UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

(AB-2016-2 / DS464)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

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Short Form	Full Citation
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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States appeals certain of the Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and certain of the Panel's findings that U.S. measures challenged by Korea in this dispute are inconsistent with various provisions of the AD Agreement and the GATT 1994.

2. As demonstrated below, the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement by failing to interpret that provision in accordance with the customary rules of interpretation of public international law, as required by Articles 3.2 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. Specifically, section II.B demonstrates that the Panel erred in its interpretation of the relevant "pattern" in the second sentence of Article 2.4.2 of the AD Agreement. The Panel concluded that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This conclusion does not follow from a proper application of the customary rules of interpretation of public international law.

4. Properly interpreted, the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods," requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. Any such "pattern" necessarily would be a pattern of export prices that would transcend multiple purchasers, regions, or time periods, and necessarily would include both lower and higher export prices that "differ significantly" from each other.

5. Section II.C demonstrates that the Panel's findings regarding the scope of application of the alternative, average-to-transaction comparison methodology are erroneous. The Panel erred by failing to undertake a proper analysis pursuant to the customary rules of interpretation, by engaging in circular logic, and by premising its findings on its own erroneous interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 of the AD Agreement.

6. Section II.D demonstrates that the Panel erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with provisions of the AD Agreement and the GATT 1994. The

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,297 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 32,621 words (including footnotes).

Panel erred by failing to properly interpret the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law.

7. The Panel engaged in virtually no analysis whatsoever of the text of what it called the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement.[2] Instead, the Panel based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern" and its own misreading of the Appellate Body's previous findings concerning zeroing.

8. A proper examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes, and it can be confirmed by recourse to the negotiating history of Article 2.4.2 of the AD Agreement.

9. The Panel also erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Articles 2.4 and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994. These findings are dependent on the Panel's erroneous findings under Article 2.4.2 of the AD Agreement, and should be reversed for the same reasons.

10. Section II.E demonstrates that the Panel erred in finding that a differential pricing analysis undertaken by the U.S. Department of Commerce ("USDOC") is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement. The Panel's finding was premised on its understanding of the relevant "pattern," but the Panel's understanding of the relevant "pattern" is erroneous and not consistent with a proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

11. Additionally, the USDOC's differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2, when that clause is properly interpreted in accordance with the customary rules of interpretation. The "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. The USDOC has done this when it has applied a differential pricing analysis in antidumping proceedings.

12. A differential pricing analysis seeks to identify a "pattern," but does not require a specific "target." 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

[2] The "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement provides that: "A normal value established on a weighted average basis may be compared to prices of individual export transactions…." *See United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Report of the Panel, WT/DS464/R (March 11, 2016) ("Panel Report"), para. 7.9.

different purchasers, regions or time periods." Investigating authorities might take other approaches to identify a "pattern" that also are consistent with the terms of the "pattern clause."

13. In contrast to a "targeted dumping approach," a differential pricing analysis looks 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. The conceptual framework of that analysis is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which calls upon the investigating authority to find "export prices which differ significantly," but which does not require a focus either on lower-priced or higher-priced export sales.

14. A differential pricing analysis does not aggregate random and unrelated price variations. A differential pricing analysis considers the pricing behavior of the exporter in the United States market as a whole. 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 purchasers, regions, or time periods cannot be cumulated with the significant differences in export prices among other categories (*i.e.*, purchasers, regions, or time periods) when assessing whether the exporter's pricing behavior exhibits "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

II. U.S. APPEAL OF CERTAIN OF THE PANEL'S FINDINGS UNDER THE AD AGREEMENT

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

15. The U.S. appeal of certain findings the Panel made under the AD Agreement concerns the Panel's interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement, as well as consequential findings under Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

16. No prior dispute at the World Trade Organization (WTO) has involved a Member's application of the alternative comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement, where the conditions for use of that methodology have been established. Accordingly, up until this dispute, neither the Appellate Body nor any panel has been called upon to interpret and apply the terms of the second sentence of Article 2.4.2.

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

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices

> which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

18. On its face, Article 2.4.2 of the AD Agreement sets forth three comparison methodologies by which an investigating authority may determine the "existence of margins of dumping." Per the first sentence, "normally," an investigating authority "shall" do so "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." More succinctly, the two primary comparison methodologies available to an investigating authority are the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that:

> The first sentence of Article 2.4.2 sets out the two methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping". Although the transaction-to-transaction and weighted average-to-weighted average comparison methodologies are distinct, they fulfil the same function. They are also equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two. An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.[3]

19. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which, the Appellate Body has observed, "involves an asymmetrical comparison and may be used only in exceptional circumstances."[4] As an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should not "lead to results that are systematically different"[5] – the third comparison methodology, by logical extension, should "lead to results that are systematically different," when the conditions for its use have been established.

20. The third comparison methodology may be used only when two conditions are met. The Panel described its general understanding of Article 2.4.2 of the AD Agreement and the conditions for using the alternative comparison methodology in the following terms:

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[3] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[4] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97 ("[T]he methodology in the second sentence of Article 2.4.2 is an exception."); *see also US – Zeroing (Japan) (AB)*, para. 131 ("The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which are normally to be used.").
[5] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

> Article 2.4.2 comprises the comparison methodologies applicable to establish margins of dumping in the investigation phase. The first sentence provides for two comparison methodologies that should "normally" be used to establish margins of dumping. The second sentence provides for a third comparison methodology for establishing the margins of dumping, to be used in exceptional cases only. The second sentence of Article 2.4.2 is divided into three parts. The first part, which we refer to as the "methodology clause", explains that an investigating authority is allowed to use an asymmetrical comparison methodology involving the comparison of a weighted average normal value with "prices of individual export transactions". The second and third parts provide that certain conditions must be met before such asymmetrical comparison may be undertaken. The second part, which we refer to as the "pattern clause", requires the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods". The third part, which we refer to as the "explanation clause", requires the investigating authority to explain why "such differences" cannot be taken into account appropriately by the use of a weighted average-to-weighted average … or transaction-to-transaction … comparison methodology.[6]

21. The United States agrees with the Panel's general description of the structure of the second sentence of Article 2.4.2 of the AD Agreement. In this submission, we will use the same terms used by the Panel to refer to the "methodology clause," the "pattern clause," and the "explanation clause" of the second sentence of Article 2.4.2.

22. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement were questions of first impression for the Panel. To answer those questions, the Panel was required to undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2 in accordance with the customary rules of interpretation of public international law.[7]

23. Before turning to the legal matters at issue, the United States has the following prefatory comment on the tone Korea adopted in its written submissions and oral statements to the Panel. From the outset of the panel proceeding, Korea sought to portray this dispute as one involving an unrepentant WTO Member acting in disregard of earlier DSB recommendations and rulings by continuing to use a methodology that has already been found impermissible.[8] This characterization is both inaccurate and unfair. The present dispute is not about whether the United States has complied with any earlier findings of the Appellate Body or other panels – indeed, the United States has fully complied with those earlier findings by changing its normal approach for calculating the margin of dumping.[9] Nor is this dispute about re-litigating previous interpretations of the AD Agreement.

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[6] Panel Report, para. 7.9 (citations omitted).
[7] DSU, Article 3.2.
[8] *See, e.g.*, First Written Submission of Korea (Confidential) (September 29, 2014) ("Korea First Written Submission"), para. 57.
[9] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006) (Exhibit USA-1); *Antidumping*

24. Rather, what this dispute is about, as it relates to the USDOC's antidumping duty proceedings, is the correct interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement. That sentence, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[10] The two U.S. approaches at issue in this dispute –the *Nails* test that the USDOC applied in the washers antidumping investigation and the later-developed approach described as differential pricing analysis – are both fully within the ambit of the approaches permitted under Article 2.4.2 to "unmask targeted dumping." In contrast, Korea – through its "as applied" and "as such" challenges in this dispute – seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement.

25. As demonstrated below, the Panel erred in finding that the measures challenged by Korea are inconsistent with Articles 2.4.2, 2.4, and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994. The Panel failed to apply the customary rules of interpretation of public international law, and, consequently, the Panel erred in its interpretation and application of the provisions of the AD Agreement and the GATT 1994.

B. The Panel Erred in Its Interpretation of the Relevant "Pattern" in the Second Sentence of Article 2.4.2 of the AD Agreement

26. The Panel correctly observed that one of the conditions for the use of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement is the identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods."[11] The interpretation of the "relevant pattern"[12] described in the "pattern clause" of the second sentence of Article 2.4.2 has implications both for when and how the alternative, average-to-transaction comparison methodology may be applied. Indeed, the Panel's findings related to the scope of application of the alternative, average-to-transaction comparison methodology, the use of zeroing in connection with that alternative comparison methodology, and the USDOC's differential pricing analysis all

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Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3,783 (January 26, 2007) (Exhibit USA-2); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (February 14, 2012) (Exhibit USA-3); *see also, e.g., Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 22 February 2012*, WT/DSB/M/312, paras. 31-48 (May 22, 2012) ("Despite the fundamental disagreement of the United States with the Appellate Body's findings on 'zeroing', the United States welcomed the agreement to end this difficult and long-standing dispute." *Id.*, para. 42. "The EU recognized that significant progress had been made and it hoped and expected that the satisfactory completion of all steps under the roadmap would effectively bring the zeroing disputes to an end." *Id.*, para. 43.).

[10] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62 ("This provision [the second sentence of Article 2.4.2 of the AD Agreement] allows Members, in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.").

[11] *See* Panel Report, para. 7.141. *See* also AD Agreement, Article 2.4.2, second sentence.

[12] *See* Panel Report, para. 7.21.

are explicitly founded on the Panel's understanding of the relevant "pattern" in the second sentence of Article 2.4.2.[13]

27. As demonstrated below, the Panel erred in its interpretation of the second sentence of Article 2.4.2 of the AD Agreement, and the Panel's understanding of the relevant "pattern" is flawed. Accordingly, the United States seeks review and modification of the Panel's legal findings related to the interpretation of the term "pattern" in the second sentence of Article 2.4.2.[14]

1. The Panel Erroneously Concluded that the Relevant "Pattern" Comprises Only Low-Priced Export Transactions to a Particular "Target"

28. The panel report does not in any one place clearly present the Panel's understanding of the relevant "pattern." Instead, the panel report includes various statements concerning the relevant "pattern" in a number of places throughout the panel report. While this regrettable lack of clarity may not on its own constitute reversible error, the Panel's statements, when considered together, do not amount to a proper examination of the terms of the second sentence of Article 2.4.2 of the AD Agreement that accords with the customary rules of interpretation of public international law.

29. In connection with its discussion of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, the Panel stated, *inter alia*, that:

> The parties agree that a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations". We accept that this definition accords with the ordinary meaning of the term "pattern" as used in the second sentence of Article 2.4.2.[15]
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> * * *
>
> In the context of the second sentence, the relevant form or sequence is determined by reference to purchasers, regions or time periods. If particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. <u>The price differences are "regular" and "intelligible" because they pertain only to that particular purchaser, region or time period</u>.[16]

30. Elsewhere, in connection with its consideration of the scope of application of the alternative, average-to-transaction comparison methodology, the Panel added:

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[13] *See* Panel Report paras. 7.28-29 (scope of application of the alternative, average-to-transaction comparison methodology), 7.187-189 (zeroing), and 7.141-144 (differential pricing analysis).
[14] *See, e.g.*, Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.
[15] Panel Report, para. 7.45 (citations omitted).
[16] Panel Report, para. 7.46 (emphasis added).

> Once those prices are identified, they constitute the relevant "pattern". Although those prices are identified by reference to other prices pertaining to other purchasers, regions or time periods, those other prices are not part of the relevant "pattern" (just as a floral pattern on a garment is concerned with the flowers printed against a backdrop, rather than the backdrop itself).[17]

31. Additionally, the Panel offered the following in connection with its consideration of the USDOC's differential pricing analysis:

> In our view, the phrase "among different purchasers, regions or time periods" determines the question of how the relevant "pattern" must be identified. The use of the disjunctive "or" in this phrase is significant, as its ordinary meaning indicates that a "pattern" can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods. This excludes the possibility of establishing a "pattern" across the three categories cumulatively. We find support for this approach in the Appellate Body's previous clarification that there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods". The Appellate Body did not identify any other types of "targeted" dumping.[18]
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> We also emphasise the use of the word "among" in the second sentence of Article 2.4.2. According to its dictionary meaning, the word "among" is "used when you are mentioning a particular person or thing in relation to the rest of the group they belong to". The use of the word "among" thus emphasises membership of a group, and the notion of belonging to that group. We are of the view that something belongs to a group when it shares certain common characteristics with the other members of that group, or has some form of relationship with them. As a result, a "pattern" of significant price differences "among" different purchasers must be found in the price variation within a group of purchasers, as between one or more particular purchasers in relation to all other purchasers of the same group. The same is true for a "pattern" of significant price differences "among" different regions or time periods.[19]
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> * * *
>
> Furthermore, it follows from the definition of "pattern" that price variation within a "pattern" must pertain to the same parameters. Otherwise, no "regular and intelligible form or sequence" may be discerned from the group of price variation. For this reason, prices that are too high and prices that are too low do not belong to the same pattern: high prices differ significantly from all other prices because they are higher than them; low prices differ significantly from all other prices because

[17] Panel Report, para. 7.28 (emphasis added; citations omitted).
[18] Panel Report, para. 7.141 (citations omitted).
[19] Panel Report, para. 7.142 (citations omitted).

