



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

REPORT OF THE PANEL

Addendum

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

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ANNEX A

PANEL DOCUMENTS

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 20 June 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.
- (2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.
- (2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.
- (3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
- (4) The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.
- (2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.
- (3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.
- (4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

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

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

- a. the United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Canada shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
 - c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
 - d. Any request for such a preliminary ruling by the United States prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.
- (2) The procedure set out in paragraph (1) is without prejudice to any of the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

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

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Canada should be numbered CAN-1, CAN-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered CAN-5, the first exhibit in connection with the next submission thus would be numbered CAN-6.

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

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

Editorial Guide

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

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
 - a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.
 - a. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 14 and 20 below.

Substantive meetings

10. The parties shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.
11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.
13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
14. The first substantive meeting of the Panel with the parties shall be conducted as follows:
 - a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.
 - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.
 - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first. Before each

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

f. Following the meeting:

- i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
- ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
- iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
- iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

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

Third party session

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

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

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

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

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

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

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

- a. All parties and third parties may be present during the entirety of this session.
- b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third party session

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

- c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third party session:
 - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

- 21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.
- 22. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement, and where possible, its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission, its second oral statement, and where possible, its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.
- 23. Each integrated executive summary shall be limited to no more than 15 pages.
- 24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.
- 25. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

Interim review

26. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.
27. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

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

Service of documents

29. The following procedures regarding service of documents shall apply:
- a. Each party and third party shall submit all submissions, exhibits, oral statements, responses to questions, comments on responses, comments on comments, comments on the descriptive part of the Panel report, and comments on the Interim Report of the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.
 - b. In case any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall send these documents by e-mail to DSRegistry@wto.org, WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding, the other party, and where appropriate, the third party by 6.00 pm. The uploading to the DDSR shall be made on the following working day.
 - c. Any request for technical assistance regarding the use of DDSR shall be addressed to DSRegistry@wto.org and ddsr.support@wto.org (assistance available only during WTO working hours).
 - d. For all documents that were filed via DDSR, each party and third party shall file one paper copy of such documents with the DS Registry the working day following the electronic filing.
 - e. The Panel shall provide all documents and communications to the parties and the third parties via e-mail. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version shall constitute the official version for the purposes of the record of the dispute.

Correction of clerical errors in submissions

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

ANNEX A-2**ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION****Adopted on 20 June 2018**

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.
2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the US Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the antidumping proceeding at issue in this dispute, entitled Softwood Lumber from Canada (A-122-857). In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation has agreed in writing to make the information publicly available.
3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Canada and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.
4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.
5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information. Third parties' access to BCI shall be subject to the terms of these procedures.
6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit CAN-1 (BCI)).
7. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".
8. Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall

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

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

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

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

ANNEX A-3

ADDITIONAL WORKING PROCEDURES ON OPEN MEETINGS

Adopted on 20 June 2018

1. The Panel will start substantive meetings with the parties (dates of substantive meetings provided for in its Timetable) with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").
2. At such sessions, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in the Working Procedures adopted by the Panel. The Panel may pose any questions or make any comments during such session. Such questions shall not include confidential information.
3. To the extent that the Panel or either of the parties considers it necessary, the Panel shall proceed to a closed session ("confidential session"), during which the parties will be allowed to make additional statements or comments and pose questions that involve confidential information. The Panel may also pose questions during the confidential session.
4. The Panel will start the third party session of its first substantive meeting with the parties by opening a portion of this session to the public ("non-confidential third party session"). At this portion of the third party session, no confidential information shall be referred to or disclosed. Each third party wishing to make its statement in the non-confidential third party session shall do so, but shall ensure that its statement does not include confidential information. After such third parties have made their statements, questions or comments from the parties or the Panel may be presented concerning these statements, as foreseen in the Working Procedures adopted by the Panel. Such questions or comments shall not include confidential information. To the extent that the Panel or any of the other third parties considers it necessary, the Panel shall then conclude this portion of the third party session and proceed to a third party closed session ("confidential third party session") during which other third parties shall make their statements.
5. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:
 - Members of the Panel;
 - Members of the delegations of the parties;
 - Members of the delegations of the third parties throughout the third party session;
 - WTO Secretariat staff assisting the Panel.
6. As set out below in paragraph 7, a live closed-circuit television broadcast of the Panel meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.
7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewings. No later than four weeks before the substantive meetings, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The date(s) of the deadline for public registration will be informed to the parties as soon as it has been established.

