Article 2.4.2 of the AD Agreement reveals changes that negotiators made to the negotiated text. The Panel should take the evolution of the text into account to confirm the meaning of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which, as the United States has shown, can be ascertained by a proper application of the customary rules of interpretation.

37. As the United States has demonstrated, the differential pricing analysis sought to identify "a pattern" for an exporter and product as a whole by considering all of that exporter's export prices to discern whether significant differences in the export prices were exhibited collectively among different purchasers, or different regions, or different time periods. This approach is not inconsistent with the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which directs investigating authorities to consider whether there exists a pattern of export prices which differ significantly "among different purchasers, regions or time periods".

C. Canada's Claims that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement Lack Merit

38. The U.S. first written submission demonstrates that an examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international law. This conclusion also accords with and is the logical extension of the Appellate Body's findings in previous disputes relating to the use of zeroing in connection with the comparison methodologies provided in the first sentence of Article 2.4.2 of the AD Agreement. And this is the conclusion reached by one Appellate Body member in *US − Washing Machines*.

39. In its opening statement at the first panel meeting and in response to certain of the Panel's questions, Canada addresses the U.S. arguments related to zeroing. The United States takes the opportunity in this submission to reply to Canada's new arguments. Where appropriate, rather than repeating arguments made in the U.S. first written submission, we respectfully refer the Panel to the relevant portions of the U.S. first written submission that address Canada's arguments.

1. The U.S. Interpretive Analysis of the Second Sentence of Article 2.4.2 of the AD Agreement Remains Unrebutted

40. The U.S. first written submission presents an interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement that applies the customary rules of interpretation of public international law. The U.S. first written submission also directly addresses findings related to the interpretation of the second sentence of Article 2.4.2 in prior Appellate Body reports and identifies a number of errors in those findings.

41. Canada has made no attempt to rebut the U.S. arguments. Instead, Canada simply reiterates its assertion that the findings in prior Appellate Body reports are correct, and does not engage at all with the U.S. arguments.

42. For example, Canada asserted in its opening statement at the first substantive meeting that "the findings in [the *US − Washing Machines* Appellate Body] report are consistent with both the text of the Agreement and more than 17 years of Appellate Body jurisprudence on zeroing." The U.S. first written submission demonstrates that the Appellate Body majority incorrectly interpreted the second sentence of Article 2.4.2 of the AD Agreement, and the Appellate Body majority's findings not only departed from the findings of one Appellate Body member in *US − Washing Machines*, but the majority's findings cannot be reconciled with findings related to zeroing in prior Appellate Body reports. Canada has made no attempt to respond to these U.S. arguments.

43. Furthermore, despite Canada's suggestion to the contrary, before *US − Washing Machines*, the Appellate Body had never previously made findings concerning the use of zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2. That is clear from reading prior Appellate Body reports discussing zeroing. Prior to *US − Washing Machines*, the Appellate Body had found zeroing impermissible in the context of the average-to-average and transaction-to-transaction comparison methodologies, which are to be used "normally" under the first sentence of Article 2.4.2. The Appellate Body also had found zeroing impermissible in the context of the U.S. application of an average-to-transaction comparison methodology in administrative reviews, in a situation where the conditions set forth in the second sentence of Article 2.4.2 were not established.

44. The Appellate Body had never found, however, that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 have been established. The Appellate Body had not even confronted that situation in any prior dispute.

45. Accordingly, the permissibility of zeroing under the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 was an issue of first impression for the Appellate Body in *US − Washing Machines*. At this point, only two Appellate Body members have ever found zeroing to be prohibited in connection with the alternative, average-to-transaction comparison methodology.

46. Canada asserts that "zeroing is inconsistent with the terms 'dumping' and 'margin of dumping'." However, that is not what the Appellate Body majority found in *US − Washing Machines*, nor has the Appellate Body ever found that the terms "dumping" and "margin of dumping" are themselves the source of the prohibition on zeroing. If that were the case, the Appellate Body could have made that clear long before *US − Washing Machines*, but the Appellate Body carefully avoided making any such finding.

47. The Appellate Body majority in *US − Washing Machines* does refer to the terms "dumping" and "margins of dumping". The U.S. first written submission explains why the findings in the *US − Washing Machines* Appellate Body report cannot be reconciled with findings in prior Appellate Body reports concerning the concept of "product as a whole". The Appellate Body majority in *US − Washing Machines* prescribed a new alternative methodology for addressing targeted dumping that explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." In the words of the Appellate Body majority: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', <u>without having to take into account</u> 'non-pattern transactions'." Thus, the Appellate Body majority's approach literally requires that a margin of dumping be determined <u>not</u> for the product as a whole, and in a manner that explicitly does <u>not</u> take into account all export transactions. The Appellate Body majority's finding cannot be reconciled with the reasoning in prior Appellate Body reports.

48. Canada's assertion concerning the terms "dumping" and "margin of dumping" is thus unavailing and fails to rebut the U.S. arguments.

49. Canada further asserts that "it was entirely consistent with their past reasoning when in *US − Washing Machines*, the Appellate Body found that transaction specific intermediate results in the W-T methodology are not margins of dumping." The United States has demonstrated that the findings in the *US − Washing Machines* Appellate Body report cannot be reconciled with findings in prior Appellate Body reports. Additionally, the United States does not argue here that "transaction specific intermediate results in the W-T methodology" are themselves "margins of dumping". Canada is making a straw man argument. The United States argues that the results of intermediate comparisons may be <u>evidence</u> of dumping and that such evidence of dumping can be masked by higher-priced sales that are above normal value. The U.S. view, in this regard, is consistent with the logic underlying the findings in the *US − Washing Machines* Appellate Body report.

50. In responses to questions from the Panel, Canada also refers to the terms "pattern" and "individual export transactions". Canada does not engage in any interpretive analysis of those terms, however. Canada merely asserts, for example, that "the text of the second sentence of Article 2.4.2 allows an investigating authority to focus on 'individual export transactions' when it is conducting

the comparison of export prices to a weighted average normal value." Canada makes no attempt to explain why this is so. Canada just reiterates its support for the findings in the panel and Appellate Body reports in *US − Washing Machines*.

51. Canada also asserts that "[b]y using the words 'pattern' and 'individual export transactions' the text explicitly provides for a focus on those transactions." The use of those terms does not make that explicit at all. Canada's assertion simply is not credible.

52. Finally, Canada asserts that "[t]he text of the second sentence prohibits zeroing." Again, Canada suggests that the source of such a prohibition is the terms "pattern" and "individual export transactions". The United States notes that elsewhere Canada suggests that zeroing is prohibited throughout the AD Agreement by the terms "dumping" and "margin of dumping". Canada has made no attempt to reconcile its conflicting assertions and explain precisely what in the AD Agreement establishes a prohibition − or multiple prohibitions − on the use of zeroing.

53. The U.S. first written submission explains why the interpretations of the terms "pattern" and "individual export transactions" in the *US − Washing Machines* Appellate Body report do not follow from a proper application of the customary rules of interpretation of public international law, and the U.S. first written submission also points to specific internal logical inconsistencies in the Appellate Body report. Canada has not responded to the U.S. arguments, which remain unrebutted.

54. In sum, Canada still has not presented the Panel with an interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement. Canada persists in simply summarizing or referencing various findings in prior Appellate Body reports without engaging or responding to the U.S. arguments that have identified errors in those reports. In approaching this dispute as it has, Canada has failed to help the Panel discharge its function under the DSU, which requires the Panel to make its own "objective assessment of the matter before it". Such an objective assessment involves an objective assessment of "the applicability of and conformity with the relevant covered agreements," and necessarily includes an interpretive analysis of any of the provisions of the relevant covered agreements "in accordance with customary rules of interpretation of public international law". The United States has demonstrated that such an analysis leads to the conclusion that zeroing is permissible − indeed, it is necessary − under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2.

2. The U.S. Arguments Concerning Mathematical Equivalence Remain Unrebutted

55. The U.S. first written submission demonstrates that if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then both methodologies, when applied to the same set of transactions, will always yield identical results, with respect to the total amount of all comparison results, the total amount of dumping, and the weighted average dumping margin, which would render the second sentence of Article 2.4.2 of the AD Agreement *inutile*, contrary to the principle of effectiveness. The U.S. first written submission establishes this using hypothetical examples as well as the actual data from the softwood lumber antidumping investigation.

56. Canada briefly addressed the U.S. argument during the first substantive panel meeting, suggesting that the United States "ignores" findings related to mathematical equivalence in prior Appellate Body reports. On the contrary, the U.S. first written submission discusses the Appellate Body's prior consideration of mathematical equivalence at length, demonstrating that those findings neither support nor compel the Panel's rejection of the mathematical equivalence argument in this dispute. Canada has ignored the U.S. arguments and made no attempt to rebut them.

57. Canada further asserts that the United States "also ignores the fact that the United States itself has acknowledged during the Appellate Body hearing for *US − Washing Machines* that calculating a margin of dumping focused only on pattern transactions would lead to a mathematically different result." The position of the United States during the Appellate Body hearing on this issue hardly seems relevant. The Appellate Body majority expressly made that very finding in the *US − Washing Machines* Appellate Body report. The U.S. first written submission directly addresses why that finding is not responsive to the mathematical equivalence argument.

58. To summarize, by finding that the second sentence of Article 2.4.2 requires the application of the average-to-transaction comparison methodology to a subset of transactions while also prohibiting the use of zeroing, the Appellate Body majority found, in effect, that the application of the average-to-average comparison methodology to that subset of transactions (without zeroing) is what actually is contemplated by the second sentence of Article 2.4.2. The Appellate Body majority effectively rewrote the second sentence of Article 2.4.2, changing it from allowing the application of the average-to-transaction comparison methodology under certain circumstances to allowing the application of the average-to-average comparison methodology to a subset of transactions under certain circumstances. The Appellate Body majority invented an entirely new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2, and which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time after. Ultimately, the Appellate Body majority read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, contrary to the principle of effectiveness. The Appellate Body majority did all of this in a rather awkward − but futile − attempt to avoid the problem of mathematical equivalence.

59. Canada has ignored the U.S. arguments and made no attempt to rebut them.

60. Finally, the Panel asked Canada whether it agrees "that if the W-T and the W-W methodologies are applied to the same set of export transactions, the dumping margin obtained under these two methodologies would be mathematically equivalent". Canada responded, "No." However, Canada obfuscates by qualifying its response, explaining that, "[w]hen the two methodologies are applied correctly, they yield mathematically different results", and "the W-W and the W-T methodologies, as described in the Anti-Dumping Agreement, properly interpreted, cannot be applied to the same set of export transactions." Thus, Canada has avoided answering the question that the Panel asked. Canada has not demonstrated that the United States is incorrect about the fact of mathematical equivalence.

61. Even the Appellate Body majority in *US − Washing Machines* acknowledged the reality of mathematical equivalence, referring to "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern". The panels in *US − Washing Machines* and *US − Anti-Dumping Methodologies (China)* also recognized the fact of mathematical equivalence. No WTO panel, nor the Appellate Body, has ever found that the United States is incorrect that the average-to-average comparison methodology (without zeroing) and the average-to-transaction comparison methodology (also without zeroing) yield the same mathematical result when applied to the same set of export transactions.

62. The United States continues to respectfully request that the Panel make a factual finding that, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies, when applied to the same set of transactions, will yield mathematically equivalent results in all cases, including in the challenged antidumping investigation. This fact remains unrebutted.

3. The U.S. Arguments Concerning the Negotiating History of the AD Agreement Remain Unrebutted

63. The U.S. first written submission demonstrates that the negotiating history of the AD Agreement confirms that zeroing is permissible when applying the asymmetrical, alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

64. In its opening statement at the first panel meeting, Canada argued that "negotiating history is a supplemental means of treaty interpretation that can only be relied upon where the meaning of the text is unclear." Canada is incorrect. As explained in the U.S. first written submission, Article 32 of the Vienna Convention has been recognized by the Appellate Body as reflecting a customary rule of interpretation of public international law. The United States has not suggested that the meaning of the second sentence of Article 2.4.2 is unclear. Rather, the meaning of that provision − specifically that zeroing is permissible when applying the comparison methodology set forth in that provision − can be confirmed through recourse to documents from the negotiating history of the AD Agreement.

65. Japan, in its responses to the Panel's questions, likewise argues that "[t]he negotiating history confirms that the second sentence of Article 2.4.2 was indeed aimed at addressing the issue of targeted dumping." Japan appears to agree with the principle under the customary rules of interpretation that negotiating history documents can be used by a treaty interpreter to confirm the meaning that results from the application of Article 31 of the Vienna Convention.

66. The U.S. first written submission discusses particular documents from the negotiating history of the second sentence of Article 2.4.2 of the AD Agreement as well as the consideration of those documents in the *US − Washing Machines* Appellate Body report. Canada has made no effort to respond to the substance of the U.S. arguments.

67. The U.S. argument − that the correct understanding of the negotiating history confirms the interpretation of the second sentence of Article 2.4.2 of the AD Agreement proposed by the United States − remains unrebutted.

4. Canada's Claim that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology is Inconsistent with Article 2.4 of the AD Agreement Lacks Merit

68. The U.S. first written submission demonstrates that Canada's claim that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4 of the AD Agreement lacks merit.

69. Canada has made no new arguments in support of its claim under Article 2.4 in its statements during the first substantive meeting, nor in its responses to the Panel's questions. Canada simply reiterated its support for the findings in prior Appellate Body reports without addressing the U.S. arguments that those findings are erroneous and contain logical inconsistencies.

70. For example, Canada asserts that, "in the context of both W-W and T-T, the Appellate Body found that zeroing altered certain transactions or treated them as less than their actual value. Relying on these prior interpretations, the Appellate Body concluded that the same reasoning applies to the W-T methodology", and "[t]he Appellate Body was also relying on its prior interpretations when it found that zeroing inflates the magnitude of dumping and makes positive determinations more likely when sales above normal value exceed those below normal value."

71. The United States has explained that the "exclusion of 'non-pattern transactions' from the establishment of dumping and margins of dumping" is, in reality and effect, essentially the same as zeroing. Following, for argument's sake, the logic of the Appellate Body majority in *US − Washing Machines*, the "exclusion of 'non-pattern transactions'" "does *not* take fully into account the prices of *all* comparable export transactions." There has never been any suggestion that non-pattern transactions are somehow not comparable to corresponding normal value transactions. Thus, applying the methodology and logic of the Appellate Body majority would mean that not all comparable export transactions would be taken into account. Indeed, the Appellate Body majority itself described the methodology it prescribed in *US − Washing Machines* in the following terms: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', without having to take into account 'non-pattern transactions'."

72. Additionally, the so-called non-pattern export transactions that are to be excluded under the methodology prescribed by the Appellate Body majority would be, following the majority's logic, higher-priced export transactions. Thus, the "exclusion of 'non-pattern transactions'" would mean that the margin of dumping determined under the majority's methodology would be higher, and a positive determination of dumping would be more likely in circumstances where the "non-pattern" export prices are above normal value and the "pattern transactions" are below normal value.

73. The Appellate Body majority treated nearly identical factual situations differently, deeming one (zeroing) to be unfair while deeming another (the Appellate Body majority's own prescription for addressing targeted dumping) to be fair. There is no textual or logical support for the Appellate Body majority's finding.

74. Canada has not responded to the U.S. arguments, and they remain unrebutted.

75. Another serious concern highlighted by Canada's statements is that, as Canada notes, the Appellate Body majority was "relying on [the Appellate Body's] prior interpretations" when it made its findings in *US − Washing Machines*, rather than applying the customary rules of interpretation and then taking into account findings in prior adopted reports. The danger in undertaking an interpretive analysis by relying on prior interpretations − aside from that being contrary to the customary rules of interpretation − is that doing so leaves the adjudicator further and further removed from the treaty text being interpreted, making it more likely that an erroneous interpretation will result.

76. Finally, Canada suggests that, "[i]n the present dispute, it could not be clearer that the Appellate Body was correct", asserting that "[a] company that on average sold for a higher price in the United States finds itself subject to an anti-dumping order because of zeroing." That could just as well be true under the approach prescribed by the Appellate Body majority in *US − Washing Machines*, depending on the data. This is no indication that the approach taken by the USDOC was somehow not "fair" within the meaning of Article 2.4 of the AD Agreement, and it tells one nothing about the proper interpretation of the AD Agreement.

77. As the United States has explained, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping" in "exceptional" situations. It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased, as one Appellate Body member agreed in *US − Washing Machines*.

78. For these reasons, the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in the softwood lumber antidumping investigation is not inconsistent with Article 2.4 of the AD Agreement.

D. Canada's Consequential Claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 Lack Merit

79. The U.S. first written submission demonstrates that Canada offered no support for its claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 beyond suggesting that breaches of those provisions follow as a consequence of breaches of Articles 2.4 and 2.4.2 of the AD Agreement. As the United States has established, Canada's claims that the United States has acted inconsistently with Articles 2.4 and 2.4.2 of the AD Agreement lack merit, and thus Canada's claims under under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are equally without merit. Canada made no further reference to its consequential claims, neither in its opening statement at the first substantive meeting nor in response to the Panel's questions.

IV. CONCLUSION

80. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject Canada's claims.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

[1] Brazil submitted the text of the oral statement as its integrated executive summary.
[2] China submitted the text of the oral statement as its integrated executive summary.

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

Mr. Chair, distinguished Members of the Panel,

1. Brazil appreciates the opportunity to appear before you as a third party in the current proceedings. This oral statement will focus on two issues of systemic importance: first, Brazil would like to express its views on the relevance of prior Appellate Body reports in the settlement of subsequent disputes involving similar matters; and second, Brazil would like to elaborate on the proper interpretation of Article 2.4.2 of the Anti-Dumping Agreement.

2. In this dispute, Canada claims that the United States has acted inconsistently with the Anti-Dumping Agreement in two manners. First, the United States Department of Commerce (USDOC) has resorted to a weighted-average-to-transaction (W-T) comparison methodology without fulfilling the requirements provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Second, in calculating the margin of dumping, the United States Department of Commerce (USDOC) has also inflated the results by applying "zeroing". According to Canada, both conducts by the United States have already been found to be inconsistent with WTO law in previous disputes, as confirmed by the Appellate Body Report in *US − Washing Machines*.

3. In response, the United States argues that the panel must make its own assessment of the matter, regardless of what was decided in *US − Washing Machines*, because the text of Article 3.2 of the DSU does not expressly attribute any interpretative value to previous reports of the Appellate Body. In addition, the United States argues that, if the panel were to interpret Article 2.4.2 of the Anti-Dumping Agreement according to the customary rules of interpretation of public international law, it would find that both the choice by the United States Department of Commerce (USDOC) to apply the weighted-average-to-transaction (W-T) methodology *and* the introduction of "zeroing" in the calculation were consistent with the covered agreements.

Relevance of Prior Appellate Body reports

4. Brazil would first like to address the United States' argument that the Appellate Body findings in *US − Washing Machines* should not influence the resolution of this dispute, because, according to the DSU, previous reports adopted by the DSB are not binding for future panels. Brought to its limits, this argument appears to be quite a broad refutation of the interpretative value of prior panel and Appellate Body reports in the WTO dispute settlement mechanism as a whole.

5. In order to support its argument, the United States refers to a portion of Article 3.2 of the DSU according to which, in clarifying the meaning of the covered agreements, panels are required to apply the "customary rules of interpretation of public international law."[1] The underlying implication seems to be that, because precedents of the Appellate Body are not expressly listed as a criterion for legal interpretation in the DSU, panels are free to disregard their content when making their rulings on similar matters. It is noteworthy that, immediately after making this argument, the United States seeks to validate its own interpretation of Article 3.2 by referring to an Appellate Body finding in *US- Gasoline*.[2]

6. In *US − Oil Country Tubular Goods Sunset Review*, the Appellate Body noted that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[3] It seems to Brazil, however, that the expectation that panels will not disregard previous case law is not exclusive to the Appellate Body; it is, rather, shared by the Membership and supported by both law and practice.

7. From a legal perspective, Article 3.2 of the DSU, refers to the entire dispute settlement system, which includes the panel and appellate stages, as being a central element in providing security and predictability to the multilateral trading system. Therefore, one could conclude that,

[1] United States' First Written Submission, para. 23.
[2] Ibid.
[3] *US − Oil Country Tubular Goods Sunset Reviews*, Appellate Body Report, para. 188.

according to Article 3.2, both panels and the Appellate Body play a shared role in providing security and predictability to the multilateral trading system.

8. Brazil considers that a system in which different panels are free to issue conflicting versions of what they consider to be the correct interpretation of a single provision, especially when the issues are the same, would offer *less* security and predictability than a system in which adjudicators strive to interpret WTO law in a consistent manner.

9. From a practical perspective, it is an irrefutable fact that Members resort to prior reports of the Appellate Body in their submissions quite frequently, and in doing so reveal a very clear expectation that those precedents will influence panels' decisions. A glance at the "tables of cases" that appear on the first pages of all Member's submissions confirms this to be the case. This practice does not indicate that Members consider adopted Appellate Body reports to be authoritative interpretations or amendments to the covered agreements. They simply believe that the application of the customary rules of interpretation of public international law to the agreed texts should yield consistent, rather than erratic, results.

10. Moreover, it may be useful to recall that, when interpreting the covered agreements, the Appellate Body is held by the exact same standards as panels. This means that the Appellate Body is also required to apply "customary rules of interpretation of public international law" and, as a result, its reports offer guidance on precisely the same analysis that panels are expected to conduct.

Interpretation of Article 2.4.2 of the Anti-Dumping Agreement

11. Brazil will now comment briefly on the proper interpretation of Article 2.4.2 of the Anti-Dumping Agreement. Brazil notes that the parties seem to be in agreement with the fact that the two symmetrical methods - weighted-average to weighted-average and transaction to transaction (W-W and T-T) - provided for in the first sentence of Article 2.4.2 are normally to be used first in order to calculate the margin of dumping. Thus, the third method - weighted-average-to-transaction (W-T) - is clearly an exception, to be used exclusively as a means to counteract the practice of "targeted dumping" and only in the presence of certain requirements.

12. In this context, the panel should first analyze whether the requirements for the recourse to the weighted-average-to-transaction (W-T) methodology were present in the investigation at hand. To this end, the panel should verify whether United States Department of Commerce (USDOC) was able to detect a "pattern of export prices which differ significantly among different purchasers, regions or time periods" and also whether the investigating authority was able to explain why the symmetrical comparison methodologies could not appropriately take into account such identified "pattern".