> they are lower than them. The characteristic for establishing the degree of price variation is therefore not the same.[20]

32. The Panel explained that, in its view, "the second sentence of Article 2.4.2 is designed to enable an investigating authority to focus on pattern transactions to unmask targeted dumping that would otherwise be masked by an absence of dumping in respect of non-pattern transactions."[21] The Panel reasoned that, "given that the object and purpose of the second sentence is to unmask 'targeted dumping', the authority is able to ('may') restrict the application of the [average-to-transaction] comparison methodology to pattern transactions only, since it is those pattern transactions that are indicative of targeted dumping."[22]

33. Finally, the Panel suggested that its understanding of the relevant "pattern" "is consistent with the statement by the Appellate Body in *US – Zeroing (Japan)* that the universe of transactions that fall within the relevant pricing pattern 'would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply'."[23]

34. When these various statements from the panel report are read together, it appears that the Panel concluded that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 of the AD Agreement comprises only low-priced export transactions to each particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. As explained below, the Panel's conclusion does not follow from a proper application of the customary rules of interpretation of public international law.

2. A Proper Analysis Pursuant to the Customary Rules of Interpretation Reveals that "A Pattern of Export Prices which Differ Significantly among Different Purchasers, Regions or Time Periods" Is a Regular and Intelligible Form or Sequence of Export Prices which Are Unlike in an Important Manner or to a Significant Extent as between Different Purchasers, Regions, or Time Periods

35. An interpretation of the term "pattern" in the second sentence of Article 2.4.2 of the AD Agreement, undertaken in accordance with the customary rules of interpretation of public international law, requires an analysis of the ordinary meaning of the term "pattern," in its context and in light of the object and purpose of the AD Agreement.[24] The most immediate context for interpreting the term "pattern" is the "pattern clause" of the second sentence of Article 2.4.2, in which the term "pattern" appears. The "pattern clause" refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods." A proper analysis

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[20] Panel Report, para. 7.144 (emphasis added; citations omitted).
[21] Panel Report, para. 7.162.
[22] Panel Report, para. 7.27.
[23] Panel Report, para. 7.28, footnote 80.
[24] *See Vienna Convention on the Law of Treaties* ("Vienna Convention"), Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."). *See also US – Gasoline (AB)*, p. 17.

pursuant to the customary rules of interpretation demonstrates that the relevant "pattern" in the "pattern clause" is 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.

36. The Appellate Body has explained that an ordinary meaning analysis "may start with the dictionary definitions of the terms to be interpreted," but the Appellate Body has cautioned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[25] Rather, as the panel explained in *US – Section 301 Trade Act*:

> For pragmatic reasons the normal usage … is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.[26]

37. The word "pattern" has a wide variety of dictionary definitions, including the noun and adjective forms, as well as numerous compound forms. Altogether, there are dozens of entries in the dictionary for the word "pattern," ranging, for example, from "a model, example, or copy" and "an example or model to be imitated," to "a quantity of material sufficient for making a garment," or "a regular or decorative arrangement," or "the distribution of shot fired from a gun."[27]

38. The most apt definition, though, as Korea and the Panel each agreed,[28] is "a regular and intelligible form or sequence discernible in certain actions or situations."[29] The *Oxford English Dictionary*, from which all of the above definitions are drawn, notes that this definition is used "[f]req[uently] with *of*, as *pattern of behaviour*." In the second sentence of Article 2.4.2, the word "pattern" appears together with "*of* export prices . . .," which is a contextual indication of the proper ordinary meaning of the word "pattern" as it is used there. Thus, it would appear that the term "pattern of export prices . . ." can be understood to mean a regular and intelligible form or sequence discernible in export prices.

39. Article 2.1 of the AD Agreement suggests that the term "export price" should be understood "[f]or the purpose of [the AD] Agreement" as the "price of the product exported from one country to another."[30] Before the Panel, Korea did not contest this understanding of the term "export price[]" in the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. Likewise, the Panel did not suggest in the panel report that the term should have a meaning different than that established in Article 2.1.

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[25] *US – Gambling (AB)*, para. 164 (citations omitted; emphasis in original).
[26] *US – Section 301 Trade Act*, para. 7.22 (cited by the Appellate Body in *US – Gambling (AB)*, para. 164, footnote 191).
[27] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-4).
[28] Panel Report, para. 7.45.
[29] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit USA-4).
[30] In its first written submission, Korea does not suggest a different definition for the term "export price."

40. The relevant pattern at issue in the second sentence of Article 2.4.2 is that of "export prices which differ significantly . . . ."[31] The dictionary contains several definitions of the word "differ."[32] The most appropriate definition, in the sense in which the term is used in the second sentence of Article 2.4.2, appears to be "to have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in some specified respect."[33] This is confirmed when the word "differ" is read together with the word "among."

41. The preposition "among" is defined, *inter alia*, as "of relation between object and objects"; "of the relation of a thing (or things) to the whole surrounding group or composite substance"; "of the relation of anything in a local group to the other members of the group, although these do not actually surround it; as of an individual to the other members of the same community"; "of the relation of a thing to others in the same nominal or logical group: In the number or class of"; and "*esp.* of things distinguished in kind from the rest of the group: Preeminent among, as distinguished from, in comparison with, above the others."[34] The preposition "among" thus references a relationship between one thing, for example, a purchaser, region, or time period, and other similar things of the same type, *e.g.*, other purchasers, regions, or time periods. The Panel had a similar understanding of the meaning of the word "among."[35]

42. Thus, when the second sentence of Article 2.4.2 refers to "export prices which differ significantly among different purchasers, regions or time periods," this suggests the need for a comparison, for example, of export prices to one purchaser with export prices to other purchasers to ascertain whether the export prices to the former are not the same, or are unlike, or are distinct from the export prices to the latter in some respect.[36]

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

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[31] AD Agreement, Article 2.4.2, second sentence (emphasis added).
[32] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-5).
[33] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-5). The word "differ" is also defined as "to put apart or separate from each other in qualities." Along with being described as "now unusual" in the dictionary, the term is also a transitive verb, suggesting action, while the definition above is that of an intransitive verb. Thus, this definition seems less apt. Also, it is unlikely that a definition related to "heraldry" is appropriate; nor does a definition relating to holding different opinions or being in disagreement (in that same sense) appear suitable.
[34] *See* Definition of "among" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-6).
[35] *See* Panel Report, para. 7.142.
[36] We refer in this sentence only to an analysis of purchasers for the sake of clarity. There does not appear to be any disagreement between the parties that the appropriate comparison is between the export prices to one purchaser and the export prices to another purchaser or purchasers, or between the export prices to one region and the export prices to another region or regions, or between the export prices in one time period and the export prices in another time period or time periods. No party appears to suggest that the second sentence of Article 2.4.2 calls for a comparison, for example, of export prices to a purchaser with export prices to a region.

substantially, considerably."[37] The Appellate Body has observed that "[t]he term 'significant' has been understood … as 'something that can be characterized as important, notable, or consequential.'"[38] The Panel agreed with the Appellate Body's observation concerning the meaning of the term "significant."[39]

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

45. Furthermore, we note, as additional context, that the "pattern clause" appears in the second sentence of Article 2.4.2 of the AD Agreement and is a condition for resorting to the "exceptional"[40] average-to-transaction comparison methodology, which is an alternative to the comparison methodologies that investigating authorities "normally"[41] are to use. Logically, one would expect that the conditions for resorting to the "exceptional" alternative methodology "normally" would not be met. Accordingly, an investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the price differences among different purchasers, regions, or time periods are significant.

46. Finally, the United States observes that the interpretation of the "pattern clause" set forth above is consistent with and supports the object and purpose of the AD Agreement. Although the AD Agreement "does not contain a preamble or an explicit indication of its object and purpose,"[42] 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.

47. As the Appellate Body has observed, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[43] in "exceptional"[44] situations. Interpreting the "pattern clause" as discussed above – *i.e.*, as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods – serves the aim of the

[37] *See* Definition of "significantly" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-7).
[38] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426).
[39] *See* Panel Report, para. 7.48.
[40] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[41] AD Agreement, Article 2.4.2, first sentence.
[42] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 118.
[43] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[44] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

second sentence of Article 2.4.2 and is consistent with the overall balance of rights and obligations struck in the AD Agreement.

3. The Panel's Conclusion Concerning the Relevant "Pattern" Is Erroneous and Does Not follow from a Proper Application of the Customary Rules of Interpretation

48. As explained above, it appears from various statements in the panel report that the Panel concluded that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 of the AD Agreement comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions.[45] For a number of reasons, the Panel's conclusion is erroneous and does not follow from a proper application of the customary rules of interpretation.

49. First, the apparent premise of the Panel's conclusion is inconsistent with the ordinary meaning of the term "pattern" that the Panel accepted. We recall that the Panel agreed with the parties that the definition of the term "pattern" that "accords with the ordinary meaning" of that term is "[a] regular and intelligible form or sequence discernible in certain actions or situations."[46] We discuss above how the appropriateness of that definition is confirmed through a contextual analysis of the "pattern clause." Yet, elsewhere in the panel report, the Panel appears to premise its reasoning on an altogether different definition of the word "pattern."

50. Referring to export price transactions to a purported "target," which, in the Panel's view, constitute the "pattern," the Panel observed that "[a]lthough those prices are identified by reference to other prices pertaining to other purchasers, regions or time periods, those other prices are not part of the relevant 'pattern' (<u>just as a floral pattern on a garment is concerned with the flowers printed against a backdrop, rather than the backdrop itself</u>)."[47] The Panel's reference to the example of a floral pattern on a garment reveals the flawed logic underpinning the Panel's conclusion, which is inconsistent with the definition of the word "pattern" that the Panel found accords with the ordinary meaning of the term. The Panel's example is more akin to a different definition that is also included among the many dictionary definitions of "pattern," namely "[a] regular or decorative arrangement," as in "[a] decorative or artistic design, often repeated, esp. on a manufactured article such as a piece of china, a carpet, fabric, etc.; a style, type, or class of decoration, composition, or elaboration of form."[48]

51. That definition of "pattern," however, is not the ordinary meaning of "pattern" as that term is used in the context of the second sentence of Article 2.4.2 of the AD Agreement. As discussed above, the word "pattern" is collocated with the word "of," which itself is contextual confirmation that a more apt definition of "pattern" is that which was suggested by the parties and purportedly accepted by the Panel. The Panel erred by premising its interpretation of the term "pattern" on an

[45] *See supra*, section II.B.1.
[46] *See* Panel Report, para. 7.45.
[47] Panel Report, para. 7.28 (emphasis added; citations omitted).
[48] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 9.a. (Exhibit USA-4).

inapt definition of that term, one that is inconsistent with the correct definition adopted by the Panel elsewhere in the panel report.

52. Second, the Panel's conclusion regarding the relevant "pattern" is not supported by other text in the "pattern clause," in which the term "pattern" is used. The Panel reasoned that, "[i]f particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. The price differences are 'regular' and 'intelligible' because they pertain only to that particular purchaser, region or time period."[49] The Panel's reasoning is inconsistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which requires an investigating authority to find "a pattern … among different purchasers, regions or time periods."[50] On its face, this text contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods. The Panel's conclusion that the "pattern" comprises export prices only to a particular "target," while export prices to other purchasers, regions, or time periods are "non-pattern" transactions, is at odds with the plain meaning of the text of the "pattern clause."

