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

(DS534)

COMMENTS OF THE UNITED STATES OF AMERICA ON CANADA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

January 10, 2019

TABLE OF REPORTS

Short Form	Full Citation
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
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 – Softwood Lumber V (Article 21.5 – Canada) (AB)	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
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 – 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

1. In this document, the United States comments on Canada's responses to the Panel's second set of written questions.[1] The absence of a U.S. comment on an aspect of Canada's response to any particular question should not be understood as agreement with Canada's response.

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).

c. <u>To both parties</u>. 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?

<u>Comment:</u>

2. Canada asserts that "the use of two separate methodologies to calculate a margin of dumping is not permitted" under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[2] For support, Canada cites the same paragraph of the *US – Washing Machines* Appellate Body report that the United States discussed in its response to this question.[3] As explained in the U.S. response, Korea did not advance any claim in *US – Washing Machines* that the application of a "mixed" comparison methodology is impermissible under the AD Agreement. Thus, as the *US – Washing Machines* panel found, there was "no need" for the panel to rule on the matter.[4] Since the panel report did not set forth a legal interpretation concerning the permissibility of the application of a "mixed" comparison methodology,[5] there were no "legal findings and conclusions of the panel" for the Appellate Body to "uphold, modify or reverse" on appeal.[6]

3. Canada further asserts that "[t]here is no support in the text for a mixed comparison methodology."[7] Contrary to Canada's assertion, though, nothing in the AD Agreement precludes

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[1] *See* Responses of Canada to Questions to the Parties from the Panel in Connection with the Second Substantive Meeting (December 19, 2018) ("Canada's Responses to the Second Set of Panel Questions").

[2] Canada's Responses to the Second Set of Panel Questions, para. 1 (citing *US – Washing Machines (AB)* para. 5.120).

[3] *See* Responses of the United States to the Panel's Second Set of Questions to the Parties (December 19, 2018) ("U.S. Responses to the Second Set of Panel Questions"), para. 36.

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

[5] *See Understanding on Rules and Procedures Governing the Settlement of* Disputes ("DSU"), Art. 17.6.

[6] DSU, Art. 17.13.

[7] Canada's Responses to the Second Set of Panel Questions, para. 1.

the application of a "mixed" comparison methodology. Such an approach simply is not expressly addressed by the text of the AD Agreement.

4. Canada contends that its view "is reinforced by the fact that the [average-to-average comparison] methodology necessarily includes *all* export transactions".[8] While that may be the case for an application of the average-to-average comparison methodology under the first sentence of Article 2.4.2 of the AD Agreement, the word "all" does not appear in the second sentence of Article 2.4.2. An application of the average-to-average comparison methodology as part of a "mixed" approach under the second sentence of Article 2.4.2 would not be strictly governed by the terms of the first sentence of Article 2.4.2.

5. Canada goes on, "for the sake of the question", to make some additional comments concerning Article 2.1 of the AD Agreement and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"),[9] but Canada's comments undermine Canada's position in this dispute. Canada contends that "Article 2.1 of the Anti-Dumping Agreement provides definitions '[f]or the purposes of th[e] Agreement', as does Article VI of the GATT 1994. These definitions are central to the interpretation of the Agreement, and are consistent throughout the Agreement."[10] Canada further argues that "[a]llowing an investigating authority to disregard an intermediate comparison result under the mixed methodology, when it is impermissible to disregard intermediate comparison results under all the calculation methodologies described in Article 2.4.2, would lead to an inconsistent interpretation of the term 'margin of dumping'. Nothing in the text of the second sentence of Article 2.4.2 authorizes such a departure from the consistent interpretation of this term."[11] The United States addressed Canada's contention in the U.S. first written submission.[12] Canada continues to ignore the U.S. argument.

