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

(DS534)

RESPONSES OF THE UNITED STATES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

December 19, 2018

TABLE OF REPORTS

Short Form	Full Citation
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Washing Machines (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

1. <u>To the United States</u>. If a foreign producer's export sales to a purchaser in one CONNUM passes the Cohen's *d* test and its export sales to the same purchaser in another separate CONNUM fails the Cohen's *d* test, are the sales to the purchaser in only the CONNUM that passes the Cohen's *d* test considered under the ratio test?

<u>Response:</u>

1. Yes. The U.S. Department of Commerce ("USDOC") defined comparable merchandise using the product control number (referred to as the "CONNUM"), as well as all other characteristics of the sales (*e.g.*, the level of trade), other than purchaser, region, and time period, which also are used when making comparisons of export price (or constructed export price) and normal value.[1] In applying the Cohen's *d* test, export sales were compared on a CONNUM basis for each purchaser, region, and time period.

2. If a particular CONNUM-specific export transaction did not pass the Cohen's *d* test for a given purchaser, for example, that CONNUM-specific export transaction was not included in the ratio test analysis. That being said, the same CONNUM-specific export transaction also was analyzed on the basis of the region of the transaction and the time period of the transaction, in addition to being examined on the basis of the purchaser of the transaction. If the CONNUM-specific export transaction passed the Cohen's *d* test when analyzed by region or by time period, then that CONNUM-specific export transaction was included in the ratio test analysis for that reason.

3. As the United States has explained before, 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.[2] To clarify, if an export sale passed the Cohen's *d* test by purchaser and region, then the USDOC only counted the export sale once in the aggregation of the results for the purpose of the ratio test. The USDOC aggregated the results of the Cohen's *d* test so that it could consider each exporter's overall pricing behavior in the United States market for the product as a whole.

2. The United States asserts in footnote 177 of its first written submission that there will be mathematical equivalence in the dumping margin determined under the W-W methodology (applied to all export transactions, without zeroing), and a <u>mixed methodology</u> wherein the <u>W-T methodology is applied to a subset of export transactions</u> (without zeroing) and <u>the W-W methodology is applied to the remaining transactions</u> (without zeroing).

a. <u>To the United States</u>. Please present relevant calculations supporting your assertion.

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[1] *Memorandum to Ronald K. Lorentzen from Gary Taverman re: Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada* (June 23, 2017) ("Lumber Preliminary Decision Memorandum"), p. 14 (Exhibit CAN-03).

[2] First Written Submission of the United States of America (Confidential) (July 24, 2018) ("U.S. First Written Submission"), para. 62.

Response:

4. 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.[3] The U.S. first written submission establishes this using hypothetical examples as well as the actual data from the softwood lumber antidumping investigation.

5. It is also the case that, if zeroing is prohibited under the average-to-average comparison methodology, the average-to-transaction comparison methodology, and a "mixed" comparison methodology, then all three methodologies, when applied to the same set of transactions, will always yield identical results. Under a "mixed" comparison methodology, the average-to-transaction comparison methodology is applied to a subset of transactions and the average-to-average comparison methodology is applied to the remaining transactions. The results of the two comparison methodologies are combined to determine the total comparison result and the amount of dumping.

6. The USDOC determines the margin of dumping using a "mixed" comparison methodology under certain circumstances when it utilizes a differential pricing analysis. Those circumstances did not arise in the softwood lumber antidumping investigation, and the USDOC therefore did not use a "mixed" comparison methodology in that investigation. However, to respond to the Panel's question, the United States demonstrates below, using hypothetical data, that mathematical equivalence would result under the "mixed" comparison methodology as well. To do so, and for greater clarity, the United States first repeats here the demonstration of mathematical equivalence as between the average-to-average and average-to-transaction comparison methodologies, which is presented in the U.S. first written submission, and then continues with the demonstration of mathematical equivalence with respect to the "mixed" comparison methodology.

i. Mathematical Equivalence Demonstrated Using Hypothetical Data

7. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. The associative principle states that one can combine addition or multiplication operations in different groupings and get the same results.[4] The commutative principle states that one can perform addition or multiplication

[3] *See* U.S. First Written Submission, paras. 122-160.

