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

(DS534)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

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Canada – Welded Pipe (Panel)	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and WT/DS482/R/Add.1, adopted 25 January 2017
China – Broiler Products (Panel)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
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US – Countervailing Duty Investigation on DRAMS (AB)	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
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US – Lamb (AB)	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
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

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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

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Exhibit No.	Description
USA-14	Canadian International Trade Tribunal, Appeal No. AP-2011-027, *Aluminart Products Limited v. President of Canada Border Services Agency* (19 April 2012)

Mr. Chairperson, members of the Panel:

1. The United States thanks you for agreeing to serve on this Panel, and we would like to express our gratitude as well to the Secretariat staff assisting you with your work. The United States appreciates this opportunity to present its views on the issues in this dispute. This dispute raises a number of important questions concerning the proper interpretation and application of the Antidumping Agreement,[1] as well as questions about the nature and the operation of the WTO dispute settlement system.

2. Canada asserts that "this dispute is a profoundly simple one".[2] Canada insists that "the Panel must follow the DSB rulings in *US – Washing Machines*".[3] Canada is wrong. Canada's portrayal of the role of the Panel in this dispute is fundamentally contrary to the DSU[4] and the WTO Agreement.[5]

3. Rather than simply follow prior findings adopted by the DSB, as Canada suggests, the role of the Panel – the role of every WTO dispute settlement panel established by the DSB[6] – 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".[7] That assessment is one of conformity with the covered agreements – not prior reports adopted by the DSB. And, finally, the DSU states 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".[8]

4. 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. 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

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (or "AD Agreement").

[2] First Written Submission of Canada (June 22, 2018) ("Canada's First Written Submission"), para. 3.

[3] Canada's First Written Submission, para. 3.

[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

[5] *Agreement Establishing the World Trade Organization*.

[6] DSU Article 7.1.

[7] DSU Article 11 (second sentence).

[8] DSU Article 3.2 (second sentence).

Body reports by the DSB, is without prejudice to the procedure to obtain an authoritative interpretation by the Ministerial Conference or General Council.

5. Indeed, by arguing that a panel "must follow"[9] a prior interpretation in an adopted report, Canada seeks to create obligations for Members that go beyond the text of the covered agreements. That is expressly prohibited under Articles 3.2 and 19.2 of the DSU, which provide that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations of Members provided in the covered agreements.

6. Canada contends that Article 3.2 of the DSU implies that "panels are expected to decide the same issues in the same ways absent 'cogent reasons' to depart from previous reasoning."[10] But 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. To the contrary, Article 3.2 of the DSU specifies that an adjudicator is to apply customary rules of interpretation to the text of the covered agreements and does not relieve a panel of its responsibility under Article 11 of the DSU to conduct an objective assessment of the matter before it, including of the facts of the dispute and the applicability of and conformity with the relevant covered agreements. Simply put, an Appellate Body report, or panel report, adopted by the DSB in one dispute does not alter the responsibility of a panel to make an objective assessment of the covered agreement in a separate dispute.

7. This actually was Canada's own view in the *Canada – Welded Pipe* dispute (DS482). In that dispute, Canada argued that there were "cogent reasons to depart from the [Appellate Body's] interpretation in *Mexico – Anti-Dumping Measures on Rice*".[11] Canada contended that "[t]he Panel must interpret Article 5.8 [of the AD Agreement] in accordance with the ordinary meaning of the terms … and in accordance with the context of those terms".[12] Canada further argued that the Appellate Body's "interpretation in *Mexico – Anti-Dumping Measures on Rice* … is irreconcilable with the text of Article 9.4 [of the AD Agreement]".[13] Thus, per the view expressed by Canada in *Canada – Welded Pipe*, a panel must undertake its own interpretive analysis, and an error of legal interpretation in a prior Appellate Body report constitutes a "cogent reason" for a panel not to follow the reasoning and findings in such a report.

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[9] Canada's First Written Submission, para. 3.

