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

(AB-2019-3 / DS534)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Canada appeals certain legal findings, conclusions, and other statements in the panel report[2] related to the interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), as well as certain of the Panel's findings that U.S. measures challenged by Canada in this dispute are not inconsistent with the AD Agreement. This submission demonstrates that Canada's appeal lacks merit.

2. In this dispute, Canada challenges the determination of the U.S. Department of Commerce ("USDOC") in an antidumping investigation of softwood lumber products from Canada. Canada began its first written submission to the Panel by asserting that this dispute "is a profoundly simple one", the Panel "must follow" *US – Washing Machines* and find that the USDOC's application of a differential pricing analysis and its use of zeroing in the antidumping investigation of softwood lumber products from Canada is inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement.[3] Canada's portrayal of the role of the Panel in this dispute is fundamentally contrary to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the *Agreement Establishing the World Trade Organization* ("WTO Agreement").

3. The Panel's role in this dispute was to make an objective assessment of the matter before it,[4] including of "the applicability of and conformity with the covered agreements", interpreting the relevant covered agreements in accordance with customary rules of interpretation of public international law.[5] That is the role of any panel in any WTO dispute. 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 Dispute Settlement Body ("DSB") in a prior dispute,[6] rather than to interpret and apply the text of the covered agreements. And under the DSU, neither the Appellate Body nor any panel can issue, because the DSB has no authority to adopt, an authoritative interpretation of the covered agreements. That authority is reserved to the Ministerial Conference or the General Council acting under a special procedure.[7]

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[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,932 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 34,540 words (including footnotes).

[2] Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R and Add.1, circulated April 9, 2019 ("Panel Report").

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

[4] *See* DSU, Art. 11.

[5] *See* DSU, Art. 3.2.

[6] Canada does not explain where it considers the DSU defines a "ruling", but the United States understands Canada to mean this by "follow the DSB's rulings". Canada's First Written Submission, para. 3.

[7] *See* WTO Agreement, Art. IX:2.

4. Throughout this dispute, Canada's approach to the proceedings has been contrary to the DSU. Instead of presenting interpretive analyses of the AD Agreement applying customary rules of interpretation to support its claims, Canada has simply referred to and relied on interpretations presented in prior Appellate Body reports. However, the Panel would have contravened the DSU and the WTO Agreement had it simply applied a prior interpretation. And the Panel was correct to reject the interpretations for which Canada advocates because they cannot be reconciled with 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.

5. In fact, Canada's proposed interpretation of Article 2.4.2 of the AD Agreement effectively rewrites the second sentence of that provision and reads the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. In doing so, Canada's proposed interpretation, in effect, renders this provision *inutile* by failing to "give meaning and effect to all the terms of the treaty".[8] Accordingly, all of Canada's legal arguments lack merit, and should be rejected.

6. This submission is organized as follows. Section II demonstrates that Canada's claim that the Panel acted inconsistently with Article 11 of the DSU is baseless. Canada's understanding of the role of the Panel in this dispute is fundamentally contrary to the DSU and the WTO Agreement. Canada's claim is corrosive to the WTO's dispute settlement system and calls into question whether that system serves to preserve the balance of rights and obligations, and the institutional structure, set out in the covered agreements or whether that system serves to change those rights and obligations and that structure, contrary to the plain text of those agreements. Contrary to Canada's claim, there is no support in the DSU for any so-called "cogent reasons standard".[9] As provided in the DSU, WTO adjudicative bodies are to interpret the covered agreements in accordance with customary rules of interpretation of public international law,[10] which means starting with the terms of the covered agreements, not prior panel or Appellate Body reports. A failure by WTO adjudicators to follow the agreed rules undermines Members' support for the WTO and its dispute settlement system.

7. The Panel here fulfilled its function under Article 11 of the DSU by making an objective assessment of the matter before it and undertaking an interpretive analysis of the terms of the second sentence of Article 2.4.2 of the AD Agreement in accordance with customary rules of interpretation of public international law. The DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB, or interpretations contained in those reports. The Panel was not obligated to follow or apply findings in prior adopted reports. Indeed, the Panel would have failed to assist the DSB in carrying out its responsibilities under the DSU if the Panel had taken the flawed approach for which Canada advocates.

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

[9] Appellant Submission of Canada (June 4, 2019) ("Canada's Appellant Submission"), para. 51.

[10] *See* DSU, Art. 3.2.

8. Section III demonstrates that the Panel did not err in its interpretation and application of Articles 2.4.2 and 2.4 of the AD Agreement. In particular, section III.B explains that, properly interpreted, the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, which refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods," requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. Any such "pattern" necessarily would be a pattern of export prices that would transcend multiple purchasers, regions, or time periods, and necessarily would include both lower and higher export prices that "differ significantly" from each other. The Panel correctly found that such a pattern may include prices that differ by virtue of being significantly higher than other prices, in addition to prices that differ by virtue of being significantly lower. The Panel's reasoning is logical and the Panel's conclusion is that which follows from a proper application of customary rules of interpretation.

9. Section III.C demonstrates that the Panel did not err in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is not inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement. A proper examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes, and it can be confirmed by recourse to the negotiating history of Article 2.4.2 of the AD Agreement.

10. With respect to Article 2.4 of the AD Agreement, the Panel correctly found that Canada's claim under Article 2.4 was dependent on Canada's claim under Article 2.4.2, which the Panel already had rejected. The Panel's reasoning is sound and accords with findings in prior reports in which a party has made a similar consequential argument. Ultimately, Canada failed to make its case for finding a breach of Article 2.4 of the AD Agreement because Canada made no attempt whatsoever to establish a basis for such a finding independent of Canada's arguments related to Article 2.4.2 of the AD Agreement. On appeal, Canada seeks to blame the Panel for Canada's own failure. As demonstrated in section III.C.2, the Panel did not err in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is not inconsistent with Article 2.4 of the AD Agreement.

11. Finally, section IV responds to Canada's appeal of statements in the panel report concerning the use of a mixed methodology, in which the alternative, average-to-transaction comparison methodology is applied to certain export transactions while one of the normal comparison methodologies described in the first sentence of Article 2.4.2 of the AD Agreement is applied to the remaining transactions, namely the Panel's statement that such a mixed methodology is required. Canada did not claim in its panel request that the United States acted inconsistently with U.S. WTO obligations due to the USDOC's application of a mixed methodology. Indeed, the USDOC did not use a mixed methodology in the underlying antidumping investigation of softwood lumber products from Canada, which is the subject of this dispute. Appropriately, the Panel therefore made no finding of inconsistency, nor any

recommendation, concerning that issue. That being the case, there is no need for the Appellate Body to review the Panel's statements concerning the use of a mixed methodology, as there can be no recommendation adopted by the DSB concerning that issue, and appellate review of the issue would not help resolve the dispute between the parties.

12. Even aside from the absence of legal findings to review, Canada's arguments on appeal do not support reversal of the Panel's statements. Canada is incorrect when it asserts that the scope of application of the alternative, average-to-transaction comparison methodology is limited to so-called "pattern transactions", which Canada understands to mean low-priced sales to a target. Canada's false premise does not support reversing the Panel's statement concerning the use of a mixed methodology. Canada's arguments concerning the concept of "product as a whole" also do not support reversing the Panel's statements. The term "product as a whole" does not appear in the AD Agreement. Furthermore, the new alternative methodology for addressing targeted dumping prescribed by the Appellate Body majority in *US – Washing Machines* – for which Canada now advocates – explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." Finally, while the United States shares Canada's concern about the Panel's statement regarding the provision of offsets when a mixed methodology is applied, that mutual concern does not support reversing the Panel's statement that the use of a mixed methodology is required.

13. In sum, for the reasons given in this submission, Canada's arguments on appeal lack merit, and all of Canada's claims on appeal should be rejected.

II. CANADA'S CLAIM THAT THE PANEL ACTED INCONSISTENTLY WITH ARTICLE 11 OF THE DSU IS BASELESS

14. Canada claims that the Panel acted inconsistently with Article 11 of the DSU because the Panel "expressly departed from adopted Appellate Body interpretations and reasoning" and "failed to adhere" to a purported "cogent reasons standard".[11] Canada observes that this is a "very serious allegation".[12] While Canada's Article 11 claim utterly lacks merit, Canada is, in this limited regard, correct. Canada's allegation is very serious.

15. Not only is Canada's allegation corrosive to the WTO's dispute settlement system, Canada's claim, if upheld, would threaten the very future of the WTO itself. It is past time for the Appellate Body to correct any misunderstanding that has resulted from its articulation of a supposed – but non-existent – "cogent reasons standard", and to affirm clearly that the sole source of Members' obligations under the covered agreements is the covered agreements themselves to which Members agreed. As provided in the DSU, WTO adjudicators are to interpret the covered agreements in accordance with customary rules of interpretation of public international law,[13] which means starting with the terms of the covered agreements, not prior

[11] Canada's Appellant Submission, para. 51.

[12] Canada's Appellant Submission, para. 51.

[13] *See* DSU, Art. 3.2.

panel or Appellate Body reports. A failure by WTO adjudicators to follow the agreed rules undermines Members' support for the WTO dispute settlement system.

16. Before the Panel, instead of mounting affirmative arguments in support of its claims, based on interpretive analyses that accord with customary rules of interpretation of public international law, Canada simply insisted that the Panel "must" find in Canada's favor because the United States purportedly "failed to offer any cogent reason for [the] Panel to depart from the findings of the Appellate Body in *US – Washing Machines*."[14] Canada makes the same argument on appeal. Canada's proposed approach to this dispute is contrary to – and, again, it is corrosive to – the DSU. This is an issue of fundamental importance to the WTO dispute settlement system.

17. In short, the DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB, or interpretations contained in those reports, in the sense of an interpretation that must be followed in a subsequent dispute. Instead, the DSU and the WTO Agreement reserve such weight to authoritative interpretations adopted by WTO Members in a different body – the Ministerial Conference or General Council – acting not by negative consensus but under different procedures. The DSU explicitly provides in Article 3.9 that the dispute settlement system operates without prejudice to this interpretative authority. The DSU states that it exists to resolve disputes arising under the covered agreements[15] – not disputes concerning panel or Appellate Body interpretations of those agreements. The DSU also provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[16] Those customary rules of interpretation likewise do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text.

18. In this, the DSU presented no change from the dispute settlement system under the GATT 1947, a point which the Appellate Body understood clearly in its early years. The United States is, of course, aware that the Appellate Body has more recently suggested that a panel must follow a prior Appellate Body interpretation absent undefined "cogent reasons" for departing from that interpretation. The Appellate Body's statement is wrong under the DSU, as explained in detail below. But what is most ironic is that this Appellate Body statement, which asserts a value like "precedent" for prior Appellate Body interpretations, would be rejected as precedent in a common law system, like that of the United States, in which precedent is an inherent feature of adjudication.

19. The reason that the "cogent reasons" assertion would not itself be treated as precedent is that the Appellate Body made this assertion in a report considering a claim on which it did not make findings. For that reason, the Appellate Body's statement was a mere advisory opinion (or

[14] Second Written Submission of Canada (October 17, 2018) ("Canada's Second Written Submission"), para. 3.

[15] DSU, Art. 1.

[16] DSU, Arts. 3.2, 7.1.

obiter dicta) and would not, under a system of precedent, be entitled to any deference in a subsequent proceeding.

20. All the more so in the WTO, in which WTO Members did not establish a common law system or a system of precedent, but rather reserved to themselves, in the Ministerial Conference, the authority to establish precedent through an "authoritative interpretation".[17] It is not for WTO adjudicators, through their reports, which are adopted by negative consensus, to change the nature of the WTO dispute settlement system, and certainly WTO adjudicators may not and must not alter the rights and obligations of Members under the covered agreements.[18]

21. What is more, the United States would not agree, as a matter of the design of an adjudicatory system, that assigning precedential weight (or a "cogent reasons" approach) is appropriate or positive for the WTO. The Appellate Body's assertion diminishes the value of the work of panels. It inhibits the engagement of panels with the text of the covered agreements, contrary to a panel's function to make an objective assessment of the applicability of and conformity with the covered agreements. The result of diminishing the role of a panel is that persuasive interpretations are less likely to arise from the dispute settlement system.

22. To think otherwise would require one to consider that the first time the Appellate Body considers an interpretive issue, it necessarily will render not only a correct interpretation, but the best interpretation. The United States considers that this proposition is contrary to experience and human nature.

23. One can draw an analogy to scientific experimentation. The most important discoveries in science do not come from the first time an experiment is performed, but from the second time, the third time, the fourth time that the experiment is repeated successfully and the initial results are demonstrated to be valid. The real value and persuasive force of a scientific discovery comes when the results are replicated by someone else, in particular by someone else who sets out to disprove the first result.

24. The same is true when different interpreters apply customary rules of interpretation. They are applying the same rules of interpretation, so, naturally, it is "expected"[19] that they will come to the same interpretive conclusions concerning the same text. This assumes, however, that all interpreters apply the rules of interpretation correctly. Where different interpreters come to different conclusions, it is necessary to closely evaluate the competing interpretations and the reasons given for the conclusions reached to assess the persuasiveness of any proposed interpretation.

25. By applying customary rules of interpretation to the text of the WTO agreements, a panel contributes its efforts to explaining an interpretation that may, through the persuasive reasons given, earn respect from WTO Members. As part of that endeavor, a panel should take into account any previous reports – panel or Appellate Body – in order to engage with those previous

[17] WTO Agreement, Art. IX:2.

[18] DSU, Arts. 3.2, 19.2.

[19] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188.

efforts, as this will contribute to the panel's own efforts to provide the best report possible for the DSB. Whether or not that would result in a panel coming to interpretive conclusions that differ from the findings in prior reports, it is the task that WTO Members, in the DSU, have set out for any panel,[20] and it is the task that the DSB set out for the Panel in this dispute, in particular.[21]

26. The approach Canada describes is inconsistent with the task assigned to panels under the DSU. The DSU does not require, or even permit, a panel to apply as law or controlling "precedent" the reasoning set out in prior panel or Appellate Body reports. Rather, the DSU is explicit that WTO adjudicators are to apply the text of the covered agreements. Moreover, none of the reports cited by Canada support Canada's proposed analytical approach.

A. The DSU Does Not Require, or Even Permit, a Panel to Apply as Law or Controlling "Precedent" a Prior Appellate Body Interpretation

27. The DSU provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law to the text of the covered agreements in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[22] Those rules of interpretation do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text. A panel is not required – nor is it permitted – to ignore the task it has been given under the DSU and instead simply treat prior panel or Appellate Body reports as "precedent".

1. The Function of Panels and Appellate Body under the DSU

28. Fundamentally, the purpose of the WTO dispute settlement system is to resolve particular trade disputes between Members. In Article 3.7 of the DSU, WTO Members agreed: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." To achieve this focused aim, Members established in the DSU specific processes for resolving disputes promptly, including panels, and the Appellate Body where appropriate, assisting the DSB for this purpose.

29. When a Member has not been able to resolve a dispute with another Member through consultations, it may request that the DSB establish a panel to examine a matter. Through the standard terms of reference for panels in Article 7 of the DSU, the DSB charges the panel with two tasks: (1) to "examine … the matter referred to the DSB" in a panel request, and (2) "to make such findings as will assist the DSB in making the recommendations" provided for in the DSU.[23] Article 19.1 of the DSU is explicit in what the recommendation is: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." Thus, it is through such a finding of WTO-inconsistency and through such a recommendation "to

[20] *See* DSU, Art. 7.1.

[21] *See United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, Constitution of the Panel Established at the Request of Canada, WT/DS534/3 (May 23, 2018).

[22] *See* DSU, Art. 3.2.

[23] DSU, Art. 7.1.

bring the measure into conformity" that panels carry out the terms of reference "to make such findings as will assist the DSB in making the recommendations" provided for in the covered agreements.[24]

30. Members reinforced in Article 11 of the DSU that the "function of panels is to assist the DSB in discharging its responsibilities under [the DSU]." In exercising this function, Article 11 states that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." An objective assessment requires that a panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in the dispute. An objective assessment also requires that a panel interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member's commitments.[25]

31. Article 3.2 of the DSU further informs the function of a panel that has been established by the DSB to assist it. Article 3.2 explains that "Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Thus, it is the rights and obligations under those agreements that are fundamental. And, for purposes of understanding the "existing provisions" of the covered agreements – that is, their text – the DSU directs WTO adjudicators to apply "customary rules of interpretation of public international law," which are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").[26]

32. Accordingly, a panel's task is straightforward and also limited. The Appellate Body's task under the DSU is similarly limited to assisting the DSB in discharging its functions under the DSU, although the role of the Appellate Body is even more limited than the role of panels. Under Article 17.6 of the DSU, an appeal is "limited to issues of law covered in the panel report and legal interpretations developed by the panel". Further, under Article 17.13 of the DSU, the Appellate Body is only authorized to "uphold, modify or reverse the legal findings and conclusions of the panel." Since a panel's function under Article 11 of the DSU is "to assist the DSB in discharging its responsibilities" under the DSU, the Appellate Body, in reviewing a panel's legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities to find whether the responding Member's measure is consistent with WTO rules.

2. The DSU Does Not Establish a System of Precedent

33. As is clear from the foregoing, there is no provision in the DSU or the covered agreements that establishes a system of "case-law" or "precedent," or that otherwise requires a panel to apply the provisions of the covered agreements consistently with the adopted findings in previous panel or Appellate Body reports. Nor is there any provision of the DSU – or any

[24] DSU, Art. 7.1.

[25] DSU, Art. 11 ("Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . .").

[26] *See, e.g., US – Gasoline (AB)*, p. 17.

covered agreement – that refers to "cogent reasons" or suggests that a panel must justify legal findings that are not consistent with the reasoning set out in prior reports. Indeed, were a panel to decide to apply the reasoning in prior Appellate Body reports alone, and decline to fulfill its function under Articles 7.1, 11, and 3.2 of the DSU – to make findings on the applicability of and conformity with existing provisions of the covered agreements, as understood objectively through the application of customary rules of interpretation – the panel would risk creating additional obligations for Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU.

34. To say that an Appellate Body interpretation in one dispute is controlling for later disputes would effectively convert that interpretation into an authoritative interpretation of the covered agreement. Such an approach would directly contradict the agreed text of the WTO Agreement, which provides in Article IX:2: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Thus, WTO Members reserved the authority to adopt interpretations to themselves, acting in the Ministerial Conference (or General Council), not the DSB. WTO Members further set out a different process for adopting such an interpretation. The Members decided that they would act on the basis of a recommendation from the relevant Council, ensuring discussion and deliberation by Members. Finally, WTO Members set out a special decision-making rule for adopting an authoritative interpretation, not the negative consensus adoption that applies to reports under the DSU.