53. Furthermore, 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."[51] Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" from each other. An export price cannot "differ significantly" on its own. Given that "difference" is a comparative or relative concept, for something to differ, it must differ from something else. Thus, lower export prices cannot form a "pattern of export prices which differ significantly" without the higher export prices from which they differ significantly. The Panel's understanding of "pattern" – as comprising only lower-priced export transactions to a "target" – cannot be a correct interpretation of the term "pattern of export prices which differ significantly" because the export prices from which the lower-priced export transactions differ are, under the Panel's reasoning, so-called "non-pattern" transactions that are excluded from the "pattern of export prices which differ significantly."

54. Finally, the Panel misapplied the concept of "object and purpose" when it based its conclusion on the "object and purpose of the second sentence" of Article 2.4.2 of the AD Agreement.[52] 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 Appellate Body has recognized that Article 31 of the Vienna Convention reflects such customary rules.[53] 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." In Article 31 of the Vienna Convention, the word "its" refers to the "treaty," or in this case, the AD Agreement. The Panel's reliance on the purported "object and purpose" of the

[49] Panel Report, para. 7.46.
[50] AD Agreement, Article 2.4.2, second sentence (emphasis added).
[51] AD Agreement, Article 2.4.2, second sentence (emphasis added).
[52] Panel Report, para. 7.26.
[53] *See US – Gasoline (AB)*, p. 17.

second sentence of Article 2.4.2 of the AD Agreement constitutes a failure to properly apply the customary rules of interpretation of public international law.

55. For these reasons, the Panel erred in its interpretation of the second sentence of Article 2.4.2 of the AD Agreement when it found that the relevant "pattern" for the purpose of that provision comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. Accordingly, the United States respectfully requests that the Appellate Body reverse or modify[54] the Panel's legal findings relating to the relevant "pattern," which are set forth in various paragraphs of the panel report,[55] and find that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 is 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.

C. The Panel's Findings Regarding the Scope of Application of the Alternative, Average-to-Transaction Comparison Methodology Are Erroneous

56. The United States seeks review of the Panel's findings regarding the "scope of application" of the alternative, average-to-transaction comparison methodology.[56] The Panel found that the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement by applying the alternative, average-to-transaction comparison methodology to all export transactions in the washers antidumping investigation.[57] The Panel also found that the USDOC's differential pricing analysis is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, "as such," because it applies the alternative, average-to-transaction comparison methodology to all export transactions in certain situations.[58] In making these findings, the Panel erred in its interpretation of what it called the "methodology clause" of the second sentence of Article 2.4.2 by failing to undertake a proper analysis pursuant to the customary rules of interpretation, by engaging in circular logic, and by premising its findings on its own erroneous interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 of the AD Agreement.

57. What the Panel refers to as the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement provides simply that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions."[59]

58. The Panel began its analysis of the "methodology clause" by making the following assertions:

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[54] *See* DSU, Article 17.13.
[55] *See, e.g.*, Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.
[56] Panel Report, para. 7.11.
[57] *See* Panel Report, paras. 7.29, 8.1.a.i.
[58] *See* Panel Report, paras. 7.119.c, 8.1.a.vi.
[59] *See* Panel Report, para. 7.9. *See also* AD Agreement, Article 2.4.2, second sentence.

> We consider that the term "individual" in the first part of the second sentence indicates that the [average-to-transaction] comparison will not involve all export transactions. Rather, the [average-to-transaction] comparison will only involve certain export transactions identified individually. The only textual basis for individual identification of export transactions to be used in the [average-to-transaction] comparison is that they form the pattern referred to in the second part of the second sentence, i.e. those export transactions with prices that differ significantly (by purchaser, region or time period). The second sentence provides no other basis for identifying which "individual" export transactions should be included in the [average-to-transaction] comparison.[60]

59. The above paragraph constitutes the full extent of the Panel's textual analysis of the "methodology clause." Rather than scrutinize all of the terms of the "methodology clause" to discern their ordinary meaning, as contemplated by Article 31 of the Vienna Convention, the Panel instead focuses on just one word of the clause, "individual." The Panel makes no attempt whatsoever to define the word "individual." The Panel merely asserts, without explanation, that the presence of the word "individual" imposes a limitation on the scope of application of the alternative, average-to-transaction comparison methodology. There is no textual or contextual support for this proposition.

60. The most relevant dictionary definition of the word "individual" as an adjective is "single; separate."[61] The word "individual" is collocated with and modifies the term "export transactions" in the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement. This suggests that the prices of single, separate export transactions may be compared to a normal value established on a weighted average basis.

61. As a contextual matter, the asymmetrical comparison methodology set forth in the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement contrasts with the symmetrical comparison methodologies provided for in the first sentence of Article 2.4.2, those being the average-to-average comparison methodology, which involves a comparison of averages, and the transaction-to-transaction comparison methodology, which involves the comparison of multiple (individual, single, or separate) normal values and multiple (individual, single, or separate) export prices. The word "individual" in the "methodology clause" of the second sentence helps to establish the contrast between the comparison methodologies in the first sentence and the alternative comparison methodology in the second sentence.

62. Nothing in the above textual and contextual analysis of the word "individual" suggests that that term establishes a limitation on the transactions that may be included in an application of the alternative, average-to-transaction comparison methodology, as the Panel concluded.

63. Additional contextual considerations also weigh against the Panel's conclusion that the presence of the word "individual" in the "methodology clause" establishes the kind of linkage between the term "export transactions" in the "methodology clause" and the term "export prices"

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[60] Panel Report, para. 7.22.

[61] *See* Definition of "individual" from Oxford English Dictionary Online, definition 1, http://www.oxforddictionaries.com/us/definition/american_english/individual.

in the "pattern clause" that the Panel found. While the term "export transactions" is modified by the term "individual," the term "export prices" is not. Nor is the term "export prices" in the "pattern clause" otherwise modified to establish any particular relationship to the term "export transactions" in the "methodology clause." One could conceive of ways that the second sentence of Article 2.4.2 might have been written to establish such a linkage. However, the DSU affirmatively bars the Panel from rewriting the AD Agreement, which it effectively has done.[62]

64. The Panel reasons that "[t]he only textual basis for individual identification of export transactions to be used in the [average-to-transaction] comparison is that they form the pattern referred to in the second part of the second sentence."[63] The Panel further suggests that "[t]he second sentence provides no other basis for identifying which 'individual' export transactions should be included in the [average-to-transaction] comparison."[64] Here, the Panel commits the logical error of begging the question. The Panel explained at the outset of its discussion that it considered that its task was to determine "whether the [average-to-transaction] comparison methodology may be applied to all export transactions, or only to transactions that constitute the relevant pattern (pattern transactions)."[65] However, the Panel then assumed that application of the alternative comparison methodology is limited to the "pattern," and found nothing in the text that would allow application to "non-pattern" transactions. Contrary to the Panel's reading, there is nothing whatsoever in the text of the second sentence that limits the individual export transactions that may be included in the alternative, average-to-transaction comparison methodology.

65. The Panel suggests that its conclusion is "further supported" by the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.[66] The Panel reasons that "such explanation relates to pattern transactions precisely because only those pattern transactions should be subject to a [average-to-transaction] comparison."[67] The Panel's logic is circular. The Panel appears to take the view that its conclusion is supported by its reading of the "explanation clause" because its reading of the "explanation clause" is supported by its conclusion. Even if the term "such differences" in the "explanation clause" refers to the conditions which may lead to masked or "targeted" dumping, which are evidenced by the differences between export prices found to be significant, *i.e.*, the term "export prices which differ significantly" in the "pattern clause," this relationship says nothing about the scope of application of the alternative, average-to-transaction comparison methodology, and lends no support to the Panel's conclusion.

66. The Panel then suggests that "[its] reading of the text of the second sentence is further supported by contextual considerations."[68] The Panel's consideration of the "explanation clause," discussed in the preceding paragraph of the panel report, appears itself to be a contextual consideration. The Panel's view on that is unclear, however, given the distinction it draws, which

[62] *See* DSU, Articles 3.2 and 19.2. "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." DSU, Article 19.2.
[63] Panel Report, para. 7.22.
[64] Panel Report, para. 7.22.
[65] Panel Report, para. 7.21.
[66] Panel Report, para. 7.23.
[67] Panel Report, para. 7.23.
[68] Panel Report, para. 7.24.

raises further questions about the consistency of the Panel's interpretive analysis with the customary rules of interpretation. In any event, the Panel's consideration of context does not support its conclusion. The Panel observes that the methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement is an exception to the methodologies that are to be used "normally," as provided by the first sentence of Article 2.4.2. In the Panel's view:

> In exceptional cases where the [average-to-transaction] comparison methodology applies, a sub-set of export transactions is set aside for specific consideration. The exceptional nature of this comparison methodology suggests that something different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration.[69]

67. Once again, the Panel begs the question. The exceptional nature of the comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement does not impose any limitation on the scope of application of the alternative, average-to-transaction comparison methodology. That methodology is exceptional because it may be used only under certain conditions that are specified in the second sentence of Article 2.4.2, and because "normally" one of the two methodologies described in the first sentence must be used. The Panel is correct conceptually that the second sentence of Article 2.4.2 provides that "something different from the first sentence should be undertaken."[70] That "something different" is specified in clear terms in the second sentence: asymmetrical, average-to-transaction comparisons, as contrasted with the symmetrical comparisons that are to be used "normally." Nothing in the text of Article 2.4.2 supports the Panel's view that the mere fact of the alternative, average-to-transaction comparison methodology being an exception means that the scope of its application must be limited to so-called "pattern transactions," which the Panel understood to mean only low-priced sales to a particular "target."

68. The Panel also suggests that its "reading of the text of the second sentence of Article 2.4.2 is … supported by its object and purpose."[71] As explained above, the Panel's reliance on the purported "object and purpose" of the second sentence of Article 2.4.2 of the AD Agreement, rather than the object and purpose of the AD Agreement itself, reflects a misapplication of Article 31 of the Vienna Convention and constitutes a failure by the Panel to properly apply the customary rules of interpretation of public international law.

69. Finally, the Panel suggests that further support for its conclusion can be found in certain statements in the *US – Zeroing (Japan)* Appellate Body report.[72] However, the Panel's reliance on that Appellate Body report is misplaced. The *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology in a situation where the conditions for the use of that alternative comparison methodology had been established. The Appellate Body itself "emphasize[d] … that [its] analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that

[69] Panel Report, para. 7.24.
[70] Panel Report, para. 7.24.
[71] Panel Report, para. 7.26.
[72] *See* Panel Report, paras. 7.25 and 7.27.

provision."[73] Thus, in reading the text of Article 2.4.2, the Appellate Body expressly was not making findings of legal interpretation that resulted from a complete analysis of the second sentence of Article 2.4.2 pursuant to the customary rules of interpretation of public international law.

70. Additionally, the Appellate Body observations on which the Panel relies would only support the Panel's conclusion regarding the scope of application of the alternative, average-to-transaction comparison methodology if the Panel's interpretation of the relevant "pattern" were correct. We have shown that the Panel's interpretation of the relevant "pattern" is flawed.[74]

71. The Panel quotes the following passage from paragraph 135 of the *US – Zeroing (Japan)*Appellate Body report:

> [t]he emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.[75]

72. The United States argued before the Panel[76] that the Appellate Body suggested that "in order to unmask targeted dumping, an investigating authority *may* limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[77] We emphasized that the Appellate Body used the word "may." The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions. It would have been illogical for the Appellate Body to do so because a "pattern" within the meaning of the "pattern clause" necessarily includes both lower and higher export prices that "differ significantly" from each other.

73. The Panel took a different view of the Appellate Body's statement. The Panel considered that, "given that the object and purpose of the second sentence is to unmask 'targeted dumping', the authority is able to ('may') restrict the application of the [average-to-transaction] comparison methodology to pattern transactions only, since it is those pattern transactions that are indicative of targeted dumping."[78] The Panel favored its reading of the passage from the *US – Zeroing*

[73] *US – Zeroing (Japan) (AB)*, para. 136.
[74] *See supra*, section II.B.
[75] Panel Report, para. 7.25 (quoting *US – Zeroing (Japan) (AB)*, para. 135).
[76] *See* Panel Report, para. 7.27.
[77] *See US – Zeroing (Japan) (AB)*, para. 135 (emphasis added).
[78] Panel Report, para. 7.27. Here again, the Panel misapplies the interpretive concept of "object and purpose."