[4] *See, e.g.,* Definition of "associative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 133 (Exhibit USA-7) ("*Math.* Governed by or stating the condition that where three or more quantities in a given order are connected together by operators, the result is independent of any grouping of the quantities, e.g. that (a X b) X c = a X (b X c).").

operations in different orders and get the same results.[5] The distributive principle states that one can extend, or distribute, addition and multiplication operations into different groups and get the same results.[6]

8. Below, we present a simple hypothetical scenario to demonstrate how these properties are at work in the average-to-average, average-to-transaction, and "mixed" comparison methodologies when zeroing is prohibited in connection with all three approaches. For simplicity, the following scenario involves 5 export transactions, of 1 unit each, of 1 model of a product, to 5 different purchasers.

9. By having each sale in our hypothetical scenario involve only 1 unit, we strip away the complexity of weight averaging. We also strip away the complexity of adjustments, which are made to ensure price comparability. When these complexities are incorporated, however, for example, in an actual application such as in the softwood lumber antidumping investigation, they have no effect on mathematical equivalence because of the mathematical principles identified above and because the same basis for weight averaging is used and the same adjustments are made in the average-to-average, average-to-transaction, and "mixed" comparison methodologies.

10. By having the hypothetical scenario involve only 1 model, we also strip away the complexity of "multiple averaging" to account for different models. Again, though, when this complexity is incorporated, as in the softwood lumber antidumping investigation, it has no effect on mathematical equivalence because the different "model averaging" groups, when combined, still yield the same mathematical result in both comparison methodologies.[7]

11. For this hypothetical scenario, the export price data are as follows:

Export Price to Purchaser 1	13
Export Price to Purchaser 2	13
Export Price to Purchaser 3	11
Export Price to Purchaser 4	10
Export Price to Purchaser 5	4

In this hypothetical scenario, we will not apply the kind of analysis that the USDOC applied in the antidumping investigation of softwood lumber from Canada to identify a "pattern of export

[5] *See, e.g.,* Definition of "commutative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 456 (Exhibit USA-8) ("*Math.* governed by or stating the condition that the result of a binary operation is unchanged by interchange of the order of quantities, e.g. that a X b = b X a."). Subtraction, on the other hand, is not commutative: 2 - 1 is not equal to 1 - 2.

[6] *See, e.g.,* Definition of "distributive" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 709 (Exhibit USA-9) ("*Math.* Governed by or stating the condition that when an operation is performed on two or more quantities already combined by a second operation, the result is the same as when it is performed on each quantity individually and products then combined, e.g. that a X (b + c) = (a X b) + (a X c).").

[7] *See* U.S. First Written Submission, paras. 141-150 (demonstrating mathematical equivalence in a hypothetical situation involving multiple models of a product).

prices which differ significantly," but it should be readily apparent that the export price to Purchaser 5 and the export prices to the other purchasers "differ significantly."

12. In this hypothetical scenario, we will posit that the weighted average normal value is 10. As demonstrated in the U.S. first written submission, nothing in the text or context of Article 2.4.2 of the AD Agreement suggests that the "weighted average normal value" used in the average-to-average comparison methodology should be any different from the "normal value established on a weighted average basis" used in the average-to-transaction comparison methodology.[8] Thus, normal value for the purpose of the average-to-average, average-to-transaction, and mixed comparison methodologies is 10.

ii. The Average-to-Average Comparison Methodology

13. For the average-to-average comparison methodology, we first calculate the weighted average export price. Again, as this hypothetical scenario involves five sales transactions of 1 unit each, a weighted average is the same as a simple average. To calculate this average, we add the export prices together and divide by 5 (the total quantity of the export transactions). That calculation looks like this:

$$\frac{13 + 13 + 11 + 10 + 4}{5} = 10.2$$

14. Thus, the weighted average export price is 10.2. To determine the average comparison result for this model, this weighted average export price is "compared to," or subtracted from the weighted average normal value, which, again, is 10:

$$10 - 10.2 = -0.2$$

Then the difference calculated, -0.2, is multiplied by the total quantity, 5 units, to determine the total amount of the comparison results for all units of the model:

$$-0.2 \times 5 = -1$$

15. Thus, the total amount of the comparison results calculated using the average-to-average comparison methodology in our hypothetical example is -1. The total amount of dumping (and the weighted average dumping margin) when using the average-to-average comparison methodology would be zero in this scenario. The dumping that would be evidenced by the export sale to Purchaser 5, at a price of 4, which is 6 below the normal value of 10, has been masked by higher-priced sales.