[10] Canada's First Written Submission, para. 67.

[11] *Canada – Welded Pipe (Panel)*, Executive Summary of the Second Written Submission of Canada, para. 5 (Panel Report, Annex C-1, p. C-10).

[12] *Canada – Welded Pipe (Panel)*, Executive Summary of the Second Written Submission of Canada, para. 6 (Panel Report, Annex C-1, p. C-10).

[13] *Canada – Welded Pipe (Panel)*, Executive Summary of the Second Written Submission of Canada, para. 7 (Panel Report, Annex C-1, p. C-10).

8. Yet here, Canada argues that consistency in interpretation is necessary "if the WTO dispute settlement system is to retain its role in ensuring the security and predictability of the multilateral trade system" as provided in Article 3.2 of the DSU.[14] The United States cannot agree that Canada was attempting, in the *Welded Pipe* dispute, to compromise the security and predictability of the multilateral trading system.

9. Contrary to Canada's suggestion here, Article 3.2 of the DSU does not indicate that simply following the findings in past panel or Appellate Body reports will provide any security and predictability to the multilateral trading system. Rather, Article 3.2 indicates that it is the proper operation of the DSU, including application by an adjudicator of customary rules of interpretation to the text of the covered agreements, that contributes to the security and predictability of the WTO. Canada's proposed approach in this dispute (to substitute statements from adopted reports in place of the text of the covered agreements), which departs from the approach Canada took in the *Welded Pipe* dispute, would undermine the security and predictability of the WTO, and undermine Members' confidence in the WTO.

10. The United States recalls that the Decision of 12 April 1989 on Improvements to GATT Dispute Settlement Rules and Procedures contained substantially identical language to the DSU language on which Canada relies. That GATT decision provided that "the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system." Through that language, the GATT dispute settlement system did not establish a system of precedent or require (absent cogent reasons) a subsequent GATT panel to follow a prior GATT panel's reasoning. Indeed, even the WTO Appellate Body, in one of its first reports, recognized that:

> We do not believe that the [GATT] CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in [Article IX:2 of] the WTO Agreement. . . . . The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.[15]

We are not aware that the Appellate Body has ever disavowed this understanding, which is contained in a report adopted by the DSB.

11. Regrettably, Canada did nothing in its first written submission to help the Panel accomplish the task it has been given under the DSU. Instead of presenting interpretive analyses

[14] Canada's First Written Submission, para. 67.

[15] *Japan – Alcoholic Beverages II (AB)*, at 13 (second paragraph).

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 text of the AD Agreement, read in context, and in light of the object and purpose of the AD Agreement.

12. In fact, Canada's proposed interpretation of Article 2.4.2 of the AD Agreement effectively rewrites the second sentence of that provision – a provision that reflects a finely balanced compromise reached during the Uruguay Round negotiations – and reads the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. In doing so, Canada's proposed interpretation fails to "give meaning and effect to all the terms of the treaty".[16]

13. The U.S. first written submission discusses in great detail the proper interpretation of the AD Agreement, and demonstrates that all of Canada's legal claims lack merit. We will not attempt to repeat in this statement all of the arguments presented in that submission. We would, however, like to highlight some of the issues that we believe will be critical to the Panel's resolution of this dispute.

A. The USDOC's Use 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

14. The U.S. first written submission presents an interpretive analysis of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement that is in accordance with the customary rules of interpretation.[17] The conclusion that flows from such an analysis is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether there exists a "pattern of export prices which differ significantly" should employ rigorous analytical methodologies and view the data holistically.

15. As demonstrated in the U.S. first written submission, that is precisely what the USDOC[18] did in the antidumping investigation of softwood lumber from Canada.[19] 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

[16] *US – Gasoline (AB)*, p. 23 (noting that the principle of effectiveness aids in the application of the customary rules of interpretation).

[17] *See* First Written Submission of the United States of America (July 24, 2018) ("U.S. First Written Submission"), paras. 39-52.