13. If the panel is satisfied that the United States Department of Commerce (USDOC) resorted legitimately to the weighted-average-to-transaction (W-T) comparison methodology, it must then establish whether the margins of dumping were properly calculated. In this second stage of the analysis, it is important for the panel to determine whether the exceptional methodology was applied exclusively to the sales that presented the "pattern" of "targeted dumping" and also whether the actual calculation observed mathematical standards consistent with the Anti-Dumping Agreement.

14. Mr. Chair, distinguished members of the Panel, this concludes Brazil's statement. Thank you for your attention.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. Mr. Chairman, Members of the Panel. China welcomes this opportunity to present its views in this dispute.

2. Today, we will focus on two critical issues in relation to Canada's claims on the USDOC's use of differential pricing methodology ("DPM"): (i) the identification of a pattern; and (ii) the permissibility of zeroing, under the second sentence of Article 2.4.2 of the Anti-dumping Agreement ("ADA").

3. As the Panel is aware, this case is not the first one regarding how WTO disciplines shall apply to the use of the "weighted average-to-transaction" ("W-T") comparison methodology in anti-dumping investigations. In this regard, China believes that the previous panel and Appellate Body reports adopted by the DSB have provided clear guidance for addressing issues raised in this dispute.

4. First, with respect to the proper identification of a pattern in the second sentence of ADA Article 2.4.2, China notes that this is a key condition to be satisfied before resorting to the asymmetrical W-T comparison methodology to "determine the existence of margins of dumping". We believe that the exceptional nature of the W-T methodology, as consistently held by the Appellate Body[1] and agreed by the parties to this dispute[2], warrants a strict interpretation of the pattern requirement.

5. Pursuant to ADA Article 2.4.2, when employing the W-T methodology, an investigating authority shall identify a "pattern" of export prices that "differ significantly *among* different purchasers, regions *or* time periods" (emphasis added). The Appellate Body found that while the conjunction "or" may be exclusive or inclusive, the word "among" requires that each category be considered on its own, in the sense that a pattern of prices among different purchasers must be found within purchasers, as between particular purchasers and other purchasers (with the same applying to regions and time periods, respectively).[3] The combined use of the words "or" and "among" in that phrase means that different categories cannot be considered cumulatively to find one single pattern.[4]

6. However, according to Canada[5], in applying the DPM, the USDOC has done the opposite by aggregating the results of comparisons of export prices to purchasers, regions *and* time periods to identify the pattern. In our view, such a practice cannot be compatible with the plain language of the second sentence of ADA Article 2.4.2.

7. Second, zeroing is not permissible even when the strict criteria of W-T methodology have been met. WTO panels and the Appellate Body have consistently held that the use of zeroing is inconsistent with ADA under any of the three comparison methodologies, i.e. "weighted average-to-weighted average" ("W-W"), "transaction-to-transaction" ("T-T") or W-T methodology, as contemplated in ADA Article 2.4.2.[6]

8. In the recent *US – Anti-Dumping Methodologies (China)* and *US – Washing Machines (Korea)* cases, the panel and Appellate Body reaffirmed the inconsistency of the use of zeroing in the W-T

[1] Appellate Body Report, US – Washing Machines, para. 5.18; see also Appellate Body Report, US – Softwood Lumber V (Article 21.5 Canada), para. 55; Appellate Body Report, US – Stainless Steel (Mexico), para. 48.

[2] See e.g. Canada's first written submission to the Panel, para. 37; United States' first written submission to the Panel, para. 115.

[3] Appellate Body Report, *US – Washing Machines*, para. 5.31.

[4] Ibid. para. 5.33.

[5] Canada's first written submission to the Panel, paras. 40-42.

[6] See, e.g., Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 123; *US – Continued Zeroing*, paras. 314-316; *US –Stainless Steel (Mexico)*, paras. 133-134; *US – Zeroing (EC)*, paras. 263(b); *US – Zeroing (Japan)*, paras. 121-129 and 190; *US – Washing Machines*, paras. 6.9-6.11.

methodology scenario.[7] In China's view, any contrary position would be inconsistent with the foundational "exporter-specific" and "product-related" conception of dumping.[8]

9. The mathematical equivalence argument of the United States has also been carefully considered and consistently rejected by the Appellate Body in various disputes.[9] Mathematical equivalence only holds under a specific set of assumptions. If the assumptions are varied, W-T and W-W will generally yield different results.[10]

10. The US mathematical equivalence argument also fails to grapple with the relevance of the T-T methodology. T-T methodology will generally yield results that are different from both W-W and W-T methodology, even though zeroing is not permissible under the T-T methodology.[11]

11. In conclusion, DPM has been ruled "as such" inconsistent with the WTO covered agreements.[12] China sees no "cogent reason" for the Panel to depart from the previous panel and Appellate Body reports adopted by the DSB.

12. Mr. Chairman, Members of the Panel, thank you for your attention. China also wishes to thank the Secretariat team for their hard work. We look forward to your questions.

[7] Panel Report, *US − Anti-Dumping Methodologies (China)*, paras. 7.201-7.209; Appellate Body Report, *US − Washing Machines*, paras. 6.9-6.11.

[8] See, e.g., Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 94.

[9] See e.g., Appellate Body Reports, *US − Softwood Lumber V (Article 21.5 − Canada),* paras. 97-100; *US − Zeroing (Japan),* paras. 135-136; *US − Stainless Steel (Mexico),* paras. 126-127; *and US − Continued Zeroing,* para. 298.

[10] Appellate Body Report, *US − Washing Machines*, paras. 5.125-5.128.

[11] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 Canada)*, para. 88.

[12] Appellate Body Report, *US − Washing Machines*, paras. 6.3.b, 6.4.c, 6.9.a, 6.10.a, and 6.11.a.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 13 September and its replies to the Panel's questions to Third Parties of 27 September 2018. The European Union considers that the present case raises important systemic questions, in particular on the role of prior Appellate Body Reports and on the interpretation and application of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). The European Union's submissions focussed on those systemic questions, without taking a definitive position on the facts of the case.

I. The role of prior Appellate Body Reports

2. Concerning the United States' argument contesting the relevance of the Appellate Body's findings in *US – Washing Machines*, it is standing case-law that adopted Appellate Body Reports create legitimate expectations amongst Members as to the interpretations of WTO law contained therein. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[1]

3. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows exactly that the entire WTO Membership recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. Consistency and stability ensure legal certainty. In turn, legal certainty provides an indispensable condition for international trade to flow smoothly, and must therefore not be jeopardized.

4. An important nuance must be made between legal interpretations and the application of the law to the facts. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case. Interpretations of the law by the Appellate Body should thus not change depending on the case at hand. The possibility of authoritative interpretations under Article IX:2 of the WTO Agreement does not diminish the value of interpretations by the Appellate Body.

II. Article 2.4.2 of the Anti-Dumping Agreement

5. The Appellate Body has clarified that the asymmetrical W-T comparison methodology in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement may be used if the following two conditions are met: first, "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and, second, "an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.[2]

6. The Appellate Body explained that the "pattern" must be understood as a regular and intelligible form or sequence of export prices which differ significantly.[3] Hence, a *pattern* must be identified as consisting of prices that differ *significantly* among different purchasers, regions or time periods. There must be regularity to the sequence of "export prices which differ significantly" and this sequence must be capable of being understood. The Appellate Body stressed that the word "intelligible" excludes the possibility of a pattern merely reflecting random price variation.

7. In reply to a question from the Panel, the European Union considers that the differences in *prices* have to be significant, either in quantitative or qualitative sense. Hence, the starting point is

[1] Appellate Body Report, *US – Stainless Steel (Mexico),* paras. 158-161.

[2] Appellate Body Report, *US – Washing Machines*, para. 5.16, referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 86; and *US – Zeroing (Japan)*, para. 131.

[3] Appellate Body Report, *US – Washing Machines,* para. 5.27.

the comparison of the prices of export transactions, not a comparison in export volumes. The European Union does not exclude that export volumes could be relevant to assess the significance of a price difference, but that would depend on specific facts of the case.

8. The Appellate Body has explained that in order to ascertain whether there is a "pattern" an investigating authority may, starting from the set of *all* export transactions attributable to an investigated producer/exporter, select for further consideration a *sub-set*, which must consist of *all* that producer's/exporter's export transactions to a particular *purchaser* (as opposed to other purchasers) or to a particular *region* (as opposed to the remainder of the territory of the importing Member) or during a particular *time period* (as opposed to the remainder of the investigation period).[4] The so-selected prices of transactions within the sub-set of transactions (grouped according to purchaser, region, or time period) are then compared with the prices of all transactions.

9. A pattern must pertain to all the export transactions to *one particular category* (a purchaser, region or time period). Related purchasers and adjacent regions or time periods are considered as a single category. For the purposes of finding a pattern, it is not possible to *combine* export transactions from different purchasers, different regions, or different time periods. Nor is it possible, for the purposes of finding a pattern, to *combine* export transactions from one of the three types of possible category with export transactions from *another* one of the three types of category.[5]

10. The Appellate Body has also clarified that for there to be a pattern, the export prices in the sub-set (considered as a whole) must be *lower* than the export prices outside the sub-set (considered as a whole); a sub-set of *higher* export prices is not a relevant pattern for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.[6]

11. The W-T comparison methodology may only be applied to the export transactions constituting the relevant pattern, and not to the export transactions that fall outside the sub-set constituting the pattern.[7] Therefore, if the investigating authority has decided to rely on the W-T comparison methodology under the conditions of Article 2.4.2 of the AD Agreement to address targeted dumping, it cannot include the transactions outside the pattern in the numerator for calculating the dumping margin.

12. Finally, the Appellate Body has also rightly found that in applying the W-T comparison methodology to the transactions in the sub-set constituting the pattern zeroing is not permitted. The fact that in *US − Washing Machines*, one member has provided a separate opinion in this regard does not diminish the value of the adopted Appellate Body Report or of the legal interpretation contained therein.

13. Thus, all export transactions in the sub-set must be fully taken into account irrespective of whether they are above or below normal value. When combining intermediate results of comparisons between a weighted average normal value and individual export transactions, export transactions above normal value must be treated as having been made at the price at which they were actually made, and the results of such intermediate comparisons must not be set to zero before determining the dumped amount for the targeted sub-set as a whole.[8]

14. As set out above, if the conditions of Article 2.4.2 are met, the investigating authority is permitted to establish a dumping amount for the transactions that are part of the pattern and thus to disregard the transactions that are not part of the pattern. There is nothing in the text of Article 2.4.2 that would permit an investigating authority to do more, and disregard further certain transactions that are part of the sub-set (namely those for which the export price is above the average normal value). Thus, apart from the specificities provided for in Article 2.4.2, the normal rules for calculating dumping margins apply, and with them, the general prohibition of zeroing as it has now been established in decades of prior case-law, for all types of dumping and all types of determinations.

[4] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[5] Appellate Body Report, *US − Washing Machines*, paras. 5.30-5.34.
[6] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[7] Appellate Body Report, *US − Washing Machines*, paras. 5.50-5.55.
[8] Appellate Body Report, *US − Washing Machines*, paras. 5.151-5.160.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. The USDOC's Methodology Does Not Meet the "Pattern" Requirement

1. The second sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*" or the "*Agreement*") mandates that, before investigating authorities may apply the "exceptional" W-T comparison methodology, they must identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods", rather than to find merely "export prices which differ significantly".[1] The "differential pricing methodology" ("DPM") used by the United States Department of Commerce ("USDOC") is inconsistent with this "pattern" requirement in the following three respects.

A. A "Pattern" Must Help Unmask Targeted Dumping

2. First, the DPM examines both lower and higher export prices to establish *the presence of export prices which differ significantly.*[2] This approach is inconsistent with the "pattern" requirement.

3. As the Appellate Body has explained, and the United States appears to agree[3], a "pattern" means "[a] regular and intelligible form or sequence discernible in certain actions or situations".[4] A "regular and intelligible form or sequence" must be capable of being understood, which means that random price variations do not constitute a "pattern".[5] However, the USDOC's evaluation of both lower and higher export prices by a methodology that relies exclusively on numerical benchmarks[6] will only reveal such random variations − that is, the mere presence, or absence, of export prices which differ significantly − rather than a *pattern* of export prices which differ significantly.[7]

4. Also, because the function of the second sentence of Article 2.4.2 is to identify and address "targeted dumping", the relevant "pattern" can only comprise prices that are significantly *lower* than other export prices among different purchasers, regions or time periods.[8]

B. A "Pattern" Must Consist of Prices that "Differ Significantly", Both Quantitatively and Qualitatively

5. Second, by employing a purely quantitative threshold that is applied to all cases for the determination of targeted dumping, the DPM fails to satisfy the precondition set forth in the second sentence of Article 2.4.2 that the relevant pattern must be one of export prices that "differ significantly." The Appellate Body has found that the term "significantly" "has both quantitative and qualitative dimensions."[9] Even limiting the definition of the term "significantly" to mean "to a significant extent"[10], as the United States does, the assessment of whether significant price differences are present must include consideration of certain qualitative factors, such as the "circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand."[11]

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[1] United States' first written submission, para. 68.
[2] United States' first written submission, paras. 68, 74.
[3] United States' first written submission, paras. 49, 52; Appellate Body Report, *US − Washing Machines*, fn. 108.
[4] Appellate Body Report, *US − Washing Machines*, para. 5.25.
[5] Appellate Body Report, *US − Washing Machines*, para. 5.25.
[6] United States' first written submission, para. 77.
[7] United States' first written submission, paras. 68, 74.
[8] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[9] Appellate Body Report, *US − Washing Machines*, paras. 5.63, 5.66.
[10] United States' first written submission, para. 49.
[11] Appellate Body Report, *US − Washing Machines*, para. 5.66. *See also* Appellate Body Report, *US − Washing Machines*, para. 5.63.

C. A "Pattern" Cannot Transcend Categories

6. Third, in applying the DPM, the USDOC aggregates all the price differences among different purchasers, regions, or time periods. This aggregation is inconsistent with the concept of a "pattern" as used in the second sentence of Article 2.4.2. The terms "among" and "or" in the second sentence of Article 2.4.2, along with the definition of the term "pattern", call for the identification of a pattern of export prices which differ significantly *among* different purchasers, or *among* different regions, or *among* different time periods.[12] Japan agrees with the Appellate Body's reasoning that "[a] single 'pattern' comprising prices that are found to be significantly different from other prices *across* different categories would effectively be composed of prices that do not form a regular and intelligible sequence."[13]

7. The United States contends that the DPM does not aggregate random and unrelated price variations, because a respondent's pricing behavior cannot be described as "random".[14] But this logic would lead to the incorrect conclusion that any jumble of export sales by a respondent comprises a "pattern". The United States fails to explain how a respondent's pricing behavior towards a purchaser A is related to its pricing behavior towards region B, or time period C as a general matter. Without demonstrating a link between these pricing behaviors, the existence of a *pattern* or *regular sequence* of export prices cannot be found. This, in turn, means that the precondition for the aggregation of all the alleged price differences has not been met.

II. The USDOC's methodology does not meet the "explanation" requirement

8. The USDOC also fails to meet another requirement under the second sentence of Article 2.4.2 – namely, to provide an "explanation" as to "why such differences cannot be taken into account appropriately by the use of" the W-W or T-T comparison methodologies. "[S]uch *differences*" refer back to the phrase, "a pattern of export prices which ***differ*** significantly".[15] In the DPM, the USDOC just confirms that "there is a meaningful difference between the weighted-average dumping margin calculated using the [W-W] method and that calculated using [...] the [W-]T method."[16] This form of "explanation" merely identifies quantitative differences in the outcomes obtained through the application of the different comparison methodologies, and fails to explain why the pattern of prices that differ significantly cannot be taken into account appropriately by the W-W or T-T comparison methodology.

9. Moreover, due to the USDOC's use of zeroing with respect to the W-T comparison methodology but not to the W-W (or T-T) comparison methodology, the quantitative impact of the W-T comparison is inflated, and the existence of a "meaningful difference" between the margins calculated using the different comparison methodologies is all but guaranteed. In other words, that difference is exaggerated through the USDOC's W-T methodology that is WTO-inconsistent. An explanation based on such a flawed foundation cannot suffice.

III. The USDOC improperly applies the W-T methodology to the entire universe of export sales

10. In certain instances the USDOC applies the W-T methodology to *all* export transactions, including both pattern and non-pattern sales. However, the application of the W-T comparison methodology to non-pattern sales is inconsistent with the second sentence of Article 2.4.2.

11. Specifically, the universe of export transactions that comprise a "pattern" under the second sentence of Article 2.4.2 "would necessarily be more limited" than the "universe" of all export transactions under the first sentence.[17] Further, in light of the function of the second sentence to address "targeted dumping", Japan agrees with the Appellate Body that "the W-T comparison methodology should only be applied to those transactions that justify its use, namely, those transactions forming the relevant 'pattern'."[18]

[12] Appellate Body Report, *US – Washing Machines*, para. 5.33.
[13] Appellate Body Report, *US – Washing Machines*, para. 5.32 (emphasis original).
[14] United States' first written submission, para. 78.
[15] Emphasis added.
[16] *See* Lumber Final I&D Memo, p. 56 (Exhibit CAN-01).
[17] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[18] Appellate Body Report, *US – Washing Machines*, para. 5.55.

IV. Zeroing Is Impermissible Under The Second Sentence of Article 2.4.2 of the *Agreement*

12. The United States further violates the second sentence of Article 2.4.2 of the *Agreement* by applying the "zeroing" procedures when calculating a margin of dumping pursuant to the W-T comparison methodology.

13. It is well established through consistent WTO jurisprudence that zeroing is impermissible in the calculation of dumping margins in any context or proceeding in which such margins are calculated. The concepts of "dumping" and "margins of dumping" are the same throughout the *Agreement*, which establishes the basic principle that margins of dumping are established for the product under investigation "as a whole".[19] On this basis, the Appellate Body concluded that "[z]eroing the negative intermediate comparison results within the pattern" is not "consistent with the establishment of dumping and margins of dumping as pertaining to the 'universe of export transactions' identified under the second sentence of Article 2.4.2."[20]

14. The United States attempts to justify the USDOC's use of zeroing by raising the "mathematical equivalence" argument.[21] However, this argument has already been thoroughly considered and repeatedly rejected by the WTO[22], and the United States provides no reason for the Panel to reconsider it.

15. The United States nonetheless insists that there is no textual basis to exclude "non-pattern transactions" from the establishment of dumping and margins of dumping in W-T comparisons, which is "essentially the same as zeroing."[23] However, the differences between the exceptional W-T comparison methodology under the second sentence of Article 2.4.2 and the two methodologies under the first sentence result from the presence of targeted dumping, which is to be "unmasked" according to the purpose of the second sentence of Article 2.4.2.[24] "Such differences" in the pricing patterns will therefore justify the use of the exceptional W-T methodology when they cannot be appropriately taken into account by the methodologies under the first sentence (and as properly explained by the investigating authority).

16. On the other hand, zeroing the negative intermediate comparison results − whether within or outside the pattern − is not necessary to "unmask" "targeted dumping" among the "pattern transactions".[25] To the contrary, zeroing merely leads to the defect of unreasonably inflating the dumping margin, or creating a margin where one otherwise would not exist, which is inconsistent with the obligations established by Articles 2.4 and 2.4.2 of the *Agreement*.

17. The United States also tries to justify zeroing by referring to the comments on "asymmetrical" nature of the comparison methodology authorized by the second sentence of Article 2.4.2 in some decisions by the Appellate Body[26] and the negotiating history of the *Agreement.*[27] However, these comments merely pointed out that the W-T comparison pursuant to the second sentence consisted of the weighted average price of all domestic sales, on the one hand, and individual export transaction prices, on the other hand, which were not "symmetric".

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[19] Appellate Body Report, *US − Washing Machines*, paras. 5.90-5.91, 5.145.
[20] Appellate Body Report, *US − Washing Machines*, para. 5.160.
[21] United States' first written submission, paras. 122-160.
[22] Appellate Body Report, *US − Washing Machines*, para. 5.125.
[23] United States' first written submission, para. 196.
[24] Appellate Body Report, *US − Zeroing (Japan)*, para. 135. *See also* Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 127.
[25] Appellate Body Report, *US − Washing Machines*, paras. 5.156, 5.160.
[26] United States' first written submission, para. 179.
[27] United States' first written submission, paras. 183-186.

WORLD TRADE ORGANIZATION

WT/DS534/R/Add.1

9 April 2019

(19-2216)

UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA (DS 534)

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS534/R.

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LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

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ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 20 June 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) The following procedures shall apply if the responding party asks for a ruling that certain measures or claims are not properly before the Panel:

If the United States considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or Canada's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. the United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Canada shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) The procedure set out in paragraph (1) is without prejudice to any of the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Canada should be numbered CAN-1, CAN-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered CAN-5, the first exhibit in connection with the next submission thus would be numbered CAN-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

    a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

    a. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 14 and 20 below.

Substantive meetings

10. The parties shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

    (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

    a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

    b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

    c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

    d. The Panel may subsequently pose questions to the parties.

    e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first. Before each

party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day prior to the meeting. In that case, Canada shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

Third party session

16. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

20. The third party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third party session

shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

22. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement, and where possible, its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission, its second oral statement, and where possible, its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.

23. Each integrated executive summary shall be limited to no more than 15 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

Interim review

26. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

27. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

28. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

29. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all submissions, exhibits, oral statements, responses to questions, comments on responses, comments on comments, comments on the descriptive part of the Panel report, and comments on the Interim Report of the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.

b. In case any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall send these documents by e-mail to DSRegistry@wto.org, WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding, the other party, and where appropriate, the third party by 6.00 pm. The uploading to the DDSR shall be made on the following working day.

c. Any request for technical assistance regarding the use of DDSR shall be addressed to DSRegistry@wto.org and ddsrsupport@wto.org (assistance available only during WTO working hours).

d. For all documents that were filed via DDSR, each party and third party shall file one paper copy of such documents with the DS Registry the working day following the electronic filing.

e. The Panel shall provide all documents and communications to the parties and the third parties via e-mail. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version shall constitute the official version for the purposes of the record of the dispute.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 20 June 2018

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the US Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the antidumping proceeding at issue in this dispute, entitled Softwood Lumber from Canada (A-122-857). In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation has agreed in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Canada and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information. Third parties' access to BCI shall be subject to the terms of these procedures.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit CAN-1 (BCI)).

7. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall

clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

9. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES ON OPEN MEETINGS

Adopted on 20 June 2018

1. The Panel will start substantive meetings with the parties (dates of substantive meetings provided for in its Timetable) with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").

2. At such sessions, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in the Working Procedures adopted by the Panel. The Panel may pose any questions or make any comments during such session. Such questions shall not include confidential information.

3. To the extent that the Panel or either of the parties considers it necessary, the Panel shall proceed to a closed session ("confidential session"), during which the parties will be allowed to make additional statements or comments and pose questions that involve confidential information. The Panel may also pose questions during the confidential session.

4. The Panel will start the third party session of its first substantive meeting with the parties by opening a portion of this session to the public ("non-confidential third party session"). At this portion of the third party session, no confidential information shall be referred to or disclosed. Each third party wishing to make its statement in the non-confidential third party session shall do so, but shall ensure that its statement does not include confidential information. After such third parties have made their statements, questions or comments from the parties or the Panel may be presented concerning these statements, as foreseen in the Working Procedures adopted by the Panel. Such questions or comments shall not include confidential information. To the extent that the Panel or any of the other third parties considers it necessary, the Panel shall then conclude this portion of the third party session and proceed to a third party closed session ("confidential third party session") during which other third parties shall make their statements.

5. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:

- Members of the Panel;
- Members of the delegations of the parties;
- Members of the delegations of the third parties throughout the third party session;
- WTO Secretariat staff assisting the Panel.

6. As set out below in paragraph 7, a live closed-circuit television broadcast of the Panel meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.

7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewings. No later than four weeks before the substantive meetings, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The date(s) of the deadline for public registration will be informed to the parties as soon as it has been established.

ANNEX A-4

TIMETABLE FOR THE PANEL PROCEEDINGS[1]

Adopted on 20 June 2018
Revised on 7 December 2018

Panel established on 9 April 2018
Panel composed on 22 May 2018

Description	Dates[2]
a. Receipt of first written submissions	
i. Canada	22 June 2018
ii. United States	24 July 2018
b. Receipt of third parties' written submissions	31 July 2018
c. First substantive meeting with the parties	12, 13 September 2018
Third party session	13 September 2018
d. Receipt of responses to questions posed by the Panel	27 September 2018
e. Receipt of integrated executive summaries of third parties Receipt of the first integrated executive summaries of the parties	4 October 2018
f. Receipt of written rebuttals of the parties	17 October 2018
g. Second substantive meeting with the parties	4 December 2018 (and 5 December if necessary)
h. Receipt of responses to questions posed by the Panel	19 December 2018
i. Receipt of comments on responses to questions posed by the Panel	10 January 2019
j. Receipt of second integrated executive summaries of parties	17 January 2019
k. Issuance of descriptive part of the report to the parties	29 January 2019

[1] The above timetable may be changed in the light of subsequent developments.
[2] The exact time of the deadline for receipt of documents are 5 p.m. of the date indicated in this column unless the Panel separately otherwise indicates.

	Description	Dates[2]
l.	Receipt of comments by the parties on the descriptive part of the report	8 February 2019
m.	Issuance of the interim report, including findings and conclusions to the parties	28 February 2019
n.	Deadline for parties to request review of part(s) of the report and to request interim review meeting	7 March 2019
o.	Interim review meeting, if requested – If no meeting requested, deadline for comments on requests for review	13 March 2019
p.	Issuance of final report to the parties	27 March 2019
q.	Circulation of the final report to the Members	9 April 2019

ANNEX A-5

INTERIM REVIEW

1. INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the comments received during the interim review process. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the United States. The paragraph and footnote numbers in the Final Report remain unchanged.

2. SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1. Paragraph 7.19

2.1. Noting that we observed in paragraph 7.19 of the Interim Report that it is "well established by now in WTO jurisprudence" that "zeroing is prohibited under the W-W and T-T methodologies", the United States contends that this sentence as drafted may suggest that WTO rights and obligations originate in WTO panel or Appellate Body reports, rather than the covered agreements.[1] Thus, the United States requests us to modify this sentence. Canada opposes the United States' request, asserting that this request is premised on a misinterpretation of Article 3.2 of the DSU and that interim review is not an appropriate time to reopen such an issue.[2]

2.2. We have made the modifications suggested by the United States because they do not change the meaning or scope of what is already stated in this paragraph of the Interim Report. We also do not share Canada's concerns with respect to the United States' request. In this regard, we note that the modifications made do not affect our own analysis or findings in this dispute.

2.2. Paragraph 7.25

2.3. The United States requests us to modify paragraph 7.25 of the Interim Report where we stated that the USDOC used "statistical analysis" to consider whether the difference in the weighted average prices to the test group and the comparison group was significant.[3] The United States submits that our description of the USDOC's actions is inaccurate because the USDOC did not assert that it was conducting formal "statistical analysis".[4] The United States requests that we remove the reference to the USDOC's use of "statistical analysis" and instead state that the USDOC used "the Cohen's d coefficient, which is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group".[5] Canada opposes the United States' request, noting that because it has not challenged the Cohen's d test, this test's precise nature is not an issue that is either before the Panel or that would be appropriate for the Panel to determine.[6]

2.4. We were not required to, and did not, express any view in these panel proceedings on whether the Cohen's d coefficient is a "generally recognized statistical measure". Making the drafting changes proposed by the United States may incorrectly suggest to the reader of our Report that we expressed such a view. Therefore, we decline to modify this paragraph in the manner proposed by the United States. Nonetheless, we have made certain changes to more accurately reflect the USDOC's description of the Cohen's d test.

[1] United States' request for interim review, para. 4.
[2] Canada's comments on the United States' request for interim review, para. 3.
[3] United States' request for interim review, para. 5.
[4] United States' request for interim review, para. 5.
[5] United States' request for interim review, para. 5. (emphasis omitted)
[6] Canada's comments on the United States' request for interim review, para. 5.

2.3. Paragraphs 7.28 and 7.32

2.5. The United States requests us to make certain changes in paragraphs 7.28 and 7.32 to accurately describe how the USDOC applied the DPM in the underlying investigation.[7] Canada does not comment on the United States' request.

2.6. We have made the changes requested by the United States.

2.4. Paragraph 7.36(b)

2.7. The United States requests us to modify this paragraph by noting that the pattern found by the USDOC in the underlying investigation included prices to purchasers, regions or time periods that differed significantly because they were significantly *lower* than export prices to other purchasers, regions or time periods.[8] Canada does not comment on the United States' request.

2.8. We decline to make the modifications requested by the United States. In paragraphs 7.36 and 7.37 we set out the issues that the parties disagree on as "a matter of law". The parties do not disagree that a pattern of export prices which differ significantly may include export prices that differ significantly because they are significantly *lower* than export prices to other purchasers, regions or time periods. Thus, the modifications proposed by the United States would affect the clarity of our Report. We also note that paragraph 7.31 of our Report already sets out the relevant facts in this regard.

2.5. Paragraph 7.46

2.9. The United States requests us to make certain changes to accurately reflect its arguments.[9] Canada does not comment on the United States' request.

2.10. We have made the changes requested by the United States.

2.6. Paragraph 7.83

2.11. The United States requests us to modify this paragraph to accurately reflect the text of the pattern clause.[10] Canada does not comment on the United States' request.

2.12. We have made the modification requested by the United States.

2.7. Paragraph 7.107

2.13. The United States opposes the reference to "cogent reasons" in this paragraph and asks us to make edits by removing this reference.[11] Canada opposes the United States' request, noting in this regard that interim review is not the appropriate stage for the United States to reopen this issue.[12]

2.14. We decline to make the changes suggested by the United States in interim review and consider that our Report adequately sets out the legal as well as factual basis for our conclusions in this dispute.

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[7] United States' request for interim review, paras. 6-7.
[8] United States' request for interim review, para. 8.
[9] United States' request for interim review, para. 9.
[10] United States' request for interim review, para. 10.
[11] United States' request for interim review, para. 11.
[12] Canada's comments on the United States' request for interim review, para. 4.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the continued improper application of the U.S. Differential Pricing Methodology ("DPM") − a measure that the Dispute Settlement Body has ruled to be "as such" inconsistent with Articles 2.4 and 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), when it adopted the Appellate Body and panel reports in *US − Washing Machines* on September 26, 2016.

2. On November 25, 2016, the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Petitioner") filed an anti-dumping petition concerning *Certain Softwood Lumber Products from Canada*. Commerce initiated an anti-dumping investigation on December 15, 2016. On January 27, 2017, Commerce selected Canfor Corporation, Canadian Forest Products Ltd. and Canfor Wood Products Marketing Ltd. ("Canfor"), Resolute FP Canada Inc. ("Resolute"), Tolko Marketing and Sales Ltd. ("Tolko"), and West Fraser Mills Ltd. ("West Fraser") as mandatory respondents.

3. On June 23, 2017, Commerce issued its preliminary determination and applied the DPM. The Governments of Canada, Ontario, and Québec as well as the British Columbia Lumber Trade Council, the Conseil de l'industrie forestière du Québec, and the Ontario Forest Industries Association filed a joint case brief on August 7, 2017, arguing that the Appellate Body Report in *US − Washing Machines* found the DPM to be "as such" inconsistent with the United States' WTO obligations and therefore argued that Commerce should not apply it in this case. Nonetheless, Commerce continued to apply the DPM its Final Determination, which it issued on November 1, 2017.

4. Following the U.S. International Trade Commission's final affirmative injury determination, Commerce published its anti-dumping duty order on January 3, 2018.

5. The DPM is a methodology that Commerce uses to bypass the regular methodologies for calculating a margin of dumping. Article 2.4.2 of the Anti-Dumping Agreement provides that margins of dumping shall normally be calculated using either the weighted-average-to-weighted-average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies. In order to have recourse to the exceptional weighted-average-to-transaction ("W-T") methodology, an investigating authority must meet the criteria set out in the second sentence of Article 2.4.2. Commerce applies the DPM in all cases, and, ignoring the criteria in Article 2.4.2, utilizes the DPM in an attempt to justify its frequent recourse to the exceptional W-T methodology.

6. Applying the DPM, and the W-T methodology to all transactions with zeroing, Commerce's final calculations yielded margins for Resolute, Tolko, and West Fraser of 3.20%, 7.22%, and 5.57%. The use of this methodology increased their respective margins from 0.00%, 4.07%, and 2.28%, under the default W-W methodology.

II. THE USE OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

7. Commerce erred when it applied the DPM in its investigation into *Certain Softwood Lumber Products from Canada*. Commerce's reliance on the DPM is contrary to the plain wording of Article 2.4.2 of the Anti-Dumping Agreement. Moreover, the application of the DPM in this investigation was the identical methodology the Appellate Body found "as such" inconsistent in *US - Washing Machines*.

8. Article 2.4.2 is a tool that allows Members to address targeted dumping and therefore permits an investigating authority to have recourse to the exceptional W-T methodology, albeit in very limited circumstances. Article 2.4.2 expressly requires that, before resorting to the W-T methodology, an investigating authority must identify a "pattern of export prices which differ significantly among different purchasers, regions or time periods."

9. The Appellate Body has confirmed that the ordinary meaning of the term "pattern" means that a pattern must constitute a regular and intelligible form or sequence discernible in certain actions or situations. The Appellate Body further confirmed that the use of the term "among" requires that each category be considered on its own. A "pattern" must therefore exist with respect to certain purchasers, to certain time periods, or to certain regions. Finally, when Article 2.4.2 is read in the context of its purpose of addressing targeted dumping, and in the wider context of the Anti-Dumping Agreement as a whole, it is clear that the relevant transactions for the purpose of identifying a pattern are low priced transactions.

10. The DPM, however, fails to identify a pattern of any kind. Instead, it compares all export transactions across the different categories, identifies both high and low priced transactions as part of the claimed pattern, and then aggregates the results from these unrelated categories. The plain language meaning of the term "pattern" simply cannot be reconciled with Commerce's approach of weighing the value of sales that happen to pass the DPM's statistical test with no assessment of whether there is regularity or a sequence to the export prices that have passed the test. The DPM merely identifies differences in price rather than a pattern of export prices.

11. In its investigation, Commerce improperly aggregated the results of its application of the Cohen's *d* test in the DPM for all categories (purchasers, regions, *and* time periods) before using this aggregated total to determine that the DPM's 66% threshold was met for each of the respondents. In applying the DPM, Commerce also improperly aggregated both high priced and low priced transactions and combined transactions that passed the Cohen's *d* test based on purchasers, regions, *and* time periods. The use of this process to justify the application of the exceptional W-T methodology was therefore improperly based on both high priced and low priced transactions *and* ignored the requirement set out in Article 2.4.2 to identify a pattern *among* purchasers, regions *or* time periods. One cannot have a "pattern" consisting of fundamentally different prices. This is contrary to the ordinary meaning of the word "pattern".

12. Consequently, on the basis of all of the above, Commerce acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement when it applied the exceptional W-T methodology to Resolute, Tolko, and West Fraser.

III. THE USE OF ZEROING AS PART OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

13. Commerce further erred when it applied zeroing as part of the DPM in its investigation. The Appellate Body has confirmed that the zeroing methodology is inconsistent with the Anti-Dumping Agreement when applying any of the three comparison methodologies permitted under Article 2.4.2. In *US − Washing Machines*, the Appellate Body expressly found that Commerce's reliance on the DPM to reintroduce zeroing through the W-T methodology was "as such" inconsistent with the United States' WTO obligations.

14. Despite clear guidance as to the WTO-inconsistency of zeroing in the DPM, Commerce nevertheless relied on the DPM to apply this same zeroing technique in its W-T methodology when calculating the dumping margins for Resolute, Tolko, and West Fraser. The use of zeroing as part of the DPM as applied in Commerce's investigation into *Certain Softwood Lumber Products from Canada* is necessarily WTO-inconsistent for at least three reasons.

15. First, zeroing is simply impermissible during the application of the W-T methodology. This is clear both from the text of Article 2.4.2 and from the Anti-Dumping Agreement as a whole. The concepts of "dumping" (as defined by Article 2.1) and "margins of dumping" are the same throughout the Anti-Dumping Agreement. This means that the previous interpretations related to these terms over some 18 years of WTO jurisprudence are equally applicable to the interpretation of the second sentence of Article 2.4.2. Intermediate transactions are not margins of dumping.

16. WTO panels and the Appellate Body have also consistently held that the zeroing methodology is inconsistent with the Anti-Dumping Agreement. This is because zeroing effectively alters certain transactions or treats them as less than their actual value.

17. Second, zeroing in the W-T methodology does not account for all of the purported "pattern" transactions in calculating the margin of dumping. As the Appellate Body confirmed in *US − Washing*

Machines, while export prices within an Article 2.4.2 "pattern" must differ significantly from other export prices, the pattern ultimately used in the W-T calculation must be composed of *all* the export prices to one or more particular purchasers, regions, or time periods, not just those export prices that are below normal value. The Appellate Body further determined, in that dispute, that there is no basis for excluding pattern transactions that are priced above normal value.

18. These Appellate Body findings are firmly rooted in the text of the Anti-Dumping Agreement. Article 2.4.2 allows an investigating authority to narrow the universe of export transactions. For the purposes of the numerator in a W-T comparison, this means that all of the export transactions in the relevant universe of sales under consideration must be considered. The second sentence of Article 2.4.2, with its emphasis on "individual export transactions", distinguishes the universe of sales under consideration for the W-T comparison process from the universe of export sales under consideration in the first sentence, which is all export sales. The text requires that, if an investigating authority chooses to use the W-T methodology, it is required to assess the *whole pattern*, and not only part of it. Zeroing within an identified pattern detaches the notion of "pattern" in the second sentence of Article 2.4.2 from the pattern to which the W-T comparison methodology is applied for establishing margins of dumping in order to address targeted dumping. Zeroing within the W-T methodology thus improperly considers only those transactions that fall below the normal value rather than, as required by Article 2.4.2, the *entire universe* of export transactions that fall within the pattern as properly identified. The narrowing of the universe of export transactions to *all* pattern transactions, and the inclusion of all transactions in the denominator, ensures that the resultant dumping margin is for the product as a whole.

19. Third, zeroing does not lead to a fair comparison of export prices as required by Article 2.4 of the Anti-Dumping Agreement. The *chapeau* of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value", while the introductory clause to Article 2.4.2 expressly provides that the dumping calculation methodologies set out in that Article are subject to the fair comparison obligation in Article 2.4.

20. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4. The ordinary meaning of "fair" requires impartiality and a lack of bias. The Appellate Body in *US − Corrosion-Resistant Steel Sunset Review* found that there is an inherent bias in the zeroing methodology as the methodology may inflate the magnitude of a dumping margin and may also distort a finding of the very existence of dumping itself.

21. In the context of zeroing in the W-T methodology, in *US − Washing Machines*, the Appellate Body confirmed that setting to zero intermediate negative comparison results inflates the magnitude of dumping and also makes positive determinations of dumping more likely where export prices above normal value exceed those below normal value. It also concluded that, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form Article 2.4.2's "universe of export transactions". Zeroing in applying the W-T methodology thus fails to make a fair comparison between export prices and normal value.

22. In this case, zeroing produced the unfair results foreseen by the Appellate Body. It not only inflated the margins of dumping for Tolko and West Fraser, but it also created a positive determination of dumping for Resolute where none otherwise existed. While Resolute's calculated margin of dumping was -2.61%, Commerce's use of zeroing in the W-T methodology ultimately inflated Resolute's margin of dumping by 5.81 percentage points. As a result, a company that on average sold for a price that was higher than normal value in the United States is subject to an anti-dumping order because of zeroing.

23. Despite all of the above, the United States argues that, without zeroing, all three of the comparison methodologies yield the same result, a concept it calls "mathematical equivalency". However, the Appellate Body expressly found in *US − Washing Machines* that mathematical equivalency is not determinative of the meaning of the text. Moreover, the United States itself acknowledged during the Appellate Body hearing for *US − Washing Machines* that calculating a margin of dumping focused only on pattern transactions would lead to a mathematically different result.

24. Canada further notes that, when the W-T and W-W methodologies are applied correctly, they yield mathematically different results. The W-T and the W-W methodologies, as described in the

Anti-Dumping Agreement, and when properly interpreted, cannot be applied to the same set of export transactions. In order to manipulate the W-T calculation to yield mathematically equivalent results to the W-W methodology, among other choices that would need to be made in the calculation, the W-T calculation would have to be applied to *all* export transactions. However, Article 2.4.2 clarifies that the W-T methodology may be applied only to "pattern" sales and not to *all* export transactions. Had Commerce correctly applied the W-W and W-T methodologies to Resolute, Tolko, and West Fraser, without zeroing, they would have yielded mathematically different results.

25. The United States also argues that the Panel should resort to the negotiating history of the Anti-Dumping Agreement to interpret this provision. However, as the meaning of the second sentence of Article 2.4.2 is clear, there is no need to resort to negotiating history to interpret it.

26. Consequently, on the basis of all of the above, when Commerce applied zeroing as part of the DPM in calculating the dumping margins using the W-T methodology for Resolute, Tolko, and West Fraser, it breached the United States' obligations under the second sentence of Article 2.4.2 and Article 2.4.

IV. PANELS ARE EXPECTED TO FOLLOW APPELLATE BODY REPORTS

27. Panels are expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system. The Appellate Body has repeatedly confirmed this principle, which arises directly from the provisions of the Dispute Settlement Understanding ("DSU").

28. The DSU specifies that the Appellate Body may, on appeal, uphold, modify or reverse the legal findings and conclusions of a panel. The DSU therefore clearly creates a hierarchical system. In all legal systems the decisions of a hierarchically superior court or tribunal are generally followed by subsidiary bodies. For this reason, while reports formally bind only the parties to a particular dispute, panels cannot disregard adopted Appellate Body decisions.

29. This is clear from the text of Article 3.2 of the DSU. In *US — Stainless Steel (Mexico)*, the Appellate Body confirmed that this Article informs a panel's function under the DSU. Article 3.2 states that the dispute settlement system "is a central element in providing security and predictability" and serves "to clarify" the provisions of the WTO agreements. Appellate Body oversight of panel decisions promotes security and predictability by ensuring the consistent interpretation of the WTO agreements. In *US — Stainless Steel (Mexico)*, the Appellate Body noted that the reference to clarification in Article 3.2 demonstrates that adopted reports are relevant beyond the application of a particular provision in a particular case and found that a panel that fails to follow the Appellate Body undermines the development of a coherent and predictable body of jurisprudence.

30. The Appellate Body in *US − Shrimp (Article 21.5 − Malaysia)* also confirmed that adopted reports are part of the WTO acquis and that these reports create legitimate expectations among the Members. For this reason, every panel and Appellate Body report cites to previous findings and Members repeatedly cite prior reports in their pleadings. The United States itself does this, including in the present dispute.

31. Finally, in *US — Oil Country Tubular Goods Sunset Reviews*, the Appellate Body expressly found that where a panel relies on the Appellate Body's conclusions with respect to the exact same issue, it will not have failed to make an objective assessment for the purposes of Article 11 of the DSU. To the contrary, it is appropriate for a panel to rely on the Appellate Body's conclusions.

32. In this dispute, however, the United States has gone so far as to expressly invite this Panel to ignore Appellate Body guidance. It has also suggested that Canada's position is contrary to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization. Jurisprudence addresses the relationship between this Article and adopted reports. The panel in *US − Countervailing and Anti-Dumping Measures (China)* considered that, if a multilateral interpretation under Article IX:2 conflicts with a prior Appellate Body interpretation, cogent reasons may exist for a panel to refuse to follow the Appellate Body. There is no multilateral interpretation relevant to this dispute, and there are no cogent reasons to depart from Appellate Body findings with respect to the DPM.

33. Consequently, this Panel must objectively assess whether the DPM is the same DPM that was at issue in *US – Washing Machines*. If it is, and it is, this Panel must follow the Appellate Body's decision in that dispute.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the continued improper application of the United States' Differential Pricing Methodology ("DPM") − a measure that the Dispute Settlement Body has ruled to be "as such" inconsistent with Articles 2.4 and 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), when it adopted the Appellate Body and panel reports in *US − Washing Machines* on September 26, 2016.