(Japan) Appellate Body report over the U.S. reading because, in the Panel's view, the U.S. reading:

> would be at odds with the Appellate Body's statement *in the preceding sentence* (set forth in the extract above) that the universe of transactions subject to the [average-to-transaction] comparison methodology would "necessarily" be more limited than the universe of transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. The term "necessarily" excludes the possibility that the [average-to-transaction] comparison methodology might in certain circumstances also apply to non-pattern transactions.[79]

74. Even if the Panel understood the Appellate Body's observation as having implications for the Panel's findings in this dispute, such implications depend entirely on how one interprets the relevant "pattern." As we have shown above, the Panel failed to properly interpret the relevant "pattern,"[80] and the Panel's finding that the United States breached Article 2.4.2 was dependent on its flawed understanding of the relevant "pattern."[81] This is a further reason why the Panel's interpretation of the "methodology clause" is erroneous.

75. Additionally, in the context of the USDOC's application of the *Nails* test in the washers antidumping investigation, the export prices of those sales that passed the *Nails* test and those of other sales were significantly different from one another. Taken together, and only taken together, all of the export prices examined constituted the "pattern of export prices which differ significantly among different purchasers, regions or time periods."[82] As the USDOC explained in the washers AD investigation final issues and decision memorandum:

> If the Department were to apply the average-to-transaction method only to those U.S. sales which pass the Nails test, as argued by the respondents, then this approach would include only part of the U.S. sales which constitute the identified pattern. In other words, the U.S. sales which pass the Nails test represent only part of the pricing behavior of the respondent, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not. The identified pattern is defined by all of the respondent's U.S. sales.[83]

76. As the "pattern" the USDOC identified in the washers antidumping investigation was revealed by, and therefore comprised, all sales transactions, the USDOC's application of the average-to-transaction comparison methodology to all sales transactions is not at odds with the Appellate Body's suggestion that "an investigating authority may limit the application of the

[79] Panel Report, para. 7.27 (emphasis in original).
[80] *See supra*, section II.B.
[81] *See* Panel Report, para. 7.28.
[82] AD Agreement, Article 2.4.2, second sentence.
[83] Washers Final AD I&D Memo, p. 34 (Exhibit KOR-18).

[average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[84]

77. For the reasons given above, the United States respectfully requests that the Appellate Body reverse the Panel's finding in paragraph 7.29 of the panel report that "the [average-to-transaction] comparison methodology should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'."[85]

78. The United States further respectfully requests that the Appellate Body reverse the Panel's finding in paragraphs 7.29 and 8.1.a.i of the panel report that "the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement" because "[i]n the *Washers* anti-dumping investigation, the USDOC applied the [average-to-transaction] comparison methodology to all transactions, including transactions other than those constituting the patterns of transactions that the USDOC had determined to exist."[86] The United States also respectfully requests that the Appellate Body reverse the Panel's finding in paragraphs 7.119.c and 8.1.a.vi of the panel report that the differential pricing analysis, because it applies the average-to-transaction comparison methodology to all transactions under certain conditions, is inconsistent with the second sentence of Article 2.4.2, "as such."[87] Each of these findings is based on the Panel's flawed legal interpretation of the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement, and should be reversed for the reasons given above.

D. The Panel Erred in Finding that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Is Inconsistent with Provisions of the AD Agreement and the GATT 1994

79. The United States seeks review of the Panel's findings regarding the use of zeroing[88] in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[89] The Panel found that "the USDOC's use of zeroing when applying the [average-to-transaction] comparison methodology is 'as such' inconsistent with the second sentence of Article 2.4.2," and that "the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing when

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[84] *See US – Zeroing (Japan) (AB)*, para. 135.
[85] Panel Report, para. 7.29.
[86] Panel Report, para. 7.29.
[87] *See* Panel Report, para. 7.119.c.
[88] The Panel described zeroing in the following terms: "Zeroing in the context of establishing margins of dumping using the [average-to-transaction] comparison methodology occurs when the USDOC disregards (i.e. treats as 'zero') any negative dumping when the results from multiple comparisons between the weighted average normal value and each of the individual export transactions are aggregated." Panel Report, para. 7.172. In general, this is an accurate description of zeroing when used in connection with the alternative, average-to-transaction comparison methodology. However, the United States suggests that "negative dumping" should be read as "negative comparison results" because the AD Agreement does not contemplate the possibility of "negative dumping" and the intermediate comparison results of individual, average-to-transaction comparisons are not themselves margins of dumping. *See US – Zeroing (Japan) (AB)*, para. 115; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.
[89] *See* Panel Report, section 7.5.

applying the [average-to-transaction] comparison methodology in the *Washers* anti-dumping investigation."[90] As explained below, in making these findings, the Panel erred by failing to properly interpret the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law.

1. The Panel's Findings Are Not Based on the Text of the Second Sentence of Article 2.4.2 of the AD Agreement and Are Not Supported by Previous Appellate Body Findings

80. The Panel purported to base its findings on "the text of the second sentence of Article 2.4.2 and previous findings of the Appellate Body concerning zeroing."[91] However, the Panel engaged in virtually no analysis whatsoever of the text of the "methodology clause" of the second sentence of Article 2.4.2. Instead, the Panel based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern" and its own misreading of the Appellate Body's previous findings concerning zeroing.

81. The Panel began its discussion of zeroing by "recall[ing] the emphasis placed on pattern transactions in the second sentence of Article 2.4.2."[92] In a footnote that followed this recollection, the Panel referred to paragraph 7.25 of the panel report. Paragraph 7.25 of the panel report simply quotes from paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report. The Panel also referred to its analysis in paragraphs 7.158 to 7.160 of the panel report.[93] Paragraph 7.159 of the panel report likewise simply quotes from paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report. The Panel noted that:

> Our analysis [in paragraphs 7.158 to 7.160] explains our understanding of the possible tension that may be inferred from [four fundamental concepts identified by the Appellate Body] and the explanation by the Appellate Body, that the phrase "individual export transactions" in the second sentence of Article 2.4.2 refers to the transactions that fall within the relevant pricing pattern, a more limited universe than the export transactions covered when applying the symmetrical comparison methodologies foreseen in the first sentence of Article 2.4.2.[94]

One citation is omitted from the passage quoted above. That citation, which follows "explanation by the Appellate Body," is to paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report.[95]

82. Following the above introductory remarks, the Panel asserted that:

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[90] Panel Report, para. 7.192.
[91] Panel Report, para. 7.187.
[92] Panel Report, para. 7.187.
[93] *See* Panel Report, para. 7.188.
[94] Panel Report, para. 7.188 (citations omitted).
[95] *See* Panel Report, para. 7.188, footnote 344. The Panel also observed that "a similar statement was made by the Appellate Body in footnote 166 of its report on *US – Softwood Lumber V (Article 21.5)*."

> In the context of the second sentence of Article 2.4.2, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer, the investigating authority is entitled to have particular regard, and therefore limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form "a pattern of export prices which differ significantly among different purchasers, regions or time periods". This explains the Appellate Body's reference to the "emphasis" of the second sentence of Article 2.4.2 being on pattern transactions. Consequently, and in order to fulfil the object and purpose of the second sentence of Article 2.4.2, the [average-to-transaction] comparison methodology allows the investigating authority to zoom in on the evidence of dumping in respect of pattern transactions, and ensure that such evidence is fully reflected in the margin of dumping, rather than being masked through the use of one of the symmetrical comparison methodologies provided for in the first sentence.[96]

83. Thus, in the Panel's view, the second sentence of Article 2.4.2 of the AD Agreement allows an investigating authority "to have particular regard, and therefore limit its analysis to" or "zoom in on the evidence of dumping in respect of pattern transactions."[97] The Panel elaborated on this methodology earlier in the panel report, explaining that:

> while the net amount of dumping may be established from considering the evidence of dumping in pattern transactions (in its entirety, as explained above), the calculation of the margin as a percentage of the exports of that exporter or foreign producer must reflect the price of its total exports. It follows that, while the numerator may be established from the evidence of dumping in pattern transactions, the denominator of the equation has to reflect the value of total exports of the individual exporter or foreign producer concerned.[98]

84. The Panel's description of its understanding of how the alternative, average-to-transaction comparison methodology operates is, on its face, not based on an examination of the relevant text of the second sentence of Article 2.4.2 of the AD Agreement. The relevant text of the second sentence is the "methodology clause," which provides simply that "[a] normal value established on a weighted average basis may be compared to prices of individual transactions" under certain, specified conditions. Rather than being based on the text of the "methodology clause," the Panel's understanding of the operation of that clause derives from and is dependent on its earlier interpretation of the relevant "pattern" and its related conclusion that the scope of application of the alternative, average-to-transaction comparison methodology is limited to "pattern" transactions and not "non-pattern" transactions. As we have established, those findings by the Panel are erroneous.[99] Accordingly, the Panel's findings related to the operation of the alternative, average-to-transaction comparison methodology, which are based on those earlier flawed findings, are themselves also erroneous.

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[96] Panel Report, para. 7.189 (emphasis added).
[97] Panel Report, para. 7.189.
[98] Panel Report, para. 7.160.
[99] *See supra*, sections II.B and II.C.

85. The Panel's understanding of the operation of the alternative, average-to-transaction comparison methodology, as well as its understanding of the relevant "pattern" and the scope of application of the alternative methodology, appears to be based not on the terms of the second sentence of Article 2.4.2 read in their context, but instead on the Panel's reading and extrapolation of paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report. As we have explained, however, in *US – Zeroing (Japan)*, the Appellate Body was not considering an actual application of the alternative, average-to-transaction comparison methodology in that dispute, and the Appellate Body "emphasize[d] … that [its] analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."[100]

86. After describing its understanding of the operation of the alternative, average-to-transaction comparison methodology in general, the Panel turned to the specific question of the use of zeroing. The Panel's interpretative analysis related to zeroing, like its analysis with respect to other issues, is divorced from the customary rules of interpretation.

87. The Panel suggested that:

> Since the second sentence involves particular emphasis on the exporter's pricing behaviour in respect of pattern transactions, the entirety of the evidence of dumping in respect of that pattern must be taken into account. The focus of the [average-to-transaction] comparison methodology is on the prices of the "individual" export transactions within the pattern. The word "individual" suggests to us that each pattern transaction should be considered in its own right, and with equal weight, irrespective of whether the export price is above or below normal value. There is no basis to conclude that the export prices in certain individual transactions (e.g. those below normal value) should be accorded greater significance than the export prices in other individual export transactions (e.g. those above normal value). There is certainly nothing in the text of the second sentence to suggest that the investigating authority is entitled to disregard evidence pertaining to pattern transactions where the export price is above normal value. On the contrary, the phrase "individual export transactions" in the first part of the second sentence suggests to us that each and every pattern transaction should be fully taken into account in the assessment of the exporter's pricing behaviour in respect of that pattern.[101]

88. The passage above makes clear that the purported textual basis for the Panel's prohibition on zeroing is the presence in the second sentence of Article 2.4.2 of the word "individual." We recall that elsewhere in the panel report, the Panel considered that the word "individual" also delineates the scope of application of the alternative, average-to-transaction comparison

[100] *US – Zeroing (Japan) (AB)*, para. 136. As discussed below in section II.D.2.d, an additional concern about the Panel's reliance on paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report is that paragraph 135 contains an error. Paragraph 135 misquotes the second sentence of Article 2.4.2 of the AD Agreement, and it is unclear whether the Appellate Body's reasoning that follows the misquotation follows *from* the misquotation, and is thus itself also erroneous. *See infra*, section II.D.2.d.

[101] Panel Report, para. 7.190 (emphasis added).

methodology.[102] Specifically, in the context of its consideration of the scope of application of the alternative methodology, the Panel found that "the term 'individual' in the first part of the second sentence indicates that the [average-to-transaction] comparison will not involve all export transactions. Rather, the [average-to-transaction] comparison will only involve certain export transactions identified individually."[103] Yet, in considering whether zeroing is permissible, the Panel found that "the phrase 'individual export transactions' in the first part of the second sentence suggests to us that each and every pattern transaction should be fully taken into account."[104] In the Panel's view, then, 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. The Panel's 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.

89. As discussed above in section II.C, the most apt dictionary definition and the ordinary meaning of the word "individual" is "single; separate."[105] The use of the word "individual" to modify the term "export transactions" in the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement indicates that an asymmetrical comparison of single, separate export transactions to a normal value established on a weighted average basis is permitted under certain, specified conditions. That is in contrast to the symmetrical comparisons that are to be undertaken "normally" under the first sentence.[106] The Panel's conclusion that the term "individual" is pregnant with meaning such that it simultaneously reduces and expands the transactions that are to be included in the alternative, average-to-transaction comparison methodology is not supported by the ordinary meaning of the term "individual," read in its context.