6. Canada's reference in its response to this question to the definition of the term "margin of dumping" is another way of advancing the argument that Canada made in its first written submission, in which Canada emphasized findings in prior reports related to the concept of "product as a whole."[13] 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

[8] Canada's Responses to the Second Set of Panel Questions, para. 1.

[9] *See* Canada's Responses to the Second Set of Panel Questions, paras. 2-3.

[10] Canada's Responses to the Second Set of Panel Questions, para. 2.

[11] Canada's Responses to the Second Set of Panel Questions, para. 3.

[12] *See* First Written Submission of the United States of America (Confidential) (July 24, 2018) ("U.S. First Written Submission"), para. 95.

[13] *See* First Written Submission of Canada (June 22, 2018) ("Canada's First Written Submission"), paras. 50-51, 53-56.

'pattern transactions', without having to take into account 'non-pattern transactions'."[14] 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.

7. Put another way, the Appellate Body itself prescribed a methodology that has the same effect, in practice, as the so-called "systemic disregarding" that Canada now argues is impermissible under the definition of "margin of dumping" that applies throughout the AD Agreement. The Appellate Body simply described its approach using different terminology. But the result is the same; the so-called "non-pattern transactions" are not considered in the numerator in the ultimate calculation of the margin of dumping. As the United States has demonstrated, the Appellate Body majority's findings in *US – Washing Machines*, and Canada's argument in this dispute, simply cannot be reconciled 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).

8. In any event, 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. Accordingly, as in *US – Washing Machines*, there is "no need" for the Panel here to set forth a legal interpretation concerning the permissibility of the application of a "mixed" comparison methodology.[15]

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.

Comment:

9. Canada asserts that, "[w]hile the results of such a comparison may be mathematically equivalent under certain circumstances, this will not always be the case."[16] Canada attempts to

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

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

[16] Canada's Responses to the Second Set of Panel Questions, para. 4.

support its assertion with hypothetical calculations, but that attempt fails. Canada just obfuscates by using a "quarterly weighted average normal value" for its application of the average-to-transaction comparison methodology, while using "annual average prices" for normal value when it applies the average-to-average comparison methodology.[17] This is not an apples-to-apples comparison and does not disprove mathematical equivalence.

10. In *US – Washing Machines*, the panel specifically "rejected Korea's argument", which Canada now makes, "that the use of different weighted average normal values could avoid mathematical equivalence."[18] "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."[19] On appeal in that dispute, the Appellate Body majority noted Korea's argument that "the possibility of changing the normal value or the adjustments to export prices breaks mathematical equivalence."[20] 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. Thus, the *US – Washing Machines* panel's findings, as unmodified by the Appellate Body report, were adopted by the Dispute Settlement Body ("DSB").

11. Under a so-called "cogent reasons" approach, for which Canada has advocated and with which the United States does not agree, an adjudicator should resolve an issue the same way in a subsequent proceeding. In this instance, Canada has offered no "cogent reasons" why the Panel should depart from these findings in *US – Washing Machines* that have been adopted by the DSB. Thus, despite urging the Panel to take a so-called "cogent reasons" approach on some issues, Canada disregards its own suggested approach when a previously adopted finding does not benefit Canada.

12. The U.S. first written submission discusses the concept of normal value under the first and second sentences of Article 2.4.2 of the AD Agreement and demonstrates that there is no textual or contextual support for the proposition that the normal value used under the average-to-average comparison methodology and the average-to-transaction comparison methodology should be different or calculated on a different basis.[21] Canada has never responded to the U.S. arguments in this regard.

13. Returning to the text of the AD Agreement, while it is worded somewhat differently, the term "[a] normal value established on a weighted average basis" in the second sentence of Article 2.4.2 has the same meaning as the term "a weighted average normal value" in the first

[17] Canada's Responses to the Second Set of Panel Questions, para. 4.

[18] *US – Washing Machines (AB)*, para. 5.83 (referring to *US – Washing Machines (Panel)*, para. 7.165).