35. That Article IX:2 reserves to WTO Members in the Ministerial Conference the critical authority to adopt authoritative interpretations has been emphasized by Members. In the debate over the promulgation of "amicus procedures" by the Appellate Body, numerous WTO Members spoke in the General Council on this point. They correctly noted that it was not for panels or the Appellate Body to fill gaps in the DSU (or other covered agreements). It was rather for Members to amend the agreements or exercise their exclusive authority to adopt an authoritative interpretation under Article IX:2 to permit amicus submissions, if the Members considered this appropriate. Members making statements included Uruguay, Egypt (on behalf of the Informal Group of Developing Countries), Hong Kong, India, Brazil, Mexico, Singapore (on behalf of ASEAN), Colombia (on behalf of ANDEAN Members), Zimbabwe, Pakistan, Norway, Korea, Australia, Tanzania, and others.[27]

36. If this were not enough, the DSU also expressly confirms that panel and Appellate Body reports do not set out authoritative interpretations. Article 3.9 of the DSU provides that "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement." Thus, WTO Members again expressed that the adoption by negative consensus of an interpretation contained in a panel or Appellate Body report does not make that interpretation authoritative, as

[27] *See* Minutes of Meeting of the General Council on 22 November 2000, WT/GC/M/60 (Uruguay, paras. 4-9), (Egypt, para. 11), (Hong Kong, para. 28), (India, paras. 37-40), (Brazil, paras. 46-47), (Mexico, paras. 50-52), (Colombia, paras. 54-55), (Zimbabwe, para. 58), (Singapore, para. 61), Pakistan (para. 66), Norway (paras. 68-69), Korea (para. 85), Australia (para. 104), Tanzania (para. 107).

such an authoritative interpretation could only be adopted by the Ministerial Conference (or General Council) acting according to different decision-making rules.

37. Put differently, if the DSB does not have the authority under the DSU to adopt an authoritative interpretation, then a panel or the Appellate Body assisting the DSB cannot do so either.

38. In its second written submission to the Panel, Canada discussed Article IX:2, and asserted that it "has never claimed that adopted reports constitute 'authoritative interpretations' of the covered agreements."[28] Yet, in the very same paragraph, Canada also expressed the view that, "[i]f a multilateral interpretation under Article IX:2 conflicts with a prior Appellate Body interpretation, cogent reasons may exist for a panel to refuse to follow the Appellate Body."[29] In its appellant submission, Canada reiterates this position while referring to the panel report in *US – Countervailing and Anti-Dumping Measures (China)*.[30] The disturbing implication of Canada's statements is that a panel might find that such "cogent reasons" do not exist, and therefore an Appellate Body interpretation would prevail over a "multilateral interpretation under Article IX:2" adopted by WTO Members. Canada's approach would elevate the Appellate Body over the sovereign Members of the WTO, a result that directly contradicts the express terms of the WTO Agreement.

39. This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. To the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter. Such a use of prior reasoning likely would add to the persuasiveness of the panel's own analysis, whether or not the panel agrees with the prior reasoning. But considering an interpretation in a prior Appellate Body report is very different from a statement that the interpretation is controlling or "precedent" in a later dispute.

40. For these reasons, treating a prior Appellate Body interpretation as binding, or precedent, would be contrary to the structure of the DSU and the WTO Agreement, and contrary to the function of a panel assisting the DSB. Even aside from the fact that Article 11 of the DSU expresses the function of panels, not an obligation,[31] the Panel in this dispute did not act inconsistently with Article 11 of the DSU by not applying a so-called "cogent reasons" approach. Rather, by doing its own interpretive analysis applying customary rules of interpretation and

[28] Canada's Second Written Submission, para. 25.

[29] Canada's Second Written Submission, para. 25 (underline added).

[30] *See* Canada's Appellant Submission, para. 60.

[31] Article 11 of the DSU, entitled "Function of Panels", expresses that a panel "should make" an objective assessment of the matter. This use of the hortatory "should" in place of the mandatory "shall" demonstrates that Article 11 does not impose an "obligation" on a panel. This is also evident from the context of the DSU, in which a panel "should" undertake an act in only one other provision (Article 12.5 of the DSU: "Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.") while in some eight provisions a panel "shall" undertake an act (*e.g.*, Articles 7.2, 10.1, 10.2, 12.1, 12.7, 14.1, 14.2, and 14.3 of the DSU). More generally, "should" is used twenty-one times in the DSU while "shall" is used 259 times, which is indicative that each choice was deliberate and must be given meaning and effect.

setting forth the conclusions that resulted from that analysis, the Panel fulfilled its function under Article 11.

B. The Appellate Body Reports Canada Cites Do Not Support Canada's Proposed "Cogent Reasons" Approach

41. Canada contends that "[t]he Appellate Body has concluded that panels are expected to follow adopted Appellate Body interpretations and reasoning where the issues are the same and that panels must have cogent reasons for declining to do so."[32] In support of this proposition, Canada refers to the Appellate Body reports in *US – Stainless Steel (Mexico)* and *US – Oil Country Tubular Goods Sunset Reviews*.[33]

42. As discussed below, these reports do not provide a basis for a panel to disregard pertinent provisions of – and a panel's function under – the DSU. As will be explained, the Appellate Body, in its report in *Japan – Alcoholic Beverages II*, properly understood the value the DSU assigns to prior reports. However, several years later, and without any change in the relevant text of the DSU or the WTO Agreement, the Appellate Body asserted a very different approach in *US – Stainless Steel (Mexico)*, without explaining the basis for that changed approach. The statements in the *US – Stainless Steel (Mexico)* report, in addition to constituting *obiter dicta*, are fundamentally flawed and do not support the approach for which Canada advocates. Ironically, if the Appellate Body actually believed that any prior interpretation in an adopted report must be followed absent cogent reasons, it would not have, without any explanation, departed from its own understanding, which it set out in *Japan – Alcoholic Beverages II*.

1. The Appellate Body Report in *Japan – Alcoholic Beverages II* Explicitly Recognized that Adopted Panel and Appellate Body Reports Do Not Create "Precedent"

43. In *Japan – Alcoholic Beverages II*, the Appellate Body explicitly found that adoption of reports under the WTO does not create "precedent" or assign a special status for interpretations reached in reports, as that status has been reserved for authoritative interpretations reached by the Ministerial Conference. In that dispute, the Appellate Body was confronted with a question concerning the status of panel reports adopted by the GATT Contracting Parties and the WTO DSB.[34] Looking first to the GATT 1947, the Appellate Body expressed the view that the GATT Contracting Parties, in deciding to adopt a panel report, did not intend that their decision would constitute a definitive interpretation of the relevant provisions of the GATT 1947.[35] The Appellate Body then added the following: "Nor do we believe that this is contemplated under GATT 1994."[36] The Appellate Body explained that the "specific cause for this conclusion" is

[32] Canada's Appellant Submission, para. 51.

[33] *See* Canada's Appellant Submission, paras. 53-62, 68, and 72.

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

[35] *Japan – Alcoholic Beverages II (AB)*, p. 13.

[36] *Japan – Alcoholic Beverages II (AB)*, p. 13.

Article IX:2 of the WTO Agreement. The Appellate Body stated the following with regard to Article IX:2:

> 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 inadvertence elsewhere.[37]

The United States agrees. It is remarkable that the Appellate Body later contradicted this statement in *US – Stainless Steel (Mexico)*, without explaining any basis for doing so – for example, the Appellate Body might have explained that it considered *Japan – Alcoholic Beverages II* wrongly decided.

44. In *Japan – Alcoholic Beverages II*, the Appellate Body also explained that the decision to adopt a panel report under Article XXIII of the GATT 1947 was different from joint action of the Contracting Parties under Article XXV of the GATT 1947; and under the WTO Agreement, the nature of reports adopted by the DSB continues to differ from interpretations made under the WTO Agreement by the Ministerial Conference or the General Council.[38] According to the Appellate Body, "[t]his is clear from a reading of Article 3.9 of the DSU". The United States agrees with this finding as well, given that Article 3.9 confirms that panel and Appellate Body reports do not set out authoritative interpretations.

45. Thus, the Appellate Body, in an early report, shortly after conclusion of the Uruguay Round, made clear that the negative consensus procedure for adoption of reports by the DSB cannot supplant the "exclusive authority" of the Ministerial Conference and the General Council to adopt, by positive consensus,[39] an "authoritative interpretation" of a covered agreement, as explicitly established in Article 3.9 of the DSU[40] and Article IX:2 of the WTO Agreement.[41]

46. The Appellate Body report in *Japan – Alcoholic Beverages II* also made clear that adopted panel reports often are considered by subsequent panels, and may be taken into account where they are relevant, but "they are not binding".[42] As stated earlier, the United States considers that a panel may take into account the reasoning in prior reports and, to the extent that a panel finds the reasoning persuasive, rely on that reasoning in conducting its own objective assessment of the matter. To be clear, the United States encourages this, and expects prior reports may have valuable insight. This is why parties to a dispute – including the United States – often cite to prior reports for their persuasive value. But this is a very different statement than

[37] *Japan – Alcoholic Beverages II (AB)*, p. 13.

[38] *Japan – Alcoholic Beverages II (AB)*, pp. 13-14.

[39] WTO Agreement, Art. IX:1.

[40] DSU, Art. 3.9 ("The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.").

[41] WTO Agreement, Art. IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.").

[42] *Japan – Alcoholic Beverages II (AB)*, p. 14.

saying panels are bound to follow prior panel and Appellate Body reports, or that they may rely on those reports instead of conducting their own objective assessment.

2. The Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews* Does Not Support Canada's Proposed "Cogent Reasons" Approach

47. In support of its contention that panels are bound by the DSU to apply a purported "cogent reasons standard", Canada refers to the Appellate Body report in *US – Oil Country Tubular Goods Sunset Reviews*.[43] In that dispute, the Appellate Body found that it was appropriate for the panel to rely on a conclusion made by the Appellate Body in a prior dispute in determining whether a particular policy bulletin is a measure.[44]

48. Notably, the Appellate Body report in *US – Oil Country Tubular Goods Sunset Reviews* includes no reference to or discussion of "cogent reasons" as a basis for departing from the Appellate Body's interpretations in a prior dispute. Thus, this report does not support the proposition that panels are expected to follow Appellate Body reports where the issues are the same, absent cogent reasons to do otherwise.

49. The United States notes that, in paragraph 188 of the *US – Oil Country Tubular Goods Sunset Reviews* report, the Appellate Body stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[45] This assertion, which is not explained or supported in the text of the Appellate Body report, would seem to itself contradict earlier statements by the Appellate Body, including in *Japan – Alcoholic Beverages II*. There is a significant difference between stating, on the one hand, that one would expect panels to reach similar conclusions where the issues are similar (*i.e.*, conducting their own objective examination, they may reach a similar outcome), and saying, on the other hand, that one would expect a panel simply to follow a prior decision without conducting an objective examination of its own. There is no support in the DSU for the latter approach.

50. This statement by the Appellate Body is also problematic in its use of the phrase "especially where the issues are the same".[46] The Appellate Body report thus implies that following a prior conclusion "is not only appropriate" but "what would be expected" from a panel even in circumstances where the issues are not the same. There is no explanation given for this implication of the statement in the report.

51. Further, the Appellate Body report's use of the passive voice – "is what would be expected from panels" – avoids expressing who expects this from a panel. It is understood that the Appellate Body expects this as the author of the passage. But this Appellate Body

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[43] *See* Canada's Appellant Submission, footnotes 105 and 107. *See also* Canada's Second Written Submission, para. 23.

[44] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188.

[45] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188.

[46] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188 (underline added).

expectation is irrelevant, as what matters in the WTO dispute settlement system is the expectations of WTO Members, as specifically expressed through their agreement in the DSU. The Appellate Body cites to no language in the DSU that suggests that WTO Members expect panels to disregard the text and structure of the DSU and the terms of the covered agreements, as elaborated above.

52. Thus, the United States does not consider that the unsupported assertion in the *US – Oil Country Tubular Goods Sunset Reviews* Appellate Body report, which also contradicts the text of the DSU, supports the purported "cogent reasons" approach for which Canada advocates.

3. The Appellate Body Report in *US – Stainless Steel (Mexico)* Does Not Support Canada's Proposed "Cogent Reasons" Approach

53. Canada also cites the Appellate Body report in *US – Stainless Steel (Mexico)*.[47] This report contains the Appellate Body's first instance of applying the concept of "cogent reasons" to a dispute. The Appellate Body makes several disparate statements in articulating the "cogent reasons" approach. Key among them is the contention that "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[48] The *US – Stainless Steel (Mexico)* Appellate Body report does not support Canada's claim under Article 11 of the DSU for several reasons. The Appellate Body's statement is, by definition, an "advisory opinion" or *obiter dicta* that, even under the Appellate Body's logic, is not a finding subject to its approach. More fundamentally, the "cogent reasons" approach is fundamentally flawed and at odds with the text of the DSU and WTO Agreement.

a. The Appellate Body's Statements Concerning Cogent Reasons in *US – Stainless Steel (Mexico)* are *Obiter Dicta*

54. As an initial matter, and even setting aside the fundamental flaws under the DSU with the "cogent reasons" approach, the United States would see no basis to cite and follow Appellate Body statements that appear in the *US – Stainless Steel (Mexico)* Appellate Body report. In *US – Stainless Steel (Mexico)*, the discussion of "cogent reasons" appears in the context of Mexico's appeal under Article 11 of the DSU.[49] Mexico argued on appeal that the panel acted inconsistently with Article 11 of the DSU by failing to follow what Mexico considered was "well-established Appellate Body jurisprudence."[50]

55. The Appellate Body did not, however, make a finding on Mexico's Article 11 appeal. Rather, the Appellate Body exercised judicial economy on Mexico's claim.[51] Thus, there was no "legal finding" on Mexico's claim of error, and the Appellate Body's discussion is not reasoning

[47] *See* Canada's Appellant Submission, paras. 58-60.

[48] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[49] *US – Stainless Steel (Mexico) (AB)*, para. 154.

[50] *US – Stainless Steel (Mexico) (AB)*, para. 154.

[51] *US – Stainless Steel (Mexico) (AB)*, para. 162.

"resolv[ing a] legal question".[52] The "cogent reasons" approach (as explained by the Appellate Body) thus would not even apply to the Appellate Body's own statement on "cogent reasons".

56. That the Appellate Body made no legal finding on Mexico's appeal is made explicit by the Appellate Body's conclusion at paragraph 162 of its report, where it stated the following:

> Since we have [elsewhere in the report] corrected the Panel's erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU.[53]

Therefore, the entire discussion of "cogent reasons" and any reasoning leading up to the conclusion not to make a finding on Mexico's appeal is, by definition, an "advisory opinion" or *obiter dicta*.

57. "Advisory opinions" are commonly defined as "a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation."[54] *Obiter dictum* has been defined "in common law context as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"[55] and "an opinion not necessary to a judgment; an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect".[56] Given that the Appellate Body expressly declined to make any finding on Mexico's appeal under Article 11 of the DSU, the preceding discussion – including on "cogent reasons" – is, by definition, merely advisory, or *obiter dicta*.

58. In this regard, the United States notes that the Appellate Body itself elsewhere confirms that, on its approach, statements that are not necessary to "resolve [a] legal question" would not be subject to its approach. At paragraph 158 of its report, the Appellate Body itself states the following:

> It is well settled that the Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.[57]

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[52] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[53] *US – Stainless Steel (Mexico) (AB)*, para. 162 (underline added).

[54] *See, e.g.*, Oxford Dictionaries, "advisory opinion" (https://en.oxforddictionaries.com/definition/advisory_opinion).

[55] *See, e.g.*, Black's Law Dictionary (9th ed, 2009).

[56] Wharton's Law Lexicon (14th Ed. 1993).

[57] *US – Stainless Steel (Mexico) (AB)*, para. 158.

59. The implication of this statement, particularly the second sentence, is that the Appellate Body in this report considers panels may not disregard the "*ratio decidendi*" contained in previous reports adopted by the DSB. Given that the Appellate Body did not make findings on Mexico's claim under Article 11 of the DSU, the Appellate Body's "cogent reasons" analysis did not and could not form part of the "*ratio decidendi*" of the Appellate Body report in *US – Stainless Steel (Mexico)*.

60. Therefore, even under the Appellate Body's own approach, its discussion of "cogent reasons" is "not binding" on a subsequent panel, and a panel is "free to disregard" it.

b. The Appellate Body's Statements Concerning Cogent Reasons in *US – Stainless Steel (Mexico)* are Profoundly Flawed

61. More fundamentally, however, the Appellate Body's statements concerning "cogent reasons" in *US – Stainless Steel (Mexico)* are profoundly flawed in several respects. These include: (1) a failure to properly appreciate the functions of panels and the Appellate Body within the WTO dispute settlement system; (2) an erroneous interpretation of Article 3.2 of the DSU that does not reflect the text of that provision; (3) a reliance on reports that do not support a "cogent reasons" approach; (4) a misunderstanding (or misstatement) of why parties cite prior reports; (5) inappropriate (and incomplete) analogies to other international adjudicative fora; and (6) incorrect assumptions concerning the existence of a hierarchical structure that does not reflect the limited task assigned to the Appellate Body in the DSU. The following sections briefly discuss each of these concerns.

(i) Article 11 of the DSU

62. First, the Appellate Body's statements concerning "cogent reasons" reflect a failure to properly appreciate the tasks assigned to panels and the Appellate Body by the relevant provisions of the DSU. Although the Appellate Body purports to "begin [its] consideration with the text of Article 11 of the DSU",[58] the Appellate Body subsequently ignores the limitations of this text.

63. As discussed, Article 11 of the DSU stipulates that "[t]he function of panels is to assist the DSB in discharging its responsibilities" under the DSU and the covered agreements. In exercising this function, Article 11 of the DSU states that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." An objective assessment requires that a panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in the dispute. An objective assessment also requires that a panel interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member's commitments.

64. As noted previously, nowhere in Article 11 of the DSU is a panel's objective assessment linked to prior Appellate Body interpretations. Nor does the context of Article 3.2 of the DSU,

[58] *US – Stainless Steel (Mexico) (AB)*, para. 155.

which is discussed next, or the structure of Article IX:2 of the WTO Agreement or Article 3.9 of the DSU, support reading into Article 11 of the DSU a requirement for panels to establish "cogent reasons" to depart from findings by the Appellate Body in a separate dispute. The Appellate Body makes no real attempt in *US – Stainless Steel (Mexico)* to ground such a requirement in the text of Article 11 of the DSU itself, nor does Canada do so in its appellant submission.

(ii) Article 3.2 of the DSU

65. Second, the Appellate Body relies – as does Canada[59] – on an interpretation of Article 3.2 of the DSU that fails to reflect the plain reading of that provision. At paragraph 160 of the *US – Stainless Steel (Mexico)* report, the Appellate Body states that "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated by Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[60]

66. There are a number of evident flaws in this assertion. First, the statement that Article 3.2 of the DSU "implies" an approach reveals the weakness of the Appellate Body's argument. The Appellate Body, through this language, concedes that Article 3.2 does not, by its terms, require or even set out a "cogent reasons" approach.

67. Second, the statement that Article 3.2 implies a "cogent reasons" approach to past Appellate Body interpretations plainly contradicts the Appellate Body's own understanding of the DSU in *Japan – Alcoholic Beverages II*. In that report, after examining Article 3.9 of the DSU and Article IX:2 of the WTO Agreement, the Appellate Body correctly concluded that "[t]he 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 inadvertence elsewhere."[61]

68. Third, the Appellate Body statement that Article 3.2 "implies" a "cogent reasons" approach also rests on a misunderstanding of the text of Article 3.2. Article 3.2 provides, in relevant part:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

69. The "it" in the second sentence of Article 3.2 refers to the subject of the first sentence, "the dispute settlement system of the WTO". In other words, Members recognized that the

[59] *See* Canada's Appellant Submission, para. 55.