90. The Panel's discussion of the word "individual" constitutes the entirety of the Panel's textual analysis of the second sentence of Article 2.4.2 of the AD Agreement. The Panel engaged in no contextual analysis at all. As it did elsewhere, the Panel mistakenly referred to and relied upon the "object and purpose" of the second sentence of Article 2.4.2 as support for its conclusion, contrary to Article 31 of the Vienna Convention. In sum, when considering the question of the permissibility of the use of zeroing in connection with the alternative, average-to-transaction comparison methodology, the Panel utterly failed to engage in an interpretive analysis of the second sentence of Article 2.4.2 that conforms to the customary rules of interpretation of public international law.

91. The Panel's narrow focus on one paragraph of the *US – Zeroing (Japan)* Appellate Body report, coupled with its cursory consideration of one textual element of the second sentence of Article 2.4.2, suggests that the Panel may have mistakenly believed that the Appellate Body has previously decided the question of the permissibility of the use of zeroing in connection with the alternative, average-to-transaction comparison methodology, when the conditions set forth in the

[102] *See* Panel Report, para. 7.22.
[103] Panel Report, para. 7.22.
[104] Panel Report, para. 7.190.
[105] *See* Definition of "individual" from Oxford English Dictionary Online, definition 1, http://www.oxforddictionaries.com/us/definition/american_english/individual.
[106] AD Agreement, Article 2.4.2, first sentence.

second sentence of Article 2.4.2 are met. However, it is clear from reading prior Appellate Body reports discussing zeroing that the Appellate Body has not done so. The Appellate Body has found zeroing impermissible in the context of the average-to-average[107] and transaction-to-transaction[108] comparison methodologies, which are to be used "normally" under the first sentence of Article 2.4.2. The Appellate Body also has 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.[109]

92. The Appellate Body has 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 has not even confronted that situation in any prior dispute. As the Appellate Body emphasized in *US – Stainless Steel (Mexico)*:

> The Appellate Body has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2. Nor is it an issue before us in this appeal. As in *US – Zeroing (Japan)*, our analysis here of the second sentence of Article 2.4.2 is therefore confined to addressing the contextual arguments of the Panel based on that provision.[110]

Likewise, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body confirmed that:

> 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.[111]

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 Panel, as it is for the Appellate Body.

93. That being said, even though the Appellate Body has not previously made a finding with respect to the permissibility of zeroing under the average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2, the United States recognizes that a number of Appellate Body and panels reports include findings that bear on the interpretive questions in this dispute. Appellate Body reports addressing zeroing in other contexts, as well as the interpretation and general applicability of certain terms of the AD Agreement, are of particular relevance. For

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[107] *See, e.g., US – Softwood Lumber V (AB)*, para. 117; *US – Zeroing (EC) (AB)*, para. 222.
[108] *See, e.g., US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 116; *US – Zeroing (Japan) (AB)*, para. 138.
[109] *See, e.g., US – Zeroing (EC) (AB)*, para. 135; *US – Zeroing (Japan) (AB)*, para. 166.
[110] *See US – Stainless Steel (Mexico) (AB)*, para. 127.
[111] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.

example, in *US – Stainless Steel (Mexico)*, the Appellate Body provided the following summary of its findings relating to the legal interpretation of certain terms in the AD Agreement:

> [I]t is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*.[112]

The Appellate Body also has found that, when examining situations involving multiple transaction-specific comparisons, "the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'."[113]

94. The United States emphasizes that it is not arguing here that the results of transaction-specific comparisons are themselves "margins of dumping" when the average-to-transaction comparison methodology is applied pursuant to the second sentence of Article 2.4.2.[114] Rather, as the Appellate Body has found:

> [W]hen an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."[115]

The United States does not ask the Appellate Body to depart from this finding. We do ask the Appellate Body, though, to extend the cautious approach it exercised in making prior findings and in drawing interpretive conclusions from the text and context of the AD Agreement as it now considers the proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

95. As explained below, 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. It also accords

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[112] *US – Stainless Steel (Mexico) (AB)*, para. 94 (italics in original).
[113] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87 (citations omitted).
[114] Of course, accepting that a transaction-specific comparison is not itself a "margin of dumping" does not mean that a particular transaction cannot constitute evidence of "dumping." Indeed, the Appellate Body has explained that unmasking such "dumping" is the very purpose of the alternative comparison methodology in the second sentence of Article 2.4.2 of the AD Agreement. *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[115] *US – Zeroing (Japan) (AB)*, para. 115; *see also US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes.

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

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

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

Read in the context of Article 2.4.2 as a whole, it is evident that the average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 is, like the two comparison methodologies provided in the first sentence of Article 2.4.2, a means by which "the existence of margins of dumping . . . [may] be established."[116]

97. While it is worded somewhat differently, the Panel agreed that there is no "textual basis" to conclude that the meaning of the term "[a] normal value established on a weighted average basis" in the second sentence of Article 2.4.2 should differ from the meaning of the term "a weighted average normal value" in the first sentence of Article 2.4.2.[117] When read together with Article 2.1 of the AD Agreement, the term "normal value" can be understood to mean "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country,"[118] that is, the price of the like product in the home market (in this dispute, the price of large residential washers in Korea).

98. A weighted average normal value is calculated based on, and incorporates multiple sales transactions in the home market, and can be distinguished from a normal value based on an individual sales transaction in the home market, such as would be used when making "a comparison of normal value and export prices on a transaction-to-transaction basis."[119] Because nothing in the text of Article 2.4.2 suggests that the "weighted average normal value" described in the first sentence of Article 2.4.2 is any different from the "normal value established on a weighted average basis" described in the second sentence of Article 2.4.2,[120] there is no reason

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[116] AD Agreement, Article 2.4.2, first sentence.
[117] Panel Report, para. 7.165.
[118] AD Agreement, Article 2.1; *see also* AD Agreement, Article 2.2.
[119] AD Agreement, Article 2.4.2, first sentence.
[120] *See* Panel Report, para. 7.165.

why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2. The Panel agreed with this proposition.[121]

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

100. The Appellate Body has recognized that "multiple averaging" is possible under the average-to-average comparison methodology, in which case transactions may be divided into groups, for instance, according to model or product type.[122] There is no textual basis to indicate that this is not equally true under the average-to-transaction comparison methodology. In fact, in the washers antidumping investigation, the USDOC calculated multiple weighted average normal values for different averaging groups to ensure price comparability.[123] The USDOC used the same "multiple averaging" methodology[124] to calculate normal value in its application of both the average-to-average comparison methodology and the average-to-transaction comparison methodology.

101. The term "prices of individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement appears to be synonymous with the term "export prices" in the first sentence of Article 2.4.2. Article 2.1 of the AD Agreement indicates that the term "export price" means the "price of the product exported from one country to another," and the "price of individual export transactions" appears simply to be another way of conveying the same meaning, but in a situation wherein there is more than one export transaction. Put another way, "prices of individual export transactions" and "export prices" both mean the prices of the sales transactions when the product is sold in the export market (here, the prices of large residential washers from Korea that were sold in the United States).[125]

102. The term "may be compared to" in the second sentence of Article 2.4.2 links the term "[a] normal value established on a weighted average basis" and the term "prices of individual export transactions" and indicates that it is permissible for an investigating authority to "compare[]", or

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[121] *See* Panel Report, para. 7.165.

[122] *See US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

[123] *See* Final Samsung AD Calculation Memo, at Attachment 1, p. 27 (p. 92 of the PDF version of Exhibit KOR-41 (BCI)); Final LG AD Calculation Memo, at Attachment 1, p. 36 (p. 89 of the PDF version of Exhibit KOR-42 (BCI)).

[124] *See US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

[125] While the terms "prices of individual export transactions" and "export prices" both refer to the prices of the sales transactions when the product is sold in the export market, it does not follow, as the Panel found, that the use of the term "prices of individual export transactions" means that the scope of application of the alternative, average-to-transaction comparison methodology is limited to the "export prices" included in the "pattern" identified. *See supra*, section II.C. The synonymous nature of the terms could equally support the conclusion that the alternative methodology should be applied to so-called "non-pattern" transactions because such transactions are themselves also "export prices."

"[c]onsider or estimate the similarity or dissimilarity of" those two things.[126] The reference in the second sentence of Article 2.4.2 to "prices of individual export transactions" in the plural suggests that the comparison exercise undertaken pursuant to that provision "will generally involve multiple transactions."[127]

103. At this point in the textual and contextual analysis, it appears that, when certain conditions are met, the second sentence of Article 2.4.2 permits an investigating authority to examine multiple export sale transactions in order to estimate, measure, or note the similarity or dissimilarity between the prices of those export sale transactions and the price of the like product, on average, when it is sold in the home market. The textual and contextual analysis of the second sentence of Article 2.4.2 of the AD Agreement thus far does not yet suggest an answer to the question of whether zeroing is or is not permissible when the methodology provided in the second sentence of Article 2.4.2 is applied.

104. We observe that, when the Appellate Body found prohibitions on zeroing previously, its interpretations were rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement. 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."[128] 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."[129] 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.

105. 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

106. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the

[126] Definition of "compare" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 457 (Exhibit USA-11).
[127] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.
[128] *See EC – Bed Linen (AB)*, para. 55.
[129] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

sense that Article 2.4.2 does not establish a hierarchy between the two."[130] The Appellate Body has reasoned that it would be illogical if these two symmetrical comparison methodologies were to yield "results that are systematically different."[131]

107. The Appellate Body has further observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[132] 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,"[133] 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 has also found that this exceptional methodology provides a means by which Members can "unmask targeted dumping."[134]

108. That the average-to-transaction comparison methodology is an exception to the comparison methodologies that "shall normally" be applied, and that it can be used to "unmask targeted dumping,"[135] is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law.

109. The Appellate Body has observed previously that "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness."[136] As the Appellate Body has explained:

> One of the corollaries of "the general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[137]

110. The Appellate Body has referenced this "fundamental tenet of treaty interpretation" previously when considering the meaning of Article 2.4.2 of the AD Agreement. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body posited that "[i]t could be

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[130] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[131] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[132] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.
[133] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[134] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[135] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[136] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[137] *See US – Gasoline (AB)*, p. 23.

argued . . . that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*."[138] An implication of the Appellate Body's observation in this regard is that it is possible to use zeroing "to capture pricing patterns constituting 'targeted dumping.'"[139]

111. Of course, in the same dispute, the Appellate Body found "the concerns of the Panel and the United States over the third comparison methodology (weighted average-to-transaction) being rendered *inutile* by a prohibition of zeroing under the transaction-to-transaction methodology to be overstated."[140] The Appellate Body reasoned that:

> One part of a provision setting forth a methodology is not rendered *inutile* simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision. In other words, the fact that, under the specific assumptions of the hypothetical scenario provided by the United States, the weighted average-to-transaction comparison methodology could produce results that are equivalent to those obtained from the application of the weighted average-to-weighted average methodology is insufficient to conclude that the second sentence of Article 2.4.2 is thereby rendered ineffective. It has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results. Even if that were the case, it would not be sufficient to compel a finding that zeroing is permissible under the transaction-to-transaction comparison methodology, because this methodology is not involved in the "mathematical equivalence" argument.[141]

112. The final sentence of this passage is key to distinguishing the situation in *US – Softwood Lumber V (Article 21.5 – Canada)* from the situation in this dispute. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body was rejecting the panel's concern about effectiveness in connection with a review of the panel's contextual analysis of the first sentence of Article 2.4.2 when it was examining whether zeroing is prohibited under the transaction-to-transaction comparison methodology. Earlier in the same report, the Appellate Body confirmed that "[t]he 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."[142] Since there had been no finding that zeroing was prohibited under the alternative, average-to-transaction comparison methodology, the Appellate Body

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[138] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.
[139] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100. Of course, the Appellate Body has never found that it is permissible to use zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2, when the conditions for use of that methodology have been established, just as it has never found that it is impermissible to do so, because it has never had occasion to examine that issue. *See US – Stainless Steel (Mexico) (AB)*, para. 127.
[140] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.
[141] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99 (emphasis added).
[142] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98 (emphasis added).

considered that the "hypothetical" possibility of "mathematical equivalence" did not support a finding that zeroing is permissible under the transaction-to-transaction methodology.

113. The reverse, however, would not be true. That is, in a situation, such as in this dispute, where the permissibility of the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is at issue, if it is proven that "in all cases, or at least in most of them,"[143] prohibiting zeroing under the average-to-transaction comparison methodology would lead to that methodology yielding results that are mathematically identical to the results of the average-to-average comparison methodology (and, by logical extension, they also would be systematically similar to the results of the transaction-to-transaction comparison methodology), then the concern about effectiveness would be well founded. An interpretation that led to such a result would not be consistent with the principle of effectiveness.