[19] *US – Washing Machines (AB)*, para. 5.83 (referring to *US – Washing Machines (Panel)*, para. 7.166).

[20] *US – Washing Machines (AB)*, para. 5.161 (opinion of two Appellate Body members).

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

sentence of Article 2.4.2.[22] When read together with Article 2.1 of the AD Agreement, the term "normal value" can be understood to mean "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[23]

14. A weighted average normal value is calculated based on, and incorporates, multiple sales transactions in the home market. Such a weighted average normal value can be distinguished from a normal value based on an individual sales transaction in the home market, such as would be used when making "a comparison of normal value and export prices on a transaction-to-transaction basis."[24] Because nothing in the text of Article 2.4.2 suggests that the "weighted average normal value" described in the first sentence of Article 2.4.2 is any different from the "normal value established on a weighted average basis" described in the second sentence of Article 2.4.2,[25] there is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 in the same antidumping proceeding.

15. We also observe that both of the references to weighted average normal value in Article 2.4.2, in the first sentence as well as in the second sentence, are singular. That is, the first sentence refers to "a weighted average normal value" and the second sentence likewise refers to "a normal value established on a weighted average basis." This is further contextual support for understanding that these terms share a common meaning.

16. There is no textual or contextual support, nor any basis in logic, for an investigating authority to use normal values calculated on different bases when applying the average-to-average and average-to-transaction comparison methodologies in the same antidumping proceeding. The underlined "average" in the preceding sentence is the same for each comparison methodology, *i.e.*, the weighted average normal value.

17. Additionally, Canada's own hypothetical calculations can be used to demonstrate mathematical equivalence, if they are done properly, consistently using either a "quarterly weighted average normal value" or "annual average prices" for the different comparison methodologies. We demonstrate this below.

A. Canada's Hypothetical Calculations Using Annual Average Normal Value for Both Approaches

18. Canada presents correct calculations for the average-to-average comparison methodology using an "[a]nnual average export price (EP) compared to annual average normal value (NV)".[26] Based on the hypothetical data that Canada provides, an average export price of 13.3 is compared to – *i.e.*, subtracted from – an annual average normal value of 14, for a difference of

[22] *US – Washing Machines (Panel)*, para. 7.165.

[23] AD Agreement, Art. 2.1.

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

[25] *See US – Washing Machines (Panel)*, para. 7.165.

[26] Exhibit CAN-33.

0.7. That 0.7 is multiplied by the total number of units, 20, to establish the total amount of dumping, 14. As Canada shows, that total amount of dumping, 14, can be divided by the total export sales value, 266, to establish the margin of dumping, 5.26 percent.

19. To be consistent, a "mixed" comparison methodology approach, which applies the average-to-transaction comparison methodology to a subset of sales – *e.g.*, the so-called "pattern transactions" in Canada's hypothetical – and applies the average-to-average comparison methodology to the remaining sales, should use a normal value determined on the same basis, *i.e.*, an annual average normal value.

20. In that case, the average-to-transaction comparison methodology would be applied as follows, using the red export prices in Canada's hypothetical data set:

$$14 - 8 = 6$$

$$14 - 10 = 4$$

$$14 - 10 = 4$$

$$14 - 10 = 4$$

$$14 - 8 = 6$$

The total comparison result of this application of the average-to-transaction comparison methodology would be 24 (*i.e.*, 6 + 4 + 4 + 4 + 6 = 24).

21. As Canada correctly shows in Exhibit CAN-33, for the remaining transactions, the application of the average-to-average comparison methodology results in an average export price of 14.6667, which is compared to – *i.e.*, subtracted from – an annual average normal value of 14, for a difference of -0.6667. That -0.6667 is multiplied by the total number of units for which the average-to-average comparison methodology is applied, 15, to establish the comparison result of -10.