[60] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[61] *Japan – Alcoholic Beverages II (AB)*, p. 13 (underline added).

dispute settlement system of the WTO – as set out in the DSU – serves to preserve the rights and obligations of Members under the covered agreements, and the dispute settlement system of the WTO – as set out in the DSU – serves to clarify the existing provisions of those agreements.

70. This text of Article 3.2 is neither a directive to panels or the Appellate Body nor an authorization for them. There is no "shall" or "may" in this text. Instead, it is a statement of what Members have agreed flows from the dispute settlement system itself when it operates in accordance with the provisions agreed by Members in the DSU. Moreover, the text of Article 3.2 nowhere mentions precedent or cogent reasons, and immediate context in Article 3.9 of the DSU (and Article IX:2 of the WTO Agreement) reinforces that these concepts cannot be inserted through implication into Article 3.2.

71. Finally, the United States notes that the Appellate Body does not appear to take seriously its own statement on "cogent reasons". Aside from the Appellate Body's own failure to resolve the issue of the value of prior adopted reports the same way it had resolved that question in *Japan – Alcoholic Beverages II*, the Appellate Body statement confuses the "adjudicatory body" at issue. The passage in the *US – Stainless Steel (Mexico)* Appellate Body report reads: "Article 3.2 of the DSU[] implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." This statement describes "an adjudicatory body" – for example, the Appellate Body. But it does not address a different adjudicatory body, such as a panel. Thus, whether or not the Appellate Body statement could be correct as applied to "an adjudicatory body", it says nothing about the approach of a <u>different</u> "adjudicatory body", like a panel.

72. On the other hand, if the Appellate Body considered the DSB to be "an adjudicatory body", the Appellate Body's logic would suggest that, once a <u>panel</u> has given a legal interpretation and that interpretation has been adopted by the DSB, then the <u>Appellate Body</u> would need to follow that adopted <u>panel</u> interpretation, "absent cogent reasons" not to do so. But the Appellate Body has <u>never</u> suggested that it would accept that outcome. The Appellate Body report in *US – Stainless Steel (Mexico)* thus does not address or explain the discrepancy in using the phrase "an adjudicatory body" to imply something about a panel's relationship to a prior Appellate Body interpretation.

73. For all these reasons, the Appellate Body's reasoning on Article 3.2 of the DSU does not support the "cogent reasons" approach to dispute settlement for which Canada advocates.

(iii) Reliance on Prior Appellate Body Reports

74. Third, the Appellate Body, in its discussion of cogent reasons, also cites to its reports in *Japan – Alcoholic Beverages II*, *US – Shrimp (Article 21.5 – Malaysia)*, and *US – Oil Country Tubular Goods Sunset Reviews*.[62] However, for the reasons already discussed, the *Japan – Alcoholic Beverages II* and *US – Oil Country Tubular Goods Sunset Reviews* reports provide no basis for a "cogent reasons" approach. The Appellate Body report in *Japan – Alcoholic Beverages II*, in particular, is contrary to such an approach. In fact, the Appellate Body provides no "cogent reasons" for departing from the reasoning in that prior report. This obvious failure to

[62] *See US – Stainless Steel (Mexico) (AB)*, paras. 158-159.

follow its own approach, supposedly based on a systemic understanding of the DSU, rather suggests that the "cogent reasons" approach is directed towards an outcome of ensuring panels follow Appellate Body statements, regardless of the lack of any basis in the DSU for that approach.

75. The *US – Shrimp (Article 21.5 – Malaysia)* Appellate Body report, to which Canada also refers,[63] likewise does not support the Appellate Body's "cogent reasons" approach. Paragraph 109 of the report in *US – Shrimp (Article 21.5 – Malaysia)*, which follows a quotation from the report in *Japan – Alcoholic Beverages II* concerning the status of adopted panel reports, provides, in part:

> This reasoning applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning.[64]

76. With regard to the first sentence of this paragraph, the United States would agree that the Appellate Body's reasoning in *Japan – Alcoholic Beverages II* concerning the status of adopted panel reports also "applies to adopted Appellate Body Reports as well".[65] That is, a panel may rely on them, but they are not binding and should not be understood as supplanting the "exclusive authority" of Members to seek authoritative interpretations of the covered agreements under the WTO Agreement.

77. In the second and third sentences of paragraph 109, the Appellate Body points out that the panel in that dispute did not err by "taking into account" the reasoning of an adopted Appellate Body report. Here, too, the United States agrees for the reasons explained. Moreover, it is critical to note that the Appellate Body explained the panel was correct in relying on prior findings "as a tool for its own reasoning".[66] In other words, the panel did not use those prior findings as a substitute for its own reasoning or in place of conducting its own objective assessment (including applying customary rules of interpretation), and the Appellate Body did not suggest that it would be appropriate or permissible under the DSU for the panel to do so.

(iv) Parties' Citation of Prior Reports

78. Fourth, in its discussion of cogent reasons, the Appellate Body also misunderstands or misrepresents why parties often cite to adopted panel and Appellate Body reports in dispute settlement proceedings.[67] There is nothing surprising about the fact that parties in WTO disputes cite to reports to the extent they may consider them persuasive. As mentioned, the United States

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[63] *See* Canada's Appellant Submission, footnotes 82 and 85.

[64] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109 (underline added).

[65] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109.

[66] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 109 (underline added).

[67] *See US – Stainless Steel (Mexico) (AB)*, para. 158. *See also* Canada's Appellant Submission, para. 58.

expects this, does this itself, and anticipates panels will do the same. But there is no support for the proposition that parties cite to reports because they consider them somehow binding on or precedential for subsequent panels and the Appellate Body, which is what the Appellate Body appears to imply. Here again, the Appellate Body ignores that there is a significant difference between, on the one hand, citing a report for its persuasive value, and, on the other hand, arguing that the report is binding on or precedential for future panels.

79. The Appellate Body also asserts that "when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports."[68] The report cites no evidence for this proposition, nor does Canada. To the extent the Appellate Body statement intended to refer to compliance actions taken by Members, those Members would be looking to the recommendations of the DSB in a particular dispute. More generally, the United States would expect Members to look first to the text of the covered agreements in enacting or modifying their national measures. And Members are entitled to act according to the text of those agreements embodying their commitments, as understood through customary rules of interpretation, rather than according to an interpretation rendered in a dispute settlement report. This is particularly so given the probability that some interpretations may be in error, and panel or Appellate Body findings may not add to or diminish the rights or obligations of Members under the covered agreements.

(v) Other International Fora

80. Fifth, to support its statement that Article 3.2 of the DSU implies that, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case", the Appellate Body report in *US – Stainless Steel (Mexico)* includes a lengthy footnote that attempts to draw significance from how consistency of disputes may be regarded in other international fora for dispute settlement.[69]

81. The Appellate Body provides no explanation as to whether or how the applicable rules and structures of the two tribunals it references are relevant for understanding the WTO dispute settlement system, or how the structure of these tribunals or their constitutive statutes give any insight into the role or value of WTO reports.

82. To the extent that the Appellate Body intended to suggest that "precedent" is reflective of customary international law, the United States would note that the statement of two tribunals would not establish the existence of such a rule.[70] Moreover, under international law, treaty text will prevail over customary law as between parties to the treaty. Customary law cannot override clear treaty text as to rights and obligations between parties to the treaty. The view that a "cogent reasons" approach is justified based on customary international law would conflict with the text of Articles 3.2, 3.9, and 11 of the DSU, as well as other relevant provisions of the DSU

[68] *US – Stainless Steel (Mexico) (AB)*, para. 160. *See also* Canada's Appellant Submission, para. 58.

[69] *See US – Stainless Steel (Mexico) (AB)*, footnote 313.

[70] A rule of customary law is understood to be comprised of widespread and consistent State practice and "opinio juris" (or "a belief in legal obligation"). *See, e.g.*, North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44.

and the WTO Agreement. The approach of the DSU – that no "cogent reasons" approach is necessary or appropriate – therefore would prevail.

(vi) Structure Contemplated in the DSU

83. Finally, the Appellate Body's discussion of "cogent reasons" is based on an asserted "hierarchical structure contemplated in the DSU," but the Appellate Body's assertion fails to accurately reflect the important, but limited, role assigned to the Appellate Body, and is divorced from the text of the DSU. At paragraph 161 of the report in *US – Stainless Steel (Mexico)*, the Appellate Body suggests that it was created by Members and "vested with authority" pursuant to Articles 17.6 and 17.13 of the DSU so as to promote security and predictability in the dispute settlement system.[71] And so, according to the Appellate Body, a panel's "failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predicable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated by the DSU."[72]

84. Articles 17.6 and 17.13 of the DSU do not "vest" the Appellate Body with broad authority to develop "a coherent and predictable body of jurisprudence". The latter phrase does not appear in either of those provisions – nor is there any hint of such terms. In fact, Articles 17.6 and 17.13 are <u>limitations</u> on the parameters of appellate review and on the permissible actions of the Appellate Body. For example, Article 17.6 provides that "[a]n appeal shall be <u>limited</u> to issues of law covered in the panel report and legal interpretations."[73] And Article 17.13 limits the Appellate Body's functions by saying that it "may uphold, modify or reverse the legal findings and conclusions of the panel." Of course, this list of authorized actions does not include issuing authoritative interpretations that must be followed by subsequent panels.

85. Given these limitations, it is not consistent with the text of Articles 17.6 and 17.13 of the DSU to read those provisions as providing the Appellate Body the authority to render an interpretation in one dispute that would, in another separate dispute, relieve a panel of the responsibility it has to the DSB to conduct an objective assessment of the applicability of and conformity with a covered agreement, using customary rules of interpretation. Rather, as discussed, authoritative interpretations of the covered agreements are reserved exclusively to WTO Members acting in the Ministerial Conference (or General Council).

86. The notion of a "hierarchical structure" in the dispute settlement system also fails to acknowledge the role of the DSB. It is the DSB that establishes a panel and charges it with making those findings necessary for the DSB to provide a recommendation to bring a WTO-inconsistent measure into conformity with the WTO agreements.[74] It is the DSB that panels and the Appellate Body assist by carrying out their functions as set out in the DSU.

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[71] *US – Stainless Steel (Mexico) (AB)*, para. 161. *See also* Canada's Appellant Submission, paras. 56 and 68.

[72] *US – Stainless Steel (Mexico) (AB)*, para. 161.

[73] DSU, Art. 17.6 (underline added).

[74] DSU, Art. 7.1. Article 7.1 of the DSU provides that:

87. As noted above, panel findings and recommendations that are adopted by the DSB are of equal legal status as Appellate Body findings and recommendations that are adopted by the DSB. The Appellate Body has never suggested that it would accept this consequence of the "hierarchical structure" of the DSU – that the Appellate Body itself would be "expected" to follow findings in prior panel reports adopted by the DSB – likely because this would restrict the Appellate Body's influence in the dispute settlement system. But the United States views the notion of a hierarchical structure in the DSU to be misguided.

88. DSB recommendations resulting from panel or Appellate Body findings, or arbitration awards under Article 25 of the DSU, are directed at resolving a dispute between Members. Should a Member wish to obtain an authoritative interpretation that will be binding on all Members, or serve as precedent in a future dispute, it must have recourse to the different process set out in Article IX:2 of the WTO Agreement for the hierarchically superior body, the Ministerial Conference.

89. For these reasons, it is inconsistent with the text and structure of the DSU and the WTO Agreement for a panel to treat prior interpretations in Appellate Body reports as binding, or precedent, absent "cogent reasons" for departing from them. A panel does not act inconsistently with its function under Article 11 of the DSU simply because it applied customary rules of interpretation and came to an interpretive conclusion that differs from a conclusion rendered in a prior report. Accordingly, Canada's claim under Article 11 of the DSU utterly lacks merit and should be rejected.

90. As demonstrated in the following sections, the Panel had ample reason to reach interpretive conclusions that differ from those in prior reports. The Panel here correctly applied customary rules of interpretation, and its findings are logical and well reasoned. Canada's suggestion that the Panel failed in its duty to make an objective assessment of the matter is patently absurd.

III. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLES 2.4.2 AND 2.4 OF THE AD AGREEMENT

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

91. Canada appeals certain of the Panel's findings concerning the interpretation of the term "pattern" in the second sentence of Article 2.4.2 of the AD Agreement.[75] Canada also appeals the Panel's finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not inconsistent with Articles 2.4.2 or 2.4 of the AD

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[75] *See* Canada's Appellant Submission, paras. 10-22.

Agreement.[76] And, finally, Canada appeals the Panel's statement that the use of a mixed comparison methodology involving the application of the average-to-transaction comparison methodology to certain export transactions and the application of the average-to-average or transaction-to-transaction comparison methodology to the remaining export transactions is required.[77] The United States responds to Canada's arguments below and demonstrates that they lack merit.

92. As explained in detail in this submission, Canada seeks to rewrite the second sentence of Article 2.4.2, and to read the alternative, average-to-transaction comparison methodology out of the AD Agreement entirely. Canada's proposed interpretation is erroneous and does not accord with customary rules of interpretation of public international law. The Panel, on the other hand, applied customary rules of interpretation correctly and arrived at interpretive conclusions that are logical and well reasoned. The Panel's findings should not be reversed.

93. Article 3.2 of the DSU and Article 17.6(ii) of the AD Agreement both provide that panels interpreting the AD Agreement are to apply "customary rules of interpretation of public international law". Article 31 of the Vienna Convention, which has been recognized as reflecting such customary rules,[78] provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

94. Thus, any interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement must begin with the text of that provision. Article 2.4.2 of the AD Agreement, in its entirety, provides that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

95. On its face, Article 2.4.2 of the AD Agreement sets forth three comparison methodologies by which an investigating authority may determine the "existence of margins of dumping." Per the first sentence, "normally," an investigating authority "shall" do so "on the

[76] *See* Canada's Appellant Submission, paras. 38-50.

[77] *See* Canada's Appellant Submission, paras. 23-37.

[78] *See, e.g., US – Gasoline (AB)*, p. 17.

basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." More succinctly, the two primary comparison methodologies available to an investigating authority are the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. In this submission, the United States refers to these as the normal comparison methodologies. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[79] The Appellate Body has reasoned that it would be illogical if these two symmetrical comparison methodologies were to yield "results that are systematically different."[80]

96. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which, the Appellate Body has observed, "involves an asymmetrical comparison and may be used only in exceptional circumstances."[81] As an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should not "lead to results that are systematically different"[82] – the third comparison methodology, by logical extension, should "lead to results that are systematically different," when the conditions for its use have been established.

97. The third comparison methodology may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

98. The three parts of the second sentence of Article 2.4.2 have been referred to as the methodology clause, the pattern clause, and the explanation clause,[83] and the United States uses those terms in this submission.

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[79] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93. *See also US – Washing Machines (AB)*, paras. 5.15, 5.75.

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

[81] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86. *See also id.*, para. 97 ("[T]he methodology in the second sentence of Article 2.4.2 is an exception."); *US – Zeroing (Japan) (AB)*, para. 131 ("The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which are normally to be used."); *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.

[82] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

[83] *See, e.g., US – Washing Machines (Panel)*, para. 7.9.

B. The Panel Did Not Err in Finding that the Pattern Described in the Second Sentence of Article 2.4.2 of the AD Agreement Includes Both Significantly Lower-Priced Export Transactions and Significantly Higher-Priced Export Transactions

99. Canada appeals "the Panel's finding that a 'pattern', for the purposes of the second sentence of Article 2.4.2, may include significantly higher prices".[84] Canada contends that "a pattern for the purposes of the second sentence will be comprised of export prices that are significantly *lower* than other prices."[85] As demonstrated below, Canada's proposed interpretation of the relevant "pattern" does not follow from a proper application of customary rules of interpretation of public international law, and thus it lacks merit.

1. "A Pattern of Export Prices which Differ Significantly among Different Purchasers, Regions or Time Periods" Is a Regular and Intelligible Form or Sequence of Export Prices which Are Unlike in an Important Manner or to a Significant Extent

100. One of the conditions for the use of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement is the identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods."[86] The interpretation of the "pattern" described in the second sentence of Article 2.4.2 has implications both for when and how the alternative, average-to-transaction comparison methodology may be applied.

101. An interpretation of the term "pattern" in the second sentence of Article 2.4.2 of the AD Agreement, undertaken in accordance with customary rules of interpretation, requires an analysis of the ordinary meaning of the term "pattern," in its context and in light of the object and purpose of the AD Agreement.[87] The most immediate context for interpreting the term "pattern" is the pattern clause of the second sentence of Article 2.4.2, in which the term "pattern" appears. Such an analysis demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" means a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as among different purchasers, regions, or time periods.

102. The Appellate Body has explained that an ordinary meaning analysis "may start with the dictionary definitions of the terms to be interpreted," but the Appellate Body has cautioned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation,

[84] Canada's Appellant Submission, para. 22. *See also id*., paras. 10-22.

[85] Canada's Appellant Submission, para. 12 (italics in original).

[86] *See* AD Agreement, Art. 2.4.2, second sentence.

[87] *See* Vienna Convention, Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."). *See also US – Gasoline (AB)*, p. 17.

as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[88] Rather, as the panel explained in *US – Section 301 Trade Act*:

> For pragmatic reasons the normal usage … is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.[89]

103. The word "pattern" has a wide variety of dictionary definitions, including the noun and adjective forms, as well as numerous compound forms. Altogether, there are dozens of entries in the dictionary for the word "pattern," ranging, for instance, from "a model, example, or copy" and "an example or model to be imitated," to "a quantity of material sufficient for making a garment," or "a regular or decorative arrangement," or "the distribution of shot fired from a gun."[90]

104. The most apt definition, though, as Canada has agreed,[91] is "a regular and intelligible form or sequence discernible in certain actions or situations."[92] The *Oxford English Dictionary*, from which all of the above definitions are drawn, notes that this definition is used "[f]req[uently] with *of*, as *pattern of behaviour*." In the second sentence of Article 2.4.2, the word "pattern" appears together with "of export prices . . .," which is a contextual indication of the proper ordinary meaning of the word "pattern" as it is used there. Thus, it would appear that the term "pattern of export prices . . ." can be understood to mean a regular and intelligible form or sequence discernible in export prices. The Appellate Body in *US – Washing Machines* agreed with this understanding of the plain meaning of the term "pattern",[93] as did the Panel here.[94]

105. The relevant pattern at issue in the second sentence of Article 2.4.2 is that of "export prices which differ significantly . . . ."[95] The dictionary contains several definitions of the word "differ."[96] The most appropriate definition, in the sense in which the term is used in the second sentence of Article 2.4.2, appears to be "to have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in

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[88] *US – Gambling (AB)*, para. 164 (citations omitted; italics in original).

[89] *US – Section 301 Trade Act (Panel)*, para. 7.22 (cited by the Appellate Body in *US – Gambling (AB)*, para. 164, footnote 191).

[90] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-1).

[91] *See* Canada's Appellant Submission, para. 13.

[92] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit USA-1).

[93] *See US – Washing Machines (AB)*, para. 5.25.