16. The complete calculation under the average-to-average comparison methodology can be expressed as an algebraic equation as follows:

$$\left(10 - \left(\frac{13 + 13 + 11 + 10 + 4}{5}\right)\right)5 = -1$$

[8] *See* U.S. First Written Submission, paras. 103-105.

As can be seen, this equation simply combines the preceding steps in a format that is modestly different, visually. All of the operations, however, remain the same. We will return to this algebraic representation of the average-to-average comparison methodology shortly.

iii. The Average-to-Transaction Comparison Methodology

17. Now, we will demonstrate the calculation of the total amount of the comparison results and the total amount of dumping using the average-to-transaction comparison methodology.[9] In the average-to-transaction comparison methodology, each individual export price is "compared to" the weighted average normal value, which is to say that each individual export price is subtracted from the weighted average normal value. Comparing each of the export prices above with the weighted average normal value on an individual, transaction-specific basis, one gets the following comparison results:

$$10 - 13 = -3$$
$$10 - 13 = -3$$
$$10 - 11 = -1$$
$$10 - 10 = 0$$
$$10 - 4 = 6$$

The amount of comparisons yielding negative results is -7 (*i.e.*, (-3) + (-3) + (-1)). The amount of comparisons yielding positive results, which is evidence of dumping, is 6. If zeroing is prohibited, then the amount of comparisons yielding negative results is combined with the amount of comparisons yielding positive results to calculate the total amount of the comparison results, as follows:

$$(-3) + (-3) + (-1) + (0) + (6) = -1$$

In this scenario, the total amount of dumping (and the weighted average dumping margin) when using the average-to-transaction comparison methodology would be zero.

18. As can be seen from the above, the total amount of the comparison results, the total amount of dumping, and the weighted average dumping margin calculated using the average-to-average comparison methodology (without zeroing) are identical to the calculations that result from the application of the average-to-transaction comparison methodology (without zeroing).

19. The complete calculation under the average-to-transaction comparison methodology can be expressed as an algebraic equation as follows:

$$(10 - 13) + (10 - 13) + (10 - 11) + (10 - 10) + (10 - 4) = -1$$

20. Applying the mathematical principles referenced above, this equation can be rearranged, separating out each 10, as follows, with the same mathematical result:

[9] In this hypothetical scenario, the average-to-transaction comparison methodology is applied to all export transactions.

$$(10 + 10 + 10 + 10 + 10) - (13 + 13 + 11 + 10 + 4) = -1$$

This equation can again be rearranged as follows, so that instead of adding the 10s, we multiply 10 by 5, once again with the same mathematical result:

$$(5 \times 10) - (13 + 13 + 11 + 10 + 4) = -1$$

Finally, the same equation can be rearranged one more time as follows, again with the same mathematical result:

$$\left(10 - \left(\frac{13 + 13 + 11 + 10 + 4}{5}\right)\right)5 = -1$$

This equation is the equivalent of the three equations that immediately precede it and, of course, it is the very same algebraic equation presented earlier for the average-to-average comparison methodology.

21. If zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies, then these two methodologies will always be identical, or "mathematically equivalent," in every situation, because, ultimately, the mathematical operations in each are identical and are only ordered differently.

22. As a consequence, if zeroing is prohibited in the application of the average-to-transaction comparison methodology, the dumping that would be evidenced by the export sale to Purchaser 5, or the amount of the positive comparison result, is masked by higher-priced sales to other purchasers, even though there is a "pattern" of significantly differing export prices among the different purchasers. That evidence of dumping can be "unmasked" using zeroing, in which case the negative comparison results are set to zero, and the total amount of the comparison results would be 6.

iv. **The "Mixed" Comparison Methodology**

23. Finally, we will use hypothetical data to demonstrate mathematical equivalence between the average-to-average comparison methodology, the average-to-transaction comparison methodology, and a "mixed" comparison methodology (where zeroing is prohibited). Under a "mixed" comparison methodology, the average-to-transaction comparison methodology is applied to a subset of transactions and the average-to-average comparison methodology is applied to the remaining transactions. The results of the two comparison methodologies are combined to determine the total comparison result and the amount of dumping.

24. Continuing to use the same hypothetical scenario presented above, the weighted average normal value is 10 and the export price data are as follows:

Export Price to Purchaser 1	13
Export Price to Purchaser 2	13
Export Price to Purchaser 3	11
Export Price to Purchaser 4	10

Export Price to Purchaser 5	4

25. Recall that the average-to-average and average-to-transaction comparison methodologies both resulted in the total amount of the comparison results being -1.