2. The DPM is a methodology that the United States Department of Commerce ("Commerce") uses to bypass the regular methodologies for calculating a margin of dumping. Article 2.4.2 of the Anti-Dumping Agreement provides that margins of dumping shall normally be calculated using either the weighted-average-to-weighted-average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies. In order to have recourse to the exceptional weighted-average-to-transaction ("W-T") methodology, an investigating authority must meet the criteria set out in the second sentence of Article 2.4.2. Commerce applies the DPM in all cases, and, ignoring the criteria in Article 2.4.2, utilizes the DPM in an attempt to justify its frequent recourse to the exceptional W-T methodology.

3. Applying the DPM, and the W-T methodology to all transactions with zeroing, Commerce's final calculations yielded margins for Resolute FP Canada Inc. ("Resolute"), Tolko Marketing and Sales Ltd. ("Tolko"), and West Fraser Mills Ltd. ("West Fraser") of 3.20%, 7.22%, and 5.57%. The use of this methodology increased their respective margins from 0.00%, 4.07%, and 2.28%, under the default W-W methodology.

II. THE USE OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

4. Commerce erred when it applied the DPM in its investigation into *Certain Softwood Lumber Products from Canada*. Commerce's reliance on the DPM is contrary to the plain wording of Article 2.4.2 of the Anti-Dumping Agreement. Moreover, the application of the DPM in this investigation was the identical methodology the Appellate Body found "as such" inconsistent in *US - Washing Machines*.

5. The second sentence of Article 2.4.2 is a tool that allows Members to unmask and address targeted dumping by an exporter. It permits an investigating authority to have recourse to the exceptional W-T methodology, albeit in very limited circumstances. Before resorting to the W-T methodology, an investigating authority must identify a "pattern of export prices which differ significantly among different purchasers, regions or time periods". The application of the Article therefore hinges on the identification and proper analysis of the requisite pattern.

6. The Appellate Body has confirmed that the ordinary meaning of the term "pattern" means that a pattern must constitute a regular and intelligible form or sequence discernible in certain actions or situations. The Appellate Body further confirmed that the use of the term "among" requires that each category be considered on its own. A "pattern" must therefore exist with respect to certain purchasers, to certain time periods, or to certain regions. This narrowing of the universe of export transactions is clearly provided for in the text. The text does not, however, create a relationship between the term "pattern" and normal value. Consequently, both pattern transactions and non-pattern transactions may be above or below normal value.

7. Once a pattern is identified, all the pattern transactions are part of the comparison. Finally, when Article 2.4.2 is read in the context of its purpose of addressing targeted dumping, and in the wider context of the Anti-Dumping Agreement as a whole, it is clear that the relevant transactions for the purpose of identifying a pattern are lower priced transactions.

8. The DPM, however, fails to identify a pattern of any kind. Instead, it compares all export transactions across the different categories, identifies both high and low priced transactions as part of the claimed pattern, and then aggregates the results from these unrelated categories. The plain

language meaning of the term "pattern" simply cannot be reconciled with Commerce's approach of weighing the value of sales that happen to pass the DPM's statistical test with no assessment of whether there is regularity or a sequence to the export prices that have passed the test. The DPM merely identifies differences in price rather than a pattern of export prices. It is therefore unsurprising that Commerce determined that all four respondents, Canadian Forest Products Ltd ("Canfor"), Resolute, Tolko, and West Fraser, had a "pattern" of export prices that differ significantly.[1]

9. While the United States initially asserted that Commerce undertook a "rigorous, holistic examination" to determine whether a pattern existed in this case[2], it subsequently admitted that Commerce had failed to identify specific transactions that formed part of the pattern.[3] This admission cannot be reconciled with the assertion that the USDOC determined that a pattern existed. It is inconceivable that an investigating authority would purport to have identified a pattern but not be able to specify what that pattern is. In this case, the Commerce did not identify a pattern because the DPM does not identify a pattern.

10. All Commerce did was apply its ratio test. This exclusive reliance on the ratio test is not consistent with the wording of the second sentence of Article 2.4.2. The ratio test is designed to sum the value of transactions that are identified by the Cohen's *d* test as differentially priced. The ratio test in no way determines whether there is a regular or intelligible sequence to the identified transactions, as required by the ordinary meaning of the term "pattern".

11. Commerce also improperly aggregated the results of its application of the Cohen's *d* test in the DPM for all categories (purchasers, regions, *and* time periods) and improperly aggregated both high priced and low priced transactions and combined transactions that passed the Cohen's *d* test based on purchasers, regions, *and* time periods. The United States defends the use of this process on the basis that a pattern would "transcend multiple purchasers, regions, or time periods".[4] This approach is nonsensical. There can be no regular and intelligible sequence that transcends the differences between purchasers, and the differences between regions, and the differences between time periods. Aggregating different types of transactions cannot identify the requisite regular or intelligible sequence. There is no relationship or similarity between these transactions grouped together and there is no "pattern" whatsoever.

12. The United States contends that a pattern could also consist of every transaction in an investigation.[5] This is incorrect. As the panel in *US − Anti-Dumping Methodologies (China)* found, the "export prices which form part of that discernible group form the relevant 'pattern' rather than the larger universe of export prices from which that group is discerned or distinguished".[6] The word "pattern" suggests a subset of export prices that is discernable from the larger universe of export prices. It is those export prices—which form part of the discernable group—that form the pattern, not the larger universe of export prices from which they differ.[7]

[1] For Resolute: US Department of Commerce, *Antidumping Duty Investigation of Certain Softwood Lumber Products: Analysis of Data Submitted by Resolute FP Canada, Inc. for the Final Determination* (A-122-857), November 1, 2017, Exhibit CAN-07 (BCI), p.7. For Tolko: *US Department of Commerce, Antidumping Duty Investigation of Certain Softwood Lumber Products: Analysis of Data Submitted by Tolko Marketing and Sales Ltd. and Tolko Industries Ltd for the Final Determination* (A-122-857), November 1, 2017, Exhibit CAN-08 (BCI), p.8. For West Fraser: US Department of Commerce, *Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by West Fraser Mills Ltd. for Final Determination* (A-122-857), November 1, 2017, Exhibit CAN-09 (BCI), p.7. For Canfor: US Department of Commerce, *Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd. for the Amended Final Determination* (A-122-857), December 4, 2017, Exhibit CAN-06, p.3.

[2] United States' second written submission, para. 21.

[3] United States' response to Panel question No. 4 in connection with the second substantive meeting, para. 43.

[4] United States' second written submission, para. 42.

[5] United States' first written submission, para. 62; United States' second written submission, para. 48; where the United States maintains that the pattern is the overall pricing behaviour of an exporter.

[6] Panel Report, *US − Anti-Dumping Methodologies (China)*, para. 7.178.

[7] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.31; see also Panel Reports, *US − Washing Machines*, para. 7.142, and *US − Anti-Dumping Methodologies (China)*, para. 7.178; Appellate Body Report, *US − Washing Machines*, para. 5.31.

13. The United States also asserts that aggregation is necessary to account for the product as a whole.[8] However, the United States offers no explanation as to why the correct approach, as discussed in the Appellate Body's report in *US − Washing Machines*, fails to account for the product as a whole. In fact, by searching for a pattern in only one category, all relevant transactions are considered. This permits an analysis of the product as a whole.

14. Finally, in an attempt to find textual support for its position, United States suggests that the word "among" would appear three times in Article 2.4.2 if that term was meant to limit the identification of a pattern to the consideration of transactions within a single category, e.g., before "purchasers", "regions", and "time periods".[9] At the second substantive meeting of the Panel, Canada demonstrated that this approach was misguided. The word "different" clearly qualifies each of the categories and yet it too occurs only once.

15. Consequently, on the basis of all of the above, Commerce acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement when it applied the exceptional W-T methodology to Resolute, Tolko, and West Fraser.

III. THE USE OF ZEROING AS PART OF THE DPM IN THIS INVESTIGATION VIOLATED THE ANTI-DUMPING AGREEMENT

16. Commerce further erred when it applied zeroing as part of the DPM in its investigation. The Appellate Body has confirmed that the zeroing methodology is inconsistent with the Anti-Dumping Agreement when applying any of the three comparison methodologies permitted under Article 2.4.2. In *US − Washing Machines*, the Appellate Body expressly found that Commerce's reliance on the DPM to reintroduce zeroing through the W-T methodology was "as such" inconsistent with the United States' WTO obligations.

17. Despite clear guidance as to the WTO-inconsistency of zeroing in the DPM, Commerce nevertheless relied on the DPM to apply this same zeroing technique in its W-T methodology when calculating the dumping margins for Resolute, Tolko, and West Fraser. Canada has demonstrated that the use of zeroing as part of the DPM as applied in Commerce's investigation into *Certain Softwood Lumber Products from Canada* is necessarily WTO-inconsistent for at least three reasons.

18. First, zeroing is impermissible during the application of the W-T methodology. This is clear both from the text of Article 2.4.2 and from the Anti-Dumping Agreement as a whole. The concepts of "dumping" (as defined by Article 2.1 and Article VI:1 of the GATT 1994) and "margins of dumping" are the same throughout the Anti-Dumping Agreement. This means that the previous interpretations related to these terms over some 18 years of WTO jurisprudence are equally applicable to the interpretation of the second sentence of Article 2.4.2.[10] Intermediate comparison results are not margins of dumping. The second sentence of Article 2.4.2 cannot be used as a justification to depart from any other obligation. It cannot change the definition of dumping or transform an intermediate comparison result into a margin of dumping.

19. Second, zeroing in the W-T methodology does not account for all of the "pattern" transactions in calculating the margin of dumping. As the Appellate Body confirmed in *US − Washing Machines*, while export prices within an Article 2.4.2 "pattern" must differ significantly from other export prices, the pattern ultimately used in the W-T calculation must be composed of *all* the export prices to one or more particular purchasers, regions, or time periods, not just those export prices that are below normal value. The Appellate Body further determined, in that dispute, that there is no basis for excluding pattern transactions that are priced above normal value.

20. These Appellate Body findings are firmly rooted in the text of the Anti-Dumping Agreement. Article 2.4.2 allows an investigating authority to narrow the universe of export transactions in accordance with the text. For the purposes of the numerator in a W-T comparison, this means that all of the export transactions in the relevant universe of sales under consideration must be

[8] United States' response to Panel question No. 1 in connection with the second substantive meeting, para. 3.

[9] United States' first written submission, para. 86; United States' second written submission, para. 41; United States' opening statement at the first substantive meeting of the Panel, para. 27.

[10] WTO panels and the Appellate Body have also consistently held that the zeroing methodology is inconsistent with the Anti-Dumping Agreement. This is because zeroing effectively alters certain transactions or treats them as less than their actual value.

considered. The second sentence of Article 2.4.2, with its emphasis on "individual export transactions", distinguishes the universe of sales under consideration for the W-T comparison process from the universe of export sales under consideration in the first sentence, which is all export sales. The text requires that, if an investigating authority chooses to use the W-T methodology, it is required to assess the *whole pattern*, and not only part of it. As the Appellate Body clarified, "the 'targeted dumping' to be 'unmasked' corresponds to the properly identified 'pattern', and not to a set of sales below normal value within that pattern for which there exists neither a textual nor a contextual basis in the second sentence".[11] Zeroing within an identified pattern detaches the notion of "pattern" in the second sentence of Article 2.4.2 from the pattern to which the W-T comparison methodology is applied for establishing margins of dumping in order to address targeted dumping. Zeroing within the W-T methodology thus improperly considers only those transactions that fall below the normal value rather than, as required by Article 2.4.2, the *entire universe* of export transactions that fall within the pattern as properly identified.

21. The narrowing of the universe of export transactions to *all* pattern transactions, and the inclusion of all transactions in the denominator, ensures that the resultant dumping margin is for the product as a whole. By contrast, the Appellate Body has repeatedly found that zeroing fails to take into account the product as a whole. Indeed, zeroing arbitrarily manipulates the data such that they no longer reflect the underlying transactions.

22. Third, zeroing does not lead to a fair comparison of export prices as required by Article 2.4 of the Anti-Dumping Agreement. The *chapeau* of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value", while the introductory clause to Article 2.4.2 expressly provides that the dumping calculation methodologies set out in that Article are subject to the fair comparison obligation in Article 2.4.

23. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4. The ordinary meaning of "fair" requires impartiality and a lack of bias. The Appellate Body in *US − Corrosion-Resistant Steel Sunset Review* found that there is an inherent bias in the zeroing methodology as the methodology may inflate the magnitude of a dumping margin and may also distort a finding of the very existence of dumping itself.

24. In the context of zeroing in the W-T methodology, in *US − Washing Machines*, the Appellate Body confirmed that setting to zero intermediate negative comparison results inflates the magnitude of dumping and also makes positive determinations of dumping more likely where export prices above normal value exceed those below normal value. It also concluded that, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form Article 2.4.2's "universe of export transactions". Zeroing in applying the W-T methodology thus fails to make a fair comparison between export prices and normal value.

25. In this case, zeroing produced the unfair results foreseen by the Appellate Body. It not only inflated the margins of dumping for Tolko and West Fraser, but it also created a positive determination of dumping for Resolute where none otherwise existed. While Resolute's calculated margin of dumping was -2.61%, Commerce's use of zeroing in the W-T methodology ultimately inflated Resolute's margin of dumping by 5.81 percentage points. As a result, a company that on average sold for a price that was higher than normal value in the United States is subject to an anti-dumping order because of zeroing. Nonetheless, the United States asserts that both the Appellate Body's approach in *US − Washing Machines* and zeroing are "in reality and effect, essentially the same"[12], and therefore, zeroing cannot violate the fair comparison requirement.[13] This assertion is untrue. At the second substantive meeting of the Panel, Canada demonstrated that both approaches would produce different results for Resolute and that zeroing was actually necessary to manufacture a margin of dumping for that company.[14]

26. Despite all of the above, the United States attempts to support zeroing by arguing that, without zeroing, the comparison methodologies described in Article 2.4.2 and a so-called mixed

[11] Appellate Body Report, *US − Washing Machines*, para. 5.156.
[12] United States' second written submission, para. 83.
[13] United States' second written submission, paras. 84 and 85.
[14] Canada's opening statement at the second substantive meeting of the Panel, 4 December 2018, paras. 9-11; Resolute's Margin of Dumping, Exhibit CAN-13 (BCI); Alternative Margin Analysis, Resolute, Exhibit CAN-32 (BCI).

methodology (W-T and W-W) would "always yield" the same result[15], a concept it calls "mathematical equivalency". The United States' arguments concerning purported mathematical equivalency are not well founded.

27. First, any potential, and hypothetical, mathematical equivalency is not determinative of the correct interpretation of Article 2.4.2.[16]

28. Second, it would be incorrect to interpret the meaning of the Article based on the purported mathematical equivalency of the WTO-inconsistent mixed methodology. The Appellate Body has found that the use of two separate methodologies to calculate a margin of dumping is not permitted under the Anti-Dumping Agreement.[17] The three permissible methodologies are expressly set out in Article 2.4.2, which specifies that margins of dumping "shall normally be established" on the basis of the W-W or the T-T methodology, and then creates an exceptional methodology that may be used when the requirements of the second sentence are met. There is, however, no support in the text for the United States' proposed mixed comparison methodology. Conducting separate comparisons would undermine the purpose of the second sentence of Article 2.4.2, which is to unmask targeted dumping.[18] Moreover, the export transactions to which the W-T methodology would apply would merely re-assess a subset of the same transactions already captured by the W-W analysis, which necessarily compares all transactions.

29. Finally, Canada has concretely demonstrated that mathematical equivalence will not arise in every case. At the second substantive meeting of the Panel, Canada established that the correct application of the W-T methodology without zeroing[19] to Resolute's transactions in this case clearly yields mathematically different results when compared to the W-W methodology.[20] Similarly, in its responses to Panel questions in connection with the second substantive meeting, Canada calculated margins of dumping for a hypothetical set of transactions. For the mixed methodology example, the W-T calculation compared a quarterly weighted average normal value to each pattern transaction, while the W-W calculation compares annual weighted average prices. These comparisons yielded different margins of dumping.[21]

30. Relying on its highly problematic mathematical equivalency theory, the United States claims that zeroing is necessary to unmask evidence of dumping.[22] However, in so doing, the United States ignores that the purpose of Article 2.4.2 is to unmask *targeted* dumping. In *US – Washing Machines*, the Appellate Body clarified that the text narrows the universe of export transactions with references both to the "pattern" and "individual export transactions" (terms rooted in the text). Targeted dumping is properly unmasked by narrowing the universe of export transactions to the pattern transactions for the purpose of calculating the numerator, regardless of whether they are above or below normal value.[23] The Appellate Body's approach does not exclude from the numerator all sales above normal value, as zeroing does. Moreover, as mentioned above, zeroing finds no basis in the text whatsoever and actually alters certain intermediate comparison results based solely on their relationship to normal value.[24]

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[15] United States' response to Panel question No. 2(a) in connection with the second substantive meeting, para. 32.

[16] Appellate Body Reports, *US – Washing Machines*, para. 5.128, and *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

[17] Appellate Body Report, *US – Washing Machines*, para. 5.120.

[18] Appellate Body Report, *US – Washing Machines*, para. 5.122.

[19] Note that Canada's calculations below do not correct for errors in failing to identify a pattern.

[20] Effect of Comparison Methodology on Resolute's Margin of Dumping, Exhibit CAN-31.

[21] Mixed Methodology Calculation, Exhibit CAN-33. Canada also notes that the United States itself acknowledged during the Appellate Body hearing for *US – Washing Machines* that calculating a margin of dumping focused only on pattern transactions would lead to a mathematically different result.

[22] United States' response to Panel question No. 2(a) in connection with the second substantive meeting, para. 22.

[23] The United States asserts that the WTO-consistent manner of properly narrowing the universe of export transactions, as articulated by the Appellate Body, is simply the "findings of two Appellate Body Members" (United States' response to Panel question No. 8 in connection with the second substantive meeting, para. 55). This is wrong on its face as the findings in an Appellate Body report are the findings of that Body, as a whole. The United States' assertion is further undermined because the entire division agreed that the universe of export transactions should be narrowed.

[24] Appellate Body Report, *US – Washing Machines,* para. 5.170; Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.208.

31. The United States also argues that the Panel should resort to the negotiating history of the Anti-Dumping Agreement, including previous drafts, to interpret Article 2.4.2, at least in part because it alleges that the Appellate Body invented a new methodology for calculating margins of dumping that is unsupported by the text of the Article. This is incorrect for several reasons.

32. At the outset, it is not necessary to have recourse to the negotiating history to confirm the meaning of the second sentence of Article 2.4.2.[25] The Appellate Body did not invent an entirely new methodology. It merely clarified the WTO-consistent functioning of the W-T methodology with reference to the text of the Article. That clarification is consistent both with the approach taken by the panels in *US - Washing Machines* and in *US-Anti-Dumping Methodologies (China)*[26] and with the interpretation of the provision provided by the third parties in this dispute.[27] This common understanding of the meaning of the text suggests that the Appellate Body's interpretation was indeed contemplated by the Members. As the meaning of the second sentence of Article 2.4.2 is clear, there is no need to resort to negotiating history to interpret it.

33. Moreover, attempting to interpret the current text of Article 2.4.2 with reference to past drafts is problematic as those earlier texts did not contain some of the key terms that are crucial to understanding the different comparison methodologies. In particular, unlike previous drafts, the final text specifically indicates that the W-W methodology is a comparison of "all comparable export transactions", while the discussion of the exceptional weighted-average-to-transaction methodology in the second sentence of the final draft expressly does not contain a similar reference to "all" transactions. This demonstrates that the exceptional methodology, as adopted in the final text, is not meant to apply to the same universe of transactions.

34. An analysis of Article 2.4.2 demonstrates that it is the United States, and not the Appellate Body, that has invented a methodology that does not have a basis in the text.

35. Consequently, on the basis of all of the above, when Commerce applied zeroing as part of the DPM in calculating the dumping margins using the W-T methodology for Resolute, Tolko, and West Fraser, it breached the United States' obligations under the second sentence of Article 2.4.2 and Article 2.4.

IV. PANELS ARE EXPECTED TO FOLLOW APPELLATE BODY REPORTS

36. Panels are expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system. The United States continues to argue that there is no textual support for this principle[28], ignoring that it arises directly from the provisions of the Dispute Settlement Understanding ("DSU").

37. The DSU specifies that the Appellate Body may, on appeal, uphold, modify or reverse the legal findings and conclusions of a panel. The DSU therefore clearly creates a hierarchical system. In all legal systems the decisions of a hierarchically superior court or tribunal are generally followed by subsidiary bodies. For this reason, while reports formally bind only the parties to a particular dispute, panels cannot disregard adopted Appellate Body decisions.

38. This is confirmed by Article 3.2 of the DSU. In *US — Stainless Steel (Mexico)*, the Appellate Body determined that this Article informs a panel's function under the DSU. Article 3.2 states that the dispute settlement system "is a central element in providing security and predictability" and serves "to clarify" the provisions of the WTO agreements. Appellate Body oversight of panel decisions promotes security and predictability by ensuring the consistent interpretation of the WTO agreements. In *US — Stainless Steel (Mexico)*, the Appellate Body noted that the reference to clarification in Article 3.2 demonstrates that adopted reports are relevant beyond the application of a particular provision in a particular case.

39. The Appellate Body in *US − Shrimp (Article 21.5 − Malaysia)* also confirmed that adopted reports are part of the WTO *acquis* and that these reports create legitimate expectations among the

[25] Appellate Body Report, *US − Washing Machines*, para. 5.167.
[26] Panel Reports, *US − Washing Machines*, para. 7.160, and *US − Anti-Dumping Methodologies (China)*, para. 7.208.
[27] Brazil's third party statement, para. 13; European Union's third party submission, para. 22; Japan's third party submission, paras. 19-22.
[28] United States' second written submission, para. 12.

Members. For this reason, every panel and Appellate Body report cites to previous findings and Members repeatedly cite prior reports in their pleadings. The United States itself does this, including in the present dispute.

40. Finally, the Appellate Body expressly found that where a panel relies on the Appellate Body's conclusions with respect to the exact same issue, it will not have failed to make an objective assessment for the purposes of Article 11 of the DSU.[29] To the contrary, it is appropriate for a panel to rely on the Appellate Body's conclusions and that Body expects panels to accede to the hierarchical structure of WTO dispute settlement and to follow previous adopted Appellate Body reports.[30] The Appellate Body has also determined that a panel's decision to depart from these reports is of deep concern and has serious implications for the dispute settlement system.[31] In this dispute, however, the United States has gone so far as to expressly invite this Panel to ignore Appellate Body guidance.