[94] *See* Panel Report, para. 7.39.

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

[96] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-2).

some specified respect."[97] The Appellate Body in *US – Washing Machines* agreed with this understanding of the plain meaning of the term "differ."[98]

106. The meaning of the word "differ" is confirmed when it is read together with the word "among." The preposition "among" is defined, *inter alia*, as "of relation between object and objects"; "of the relation of a thing (or things) to the whole surrounding group or composite substance"; "of the relation of anything in a local group to the other members of the group, although these do not actually surround it; as of an individual to the other members of the same community"; "of the relation of a thing to others in the same nominal or logical group: In the number or class of"; and "*esp.* of things distinguished in kind from the rest of the group: Preeminent among, as distinguished from, in comparison with, above the others."[99] The preposition "among" thus references a relationship between one thing, for example, a purchaser, region, or time period, and other similar things of the same type, *e.g.*, other purchasers, regions, or time periods.

107. Thus, when the second sentence of Article 2.4.2 refers to "export prices which differ significantly among different purchasers, regions or time periods," this suggests the need for a comparison, for example, of export prices to one purchaser with export prices to other purchasers to ascertain whether the export prices to the former are not the same, or are unlike, or are distinct from the export prices to the latter in some respect.[100]

108. The word "differ" in the second sentence of Article 2.4.2 is modified by the word "significantly." Thus, not only must there be a pattern of export prices that "differ" among purchasers, regions, or time periods, the export prices must differ "significantly." The word "significantly," when used as an adverb, as it is in the pattern clause, is defined as "in a significant manner; *esp.* so as to convey a particular meaning; expressively, meaningfully"; "importantly, notably"; or "to a significant degree or extent; so as to make a noticeable difference; substantially, considerably."[101] The Appellate Body has observed that "[t]he term

[97] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-2). The word "differ" is also defined as "to put apart or separate from each other in qualities." Along with being described as "now unusual" in the dictionary, the term is also a transitive verb, suggesting action, while the definition above is that of an intransitive verb. Thus, this definition seems less apt. Also, it is unlikely that a definition related to "heraldry" is appropriate; nor does a definition relating to holding different opinions or being in disagreement (in that same sense) appear suitable.

[98] *See US – Washing Machines (AB)*, para. 5.26.

[99] *See* Definition of "among" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-3).

[100] We refer in this sentence only to an analysis of purchasers for the sake of clarity. There does not appear to be any disagreement between the parties that the appropriate comparison is between the export prices to one purchaser and the export prices to another purchaser or purchasers, or between the export prices to one region and the export prices to another region or regions, or between the export prices in one time period and the export prices in another time period or time periods. No party appears to suggest that the second sentence of Article 2.4.2 calls for a comparison, for example, of export prices to a purchaser with export prices to a region.

[101] *See* Definition of "significantly" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-4).

'significant' has been understood … as 'something that can be characterized as important, notable, or consequential.'"[102]

109. Viewed together, the terms of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement provide that the relevant pattern is a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as among different purchasers, regions, or time periods.

110. Furthermore, we note, as additional context, that the pattern clause appears in the second sentence of Article 2.4.2 of the AD Agreement and is a condition for resorting to the "exceptional"[103] average-to-transaction comparison methodology, which is an alternative to the comparison methodologies that investigating authorities "normally"[104] are to use. Accordingly, an investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the price differences among different purchasers, regions, or time periods are significant.

111. Finally, the United States observes that the interpretation of the pattern clause set forth above is consistent with and supports the object and purpose of the AD Agreement. Although the AD Agreement "does not contain a preamble or an explicit indication of its object and purpose,"[105] guidance can be found in Article VI:1 of the GATT 1994, in which Members have recognized that injurious dumping "is to be condemned." Of course, the AD Agreement also provides detailed rules governing the application of antidumping measures, including procedural safeguards for interested parties and substantive rules on the calculation of a margin of dumping. The AD Agreement thus appears to be aimed at providing a balanced set of rights and obligations regarding the use of antidumping measures to remedy injurious dumping.

112. As the Appellate Body has observed, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[106] in "exceptional"[107] situations. Interpreting the pattern clause as discussed above – *i.e.*, as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as among different purchasers, regions, or time periods – serves the aim of the second sentence of Article 2.4.2 and is consistent with the overall balance of rights and obligations struck in the AD Agreement.

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[102] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426).

[103] *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.

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

[105] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 118.

[106] *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.

[107] *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.

2. Summary of the Differential Pricing Analysis Applied in the Antidumping Investigation of Softwood Lumber Products from Canada

113. Before responding to Canada's arguments and demonstrating that they lack merit, the United States provides a brief summary of the analysis that the USDOC undertook in the antidumping investigation of softwood lumber products from Canada. The USDOC fully described its analysis in the preliminary decision memorandum that accompanied the USDOC's preliminary determination and the final issues and decision memorandum that accompanied the USDOC's final determination.[108]

114. To determine whether there existed "a pattern of export prices which differ significantly among different purchasers, regions or time periods",[109] the USDOC used analytically sound methods that relied upon objective criteria and verified factual information. Specifically, as part of its differential pricing analysis, the USDOC used the "Cohen's *d* test" to "evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise",[110] and the USDOC also used the "ratio test" to "assess the extent of the significant price differences for all sales as measured by the Cohen's *d* test."[111] Each of these tests is further described below.

a. The Cohen's *d* Test

115. The central feature of the Cohen's *d* test is the calculation of a Cohen's *d* coefficient.[112] The Cohen's *d* coefficient is a measure of "effect size," which quantifies the importance, usefulness, or significance of the differences between two sets of observations by gauging the difference in the means of the two groups based on the degree of variance in the underlying data. As the USDOC explained, "[t]he Cohen's *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean, *i.e.*, weighted-average export price, of a test group and the mean, *i.e.*, weighted-average price, of a comparison group."[113] Canada has

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[108] *See 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"), pp. 13-16 (Exhibit CAN-03); *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, pp. 50, 53-65 (Exhibit CAN-01).

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

[110] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03). *See also* Lumber Final I&D Memo, Comment 18, p. 55 (Exhibit CAN-01) ("Consistent with the pattern requirement, the Cohen's *d* test, for comparable merchandise compares the mean price to a given purchaser, region or time period to the mean price to all other purchasers, regions or time periods, respectively, to determine whether this difference is significant.").

[111] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03); Lumber Final I&D Memo, Comment 18, p. 55 (Exhibit CAN-01).

[112] *See* Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

[113] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03). *See also* Lumber Final I&D Memo, Comment 18, p. 55 (Exhibit CAN-01).

acknowledged that "[t]he Cohen's *d* test is a commonly used statistical formula for measuring how large the effect of something is."[114] The USDOC used the Cohen's *d* coefficient "to evaluate the extent to which the prices to the particular purchaser, region, or time period differ[ed] significantly from the prices of all other sales of comparable merchandise."[115]

116. To make comparisons of export prices among different purchasers, regions, or time periods, the USDOC grouped all export sales into different purchasers, regions, and time periods based on information provided to the USDOC by the respondents. The USDOC used default definitions for these three groups, as well as for comparable merchandise. Specifically, the USDOC defined purchasers using reported consolidated customer codes; the USDOC defined regions using reported destination codes, *i.e.*, zip code or state for the destination reported by the respondent, which the USDOC then grouped into regions based upon standard definitions published by the U.S. Census Bureau, a sub-agency of the USDOC; and the USDOC defined time periods by quarter (*i.e.*, by three-month periods), starting with the beginning of the period of investigation.[116] In addition, comparable merchandise was defined 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.[117]

117. Having identified the export sales to different purchasers, to different regions, and during different time periods made by each respondent, the USDOC then tested each respondent's sale prices to a particular purchaser, region, or time period against the sale prices made to all other purchasers, regions, or time periods of the same comparable merchandise.[118] To perform this analysis, the USDOC averaged all sale prices of the comparable merchandise to the particular purchaser, region, or time period being examined to establish the "test group," and then averaged all sale prices of the comparable merchandise for all other sales to establish the "comparison group." Using these two groups, the USDOC calculated the Cohen's *d* coefficient, which quantifies the difference in the weighted average export price to the test group with the weighted average export price for the comparison group. The USDOC placed additional conditions on this calculation in that there needed to be at least two export sales to both the test group and to the comparison group, and the export sale volume to the comparison group must have been at least five percent of the total volume of export sales of the comparable merchandise.[119]

118. To calculate the Cohen's *d* coefficient, the USDOC first calculated, for comparable merchandise, a weighted average export price to a test group and a weighted average export price to the comparison group. Next, the USDOC calculated the variance of the export prices within the test group and within the comparison group. From these two variances, the USDOC

[114] Canada's First Written Submission, para. 11.

[115] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

[116] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03). The period of investigation was October 1, 2015, through September 30, 2016. *See* Lumber Final I&D Memo, p. 4 (Exhibit CAN-01). In this investigation, none of the respondents proposed that the USDOC use different definitions for these groups.

[117] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

[118] *See* Lumber Preliminary Decision Memorandum, pp. 13-14 (Exhibit CAN-03).

[119] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

calculated the "pooled standard deviation," which is the square root of the simple averages of these two variances. Using this information, the USDOC calculated the Cohen's *d* coefficient, which is the quotient of the difference between the weighted average export prices of the test group and the comparison group, and the pooled standard deviation. This calculation is reflected in the equation below:

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

119. The USDOC then examined the calculated Cohen's *d* coefficient to determine whether the difference between the export prices in the test and comparison groups was significant. The extent of these differences could be quantified by one of three fixed thresholds: small, medium, or large. Of these thresholds, the large threshold provided the strongest indication that there was a significant difference between the weighted average export prices of the test group and the comparison group, while the small threshold provided the weakest indication that such a difference was meaningful.[120] As explained in the preliminary decision memorandum, the USDOC relied on the large threshold as providing the strongest indication that the difference in the weighted average export prices was significant, and thus the absolute value of the Cohen's *d* coefficient needed to equal or exceed the large threshold, *i.e.*, 0.8. If the calculated Cohen's *d* coefficient was equal to or exceeded the large threshold, then the USDOC considered the export sale prices within the test group to have passed the Cohen's *d* test because those prices differed significantly from the other prices to which they were compared.[121]

120. The USDOC performed the analysis described above for each respondent for the export sales to each purchaser, region, and time period.

b. The Ratio Test

121. The second step in the differential pricing analysis that the USDOC applied in this investigation was the ratio test.[122] The USDOC used the ratio test to evaluate the extent to which significant price differences were exhibited in an exporter's pricing behavior and whether a "pattern" existed during the period of investigation within the meaning of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement.

122. For the ratio test, the results of the Cohen's *d* test were aggregated – on a respondent-by-respondent basis – to determine the extent to which the export prices differed significantly among different purchasers, regions, or time periods.[123] In other words, the USDOC aggregated

[120] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

[121] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03); Lumber Final I&D Memo, p. 57 (Exhibit CAN-01).

[122] *See* Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

[123] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03). The ratio was calculated as the total value of export sales made at prices found to differ significantly divided by the total value of all export sales.

the results of the Cohen's *d* test among different purchasers, regions, or time periods found to pass that test. The USDOC did not double count export sales that passed the Cohen's *d* test for more than one category, *i.e.*, by purchaser, region, or time period. To clarify, if an export sale passed the Cohen's *d* test by purchaser and region, then the USDOC only counted that 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.

123. In the antidumping investigation of softwood lumber products from Canada, the ratio test was applied as follows: if 33 percent or less of the total value of all export sales by the particular respondent for the product as a whole passed the Cohen's *d* test, then the USDOC did not consider whether the application of the alternative, average-to-transaction comparison methodology was necessary; if between 33 percent and 66 percent of the total value of all export sales by the respondent for the product as a whole passed the Cohen's *d* test, then the USDOC found that a pattern existed during the period of investigation and subsequently considered whether the application of the alternative, average-to-transaction comparison methodology was warranted, based on the application of the average-to-transaction comparison methodology to the export sales that passed the Cohen's *d* test and the application of the average-to-average comparison methodology to the remaining export sales that did not pass the Cohen's *d* test; if 66 percent or more of the total value of all export sales by the respondent for the product as a whole passed the Cohen's *d* test, then the USDOC found that a pattern existed during the period of investigation and subsequently considered whether the application of the alternative, average-to-transaction comparison methodology was warranted based on the application of that methodology to all export sales.[124]

124. For respondent companies Resolute, Tolko, and West Fraser, the USDOC found that 73.56 percent, 72.69 percent, and 80.83 percent of those respondents' export sales passed the Cohen's *d* test, respectively.[125] 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.[126]

125. Subsequently, if the application of the Cohen's *d* and ratio tests led to a determination that a "pattern" existed during the period of investigation, then the USDOC explained, pursuant

[124] Lumber Preliminary Decision Memorandum, p. 14 (Exhibit CAN-03).

[125] *See* 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)**.

[126] *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)**.

to the explanation clause of the second sentence of Article 2.4.2 of the AD Agreement, "why such differences" in export prices that were observed could not be "taken into account appropriately" through use of the "normal[]"[127] average-to-average comparison methodology.[128] The USDOC provided such explanations for respondents Resolute, Tolko, and West Fraser.[129]

126. In sum, the USDOC undertook a rigorous, holistic examination of each respondent's export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as among different purchasers, regions or time periods. As established in section III.B.1 above, a proper interpretive analysis pursuant to customary rules of interpretation of public international law reveals that that is precisely what the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to do.

3. The Panel Did Not Err in Finding that the USDOC's Consideration of Both Low and High Prices Is Not Inconsistent with the Pattern Clause of the Second Sentence of Article 2.4.2 of the AD Agreement

127. Canada presents two arguments in support of its contention that the Panel "improperly interpreted" Article 2.4.2 of the AD Agreement to find that a pattern could include export prices that are both significantly lower and significantly higher than other export prices.[130] As demonstrated below, neither of Canada's arguments has any merit.

a. Canada's Ordinary Meaning Arguments Lack Merit

128. First, Canada argues that the Panel "fail[ed] to understand the implications" of the dictionary definition of the term "pattern".[131] Relying on the panel and Appellate Body reports in *US – Washing Machines*, Canada asserts that, "[i]f prices differ in different ways, i.e. by being both significantly lower *and* higher, the price variations would not pertain to the same parameters and the sequence of prices which differ significantly would be both irregular and unintelligible."[132] The Panel addressed Canada's argument and found it unpersuasive.

129. The Panel reasoned that:

> What is important is that the sequence of export prices should form a regular and intelligible sequence that is discernible in certain actions and capable of being understood. Export prices which "differ significantly" because they are significantly higher or

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

[128] Lumber Preliminary Decision Memorandum, pp. 14-15 (Exhibit CAN-03); Lumber Final I&D Memo, Comment 18, p. 56 (Exhibit CAN-01).

[129] *See* Resolute Final Data Analysis, p. 7 (Exhibit CAN-07) **(BCI)**; Tolko Final Data Analysis, p. 8 (Exhibit CAN-08) **(BCI)**; West Fraser Final Data Analysis, p. 7 (Exhibit CAN-09) **(BCI)**.

[130] Canada's Appellant Submission, para. 11.

[131] Canada's Appellant Submission, para. 13.

[132] Canada's Appellant Submission, para. 15 (italics in original).

> significantly lower could form such a sequence. Such a sequence of significantly higher and significantly lower export prices to purchasers, regions or time periods would stand out relative to export prices to other purchasers, regions or time periods because they "differ significantly", and thus would be capable of being understood. Moreover, the word "pattern" should not be viewed in isolation from the other parts of the text that specify what type *of* pattern an investigating authority must find. In so specifying, the pattern clause only requires that the pattern be *of* export prices which differ significantly, and does not prescribe whether they should differ because they are significantly higher or significantly lower relative to export prices to other purchasers, regions or time periods. Therefore, the pattern clause does not preclude an investigating authority from finding that the pattern includes export prices to purchasers, regions or time periods that "differ significantly" because they are significantly higher relative to export prices to other purchasers, regions or time periods.[133]

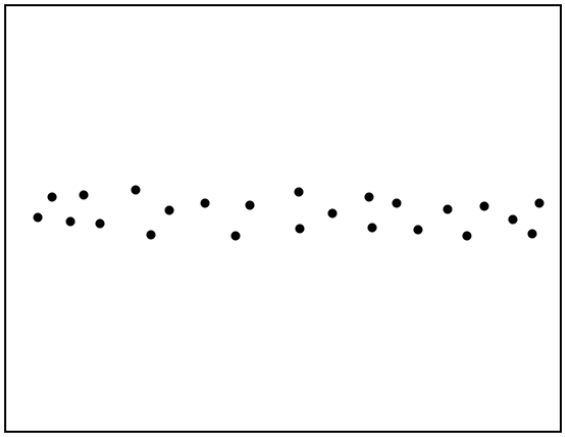
130. The Panel's reasoning is logical and the Panel's conclusion is that which follows from a proper application of customary rules of interpretation. As explained above in section III.B.1, the relevant "pattern" within the meaning of the second sentence of Article 2.4.2 is "a pattern of export prices which differ significantly among different purchasers, regions, or time periods."[134] Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" from each other. A set of lower-priced export sales to a particular purchaser (or to a particular region or during a particular time period) is not "a pattern of export prices which differ significantly". It would be a pattern of export prices which are similar to one another, and which happen also to be lower than export prices to other purchasers (or regions or time periods).

131. 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). The interpretation for which Canada advocates simply does not accord with the terms of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement.

132. The following illustration reveals the problem with Canada's proposed interpretation.

[133] Panel Report, para. 7.61 (italics in original).

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



The dots in the image above are prices to a particular purchaser. Looking at the dots, it is impossible to discern whether these prices are higher or lower than prices to other purchasers. The parties agree, as did the Panel, that the most apt dictionary definition of the term "pattern" is "a regular and intelligible form or sequence discernible in certain actions or situations."[135] 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 Canada's interpretation of the term "pattern" cannot be correct. Canada's 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.

133. In effect, the Appellate Body in *US – Washing Machines* rewrote the pattern clause of the second sentence of Article 2.4.2 (as Canada also has done here) by changing the word "among" to "from". Indeed, the Appellate Body expressly found that "the distinguishing factor that allows [the] authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly <u>from</u> the prices not in the pattern."[136] But again, the pattern clause describes "a pattern of export prices which differ significantly <u>among</u> different purchasers, regions or time periods",[137] not a pattern of export prices which differ significantly <u>from</u> different purchasers, regions or time periods. The pattern described by the Appellate Body, and for which Canada now advocates, 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.

b. Canada's Contextual Arguments Lack Merit

134. Second, Canada argues that contextual analysis, and reading the term "pattern" in light of the object and purpose of the AD Agreement, "confirms that a 'pattern' cannot include significantly *higher* export prices."[138] Again relying on the Appellate Body report in *US –*

[135] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-1); Canada's Appellant Submission, para. 13; Panel Report, para. 7.39.

[136] *US – Washing Machines (AB)*, para. 5.26 (citations omitted; underline added).

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

[138] Canada's Appellant Submission, para. 17 (italics in original).