114. In the next subsection, the United States demonstrates that, if the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is prohibited, then that comparison methodology will, as a mathematical certainty, in every case, yield an aggregate weighted average dumping margin that is identical to the aggregate weighted average dumping margin calculated using the average-to-average comparison methodology (also without zeroing). This has been referred to in previous disputes as the mathematical equivalence argument.[144]

c. Mathematical Equivalence Demonstrated

115. If zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then both methodologies 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 are based on the same normal value and export sales data, but the mathematical operations simply are conducted in a different order. Briefly summarized, either the individual transaction data are weight averaged and then added or subtracted from each other (the average-to-average comparison methodology) or the individual transaction data are added or subtracted from each other and then weight averaged (the average-to-transaction comparison methodology). As revealed below, though, the mathematical operations can be rearranged to reveal that the results of the two calculation methodologies, without zeroing, actually are identical. We will also demonstrate that this is equally true under a "mixed" approach that combines the results of the average-to-transaction comparison methodology, applied to some transactions, and the average-to-average comparison methodology, applied to the remaining transactions.

116. To be clear, the United States does not argue that the transaction-to-transaction comparison methodology should lead to the same mathematical result as the average-to-average or average-to-transaction comparison methodologies (without zeroing). Although the Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-

[143] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99.
[144] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 96-100; *US – Zeroing (Japan) (AB)*, paras. 132-135; *US – Stainless Steel (Mexico) (AB)*, paras. 123-126.

transaction comparison methodologies, and they should not be interpreted in a way that would "lead to results that are systematically different,"[145] this does not mean that the outcomes of these two methodologies should be mathematically the *same*. The Panel agreed that there would be no mathematical equivalence if the transaction-to-transaction comparison methodology is applied to at least some transactions, but the Panel appropriately did not consider that an investigating authority "should be required to apply the [transaction-to-transaction] methodology … simply in order to avoid mathematical equivalence."[146]

117. In the sections that follow, using both hypothetical data and actual data from the washers AD proceeding, the United States demonstrates that, if zeroing is completely prohibited, the results of the average-to-average comparison methodology, the average-to-transaction comparison methodology, and a "mixed" approach combining the results of those two methodologies will be mathematically equivalent.

i. Mathematical Equivalence Demonstrated Using Hypothetical Data

118. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. The associative principle states that one can combine addition or multiplication operations in different groupings and get the same results.[147] The commutative principle states that one can perform addition or multiplication operations in different orders and get the same results.[148] The distributive principle states that one can extend, or distribute, addition and multiplication operations into different groups and get the same results.[149]

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

120. By having each sale in our hypothetical scenario involve only 1 unit, we strip away the complexity of weight averaging. We also strip away the complexity of adjustments, which are made to ensure price comparability. When these complexities are incorporated, however, for

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

[146] Panel Report, para. 7.164, footnote 303.

[147] *See, e.g.*, Definition of "associative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 133 (Exhibit USA-12) ("*Math.* Governed by or stating the condition that where three or more quantities in a given order are connected together by operators, the result is independent of any grouping of the quantities, e.g. that (a X b) X c = a X (b X c).").

[148] *See, e.g.*, Definition of "commutative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 456 (Exhibit USA-13) ("*Math.* governed by or stating the condition that the result of a binary operation is unchanged by interchange of the order of quantities, e.g. that a X b = b X a."). Subtraction, on the other hand, is not commutative: 2 - 1 is not equal to 1 - 2.

[149] *See, e.g.*, Definition of "distributive" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 709 (Exhibit USA-14) ("*Math.* Governed by or stating the condition that when an operation is performed on two or more quantities already combined by a second operation, the result is the same as when it is performed on each quantity individually and products then combined, e.g. that a X (b + c) = (a X b) + (a X c).").

example, in an actual application such as in the washers antidumping proceeding, they have no effect on mathematical equivalence because of the mathematical principles identified above and because the same basis for weight averaging is used and the same adjustments are made in both the average-to-average and average-to-transaction methodologies. As the Panel agreed, nothing in Article 2.4.2 of the AD Agreement supports the proposition that weight averaging and adjustments for price comparability should be any different in the application of the two methodologies.[150]

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

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

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

In this hypothetical scenario, we will not apply the kind of analysis that the USDOC has applied to identify a "pattern of export prices which differ significantly," but it should be readily apparent that the export price to Purchaser 5 and the export prices to the other purchasers "differ significantly."

123. In this hypothetical scenario, the weighted average normal value is 10. As explained above, nothing in the text or context of Article 2.4.2 of the AD Agreement suggests that the "weighted average normal value" used in the average-to-average comparison methodology should be any different from the "normal value established on a weighted average basis" used in the average-to-transaction comparison methodology. Thus, normal value for the purpose of both the average-to-average and average-to-transaction comparison methodologies is 10.

[150] The Panel agreed that nothing in the text of Article 2.4.2 of the AD Agreement supports the proposition that the "weighted average normal value" used in the average-to-average comparison methodology should be any different from the "normal value established on a weighted average basis" used in the average-to-transaction comparison methodology. *See* Panel Report, para. 7.165 ("If a proper application of the second sentence were to depend on it being 'appropriate' to use a different weighted average normal value under the second sentence than under the first, as suggested by Korea, we would have expected this to have been reflected in the text of the second sentence."). The Panel also agreed that, with regard to Korea's argument that an authority should "rethink the adjustments that might be necessary to ensure price comparability" when faced with a pattern of export prices which differ significantly among different purchasers, regions or time periods, "there is nothing to suggest that adjustments that would be appropriate in the context of the first sentence comparison methodologies would cease to be appropriate in the context of the second sentence methodology." Panel Report, para. 7.166.

ii. The Average-to-Average Comparison Methodology

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

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

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

$$10 - 10.2 = -0.2$$

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

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

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

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

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

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

iii. The Average-to-Transaction Comparison Methodology

128. Now, we will demonstrate the calculation of the total amount of the comparison results and the total amount of dumping using the average-to-transaction comparison methodology.[151] In

[151] In this hypothetical scenario, the average-to-transaction comparison methodology is applied to all export transactions. As discussed above, the Panel found that doing so is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. The United States appeals the Panel's findings related to the scope of application of the

the average-to-transaction comparison methodology, each individual export price is "compared to" the weighted average normal value, which is to say that each individual export price is subtracted from the weighted average normal value. Comparing each of the export prices above with the weighted average normal value on an individual, transaction-specific basis, one gets the following comparison results:

$$10 - 13 = -3$$

$$10 - 13 = -3$$

$$10 - 11 = -1$$

$$10 - 10 = 0$$

$$10 - 4 = 6$$

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

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

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

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

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

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

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

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

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

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alternative, average-to-transaction comparison methodology and, for the reasons given above, those findings should be reversed. *See supra*, section II.C.

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

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

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

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

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

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

iv. Mathematical Equivalence Still Results when There Are Multiple Models

134. It is equally true that the average-to-average and average-to-transaction comparison methodologies (both without zeroing) yield identical results even when there are multiple models that are segregated into "averaging groups." For another, only slightly more complicated hypothetical example, we will posit that the data from the hypothetical example above represents Model A in a scenario where there are two models, Model A and Model B. The only difference is that the total amount of the comparison results, and the total amount of dumping (and the weighted average dumping margin) result from an aggregation of the sales of two models. We will return to this after setting out the hypothetical data and calculations for Model B.

135. For Model B, the weighted average normal value is 15, and the export price data are as follows:

Export Price to Purchaser 1	17
Export Price to Purchaser 2	17
Export Price to Purchaser 3	14
Export Price to Purchaser 4	13
Export Price to Purchaser 5	7

136. Using the same steps laid out above for the application of the average-to-average comparison methodology, and relying on the same premise that each sale involves only one unit, we first calculate the weighted average export price:

$$\frac{17 + 17 + 14 + 13 + 7}{5} = 13.6$$

This weighted average export price of 13.6 is then subtracted from the weighted average normal value of 15 to determine the average comparison result for this model:

$$15 - 13.6 = 1.4$$

Then the difference calculated, 1.4, is multiplied by the total quantity, 5 units, to determine the amount of the comparison result for this model:

$$1.4 \times 5 = 7$$

Thus, the application of the average-to-average comparison methodology for Model B yields a comparison result of 7.

137. For the average-to-transaction comparison methodology, again, each individual export price is subtracted from the weighted average normal value:

$$15 - 17 = -2$$

$$15 - 17 = -2$$

$$15 - 14 = 1$$

$$15 - 13 = 2$$

$$15 - 7 = 8$$

If zeroing is prohibited, then the amount of comparisons yielding negative results is -4 (*i.e.*, (-2) + (-2)), and the amount of comparisons yielding positive results is 11 (*i.e.*, 1+2+8).

138. To recall, the comparison results yielded are as follows for each model and comparison methodology:

	Average-to-Average Comparison Methodology		Average-to-Transaction Comparison Methodology	
	Negative Comparison Results	Positive Comparison Results	Negative Comparison Results	Positive Comparison Results
Model A	-1	n/a	-7	6
Model B	n/a	7	-4	11

Total	-1	7	-11	17

139. The average-to-average comparison methodology yields just one comparison result for each model group, while the average-to-transaction comparison methodology may yield both negative and positive comparison results for a given model group, especially in a situation where there is a pattern of export prices which differ significantly.

140. Based on the data above, for the average-to-average comparison methodology, the total amount yielded by positive comparison results for both models is 7, the total amount yielded by negative comparison results for both models is -1, and thus the total amount of the aggregated comparison results, and the total amount of dumping for the product under investigation, is 6 (*i.e.*, 7 + (-1)).

141. Also based on the data above, for the average-to-transaction comparison methodology, the total amount yielded by positive comparison results for both models is 17 (*i.e.*, 6 + 11), the total amount yielded by negative comparison results for both models is -11 (*i.e.*, (-7) + (-4)), and thus the total amount of the aggregated comparison results, and the total amount of dumping for the product under investigation is, once again, 6 (*i.e.*, 17 + (-11)).

142. The Appellate Body will note that, in the hypothetical example with two models, the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies. This is due to the way that the positive and negative results are grouped in the different methodologies. As shown, though, even with multiple models, if zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies, then the total amounts of the comparison results calculated using those two methodologies will always be identical, or mathematically equivalent. This will hold true for any set of normal value and export sales data.

143. Like the total amount of the comparison results, the weighted average margin of dumping will also be equivalent under both methodologies because the total amount of the comparison results for each comparison methodology is divided by the same denominator (total export price multiplied by quantity) to calculate the weighted average dumping margin.[152] Nothing in Article 2.4.2 of the AD Agreement suggests that the denominator used in the average-to-average and average-to-transaction comparison methodologies should be different. Indeed, the calculation of a weighted average margin of dumping, "expressed as a percentage of the export price," is described elsewhere in the AD Agreement, in Article 5.8.

[152] The AD Agreement does not recognize the concept of "negative dumping." Accordingly, where the total, aggregated amount of comparison results is less than zero, *i.e.*, when it is a negative number, then the total, aggregated amount of comparison results is set to zero, the total amount of dumping is zero, and the weighted-average dumping margin is zero. This should not be confused with "zeroing," which Korea challenges in this dispute. Rather, this just reflects that an aggregated amount of comparison results that is negative leads to a conclusion that there is no dumping, and the margin of dumping is zero.

v. The "Mixed" Comparison Methodology

144. Finally, we will use hypothetical data to demonstrate mathematical equivalence between the average-to-average comparison methodology, the average-to-transaction comparison methodology, and a "mixed" comparison methodology (where zeroing is prohibited). Under a "mixed" comparison methodology, the average-to-transaction comparison methodology is applied to a subset of transactions and the average-to-average comparison methodology is applied to the remaining transactions. The results of the two comparison methodologies are combined to determine the total comparison result and the amount of dumping. The USDOC determines the margin of dumping using a "mixed" comparison methodology under certain circumstances when it utilizes a differential pricing analysis.[153]

145. We can demonstrate mathematical equivalence by returning to the first hypothetical scenario we presented in the preceding subsection (Model A only). Recall that, in that hypothetical scenario, the weighted average normal value is 10 and the export price data are as follows:

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

146. Also recall that the average-to-average and average-to-transaction comparison methodologies both resulted in the total amount of the comparison results being -1.

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

$$10 - 4 = 6$$

148. The result of the application of the average-to-transaction comparison methodology is a positive comparison result of 6. This, of course, is an intermediate calculation and not, by definition, a margin of dumping for the exporter and for the product under investigation.