[18] U.S. Department of Commerce.

[19] *See* U.S. First Written Submission, paras. 53-65.

explanation[20] 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 Article 2.4.2 of the AD Agreement.

16. The U.S. first written submission also demonstrates that Canada's claims concerning the USDOC's differential pricing analysis lack merit. Canada did not present an interpretive analysis of the second sentence of Article 2.4.2 in its first written submission. Instead, Canada referred to and relied on findings made by the Appellate Body in *US – Washing Machines* and other previous disputes relating to the consideration of both high-priced and low-priced export sales transactions,[21] and the aggregation of transactions across purchasers, regions, and time periods.[22] But Canada's reliance on those prior findings is misplaced, because the Appellate Body's findings are not consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2.

1. 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. 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."[23] 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.

18. Additionally, 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). 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's reasoning also is internally inconsistent, simultaneously prohibiting the consideration of higher export prices[24] while requiring the analysis of "all export

[20] *See China – Broiler Products (Panel)*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).

[21] *See* Canada's First Written Submission, paras. 35, 39, 40-41.

[22] *See* Canada's First Written Submission, paras. 35, 39, 40-41.

[23] AD Agreement, Art. 2.4.2, second sentence (emphasis added).

[24] *See US – Washing Machines (AB)*, para. 5.29.

sales made by the relevant exporter or producer to identify a pattern".[25] Necessarily, an analysis of the prices of all export sales would entail consideration of both higher- and lower-priced sales. The Appellate Body's contradictory findings create a logical impossibility.

20. As the United States has demonstrated, 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.

2. 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. Additionally, although the second sentence of Article 2.4.2 has been described as addressing "targeting" or "targeted dumping,"[26] those 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. That is what the USDOC did when it applied a differential pricing analysis in the antidumping investigation of softwood lumber from Canada. The USDOC aggregated all the results of the Cohen's *d* test as part of the ratio test to assess the extent of the export prices that were found to differ significantly among different purchasers, regions, or time periods. The UDSOC did this so that it could consider the exporter's pricing behavior in the United States market for the product as a whole, *i.e.*, whether there existed a pattern of export prices which differ significantly.

23. Contrary to Canada's assertion,[27] 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.

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[25] *US – Washing Machines (AB)*, para. 5.26 (emphasis added).

[26] *See US – Zeroing (Japan) (AB)*, para. 131.

[27] *See* Canada's First Written Submission, subheading III.A.

24. Nothing in the text of the "pattern clause" 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".[28]

25. Again, rather than engage in its own textual analysis, Canada primarily relies on the Appellate Body's findings in *US – Washing Machines*.[29] But those findings are flawed. 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". As the United States has demonstrated, that understanding is not consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2, nor is it logical.

26. To be clear, 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. That 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".[30]

27. 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, regions, or time periods. The term "among" is used only 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 conclusion 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.

28. The Appellate Body considered this argument and reasoned that such "repetition would have conveyed an identical meaning to that of the existing text."[31] However, when the Appellate Body later summarized its own findings concerning the interpretation of the "pattern clause," it used the term "among" three times. The Appellate Body wrote: "[w]e have found above that a pattern can only be found in prices which differ significantly either among purchasers, or among

[28] AD Agreement, Art. 2.4.2, second sentence.

[29] *See* Canada's First Written Submission, paras. 35-39.

[30] *See US – Washing Machines (AB)*, para. 5.31.

[31] *US – Washing Machines (AB)*, para. 5.34.

regions, or among time periods, not *across* these categories."[32] This is yet another internal inconsistency in the *US – Washing Machines* Appellate Body report, which confirms the incorrectness of the findings in that report and undermines the persuasiveness of that report.

29. 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.[33] That is what the USDOC sought to accomplish by applying a differential pricing analysis in the antidumping investigation of softwood lumber from Canada. For the reasons the United States has given, 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.