26. Under a "mixed" comparison methodology, let us assume that the average-to-transaction comparison methodology would be applied to the one low-priced sale found to "differ significantly" from the others. In this hypothetical example, that is the sale to Purchaser 5. Thus, the comparison result for this particular transaction is as follows:

$$10 - 4 = 6$$

27. The result of the application of the average-to-transaction comparison methodology is a positive comparison result of 6.

28. Next, the remaining export sale transactions would be examined using the average-to-average comparison methodology. We will first calculate the weighted average export price for this group. Note that, since only 4 sales of 1 unit each are included in this group now, the quantity here is 4, not 5, as before. Thus, the weighted average export price is calculated as follows:

$$\frac{13 + 13 + 11 + 10}{4} = 11.75$$

29. To determine the average comparison result for this average-to-average comparison, this weighted average export price is "compared to," or subtracted from our weighted average normal value, which, again, is 10:

$$10 - 11.75 = -1.75$$

Then the difference calculated, -1.75, is multiplied by the total quantity for the group, 4 units, to calculate the total amount of the comparison results:

$$-1.75 \times 4 = -7$$

or:

$$\left(10 - \left(\frac{13 + 13 + 11 + 10}{4}\right)\right)4 = -7$$

Thus, the result of the application of the average-to-average comparison methodology for this group of transactions is a negative comparison result of -7.

30. When the total amounts of the comparison results for each comparison methodology are aggregated, the aggregate total amount of the comparison results is -1 (*i.e.*, 6 + (-7)). This result, of course, is identical to the result of the application of the average-to-average comparison methodology to all sales and the application of the average-to-transaction comparison methodology to all sales, as shown above.

31. The "mixed" comparison methodology can be represented algebraically using all of the following equations, each of which is identical, except that the operations are presented in a different order:

$$(10-4)+\left(10-\left(\frac{13+13+11+10}{4}\right)\right)4=-1$$

is the same as:

$$(10-4)+((10+10+10+10)-(13+13+11+10))=-1$$

is the same as:

$$(10+10+10+10+10)-((13+13+11+10)+4)=-1$$

is the same as:

$$(10+10+10+10+10)-(13+13+11+10+4)=-1$$

is the same as:

$$(5\times 10)-(13+13+11+10+4)=-1$$

is the same as:

$$\left(10-\left(\frac{13+13+11+10+4}{5}\right)\right)5=-1$$

The final equation, of course, looks and is identical to the algebraic equations above that represent the average-to-average and average-to-transaction comparison methodologies.

32. Without zeroing – or an approach such as that considered by the panel in *US – Washing Machines*[10] and addressed in subpart (b) of this question – a "mixed" comparison methodology – combining the average-to-transaction comparison methodology and the average-to-average comparison methodology – will always yield a result that is mathematically equivalent to the average-to-average comparison methodology (without zeroing), as well as the average-to-transaction comparison methodology (without zeroing), when each of those methodologies is applied to the same set of data for normal value and export sales.

b. <u>To the United States</u>. Does the United States agree that if, as noted by the panel in *US – Washing Machines*, in using such a mixed methodology, the investigating authority systematically disregards the intermediate result calculated by applying the W-W methodology to non-pattern transactions whenever the amount is overall negative, the resultant dumping margin <u>will not</u> be mathematically equivalent to the dumping margin determined by

[10] *See US – Washing Machines (Panel)*, para. 7.164.

applying the W-W methodology to all export transactions (i.e. pattern and non-pattern transactions, without zeroing)?

Response:

33. Yes. The observation of the panel in *US – Washing Machines* is correct. However, the *US – Washing Machine* panel's observation does not eliminate or even directly address the problem of mathematical equivalence. As the United States has demonstrated, 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). Accordingly, if the use of zeroing were prohibited in connection with the application of the alternative, average-to-transaction comparison methodology, then that alternative comparison methodology would be redundant, even if incorporated into a "mixed" comparison methodology. The result of the alternative methodology – and, as shown above, all of the underlying math involved in the alternative methodology – would be identical to the average-to-average comparison methodology that is to be used "normally" (applied to the same subset of transactions).[11] Even if it were found permissible to apply a "mixed" comparison methodology in which so-called "systemic disregarding" were applied – such that the overall mathematical result were different – the mathematical equivalence problem would still remain if the use of zeroing were prohibited in connection with the application of the average-to-transaction comparison methodology.

c. To both parties. Does the second sentence of Article 2.4.2 of the Anti-Dumping Agreement permit an investigating authority to disregard the intermediate result calculated by applying the W-W methodology to non-pattern transactions whenever the result is overall negative?