ANNEX A-4**TIMETABLE FOR THE PANEL PROCEEDINGS¹**

Adopted on 20 June 2018
Revised on 7 December 2018

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

Description	Dates²
a. Receipt of first written submissions	
i. Canada	22 June 2018
ii. United States	24 July 2018
b. Receipt of third parties' written submissions	31 July 2018
c. First substantive meeting with the parties	12, 13 September 2018
Third party session	13 September 2018
d. Receipt of responses to questions posed by the Panel	27 September 2018
e. Receipt of integrated executive summaries of third parties	4 October 2018
Receipt of the first integrated executive summaries of the parties	
f. Receipt of written rebuttals of the parties	17 October 2018
g. Second substantive meeting with the parties	4 December 2018 (and 5 December if necessary)
h. Receipt of responses to questions posed by the Panel	19 December 2018
i. Receipt of comments on responses to questions posed by the Panel	10 January 2019
j. Receipt of second integrated executive summaries of parties	17 January 2019
k. Issuance of descriptive part of the report to the parties	29 January 2019

¹ The above timetable may be changed in the light of subsequent developments.

² The exact time of the deadline for receipt of documents are 5 p.m. of the date indicated in this column unless the Panel separately otherwise indicates.

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

ANNEX A-5**INTERIM REVIEW****1. INTRODUCTION**

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

2. SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES**2.1. Paragraph 7.19**

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

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

2.2. Paragraph 7.25

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

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

¹ United States' request for interim review, para. 4.

² Canada's comments on the United States' request for interim review, para. 3.

³ United States' request for interim review, para. 5.

⁴ United States' request for interim review, para. 5.

⁵ United States' request for interim review, para. 5. (emphasis omitted)

⁶ Canada's comments on the United States' request for interim review, para. 5.

2.3. Paragraphs 7.28 and 7.32

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

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

2.4. Paragraph 7.36(b)

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

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

2.5. Paragraph 7.46

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

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

2.6. Paragraph 7.83

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

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

2.7. Paragraph 7.107

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

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

⁷ United States' request for interim review, paras. 6-7.

⁸ United States' request for interim review, para. 8.

⁹ United States' request for interim review, para. 9.

¹⁰ United States' request for interim review, para. 10.

¹¹ United States' request for interim review, para. 11.

¹² Canada's comments on the United States' request for interim review, para. 4.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. PANELS ARE EXPECTED TO FOLLOW APPELLATE BODY REPORTS

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

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

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

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

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

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

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

ANNEX B-2**SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

9. While the United States initially asserted that Commerce undertook a "rigorous, holistic examination" to determine whether a pattern existed in this case², it subsequently admitted that Commerce had failed to identify specific transactions that formed part of the pattern.³ This admission cannot be reconciled with the assertion that the USDOC determined that a pattern existed. It is inconceivable that an investigating authority would purport to have identified a pattern but not be able to specify what that pattern is. In this case, the Commerce did not identify a pattern because the DPM does not identify a pattern.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. First, zeroing is impermissible during the application of the W-T methodology. This is clear both from the text of Article 2.4.2 and from the Anti-Dumping Agreement as a whole. The concepts of "dumping" (as defined by Article 2.1 and Article VI:1 of the GATT 1994) and "margins of dumping" are the same throughout the Anti-Dumping Agreement. This means that the previous interpretations related to these terms over some 18 years of WTO jurisprudence are equally applicable to the interpretation of the second sentence of Article 2.4.2.¹⁰ Intermediate comparison results are not margins of dumping. The second sentence of Article 2.4.2 cannot be used as a justification to depart from any other obligation. It cannot change the definition of dumping or transform an intermediate comparison result into a margin of dumping.

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ Appellate Body Report, *US – Washing Machines*, para. 5.156.

¹² United States' second written submission, para. 83.

¹³ United States' second written submission, paras. 84 and 85.