22. The comparison result of the average-to-transaction comparison methodology, 24, is combined with the comparison result of the average-to-average comparison methodology, -10, to establish a total amount of dumping of 14 (*i.e.*, 24 + (-10) = 14). This, of course, is the same total amount of dumping that resulted from the application of the average-to-average comparison methodology to all of the sales in Canada's hypothetical data set, and the margin of dumping also is the same, 5.26 percent (again, the total amount of dumping, 14, is divided by the total export sales value, 266).

23. Thus, Canada's own hypothetical data and calculations demonstrate mathematical equivalence, when they are applied correctly, consistently using an annual average normal value.

B. Canada's Hypothetical Calculations Using Quarterly Average Normal Value for Both Approaches

24. Canada's own hypothetical data and calculations also demonstrate mathematical equivalence if quarterly average normal values are used consistently and correctly for both the average-to-average comparison methodology applied to all sales and the "mixed" comparison methodology.

25. The following table presents Canada's hypothetical data. So-called "pattern transactions" are shown in red, as Canada presented them.[27] The table also presents quarterly average export price and quarterly average home market price.

	Export Price	Quarterly Average Export Price	Home Market Price	Quarterly Average Home Market Price
Q1	8 16 15 10	12.25	15 14 15 14	14.5
Q2	12 14 13 10 17	13.2	13 14 15 14 15	14.2
Q3	15 14 16 12 16 10	13.8333	10 12 14 13 16 15	13.3333
Q4	8 13 17 16 14	13.6	11 15 15 15 15	14.2

26. Applying the average-to-average comparison methodology to all sales on a quarterly basis yields the following calculations and comparison results (*i.e.*, quarterly average normal value minus quarterly average export price, with the result then multiplied by the number of export transaction units for the quarter):

$$\text{Q1: } 14.5 - 12.25 = 2.25;\ 2.25 \text{ x } 4 \text{ units} = 9$$

$$\text{Q2: } 14.2 - 13.2 = 1;\ 1 \text{ x } 5 \text{ units} = 5$$

[27] Exhibit CAN-33.

$$\text{Q3: } 13.3333 - 13.8333 = -0.5;\ -0.5 \text{ x } 6 \text{ units} = -3$$

$$\text{Q4: } 14.2 - 13.6 = 0.6;\ 0.6 \text{ x } 5 \text{ units} = 3$$

Thus, the total amount of dumping is 14 (*i.e.*, 9 + 5 + (-3) + 3 = 14), and the margin of dumping is 5.26 percent (as above, the total amount of dumping, 14, is divided by the total export sales value, 266).

27. To apply the "mixed" comparison methodology, the average-to-transaction comparison methodology will be used for the red export price transactions above, and each red export price transaction will be compared to the relevant, corresponding quarterly average home market price, as follows:

$$\text{Q1: } 14.5 - 8 = 6.5$$

$$\text{Q1: } 14.5 - 10 = 4.5$$

$$\text{Q2: } 14.2 - 10 = 4.2$$

$$\text{Q3: } 13.3333 - 10 = 3.3333$$

$$\text{Q4: } 14.2 - 8 = 6.2$$

Thus, the total comparison result yielded by the application of the average-to-transaction comparison methodology using quarterly normal values is 24.7333 (*i.e.*, 6.5 + 4.5 + 4.2 + 3.3333 + 6.2 = 24.7333).

28. To apply the average-to-average comparison methodology to the remaining transactions, still using quarterly average normal values, the table below again presents Canada's hypothetical data,[28] this time with the red so-called "pattern transactions" removed, and with new quarterly averages of export price determined using the remaining export transactions from Canada's hypothetical example for each quarter. The quarterly averages of home market price are unchanged from above.

	Export Price	**Quarterly Average Export Price**	**Home Market Price**	**Quarterly Average Home Market Price**
Q1	16 15	15.5	15 14 15 14	14.5
Q2	12 14 13	14	13 14 15 14	14.2

[28] Exhibit CAN-33.