Response:

34. Canada has not claimed in this dispute that the United States acted inconsistently with Article 2.4.2 of the AD Agreement due to the USDOC applying a "mixed" comparison methodology in which the USDOC disregarded the intermediate result calculated by applying the average-to-average comparison methodology to so-called "non-pattern" transactions when the result was overall negative. That situation did not arise in the USDOC's antidumping investigation of softwood lumber products from Canada.

35. That being said, nothing in the AD Agreement precludes the application of a "mixed" comparison methodology and, as the panel reasoned in *US – Washing Machines*, "[a]fter allowing an authority to unmask dumping in respect of pattern transactions, it makes no sense to require that authority to then *re-mask* such dumping by providing offsets for negative dumping in respect of non-pattern transactions."[12]

[11] AD Agreement, Art. 2.4.2, first sentence.

[12] *US – Washing Machines (Panel)*, para. 7.162 (italics in original).

36. The Appellate Body, in *US – Washing Machines*, expressed the view that the application of a "mixed" comparison methodology is not permissible under the AD Agreement.[13] Of course, as the panel in *US – Washing Machines* observed, Korea did not advance any claim in that dispute that the application of a "mixed" comparison methodology is impermissible under the AD Agreement, and thus there was "no need" for the panel to rule on the matter.[14] As the panel report did not set forth a legal interpretation concerning the permissibility of the application of a "mixed" comparison methodology,[15] there were no "legal findings and conclusions of the panel" for the Appellate Body to "uphold, modify or reverse" on appeal.[16]

d. To both parties. Do parties agree that there will be mathematical equivalence in the dumping margin determined under the W-W methodology (applied to all export transactions, without zeroing), and that determined under a mixed methodology wherein the W-T methodology is applied to pattern transactions (without zeroing) and the W-W methodology is applied to non-pattern transactions (without zeroing) provided the intermediate result calculated on the basis of non-pattern transactions is not disregarded whenever it is negative?

If you disagree with this view, please present calculations showing that mathematical equivalence will not arise in this case.

Response:

37. The United States agrees, as demonstrated above in response to subpart (a) of this question.

3. To the United States. Does the United States agree that the term "such differences" as set out in the explanation clause refers to the "export prices which differ significantly" and form part of the pattern?

If so, and if the second sentence of Article 2.4.2 provided for the application of the W-T methodology to all export transactions, would the second sentence not have required an explanation as to why "non-pattern transactions", or all export transactions (i.e. pattern and non-pattern transactions), cannot be taken into account appropriately by the use of a W-W or T-T comparison, instead of requiring an explanation only with respect to pattern transactions?

Response:

38. Canada has not advanced any claim in this dispute alleging that the United States acted inconsistently with the "explanation clause" of the second sentence of Article 2.4.2 of the AD

[13] *See US – Washing Machines (AB)*, para. 5.120.

[14] *US – Washing Machines (Panel)*, para. 7.161.

[15] *See* DSU, Art. 17.6.

[16] DSU, Art. 17.13.

Agreement. That being said, and to be responsive to the Panel's question, the United States offers the following comments.

39. The second sentence of Article 2.4.2 of the AD Agreement provides as follows:

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

40. It appears clear that the term "such differences" in the "explanation clause" refers to the differences in "export prices," which have been found to "differ significantly" pursuant to the operation of the "pattern clause," as set forth earlier in the second sentence of Article 2.4.2. The United States does not agree, however, that the term "such differences" refers to "the 'export prices which differ significantly' and form part of the pattern", as the question suggests.[17] The suggestion in the question appears to follow from the Appellate Body's incorrect interpretation of the term "pattern" in *US – Washing Machines* as meaning only so-called "pattern transactions". The United States has demonstrated that such an interpretation does not follow from a proper application of customary rules of interpretation of public international law.[18]

41. In that case, the second part of the question is not operative, *i.e.*, the United States does not agree that the "explanation clause" "require[es] an explanation only with respect to pattern transactions".