¹⁴ Canada's opening statement at the second substantive meeting of the Panel, 4 December 2018, paras. 9-11; Resolute's Margin of Dumping, **Exhibit CAN-13 (BCI)**; Alternative Margin Analysis, Resolute, **Exhibit CAN-32 (BCI)**.

methodology (W-T and W-W) would "always yield" the same result¹⁵, a concept it calls "mathematical equivalency". The United States' arguments concerning purported mathematical equivalency are not well founded.

27. First, any potential, and hypothetical, mathematical equivalency is not determinative of the correct interpretation of Article 2.4.2.¹⁶

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

29. Finally, Canada has concretely demonstrated that mathematical equivalence will not arise in every case. At the second substantive meeting of the Panel, Canada established that the correct application of the W-T methodology without zeroing¹⁹ to Resolute's transactions in this case clearly yields mathematically different results when compared to the W-W methodology.²⁰ Similarly, in its responses to Panel questions in connection with the second substantive meeting, Canada calculated margins of dumping for a hypothetical set of transactions. For the mixed methodology example, the W-T calculation compared a quarterly weighted average normal value to each pattern transaction, while the W-W calculation compares annual weighted average prices. These comparisons yielded different margins of dumping.²¹

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

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

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

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

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

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

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

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

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

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

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

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

32. At the outset, it is not necessary to have recourse to the negotiating history to confirm the meaning of the second sentence of Article 2.4.2.²⁵ The Appellate Body did not invent an entirely new methodology. It merely clarified the WTO-consistent functioning of the W-T methodology with reference to the text of the Article. That clarification is consistent both with the approach taken by the panels in *US - Washing Machines* and in *US-Anti-Dumping Methodologies (China)*²⁶ and with the interpretation of the provision provided by the third parties in this dispute.²⁷ This common understanding of the meaning of the text suggests that the Appellate Body's interpretation was indeed contemplated by the Members. As the meaning of the second sentence of Article 2.4.2 is clear, there is no need to resort to negotiating history to interpret it.

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

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

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

IV. PANELS ARE EXPECTED TO FOLLOW APPELLATE BODY REPORTS

36. Panels are expected to follow Appellate Body reports, absent cogent reasons to do otherwise, to ensure the security and predictability of the multilateral trading system. The United States continues to argue that there is no textual support for this principle²⁸, ignoring that it arises directly from the provisions of the Dispute Settlement Understanding ("DSU").

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

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

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

²⁵ Appellate Body Report, *US – Washing Machines*, para. 5.167.

²⁶ Panel Reports, *US – Washing Machines*, para. 7.160, and *US – Anti-Dumping Methodologies (China)*, para. 7.208.

²⁷ Brazil's third party statement, para. 13; European Union's third party submission, para. 22; Japan's third party submission, paras. 19-22.

²⁸ United States' second written submission, para. 12.

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

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

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

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

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

²⁹ Appellate Body Report, *US - Oil Country Tubular Goods Sunset Reviews*, para. 188.

³⁰ Appellate Body Report, *US - Continued Zeroing*, paras. 362 and 365.

³¹ Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 162.

³² United States' second written submission, para. 14.

³³ Appellate Body Report, *Japan - Alcoholic Beverages II*, p. 14.

³⁴ Appellate Body Report, *Japan - Alcoholic Beverages II*, p. 14.

³⁵ Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 158.

ANNEX B-3**FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Mathematical Equivalence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

ANNEX B-4**SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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¹ Brazil submitted the text of the oral statement as its integrated executive summary.

² China submitted the text of the oral statement as its integrated executive summary.

ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL**

Mr. Chair, distinguished Members of the Panel,

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

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

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

Relevance of Prior Appellate Body reports

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

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

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

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

¹ United States' First Written Submission, para. 23.

² Ibid.

³ *US – Oil Country Tubular Goods Sunset Reviews*, Appellate Body Report, para. 188.