	17		15	
Q3	15 14 16 12 16	14.6	10 12 14 13 16 15	13.3333
Q4	13 17 16 14	15	11 15 15 15 15	14.2

29. Applying the average-to-average comparison methodology on a quarterly basis to these export price transactions yields the following calculations and comparison results (again, quarterly average normal value minus quarterly average export price, with the result then multiplied by the number of export transaction units for the quarter):

$$\text{Q1: } 14.5 - 15.5 = -1;\ -1 \text{ x } 2 \text{ units} = -2$$

$$\text{Q2: } 14.2 - 14 = 0.2;\ 0.2 \text{ x } 4 \text{ units} = 0.8$$

$$\text{Q3: } 13.3333 - 14.6 = -1.2666;\ -1.2666 \text{ x } 5 \text{ units} = -6.3333$$

$$\text{Q4: } 14.2 - 15 = -0.8.;\ -0.8 \text{ x } 4 \text{ units} = -3.2$$

The total comparison result from the application of the average-to-average comparison methodology to the remaining transactions is -10.7333 (*i.e.*, (-2) + 0.8 + (-6.3333) + (-3.2) = -10.7333).

30. When the comparison result of the average-to-transaction comparison methodology, 24.7333, is combined with the comparison result of the average-to-average comparison methodology, -10.7333, the total amount of dumping is 14 (*i.e.*, 24.7333 + (-10.7333) = 14), and the margin of dumping is 5.26 percent (as above, the total amount of dumping, 14, is divided by the total export sales value, 266).

31. Once again, the mathematical result is equivalent to all of the approaches discussed above.

32. Canada's own hypothetical data and calculations, when applied correctly, consistently using either an annual average normal value or quarterly average normal values, confirms – does not disprove – mathematical equivalence.

5. To Canada. 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".[29]

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 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)?

Comment:

33. As the Panel's question indicates, the United States has explained how the Appellate Body majority in *US – Washing Machines* 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 of the AD Agreement, 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 altogether, contrary to customary rules of interpretation, including the principle of effectiveness.[30] Canada has failed to rebut the U.S. interpretive arguments.

34. Canada responds to the Panel's question simply by asserting that the Appellate Body majority did not invent a new methodology, and by further asserting that the Appellate Body majority's methodology is rooted in the text of the AD Agreement.[31] Canada offers no support for these flawed assertions.

35. Canada also incorrectly asserts that the third party submissions and statements of Brazil, the EU, and Japan in this dispute reflect a "common understanding of the meaning of the text" that "suggests that the Appellate Body's interpretation was indeed contemplated by the Members."[32] Canada's assertion is utterly without any support, and is, in fact, demonstrably false.

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

[30] *See Japan – Alcoholic Beverages II (AB),* p. 12.

[31] *See* Canada's Responses to the Second Set of Panel Questions, para. 6.

[32] Canada's Responses to the Second Set of Panel Questions, para. 6.

36. As a threshold matter, of course, the third parties took their positions in this dispute after the circulation of the Appellate Body report in *US – Washing Machines*, which contained the Appellate Body majority's invented approach to the application of the second sentence of Article 2.4.2 of the AD Agreement. The EU and Japan each cite to and rely on the *US – Washing Machines* Appellate Body report when articulating their views.[33] Brazil simply asserts its view without citing to any prior report or discussing the text of the AD Agreement.[34] These expressions of these particular Members' views following the circulation of the Appellate Body report in *US – Washing Machines* – and in reliance on that report – are no indication of any "common understanding"[35] of the Members at the time they agreed to the AD Agreement.

37. Furthermore, statements made in other Appellate Body reports and by these Members – and by Canada itself – prior to the circulation of the *US – Washing Machines* Appellate Body report establish the absence of any "common understanding"[36] of the parties that the second sentence of Article 2.4.2 of the AD Agreement requires the approach invented by two Appellate Body Members in *US – Washing Machines*.