Washing Machines, Canada discusses Article 2.1 of the AD Agreement and Article VI of the GATT 1994, and argues that, "[b]ecause prices that are *higher* than other export prices are not indicative of targeted dumping, the 'pattern' must comprise only 'prices that are significantly *lower* than other export prices'."[139] As Canada notes, the Panel disagreed with Canada's argument.[140]

135. The Panel observed that the Appellate Body "recognize[d] that the text of the second sentence does not expressly specify whether the export prices which differ significantly must do so because they are significantly higher or significantly lower."[141] In disagreeing with the Appellate Body's and Canada's contextual analysis, the Panel reasoned that:

> [T]he Appellate Body found support for its view in the definition of dumping in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, noting that dumped prices refer to export prices that are *lower* than the normal value. But we do not find this definition to offer specific guidance on the issue before us because low-priced export transactions may be higher or lower than the normal value, just as high-priced export transactions may be higher or lower than the normal value, especially considering that the pattern is not determined by reference to normal value.[142]

The Panel's reasoning is sound. Inarguably, both significantly lower export prices and significantly higher export prices could be above or below normal value. The relationship between the export price and the normal value is not relevant to this part of the analysis, and this relationship is not known until after the pattern analysis has been completed.

136. The Appellate Body explained in *US – Washing Machines* that: "[w]e fail to see how an investigating authority could identify and address 'targeted dumping' by considering significantly higher export prices. If the prices found to differ significantly are higher than other export prices, the other (lower) export prices would not 'mask' the (higher) dumped prices found to form the pattern."[143] The Appellate Body's reasoning makes no sense, and this reasoning is inconsistent with other Appellate Body findings in *US – Washing Machines*. The Appellate Body explained that "an investigating authority would analyse the prices of <u>all export sales</u> made by the relevant exporter or producer to identify a pattern".[144] Necessarily, an analysis of the prices of <u>all export sales</u> would entail <u>consideration</u> of <u>both</u> higher- and lower-priced sales. So, the Appellate Body's interpretation simultaneously requires and prohibits the consideration of lower-priced and higher-priced export sales transactions. That is a logical impossibility.

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[139] Canada's Appellant Submission, para. 19 (italics in original).

[140] *See* Canada's Appellant Submission, para. 20.

[141] Panel Report, para. 7.59.

[142] Panel Report, para. 7.60 (italics in original; citations omitted).

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

[144] *US – Washing Machines (AB)*, para. 5.26 (underline added).

137. Also, the Appellate Body's observation that lower-priced sales do not mask higher-priced sales misses the point. The opposite is true – *i.e.*, higher-priced sales can mask the dumping evidenced by lower-priced sales. That is the logic that underlies identifying a pattern of export prices that includes both lower-priced sales that are masked and the higher-priced sales that mask them, such as through the differential pricing analysis that the USDOC applied in the underlying investigation here. And higher-priced sales masking the dumping evidenced by lower-priced sales is the problem addressed by the second sentence of Article 2.4.2, which permits investigating authorities to address such masking through a proper application of the alternative, average-to-transaction comparison methodology.

138. Canada argues that "[t]he second sentence sets aside 'a sub-set of export transactions', i.e. the pattern transactions, for 'specific consideration'."[145] This, too, does not make sense. Elsewhere in its report, the Panel reasoned that "the purpose of the second sentence of Article 2.4.2 is to unmask targeted dumping through the application of the [average-to-transaction comparison] methodology, and not by simply disregarding non-pattern transactions."[146] The Panel further explained that:

> [H]igher-priced export transactions mask lower-priced export transactions only when they are above the normal value. Thus, it is only by comparing "[a] normal value established on a weighted average basis" with the "prices of individual export transactions" that an investigating authority can ascertain whether the high-priced export transactions are indeed masking lower-priced export transactions. Once the investigating authority applies the [average-to-transaction comparison] methodology it would be able to identify those export transactions that are being masked, and those export transactions that are masking them.[147]

139. If the "pattern" under the second sentence of Article 2.4.2 consists only of lower-priced sales to a particular purchaser (or region or time period), which are set aside for specific consideration, and the average-to-transaction comparison methodology is applied only to those lower-priced sales, any unmasking of so-called targeted dumping is not the result of applying the average-to-transaction comparison methodology. Rather, the unmasking would be the result of excluding the higher-priced sales as so-called non-pattern transactions. If that were the case, there would be no reason for Members to have included the average-to-transaction comparison methodology at all. The application of the average-to-average or the transaction-to-transaction comparison methodology to the subset of so-called pattern transactions would have achieved the same purpose. As the Panel explained, "[t]he dumping margin obtained by applying the [average-to-transaction comparison] methodology (without zeroing) to pattern transactions will be mathematically equivalent to a dumping margin obtained by applying the [average-to-average comparison] methodology to the same pattern transactions. Thus, we do not see why there would be the need to provide for the [average-to-transaction comparison] methodology if the

[145] Canada's Appellant Submission, para. 21.

[146] Panel Report, para. 7.92 (underline added).

[147] Panel Report, para. 7.101 (citations omitted).

same result could be obtained simply by limiting the [average-to-average comparison] methodology to pattern transactions."[148]

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

141. For the reasons given above, the Panel did not err in finding that the USDOC's consideration of both higher-priced and lower-priced sales in its application of a differential pricing analysis in the antidumping investigation of softwood lumber products from Canada is not inconsistent with the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement.

C. The Panel Did Not Err in Finding that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Not Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement

142. Canada appeals the Panel's finding that the USDOC did not act inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement by using zeroing in connection with the alternative, average-to-transaction comparison methodology.[149] As demonstrated below, the arguments Canada presents on appeal lack merit.

143. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that the Panel was correct to find that zeroing is permissible when applying the alternative, average-to-transaction comparison methodology. Indeed, zeroing is necessary if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of customary rules of interpretation of public international law. This conclusion also accords with and is the logical extension of the Appellate Body's findings in previous disputes relating to the use of zeroing in connection with the comparison methodologies provided in the first sentence of Article 2.4.2 of the AD Agreement. And this is the conclusion reached by one Appellate Body member in *US – Washing Machines*.[150]

[148] Panel Report, footnote 165. This is a finding of fact, which Canada has not appealed.

[149] *See* Canada's Appellant Submission, paras. 38-50.

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

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

144. A proper application of customary rules of interpretation of public international law begins with a consideration of the relevant text of the second sentence of Article 2.4.2 of the AD Agreement, in its context. The second sentence of Article 2.4.2 provides, in pertinent part, that, if the two conditions set forth in the pattern clause and the explanation clause are met, then:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions . . . .

Read in the context of Article 2.4.2 as a whole, it is evident that the average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 is, like the two comparison methodologies provided in the first sentence of Article 2.4.2, a means by which "the existence of margins of dumping . . . [may] be established."[151]

145. The following sections discuss textual and contextual elements relevant to the proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

a. "A normal value established on a weighted average basis"

146. 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 appears to have the same meaning as the term "a weighted average normal value" in the first sentence of Article 2.4.2.[152] 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."[153]

147. A weighted average normal value is calculated based on, and incorporates multiple sales transactions in the home market, and 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."[154] 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,[155] 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

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

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

[153] AD Agreement, Art. 2.1. *See also* AD Agreement, Art. 2.2.

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

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

when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2.

148. The United States also observes 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.

b. "[P]rices of individual export transactions"

149. The term "prices of individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement appears to be synonymous with the term "export prices" in the first sentence of Article 2.4.2. Article 2.1 of the AD Agreement indicates that the term "export price" means the "price of the product exported from one country to another," and the "price of individual export transactions" appears simply to be another way of conveying the same meaning, but in a situation wherein there is more than one export transaction. Put another way, "prices of individual export transactions" and "export prices" both mean the prices of the sales transactions when the product is sold in the export market (here, the prices of softwood lumber products from Canada sold in the United States).

150. Canada asserts that "[t]he ordinary meaning and structure of this provision indicate that the 'individual export transactions' it refers to are the 'pattern' of export prices that have 'a regular and intelligible form or sequence' and that are 'significantly lower than other export prices'."[156] Canada further asserts that "references to 'export transactions' in the plural, without qualification, indicate that all of the export transactions in the pattern must be taken into consideration."[157] "Accordingly," Canada argues, "Article 2.4.2 requires a comparison between a weighted-average normal value and all of the individual export transactions that form part of the pattern."[158] Canada does not explain these assertions, but instead simply refers to findings in prior Appellate Body reports.

151. In *US – Washing Machines*, the Appellate Body majority stated that, in interpreting the text of Article 2.4.2, it found that the term "individual export transactions" "refers to the pattern of export prices identified by the investigating authority" that differ because they are the lower export prices.[159] The Appellate Body majority indicated that it found "no such textual and contextual support to conclude that the term 'individual export transactions' in the second sentence of Article 2.4.2 refers only to those transactions that form part of the identified pattern but are priced below normal value."[160] These statements make clear that the purported textual

[156] Canada's Appellant Submission, para. 39.

[157] Canada's Appellant Submission, para. 40.

[158] Canada's Appellant Submission, para. 40.

[159] *US – Washing Machines (AB)*, para. 5.151 (views of two Appellate Body members).

[160] *US – Washing Machines (AB)*, para. 5.151 (views of two Appellate Body members).

basis for the Appellate Body majority's prohibition on zeroing is the presence of the terms "individual export transactions" in the second sentence of Article 2.4.2.

152. Elsewhere in the Appellate Body report, however, the Appellate Body considered that the word "individual" also delineates the scope of application of the alternative, average-to-transaction comparison methodology.[161] Specifically, in the context of its consideration of the scope of application of the alternative comparison methodology, the Appellate Body found that "(i) the use of the word 'individual' in the second sentence of Article 2.4.2 indicates that the [average-to-transaction] comparison methodology does not involve all export transactions, but only certain export transactions identified individually; and (ii) the 'individual export transactions' to which the [average-to-transaction] comparison methodology may be applied are those transactions falling within the relevant 'pattern'."[162]

153. Yet, in considering whether zeroing is permissible, the Appellate Body majority found that the phrase "individual export transactions" indicates that "each pattern transaction should be considered in its own right, and with equal weight, irrespective of whether the export price is above or below normal value."[163] Thus, in the Appellate Body majority's view, the word "individual" simultaneously reduces and expands the scope of transactions to be included in the average-to-transaction comparisons under the second sentence of Article 2.4.2 of the AD Agreement. These divergent conclusions about the meaning of the term "individual" are internally inconsistent, and neither conclusion is supported by the ordinary meaning of the term "individual," read in its context.

154. The most apt dictionary definition and the ordinary meaning of the word "individual" is "single; separate."[164] The use of the word "individual" to modify the term "export transactions" in the methodology clause of the second sentence of Article 2.4.2 of the AD Agreement indicates that an asymmetrical comparison of single, separate export transactions to a normal value established on a weighted average basis is permitted under certain, specified conditions. That is in contrast to the symmetrical comparisons that are to be undertaken "normally" under the first sentence.[165] The Appellate Body majority's conclusion that the term "individual" is pregnant with meaning such that it simultaneously reduces and expands the transactions that are to be included in the alternative, average-to-transaction comparison methodology is not supported by the ordinary meaning of the term "individual," read in its context.

155. When the Appellate Body found prohibitions on the use of zeroing in connection with the comparison methodologies described in the first sentence of Article 2.4.2 of the AD Agreement, its interpretations were rooted in the text of that sentence. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the

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

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

[163] *US – Washing Machines (AB)*, para. 5.151 (views of two Appellate Body members; quotations omitted).

[164] *See* Definition of "individual" from Oxford English Dictionary Online, definition 1, http://www.oxforddictionaries.com/us/definition/american_english/individual (Exhibit USA-5). *See also US – Washing Machines (AB)*, para. 5.49.

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

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."[166] The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis."[167]

156. 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."[168] 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'."[169]

157. In this dispute, the Panel's understanding of the term "individual" accords with the view of the dissenting Appellate Body member in *US – Washing Machines* and the view of the United States. The Panel explained that:

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

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

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

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

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

> methodology the individual export transactions that mask other export transactions, and those individual export transactions that are being masked, an investigating authority is not required to re-mask the individual export transactions above the weighted average normal value but may instead treat them as zero.[170]

The Panel's reasoning is sound and follows from a proper application of customary rules of interpretation. In particular, the Panel's observation concerning the term "all" is astute.

158. Canada asserts that "references to 'export transactions' in the plural, without qualification, indicate that all of the export transactions in the pattern must be taken into consideration."[171] However, Canada makes no attempt to reconcile its proposed interpretation of the second sentence of Article 2.4.2, in which the term "all" does not appear, with the first sentence of Article 2.4.2, in which that term does appear. If the two sentences mean the same thing, as Canada suggests, then the word "all" in the first sentence would be redundant or inutile, and such a reading is contrary to customary rules of interpretation.

159. Canada also makes no attempt to reconcile its arguments concerning the use of zeroing with its arguments concerning the scope of application of the alternative, average-to-transaction comparison methodology. Elsewhere in its appellant submission, Canada contends that:

> The language in the first sentence makes clear that *all* export transactions must be considered in determining a margin of dumping using the [average-to-average] or [transaction-to-transaction comparison] methodology. The second sentence, however, provides that the existence of a dumping margin can be determined by comparing the narrower universe of pattern transactions (as opposed to all export transactions) to a weighted-average normal value.[172]

160. Thus, it appears that Canada takes the position that the word "all" in the first sentence of Article 2.4.2, which relates only to the average-to-average comparison methodology, simultaneously prohibits zeroing under both of the normal comparison methodologies described in the first sentence, signifies that the "universe" of pattern transactions in the second sentence of Article 2.4.2 is narrower than the universes of transactions of the normal comparison methodologies, and also prohibits zeroing under the alternative comparison methodology described in the second sentence. Canada's proposed reading of the term "all" simply lacks any credibility. And once again, the term "all" does not even appear in the methodology clause of the second sentence of Article 2.4.2.

c. "[M]ay be compared to"

[170] Panel Report, para. 7.103 (citations omitted; italics in original).

[171] Canada's Appellant Submission, para. 40 (underline added).

[172] Canada's Appellant Submission, para. 29 (italics in original).

161. The term "may be compared to" in the second sentence of Article 2.4.2 links the term "[a] normal value established on a weighted average basis" and the term "prices of individual export transactions" and indicates that it is permissible for an investigating authority to "compare[]", or "[c]onsider or estimate the similarity or dissimilarity of" those two things.[173] The reference in the second sentence of Article 2.4.2 to "prices of individual export transactions" in the plural suggests that the comparison exercise undertaken pursuant to that provision "will generally involve multiple transactions."[174]

162. At this point in the textual and contextual analysis, it appears that, when certain conditions are met, the second sentence of Article 2.4.2 permits an investigating authority to examine multiple export sale transactions in order to estimate, measure, or note the similarity or dissimilarity between the prices of those export sale transactions and the price of the like product, on average, when it is sold in the home market. The textual and contextual analysis of the second sentence of Article 2.4.2 of the AD Agreement thus far does not yet suggest an answer to the question of whether zeroing is or is not permissible when the methodology provided in the second sentence of Article 2.4.2 is applied. As the Panel noted, "[t]he text of the second sentence does not explicitly state that an investigating authority is permitted to disregard, by treating as zero, those export transactions that are priced above the weighted average normal value."[175] As the Panel reasoned, "to determine whether an investigating authority is permitted to zero such higher-priced export transactions," it is necessary to "interpret the text of the second sentence in context and in light of the function of the second sentence of Article 2.4.2."[176]

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

d. The Average-to-Transaction Comparison Methodology Is an Exception to the Normal Comparison Methodologies

164. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[177] The Appellate Body has reasoned that it would be illogical if these two symmetrical comparison methodologies were to yield "results that are systematically different."[178]

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[173] Definition of "compare" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 457 (Exhibit USA-6).

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

[175] Panel Report, para. 7.102.

[176] Panel Report, para. 7.102.

[177] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93. *See also US – Washing Machines (AB)*, paras. 5.15, 5.75.

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

165. The Appellate Body has further observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[179] As an exception to the two symmetrical comparison methodologies that an investigating authority must use "normally," each of which logically, the Appellate Body has explained, should not "lead to results that are systematically different,"[180] the third comparison methodology, by logical extension, should "lead to results that are systematically different" from the "normal[]" comparison methodologies when the conditions for its use have been established. The Appellate Body also has found that this exceptional methodology provides a means by which Members can "unmask targeted dumping."[181]

166. That the average-to-transaction comparison methodology is an exception to the comparison methodologies that "shall normally" be applied, and that it can be used to "unmask targeted dumping,"[182] is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning. It would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with customary rules of interpretation of public international law.

167. The Appellate Body has observed previously that "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness."[183] As the Appellate Body has explained:

> One of the corollaries of "the general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[184]

168. The Appellate Body has referenced this "fundamental tenet of treaty interpretation" previously when considering the meaning of Article 2.4.2 of the AD Agreement. In *US –*

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[179] *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.

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

[181] *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.

[182] *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.

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

[184] *See US – Gasoline (AB)*, p. 23.

Softwood Lumber V (Article 21.5 – Canada), the Appellate Body posited that "[i]t could be argued . . . that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*."[185] An implication of the Appellate Body's observation in this regard is that it should be possible to use zeroing "to capture pricing patterns constituting 'targeted dumping.'"[186] Indeed, one Appellate Body member agreed with this understanding in *US – Washing Machines*.[187]

169. Of course, the Appellate Body also has found "the concerns … over the third comparison methodology (weighted average-to-transaction) being rendered *inutile* by a prohibition of zeroing under the transaction-to-transaction methodology to be overstated."[188] The Appellate Body reasoned that:

> One part of a provision setting forth a methodology is not rendered *inutile* simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision. In other words, the fact that, under the specific assumptions of the hypothetical scenario provided by the United States, the weighted average-to-transaction comparison methodology could produce results that are equivalent to those obtained from the application of the weighted average-to-weighted average methodology is insufficient to conclude that the second sentence of Article 2.4.2 is thereby rendered ineffective. It has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results.[189]

170. At this point, it is no longer the case that "[i]t has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results."[190] The United States requested that the Panel in this dispute make factual findings confirming that margins of dumping calculated under the average-to-average comparison methodology and the average-to-transaction comparison methodology will be mathematically equivalent if zeroing is considered impermissible under both comparison methodologies.[191] The Panel made such factual findings, and, setting aside that panel fact-finding is not subject to review on appeal,[192] Canada did not

[185] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.

[186] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.

[187] *US – Washing Machines (AB)*, para. 5.199.

[188] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.

[189] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99 (underline added).

[190] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99.

[191] *See* Panel Report, footnote 136.

[192] *See* Minutes of Meeting of the Dispute Settlement Body on August 27, 2018, WT/DSB/M/417 (November 30, 2018), paras. 4.2-4.17 (Statement by the United States Concerning Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and Appellate Review of Panel Findings of Fact, Including Domestic Law). *See also Australia – Certain Measures Concerning Trademarks, Geographical Indications and*

seek to appeal those factual findings. Thus, it is not within the authority of the Appellate Body to reverse or modify those factual findings.