B. The USDOC's Use of Zeroing Is Not Inconsistent with the AD Agreement

30. The U.S. first written submission also demonstrates that Canada's claims against the USDOC's use of zeroing in connection with the alternative, average-to-transaction comparison methodology lack merit.

1. Nothing in the Text of the Second Sentence of Article 2.4.2 of the AD Agreement Prohibits the Use of Zeroing

31. The U.S. first written submission provides a thorough examination of the text and context of Article 2.4.2 of the AD Agreement. Such an examination 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. And this is the conclusion reached by one Appellate Body member in *US – Washing Machines*.[34]

32. When the Appellate Body previously 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."[35] The Appellate Body has found that the textual basis for the prohibition on the

[32] *US – Washing Machines (AB)*, para. 5.41 (italics in original; underlining added).

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

[34] *See US – Washing Machines (AB)*, paras. 5.191-5.203 (views of one Appellate Body member).

[35] *See EC – Bed Linen (AB)*, para. 55.

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."[36]

33. 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. As one Appellate Body member explained in *US – Washing Machines*, the second sentence of Article 2.4.2 "has no qualifier, and it does not specify *how* the investigating authority is to do the comparison between a weighted average normal value and prices of individual export transactions."[37] That Appellate Body member went on to find that prohibiting the use of zeroing in connection with the alternative, average-to-transaction comparison methodology "is not required by the text of the second sentence read in the context of the entire Article 2.4.2 and in light of the object and purpose of the Anti-Dumping Agreement, and it unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with 'targeted dumping'."[38]

34. Instead of founding its claims on the text of the AD Agreement, Canada instead relies on findings in prior Appellate Body reports. Both Canada's approach to this dispute and the prior findings on which Canada relies are flawed. And it is surprising how forcefully Canada argues that zeroing is impermissible under <u>any</u> comparison methodology,[39] given that Canada's own Canada Border Services Agency has taken the position that, despite the findings of the Appellate Body, zeroing is necessary when antidumping duties are collected, because:

> [T]he elimination of zeroing would undermine the primary purpose of *SIMA* [Canada's antidumping law], which, it says, is to protect Canadian producers. Importers could import dumped goods that injure domestic producers without attracting anti-dumping duties if they also import the same goods at prices that are not dumped.[40]

In any event, the role of the Panel is to resolve the questions presented concerning the interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement by applying the customary rules of interpretation, pursuant to Article 3.2 of the DSU.

35. The second sentence of Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[41] The Appellate Body has found that Members must offset

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[36] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

[37] *US – Washing Machines (AB)*, para. 5.192 (views of one Appellate Body member; emphasis in original).

[38] *US – Washing Machines (AB)*, para. 5.196 (views of one Appellate Body member).

[39] *See* Canada's First Written Submission, para. 43.

[40] Canadian International Trade Tribunal, Appeal No. AP-2011-027, *Aluminart Products Limited v. President of Canada Border Services Agency* (19 April 2012), pp. 6-7 (Exhibit USA-14).

[41] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing.

2. The Use of Zeroing is Necessary To Give Meaning to the Exceptional Average-to-Transaction Comparison Methodology

36. The Appellate Body has further observed that the third methodology is an "exception"[42] to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different"[43] from the two "normal[]" comparison methodologies when the conditions for its use have been met.

37. That is why, after presenting an analysis of the ordinary meaning of the text of the second sentence of Article 2.4.2, in its context, the U.S. first written submission discusses at some length what has been called the "mathematical equivalence" argument.[44] The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 yielding, in all cases, results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation.

38. That is precisely what would happen under Canada's proposed interpretation. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology always will yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

39. The U.S. first written submission discusses the Appellate Body's consideration of the mathematical equivalence argument in previous disputes.[45] As we have demonstrated, the Appellate Body's prior consideration of the mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

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[42] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86. *See also, id.*, para. 97; *US – Zeroing (Japan) (AB)*, para. 131; *US – Washing Machines (AB)*, paras. 5.18, 5.51, 5.74, 5.106, 5.138, 5.152, 5.155, 5.160, 5.181, 5.193, 5.199.