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

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

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

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

Interpretation of Article 2.4.2 of the Anti-Dumping Agreement

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

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

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

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

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. Mr. Chairman, Members of the Panel. China welcomes this opportunity to present its views in this dispute.
2. Today, we will focus on two critical issues in relation to Canada's claims on the USDOC's use of differential pricing methodology ("DPM"): (i) the identification of a pattern; and (ii) the permissibility of zeroing, under the second sentence of Article 2.4.2 of the Anti-dumping Agreement ("ADA").
3. As the Panel is aware, this case is not the first one regarding how WTO disciplines shall apply to the use of the "weighted average-to-transaction" ("W-T") comparison methodology in anti-dumping investigations. In this regard, China believes that the previous panel and Appellate Body reports adopted by the DSB have provided clear guidance for addressing issues raised in this dispute.
4. First, with respect to the proper identification of a pattern in the second sentence of ADA Article 2.4.2, China notes that this is a key condition to be satisfied before resorting to the asymmetrical W-T comparison methodology to "determine the existence of margins of dumping". We believe that the exceptional nature of the W-T methodology, as consistently held by the Appellate Body¹ and agreed by the parties to this dispute², warrants a strict interpretation of the pattern requirement.
5. Pursuant to ADA Article 2.4.2, when employing the W-T methodology, an investigating authority shall identify a "pattern" of export prices that "differ significantly *among* different purchasers, regions *or* time periods" (emphasis added). The Appellate Body found that while the conjunction "or" may be exclusive or inclusive, the word "among" requires that each category be considered on its own, in the sense that a pattern of prices among different purchasers must be found within purchasers, as between particular purchasers and other purchasers (with the same applying to regions and time periods, respectively).³ The combined use of the words "or" and "among" in that phrase means that different categories cannot be considered cumulatively to find one single pattern.⁴
6. However, according to Canada⁵, in applying the DPM, the USDOC has done the opposite by aggregating the results of comparisons of export prices to purchasers, regions *and* time periods to identify the pattern. In our view, such a practice cannot be compatible with the plain language of the second sentence of ADA Article 2.4.2.
7. Second, zeroing is not permissible even when the strict criteria of W-T methodology have been met. WTO panels and the Appellate Body have consistently held that the use of zeroing is inconsistent with ADA under any of the three comparison methodologies, i.e. "weighted average-to-weighted average" ("W-W"), "transaction-to-transaction" ("T-T") or W-T methodology, as contemplated in ADA Article 2.4.2.⁶
8. In the recent *US – Anti-Dumping Methodologies (China)* and *US – Washing Machines (Korea)* cases, the panel and Appellate Body reaffirmed the inconsistency of the use of zeroing in the W-T

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

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

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

⁴ Ibid. para. 5.33.

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

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

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

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

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

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

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

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

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

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

¹⁰ Appellate Body Report, *US – Washing Machines*, paras. 5.125-5.128.

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

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

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

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

I. The role of prior Appellate Body Reports

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

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

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

II. Article 2.4.2 of the Anti-Dumping Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ Appellate Body Report, *US – Washing Machines*, para. 5.29.

⁵ Appellate Body Report, *US – Washing Machines*, paras. 5.30-5.34.

⁶ Appellate Body Report, *US – Washing Machines*, para. 5.29.

⁷ Appellate Body Report, *US – Washing Machines*, paras. 5.50-5.55.

⁸ Appellate Body Report, *US – Washing Machines*, paras. 5.151-5.160.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. The USDOC's Methodology Does Not Meet the "Pattern" Requirement**

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

A. A "Pattern" Must Help Unmask Targeted Dumping

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

3. As the Appellate Body has explained, and the United States appears to agree³, a "pattern" means "[a] regular and intelligible form or sequence discernible in certain actions or situations".⁴ A "regular and intelligible form or sequence" must be capable of being understood, which means that random price variations do not constitute a "pattern".⁵ However, the USDOC's evaluation of both lower and higher export prices by a methodology that relies exclusively on numerical benchmarks⁶ will only reveal such random variations – that is, the mere presence, or absence, of export prices which differ significantly – rather than a *pattern* of export prices which differ significantly.⁷

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

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

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

¹ United States' first written submission, para. 68.

² United States' first written submission, paras. 68, 74.

³ United States' first written submission, paras. 49, 52; Appellate Body Report, *US – Washing Machines*, fn. 108.

⁴ Appellate Body Report, *US – Washing Machines*, para. 5.25.

⁵ Appellate Body Report, *US – Washing Machines*, para. 5.25.