171. Specifically, the Panel considered that it needed to "ascertain whether the dumping margin determined under the [average-to-average comparison] methodology provided in the first sentence of Article 2.4.2 will be mathematically equivalent 'in every case' to the dumping margin determined pursuant to the second sentence of Article 2.4.2."[193] The Panel found, as the United States had demonstrated,[194] that "[t]he dumping margin determined pursuant to the second sentence where the [average-to-transaction comparison] methodology is applied to pattern transactions (without zeroing) and the [average-to-average comparison] methodology is applied to non-pattern transactions (without zeroing) will *in every case* be mathematically equivalent to the dumping margin based on the application of the [average-to-average comparison] methodology to all export transactions, provided the weighted average normal values used under the [average-to-average] and [average-to-transaction comparison] methodologies are the same."[195]

172. Canada incorrectly asserts that "[p]rohibiting zeroing only results in mathematical equivalence under the mixed methodology the Panel invented."[196] Canada misreads the panel report. The Panel also found that "[t]he dumping margin obtained by applying the [average-to-transaction comparison] methodology (without zeroing) to pattern transactions will be mathematically equivalent to a dumping margin obtained by applying the [average-to-average comparison] methodology to the same pattern transactions."[197] In other words, if the use of zeroing is prohibited in connection with both comparison methodologies, then any time the average-to-average and average-to-transaction comparison methodologies are applied to the same set of transactions, the mathematical result is the same. In light of that fact, the Panel "[did] not see why there would be the need to provide for the [average-to-transaction comparison] methodology if the same result could be obtained simply by limiting the [average-to-average comparison] methodology to pattern transactions."[198] The Panel's reasoning, in this regard, is unimpeachable.

173. The Panel's factual findings concerning mathematical equivalence also accord with findings in prior reports. In *US – Washing Machines*, the Appellate Body majority likewise acknowledged the reality of mathematical equivalence, referring to "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to

Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS435 / DS441), Third Participant Submission of the United States of America (October 12, 2018), paras. 31-50, and Third Participant Oral Statement of the United States of America (June 11, 2019), paras. 3-5.

[193] Panel Report, para. 7.73.

[194] *See* First Written Submission of the United States of America (Confidential) (July 24, 2018) ("U.S. First Written Submission"), paras. 122-160; 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"), paras. 4-32.

[195] Panel Report, para. 7.100 (italics in original).

[196] Canada's Appellant Submission, para. 45.

[197] Panel Report, footnote 165.

[198] Panel Report, footnote 165.

equivalent results as the application of the [average-to-average] comparison methodology to the same pattern".[199] The panels in *US – Washing Machines* and *US – Anti-Dumping Methodologies (China)* also recognized the fact of mathematical equivalence.[200] 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. The fact of mathematical equivalence has been definitively established.

174. Even though it acknowledged the fact of mathematical equivalence, the Appellate Body majority in *US – Washing Machines* evaded the U.S. argument. The majority observed that "the United States' argument on mathematical equivalence is premised on its understanding of what constitutes the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2,"[201] but recalled that the Appellate Body had "concluded above that the 'pattern of export prices which differ significantly' within the meaning of the second sentence of Article 2.4.2 comprises only a subset of all the export transactions".[202] The majority reasoned that "[c]omparing normal value with 'pattern transactions' only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the [average-to-average] comparison methodology to *all* export transactions."[203]

175. The Appellate Body majority's reasoning is beside the point. Even assuming, for the sake of argument, that the Appellate Body's interpretation of the term "pattern" is correct, the fact of mathematical equivalence, and the Appellate Body majority's recognition of that fact, undercuts the Appellate Body majority's conception of the operation of the alternative, average-to-transaction comparison methodology. As the United States has demonstrated[204] and as the

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

[200] *See US – Washing Machines (Panel)*, para. 7.164 ("The exclusion of 'systemic disregarding' would also lead to mathematical equivalence with the results of a straightforward application of the [average-to-average] comparison methodology to all transactions.") and footnote 303 ("We are specifically addressing the mathematical equivalence that would arise when the results of applying the [average-to-average] comparison methodology to all transactions are compared to a combined application of the [average-to-transaction] comparison methodology to pattern transactions and the [average-to-average] comparison methodology to non-pattern transactions."); *US – Anti-Dumping Methodologies (China) (Panel)*, paras. 7.145 ("[I]f zeroing was not used under either the [average-to-average] or the [average-to-transaction] methodology, the dumping margin obtained through the [average-to-transaction] methodology in the three challenged investigations would have been mathematically equivalent to that obtained through the [average-to-average] methodology."), 7.219 (finding that "the United States' mathematical equivalence argument holds only in specific circumstances, i.e. when the investigating authority uses a mixed methodology wherein it applies the [average-to-transaction] methodology to export transactions falling within the pattern and the [average-to-average] methodology (but not the [transaction-to-transaction] methodology) to export transactions falling outside it, and uses the same normal value under both of these methodologies.").

[201] *US – Washing Machines (AB)*, para. 5.162 (views of two Appellate Body members).

[202] *US – Washing Machines (AB)*, para. 5.163 (views of two Appellate Body members, referring to earlier findings made by all three members of the Appellate Body division).

[203] *US – Washing Machines (AB)*, para. 5.163 (views of two Appellate Body members).

[204] *See* U.S. First Written Submission, paras. 122-160; U.S. Responses to the Panel's Second Set of Questions, paras. 4-32.

Panel found,[205] it is a fact that the application of the average-to-average comparison methodology to any set of transactions (without zeroing) is mathematically equivalent to the application of the average-to-transaction comparison methodology to the same set of transactions (without zeroing). Thus, how the relevant "pattern" is defined under the second sentence of Article 2.4.2 of the AD Agreement is completely irrelevant to the issue of mathematical equivalence.

176. This is because, by finding that the second sentence of Article 2.4.2 requires the application of the average-to-transaction comparison methodology to a subset of transactions while also prohibiting the use of zeroing, the Appellate Body majority found, in effect, that the application of the average-to-average comparison methodology to that subset of transactions (without zeroing) is what actually is contemplated by the second sentence of Article 2.4.2.

177. As noted above, the Panel here "[could] not see why there would be the need to provide for the [average-to-transaction comparison] methodology if the same result could be obtained simply by limiting the [average-to-average comparison] methodology to pattern transactions."[206] Indeed, the Appellate Body majority effectively rewrote the second sentence of Article 2.4.2, changing it from allowing the application of the average-to-transaction comparison methodology under certain circumstances to allowing the application of the average-to-average comparison methodology to a subset of transactions under certain circumstances. The Appellate Body majority invented an entirely new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2, and which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time thereafter. Ultimately, the Appellate Body majority read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, contrary to the principle of effectiveness.[207]

178. The Appellate Body majority noted the U.S. argument in this regard,[208] but asserted that:

> Once the pattern of export prices within the meaning of the second sentence has been identified by the investigating authority, the fact that the application of the [average-to-transaction] comparison methodology to that pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern, neither undermines the *effet utile* of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, nor does it lead to equivalent results between the application of the symmetrical comparison methodologies normally used under the first sentence to the universe of *all* export transactions and the application of the [average-to-transaction]

[205] *See* Panel Report, footnote 165.

[206] Panel Report, footnote 165.

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

[208] *See US – Washing Machines (AB)*, para. 5.164 (views of two Appellate Body members).

> comparison methodology used under the second sentence of Article 2.4.2 to the limited universe of "pattern transactions".[209]

179. The Appellate Body majority's reasoning is dismissive of – but not responsive to – the U.S. argument. Again, the Appellate Body majority recognized "the fact that the application of the [average-to-transaction] comparison methodology to [the] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern".[210] Thus, just as the United States contends, the Appellate Body majority rewrote the second sentence of Article 2.4.2 of the AD Agreement such that investigating authorities now are to address targeted dumping by applying what is, in effect, the average-to-average comparison methodology to a subset of transactions. That is not what the second sentence of Article 2.4.2 of the AD Agreement provides.

180. The Panel here "carefully considered" the findings in prior panel and Appellate Body reports and found cause to disagree with them.[211] The Panel reasoned that:

> The [average-to-transaction comparison] methodology is distinct from the "normal" methodologies provided in the first sentence of Article 2.4.2. It is an exception, and unlike the two normal methodologies, its function is to unmask targeted dumping. Thus, unlike the [average-to-average] and [transaction-to-transaction comparison] methodologies, which … fulfil the same function and are meant to give systemically similar results, the [average-to-transaction comparison] methodology fulfils a different function, and is not meant to give results that are systemically similar to that obtained under either the [average-to-average comparison] methodology or the [transaction-to-transaction comparison] methodology.
>
> However, if one of the two normal methodologies, i.e. the [average-to-average comparison] methodology, systemically and in every case gives a result that is mathematically equivalent to the dumping margin determined pursuant to the second sentence of Article 2.4.2, this would suggest that the [average-to-transaction comparison] methodology is unable to fulfil its function. We consider such type of mathematical equivalence to be a symptom of an underlying problem, which is the inability of the [average-to-transaction comparison] methodology to unmask targeted dumping. Certain adjustments to the examined data may well break mathematical equivalence in some cases. For example, as Canada notes, if in using a mixed [average-to-average] and [average-to-transaction comparison] methodology an investigating

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

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

[211] Panel Report, para. 7.107.

> authority changes the temporal bases of the normal value used under the [average-to-average] and [average-to-transaction comparison] methodologies respectively, the resultant overall dumping margin may be different from that calculated by applying the [average-to-average comparison] methodology to all export transactions. But Canada (or any third party) does not assert, and we do not consider, that the Anti-Dumping Agreement requires an investigating authority to change the normal value in this manner. More to the point, we do not see, and Canada does not show, how such a change in the temporal basis for normal value calculations would allow an investigating authority to unmask targeted dumping. Thus, while adjustments of these types may well break mathematical equivalence, such type of adjustments would only make the symptom, rather than the underlying problem, disappear.
>
> Considering the *raison d'être* of the [average-to-transaction comparison] methodology is to unmask targeted dumping, the inability of this methodology to do so will render this methodology *inutile*. We recall that an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. Therefore, contextual considerations also support our view that the second sentence of Article 2.4.2 does not prohibit zeroing under the [average-to-transaction comparison] methodology. Based on the above, we find that an investigating authority is permitted to use zeroing while applying the [average-to-transaction comparison] methodology to the pattern transactions.[212]

181. The Panel's reasoning is logical and internally consistent, and, as demonstrated above, the Panel's conclusion is that which follows from a proper application of customary rules of interpretation. As the Panel found, as a matter of fact, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies will yield mathematically equivalent results in all cases, which would render the second sentence of Article 2.4.2 of the AD Agreement *inutile*, contrary to the principle of

[212] Panel Report, paras. 7.104-7.106. With regard to efforts to "break" mathematical equivalence by making adjustments to normal value, in *US – Washing Machines*, the panel there similarly "rejected Korea's argument that the use of different weighted average normal values could avoid mathematical equivalence." *US – Washing Machines (AB)*, para. 5.83 (referring to *US – Washing Machines (Panel)*, para. 7.165). "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." *US – Washing Machines (AB)*, para. 5.83 (referring to *US – Washing Machines (Panel)*, para. 7.166). In its discussion of mathematical equivalence, the Appellate Body majority noted Korea's argument on appeal that "the possibility of changing the normal value or the adjustments to export prices breaks mathematical equivalence." *US – Washing Machines (AB)*, para. 5.161 (views of two Appellate Body members). 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.

effectiveness. This is strong contextual support for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not impermissible.

e. Canada's Arguments Concerning the Concept of "Product as a Whole" Are Unavailing

182. Canada makes an additional contextual argument related to the concept of "product as a whole," which the Appellate Body has developed in prior reports.[213] Canada argues that:

> The Appellate Body and panels … have repeatedly found that Article 2.1 and Article VI of the GATT 1994 establish definitions of "dumping" and "margins of dumping" that apply to the product "as a whole" and that these definitions require an investigating authority to consider the entire "universe of export transactions". The [average-to-transaction comparison] methodology shares a common purpose with the two normal comparison methodologies, which is to determine a "margin of dumping" for the product as a whole. However, the "universe of export transactions" under the [average-to-transaction comparison] methodology is limited by the text of the second sentence, which refers to a "pattern" of export prices. This entire universe of export prices would not be taken into account if the investigating authority disregards part of the pattern of export prices through zeroing.[214]

183. Canada's reliance on the concept of "product as a whole" is problematic for Canada's position, and unavailing. The term "product as a whole," of course, is not present in the AD Agreement. Additionally, the new alternative methodology for addressing targeted dumping prescribed by the Appellate Body majority in *US – Washing Machines* – for which Canada now advocates – explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." In the words of the Appellate Body majority: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', <u>without having to take into account</u> 'non-pattern transactions'."[215] 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.

184. Canada attempts to respond to the U.S. argument, but its effort only causes Canada more trouble. In arguing against the Panel's statements concerning the use of a mixed methodology involving the application of the alternative, average-to-transaction comparison methodology in

[213] *See* Canada's Appellant Submission, para. 41.

[214] Canada's Appellant Submission, para. 41 (citations omitted).

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

combination with one of the normal comparison methodologies, Canada makes the following contention:

> The Appellate Body has explained that the application of the [average-to-transaction comparison] methodology identifies a margin of dumping for the product as a whole because the margin is established by considering a narrower universe of pattern transactions in the numerator and *all* export sales in the denominator. It expressly found that "this ensures that, for the universe of 'pattern transactions' to which the [average-to-transaction] comparison methodology is applied, the margin of dumping is calculated for that exporter […] and for the product under investigation 'as a whole'". This interpretation is reinforced by the context provided by Article 6.10, which indicates that a margin of dumping is an exporter specific concept. Including only pattern transactions in the numerator and all export sales in the denominator ensures that the margin of dumping reflects the targeted dumping of each exporter and not just the targeted sales.[216]

185. Canada argues here that the inclusion in the denominator of all of an exporter's sales makes the resulting margin of dumping a margin for the product as a whole, even if the so-called non-pattern sales are disregarded and excluded from the numerator. If that is the case, however, then a margin of dumping calculated using zeroing under any of the three comparison methodologies in Article 2.4.2 of the AD Agreement is a margin of dumping for the product as a whole as long as all of the exporter's sales are included in the denominator, which has always been the case when the USDOC has calculated a margin of dumping. The United States does not disagree with Canada's logic, but Canada appears to have inadvertently called into question a major contextual basis on which the Appellate Body has relied previously to find that zeroing is prohibited.

186. In any event, the concept of "product as a whole" can offer no support for Canada's proposed interpretation or for finding that the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology.

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

187. The first sentence of Article 2.4.2 of the AD Agreement provides that the comparison methodology used to establish margins of dumping "shall normally" be symmetrical, *i.e.*, either the average-to-average or transaction-to-transaction comparison methodology, while the second sentence of Article 2.4.2, by its terms, permits the application of an asymmetrical comparison methodology – the average-to-transaction comparison methodology. The Appellate Body has

[216] Canada's Appellant Submission, para. 28 (citations omitted). *See also id.*, para. 24.

observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[217]

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

189. Article 32 of the Vienna Convention has been recognized as reflecting a customary rule of interpretation of public international law.[218] Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation," including the "preparatory work of the treaty," or its negotiating history, to confirm the meaning of the text or to determine the meaning when the interpretation according to the general rule of interpretation "(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable."

190. Consistent with the interpretive arguments set forth above, the United States certainly does not consider that an interpretation according to the general rule of interpretation "leaves the meaning ambiguous or obscure," nor would it "lead[] to a result which is manifestly absurd or unreasonable." We do, however, believe 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.

191. Of particular relevance are proposals from GATT Contracting Parties that sought changes to the Tokyo Round Antidumping Code to address concerns about certain investigating authorities that used an asymmetrical comparison methodology, in which "the 'negative' dumping margin by which the normal value falls below the export price in the value term will be treated as zero instead of being added to the other transactions to offset the dumping margin."[219] It is clear from these proposals that the *demandeurs* viewed asymmetry and zeroing as one and the same problem.

192. Hong Kong explained one of its proposals in the following terms:

> Negative dumping margin (Article 2.6)
>
> In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where

[217] *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.

[218] *See Japan – Alcoholic Beverages II (AB)*, p. 10.

[219] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, para. 14 (December 22, 1989) (Exhibit USA-10).

> normal value is higher than the export price (i.e., dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transaction where normal value is lower than the export price (i.e., no dumping occurs), the "negative" dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.
>
> We propose that such practices should be discontinued and that the Code be amended to require comparison to be made between the weighted average normal value and the weighted average export price.[220]

193. Japan similarly linked its concerns about asymmetry and zeroing, in particular in situations where "export prices vary over time":

> Price comparison in cases where sales prices vary
>
> In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.
>
> Consequently, dumping margins occur in cases where export prices vary over time (Figure 2) or where export prices vary due to different routes of sale (Figure 3), even if the average level of export prices is equal to that of domestic sales prices.[221]

Japan proposed that its concern be addressed as follows:

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[220] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, paras. 14-15 (December 22, 1989) (Exhibit USA-10) (italics added; underline in original).

[221] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/30, p. 3 (June 20, 1988) (Exhibit USA-11) (underline in original).

> (b) The Code should set out clear guidelines that ensure symmetrical comparison of "normal value" and "export price" at the same level of trade, and eliminate the possibility of asymmetrical comparison, in disregard of certain costs actually incurred, and thereby artificially creating "dumping" when none actually exist. *The Code should also be clarified, as another aspect of "symmetrical comparison", to disallow the practice of calculating "normal value" on an average basis and then to compare it to "export price" on an individual basis.*[222]

194. The minutes of a meeting of the Negotiating Group on MTN Agreements and Arrangements reflects that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked:

> Use of weighted averages in the comparison of export price and normal value
>
> The following were among comments made:
>
> - the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased;
>
> - *if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region; sales at fair value in one region or in one portion of a product line did not offset injury caused in the other*;
>
> - given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);
>
> - *the issue at stake was masked, selective dumping, the effects of which could be considerable*;

[222] *Communication from Japan*, GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-12) (italics added; underline in original).

> - an important question was whether non-dumped imports should also have to be included in the examination of injury.[223]

195. The ultimate compromise agreed by the WTO Members is, of course, reflected in the text of Article 2.4.2 of the AD Agreement. Article 2.4.2 provides that "normally" a symmetrical comparison methodology must be used, but when certain conditions are met, an investigating authority "may" use an asymmetrical comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[224] The negotiating history documents referenced above confirm that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

196. In *US – Washing Machines*, two Appellate Body members disagreed with the analysis of the negotiating history documents presented above. The majority found that "it is not necessary to have recourse to the negotiating history of the Anti-Dumping Agreement in order to confirm the meaning of the second sentence of Article 2.4.2."[225] The two Appellate Body members acknowledged that this negotiating history "could be read, as the United States suggests, as supporting the view that the asymmetrical comparison methodology was associated with zeroing."[226] However, the two members asserted that, "[o]n the other hand, they also could be read as explaining why the final version of the Anti-Dumping Agreement included the second sentence of Article 2.4.2 as a compromise provision addressing 'targeted dumping' by means of an asymmetrical comparison methodology, but without zeroing."[227] The two members offer no support for this assertion, which is contrary to the text of the negotiating history documents, as demonstrated above.

197. Further, as the United States has established and as the Panel found, it is a matter of fact that when the average-to-average comparison methodology (without zeroing) and the average-to-transaction comparison methodology (without zeroing) are applied to the same subset of transactions (*e.g.*, the so-called "pattern transactions"), the mathematical result necessarily will always be identical. 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, 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.