41. The United States argues that Canada's position is contrary to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization. Jurisprudence addresses the relationship between this Article and adopted reports. If a multilateral interpretation under Article IX:2 conflicts with a prior Appellate Body interpretation, cogent reasons may exist for a panel to refuse to follow the Appellate Body. There is no multilateral interpretation relevant to this dispute, and there are no cogent reasons to depart from Appellate Body findings with respect to the DPM.

42. The United States also relies on an out-of-context statement by the Appellate Body in *Japan - Alcoholic Beverages II*.[32] This reliance is misplaced. First, the Appellate Body was considering whether adopted reports constituted either "subsequent practice" or other decisions of the Contracting Parties under the GATT.[33] These questions are not before this Panel. Moreover, in that report, the Appellate Body expressly acknowledged that adopted reports form part of the *acquis*, create legitimate expectations amongst the Members, and ought to be taken into account when they are relevant.[34] Second, in *US − Stainless Steel (Mexico)*, the Appellate Body cited its decision in *Japan − Alcoholic Beverages II* for the proposition that subsequent panels *are not free* to disregard the legal interpretations and findings in adopted Appellate Body reports.[35]

43. Consequently, this Panel must objectively assess whether the DPM is the same DPM that was at issue in *US − Washing Machines*. If it is, and it is, this Panel must follow the Appellate Body's decision in that dispute.

[29] Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, para. 188.
[30] Appellate Body Report, *US — Continued Zeroing*, paras. 362 and 365.
[31] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 162.
[32] United States' second written submission, para. 14.
[33] Appellate Body Report, *Japan − Alcoholic Beverages II*, p. 14.
[34] Appellate Body Report, *Japan − Alcoholic Beverages II*, p. 14.
[35] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 158.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, Canada challenges the determination of the U.S. Department of Commerce ("USDOC") in an antidumping investigation of softwood lumber from Canada. Specifically, Canada claims that the USDOC's determination is inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

2. Canada begins its first written submission by asserting that "this dispute is a profoundly simple one: the Panel must follow the [Dispute Settlement Body ("DSB")] rulings in *US – Washing Machines*" and find that the USDOC's application of a differential pricing analysis and its use of zeroing in the antidumping investigation of softwood lumber from Canada is inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement. Canada's portrayal of the role of the Panel in this dispute is fundamentally contrary to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the *Agreement Establishing the World Trade Organization* ("WTO Agreement").

3. To resolve this dispute, rather, the Panel will need to make an objective assessment of the matter before it and undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law. A WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute, rather than to interpret and apply the text of the covered agreements. And under the DSU, neither the Appellate Body nor any panel can issue, because the DSB has no authority to adopt, an authoritative interpretation of the covered agreements. That authority is reserved to the Ministerial Conference or the General Council acting under a special procedure.

4. Canada has not done anything to help the Panel accomplish the task it has been given under the DSU. Instead of presenting interpretive analyses of the AD Agreement applying customary rules of interpretation to support its claims, Canada simply refers to and relies on interpretations presented in prior Appellate Body reports. However, the interpretations for which Canada advocates cannot be reconciled with the customary rules of interpretation. When they are subjected to scrutiny, all of Canada's proposed interpretations of the AD Agreement simply are not supported by the ordinary meaning of the text of the AD Agreement, read in context, and in light of the object and purpose of the AD Agreement.

5. In fact, Canada's proposed interpretation of Article 2.4.2 of the AD Agreement effectively rewrites the second sentence of that provision and reads the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. In doing so, Canada's proposed interpretation effectively renders this provision *inutile* by failing to "give meaning and effect to all the terms of the treaty". Accordingly, all of Canada's legal claims lack merit, and should be rejected.

II. STANDARD OF REVIEW, RULES OF INTERPRETATION, AND BURDEN OF PROOF

6. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."

7. There is no provision in the DSU or any of the covered agreements that establishes a system of "case law" or "precedent," or that otherwise requires a panel to follow or be bound by the findings in previously adopted panel or Appellate Body reports. There is no provision in the DSU or the

covered agreements that refers to "cogent reasons" or that suggests that a panel must justify legal findings not consistent with the reasoning set out in prior reports.

8. To the contrary, Article 3.9 of the DSU expressly states that the DSU, including adoption of panel and Appellate Body reports by the DSB, is without prejudice to the procedure to obtain an authoritative interpretation by the Ministerial Conference or General Council. Article IX:2 of the WTO Agreement provides that "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Article IX:2 also sets out a special adoption procedure for those authoritative interpretations. Thus, the adoption by the DSB of reports from panels or the Appellate Body cannot constitute authoritative interpretations that a subsequent panel must follow.

9. Finally, it is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Canada must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.

III. CANADA'S CLAIMS RELATED TO THE USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT LACK MERIT

A. Introduction and Overview of Article 2.4.2 of the AD Agreement

10. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

11. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, should "lead to results that are systematically different" from the two "normal" comparison methodologies when the conditions for its use have been met.

12. Canada seeks to rewrite the second sentence of Article 2.4.2, and to read the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. Canada's proposed interpretation is erroneous and does not accord with the customary rules of interpretation of public international law.

B. Canada's Claims Regarding the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Lack Merit

13. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

14. In the antidumping investigation of softwood lumber from Canada, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information. Specifically, the USDOC applied a differential pricing analysis, in which it used the "Cohen's *d* test" to "evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise", and the USDOC also used the "ratio test" to "assess the extent of the significant price differences for all sales as measured by the Cohen's *d* test."

15. The USDOC undertook a rigorous, holistic examination of each respondent's export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as among different purchasers, regions or time periods. A proper interpretive analysis pursuant to the customary rules of interpretation of public international law reveals that that is precisely what the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to do. In addition to explaining its analytical approach in the preliminary decision memorandum and the final issues and decision memorandum, the USDOC addressed arguments raised by interested parties concerning the USDOC's analysis. Those memoranda provide a reasoned and adequate explanation of the USDOC's determination and demonstrate that the USDOC's application of a differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

16. Canada advances two main arguments. First, Canada argues that the USDOC's differential pricing analysis is inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 because it considers both high-priced and low-priced export sales transactions. Second, Canada contends that the USDOC's differential pricing analysis breaches the "pattern clause" because it aggregates transactions across purchasers, regions, and time periods and does not identify a pattern among purchasers, regions, or time periods. Each of Canada's arguments lacks merit.

i. The USDOC's Consideration of Both Low and High Prices Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

17. A differential pricing analysis seeks to identify a "pattern" by looking for export prices to a purchaser, region, or time period which are either significantly higher or significantly lower than the export prices to other purchasers, regions, or time periods. Such an analysis is consistent with the express terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which calls upon investigating authorities to find "export prices which differ significantly," but which does not require or foreclose a focus either on lower-priced or higher-priced export sales. Logically, any analysis pursuant to the "pattern clause" must examine <u>both</u> lower and higher export prices to establish the presence of export prices which differ significantly.

18. In *US − Washing Machines*, the Appellate Body found that "the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2 is comprised of the export prices to one or more particular purchasers which differ significantly from the prices to the other purchasers because they are *lower* than those other prices (with the same applying to regions and time periods, respectively)", and "the relevant 'pattern' … cannot be identified by considering prices that are higher than other prices." These findings, on which Canada relies, are not consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. A set of lower-priced export sales to a particular purchaser (or to a particular region or during a particular time period) is not "a pattern of export prices which differ significantly". It would be a pattern of export prices which are similar to one another, and which happen also to be lower than export prices to other purchasers (or regions or time periods). Additionally, a set of lower-priced export sales <u>to a particular purchaser</u> (or to a particular region or during a particular time period) is not "a pattern of export prices … <u>among different</u> purchasers, regions or time periods". It would be a pattern of export prices <u>to a particular purchaser</u> (or to a particular region or during a particular time period). In effect, the Appellate Body in *US − Washing Machines* rewrote the "pattern clause" of the second sentence of Article 2.4.2 by changing the word "among" to "from". The pattern described by the Appellate Body simply is a different pattern than that which is described in the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

19. The Appellate Body also explained that: "[w]e fail to see how an investigating authority could identify and address 'targeted dumping' by considering significantly higher export prices. If the prices found to differ significantly are higher than other export prices, the other (lower) export prices would not 'mask' the (higher) dumped prices found to form the pattern." This reasoning, too, makes no sense, and is inconsistent with other Appellate Body findings in *US − Washing Machines*. The Appellate Body explained that "an investigating authority would analyse the prices of <u>all export sales</u> made by the relevant exporter or producer to identify a pattern". Necessarily, an analysis of the prices of <u>all export sales</u> would entail <u>consideration</u> of <u>both</u> higher- and lower-priced sales. So, the Appellate Body's interpretation simultaneously requires and prohibits the consideration of lower-priced and higher-priced export sales transactions. That is a logical impossibility.

20. By comparing export prices to different purchasers, regions, and time periods, the differential pricing analysis seeks to identify both lower and higher export prices, because such export prices differ significantly, as expressly contemplated by the "pattern clause" of Article 2.4.2 of the AD Agreement.

ii. The USDOC's Aggregation of Price Differences Among Different Purchasers, Regions, or Time Periods Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

21. Although the second sentence of Article 2.4.2 of the AD Agreement has been described as a provision that addresses "targeting" or "targeted dumping," the United States agrees with the *US – Washing Machines* panel and most of the third parties to that dispute, including Canada, who indicated their understanding that "targeted dumping" is merely a shorthand reference to the terms of the second sentence of Article 2.4.2. However, the terms "targeting" and "targeted dumping" are not present in Article 2.4.2 nor anywhere else in the AD Agreement. As it is written, the second sentence of Article 2.4.2 provides that investigating authorities are to examine "export prices" to determine whether there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods." A "target" analysis is just one kind of analysis an investigating authority might undertake when searching for "a pattern of export prices which differ significantly among different purchasers, regions or time periods." Investigating authorities might take other approaches to analyzing a "pattern" that also are consistent with the terms of the "pattern clause."

22. When it applied a differential pricing analysis in the antidumping investigation of softwood lumber from Canada, the USDOC aggregated the results of the Cohen's *d* test as part of the ratio test to determine the extent of the export prices that were found to differ significantly among different purchasers, regions, or time periods. In other words, the USDOC aggregated the results of the Cohen's *d* test among different purchasers, regions, or time periods found to pass the Cohen's *d* test (without double counting those export sales that passed the Cohen's *d* test for more than one category, *i.e.*, by purchaser, region, or time period). The UDSOC aggregated the results of the Cohen's *d* test in this manner so that it could consider the exporter's pricing behavior in the United States market for the product as a whole, *i.e.*, whether "a pattern" exists of export prices which differ significantly. This accorded with the USDOC's understanding that the Cohen's *d* test results reflect different aspects of an exporter's overall pricing behavior, and it accords with prior Appellate Body findings regarding the concept of "product as a whole."

23. Contrary to Canada's assertion, the USDOC's differential pricing analysis did not aggregate random and unrelated price variations. A respondent's pricing behavior, which reflects its market strategies and corporate goals that logically follow economic principles in a market economy, cannot reasonably be described as "random." The results of the Cohen's *d* test by purchaser, region, or time period represented different aspects of the particular respondent's overall pricing behavior. Through the Cohen's *d* and ratio tests, the differential pricing analysis considered the pricing behavior of the respondent exporter in the United States market as a whole.

24. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among each category (*i.e.*, purchasers, regions, or time periods) cannot be considered together when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." To the contrary, the text of the "pattern clause," on its face, contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods. In particular, the "pattern clause" directs an investigating authority to consider whether there exists a pattern of export prices which differ significantly "among different purchasers, regions or time periods".

25. Rather than engage in its own textual analysis, Canada primarily relies on the Appellate Body's findings in *US – Washing Machines*. The Appellate Body reasoned that "a pattern involves export prices which differ significantly in relation to specified sub-groups, namely, 'among different purchasers, regions or time periods'", and "these terms determine how the relevant 'pattern' must be identified." The Appellate Body's analysis focused, in particular, on the words "or" and "among".

26. The Appellate Body's reading of the word "or" is exceedingly narrow. As the Appellate Body itself acknowledged, "depending on the context in which it is used, the conjunction 'or' can be

exclusive or inclusive." The presence of the word "or," and not the word "and," might just as likely indicate that it is possible for an investigating authority to find a pattern of export prices which differ significantly among different purchasers, different regions, or different time periods, or any combination of the above, but it is not necessary to find a pattern of export prices which differ significantly among all three, as would be suggested by the word "and". The Appellate Body's conclusion appears to have been colored by its misunderstanding of the relevant "pattern" as being limited to low-priced sales to a "target". That understanding is not consistent with the terms of the "pattern clause", nor is it logical.

27. The Appellate Body's understanding of the implications of the word "among" also appears to have been colored by its misunderstanding of the relevant "pattern." The Appellate Body observed that "the term 'among' refers to something *'in relation to the rest of the group [it belongs] to*'." Importantly, the differential pricing analysis applied by the USDOC involved comparisons of export prices to each purchaser with export prices to the other purchasers, export prices to each region with export prices to the other regions, and export prices during each time period with export prices during the other time periods. This is logical and consistent with the understanding of the word "among" articulated by the Appellate Body, in particular the Appellate Body's observation that "each category should be considered on its own".

28. The differential pricing analysis also sought to identify "a pattern" for an exporter and product as a whole by considering all of that exporter's export prices to discern whether significant differences in the export prices were exhibited collectively among different purchasers, or different regions, or different time periods. This approach is not inconsistent with the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which directs investigating authorities to consider whether there exists a pattern of export prices which differ significantly "among" different purchasers, regions, or time periods.

29. The term "among" is only used one time in the second sentence of Article 2.4.2 and it is placed before the identified groups of "purchasers, regions or time periods." Such usage suggests that those groups may be considered collectively in identifying a pattern of export prices which differ significantly. For the Appellate Body's reading of "among" to be correct, one would expect the term "among" to appear before the mention of each group, i.e., "among different purchasers, among different regions or among different time periods." That is not how the "pattern clause" is written.

30. The Appellate Body considered that such "repetition would have conveyed an identical meaning to that of the existing text." However, when the Appellate Body later summarized its own findings concerning the interpretation of the "pattern clause," it used the term "among" three times: "[w]e have found above that a pattern can only be found in prices which differ significantly either among purchasers, or among regions, or among time periods, not across these categories." This is yet another internal inconsistency in the *US − Washing Machines* Appellate Body report that demonstrates the incorrectness of the findings in that report and undermines the persuasiveness of that report.

31. A more plausible reading of the text of the "pattern clause" of the second sentence of Article 2.4.2 contemplates a holistic analysis of the exporter's pricing behavior for the product as a whole, which is consistent with the Appellate Body's guidance in prior reports that a dumping margin must be exporter-specific and determined for the product as a whole. That is what the USDOC sought to accomplish by applying a differential pricing analysis in the antidumping investigation of softwood lumber from Canada.

C. Canada's Claims that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement Lack Merit

32. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international law. This conclusion also accords with and is the logical extension of the Appellate Body's findings in previous disputes relating to the use of zeroing in connection with the comparison methodologies provided in the first sentence of Article 2.4.2 of the

AD Agreement. And this is the conclusion reached by one Appellate Body member in *US − Washing Machines*.

1. Canada's Arguments Against the Use of Zeroing in Connection with the Alternative, Average-to-Transaction Comparison Methodology Lack Merit

33. Canada does not present an interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement. Instead, Canada simply summarizes various findings in prior Appellate Body reports. In approaching this dispute as it has, Canada has failed to help the Panel discharge its function under Article 11 of the DSU, which requires the Panel to make its own "objective assessment of the matter before it". Such an objective assessment involves an objective assessment of "the applicability of and conformity with the relevant covered agreements," and necessarily includes an interpretive analysis of any of the provisions of the covered agreements that Canada claims the United States has breached.

34. More problematic, in presenting a selection of findings from prior reports, Canada has chosen to place emphasis on findings related to the concept of "product as a whole," a concept which the Appellate Body has developed in prior reports. The term "product as a whole," of course, is not present in the AD Agreement. Additionally, the Appellate Body majority in *US − Washing Machines* prescribed a new alternative methodology for addressing targeted dumping that explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." In the words of the Appellate Body majority: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', without having to take into account 'non pattern transactions'." Thus, the Appellate Body majority's approach literally requires that a margin of dumping be determined not for the product as a whole, and in a manner that explicitly does not take into account all export transactions.

35. Canada further argues that zeroing is impermissible in the context of the average-to-transaction comparison methodology because zeroing within an identified pattern fails to "further 'unmask' targeted dumping." In making this assertion, Canada again fails to engage in any interpretive analysis of the relevant text in Article 2.4.2 of the AD Agreement, and instead relies on the findings of two members of the Appellate Body in *US − Washing Machines*. The Appellate Body majority in *US − Washing Machines*, though, based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern." Those findings are erroneous.

36. The Appellate Body majority also stated that, in interpreting the text of Article 2.4.2, it found that the term "individual export transactions" "refers to the pattern of export prices identified by the investigating authority" that differ because they are the lower export prices. The Appellate Body majority indicated that it found "no such textual and contextual support to conclude that the term 'individual export transactions' in the second sentence of Article 2.4.2 refers only to those transactions that form part of the identified pattern but are priced below normal value." Elsewhere in the Appellate Body report, however, the Appellate Body considered that the word "individual" also delineates the scope of application of the alternative, average-to-transaction comparison methodology. Thus, in the Appellate Body majority's view, the word "individual" simultaneously reduces and expands the scope of transactions to be included in the average-to-transaction comparisons under the second sentence of Article 2.4.2 of the AD Agreement. These divergent conclusions about the meaning of the term "individual" are internally inconsistent, and neither conclusion is supported by the ordinary meaning of the term "individual," read in its context.

2. A Proper Application of the Customary Rules of Interpretation Reveals that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

a. Initial Comments on the Text and Context of the Second Sentence of Article 2.4.2 of the AD Agreement

37. When the Appellate Body found prohibitions on the use of zeroing in connection with the comparison methodologies described in the first sentence of Article 2.4.2 of the AD Agreement, its

interpretations were rooted in the text of that sentence. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis."

38. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been established.

39. Additional contextual analysis of the second sentence of Article 2.4.2 of the AD Agreement demonstrates that zeroing is permissible – and indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology provided for in the second sentence of Article 2.4.2 of the AD Agreement.

b. The Average-to-Transaction Comparison Methodology in the Second Sentence of Article 2.4.2 of the AD Agreement Is an Exception to the Comparison Methodologies in the First Sentence of Article 2.4.2 and Should Be Interpreted So that It May Yield Results that Are "Systematically Different" from the Comparison Methodologies "Normally" Applied

40. As an exception to the two symmetrical comparison methodologies that an investigating authority must use "normally," each of which logically, the Appellate Body has explained, should not "lead to results that are systematically different," the third comparison methodology, by logical extension, should "lead to results that are systematically different" from the "normal[]" comparison methodologies when the conditions for its use have been established. The Appellate Body also has found that this exceptional methodology provides a means by which Members can "unmask targeted dumping."

41. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law.

c. Mathematical Equivalence

42. If zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then both methodologies, when applied to the same set of transactions, will always yield identical results, with respect to the total amount of all comparison results, the total amount of dumping, and the weighted average dumping margin for an exporter for the product under investigation. This is true because, for both methodologies, the calculation of the margins of dumping is based on the same normal value and export sales data, but the mathematical operations simply are conducted in a different order.

d. The Appellate Body's Consideration of Mathematical Equivalence in Previous Disputes Does Not Compel Rejection of the Mathematical Equivalence Argument in this Dispute

43. The Appellate Body has considered the mathematical equivalence argument in previous disputes, including in *US – Washing Machines*. The findings concerning the mathematical equivalence argument in prior Appellate Body reports neither support nor compel the Panel's rejection of the mathematical equivalence argument in this dispute.

44. The Appellate Body majority in *US – Washing Machines* actually acknowledged the reality of mathematical equivalence, referring to "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern". The panels

in *US − Washing Machines* and *US − Anti-Dumping Methodologies (China)* also recognized the fact of mathematical equivalence. No WTO panel, nor the Appellate Body, has ever found that the United States is incorrect that the average-to-average comparison methodology (without zeroing) and the average-to-transaction comparison methodology (also without zeroing) yield the same mathematical result when applied to the same set of export transactions.

45. Even though it acknowledged the fact of mathematical equivalence, the Appellate Body majority evaded the U.S. argument in *US − Washing Machines*. The majority observed that "the United States' argument on mathematical equivalence is premised on its understanding of what constitutes the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2," but recalled that the Appellate Body had "concluded above that the 'pattern of export prices which differ significantly' within the meaning of the second sentence of Article 2.4.2 comprises only a subset of all the export transactions". The majority reasoned that "[c]omparing normal value with 'pattern transactions' only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the [average-to-average] comparison methodology to *all* export transactions."

46. As an initial matter, the Appellate Body's interpretation of the term "pattern" in the second sentence of Article 2.4.2 of the AD Agreement is erroneous and does not follow from a proper application of the customary rules of interpretation of public international law. Thus, the Appellate Body majority's finding concerning the mathematical equivalence argument, which rests on the Appellate Body's earlier flawed finding, is, as a consequence, itself flawed.

47. Even assuming, for the sake of argument, that the Appellate Body's interpretation of the term "pattern" is correct, the fact of mathematical equivalence, and the Appellate Body majority's recognition of that fact, undercuts the Appellate Body majority's conception of the operation of the alternative, average-to-transaction comparison methodology. The application of the average-to-average comparison methodology to any set of transactions (without zeroing) is mathematically equivalent to the application of the average-to-transaction comparison methodology to the same set of transactions (without zeroing). Thus, how the relevant "pattern" is defined under the second sentence of Article 2.4.2 of the AD Agreement is completely irrelevant to the mathematical equivalence argument.

48. This is because, by finding that the second sentence of Article 2.4.2 requires the application of the average-to-transaction comparison methodology to a subset of transactions while also prohibiting the use of zeroing, the Appellate Body majority found, in effect, that the application of the average-to-average comparison methodology to that subset of transactions (without zeroing) is what actually is contemplated by the second sentence of Article 2.4.2. The Appellate Body majority effectively rewrote the second sentence of Article 2.4.2, changing it from allowing the application of the average-to-transaction comparison methodology under certain circumstances to allowing the application of the average-to-average comparison methodology to a subset of transactions under certain circumstances. The Appellate Body majority invented an entirely new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2, and which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time after. Ultimately, the Appellate Body majority read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, contrary to the principle of effectiveness.