149. Next, the remaining export sale transactions would be examined using the average-to-average comparison methodology. We will first calculate the weighted average export price for

[153] *See* Panel Report, para. 7.161. The Panel described the "mixed" comparison methodology (or "combined application of methodologies") as combining "the results of applying the [average-to-transaction] comparison methodology in respect of pattern transactions with the results of applying the [average-to-average] comparison methodology in respect of non-pattern transactions." Panel Report, para. 7.161. The United States disagrees with and appeals the Panel's findings regarding the relevant "pattern." *See supra*, section II.B. However, the Panel's understanding of the operation of a "mixed" comparison methodology wherein an average-to-transaction methodology is applied to some transactions and an average-to-average methodology is applied to the remaining transactions generally is correct.

this group. Note that, since only 4 sales of 1 unit each are included in this group now, the quantity here is 4, not 5, as before. Thus, the weighted average export price is calculated as follows:

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

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

$$10 - 11.75 = -1.75$$

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

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

or:

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

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

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

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

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

is the same as:

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

is the same as:

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

is the same as:

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

is the same as:

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

is the same as:

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

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

153. Without zeroing or an approach such as that accepted by the Panel,[154] a "mixed" comparison methodology – combining the average-to-transaction comparison methodology and the average-to-average comparison methodology – will always yield a result that is mathematically equivalent to the average-to-average comparison methodology (without zeroing), as well as the average-to-transaction comparison methodology (without zeroing), when each of those methodologies is applied to the same set of data for normal value and export sales.

vi. Mathematical Equivalence Demonstrated Using Data from the Washers Antidumping Proceeding

154. The United States hopes that the above discussion of hypothetical scenarios is helpful in illustrating the problem that necessarily would result from finding that zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies. That is, the second sentence of Article 2.4.2 of the AD Agreement would be deprived of any meaning, contrary to the principle of effectiveness, because the "exceptional"[155] comparison methodology set forth therein would always yield results that are identical, or mathematically equivalent, to one of the two comparison methodologies that must be used "normally" (average-to-average), and would thus also, as a matter of logic, always yield results that are not "systematically different"[156] from the other comparison methodology that is to be used "normally" (transaction-to-transaction). It is important to note that this problem will result no matter what values or numbers are used in the hypothetical example above.

155. The problem of mathematical equivalence, however, is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the washers antidumping proceeding, if zeroing is

[154] *See* Panel Report, para. 7.164.
[155] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.
[156] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

prohibited under both comparison methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. This was the case both in the original washers antidumping investigation and the preliminary results of the first administrative review of the washers antidumping duty order.

156. This can be seen by looking at the output of the USDOC's margin programs for both LG and Samsung, as presented in the final determination margin calculation memoranda for the two companies from the original antidumping investigation.[157] Those memoranda show that, without zeroing, the total amount of dumping would be the same under both the average-to-average comparison methodology and the average-to-transaction comparison methodology.

157. For respondent LG, the total amount of dumping using the average-to-average comparison methodology is [[***]].[158] This is calculated by combining the total amount yielded by positive comparison results, [[***]], and the total amount of negative comparison results, [[***]].[159]

158. Under the average-to-transaction comparison methodology, for LG, the USDOC calculated total positive comparison results of [[***]] and total negative comparison results of [[***]].[160] As in the hypotheticals above, the Appellate Body will note that the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies. However, when the total positive comparison results are combined with, or, in other words, are offset by, the total negative comparison results, the total amount of dumping would be [[***]], which is the same total amount of dumping calculated under the average-to-average comparison methodology.

159. The same holds true for respondent Samsung. Under the average-to-average comparison methodology, Samsung's total amount of comparison results is a negative number, [[***]], which is derived by combining the negative comparison results, [[***]], with the positive comparison results, [[***]].[161]

160. Application of the average-to-transaction comparison methodology, without zeroing, would yield the same total amount of comparison results for Samsung. If the positive comparison results under the average-to-transaction comparison methodology, [[***]], are offset by the negative comparison results, [[***]], the resulting total amount of comparison results would be

[157] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 125-126 (p. 323-324 of the PDF version of Exhibit KOR-42 (BCI)); Final Samsung AD Calculation Memo, at Attachment 2, pg. 123-124 (p. 279-280 of the PDF version of Exhibit KOR-41 (BCI)).
[158] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 126 (p. 324 of the PDF version of Exhibit KOR-42 (BCI)).
[159] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 126 (p. 324 of the PDF version of Exhibit KOR-42 (BCI)).
[160] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 125 (p. 323 of the PDF version of Exhibit KOR-42 (BCI)).
[161] *See* Final Samsung AD Calculation Memo, at Attachment 2, pg. 124 (p. 280 of the PDF version of Exhibit KOR-41 (BCI)).

[[***]], which, again, is the same total amount of comparison results calculated under the average-to-average comparison methodology.[162]

161. The same holds true for the preliminary results of the first administrative review of the washers antidumping order. Even with all of the complexities inherent in an original investigation combined with the added complexity of using monthly weighted average normal values in an administrative review and the application of a "mixed" approach in applying an alternative comparison methodology, it remains the case that the actual preliminary result in the first washers antidumping administrative review, if zeroing is prohibited under both methodologies, would be that the average-to-average and the alternative, mixed comparison methodologies would yield mathematically equivalent results.

162. This can be seen by looking at the output of the USDOC's margin program for LG, as presented in the preliminary results margin calculation memorandum for LG.[163] LG is the only respondent for which the USDOC calculated a preliminary margin of dumping in the first administrative review based on reported sales.[164] The preliminary results calculation memorandum shows that, without zeroing, the total of the comparison results, both positive and negative values with no zeroing, would be the same under both the average-to-average comparison methodology and the alternative, mixed comparison methodology that ultimately was applied in the preliminary results.

163. Specifically, the total amount of the comparison results using the average-to-average comparison methodology is [[***]].[165] This is calculated by combining the total amount yielded by positive comparison results, [[***]], and the total amount of negative comparison results, [[***]].[166] Since the total amount of the comparison results is negative, the amount of dumping and consequently the margin of dumping are both zero, as the AD Agreement does not contemplate negative margins of dumping.

164. Under the alternative, mixed comparison methodology, the USDOC calculated total positive comparison results of [[***]] and total negative comparison results of [[***]].[167] As

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[162] *See* Final Samsung AD Calculation Memo, at Attachment 2, pg. 123 (p. 279 of the PDF version of Exhibit KOR-41 (BCI)).

[163] *See* Preliminary Results Margin Calculation for LGE (dated March 2, 2015) ("Preliminary LG AD AR1 Calculation Memo") (Exhibit KOR-100 (BCI)).

[164] Samsung and Daewoo both failed to respond to the USDOC's questionnaire, and, consequently, there were no sales databases to analyze for these respondents. *See* Washers AD Administrative Review Preliminary Determination, 80 Fed. Reg. at 12,457 (p. 3 of the PDF version of Exhibit KOR-96).

[165] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 99 (p. 317 of the PDF version of Exhibit KOR-100 (BCI)).

[166] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 99 (p. 317 of the PDF version of Exhibit KOR-100 (BCI)).

[167] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 101 (p. 319 of the PDF version of Exhibit KOR-100 (BCI)). To be clear, the total positive comparison results of [[***]] represent the total positive comparison results under the average-to-average and average-to-transaction comparison methodologies, added together, *i.e.*, [[***]] in positive comparison results under the average-to-average comparison methodology and [[***]] in positive comparison results under the average-to-transaction comparison methodology, which together add up to [[***]]. Similarly, the total negative comparison results of [[***]] represent the total negative comparison results under each comparison methodology added together, *i.e.*, [[***]] under the average-to-average comparison methodology plus

explained above, the Appellate Body again will note that the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies. However, when the total positive comparison results are combined with, or, in other words, are offset by, the total negative comparison results, the total of the comparison results would be [[***]], which is the same total calculated under the average-to-average comparison methodology.

165. The application of the average-to-transaction comparison methodology to all sales (without zeroing) would also yield the same result. While the USDOC applied the mixed comparison methodology to LG in the first washers administrative review, the output of the USDOC's margin program for LG shows what the result would have been had the average-to-transaction comparison methodology been applied to all of LG's sales. If the alternative, average-to-transaction comparison methodology were applied to all of LG's sales, the total positive comparison results would be [[***]] and the total negative comparison results would be [[***]].[168] Added together, the total comparison results would be [[***]]. This is, of course, mathematically equivalent to the total comparison results if the average-to-average comparison methodology is applied to all of LG's sales and it is mathematically equivalent to the total comparison results yielded by the mixed comparison methodology.

vii. Concluding Comments on the Demonstration of Mathematical Equivalence

166. The hypothetical examples discussed above, and the actual data from the washers antidumping proceeding, conclusively establish that, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies will yield mathematically equivalent results in all cases, which would render the second sentence of Article 2.4.2 of the AD Agreement *inutile*, contrary to the principle of effectiveness.

167. Before the Panel, Korea never suggested that the United States is wrong about the mathematical calculations discussed above. Korea argued instead that mathematical equivalence could be avoided by using different weighted average normal values or by making different adjustments to ensure price comparability when using the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology.[169] The Panel agreed with the United States that nothing in Article 2.4.2 of the AD Agreement supports the proposition that weight averaging and adjustments for price comparability should be any different in the application of the average-to-average and average-to-transaction comparison methodologies.[170]

[[***]] under the average-to-transaction comparison methodology. *See id.*, Attachment 2, pg. 98 (p. 316 of the PDF version of Exhibit KOR-100 (BCI)).

[168] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 100 (p. 318 of the PDF version of Exhibit KOR-100 (BCI)).

[169] *See* Panel Report, paras. 7.165-166.

[170] *See* Panel Report, paras. 7.165-166.

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

168. The United States recognizes that the Appellate Body has considered the mathematical equivalence argument in previous disputes.[171] However, the Appellate Body has never before considered mathematical equivalence in the context of an actual application of the alternative, average-to-transaction comparison methodology in which a finding that the use of zeroing is prohibited in connection with that methodology would, in fact, result in mathematical equivalence. The factual situations of those previous disputes can be distinguished from the factual situation here, and the Appellate Body's consideration of the mathematical equivalence argument in those previous disputes neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

169. The Appellate Body first addressed the mathematical equivalence argument in *US – Softwood Lumber V (Article 21.5 – Canada)*.[172] In that dispute, the Appellate Body "disagree[d] with the Panel's analysis of the 'mathematical equivalence' argument for several reasons."[173] Some of the reasons the Appellate Body gave are distinguishable from the current situation, while others are instructive.

170. The first reason offered by the Appellate Body was that the United States had "never applied the methodology provided in the second sentence of Article 2.4.2, nor has it provided examples of how other WTO Members have applied this methodology. Thus, the United States' argument on 'mathematical equivalence' rests on an untested hypothesis."[174] As explained above, that is no longer the case. The United States applied the average-to-transaction methodology in the washers antidumping proceeding (in two different ways) and has demonstrated above that, for the final determination in washers AD investigation and the preliminary results of the first administrative review, the mathematical equivalence argument holds true, if the use of zeroing in connection with the average-to-transaction comparison methodology is prohibited.

171. The Appellate Body's second reason for disagreeing with the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* was 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."[175] 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. The Appellate Body has found that the use of zeroing is not permitted in connection with those comparison methodologies, and the United States has

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[171] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 96-100; *US – Zeroing (Japan) (AB)*, paras. 132-135; *US – Stainless Steel (Mexico) (AB)*, paras. 123-126.
[172] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 96-100.
[173] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.
[174] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.
[175] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.

brought itself into compliance with the Appellate Body's findings. 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.

172. For its third reason, the Appellate Body 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."[176] The Appellate Body is correct, of course, that the mathematical equivalence argument is premised on the assumption that zeroing is prohibited under the average-to-transaction methodology. We offer 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 Appellate Body should agree now that the use of zeroing is *not* 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.

173. 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."[177] In that dispute:

> Canada and several third participants argued before the Panel that, even assuming that zeroing were prohibited also under the weighted average-to-transaction comparison methodology, mathematical equivalence would be limited to a specific set of circumstances. Canada and these third participants offered their own hypothetical scenarios showing that the weighted average-to-transaction comparison methodology would not yield necessarily the same results as the weighted average-to-weighted average methodology, even if the prohibition to use zeroing were to extend to the former. Thailand also explains that the mathematical equivalence argument works only under very specific assumptions, one of them being that the weighted-average normal value used in both the weighted average-to-weighted average and weighted average-to-transaction comparison methodologies be the same.[178]

174. 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

[176] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[177] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[178] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99.