198. The correct understanding of the negotiating history confirms that the interpretation for which Canada advocates cannot be correct. The correct interpretation is that proposed by the

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[223] *Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989*, MTN.GNG/NG8/13, p. 10 (November 15, 1989) (Exhibit USA-13) (italics added; underline in original).

[224] *See 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.

[225] *US – Washing Machines (AB)*, para. 5.167 (views of two Appellate Body members).

[226] *US – Washing Machines (AB)*, para. 5.169 (views of two Appellate Body members).

[227] *US – Washing Machines (AB)*, para. 5.169 (views of two Appellate Body members).

United States and articulated by the Panel, *i.e.*, the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not prohibited – it is required.

g. Conclusion: The Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

199. For the reasons given above, 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. Accordingly, the Panel's findings should not be reversed.

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

200. Canada also appeals the Panel's finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is not inconsistent with Article 2.4 of the AD Agreement.[228] Canada's arguments on appeal lack merit.

201. Canada complains that "the Panel improperly found that any claim of inconsistency with Article 2.4 hinges on a finding that zeroing is prohibited under the [average-to-transaction comparison] methodology under Article 2.4.2", and Canada asserts that "[t]his mischaracterizes the relevant WTO jurisprudence."[229] Canada makes no attempt to support its assertion, which is plainly incorrect.

202. The Appellate Body first examined a claim that zeroing is inconsistent with Article 2.4 of the AD Agreement in the *EC – Bed Linen* dispute. The Appellate Body found there that:

> [W]e are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[230]

The emphasis that the Appellate Body placed on the word "all" in "all comparable export transactions" is significant. Earlier in the same paragraph, the Appellate Body had reasoned that:

> . . . Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the

[228] *See* Canada's Appellant Submission, paras. 47-50.

[229] Canada's Appellant Submission, para. 47 (citations omitted).

[230] *EC – Bed Linen (AB)*, para. 55 (italics in original).

> "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value." By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation.[231]

203. The emphasis that the Appellate Body placed on the word "all" and the fact that the Appellate Body had found that the European Communities had acted inconsistently with the first sentence of Article 2.4.2 of the AD Agreement by not including "*all* comparable export transactions" indicates that, when it found that the European Communities also had breached the "fair comparison" requirement of Article 2.4 of the AD Agreement, that finding was closely related to and dependent upon the earlier finding that the European Communities had breached Article 2.4.2.

204. Certain statements the Appellate Body made in *US – Softwood Lumber V (Article 21.5 – Canada)* lend further support to this understanding of the Appellate Body's earlier findings under Article 2.4 related to zeroing. In that dispute, the United States argued that, "even if a comparison methodology that uses zeroing results in higher margins of dumping, it does not become 'unfair' by this mere fact alone, provided that it is WTO-consistent."[232] The Appellate Body did not reject this argument out of hand. Rather, the Appellate Body responded that, "[t]his proviso . . . has not been met because, as we have found, the use of zeroing under the transaction-to-transaction comparison methodology is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*."[233] This is another indication that, when the Appellate Body has found a breach of Article 2.4 of the AD Agreement, that breach has been closely related to and even dependent upon the separate finding of a breach of Article 2.4.2 of the AD Agreement.

205. In *US – Zeroing (EC)*, the Appellate Body "declined to rule" on a claim under Article 2.4 of the AD Agreement. The Appellate Body explained that:

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[231] *EC – Bed Linen (AB)*, para. 55 (italics in original).

[232] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 143.

[233] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 143.

> We have already found that zeroing, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Therefore, an additional finding that the use of the same methodology in the administrative reviews at issue is inconsistent with the "fair comparison" requirement contained in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* does not appear to us necessary for solving this dispute. Accepting the European Communities' claim with respect to Article 2.4, first sentence, would lead to the same result that we have reached after examining zeroing, as applied by the USDOC in the administrative reviews at issue, in the light of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[234]

The Appellate Body's decision not to make a finding under Article 2.4 is a further indication that the Appellate Body did not consider that Article 2.4 of the AD Agreement "separately prohibits zeroing as a result of its 'fair comparison' requirement", as Canada contends.[235] Without a doubt, it remains true that the Appellate Body has never found that zeroing breaches Article 2.4 without having first found a breach of another provision.

206. The Appellate Body's most explicit indication that a breach of Article 2.4 of the AD Agreement is closely related to and even dependent upon the separate finding of a breach of another provision of a covered agreement can be found in the Appellate Body report in *US – Zeroing (Japan)*. There, the Appellate Body explained that:

> If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. <u>This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously</u>.[236]

Here, the United States has provided the emphasis using underlining. The Appellate Body states clearly in the final sentence of the quoted passage that the basis for finding a breach of Article 2.4 is that a breach of Article 9.3 of the AD Agreement already had been established.

207. The preceding discussion demonstrates that, prior to *US – Washing Machines*, the Appellate Body found zeroing to be unfair and inconsistent with Article 2.4 only when it found

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[234] *US – Zeroing (EC) (AB)*, para. 147.

[235] Canada's Appellant Submission, para. 47.

[236] *US – Zeroing (Japan) (AB)*, para. 168 (underline added).

zeroing to be inconsistent with some other provision of the AD Agreement. That did not change in *US – Washing Machines*.

208. Nevertheless, Canada attempts to rely on the Appellate Body report in *US – Washing Machines*, and quotes the following passage from that report, asserting that "the Appellate Body explained that zeroing under the [average-to-transaction comparison] methodology":

> […] has the effect of not only inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. Moreover, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form the applicable "universe of export transactions" as required under the second sentence of Article 2.4.2, thus failing to make a "fair comparison" within the meaning of Article 2.4.[237]

The passage Canada quotes disproves Canada's argument. Plainly, by using the words "thus failing", the Appellate Body majority links the finding under Article 2.4 of the AD Agreement to the earlier finding under Article 2.4.2 of AD Agreement, indicating that the Article 2.4 finding is dependent on the Article 2.4.2 finding.

209. An additional problem with Canada's reliance on the findings of two Appellate Body members in *US – Washing Machines* is that those findings are internally inconsistent. Referring to other prior Appellate Body reports – rather than the terms of Article 2.4 – the majority in *US – Washing Machines* reasoned as follows:

> In *EC – Bed Linen*, the Appellate Body explained that "a comparison … that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' … – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2." Additionally, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body considered that, since "the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping", it "cannot be described as impartial, even-handed, or unbiased" and, accordingly, it does not "satisf[y] the 'fair comparison' requirement within the meaning of Article 2.4".
>
> Setting to zero the intermediate negative comparison results has the effect of not only inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a

[237] Canada's Appellant Submission, para. 48 (quoting *US – Washing Machines (AB)*, para. 5.180; underline added).

> positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. Moreover, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare *all* comparable export transactions that form the applicable "universe of export transactions" as required under the second sentence of Article 2.4.2, thus failing to make a "fair comparison" within the meaning of Article 2.4.[238]

210. However, the Appellate Body majority also noted – immediately preceding this analysis – that it had "found that the exclusion of 'non-pattern transactions' from the establishment of dumping and margins of dumping under the second sentence of Article 2.4.2 is consistent with the notions of impartiality, even-handedness, and lack of bias reflected in the 'fair comparison' requirement in Article 2.4."[239]

211. The "exclusion of 'non-pattern transactions' from the establishment of dumping and margins of dumping"[240] 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'"[241] "does *not* take fully into account the prices of *all* comparable export transactions."[242] There has never been any suggestion that non-pattern transactions are somehow not comparable to corresponding normal value transactions. Thus, applying the methodology and logic of the Appellate Body majority would mean that not all comparable export transactions would be taken into account. Indeed, the Appellate Body majority itself described the methodology it prescribed in *US – Washing Machines* in the following terms: "dumping and margins of dumping under the [average-to-transaction] comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and 'pattern transactions', without having to take into account 'non-pattern transactions'."[243]

212. 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, in circumstances where the "non-pattern" export prices are above normal value and the "pattern transactions" are below normal value, the "exclusion of 'non-pattern transactions'"[244] would mean that the margin of dumping determined

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[238] *US – Washing Machines (AB)*, paras. 5.179-5.180 (views of two Appellate Body members; underline added; italics in original; citations omitted).

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

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

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

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

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

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

under the majority's methodology would be higher, and a positive determination of dumping would be more likely.[245]

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

214. The Appellate Body majority's inconsistent treatment of nearly identical factual situations further indicates that the Appellate Body majority's finding that the use of zeroing is inconsistent with Article 2.4 of the AD Agreement is, in reality, dependent on and follows directly from the finding that the use of zeroing is inconsistent with Article 2.4.2 of the AD Agreement. As discussed above, the Appellate Body majority's analysis explicitly contrasts its conclusions concerning "the exclusion of 'non-pattern' transactions," which it found to be not inconsistent with Article 2.4.2 or Article 2.4, and its conclusions concerning zeroing (*i.e.*, the exclusion of non-dumped sales), which it found to be inconsistent with both provisions.[246]

215. The dissenting Appellate Body member in *US – Washing Machines* considered that the Appellate Body majority's findings under Article 2.4 of the AD Agreement were consequential findings that followed from and depended on the majority's findings under Article 2.4.2 of the AD Agreement. In a section of the Appellate Body report setting forth separate views, the dissenting Appellate Body member gave reasons for "disagree[ing] with the finding of the majority that zeroing within the 'pattern' under the [average-to-transaction] comparison methodology of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is not permissible."[247] Having done so, the dissenting Appellate Body member also stated simply that, "[c]onsequently, I also disagree with the findings of the majority on zeroing under Article 2.4 of the Anti-Dumping Agreement and under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994."[248] In the view of the dissenting Appellate Body member, the disagreement concerning the finding under Article 2.4 simply followed as a consequence of the disagreement concerning the finding under Article 2.4.2, and required no additional explanation. The dissenting Appellate Body member's understanding of the consequential nature of the Appellate Body majority's findings under Article 2.4 of the AD Agreement is consistent with findings concerning Article 2.4 in prior Appellate Body reports, as discussed above.

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[245] *See US – Washing Machines (AB)*, para. 5.180 (views of two Appellate Body members). Importantly, this conclusion would hold in circumstances where the "non-pattern" export prices are above normal value and exceed those "pattern transactions" that are below normal value. In reality, it is often the case that some export prices in what the Appellate Body considered the "pattern" are below normal value (*i.e.*, they are dumped) while other prices in the "pattern" are above normal value. And the same is true for so-called "non-pattern transactions". Some may be above normal value while others may be below normal value. This is a practical reason why the Appellate Body majority's approach – applying the average-to-transaction comparison methodology to a subset of transactions while prohibiting zeroing – ultimately may not permit the unmasking and revelation of all evidence of dumping in all cases.

[246] *See US – Washing Machines (AB)*, paras. 5.177-5.178 (views of two Appellate Body members).

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

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

216. Canada also complains that the Panel did not "address the Appellate Body's legal reasoning with respect to Article 2.4" and "[i]nstead simply sidestepped this claim by conflating the argument concerning the 'fair comparison' requirement with separate legal arguments which relate to Article 2.4.2."[249] This is plainly untrue. The Panel summarized the Appellate Body majority's reasons for its finding under Article 2.4 and the Panel explained why it "consider[s] the Appellate Body's findings under Article 2.4 to be dependent on its findings that zeroing is impermissible under the second sentence of Article 2.4.2."[250]

217. The Panel also noted that "Canada has not provided any independent basis for us to find that zeroing under the [average-to-transaction comparison] methodology is inconsistent with the 'fair comparison' obligation of Article 2.4 even if zeroing under this methodology is consistent with the second sentence of Article 2.4.2."[251] The Panel referred to "Canada's first written submission, paras. 58-63", and explained that "Canada relies on past reports of the Appellate Body that found zeroing to be impermissible under Article 2.4 only after finding that zeroing was inconsistent with other provisions of the Anti-Dumping Agreement. Thus, these reports are not directly relevant in assessing whether Article 2.4 prohibits the use of zeroing under the [average-to-transaction comparison] methodology, even if zeroing is permissible under the second sentence of Article 2.4.2."[252]

218. Ultimately, Canada failed to make its case for finding a breach of Article 2.4 of the AD Agreement because Canada made no attempt whatsoever to establish a basis for such a finding independent of Canada's arguments related to Article 2.4.2 of the AD Agreement. On appeal, Canada seeks to blame the Panel for Canada's own failure.

219. The text of Article 2.4 of the AD Agreement requires that "[a] fair comparison shall be made between the export price and the normal value", and then goes on the describe how such a "fair comparison" is to be made, including specifying that "[t]he comparison shall be made at the same level of trade … and in respect of sales made at as nearly as possible the same time." Article 2.4 also describes various adjustments ("[d]ue allowance[s]") that an investigating authority must make to export price and normal value to ensure a "fair comparison". The text of Article 2.4 says nothing about whether zeroing is fair or unfair. As the panel in *US – Zeroing (Japan)* noted, the "precise meaning of" the fair comparison requirement "must be understood in light of the nature of the activity at issue."[253] The panel concluded that "the 'fair comparison'

[249] Canada's Appellant Submission, para. 49.

[250] Panel Report, para. 7.110.

[251] Panel Report, para. 7.111.

[252] Panel Report, footnote 186.

[253] *US – Zeroing (Japan) (Panel)*, para. 7.155. *See also US – Zeroing (EC) (Panel)*, para. 7.260 ("[C]aution ... is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the AD Agreement. The meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which the rule operates."); *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.74 ("[W]e believe that a claim based on a highly general and subjective test such as 'fair comparison' should be approached with caution by treaty interpreters. For this reason, any concept of 'fairness' should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such there must be a discernible standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has

requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context."[254]

220. There is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is in any way not "fair," or that it is inconsistent with any "fair comparison" obligation in Article 2.4 of the AD Agreement. Canada argued to the Panel that the Appellate Body has interpreted the term "fair" under Article 2.4 of the AD Agreement as connoting "impartiality, even-handedness, or lack of bias."[255] It does not follow from that Appellate Body finding, however, that Article 2.4 of AD Agreement prohibits the use of zeroing in connection with the alternative, "exceptional" average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 have been met.

221. As explained above, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[256] in "exceptional"[257] 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,[258] as one Appellate Body member agreed in *US – Washing Machines*.[259]

222. For these reasons, the Panel did not err in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is not inconsistent with Article 2.4 of the AD Agreement.

IV. THE PANEL'S STATEMENT THAT THE USE OF A MIXED METHODOLOGY IS REQUIRED SHOULD NOT BE REVERSED

223. Canada also appeals certain statements in the panel report concerning the use of a mixed methodology, in which the alternative, average-to-transaction comparison methodology is applied to certain export transactions while one of the normal comparison methodologies described in the first sentence of Article 2.4.2 of the AD Agreement is applied to the remaining transactions, namely the Panel's statement that such a mixed methodology is required.[260] For the

been 'fair' or 'unfair.' Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard. If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.").

[254] *US – Zeroing (Japan) (Panel)*, para. 7.158 (quoting *US – Zeroing (EC) (Panel)*, para. 7.261).

[255] Canada's First Written Submission, para. 58.

[256] *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.

[257] *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.

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

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

[260] *See* Canada's Appellant Submission, paras. 23-37.

reasons given below, the Appellate Body need not address Canada's appeal because Canada did not raise claims in this dispute relating to the use of mixed methodology. Accordingly, the Panel's statements on this issue were not integral to the resolution of Canada's claims of inconsistency in this dispute. Even setting this issue aside, the Panel's statements were not in error and should not be reversed.

A. The Appellate Body Need Not Address the Panel's Statements Concerning the Use of a Mixed Methodology as These Were Not Findings that Would Assist the DSB in Making the Recommendations Provided for Under the DSU

224. Canada did not claim in its panel request that the United States acted inconsistently with U.S. WTO obligations due to the USDOC's application of a mixed methodology. Indeed, the USDOC did not use a mixed methodology in the underlying antidumping investigation of softwood lumber products from Canada, which is the subject of this dispute. Appropriately, the Panel therefore made no finding of inconsistency, nor any recommendation, concerning that issue. That being the case, there is no need for the Appellate Body to review the Panel's statements concerning the use of a mixed methodology, as there can be no recommendation adopted by the DSB concerning that issue, and appellate review of the issue would not help resolve the dispute between the parties.

225. Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Through the standard terms of reference for panels in Article 7 of the DSU, the DSB charges the panel with two tasks: (1) to "examine … the matter referred to the DSB" in a panel request, and (2) "to make such findings as will assist the DSB in making the recommendations" provided for in the DSU.[261] Article 19.1 of the DSU is explicit in what the recommendation is: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." Thus, it is through such a finding of WTO-inconsistency and through such a recommendation "to bring the measure into conformity" that panels carry out the terms of reference "to make such findings as will assist the DSB in making the recommendations" provided for in the covered agreements.[262]

226. Accordingly, a panel's task is straightforward and also limited. The Appellate Body's task under the DSU is similarly limited to assisting the DSB in discharging its functions under the DSU, although the role of the Appellate Body is even more limited than the role of panels. Under Article 17.6 of the DSU, an appeal is "limited to issues of law covered in the panel report and legal interpretations developed by the panel". Further, under Article 17.13 of the DSU, the Appellate Body is only authorized to "uphold, modify or reverse the legal findings and conclusions of the panel." Since a panel's function under Article 11 of the DSU is "to assist the DSB in discharging its responsibilities" under the DSU, the Appellate Body, in reviewing a panel's legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities to find whether the responding Member's measure is consistent with WTO rules.

[261] DSU, Art. 7.1.

[262] DSU, Art. 7.1.

227. There can be no finding of inconsistency in this dispute concerning the use of a mixed methodology and no recommendation concerning that issue as Canada did not bring a claim against the use of a mixed methodology, and the USDOC did not even use such a methodology in the underlying investigation. Accordingly, the Panel's statements on this issue were not integral to the resolution of Canada's claims of inconsistency in this dispute, and findings by the Appellate Body concerning the use of a mixed methodology could not assist the DSB in discharging its functions under the DSU. Accordingly, it is neither necessary nor appropriate for the Appellate Body to address Canada's appeal of these particular statements in the panel report.

B. Alternatively, the Panel's Statements Concerning the Use of a Mixed Methodology Should Not Be Reversed

228. Even setting aside that Canada has raised no claim and the Panel has made no findings concerning use of a mixed methodology, for completeness, the United States presents the following comments in response to the arguments Canada advances on appeal.

229. Canada complains that the Panel's alleged "interpretive errors … led it to create a new comparison methodology that has no basis in Article 2.4.2."[263] This is a rather brazen line of argument coming from Canada. Throughout this dispute, Canada has relied – to the exclusion of presenting actual interpretive analysis – on the findings of the Appellate Body majority in *US – Washing Machines*, which, as explained above, invented an entirely new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2, and which does not appear to have been contemplated by any WTO Member previously, neither during the Uruguay Round negotiations nor at any time thereafter.

230. Rather than creating a new comparison methodology, the United States understands the Panel to have articulated one permissible interpretation of the second sentence of Article 2.4.2 of the AD Agreement. Article 17.6(ii) of the AD Agreement expressly contemplates the possibility that provisions of the AD Agreement may "admit[] of more than one permissible interpretation". While nothing in the AD Agreement explicitly requires the use of a mixed methodology, neither does anything in the AD Agreement prohibit the use of such a methodology.