49. The Appellate Body majority noted the U.S. argument in this regard. The Appellate Body majority's reasoning is dismissive of − but not responsive to − the U.S. argument. Again, the Appellate Body majority recognized "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern". Thus, just as the United States contends, the Appellate Body majority rewrote the second sentence of Article 2.4.2 of the AD Agreement such that investigating authorities now are to address targeted dumping by applying what is, in effect, the average-to-average comparison methodology to a subset of transactions. That is not what the second sentence of Article 2.4.2 of the AD Agreement provides.

50. In a footnote, the Appellate Body majority also referred to earlier consideration of the mathematical equivalence argument in prior Appellate Body reports, including *US − Softwood Lumber V (Article 21.5 − Canada)*, *US − Stainless Steel (Mexico)*, and *US − Zeroing (Japan)*. Like the Appellate Body majority's findings in *US − Washing Machines*, the Appellate Body's consideration

of the mathematical equivalence argument in those earlier disputes neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

51. The Appellate Body first addressed the mathematical equivalence argument in *US − Softwood Lumber V (Article 21.5 − Canada)*. In that dispute, the Appellate Body "disagree[d] with the Panel's analysis of the 'mathematical equivalence' argument for several reasons." Some of the reasons the Appellate Body gave are distinguishable from the current situation, while others are instructive.

52. The Appellate Body disagreed with the panel in *US − Softwood Lumber V (Article 21.5 − Canada)* on the grounds that, "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average." In this dispute, the United States does not offer the mathematical equivalence argument to support a proposed interpretation of the transaction-to-transaction and average-to-average comparison methodologies in the first sentence of Article 2.4.2 of the AD Agreement. Rather, the mathematical equivalence argument is offered here to support the contextual argument that, as an exception, the alternative, average-to-transaction comparison methodology should not be interpreted in a way that would lead, invariably, to that comparison methodology yielding results that are identical or systematically similar to the results of the normal comparison methodologies. Nor should the second sentence of Article 2.4.2 be interpreted so as to rewrite that provision such that targeted dumping is addressed not by the application of the average-to-transaction comparison methodology but, in effect, by the application of the average-to-average comparison methodology to a subset of transactions.

53. The Appellate Body further observed in *US − Softwood Lumber V (Article 21.5 − Canada)* that "the United States' 'mathematical equivalence' argument assumes that zeroing is prohibited under the methodology set out in the second sentence of Article 2.4.2. The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases." The Appellate Body was correct, of course, that the mathematical equivalence argument is premised on the assumption, for the purpose of argument, that zeroing is prohibited under the average-to-transaction comparison methodology. The United States offers the mathematical equivalence argument here as an argument against finding that that is the case. That the Appellate Body suggested that the U.S. assumption in *US − Softwood Lumber V (Article 21.5 − Canada)* was a reason for its disagreement with the panel's analysis of the mathematical equivalence argument in that context suggests that the use of zeroing should not be prohibited in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

54. The Appellate Body also noted in *US − Softwood Lumber V (Article 21.5 − Canada)* that "there is considerable uncertainty regarding how precisely the third methodology should be applied." Similarly, in *US − Stainless Steel (Mexico)*, Mexico and the third participants argued that "the 'mathematical equivalence' argument works only under the assumption that the weighted average normal value used in the weighted average-to-transaction … comparison methodology is identical to that used in the [average-to-average] comparison methodology," and Mexico pointed out that that was "not the case under the United States' system."

55. In *US − Softwood Lumber V (Article 21.5 − Canada)* and *US − Stainless Steel (Mexico)*, as well as in *US − Zeroing (Japan)*, the Appellate Body signalled that it saw merit in the arguments of the participants and third participants described above. In *US − Stainless Steel (Mexico)*, the Appellate Body expressed the view that "the 'mathematical equivalence' argument works only under a specific set of assumptions, and … there is uncertainty as to how the [average-to-transaction] comparison methodology would be applied in practice."

56. Those prior disputes, however, did not involve an actual application of the average-to-transaction comparison methodology. In the softwood lumber antidumping investigation challenged here, and generally, the weighted average normal value used in the application of the average-to-average comparison methodology is no different from the weighted average normal value used in the application of the average-to-transaction comparison methodology.

57. The panel in *US − Washing Machines* "rejected Korea's argument that the use of different weighted average normal values could avoid mathematical equivalence." "Neither was the Panel

persuaded by Korea's argument that mathematical equivalence could be avoided if the investigating authority undertook a 'granular analysis' of the transactions involved in the [average-to-transaction] comparison methodology and a detailed approach to price adjustments, i.e. by rethinking the adjustments that might be necessary to ensure price comparability." In its discussion of mathematical equivalence, the Appellate Body majority noted Korea's argument on appeal that "the possibility of changing the normal value or the adjustments to export prices breaks mathematical equivalence." Aside from summarizing the panel's findings and Korea's arguments on appeal, though, the Appellate Body majority did not analyze − and did not reverse − the *US − Washing Machines* panel's findings in this regard.

58. Because of the different underlying factual situations in *US − Softwood Lumber V (Article 21.5 - Canada)*, *US − Stainless Steel (Mexico)*, and *US − Zeroing (Japan)*, as contrasted with the factual situation in this dispute, and because of the flaws in the reasoning of the Appellate Body majority in *US − Washing Machines*, the Appellate Body's consideration of the mathematical equivalence argument in those disputes does not compel rejection of the mathematical equivalence argument in this dispute.

e. The Negotiating History of the AD Agreement Confirms that Zeroing is Permissible when Applying the Asymmetrical Comparison Methodology Set Forth in the Second Sentence of Article 2.4.2 of the AD Agreement

59. The "asymmetrical" nature of the "third methodology," and the fact that it may be used "only in exceptional circumstances," when considered together with the negotiating history of the AD Agreement, confirms that zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

60. Of particular relevance are proposals from GATT Contracting Parties that sought changes to the Tokyo Round Antidumping Code to address concerns about certain investigating authorities that used an asymmetrical comparison methodology, in which "the 'negative' dumping margin by which the normal value falls below the export price in the value term will be treated as zero instead of being added to the other transactions to offset the dumping margin." It is clear from these proposals that the *demandeurs* viewed asymmetry and zeroing as one and the same problem.

61. The ultimate compromise agreed by the WTO Members is, of course, reflected in the text of Article 2.4.2 of the AD Agreement. Article 2.4.2 provides that "normally" a symmetrical comparison methodology must be used, but when certain conditions are met, an investigating authority "may" use an asymmetrical comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." The negotiating history documents confirm that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

3. Canada's Claim that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology is Inconsistent with Article 2.4 of the AD Agreement Lacks Merit

62. Canada claims that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4 of the AD Agreement. Canada's claim lacks merit.

63. The text of Article 2.4 of the AD Agreement requires that "[a] fair comparison shall be made between the export price and the normal value", and then goes on the describe how such a "fair comparison" is to be made, including specifying that "[t]he comparison shall be made at the same level of trade … and in respect of sales made at as nearly as possible the same time." Article 2.4 also describes various adjustments ("[d]ue allowance[s]") that an investigating authority must make to export price and normal value to ensure a "fair comparison". The text of Article 2.4 says nothing about whether zeroing is fair or unfair. As the panel in *US − Zeroing (Japan)* noted, the "precise meaning of" the fair comparison requirement "must be understood in light of the nature of the activity at issue." The panel concluded that "the 'fair comparison' requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context."

64. Canada once again seeks to support its claim not with a discussion of the terms of Article 2.4 of the AD Agreement, but instead by relying on findings in prior Appellate Body reports, including the findings of two Appellate Body members in *US − Washing Machines*. However, the findings of the majority in *US − Washing Machines* are internally inconsistent, and the Panel should not consider those findings persuasive.

65. The Appellate Body majority treated nearly identical factual situations differently, deeming one (zeroing) to be unfair while deeming another (the Appellate Body majority's own prescription for addressing targeted dumping) to be fair. There is no textual or logical support for the Appellate Body majority's finding.

66. Given the Appellate Body majority's inconsistent treatment of nearly identical factual situations, it appears that the Appellate Body majority's finding that the use of zeroing is inconsistent with Article 2.4 of the AD Agreement is, in reality, dependent on and follows directly from the finding that the use of zeroing is inconsistent with Article 2.4.2 of the AD Agreement. As demonstrated above, the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is not inconsistent with Article 2.4.2 of the AD Agreement.

67. Furthermore, there is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is in any way not "fair," or that it is inconsistent with any "fair comparison" obligation in Article 2.4 of the AD Agreement. Canada argues that the Appellate Body has interpreted the term "fair" under Article 2.4 of the AD Agreement as connoting "impartiality, even-handedness, or lack of bias." It does not follow from that Appellate Body finding, however, that Article 2.4 of AD Agreement prohibits the use of zeroing in connection with the alternative, "exceptional" average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 have been met.

68. As explained above, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping" in "exceptional" situations. It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased, as one Appellate Body member agreed in *US − Washing Machines*.

D. Canada's Consequential Claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 Lack Merit

69. Canada offers no support for its claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994. Canada does not even discuss its claims under those provisions except to assert in passing that breaches of those provisions purportedly follow as a consequence of alleged breaches of Articles 2.4 and 2.4.2 of the AD Agreement. As the United States has established, Canada's claims that the United States has acted inconsistently with Articles 2.4 and 2.4.2 of the AD Agreement lack merit. As a consequence, Canada's claims under under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are equally without merit.

IV. CONCLUSION

70. The United States respectfully requests that the Panel reject all of Canada's claims.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. The U.S. first written submission demonstrates why Canada's claims under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") fail. As the United States has shown, Canada's proposed interpretations of the AD Agreement are not supported by the ordinary meaning of terms of the AD Agreement, read in context, and in light of the object and purpose of the AD Agreement.

2. Canada's statements during the first substantive meeting and its responses to the Panel's questions have not improved Canada's case. Canada continues to refer to and rely on findings presented in prior Appellate Body reports without presenting interpretive analyses of the AD Agreement applying the customary rules of interpretation to support its claims. Where the United States has identified errors and inconsistencies in the Appellate Body findings on which Canada relies, Canada has ignored the U.S. arguments, simply repeating, for example, that the Panel "must follow the Appellate Body's decision" in *US − Washing Machines*.

3. Canada's understanding of the role of the Panel in this dispute remains fundamentally contrary to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the *Agreement Establishing the World Trade Organization* ("WTO Agreement"). To resolve this dispute, the Panel will need to make an objective assessment of the matter before it and undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law. Canada still has done nothing to help the Panel accomplish the task it has been given under the DSU.

II. CANADA MISUNDERSTANDS THE ROLE OF DISPUTE SETTLEMENT PANELS UNDER THE DSU

4. The U.S. first written submission discusses the role of WTO dispute settlement panels in disputes concerning antidumping measures. The role of panels in such disputes is established by Articles 3.2, 3.9, 11, 19.1, and 19.2 of the DSU and Article 17.6 of the AD Agreement.

5. In sum, the role of a WTO dispute settlement panel established by the DSB is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it", including an objective assessment of "the applicability of and conformity with the covered agreements". That assessment is one of conformity with the covered agreements − not prior reports adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".

6. Nevertheless, Canada maintains that WTO panels are "expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system." Canada asserts that the notion that WTO panels are "expected" to follow Appellate Body reports "arises directly from the provisions of the [DSU]". Canada is mistaken, and such a notion is directly contrary to the DSU and the WTO Agreement.

7. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements − and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation. Per Article IX:2 of the WTO Agreement, that authority is reserved to the Ministerial Conference or the General Council acting under a special procedure. And Article 3.9 of the DSU expressly states that the DSU, including adoption of panel and Appellate Body reports by the DSB, is without prejudice to the procedure to obtain an authoritative interpretation by the

Ministerial Conference or General Council. Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute.

8. This was the view expressed by the Appellate Body in one of its first reports, in *Japan – Alcoholic Beverages II*. The United States is not aware that the Appellate Body has ever disavowed this understanding, which is contained in a report adopted by the DSB.

9. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such customary rules. Article 31 of the Vienna Convention provides that "[a] treaty shall 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 the light of its object and purpose."

10. Ideally, WTO panels and the Appellate Body will apply the customary rules of interpretation correctly, and thus different adjudicators will consistently reach similar conclusions concerning the interpretation of the covered agreements. After a panel first applies the customary rules of interpretation itself and reaches its own preliminary conclusion concerning the interpretation of a covered agreement, it is appropriate for the panel to take into account the interpretive findings in prior panel and Appellate Body reports that have been adopted by the DSB. Where a panel's preliminary interpretive conclusion accords with the conclusion in a prior report, the panel can have greater confidence in the correctness of its own conclusion and reflect that in its own report. However, where a panel's preliminary interpretive conclusion differs from the conclusion in a prior report, it may be appropriate for the panel to further consider the matter, and assess whether the panel has erred in its own application of the customary rules of interpretation, or whether the panel considers that the interpretive finding in a prior report is erroneous. Such an approach would be consistent with the role of a WTO dispute settlement panel, as provided in the DSU, while also taking appropriate account of prior reports adopted by the DSB.

11. On the other hand, starting (and perhaps even ending) a so-called "interpretive analysis" with prior reports adopted by the DSB is not what WTO dispute settlement panels are "expected" to do, per the terms of the DSU. Taking such an approach would constitute a failure by a panel to fulfil its role under the DSU.

III. CANADA'S CLAIMS RELATED TO THE USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT LACK MERIT

A. Introduction

12. The U.S. first written submission demonstrates that the interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law.

13. Canada has declined to provide the Panel with an interpretive analysis of the AD Agreement based on the customary rules of interpretation, *i.e.*, a discussion of the ordinary meaning of the terms of the AD Agreement in their context and in light of the object and purpose of the AD Agreement. Instead, Canada insists that this dispute is "narrow" and incorrectly urges the Panel simply to "follow Appellate Body reports." As the United States has demonstrated, the Panel is not authorized by the DSU to take the approach Canada proposes.

14. Furthermore, aside from not being based on an application of the customary rules of interpretation, Canada's proposed interpretations are untenable because they would read the average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 out of the AD Agreement entirely.

15. As the United States has explained, the USDOC, through its application of a differential pricing analysis in the antidumping investigation of softwood lumber from Canada, undertook a rigorous, holistic examination to determine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods, and the USDOC did so in a manner

that gives effect to the "pattern clause" and the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement.

16. For the reasons given below, the United States continues to urge the Panel to engage in a thorough interpretive analysis in accordance with the customary rules of interpretation of public international law. The United States remains confident that doing so will lead the Panel to conclude that Canada's claims are without merit, and the USDOC's determination in the antidumping investigation of softwood lumber from Canada is not inconsistent with the AD Agreement or the GATT 1994.

B. Canada's Claims Regarding the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Lack Merit

17. The U.S. first written submission demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2 of the AD Agreement − the "pattern clause" − means a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. This is the interpretive conclusion that follows from a proper application of the customary rules of interpretation of public international law.

18. The U.S. first written submission further shows that the USDOC undertook a rigorous, holistic examination of each respondent's export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as among different purchasers, regions or time periods. In addition to explaining its analytical approach in the preliminary decision memorandum and the final issues and decision memorandum, the USDOC addressed arguments raised by interested parties concerning the USDOC's analysis. Those memoranda provide a reasoned and adequate explanation of the USDOC's determination and demonstrate that the USDOC's application of a differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

19. Finally, the U.S. first written submission explains that Canada's arguments regarding the meaning and application of the "pattern clause" lack merit. In its statements at the first substantive meeting and in its responses to the Panel's questions, Canada has done nothing to improve its deficient arguments against the USDOC's determination. Instead, Canada largely repeats arguments it made in its first written submission, and Canada continues to rely on findings in prior reports rather than on interpretive analyses pursuant to the customary rules of interpretation. Canada's arguments continue to lack merit.

1. The USDOC's Consideration of Both Low and High Prices Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

20. The U.S. first written submission demonstrates that the USDOC's consideration of both low and high prices is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

21. Canada asserts that "[t]he analysis must begin from the ordinary meaning of the term 'pattern.'" The United States agrees, and Canada's assertion is consistent with the customary rules of interpretation of public international law, as reflected in Article 31 of the Vienna Convention. The United States and Canada also are in agreement about the ordinary meaning of the term "pattern," which can be discerned from the dictionary definition of that term.

22. Canada, however, quoting the Appellate Body report in *US − Washing Machines*, contends that the use of the term "pattern" "means that the sales that are part of the pattern must demonstrate some similarities. One cannot have a 'pattern' consisting of fundamentally different prices." Canada's argument fails to account for the context in which the term "pattern" is used.

23. The relevant "pattern" within the meaning of the second sentence of Article 2.4.2 is "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" from one another. A set of lower-priced export sales to a particular purchaser, for example, is not "a

pattern of export prices which differ significantly". It would be a pattern of export prices which are similar to one another, and which happen also to be lower than export prices to other purchasers.

24. Canada further contends that its proposed interpretation is "consistent with the phrase 'differ significantly among different purchasers, regions or time periods,' because the sales in the pattern differ significantly from the sales to other purchasers, or other regions, or other time periods." The U.S. first written submission addresses this precise contention, but Canada has ignored the U.S. argument. A set of lower-priced export sales to a particular purchaser (or to a particular region or during a particular time period) is not "a pattern of export prices … among different purchasers, regions or time periods". It would be a pattern of export prices to a particular purchaser (or to a particular region or during a particular time period). Canada, like the Appellate Body in *US − Washing Machines*, in effect rewrites the "pattern clause" of the second sentence of Article 2.4.2 by changing the word "among" to "from". The "pattern clause" describes "a pattern of export prices which differ significantly among different purchasers, regions or time periods", not a pattern of export prices which differ significantly from different purchasers, regions or time periods. The pattern described by Canada and the Appellate Body simply is a different pattern than that which is described in the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

25. Finally, Canada argues that its proposed interpretation "is further reinforced when the Article is read in the light of the purpose of the second sentence of Article 2.4.2 and the Anti-Dumping Agreement as a whole." Canada's proposal that the Panel interpret the second sentence of Article 2.4.2 of the AD Agreement in light of the purpose of the second sentence itself is inconsistent with the customary rules of interpretation. The customary rules of interpretation do not contemplate reading the terms of a provision of a treaty in light of the purpose of the provision. Doing so would carry a high risk of engaging in circular reasoning. For example, one might incorrectly reason that the purpose of a provision is X, therefore the terms of the provision must mean X. But one cannot know what the purpose of a provision is prior to interpreting the provision. Applying the customary rules of interpretation, an adjudicator can discern the meaning (and the purpose) of a provision by interpreting the provision "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose." Canada's proposed interpretive approach is precisely backwards.

26. Canada asserts that "[t]he second sentence of Article 2.4.2 allows an investigating authority to focus on a more limited universe of export sales than under the normal comparison methodologies in order to address possible 'targeted dumping.'" Canada refers to paragraph 135 of the Appellate Body report in *US − Zeroing (Japan)* as support for the proposition that "'individual export transactions' refers to transactions that fall within the 'pattern'."

27. There is reason for the Panel to exercise caution when considering whether to draw guidance from paragraph 135 of the Appellate Body report in *US − Zeroing (Japan)*. That paragraph contains an error. The *US − Zeroing (Japan)* Appellate Body report misquotes the second sentence of Article 2.4.2 when it states that "[t]he emphasis in the second sentence of Article 2.4.2 is on a 'pattern', namely a 'pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods[]'". Where the Appellate Body report uses the term "differs," the second sentence of Article 2.4.2 uses the term "differ." The presence of the term "differs" would suggest that the "pattern" is what "differs" from something that is not the "pattern" − or the export prices in the "pattern" are what differs from export prices that are not in the "pattern". However, the terms of the second sentence of Article 2.4.2 provide that the relevant pattern is one that includes "export prices which differ significantly among different purchasers, regions or time periods." The brevity of the Appellate Body's discussion that follows the misquotation makes it difficult to determine whether the Appellate Body's reasoning follows from the misquotation and is thus itself also erroneous for that reason.

28. In *US − Washing Machines*, the Appellate Body addressed the U.S. argument. The United States does not agree that it is clear from paragraph 135 of the Appellate Body report in *US − Zeroing (Japan)* that the Appellate Body correctly understood the terms of the second sentence of Article 2.4.2 of the AD Agreement. Thus, the United States would caution the Panel against relying on the findings in that paragraph.

29. Concerning the object and purpose of the AD Agreement as a whole, the interpretation of the "pattern clause" proposed by the United States is consistent with and supports the object and purpose of the AD Agreement. Although the AD Agreement "does not contain a preamble or an

explicit indication of its object and purpose," guidance can be found in Article VI:1 of the GATT 1994, in which Members have recognized that injurious dumping "is to be condemned." Of course, the AD Agreement also provides detailed rules governing the application of antidumping measures, including procedural safeguards for interested parties and substantive rules on the calculation of a margin of dumping. The AD Agreement thus appears to be aimed at providing a balanced set of rights and obligations regarding the use of antidumping measures to remedy injurious dumping.

30. While the AD Agreement may be said to be concerned with injurious dumping and low-priced sales, there exists the possibility, as the parties and third parties appear to agree, that low-priced sales that would be evidence of dumping may be masked by higher-priced sales that would conceal the evidence of dumping. The Appellate Body, too, has observed that the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping" in "exceptional" situations. Interpreting the "pattern clause" as proposed by the United States – *i.e.,* as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as among different purchasers, regions, or time periods – serves the aim of the second sentence of Article 2.4.2, as described by the Appellate Body, and is consistent with the overall balance of rights and obligations struck in the AD Agreement. The interpretation proposed by the United States also is that which follows from a proper application of the customary rules of interpretation, as we have demonstrated.

2. The USDOC's Aggregation of Price Differences Among Different Purchasers, Regions, or Time Periods Is Not Inconsistent with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

31. The U.S. first written submission demonstrates that the USDOC's aggregation of price differences among different purchasers, regions, or time periods is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

32. Canada argues that the United States is asking the Panel "essentially to rewrite [the pattern clause] so that it allows amalgamation across purchasers, regions, and time periods." It is not the United States that asks the Panel to rewrite the "pattern clause". The United States has demonstrated that Canada's proposed interpretation would require rewriting the pattern clause, specifically by adding two more instances of the word "among" in places in which that term does not appear. The United States has demonstrated this by putting before the Panel an interpretive analysis of the text of the "pattern clause" undertaken in accordance with the customary rules of interpretation. Canada, for its part, continues to quote the findings in prior Appellate Body reports, but has steadfastly refused to set forth a fulsome interpretive analysis that engages seriously with the text of the second sentence of Article 2.4.2; nor has Canada responded to the arguments presented by the United States.

33. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among each category (*i.e.*, purchasers, regions, or time periods) cannot be considered together when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." To the contrary, the text of the "pattern clause," on its face, contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods. In particular, the "pattern clause" directs an investigating authority to consider whether there exists a pattern of export prices which differ significantly "<u>among different</u> purchasers, regions or time periods".

34. In response to a question from the Panel, Canada presents arguments based on the negotiating history of the AD Agreement. Canada's arguments are not well founded. The "pattern" described in the New Zealand III text, to which Canada points, is a different pattern than that described in the text to which Members ultimately agreed. Canada's proposed interpretation appears to be more similar to the pattern in the New Zealand III text, *i.e.*, a pattern "<u>to particular</u> customers", as opposed to the pattern described in the second sentence of Article 2.4.2 of the AD Agreement, *i.e.*, "a pattern of export prices which differ significantly <u>among different</u> customers, regions or time periods".

35. Canada also refers to the text of the Carlisle II draft. Once, again, Canada misunderstands the implication of the changes made from the draft text to the final text. The Carlisle II text was not

simply modified "to remove the repetitious and unnecessary 'or's", as Canada suggests. Also gone from the final text are the modifiers in "*specific* customers", "*different* regions", and "*certain* periods". While the Carlisle II text might have supported the interpretation Canada proposes − *i.e.*, that the relevant subset of transactions is limited to "*specific* customers", "*different* regions", or "*certain* periods" − that is not the text to which WTO Members ultimately agreed.

36. The evolution of the text of what eventually became the second sentence of Article 2.4.2 of the AD Agreement reveals changes that negotiators made to the negotiated text. The Panel should take the evolution of the text into account to confirm the meaning of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which, as the United States has shown, can be ascertained by a proper application of the customary rules of interpretation.

37. As the United States has demonstrated, the differential pricing analysis sought to identify "a pattern" for an exporter and product as a whole by considering all of that exporter's export prices to discern whether significant differences in the export prices were exhibited collectively among different purchasers, or different regions, or different time periods. This approach is not inconsistent with the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which directs investigating authorities to consider whether there exists a pattern of export prices which differ significantly "among different purchasers, regions or time periods".

C. Canada's Claims that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement Lack Merit

38. The U.S. first written submission demonstrates that an examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international law. This conclusion also accords with and is the logical extension of the Appellate Body's findings in previous disputes relating to the use of zeroing in connection with the comparison methodologies provided in the first sentence of Article 2.4.2 of the AD Agreement. And this is the conclusion reached by one Appellate Body member in *US − Washing Machines*.

39. In its opening statement at the first panel meeting and in response to certain of the Panel's questions, Canada addresses the U.S. arguments related to zeroing. The United States takes the opportunity in this submission to reply to Canada's new arguments. Where appropriate, rather than repeating arguments made in the U.S. first written submission, we respectfully refer the Panel to the relevant portions of the U.S. first written submission that address Canada's arguments.

1. The U.S. Interpretive Analysis of the Second Sentence of Article 2.4.2 of the AD Agreement Remains Unrebutted

40. The U.S. first written submission presents an interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement that applies the customary rules of interpretation of public international law. The U.S. first written submission also directly addresses findings related to the interpretation of the second sentence of Article 2.4.2 in prior Appellate Body reports and identifies a number of errors in those findings.

41. Canada has made no attempt to rebut the U.S. arguments. Instead, Canada simply reiterates its assertion that the findings in prior Appellate Body reports are correct, and does not engage at all with the U.S. arguments.

42. For example, Canada asserted in its opening statement at the first substantive meeting that "the findings in [the *US − Washing Machines* Appellate Body] report are consistent with both the text of the Agreement and more than 17 years of Appellate Body jurisprudence on zeroing." The U.S. first written submission demonstrates that the Appellate Body majority incorrectly interpreted the second sentence of Article 2.4.2 of the AD Agreement, and the Appellate Body majority's findings not only departed from the findings of one Appellate Body member in *US − Washing Machines*, but the majority's findings cannot be reconciled with findings related to zeroing in prior Appellate Body reports. Canada has made no attempt to respond to these U.S. arguments.

43. Furthermore, despite Canada's suggestion to the contrary, before *US − Washing Machines*, the Appellate Body had never previously made findings concerning the use of zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2. That is clear from reading prior Appellate Body reports discussing zeroing. Prior to *US − Washing Machines*, the Appellate Body had found zeroing impermissible in the context of the average-to-average and transaction-to-transaction comparison methodologies, which are to be used "normally" under the first sentence of Article 2.4.2. The Appellate Body also had found zeroing impermissible in the context of the U.S. application of an average-to-transaction comparison methodology in administrative reviews, in a situation where the conditions set forth in the second sentence of Article 2.4.2 were not established.

44. The Appellate Body had never found, however, that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 have been established. The Appellate Body had not even confronted that situation in any prior dispute.

45. Accordingly, the permissibility of zeroing under the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 was an issue of first impression for the Appellate Body in *US − Washing Machines*. At this point, only two Appellate Body members have ever found zeroing to be prohibited in connection with the alternative, average-to-transaction comparison methodology.

46. Canada asserts that "zeroing is inconsistent with the terms 'dumping' and 'margin of dumping'." However, that is not what the Appellate Body majority found in *US − Washing Machines*, nor has the Appellate Body ever found that the terms "dumping" and "margin of dumping" are themselves the source of the prohibition on zeroing. If that were the case, the Appellate Body could have made that clear long before *US − Washing Machines*, but the Appellate Body carefully avoided making any such finding.

47. The Appellate Body majority in *US − Washing Machines* does refer to the terms "dumping" and "margins of dumping". The U.S. first written submission explains why the findings in the *US − Washing Machines* Appellate Body report cannot be reconciled with findings in prior Appellate Body reports concerning the concept of "product as a whole". The Appellate Body majority in *US − Washing Machines* prescribed a new alternative methodology for addressing targeted dumping that explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." In the words of the Appellate Body majority: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', <u>without having to take into account</u> 'non-pattern transactions'." Thus, the Appellate Body majority's approach literally requires that a margin of dumping be determined <u>not</u> for the product as a whole, and in a manner that explicitly does <u>not</u> take into account all export transactions. The Appellate Body majority's finding cannot be reconciled with the reasoning in prior Appellate Body reports.

48. Canada's assertion concerning the terms "dumping" and "margin of dumping" is thus unavailing and fails to rebut the U.S. arguments.

49. Canada further asserts that "it was entirely consistent with their past reasoning when in *US − Washing Machines*, the Appellate Body found that transaction specific intermediate results in the W-T methodology are not margins of dumping." The United States has demonstrated that the findings in the *US − Washing Machines* Appellate Body report cannot be reconciled with findings in prior Appellate Body reports. Additionally, the United States does not argue here that "transaction specific intermediate results in the W-T methodology" are themselves "margins of dumping". Canada is making a straw man argument. The United States argues that the results of intermediate comparisons may be <u>evidence</u> of dumping and that such evidence of dumping can be masked by higher-priced sales that are above normal value. The U.S. view, in this regard, is consistent with the logic underlying the findings in the *US − Washing Machines* Appellate Body report.

50. In responses to questions from the Panel, Canada also refers to the terms "pattern" and "individual export transactions". Canada does not engage in any interpretive analysis of those terms, however. Canada merely asserts, for example, that "the text of the second sentence of Article 2.4.2 allows an investigating authority to focus on 'individual export transactions' when it is conducting

the comparison of export prices to a weighted average normal value." Canada makes no attempt to explain why this is so. Canada just reiterates its support for the findings in the panel and Appellate Body reports in *US − Washing Machines*.

51. Canada also asserts that "[b]y using the words 'pattern' and 'individual export transactions' the text explicitly provides for a focus on those transactions." The use of those terms does not make that explicit at all. Canada's assertion simply is not credible.

52. Finally, Canada asserts that "[t]he text of the second sentence prohibits zeroing." Again, Canada suggests that the source of such a prohibition is the terms "pattern" and "individual export transactions". The United States notes that elsewhere Canada suggests that zeroing is prohibited throughout the AD Agreement by the terms "dumping" and "margin of dumping". Canada has made no attempt to reconcile its conflicting assertions and explain precisely what in the AD Agreement establishes a prohibition − or multiple prohibitions − on the use of zeroing.

53. The U.S. first written submission explains why the interpretations of the terms "pattern" and "individual export transactions" in the *US − Washing Machines* Appellate Body report do not follow from a proper application of the customary rules of interpretation of public international law, and the U.S. first written submission also points to specific internal logical inconsistencies in the Appellate Body report. Canada has not responded to the U.S. arguments, which remain unrebutted.

54. In sum, Canada still has not presented the Panel with an interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement. Canada persists in simply summarizing or referencing various findings in prior Appellate Body reports without engaging or responding to the U.S. arguments that have identified errors in those reports. In approaching this dispute as it has, Canada has failed to help the Panel discharge its function under the DSU, which requires the Panel to make its own "objective assessment of the matter before it". Such an objective assessment involves an objective assessment of "the applicability of and conformity with the relevant covered agreements," and necessarily includes an interpretive analysis of any of the provisions of the relevant covered agreements "in accordance with customary rules of interpretation of public international law". The United States has demonstrated that such an analysis leads to the conclusion that zeroing is permissible − indeed, it is necessary − under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2.

2. The U.S. Arguments Concerning Mathematical Equivalence Remain Unrebutted

55. The U.S. first written submission demonstrates that if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then both methodologies, when applied to the same set of transactions, will always yield identical results, with respect to the total amount of all comparison results, the total amount of dumping, and the weighted average dumping margin, which would render the second sentence of Article 2.4.2 of the AD Agreement *inutile*, contrary to the principle of effectiveness. The U.S. first written submission establishes this using hypothetical examples as well as the actual data from the softwood lumber antidumping investigation.

56. Canada briefly addressed the U.S. argument during the first substantive panel meeting, suggesting that the United States "ignores" findings related to mathematical equivalence in prior Appellate Body reports. On the contrary, the U.S. first written submission discusses the Appellate Body's prior consideration of mathematical equivalence at length, demonstrating that those findings neither support nor compel the Panel's rejection of the mathematical equivalence argument in this dispute. Canada has ignored the U.S. arguments and made no attempt to rebut them.

57. Canada further asserts that the United States "also ignores the fact that the United States itself has acknowledged during the Appellate Body hearing for *US − Washing Machines* that calculating a margin of dumping focused only on pattern transactions would lead to a mathematically different result." The position of the United States during the Appellate Body hearing on this issue hardly seems relevant. The Appellate Body majority expressly made that very finding in the *US − Washing Machines* Appellate Body report. The U.S. first written submission directly addresses why that finding is not responsive to the mathematical equivalence argument.

58. To summarize, by finding that the second sentence of Article 2.4.2 requires the application of the average-to-transaction comparison methodology to a subset of transactions while also prohibiting the use of zeroing, the Appellate Body majority found, in effect, that the application of the average-to-average comparison methodology to that subset of transactions (without zeroing) is what actually is contemplated by the second sentence of Article 2.4.2. The Appellate Body majority effectively rewrote the second sentence of Article 2.4.2, changing it from allowing the application of the average-to-transaction comparison methodology under certain circumstances to allowing the application of the average-to-average comparison methodology to a subset of transactions under certain circumstances. The Appellate Body majority invented an entirely new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2, and which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time after. Ultimately, the Appellate Body majority read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, contrary to the principle of effectiveness. The Appellate Body majority did all of this in a rather awkward − but futile − attempt to avoid the problem of mathematical equivalence.

59. Canada has ignored the U.S. arguments and made no attempt to rebut them.

60. Finally, the Panel asked Canada whether it agrees "that if the W-T and the W-W methodologies are applied to the same set of export transactions, the dumping margin obtained under these two methodologies would be mathematically equivalent". Canada responded, "No." However, Canada obfuscates by qualifying its response, explaining that, "[w]hen the two methodologies are applied correctly, they yield mathematically different results", and "the W-W and the W-T methodologies, as described in the Anti-Dumping Agreement, properly interpreted, cannot be applied to the same set of export transactions." Thus, Canada has avoided answering the question that the Panel asked. Canada has not demonstrated that the United States is incorrect about the fact of mathematical equivalence.

61. Even the Appellate Body majority in *US − Washing Machines* acknowledged the reality of mathematical equivalence, referring to "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern". The panels in *US − Washing Machines* and *US − Anti-Dumping Methodologies (China)* also recognized the fact of mathematical equivalence. No WTO panel, nor the Appellate Body, has ever found that the United States is incorrect that the average-to-average comparison methodology (without zeroing) and the average-to-transaction comparison methodology (also without zeroing) yield the same mathematical result when applied to the same set of export transactions.

62. The United States continues to respectfully request that the Panel make a factual finding that, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies, when applied to the same set of transactions, will yield mathematically equivalent results in all cases, including in the challenged antidumping investigation. This fact remains unrebutted.

3. The U.S. Arguments Concerning the Negotiating History of the AD Agreement Remain Unrebutted

63. The U.S. first written submission demonstrates that the negotiating history of the AD Agreement confirms that zeroing is permissible when applying the asymmetrical, alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

64. In its opening statement at the first panel meeting, Canada argued that "negotiating history is a supplemental means of treaty interpretation that can only be relied upon where the meaning of the text is unclear." Canada is incorrect. As explained in the U.S. first written submission, Article 32 of the Vienna Convention has been recognized by the Appellate Body as reflecting a customary rule of interpretation of public international law. The United States has not suggested that the meaning of the second sentence of Article 2.4.2 is unclear. Rather, the meaning of that provision − specifically that zeroing is permissible when applying the comparison methodology set forth in that provision − can be confirmed through recourse to documents from the negotiating history of the AD Agreement.

65. Japan, in its responses to the Panel's questions, likewise argues that "[t]he negotiating history confirms that the second sentence of Article 2.4.2 was indeed aimed at addressing the issue of targeted dumping." Japan appears to agree with the principle under the customary rules of interpretation that negotiating history documents can be used by a treaty interpreter to confirm the meaning that results from the application of Article 31 of the Vienna Convention.

66. The U.S. first written submission discusses particular documents from the negotiating history of the second sentence of Article 2.4.2 of the AD Agreement as well as the consideration of those documents in the *US − Washing Machines* Appellate Body report. Canada has made no effort to respond to the substance of the U.S. arguments.

67. The U.S. argument − that the correct understanding of the negotiating history confirms the interpretation of the second sentence of Article 2.4.2 of the AD Agreement proposed by the United States − remains unrebutted.

4. Canada's Claim that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology is Inconsistent with Article 2.4 of the AD Agreement Lacks Merit

68. The U.S. first written submission demonstrates that Canada's claim that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4 of the AD Agreement lacks merit.

69. Canada has made no new arguments in support of its claim under Article 2.4 in its statements during the first substantive meeting, nor in its responses to the Panel's questions. Canada simply reiterated its support for the findings in prior Appellate Body reports without addressing the U.S. arguments that those findings are erroneous and contain logical inconsistencies.

70. For example, Canada asserts that, "in the context of both W-W and T-T, the Appellate Body found that zeroing altered certain transactions or treated them as less than their actual value. Relying on these prior interpretations, the Appellate Body concluded that the same reasoning applies to the W-T methodology", and "[t]he Appellate Body was also relying on its prior interpretations when it found that zeroing inflates the magnitude of dumping and makes positive determinations more likely when sales above normal value exceed those below normal value."

71. The United States has explained that the "exclusion of 'non-pattern transactions' from the establishment of dumping and margins of dumping" is, in reality and effect, essentially the same as zeroing. Following, for argument's sake, the logic of the Appellate Body majority in *US − Washing Machines*, the "exclusion of 'non-pattern transactions'" "does *not* take fully into account the prices of *all* comparable export transactions." There has never been any suggestion that non-pattern transactions are somehow not comparable to corresponding normal value transactions. Thus, applying the methodology and logic of the Appellate Body majority would mean that not all comparable export transactions would be taken into account. Indeed, the Appellate Body majority itself described the methodology it prescribed in *US − Washing Machines* in the following terms: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', without having to take into account 'non-pattern transactions'."

72. Additionally, the so-called non-pattern export transactions that are to be excluded under the methodology prescribed by the Appellate Body majority would be, following the majority's logic, higher-priced export transactions. Thus, the "exclusion of 'non-pattern transactions'" would mean that the margin of dumping determined under the majority's methodology would be higher, and a positive determination of dumping would be more likely in circumstances where the "non-pattern" export prices are above normal value and the "pattern transactions" are below normal value.

73. The Appellate Body majority treated nearly identical factual situations differently, deeming one (zeroing) to be unfair while deeming another (the Appellate Body majority's own prescription for addressing targeted dumping) to be fair. There is no textual or logical support for the Appellate Body majority's finding.

74. Canada has not responded to the U.S. arguments, and they remain unrebutted.

75. Another serious concern highlighted by Canada's statements is that, as Canada notes, the Appellate Body majority was "relying on [the Appellate Body's] prior interpretations" when it made its findings in *US − Washing Machines*, rather than applying the customary rules of interpretation and then taking into account findings in prior adopted reports. The danger in undertaking an interpretive analysis by relying on prior interpretations − aside from that being contrary to the customary rules of interpretation − is that doing so leaves the adjudicator further and further removed from the treaty text being interpreted, making it more likely that an erroneous interpretation will result.

76. Finally, Canada suggests that, "[i]n the present dispute, it could not be clearer that the Appellate Body was correct", asserting that "[a] company that on average sold for a higher price in the United States finds itself subject to an anti-dumping order because of zeroing." That could just as well be true under the approach prescribed by the Appellate Body majority in *US − Washing Machines*, depending on the data. This is no indication that the approach taken by the USDOC was somehow not "fair" within the meaning of Article 2.4 of the AD Agreement, and it tells one nothing about the proper interpretation of the AD Agreement.

77. As the United States has explained, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping" in "exceptional" situations. It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased, as one Appellate Body member agreed in *US − Washing Machines*.

78. For these reasons, the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in the softwood lumber antidumping investigation is not inconsistent with Article 2.4 of the AD Agreement.

D. Canada's Consequential Claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 Lack Merit

79. The U.S. first written submission demonstrates that Canada offered no support for its claims under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 beyond suggesting that breaches of those provisions follow as a consequence of breaches of Articles 2.4 and 2.4.2 of the AD Agreement. As the United States has established, Canada's claims that the United States has acted inconsistently with Articles 2.4 and 2.4.2 of the AD Agreement lack merit, and thus Canada's claims under under Articles 1 and 2.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are equally without merit. Canada made no further reference to its consequential claims, neither in its opening statement at the first substantive meeting nor in response to the Panel's questions.

IV. CONCLUSION

80. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject Canada's claims.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

[1] Brazil submitted the text of the oral statement as its integrated executive summary.
[2] China submitted the text of the oral statement as its integrated executive summary.

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

Mr. Chair, distinguished Members of the Panel,

1. Brazil appreciates the opportunity to appear before you as a third party in the current proceedings. This oral statement will focus on two issues of systemic importance: first, Brazil would like to express its views on the relevance of prior Appellate Body reports in the settlement of subsequent disputes involving similar matters; and second, Brazil would like to elaborate on the proper interpretation of Article 2.4.2 of the Anti-Dumping Agreement.

2. In this dispute, Canada claims that the United States has acted inconsistently with the Anti-Dumping Agreement in two manners. First, the United States Department of Commerce (USDOC) has resorted to a weighted-average-to-transaction (W-T) comparison methodology without fulfilling the requirements provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Second, in calculating the margin of dumping, the United States Department of Commerce (USDOC) has also inflated the results by applying "zeroing". According to Canada, both conducts by the United States have already been found to be inconsistent with WTO law in previous disputes, as confirmed by the Appellate Body Report in *US − Washing Machines*.

3. In response, the United States argues that the panel must make its own assessment of the matter, regardless of what was decided in *US − Washing Machines*, because the text of Article 3.2 of the DSU does not expressly attribute any interpretative value to previous reports of the Appellate Body. In addition, the United States argues that, if the panel were to interpret Article 2.4.2 of the Anti-Dumping Agreement according to the customary rules of interpretation of public international law, it would find that both the choice by the United States Department of Commerce (USDOC) to apply the weighted-average-to-transaction (W-T) methodology *and* the introduction of "zeroing" in the calculation were consistent with the covered agreements.

Relevance of Prior Appellate Body reports

4. Brazil would first like to address the United States' argument that the Appellate Body findings in *US − Washing Machines* should not influence the resolution of this dispute, because, according to the DSU, previous reports adopted by the DSB are not binding for future panels. Brought to its limits, this argument appears to be quite a broad refutation of the interpretative value of prior panel and Appellate Body reports in the WTO dispute settlement mechanism as a whole.

5. In order to support its argument, the United States refers to a portion of Article 3.2 of the DSU according to which, in clarifying the meaning of the covered agreements, panels are required to apply the "customary rules of interpretation of public international law."[1] The underlying implication seems to be that, because precedents of the Appellate Body are not expressly listed as a criterion for legal interpretation in the DSU, panels are free to disregard their content when making their rulings on similar matters. It is noteworthy that, immediately after making this argument, the United States seeks to validate its own interpretation of Article 3.2 by referring to an Appellate Body finding in *US- Gasoline*.[2]

6. In *US − Oil Country Tubular Goods Sunset Review*, the Appellate Body noted that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[3] It seems to Brazil, however, that the expectation that panels will not disregard previous case law is not exclusive to the Appellate Body; it is, rather, shared by the Membership and supported by both law and practice.

7. From a legal perspective, Article 3.2 of the DSU, refers to the entire dispute settlement system, which includes the panel and appellate stages, as being a central element in providing security and predictability to the multilateral trading system. Therefore, one could conclude that,

[1] United States' First Written Submission, para. 23.
[2] Ibid.
[3] *US − Oil Country Tubular Goods Sunset Reviews*, Appellate Body Report, para. 188.

according to Article 3.2, both panels and the Appellate Body play a shared role in providing security and predictability to the multilateral trading system.