42. Nevertheless, the United States observes that the "explanation clause" requires the investigating authority to explain why "such differences" in export prices to different purchasers, regions, or time periods cannot be taken into account appropriately using one of the symmetrical comparison methodologies that are to be used "normally" pursuant to the first sentence of Article 2.4.2 of the AD Agreement. Even under the Appellate Body's and Canada's incorrect interpretation of the term "pattern", the "explanation clause" would not call for an examination of the "pattern." Under their incorrect interpretation, the "pattern" would comprise export prices to a particular purchaser, in a particular region, or during a particular time period, and the export prices would not differ significantly amongst themselves, but would be lower than other so-called "non-pattern transactions". In other words, the "such differences" referenced in the "explanation clause" would not be present in the "pattern" as defined by the Appellate Body and Canada. Accordingly, to examine "such differences" under the "explanation clause" would necessitate looking at both so-called "pattern transactions" and the so-called "non-pattern transactions" from which they differ significantly.

[17] Underline added.

[18] *See* U.S. First Written Submission, paras. 41-52, 66-89.

4. <u>To the United States</u>. The United States submits that under the DPM the "relevant pattern may consist of export transactions that pass the Cohen's *d* test, as well as export transactions that do not pass the Cohen's *d* test".[19]

The United States also notes that under the DPM, when between 33%-66% of the total value of all export sales by the respondent for the product as a whole pass the Cohen's *d* test, the USDOC considers applying the W-T methodology to export sales that pass the Cohen's *d* test and the W-W methodology to the remaining export sales that do not pass the Cohen's *d* test.[20]

Does this mean that when 33%-66% of the total value of all export sales by the respondent for the product as a whole pass the Cohen's *d* test, all export transactions form the relevant "pattern", but the USDOC applies the W-T methodology only to a subset of pattern transactions? If so, what is the criteria based on which the USDOC limits application of the W-T methodology to those export transactions that pass the Cohen's *d* test?

<u>Response:</u>

43. The USDOC did not find in the antidumping investigation of softwood lumber products from Canada that the pattern consisted of all export sales. Rather, through the application of a differential pricing analysis, the USDOC determined that a pattern existed, and did not specify particular transactions that make up the pattern.

44. On its face, the second sentence of Article 2.4.2 of the AD Agreement does not define the "pattern" as comprising only certain export transactions[21] and does not require the investigating authority to identify export transactions that are in the pattern or not in the pattern.

45. The 33 percent and 66 percent thresholds associated with the ratio test under the differential pricing analysis reflect the USDOC's reasoned judgment concerning when consideration of the application of the alternative, average-to-transaction comparison methodology may be warranted. Of course, the text of the second sentence of Article 2.4.2 of the AD Agreement does not require the use of these or any similar thresholds, nor does it prohibit their use. The broad language of the second sentence of Article 2.4.2 affords a great deal of flexibility for different investigating authorities to develop different approaches.

46. We would also note that the USDOC's application of either a "mixed" comparison methodology or the average-to-transaction comparison methodology to all export sales is not inflexible. In the underlying antidumping investigation, the USDOC found, for Resolute, Tolko, and West Fraser, that 73.56 percent, 72.69 percent, and 80.83 percent of those respondents'

[19] Responses of the United States to the Panel's First Set of Questions to the Parties (September 27, 2018) ("U.S. Responses to the First Set of Panel Questions"), U.S. response to Panel question 8(b), para. 30.

[20] U.S. First Written Submission, para. 63.

[21] *See* U.S. First Written Submission, paras. 41-52, 66-89.

export sales passed the Cohen's *d* test, respectively.[22] The USDOC determined that those findings supported consideration of the application of the alternative, average-to-transaction comparison methodology to all sales if the average-to-average comparison methodology ultimately was not able to account for each respondent's pricing behavior.[23]

47. During the second substantive meeting, the exchange between the parties in response to this question led to a discussion of the meaning of the term "pattern". The U.S. delegate reiterated the U.S. argument[24] that, when read in the context of the second sentence of Article 2.4.2 of the AD Agreement, the "pattern" in the "pattern clause" necessarily includes both lower and higher export prices that "differ significantly" from one another, and the "pattern" necessarily must transcend multiple purchasers to be a pattern "among different purchasers, regions or time periods".[25]