38. For example, the *US – Softwood Lumber V (Article 21.5 – Canada)* Appellate Body report, which was circulated prior to the *US – Washing Machines* Appellate Body report, noted that "there is considerable uncertainty regarding how precisely the third methodology should be applied."[37] This is an indication that the Appellate Body was not aware of any "common understanding"[38] of the Members concerning the application of the second sentence of Article 2.4.2 of the AD Agreement; rather, quite the opposite.

39. During the appeal in *US – Softwood Lumber V (Article 21.5 – Canada)*, "Canada and Japan suggested that the weighted average-to-transaction methodology could be applied only to the pattern of exports [sic] transactions that have prices that differ significantly among different purchasers, regions, or time periods."[39] Canada and Japan made this suggestion in the context of the discussion of the U.S. mathematical equivalence argument. They did so as part of their effort to disprove mathematical equivalence. These were not interpretive arguments relating to what the second sentence of Article 2.4.2 of the AD Agreement requires, nor do Canada and Japan appear to have been asserting that the only permissible approach to applying the second sentence of Article 2.4.2 is the approach later articulated by the Appellate Body majority in *US – Washing*

[33] *See* Third Party Written Submission by the European Union (July 31, 2018), para. 18; Third Party Submission of Japan (July 31, 2018), paras. 19-22.

[34] *See* Third Party Oral Statement of Brazil (September 13, 2018), para. 13.

[35] Canada's Responses to the Second Set of Panel Questions, para. 6.

[36] Canada's Responses to the Second Set of Panel Questions, para. 6.

[37] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.

[38] Canada's Responses to the Second Set of Panel Questions, para. 6.

[39] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98 (underline added).

Machines. This suggests that, at that time, Canada and Japan were unaware of any "common understanding"[40] of the Members concerning what the second sentence of Article 2.4.2 requires.

40. In *US – Washing Machines*, before the panel, Brazil expressed the view that, "[w]ith respect to how the [average-to-transaction comparison] method should operate in practice once the conditions for its use are met, there seems to be considerable uncertainties in this regard."[41] Brazil explained that:

> An interpretation of the second sentence of Article 2.4.2 that would limit the application of this method to the transactions within the pattern raises several doubts: how the results of the W-T (applied to the transactions within the pattern) and the W-W or T-T comparisons (applied to the rest of the transactions) would be combined for the purpose of calculating an overall dumping margin? Would it be possible to adjust the W-A normal values, so as to produce different mathematical results? The answers to these questions should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself.[42]

Brazil's stated view before the panel in *US – Washing Machines* supports the conclusion that Members were uncertain about how to apply the second sentence of Article 2.4.2 of the AD Agreement, and did not share a "common understanding"[43] that the approach invented by the Appellate Body majority in *US – Washing Machines* is the only permissible approach.

41. The EU explained its position as follows during the appeal in *US – Washing Machines*:

> The EU disagrees that the final sentence of Article 2.4.2 requires that the existence and amount of targeted dumping, if any, must be calculated only on the basis of the export transactions passing the pattern and gap tests, as opposed to all transactions to or in the particular purchaser, region or time period.[44]

42. Canada was explicit in expressing its view in *US – Washing Machines*. Canada stated that "the Panel erred in finding that the second sentence of Article 2.4.2 permits an investigating authority to establish an 'amount of dumping' exclusively by reference to 'pattern'

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[40] Canada's Responses to the Second Set of Panel Questions, para. 6.

[41] *US – Washing Machines (Panel)*, Addendum, Annex D-1, Executive Summary of Arguments of Brazil, para. 11 (WT/DS464/R/Add.1, p. D-4) (underline added).

[42] *US – Washing Machines (Panel)*, Addendum, Annex D-1, Executive Summary of Arguments of Brazil, para. 11 (WT/DS464/R/Add.1, p. D-4).

[43] Canada's Responses to the Second Set of Panel Questions, para. 6.