8. Brazil considers that a system in which different panels are free to issue conflicting versions of what they consider to be the correct interpretation of a single provision, especially when the issues are the same, would offer *less* security and predictability than a system in which adjudicators strive to interpret WTO law in a consistent manner.

9. From a practical perspective, it is an irrefutable fact that Members resort to prior reports of the Appellate Body in their submissions quite frequently, and in doing so reveal a very clear expectation that those precedents will influence panels' decisions. A glance at the "tables of cases" that appear on the first pages of all Member's submissions confirms this to be the case. This practice does not indicate that Members consider adopted Appellate Body reports to be authoritative interpretations or amendments to the covered agreements. They simply believe that the application of the customary rules of interpretation of public international law to the agreed texts should yield consistent, rather than erratic, results.

10. Moreover, it may be useful to recall that, when interpreting the covered agreements, the Appellate Body is held by the exact same standards as panels. This means that the Appellate Body is also required to apply "customary rules of interpretation of public international law" and, as a result, its reports offer guidance on precisely the same analysis that panels are expected to conduct.

Interpretation of Article 2.4.2 of the Anti-Dumping Agreement

11. Brazil will now comment briefly on the proper interpretation of Article 2.4.2 of the Anti-Dumping Agreement. Brazil notes that the parties seem to be in agreement with the fact that the two symmetrical methods - weighted-average to weighted-average and transaction to transaction (W-W and T-T) - provided for in the first sentence of Article 2.4.2 are normally to be used first in order to calculate the margin of dumping. Thus, the third method - weighted-average-to-transaction (W-T) - is clearly an exception, to be used exclusively as a means to counteract the practice of "targeted dumping" and only in the presence of certain requirements.

12. In this context, the panel should first analyze whether the requirements for the recourse to the weighted-average-to-transaction (W-T) methodology were present in the investigation at hand. To this end, the panel should verify whether United States Department of Commerce (USDOC) was able to detect a "pattern of export prices which differ significantly among different purchasers, regions or time periods" and also whether the investigating authority was able to explain why the symmetrical comparison methodologies could not appropriately take into account such identified "pattern".

13. If the panel is satisfied that the United States Department of Commerce (USDOC) resorted legitimately to the weighted-average-to-transaction (W-T) comparison methodology, it must then establish whether the margins of dumping were properly calculated. In this second stage of the analysis, it is important for the panel to determine whether the exceptional methodology was applied exclusively to the sales that presented the "pattern" of "targeted dumping" and also whether the actual calculation observed mathematical standards consistent with the Anti-Dumping Agreement.

14. Mr. Chair, distinguished members of the Panel, this concludes Brazil's statement. Thank you for your attention.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. Mr. Chairman, Members of the Panel. China welcomes this opportunity to present its views in this dispute.

2. Today, we will focus on two critical issues in relation to Canada's claims on the USDOC's use of differential pricing methodology ("DPM"): (i) the identification of a pattern; and (ii) the permissibility of zeroing, under the second sentence of Article 2.4.2 of the Anti-dumping Agreement ("ADA").

3. As the Panel is aware, this case is not the first one regarding how WTO disciplines shall apply to the use of the "weighted average-to-transaction" ("W-T") comparison methodology in anti-dumping investigations. In this regard, China believes that the previous panel and Appellate Body reports adopted by the DSB have provided clear guidance for addressing issues raised in this dispute.

4. First, with respect to the proper identification of a pattern in the second sentence of ADA Article 2.4.2, China notes that this is a key condition to be satisfied before resorting to the asymmetrical W-T comparison methodology to "determine the existence of margins of dumping". We believe that the exceptional nature of the W-T methodology, as consistently held by the Appellate Body[1] and agreed by the parties to this dispute[2], warrants a strict interpretation of the pattern requirement.

5. Pursuant to ADA Article 2.4.2, when employing the W-T methodology, an investigating authority shall identify a "pattern" of export prices that "differ significantly *among* different purchasers, regions *or* time periods" (emphasis added). The Appellate Body found that while the conjunction "or" may be exclusive or inclusive, the word "among" requires that each category be considered on its own, in the sense that a pattern of prices among different purchasers must be found within purchasers, as between particular purchasers and other purchasers (with the same applying to regions and time periods, respectively).[3] The combined use of the words "or" and "among" in that phrase means that different categories cannot be considered cumulatively to find one single pattern.[4]

6. However, according to Canada[5], in applying the DPM, the USDOC has done the opposite by aggregating the results of comparisons of export prices to purchasers, regions *and* time periods to identify the pattern. In our view, such a practice cannot be compatible with the plain language of the second sentence of ADA Article 2.4.2.

7. Second, zeroing is not permissible even when the strict criteria of W-T methodology have been met. WTO panels and the Appellate Body have consistently held that the use of zeroing is inconsistent with ADA under any of the three comparison methodologies, i.e. "weighted average-to-weighted average" ("W-W"), "transaction-to-transaction" ("T-T") or W-T methodology, as contemplated in ADA Article 2.4.2.[6]

8. In the recent *US – Anti-Dumping Methodologies (China)* and *US – Washing Machines (Korea)* cases, the panel and Appellate Body reaffirmed the inconsistency of the use of zeroing in the W-T

[1] Appellate Body Report, US – Washing Machines, para. 5.18; see also Appellate Body Report, US – Softwood Lumber V (Article 21.5 Canada), para. 55; Appellate Body Report, US – Stainless Steel (Mexico), para. 48.

[2] See e.g. Canada's first written submission to the Panel, para. 37; United States' first written submission to the Panel, para. 115.

[3] Appellate Body Report, *US – Washing Machines*, para. 5.31.

[4] Ibid. para. 5.33.

[5] Canada's first written submission to the Panel, paras. 40-42.

[6] See, e.g., Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 123; *US – Continued Zeroing*, paras. 314-316; *US –Stainless Steel (Mexico)*, paras. 133-134; *US – Zeroing (EC)*, paras. 263(b); *US – Zeroing (Japan)*, paras. 121-129 and 190; *US – Washing Machines*, paras. 6.9-6.11.

methodology scenario.[7] In China's view, any contrary position would be inconsistent with the foundational "exporter-specific" and "product-related" conception of dumping.[8]

9. The mathematical equivalence argument of the United States has also been carefully considered and consistently rejected by the Appellate Body in various disputes.[9] Mathematical equivalence only holds under a specific set of assumptions. If the assumptions are varied, W-T and W-W will generally yield different results.[10]

10. The US mathematical equivalence argument also fails to grapple with the relevance of the T-T methodology. T-T methodology will generally yield results that are different from both W-W and W-T methodology, even though zeroing is not permissible under the T-T methodology.[11]

11. In conclusion, DPM has been ruled "as such" inconsistent with the WTO covered agreements.[12] China sees no "cogent reason" for the Panel to depart from the previous panel and Appellate Body reports adopted by the DSB.

12. Mr. Chairman, Members of the Panel, thank you for your attention. China also wishes to thank the Secretariat team for their hard work. We look forward to your questions.

[7] Panel Report, *US − Anti-Dumping Methodologies (China)*, paras. 7.201-7.209; Appellate Body Report, *US − Washing Machines*, paras. 6.9-6.11.

[8] See, e.g., Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 94.

[9] See e.g., Appellate Body Reports, *US − Softwood Lumber V (Article 21.5 − Canada),* paras. 97-100; *US − Zeroing (Japan),* paras. 135-136; *US − Stainless Steel (Mexico),* paras. 126-127; *and US − Continued Zeroing,* para. 298.

[10] Appellate Body Report, *US − Washing Machines*, paras. 5.125-5.128.

[11] Appellate Body Report, *US − Softwood Lumber V (Article 21.5 Canada)*, para. 88.

[12] Appellate Body Report, *US − Washing Machines*, paras. 6.3.b, 6.4.c, 6.9.a, 6.10.a, and 6.11.a.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 13 September and its replies to the Panel's questions to Third Parties of 27 September 2018. The European Union considers that the present case raises important systemic questions, in particular on the role of prior Appellate Body Reports and on the interpretation and application of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). The European Union's submissions focussed on those systemic questions, without taking a definitive position on the facts of the case.

I. The role of prior Appellate Body Reports

2. Concerning the United States' argument contesting the relevance of the Appellate Body's findings in *US – Washing Machines*, it is standing case-law that adopted Appellate Body Reports create legitimate expectations amongst Members as to the interpretations of WTO law contained therein. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[1]

3. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows exactly that the entire WTO Membership recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. Consistency and stability ensure legal certainty. In turn, legal certainty provides an indispensable condition for international trade to flow smoothly, and must therefore not be jeopardized.

4. An important nuance must be made between legal interpretations and the application of the law to the facts. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case. Interpretations of the law by the Appellate Body should thus not change depending on the case at hand. The possibility of authoritative interpretations under Article IX:2 of the WTO Agreement does not diminish the value of interpretations by the Appellate Body.

II. Article 2.4.2 of the Anti-Dumping Agreement

5. The Appellate Body has clarified that the asymmetrical W-T comparison methodology in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement may be used if the following two conditions are met: first, "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and, second, "an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.[2]

6. The Appellate Body explained that the "pattern" must be understood as a regular and intelligible form or sequence of export prices which differ significantly.[3] Hence, a *pattern* must be identified as consisting of prices that differ *significantly* among different purchasers, regions or time periods. There must be regularity to the sequence of "export prices which differ significantly" and this sequence must be capable of being understood. The Appellate Body stressed that the word "intelligible" excludes the possibility of a pattern merely reflecting random price variation.

7. In reply to a question from the Panel, the European Union considers that the differences in *prices* have to be significant, either in quantitative or qualitative sense. Hence, the starting point is

[1] Appellate Body Report, *US – Stainless Steel (Mexico),* paras. 158-161.

[2] Appellate Body Report, *US – Washing Machines*, para. 5.16, referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 86; and *US – Zeroing (Japan)*, para. 131.

[3] Appellate Body Report, *US – Washing Machines,* para. 5.27.

the comparison of the prices of export transactions, not a comparison in export volumes. The European Union does not exclude that export volumes could be relevant to assess the significance of a price difference, but that would depend on specific facts of the case.

8. The Appellate Body has explained that in order to ascertain whether there is a "pattern" an investigating authority may, starting from the set of *all* export transactions attributable to an investigated producer/exporter, select for further consideration a *sub-set*, which must consist of *all* that producer's/exporter's export transactions to a particular *purchaser* (as opposed to other purchasers) or to a particular *region* (as opposed to the remainder of the territory of the importing Member) or during a particular *time period* (as opposed to the remainder of the investigation period).[4] The so-selected prices of transactions within the sub-set of transactions (grouped according to purchaser, region, or time period) are then compared with the prices of all transactions.

9. A pattern must pertain to all the export transactions to *one particular category* (a purchaser, region or time period). Related purchasers and adjacent regions or time periods are considered as a single category. For the purposes of finding a pattern, it is not possible to *combine* export transactions from different purchasers, different regions, or different time periods. Nor is it possible, for the purposes of finding a pattern, to *combine* export transactions from one of the three types of possible category with export transactions from *another* one of the three types of category.[5]

10. The Appellate Body has also clarified that for there to be a pattern, the export prices in the sub-set (considered as a whole) must be *lower* than the export prices outside the sub-set (considered as a whole); a sub-set of *higher* export prices is not a relevant pattern for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.[6]

11. The W-T comparison methodology may only be applied to the export transactions constituting the relevant pattern, and not to the export transactions that fall outside the sub-set constituting the pattern.[7] Therefore, if the investigating authority has decided to rely on the W-T comparison methodology under the conditions of Article 2.4.2 of the AD Agreement to address targeted dumping, it cannot include the transactions outside the pattern in the numerator for calculating the dumping margin.

12. Finally, the Appellate Body has also rightly found that in applying the W-T comparison methodology to the transactions in the sub-set constituting the pattern zeroing is not permitted. The fact that in *US − Washing Machines*, one member has provided a separate opinion in this regard does not diminish the value of the adopted Appellate Body Report or of the legal interpretation contained therein.

13. Thus, all export transactions in the sub-set must be fully taken into account irrespective of whether they are above or below normal value. When combining intermediate results of comparisons between a weighted average normal value and individual export transactions, export transactions above normal value must be treated as having been made at the price at which they were actually made, and the results of such intermediate comparisons must not be set to zero before determining the dumped amount for the targeted sub-set as a whole.[8]

14. As set out above, if the conditions of Article 2.4.2 are met, the investigating authority is permitted to establish a dumping amount for the transactions that are part of the pattern and thus to disregard the transactions that are not part of the pattern. There is nothing in the text of Article 2.4.2 that would permit an investigating authority to do more, and disregard further certain transactions that are part of the sub-set (namely those for which the export price is above the average normal value). Thus, apart from the specificities provided for in Article 2.4.2, the normal rules for calculating dumping margins apply, and with them, the general prohibition of zeroing as it has now been established in decades of prior case-law, for all types of dumping and all types of determinations.

[4] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[5] Appellate Body Report, *US − Washing Machines*, paras. 5.30-5.34.
[6] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[7] Appellate Body Report, *US − Washing Machines*, paras. 5.50-5.55.
[8] Appellate Body Report, *US − Washing Machines*, paras. 5.151-5.160.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. The USDOC's Methodology Does Not Meet the "Pattern" Requirement

1. The second sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*" or the "*Agreement*") mandates that, before investigating authorities may apply the "exceptional" W-T comparison methodology, they must identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods", rather than to find merely "export prices which differ significantly".[1] The "differential pricing methodology" ("DPM") used by the United States Department of Commerce ("USDOC") is inconsistent with this "pattern" requirement in the following three respects.

A. A "Pattern" Must Help Unmask Targeted Dumping

2. First, the DPM examines both lower and higher export prices to establish *the presence of export prices which differ significantly.*[2] This approach is inconsistent with the "pattern" requirement.

3. As the Appellate Body has explained, and the United States appears to agree[3], a "pattern" means "[a] regular and intelligible form or sequence discernible in certain actions or situations".[4] A "regular and intelligible form or sequence" must be capable of being understood, which means that random price variations do not constitute a "pattern".[5] However, the USDOC's evaluation of both lower and higher export prices by a methodology that relies exclusively on numerical benchmarks[6] will only reveal such random variations − that is, the mere presence, or absence, of export prices which differ significantly − rather than a *pattern* of export prices which differ significantly.[7]

4. Also, because the function of the second sentence of Article 2.4.2 is to identify and address "targeted dumping", the relevant "pattern" can only comprise prices that are significantly *lower* than other export prices among different purchasers, regions or time periods.[8]

B. A "Pattern" Must Consist of Prices that "Differ Significantly", Both Quantitatively and Qualitatively

5. Second, by employing a purely quantitative threshold that is applied to all cases for the determination of targeted dumping, the DPM fails to satisfy the precondition set forth in the second sentence of Article 2.4.2 that the relevant pattern must be one of export prices that "differ significantly." The Appellate Body has found that the term "significantly" "has both quantitative and qualitative dimensions."[9] Even limiting the definition of the term "significantly" to mean "to a significant extent"[10], as the United States does, the assessment of whether significant price differences are present must include consideration of certain qualitative factors, such as the "circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand."[11]

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[1] United States' first written submission, para. 68.
[2] United States' first written submission, paras. 68, 74.
[3] United States' first written submission, paras. 49, 52; Appellate Body Report, *US − Washing Machines*, fn. 108.
[4] Appellate Body Report, *US − Washing Machines*, para. 5.25.
[5] Appellate Body Report, *US − Washing Machines*, para. 5.25.
[6] United States' first written submission, para. 77.
[7] United States' first written submission, paras. 68, 74.
[8] Appellate Body Report, *US − Washing Machines*, para. 5.29.
[9] Appellate Body Report, *US − Washing Machines*, paras. 5.63, 5.66.
[10] United States' first written submission, para. 49.
[11] Appellate Body Report, *US − Washing Machines*, para. 5.66. *See also* Appellate Body Report, *US − Washing Machines*, para. 5.63.

C. A "Pattern" Cannot Transcend Categories

6. Third, in applying the DPM, the USDOC aggregates all the price differences among different purchasers, regions, or time periods. This aggregation is inconsistent with the concept of a "pattern" as used in the second sentence of Article 2.4.2. The terms "among" and "or" in the second sentence of Article 2.4.2, along with the definition of the term "pattern", call for the identification of a pattern of export prices which differ significantly *among* different purchasers, or *among* different regions, or *among* different time periods.[12] Japan agrees with the Appellate Body's reasoning that "[a] single 'pattern' comprising prices that are found to be significantly different from other prices *across* different categories would effectively be composed of prices that do not form a regular and intelligible sequence."[13]

7. The United States contends that the DPM does not aggregate random and unrelated price variations, because a respondent's pricing behavior cannot be described as "random".[14] But this logic would lead to the incorrect conclusion that any jumble of export sales by a respondent comprises a "pattern". The United States fails to explain how a respondent's pricing behavior towards a purchaser A is related to its pricing behavior towards region B, or time period C as a general matter. Without demonstrating a link between these pricing behaviors, the existence of a *pattern* or *regular sequence* of export prices cannot be found. This, in turn, means that the precondition for the aggregation of all the alleged price differences has not been met.

II. The USDOC's methodology does not meet the "explanation" requirement

8. The USDOC also fails to meet another requirement under the second sentence of Article 2.4.2 – namely, to provide an "explanation" as to "why such differences cannot be taken into account appropriately by the use of" the W-W or T-T comparison methodologies. "[S]uch *differences*" refer back to the phrase, "a pattern of export prices which ***differ*** significantly".[15] In the DPM, the USDOC just confirms that "there is a meaningful difference between the weighted-average dumping margin calculated using the [W-W] method and that calculated using [...] the [W-]T method."[16] This form of "explanation" merely identifies quantitative differences in the outcomes obtained through the application of the different comparison methodologies, and fails to explain why the pattern of prices that differ significantly cannot be taken into account appropriately by the W-W or T-T comparison methodology.

9. Moreover, due to the USDOC's use of zeroing with respect to the W-T comparison methodology but not to the W-W (or T-T) comparison methodology, the quantitative impact of the W-T comparison is inflated, and the existence of a "meaningful difference" between the margins calculated using the different comparison methodologies is all but guaranteed. In other words, that difference is exaggerated through the USDOC's W-T methodology that is WTO-inconsistent. An explanation based on such a flawed foundation cannot suffice.

III. The USDOC improperly applies the W-T methodology to the entire universe of export sales

10. In certain instances the USDOC applies the W-T methodology to *all* export transactions, including both pattern and non-pattern sales. However, the application of the W-T comparison methodology to non-pattern sales is inconsistent with the second sentence of Article 2.4.2.

11. Specifically, the universe of export transactions that comprise a "pattern" under the second sentence of Article 2.4.2 "would necessarily be more limited" than the "universe" of all export transactions under the first sentence.[17] Further, in light of the function of the second sentence to address "targeted dumping", Japan agrees with the Appellate Body that "the W-T comparison methodology should only be applied to those transactions that justify its use, namely, those transactions forming the relevant 'pattern'."[18]

[12] Appellate Body Report, *US – Washing Machines*, para. 5.33.
[13] Appellate Body Report, *US – Washing Machines*, para. 5.32 (emphasis original).
[14] United States' first written submission, para. 78.
[15] Emphasis added.
[16] *See* Lumber Final I&D Memo, p. 56 (Exhibit CAN-01).
[17] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[18] Appellate Body Report, *US – Washing Machines*, para. 5.55.

IV. Zeroing Is Impermissible Under The Second Sentence of Article 2.4.2 of the *Agreement*

12. The United States further violates the second sentence of Article 2.4.2 of the *Agreement* by applying the "zeroing" procedures when calculating a margin of dumping pursuant to the W-T comparison methodology.

13. It is well established through consistent WTO jurisprudence that zeroing is impermissible in the calculation of dumping margins in any context or proceeding in which such margins are calculated. The concepts of "dumping" and "margins of dumping" are the same throughout the *Agreement*, which establishes the basic principle that margins of dumping are established for the product under investigation "as a whole".[19] On this basis, the Appellate Body concluded that "[z]eroing the negative intermediate comparison results within the pattern" is not "consistent with the establishment of dumping and margins of dumping as pertaining to the 'universe of export transactions' identified under the second sentence of Article 2.4.2."[20]

14. The United States attempts to justify the USDOC's use of zeroing by raising the "mathematical equivalence" argument.[21] However, this argument has already been thoroughly considered and repeatedly rejected by the WTO[22], and the United States provides no reason for the Panel to reconsider it.

15. The United States nonetheless insists that there is no textual basis to exclude "non-pattern transactions" from the establishment of dumping and margins of dumping in W-T comparisons, which is "essentially the same as zeroing."[23] However, the differences between the exceptional W-T comparison methodology under the second sentence of Article 2.4.2 and the two methodologies under the first sentence result from the presence of targeted dumping, which is to be "unmasked" according to the purpose of the second sentence of Article 2.4.2.[24] "Such differences" in the pricing patterns will therefore justify the use of the exceptional W-T methodology when they cannot be appropriately taken into account by the methodologies under the first sentence (and as properly explained by the investigating authority).

16. On the other hand, zeroing the negative intermediate comparison results − whether within or outside the pattern − is not necessary to "unmask" "targeted dumping" among the "pattern transactions".[25] To the contrary, zeroing merely leads to the defect of unreasonably inflating the dumping margin, or creating a margin where one otherwise would not exist, which is inconsistent with the obligations established by Articles 2.4 and 2.4.2 of the *Agreement*.

17. The United States also tries to justify zeroing by referring to the comments on "asymmetrical" nature of the comparison methodology authorized by the second sentence of Article 2.4.2 in some decisions by the Appellate Body[26] and the negotiating history of the *Agreement.*[27] However, these comments merely pointed out that the W-T comparison pursuant to the second sentence consisted of the weighted average price of all domestic sales, on the one hand, and individual export transaction prices, on the other hand, which were not "symmetric".

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[19] Appellate Body Report, *US − Washing Machines*, paras. 5.90-5.91, 5.145.
[20] Appellate Body Report, *US − Washing Machines*, para. 5.160.
[21] United States' first written submission, paras. 122-160.
[22] Appellate Body Report, *US − Washing Machines*, para. 5.125.
[23] United States' first written submission, para. 196.
[24] Appellate Body Report, *US − Zeroing (Japan)*, para. 135. *See also* Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 127.
[25] Appellate Body Report, *US − Washing Machines*, paras. 5.156, 5.160.
[26] United States' first written submission, para. 179.
[27] United States' first written submission, paras. 183-186.