[43] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93 (emphasis added). *See also US – Washing Machines (AB)*, para. 5.15.

[44] *See* U.S. First Written Submission, paras. 122-178.

[45] *See* U.S. First Written Submission, paras. 161-178.

40. The Appellate Body majority in *US – Washing Machines* actually acknowledged the reality of mathematical equivalence,[46] as did the panels in *US – Washing Machines* and *US – Anti-Dumping Methodologies (China)*.[47] 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.

41. Even though it acknowledged the fact of mathematical equivalence, the Appellate Body majority in *US – Washing Machines* evaded the U.S. argument. The Appellate Body majority did this by interpreting the term "pattern" in a manner that is erroneous and that does not follow from a proper application of the customary rules of interpretation of public international law. The Appellate Body majority's reasoning is dismissive of – but not responsive to – the U.S. argument concerning mathematical equivalence. Ultimately, the Appellate Body majority rewrote the second sentence of Article 2.4.2 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, rather than applying the average-to-transaction comparison methodology. That is not what the second sentence of Article 2.4.2 provides.

3. The Panel Should Not Repeat Errors in Prior Reports Adopted by the DSB

42. The United States recognizes that a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. The Panel should take into account the relevant findings in adopted panel and Appellate Body reports where it finds the reasoning in those reports persuasive.[48] But the Panel most certainly should not blindly follow the findings in those reports, and should not repeat errors of interpretation and logic contained in them. To do so would be contrary to the role of the Panel under Articles 7.1 and 11 of the DSU.

43. In particular, the Panel should not rely on erroneous findings of the Appellate Body majority in *US – Washing Machines*, with which even one member of the Appellate Body did not agree. For example, the textual analysis of the Appellate Body majority in *US – Washing Machines* is internally inconsistent. The purported textual basis for the Appellate Body majority's prohibition on zeroing is the presence of the clause "individual export transactions" in the second sentence of Article 2.4.2. Elsewhere in the Appellate Body report, however, the Appellate Body considered that the word "individual" also limits the scope of application of the alternative, average-to-transaction comparison methodology only to so-called "pattern transactions".[49] Thus, in the Appellate Body majority's view, the word "individual"

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[46] *See US – Washing Machines (AB)*, para. 5.165 (views of two Appellate Body members; emphasis added).

[47] *See US – Washing Machines (Panel)*, para. 7.164 and footnote 303; *US – Anti-Dumping Methodologies (China) (Panel)*, paras. 7.145, 7.219.

[48] *See Japan – Alcoholic Beverages II (AB)*, p. 14 ([A]dopted reports "should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.").

[49] *See US – Washing Machines (AB)*, para. 5.52.

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. The Appellate Body majority's conclusion that the term "individual" is pregnant with meaning in this way is not supported by the ordinary meaning of the term "individual," read in its context.

44. The findings of the Appellate Body majority in *US – Washing Machines* also are inconsistent with prior Appellate Body findings concerning the concept of "product as a whole". That is a concept that the Appellate Body has developed in prior reports, and which has been a basis for finding a prohibition on the use of zeroing in connection with the comparison methodologies described in the first sentence of Article 2.4.2. The subset-of-transactions approach prescribed by the Appellate Body majority in *US – Washing Machines* explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." The Appellate Body majority's finding cannot be reconciled with the reasoning in prior Appellate Body reports.

45. The U.S. first written submission discusses many of the Appellate Body and panel findings related to zeroing and the interpretation of the second sentence of Article 2.4.2. None of those findings compels the Panel to find against the United States in this dispute. On the contrary, when understood in the context in which they were made, the logical extension of the Appellate Body's zeroing findings is 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.