[44] *US – Washing Machines (AB)*, Addendum, Annex C-4, Executive Summary of the European Union's Third Participant's Submission, para. 5 (WT/DS464/AB/R/Add.1, p. C-10).

transactions."[45] That is, in *US – Washing Machines*, in the context of disagreeing with the panel's findings regarding so-called "systemic disregarding", Canada took precisely the opposite view of the interpretation of the second sentence of Article 2.4.2 of the AD Agreement that it now takes in this dispute. Additionally, as the United States has noted, during the appeal in *US – Softwood Lumber V*, "Canada argued that zeroing is permitted under the third methodology but prohibited under the first two methodologies set out in Article 2.4.2."[46]

43. Yet, Canada has now asserted to the Panel in response to this question that the approach invented by the Appellate Body majority in *US – Washing Machines* reflects the "common understanding of the meaning of the text" that "was indeed contemplated by the Members."[47] In light of its own shifting views concerning the interpretation of the second sentence of Article 2.4.2 over the course of numerous disputes, Canada's assertion to the Panel is simply misleading, and undermines the Panel's efforts to produce a high-quality report that would assist the parties in resolving this dispute.

44. Canada also attempts to establish that the term "all" in the first sentence of Article 2.4.2 of the AD Agreement, and its absence from earlier draft negotiating texts of what would ultimately become Article 2.4.2, "confirm[s]" that "the exceptional weighted-average-to-transaction methodology, as described in the final text is not meant to apply to the same universe of transactions."[48] This is a particularly weak argument in light of the statements of Members in prior disputes, discussed above, which definitively establish the absence of any "common understanding"[49] that the only permissible approach to the application of the second sentence of Article 2.4.2 is that which was invented by the Appellate Body majority in *US – Washing Machines*. In reality, Canada has provided no relevant documents from the Uruguay round of negotiations that could support its view, as the Panel, with this question, requested Canada to do.

45. Finally, the Panel's observation in the final paragraph of the question is astute. If the Members had, as Canada wrongly asserts, shared a "common understanding"[50] that the *US – Washing Machines* Appellate Body majority's invented approach was the only approach that is permissible under the second sentence of Article 2.4.2 of the AD Agreement, they could have stated that far more clearly in the text to which they ultimately agreed. Specifically, as the question suggests, the Members could have simply stated that the average-to-average comparison methodology (without zeroing) may be applied to pattern transactions alone when the conditions set out in that sentence are met. But the WTO Members did not agree to such language, and the

[45] *US – Washing Machines (AB)*, Addendum, Annex C-2, Executive Summary of Canada's Third Participant's Submission, para. 5 (WT/DS464/AB/R/Add.1, p. C-3).

[46] *US – Softwood Lumber V (AB)*, footnote 164.

[47] Canada's Responses to the Second Set of Panel Questions, para. 6.

[48] Canada's Responses to the Second Set of Panel Questions, para. 9.

[49] Canada's Responses to the Second Set of Panel Questions, para. 6.

[50] Canada's Responses to the Second Set of Panel Questions, para. 6.

language to which WTO Members did agree cannot be interpreted as establishing any such obligation.

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)?

Comment:

46. For the reasons given throughout this dispute, the United States does not agree with Canada's characterization of so-called "pattern transactions" and "non-pattern transactions."[51] It is not necessary to repeat the arguments we have already made, to which Canada has never responded. Otherwise, the United States has no comment on Canada's response to this question.

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?

47. The United States refers the Panel to the U.S. response to questions 7 and 8.[52] Otherwise, the United States has no comment on Canada's response to this question.

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

[51] *See, e.g.*, U.S. First Written Submission, paras. 39-89 (discussing the proper interpretation of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement).

[52] *See* U.S. Responses to the Second Set of Panel Questions, paras. 52-55.

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.

Comment:

48. The United States has no comment on Canada's response to this question.