⁶ United States' first written submission, para. 77.

⁷ United States' first written submission, paras. 68, 74.

⁸ Appellate Body Report, *US – Washing Machines*, para. 5.29.

⁹ Appellate Body Report, *US – Washing Machines*, paras. 5.63, 5.66.

¹⁰ United States' first written submission, para. 49.

¹¹ Appellate Body Report, *US – Washing Machines*, para. 5.66. See also Appellate Body Report, *US – Washing Machines*, para. 5.63.

C. A "Pattern" Cannot Transcend Categories

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

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

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

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

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

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

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

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

¹² Appellate Body Report, *US – Washing Machines*, para. 5.33.

¹³ Appellate Body Report, *US – Washing Machines*, para. 5.32 (emphasis original).

¹⁴ United States' first written submission, para. 78.

¹⁵ Emphasis added.

¹⁶ See Lumber Final I&D Memo, p. 56 (Exhibit CAN-01).

¹⁷ Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

¹⁸ Appellate Body Report, *US – Washing Machines*, para. 5.55.

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

12. The United States further violates the second sentence of Article 2.4.2 of the *Agreement* by applying the "zeroing" procedures when calculating a margin of dumping pursuant to the W-T comparison methodology.

13. It is well established through consistent WTO jurisprudence that zeroing is impermissible in the calculation of dumping margins in any context or proceeding in which such margins are calculated. The concepts of "dumping" and "margins of dumping" are the same throughout the *Agreement*, which establishes the basic principle that margins of dumping are established for the product under investigation "as a whole".¹⁹ On this basis, the Appellate Body concluded that "[z]eroing the negative intermediate comparison results within the pattern" is not "consistent with the establishment of dumping and margins of dumping as pertaining to the 'universe of export transactions' identified under the second sentence of Article 2.4.2."²⁰

14. The United States attempts to justify the USDOC's use of zeroing by raising the "mathematical equivalence" argument.²¹ However, this argument has already been thoroughly considered and repeatedly rejected by the WTO²², and the United States provides no reason for the Panel to reconsider it.

15. The United States nonetheless insists that there is no textual basis to exclude "non-pattern transactions" from the establishment of dumping and margins of dumping in W-T comparisons, which is "essentially the same as zeroing."²³ However, the differences between the exceptional W-T comparison methodology under the second sentence of Article 2.4.2 and the two methodologies under the first sentence result from the presence of targeted dumping, which is to be "unmasked" according to the purpose of the second sentence of Article 2.4.2.²⁴ "Such differences" in the pricing patterns will therefore justify the use of the exceptional W-T methodology when they cannot be appropriately taken into account by the methodologies under the first sentence (and as properly explained by the investigating authority).

16. On the other hand, zeroing the negative intermediate comparison results – whether within or outside the pattern – is not necessary to "unmask" "targeted dumping" among the "pattern transactions".²⁵ To the contrary, zeroing merely leads to the defect of unreasonably inflating the dumping margin, or creating a margin where one otherwise would not exist, which is inconsistent with the obligations established by Articles 2.4 and 2.4.2 of the *Agreement*.

17. The United States also tries to justify zeroing by referring to the comments on "asymmetrical" nature of the comparison methodology authorized by the second sentence of Article 2.4.2 in some decisions by the Appellate Body²⁶ and the negotiating history of the *Agreement*.²⁷ However, these comments merely pointed out that the W-T comparison pursuant to the second sentence consisted of the weighted average price of all domestic sales, on the one hand, and individual export transaction prices, on the other hand, which were not "symmetric".

¹⁹ Appellate Body Report, *US – Washing Machines*, paras. 5.90-5.91, 5.145.

²⁰ Appellate Body Report, *US – Washing Machines*, para. 5.160.

²¹ United States' first written submission, paras. 122-160.

²² Appellate Body Report, *US – Washing Machines*, para. 5.125.

²³ United States' first written submission, para. 196.

²⁴ Appellate Body Report, *US – Zeroing (Japan)*, para. 135. See also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

²⁵ Appellate Body Report, *US – Washing Machines*, paras. 5.156, 5.160.

²⁶ United States' first written submission, para. 179.

²⁷ United States' first written submission, paras. 183-186.