4. The Negotiating History of the AD Agreement Confirms the Correct Interpretation of the Second Sentence of Article 2.4.2 of the AD Agreement

46. The U.S. first written submission also establishes that the meaning of the second sentence of Article 2.4.2 – 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. It is clear from those documents that zeroing was understood during the negotiations to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping. Nothing in the negotiating history of the AD Agreement suggests that any Member advocated for – or even contemplated – addressing "targeted dumping" by applying the average-to-average comparison methodology to a subset of transactions. In reaching their interpretation in *US – Washing Machines*, the two Appellate Body members simply rewrote the second sentence of Article 2.4.2 of the AD Agreement in a manner that is contrary to the terms of that sentence, and which cannot be reconciled with the negotiating history of the provision.

5. Conclusion Concerning Article 2.4.2 of the AD Agreement

47. For the reasons the United States has given, Canada's argument that the second sentence of Article 2.4.2 of the AD Agreement prohibits the use of zeroing in connection with the alternative, average-to-transaction comparison methodology lacks merit.

6. The Use of Zeroing in Connection with the Alternative, Average-to-Transaction Comparison Methodology is Not Inconsistent with Article 2.4 of the AD Agreement

48. Canada also 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.[50] That claim, too, lacks merit.

49. 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*.[51] However, the findings of the majority in *US – Washing Machines* are internally inconsistent, and the Panel should not consider those findings persuasive.

50. 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 subset-of-transactions approach) to be fair. There is no textual or logical support for the Appellate Body majority's finding.

51. The "exclusion of 'non-pattern transactions' from the establishment of dumping and margins of dumping",[52] which the Appellate Body majority prescribed in *US – Washing Machines*, is, in reality and effect, essentially the same as zeroing. Following, for argument's sake, the logic of the Appellate Body majority, the "exclusion of 'non-pattern transactions'"[53] "does *not* take fully into account the prices of *all* comparable export transactions."[54] 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'"[55] 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.[56]

52. In short, the Appellate Body majority's own prescribed methodology does precisely the same things that led the Appellate Body to find that zeroing is unfair. Such internal logical

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[50] *See* Canada's First Written Submission, paras. 57-63.

[51] *See, e.g.*, Canada's First Written Submission, para. 62.

[52] *US – Washing Machines (AB)*, para. 5.177 (views of two Appellate Body members).

[53] *US – Washing Machines (AB)*, para. 5.177 (views of two Appellate Body members).

[54] *US – Washing Machines (AB)*, para. 5.179 (views of two Appellate Body members; italics in original).

[55] *US – Washing Machines (AB)*, para. 5.177 (views of two Appellate Body members).

[56] *See US – Washing Machines (AB)*, para. 5.180 (views of two Appellate Body members).

inconsistency is untenable, and the Panel should not make the same error made by two Appellate Body members in *US – Washing Machines*.

53. The second sentence of Article 2.4.2 of the AD Agreement provides WTO Members a means to "unmask targeted dumping"[57] in "exceptional"[58] 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,[59] as one Appellate Body member agreed in *US – Washing Machines*.[60]

54. For the reasons the United States has given, 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.

II. CONCLUSION

55. As the United States has demonstrated in the U.S. first written submission and again this morning, Canada's claims are without merit, and the United States respectfully requests that the Panel reject them.

56. Mr. Chairperson, members of the Panel, this concludes our opening statement. We would be pleased to respond to your questions.

[57] *US – Zeroing (Japan) (AB)*, para. 135. *See also EC – Bed Linen (AB)*, para. 62; *US – Washing Machines (AB)*, paras. 5.17, 5.53, 5.75, 5.111, 5.155, 5.159, 5.193.

[58] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131; *US – Washing Machines (AB)*, paras. 5.18, 5.51, 5.74, 5.106, 5.138, 5.152, 5.155, 5.160, 5.181, 5.193, 5.199.

[59] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 138.

[60] *See US – Washing Machines (AB)*, para. 5.203 (views of one Appellate Body member).