231. As explained below, Canada's arguments on appeal do not support reversal of the Panel's statements.

1. Canada's Argument Concerning the Scope of Application of the Alternative, Average-to-Transaction Comparison Methodology Does Not Support Reversing the Panel's Statement Concerning the Use of a Mixed Methodology

232. Canada asserts that "[t]he structure of Article 2.4.2 and the exceptional nature of the [average-to-transaction comparison] methodology lead to the logical conclusion that the second sentence permits an investigating authority to focus on the narrower universe of pattern transactions only."[264] Canada does not explain this assertion, and instead simply refers to prior

[263] Canada's Appellant Submission, para. 23.

[264] Canada's Appellant Submission, para. 25.

reports. As explained below, Canada is incorrect, and this false premise does not support reversing the Panel's statement concerning the use of a mixed methodology.

233. Contrary to Canada's assertion, and the Panel's incorrect statement,[265] the alternative, average-to-transaction comparison methodology may be applied to all export transactions. The terms of the methodology clause of the second sentence of Article 2.4.2 of the AD Agreement do not limit the application of the alternative comparison methodology only to so-called pattern transactions.

234. As the Panel acknowledged, "[t]he pattern clause does not prescribe how an investigating authority must find a pattern."[266] Indeed, there may be any number of ways that Members' investigating authorities might find a pattern or patterns, including the use of a variety of quantitative or qualitative analyses. As demonstrated above in section III.B.1, a proper application of customary rules of interpretation indicates that the terms of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement provide that the relevant pattern is a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as among different purchasers, regions, or time periods. Further, an investigating authority should employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the price differences among different purchasers, regions, or time periods are significant. Whether an investigating authority's analysis is consistent with the requirements of the pattern clause must be assessed case by case. This leaves open the possibility that Members' investigating authorities might find a variety of patterns using a variety of analytical tools.

235. Where an investigating authority properly has found that a pattern exists, and where the investigating authority has satisfied the requirements of the explanation clause of the second sentence of Article 2.4.2 of the AD Agreement, then the methodology clause of the second sentence of Article 2.4.2 provides simply that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions". None of the terms of the methodology clause, nor any of the terms of the second sentence of Article 2.4.2, limits the application of the alternative, average-to-transaction comparison methodology only to so-called pattern transactions.

236. The Panel observed that "[t]he second sentence of Article 2.4.2 does not state that in applying the [average-to-transaction comparison] methodology an investigating authority must compare the normal value established on a weighted average basis with the prices of *all* export transactions."[267] Of course, neither does the second sentence of Article 2.4.2 state that the application of the average-to-transaction comparison methodology is limited to a subset of all export transactions. The Panel identified such a limitation not in the terms of the methodology clause of the second sentence of Article 2.4.2 but in the context of the explanation clause of the second sentence.[268] The Panel failed to recognize that the ordinary meaning of the terms of the

[265] *See*, *e.g.*, Panel Report, paras. 7.39, 7.55, 7.63-7.65, 7.78, 7.79-7.84.

[266] Panel Report, para. 7.64.

[267] Panel Report, para. 7.80 (italics in original).

[268] *See* Panel Report, paras. 7.80-7.82.

methodology clause establishes no limitation on the scope of application of the alternative, average-to-transaction comparison methodology.

237. Furthermore, the explanation clause of the second sentence of Article 2.4.2 of the AD Agreement provides that an investigating authority may utilize the alternative comparison methodology "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." In other words, the explanation clause requires that the investigating authority provide a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. On its face, the explanation clause does not do more than this, *i.e.*, it does not impose any limitation on the scope of application of the alternative, average-to-transaction comparison methodology.

238. The Panel – and Canada – have, in effect, read into the second sentence of Article 2.4.2 a limiting obligation that is not present in the terms of the agreement. While the approach to applying the second sentence described in the panel report may be rational and reasonable, it is, at most, just one possible, permissible interpretation. The terms of the second sentence of Article 2.4.2 – consistent with Article 17.6(ii) of the AD Agreement[269] – do not preclude an alternative interpretation under which the average-to-transaction comparison methodology is applied to all sales when the two conditions in the pattern clause and the explanation clause have been established.

239. Additionally, Canada's argument and the Panel's statement that "the second sentence of Article 2.4.2 does not permit an investigating authority to apply the [average-to-transaction comparison] methodology to all export transactions"[270] fails to recognize the possibility that there may be situations in which all export transactions are so-called pattern transactions. The Panel correctly found that a pattern identified under the pattern clause of the second sentence of Article 2.4.2 can include export prices to purchasers, regions, or time periods which differ significantly because they are significantly higher relative to export prices to other purchasers, regions, or time periods, as well as prices that differ by virtue of being significantly lower.[271] Thus, there could be situations in which all export prices differ significantly among different purchasers, regions, or time periods.

240. For example, one can conceive of a hypothetical scenario in which there are only two purchasers, A and B, and Purchaser A paid an extraordinarily low price for the good (the same low price for every purchase), while Purchaser B paid an extraordinarily high price for the good (again, the same high price for every purchase) (assume that there is no dispute that the prices differ significantly). In that scenario, there would exist a pattern of export prices which differ

[269] Article 17.6(ii) of the AD Agreement expressly contemplates the possibility that provisions of the AD Agreement may "admit[] of more than one permissible interpretation".

[270] Panel Report, para. 7.84. *See also id.*, paras. 7.55, 7.63, 7.65, 7.78, and 7.79-7.84.

[271] *See, e.g.*, Panel Report, para. 7.62. *See also id*., paras. 7.50-7.66.

significantly among different purchasers in which all the export sales to Purchaser A would be part of the pattern because they differ from the export sales to Purchaser B by virtue of being significantly lower, and all the export sales to Purchaser B would be part of the pattern because they differ from the export sales to Purchaser A by virtue of being significantly higher. Accordingly, the Panel's statement that the alternative, average-to-transaction comparison methodology cannot be applied to all export sales is incorrect as a matter of logic.

241. Put another way, even if it were correct that the alternative, average-to-transaction comparison methodology "must be limited to those export transactions that fall within the pattern that the investigating authority identifies under the pattern clause",[272] it would not be correct as a matter of logic that the average-to-transaction comparison methodology may never be applied to all export transactions.

242. Accordingly, Canada's assertion that the scope of application of the alternative, average-to-transaction comparison methodology necessarily is narrower than the total universe of all export transactions is incorrect, and that false premise does not support reversing the Panel's statement concerning the use of a mixed methodology.

2. Canada's Argument Concerning the Concept of "Product as a Whole" Does Not Support Reversing the Panel's Statement Concerning the Use of a Mixed Methodology

243. As it does with its arguments concerning zeroing, Canada again relies for support on the concept of "product as a whole,"[273] which the Appellate Body has developed in prior reports.[274] For the same reasons given above in section III.C.1.e, Canada's arguments concerning "product as a whole" are unavailing.

244. In sum, as explained above, the term "product as a whole" is not present in the AD Agreement. Additionally, the methodology for which Canada advocates explicitly does not account for all transactions and cannot credibly be called a margin of dumping for the "product as a whole." Furthermore, if Canada were correct that the inclusion in the denominator of all of an exporter's sales makes the resulting margin of dumping a margin of dumping for the product as a whole, even if the so-called non-pattern sales are disregarded, then a margin of dumping calculated using zeroing under any of the three comparison methodologies in Article 2.4.2 of the AD Agreement is a margin of dumping for the product as a whole as long as all of the exporter's sales are included in the denominator, which has always been the case when the USDOC has calculated a margin of dumping.[275]

245. The Panel set forth its views regarding the concept of "product as a whole" and took into account prior reports that discuss that concept.[276] The Panel does not appear to have

[272] Panel Report, para. 7.80.

[273] *See* Canada's Appellant Submission, paras. 27-30.

[274] *See* Canada's Appellant Submission, para. 41.

[275] *See* Canada's Appellant Submission, paras. 24, 28.

[276] *See* Panel Report, paras. 7.88-7.91.

misunderstood those prior reports. The Panel made a good faith effort to interpret the second sentence of Article 2.4.2 by applying customary rules of interpretation, and the Panel attempted to reconcile its interpretation with the discussion of the concept of "product as a whole" in prior reports. Canada's proposed approach, on the other hand, simply cannot be reconciled with the the concept of "product as a whole".

246. Accordingly, Canada's argument concerning the concept of "product as a whole" does not support reversing the Panel's statement concerning the use of a mixed methodology.

3. The United States Shares Canada's Concern about the Panel's Statement Regarding Offsets, but that Does Not Support Reversing the Panel's Statement that the Use of a Mixed Methodology is Required

247. Finally, Canada expresses concern that "[t]he Panel's mixed methodology requires an investigating authority to first unmask targeted dumping under the second sentence and then to *re-mask* that targeted dumping by aggregating the results of the [average-to-transaction comparison] methodology with the results of the [average-to-average] or [transaction-to-transaction comparison] methodology for non-pattern transactions."[277] There is some irony in Canada's statement as Canada's preferred approach would ignore, and therefore mask, any dumping revealed by applying one of the normal comparison methodologies to non-pattern transactions. Nonetheless, the United States considers well-founded Canada's concern that, if investigating authorities must offset evidence of dumping revealed by applying the alternative, average-to-transaction comparison methodology to so-called pattern transactions by the amount of any overall negative result yielded by applying one of the normal comparison methodologies to so-called non-pattern transactions, this would result in re-masking the dumping revealed for pattern transactions. Such offsets are not required.

248. The Panel stated, *inter alia*, that:

> [T]he second sentence of Article 2.4.2 does not permit an investigating authority to apply the [average-to-transaction comparison] methodology to all export transactions. Instead, this methodology may be applied only to pattern transactions. However, we disagree that non-pattern transactions may (or must) be excluded when an investigating authority makes dumping determinations pursuant to the second sentence. Instead, an investigating authority must apply the [average-to-average] or the [transaction-to-transaction comparison] methodology to those non-pattern transactions. The intermediate result calculated by applying the [average-to-transaction comparison] methodology to pattern transactions must be aggregated with the intermediate result calculated by applying the [average-to-average] or the [transaction-to-transaction comparison] methodology to the non-pattern transactions. The intermediate result based on

[277] Canada's Appellant Submission, para. 31 (italics in original).

> non-pattern transactions may not be excluded, irrespective of whether that result is positive or negative.[278]

249. As demonstrated above in section IV.B.1, the second sentence of Article 2.4.2 of the AD Agreement does not preclude the application of the alternative, average-to-transaction comparison methodology to all export transactions. Thus, the Panel's statement, quoted above, starts from a false premise. Of course, the second sentence of Article 2.4.2 also does not prevent an investigating authority from applying the alternative, average-to-transaction comparison methodology to fewer than all export transactions. The matter simply is not addressed in the text to which Members agreed. Therefore, Members retain discretion to adopt a variety of approaches when applying the second sentence of Article 2.4.2.

250. Given that an investigating authority could apply the alternative, average-to-transaction comparison methodology to all export transactions to unmask masked dumping, if an investigating authority opts to apply the average-to-transaction comparison methodology to fewer than all export transactions, and opts to apply one of the normal comparison methodologies to the remaining export transactions, nothing in the second sentence requires – and it would be illogical to require – that the investigating authority offset or re-mask the amount of dumping revealed by the application of the average-to-transaction comparison methodology by any negative amount resulting from the application of one of the normal comparison methodologies.

251. Both the panel and the Appellate Body in *US – Washing Machines* agreed that nothing in the second sentence of Article 2.4.2 obligates an investigating authority to re-mask dumping when combining the results of different methodologies in the context of applying a mixed methodology.[279] The panel in *US – Washing Machines* expressed the view that, after unmasking "targeted" or concealed dumping[280] by using the alternative, average-to-transaction comparison methodology, it would "make[] no sense … to then *re-mask* such dumping by providing offsets" for an overall negative comparison result yielded by application of the average-to-average comparison methodology to the remaining transactions.[281] The Appellate Body similarly reasoned that, "[i]f an investigating authority were required to conduct comparisons with export transactions outside of the pattern – i.e. for 'non-pattern transactions' – by applying one of the two normally applicable comparison methodologies, and then aggregate the result of this comparison with the result of the [average-to-transaction] comparison methodology applied to 'pattern transactions', the 'targeted dumping' identified from the consideration of 'pattern transactions' would be 're-masked' by the comparison results arising from 'non-pattern transactions', in situations where the latter produces an overall negative comparison result."[282]

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[278] Panel Report, para. 7.78.

[279] *See US – Washing Machines (Panel)*, para. 7.162; *US – Washing Machines (AB)*, para. 5.109.

[280] *See US – Zeroing (Japan) (AB)*, para. 135; *EC – Bed Linen (AB)*, para. 62.

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

[282] *US – Washing Machines (AB)*, para. 5.109.

Canada, too, agrees that "[a] methodology that forces an investigating authority to re-mask targeted dumping cannot be consistent with the second sentence of Article 2.4.2."[283]

252. Here, the Panel stated that, "while the Appellate Body took the view that the exclusion of non-pattern transactions ensures that targeted dumping identified in the pattern is not re-masked by comparison results based on non-pattern transactions, the purpose of the second sentence of Article 2.4.2 is to unmask targeted dumping through the application of the [average-to-transaction comparison] methodology, and not by simply disregarding non-pattern transactions."[284] The Panel's statement is logical, as far as it goes, and the United States agrees that so-called non-pattern transactions should not be disregarded. It is appropriate, as the Panel considered, for dumping determinations to "be based on the totality of an exporter's transactions even when the conditions for the use of the [average-to-transaction comparison] methodology under this second sentence are met."[285] However, it does not follow logically that an investigating authority is required to provide offsets in the manner described by the Panel.

253. The Panel explained that, in its view:

> [T]he universe of comparable export transactions under the [average-to-average comparison] methodology is limited to the non-pattern transactions, but it includes *all* such comparable (non-pattern) transactions. Thus, an investigating authority would apply the [average-to-average comparison] methodology to all non-pattern transactions. The intermediate result obtained by applying the [average-to-average comparison] methodology must be aggregated with the intermediate result obtained by applying the [average-to-transaction comparison] methodology to pattern transactions, to determine the overall dumping margin for the product as a whole. The same considerations apply when an investigating authority applies the [transaction-to-transaction comparison] methodology to the non-pattern transactions.
>
> However, an investigating authority is not permitted to disregard the intermediate result obtained by applying the [average-to-average] (or [transaction-to-transaction]) methodology to non-pattern transactions when the result is negative. The requirement to consider "all" comparable export transactions precludes an investigating authority from selectively excluding any comparable export transaction. It also precludes an investigating authority from collectively excluding all such comparable export transactions, which would be the case if an investigating authority

[283] Canada's Appellant Submission, para. 31.

[284] Panel Report, para. 7.92.

[285] Panel Report, para. 7.88.

> disregards the comparison result based on non-pattern transactions because it is negative.[286]

254. The Panel's statement is not supported by the text of Article 2.4.2 of the AD Agreement. The Panel relies exclusively – and incorrectly – on the presence in the first sentence of Article 2.4.2 of the word "all". That term, however, relates only to the average-to-average comparison methodology, requiring "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions".[287] In prior reports, the Appellate Body has found that the word "all" is the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology.[288] An investigating authority applying a mixed methodology fulfills its obligation to make a comparison with respect to "all comparable export transactions", at least per the interpretations in prior reports, by not using zeroing when applying the average-to-average comparison methodology. There is no textual basis to find that the word "all" establishes some further obligation relating to the combination of results when an investigating authority applies a mixed methodology.

255. The flaw in the Panel's reading of Article 2.4.2 of the AD Agreement, and in particular the term "all", is further revealed when one considers the possibility of a mixed methodology involving the application of the alternative, average-to-transaction comparison methodology to certain sales and the application of the transaction-to-transaction comparison methodology to the remaining sales. In that situation, the word "all" in the first sentence of Article 2.4.2 is not used in the descriptions of either of the comparison methodologies employed in the mixed methodology. There simply is no justification for interpreting the term "all" as applying to those other comparison methodologies, either individually or collectively.

256. Additionally, the Panel refers to the result of the application of the average-to-average comparison methodology (or the transaction-to-transaction comparison methodology) to certain export transactions as an "intermediate result".[289] However, the overall, aggregate outcome of the application of one of the normal comparison methodologies is not a comparison result or one of a number of comparison results. It is the result of the application of one of the two normal comparison methodologies to, using the Panel's terminology, a "universe" of transactions.[290] Ordinarily, the result of applying one of the normal comparison methodologies is the answer to the question whether the transactions in that "universe" were dumped or not dumped. If the transactions were dumped (and material injury or threat of material injury is established), then the Member has the right to apply antidumping duties up to the amount of dumping. If the transactions were not dumped, then the amount of dumping is zero. This reflects a straightforward application of one of the normal comparison methodologies to a particular "universe" of transactions. This does not change simply because the average-to-transaction

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[286] Panel Report, paras. 7.96-7.97.

[287] AD Agreement, Art. 2.4.2, first sentence (underline added).

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

[289] Panel Report, para. 7.96.

[290] Panel Report, para. 7.96.

comparison methodology is applied simultaneously to a different "universe" of transactions. There is no justification for requiring an investigating authority to provide offsets across different universes of transactions and different comparison methodologies.

257. While it is logical that an exporter's dumping determination would "be based on the totality of an exporter's transactions"[291], doing so does not require the provision of offsets as the Panel described. The "universe"[292] of transactions to which one of the normal comparison methodologies is applied can be taken fully and appropriately into account by applying a normal comparison methodology, aggregating any intermediate comparison results related to that "universe" of transactions, and determining an amount of dumping for that "universe" of transactions. Where the overall result reflects that the prices of the export transactions were, on average, lower than normal value, the conclusion to be drawn is that there was an amount of dumping. Again, Members have the right under the AD Agreement, subject to the requirements concerning the determination of injury, to apply antidumping duties when an amount of dumping has been found. If, on the other hand, the result of applying a normal comparison methodology is that the prices of the export transactions were, on average, higher than normal value, the conclusion to be drawn is that the amount of dumping for that "universe" of transactions is zero. This does not mean that those export transactions have been disregarded; rather, they have been taken into account appropriately.

258. For these reasons, the Panel was incorrect to state that investigating authorities are required, when applying a mixed methodology, to offset evidence of dumping revealed by applying the average-to-transaction comparison methodology to certain export transactions by the amount of any overall negative result yielded by applying one of the normal comparison methodologies to the remaining export transactions. In that regard, Canada's concern that the Panel's statement concerning a mixed methodology would lead to a re-masking of the dumping revealed through use of the alternative methodology is well founded. It does not follow, however, that the Panel's statement that the use of a mixed methodology is required should be reversed.

C. Conclusion Regarding the Panel's Statements Concerning the Use of a Mixed Methodology

259. For the reasons given above, the Appellate Body need not address and should not reverse the statements concerning the use of a mixed methodology that Canada challenges on appeal.

V. CONCLUSION

260. For the reasons given above, the United States respectfully requests that the Appellate Body reject all of Canada's claims on appeal.

[291] Panel Report, para. 7.88.

[292] Panel Report, para. 7.96.