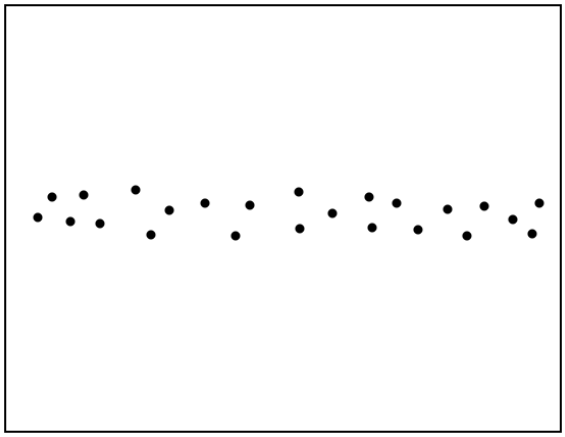
48. In connection with the discussion, the U.S. delegate displayed an illustration like the following, which the Chair asked the United States to provide to the Panel in its written responses:

[22] *See Memorandum to Gary Taverman from James Maeder re: Issues and Decision Memorandum 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* (November 1, 2017) ("Lumber Final I&D Memo"), Comment 18, p. 52 (Exhibit CAN-01); *Memorandum to the File from Robert Galantucci re: Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by Resolute FP Canada, Inc. for the Final Determination* (November 1, 2017) ("Resolute Final Data Analysis") (Exhibit CAN-07) **(BCI)**; *Memorandum to the File from Thomas Martin re: Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by Tolko Marketing and Sales Ltd., and Tolko Industries Ltd. for Final Determination* (November 1, 2017) ("Tolko Final Data Analysis") (Exhibit CAN-08) **(BCI)**; *Memorandum to the File from Stephen Bailey re: Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Analysis of Data Submitted by West Fraser Mills Ltd. for the Final Determination* (November 1, 2017) ("West Fraser Final Data Analysis") (Exhibit CAN-09) **(BCI)**.

[23] *See* Lumber Preliminary Decision Memorandum, pp. 15-16 (Exhibit CAN-03); Lumber Final I&D Memo, Comment 18, p. 52 (Exhibit CAN-01); Resolute Final Data Analysis (Exhibit CAN-07) **(BCI)**; Tolko Final Data Analysis (Exhibit CAN-08) **(BCI)**; West Fraser Final Data Analysis (Exhibit CAN-09) **(BCI)**.

[24] *See* U.S. First Written Submission, paras. 41-52, 66-89.

[25] AD Agreement, Art. 2.4.2, second sentence (underline added).



49. The U.S. delegate explained that the dots in the image above are prices to a particular purchaser and asked, rhetorically: "Are these prices higher or lower than prices to other purchasers?" It is impossible to tell. The parties agree, in general, that the most apt dictionary definition of the term "pattern" is "a regular and intelligible form or sequence discernible in certain actions or situations."[26] However, the image above is not "intelligible" in the sense of the "pattern clause" because it communicates nothing about whether the export prices shown actually "differ significantly" from any other export prices to other purchasers and, if so, how they differ (*i.e.*, are they higher or lower?). This is further confirmation that the Appellate Body's and Canada's interpretation of the term "pattern" cannot be correct. Their interpretation does not fit the context of the second sentence of Article 2.4.2 of the AD Agreement, and simply is not the "pattern" described in the "pattern clause".

5. <u>To Canada</u>. In referring to the Appellate Body's interpretation under the second sentence of Article 2.4.2, the United States asserts that the "Appellate Body majority [in US – Washing Machines] invented an entirely new methodology for calculating a margin of dumping" "which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time after".[27]

Was the methodological approach proposed by the Appellate Body of excluding non-pattern transactions when the dumping margin is determined under the second sentence of Article 2.4.2 contemplated by any WTO Member during the Uruguay round negotiations? If so, please provide relevant documents from the Uruguay round of negotiations that could support your view.

If such a methodological approach was contemplated during the Uruguay Round could the second sentence of Article 2.4.2 not have simply stated that the W-W methodology may be applied to pattern transactions alone when the conditions set

[26] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit USA-1); First Written Submission of Canada (June 22, 2018) ("Canada's First Written Submission"), para. 38; U.S. First Written Submission, para. 44.

[27] U.S. First Written Submission, para. 166.

out in that sentence are met (which the panel understands would give a result that is identical to that obtained by applying the W-T methodology to pattern transactions alone, without zeroing)?

Response:

50. This question is addressed to Canada.

6. To Canada. Does Canada agree that high-priced export sales to purchasers, regions or time periods do not mask lower-priced export sales to other purchasers, regions or time periods unless such high-priced export sales are above normal value (and the low-priced sales to other purchasers, regions or time periods are below normal value)?

Response:

51. This question is addressed to Canada.

7. To both parties. If per the methodological approach proposed by the Appellate Body, non-pattern transactions are excluded for the purpose of dumping determinations under the second sentence of Article 2.4.2 but included in the "volume of dumped imports" examined as part of the injury determination, would that not create an asymmetry in the data used for dumping and injury determinations?

Could an investigating authority make an injury determination that is based on an objective examination of positive evidence when the data used for dumping and injury determinations are asymmetric?

8. To both parties. Let us assume that, consistent with the Appellate Body's findings in *US – Washing Machines*, an investigating authority finds that the relevant "pattern of export prices which differ significantly among different time periods" comprises export transactions in Quarter 1 of the period of investigation (POI), prices in which time period are significantly lower than export prices in other parts of the POI. Thus, export transactions in Quarters 2-4 form the "non-pattern transactions", which are excluded per the Appellate Body's methodological approach and no formal determination under Article 2.4.2 regarding the "margins of dumping" is made with respect to the remaining part of the POI, i.e. Quarters 2-4.

Could an investigating authority demonstrate, based on an objective examination of positive evidence, that dumped imports are causing injury to the domestic industry when a formal determination of dumping is made for only part of the POI, whereas the injury from dumped imports is examined over the entire POI?

If yes, please explain what methodological approach could be selected to ensure that the asymmetry in the data used for dumping and injury determinations does not affect the investigating authority's ability to make an objective examination of positive evidence, as required under Article 3.1 of the Anti-Dumping Agreement.

Response:

52. The United States responds to questions 7 and 8 together.

53. As an initial matter, the United States notes that Canada has not challenged in this dispute the injury determination made by the U.S. International Trade Commission ("USITC") in the antidumping investigation of softwood lumber products from Canada. Accordingly, no claim concerning the USITC's injury determination is within the Panel's terms of reference, nor is it necessary, for the purpose of resolving this dispute, for the Panel to make any findings of legal interpretation regarding provisions of the AD Agreement that concern an investigating authority's injury analysis.

54. That being said, and to be responsive to the Panel's question, the United States recalls that certain prior Appellate Body reports that address zeroing contain statements about the relationship between the dumping analysis and the injury analysis.[28] Regrettably, the Appellate Body made such statements even in situations where it "recognize[d] that the issue of injury determination is not before us in this case."[29] The United States does not agree with the Appellate Body's suggestion that, in an analysis involving the use of zeroing, "the results of certain comparisons are disregarded … for purposes of calculating margins of dumping".[30] On the contrary, when the alternative, average-to-transaction comparison methodology is applied – properly using zeroing – all transactions and all comparisons are taken into account appropriately, and higher-priced sales above normal value are not permitted to "mask" dumping that is evidenced by lower-priced sales below normal value. The ultimate result of the analysis is a determination for, as the Appellate Body has put it, the "product as a whole".[31] Accordingly, there would be no asymmetry between the dumping analysis and the injury analysis.

55. Of course, the findings of two Appellate Body members in the *US – Washing Machines* Appellate Body report cannot be reconciled with statements in prior Appellate Body reports concerning the relationship between the dumping analysis and the injury analysis. In the words of the *US – Washing Machines* 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'."[32] 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. Yet, in *US – Softwood Lumber V*, when discussing the concept of "product as a whole", the Appellate Body reasoned that, "having defined the product under investigation, the investigating authority must treat that product as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination,

[28] *See US – Zeroing (Japan) (AB)*, para. 128; *US – Softwood Lumber V (AB)*, para. 99.

[29] *US – Zeroing (Japan) (AB)*, footnote 321.

[30] *US – Zeroing (Japan) (AB)*, para. 128.

[31] *See, e.g., US – Softwood Lumber V (AB)*, paras. 97-102; *US – Zeroing (EC) (AB)*, para. 132.

[32] *US – Washing Machines (AB)*, para. 5.147 (opinion of two Appellate Body members; underline added).

causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping."[33] This is further reason for the Panel to consider unpersuasive the findings of two Appellate Body members in *US – Washing Machines*, as those findings do not even accord with the reasoning related to zeroing in prior Appellate Body reports (in addition to not following from a proper application of customary rules of interpretation of public international law).

[33] *US – Softwood Lumber V (AB)*, para. 99. *See also US – Zeroing (Japan) (AB)*, para. 128.