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."[179]

175. In both *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the Appellate Body signaled that it saw merit in the arguments of the participants and third participants described above.[180] 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."[181]

176. Those disputes, however, did not involve an actual application of the average-to-transaction comparison methodology. In the washers antidumping proceeding, 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. As explained above, the Panel agreed that nothing in Article 2.4.2 of the AD Agreement supports the proposition that "a weighted average normal value" under the first sentence should be calculated any differently than "a normal value established on a weighted average basis" in the second sentence.[182] The Panel also agreed that nothing in Article 2.4.2 supports the proposition that an investigating authority should make different "adjustments that might be necessary to ensure price comparability" under the different comparison methodologies.[183]

177. Because of the substantially different underlying factual situations in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, as contrasted with the factual situation in this dispute, this aspect of the Appellate Body's consideration of the mathematical equivalence argument in those disputes is not germane to the Appellate Body's consideration of this argument here.

178. Finally, the Appellate Body also considered the "mathematical equivalence" argument in *US – Zeroing (Japan)*.[184] There, after noting the reasons it gave in *US – Softwood Lumber V (Article 21.5 – Canada)* for rejecting the argument, the Appellate Body disagreed with an underlying assumption of the panel in that dispute.[185] The Appellate Body explained that:

> [T]he Panel's reasoning appears to assume that the universe of export transactions to which these two comparison methodologies apply is the same, and that these two methodologies differ only in that, under the [average-to-transaction] comparison methodology, a normal value is established on a weighted average

[179] *US – Stainless Steel (Mexico) (AB)*, paras. 124; *see also id.*, para. 125.
[180] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99; *US – Stainless Steel (Mexico) (AB)*, para. 126.
[181] *US – Stainless Steel (Mexico) (AB)*, para. 126.
[182] *See* Panel Report, para. 7.165.
[183] *See* Panel Report, para. 7.166.
[184] *See US – Zeroing (Japan) (AB)*, paras. 132-135.
[185] *US – Zeroing (Japan) (AB)*, para. 135.

> basis, while it is established on a transaction-specific basis under the [transaction-to-transaction] comparison methodology.[186]

The Appellate Body suggested that, in its view:

> The 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." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern.[187]

179. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the average-to-transaction comparison methodology. Furthermore, the Appellate Body "emphasize[d] … that [its] analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."[188] Thus, in reading the text of Article 2.4.2, the Appellate Body expressly was not making findings of legal interpretation that resulted from a complete analysis pursuant to the customary rules of interpretation of public international law.

180. Additionally, it is unclear what precisely the Appellate Body meant when it suggested that, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[189] The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to transactions found to have been priced significantly lower than other transactions, *i.e.*, those found to be "targeted." To do so would have been illogical because a "pattern" within the meaning of the "pattern clause" necessarily includes both lower and higher export prices that "differ significantly" from each other.

181. Finally, there is another reason for the Appellate Body to exercise caution when considering whether to draw guidance from any of the statements in paragraph 135 of the Appellate Body report in *US – Zeroing (Japan)*. That paragraph contains an error. Paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report misquotes the second sentence of Article 2.4.2 of the AD Agreement when it states that "[t]he emphasis in the second sentence of Article 2.4.2 is

[186] *US – Zeroing (Japan) (AB)*, para. 134.
[187] *US – Zeroing (Japan) (AB)*, para. 135.
[188] *US – Zeroing (Japan) (AB)*, para. 136.
[189] *US – Zeroing (Japan) (AB)*, para. 135.

on a 'pattern', namely a 'pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods[].'"[190] Where the Appellate Body report uses the term "differs," the second sentence of Article 2.4.2 uses the term "differ." The term "differs" would suggest that the "pattern" is what "differs" from something that is not the "pattern." However, the text of the second sentence of Article 2.4.2 provides that it is "export prices" that "differ" significantly from other export prices among different purchasers, regions, or time periods. A "pattern" within the meaning of the second sentence of Article 2.4.2 would thus consist of such export prices that differ significantly from each other. 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.

182. For these reasons, the Appellate Body's consideration of the mathematical equivalence argument in previous disputes neither supports rejection of the mathematical equivalence argument in this dispute, nor compels it.

e. The Panel Erred by Failing To Address the Implications of Mathematical Equivalence for Its Zeroing Findings

183. The Panel did not address the U.S. mathematical equivalence argument when it considered whether the use of zeroing is permissible in connection with the application of the alternative, average-to-transaction comparison methodology, when the conditions for the use of that alternative methodology have been established. The Panel did not explain its decision not to address the U.S. arguments.

184. Apparently, the Panel considered that it was not necessary for it to address the U.S. mathematical equivalence arguments given the Panel's understanding of other issues in dispute, namely (1) the relevant "pattern," (2) the scope of application of the alternative comparison methodology, and (3) the operation of the alternative comparison methodology. If the Panel's understanding of these issues were correct, then it would be possible for an investigating authority to apply the alternative, average-to-transaction comparison methodology only to a subset of transactions, which the Panel called the "pattern" transactions, and, even without zeroing, arrive at a mathematical result that would be different from that which would be yielded by an application of the average-to-average comparison methodology (without zeroing).

185. However, we have established above that the Panel's understanding of these issues – the relevant "pattern," the scope of application of the alternative comparison methodology, and the operation of the alternative comparison methodology – is erroneous, and does not follow from a proper application of the customary rules of interpretation of public international law. Accordingly, the Panel's decision not to address the U.S. mathematical equivalence argument in connection with its zeroing findings was erroneous.

186. The Panel was not entirely silent on mathematical equivalence, however. In considering another claim advanced by Korea related to the application of a "mixed" comparison

[190] *US – Zeroing (Japan) (AB)*, para. 135 (emphasis added).

methodology, the Panel recognized the validity of the U.S. mathematical equivalence argument and relied on mathematical equivalence as a basis for its finding.[191] In doing so, the Panel was:

> specifically addressing the mathematical equivalence that would arise when the results of applying the [average-to-average] comparison methodology to all transactions are compared to a combined application of the [average-to-transaction] comparison methodology to pattern transactions and the [average-to-average] comparison methodology to non-pattern transactions.[192]

The Panel thus expressly found that mathematical equivalence would result from a "mixed" comparison methodology if zeroing is prohibited and an investigating authority is required to offset the positive comparison results yielded by the average-to-transaction comparison methodology applied to a subset of export transactions with an overall negative comparison result yielded by the average-to-average comparison methodology applied to the remaining export transactions.

187. The fact of mathematical equivalence, and the Panel's recognition of that fact, undercuts the Panel's conception of the operation of the alternative, average-to-transaction comparison methodology. As explained above, the Panel found that the second sentence of Article 2.4.2 of the AD Agreement allows an investigating authority "to have particular regard, and therefore limit its analysis to" or "zoom in on the evidence of dumping in respect of pattern transactions."[193] The Panel explained that, in its view:

> while the net amount of dumping may be established from considering the evidence of dumping in pattern transactions (in its entirety, as explained above), the calculation of the margin as a percentage of the exports of that exporter or foreign producer must reflect the price of its total exports. It follows that, while the numerator may be established from the evidence of dumping in pattern transactions, the denominator of the equation has to reflect the value of total exports of the individual exporter or foreign producer concerned.[194]

Put another way, the Panel took the view that the application of the average-to-transaction comparison methodology to a subset of transactions alone (without zeroing) is what is contemplated by the second sentence of Article 2.4.2.

188. We have demonstrated above, however, that the application of the average-to-<u>average</u> comparison methodology <u>to any set of transactions</u> (without zeroing) is mathematically equivalent to the application of the average-to-<u>transaction</u> comparison methodology <u>to the same set of transactions</u> (without zeroing). We explained this to the Panel as well.[195]

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[191] *See* Panel Report, para. 7.164.
[192] Panel Report, para. 7.164, footnote 303.
[193] Panel Report, para. 7.189 (emphasis added).
[194] Panel Report, para. 7.160.
[195] *See* Responses of the United States to the Panel's Second Set of Questions to the Parties Related to Antidumping Issues (June 12, 2015) ("U.S. Responses to the Second Set of Panel Questions (AD Issues)"), para. 69.

189. That being the case, what the Panel found, in reality, is that the application of the average-to-average comparison methodology to a subset of transactions alone (without zeroing) is what is contemplated by the second sentence of Article 2.4.2. The Panel 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 Panel invented a new methodology for calculating a margin of dumping that is divorced from the text of the second sentence of Article 2.4.2. In doing so, the Panel 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.[196]

190. The Panel's finding related to a "mixed" comparison methodology does not excuse its failure to address mathematical equivalence, nor does it save the Panel's findings regarding zeroing. The Panel signaled that a "mixed" comparison methodology was not its preferred approach:

> One might take the view, consistent with the focus of the second sentence being on the pricing behaviour in respect of pattern transactions, that the combined application of the [average-to-transaction] and [average-to-average] (or [transaction-to-transaction]) comparison methodologies is not envisaged by that provision. However, since Korea has not advanced any claim to this effect, there is no need for us to rule on this matter. For present purposes, therefore, we will assume that the combined application of methodologies is not excluded.[197]

Assuming for the purpose of its analysis that a "mixed" comparison methodology is permissible, the Panel found that, if an investigating authority applies the average-to-transaction comparison methodology to "pattern" transactions (without zeroing), it is not required to "provid[e] offsets for negative dumping in respect of non-pattern transactions" that it examines using the average-to-average comparison methodology (without zeroing).[198]

191. The United States agrees with Panel's observation that, "[a]fter allowing an authority to unmask dumping in respect of pattern transactions, it makes no sense to require that authority to then *re-mask* such dumping."[199] However, the Panel's findings related to a "mixed" comparison methodology do not resolve the problem of mathematical equivalence and the principle of effectiveness.

192. According to the Panel, under a "mixed" comparison methodology without offsets for negative comparison results, the average-to-transaction comparison methodology is applied to "pattern" transactions (without zeroing), the average-to-average comparison methodology is applied to "non-pattern" transactions (without zeroing), and the results are combined without

[196] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[197] Panel Report, para. 7.161.
[198] *See* Panel Report, para. 7.162.
[199] Panel Report, para. 7.162 (emphasis in original).

allowing a negative overall comparison result yielded by the "non-pattern" transactions to offset a positive overall comparison result yielded by the "pattern" transactions.

193. As explained above, though, given the fact of mathematical equivalence, what the Panel actually found permissible when it accepted such a "mixed" comparison methodology without offsets for negative comparison results is the application of the average-to-average comparison methodology to "pattern" transactions (without zeroing), the separate application of the average-to-average comparison methodology to "non-pattern" transactions (without zeroing), and the combination of the results of the separate comparisons without allowing a negative overall comparison result yielded by the "non-pattern" transactions to offset a positive overall comparison result yielded by the "pattern" transactions.

194. Accordingly, the Panel still read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement entirely. The Panel's interpretation of the second sentence of Article 2.4.2 – specifically, its finding that the use of zeroing is prohibited in connection with the application of the alternative, average-to-transaction comparison methodology – is contrary to the principle of effectiveness.[200]

195. For all of the reasons given above, the Panel erred in finding that the second sentence of Article 2.4.2 of the AD Agreement prohibits the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology, when the conditions for use of the alternative methodology have been established. On the contrary, 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. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes.

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

196. We recall that the first sentence of Article 2.4.2 of the AD Agreement provides that the comparison methodology used to establish margins of dumping "shall normally" be symmetrical, *i.e.*, either the average-to-average or transaction-to-transaction comparison methodology, while the second sentence of Article 2.4.2, by its terms, permits the application of an asymmetrical comparison methodology, the average-to-transaction comparison methodology. The Appellate Body has observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[201]

[200] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[201] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.

197. 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.

198. Article 32 of the Vienna Convention has been recognized by the Appellate Body as reflecting a customary rule of interpretation of public international law.[202] Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation," including the "preparatory work of the treaty," or its negotiating history, to confirm the meaning of the text or to determine the meaning when the interpretation according to the general rule of interpretation "(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable."

199. Consistent with the interpretive arguments set forth above, the United States certainly does not consider that an interpretation according to the general rule of interpretation "leaves the meaning ambiguous or obscure," nor would it "lead[] to a result which is manifestly absurd or unreasonable." We do, however, believe that the meaning of the second sentence of Article 2.4.2, specifically that zeroing is permissible when applying the comparison methodology set forth in that provision, can be confirmed through recourse to documents from the negotiating history of the AD Agreement.

200. 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."[203] It is clear from these proposals that the *demandeurs* viewed asymmetry and zeroing as one and the same problem.

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

> Negative dumping margin (Article 2.6)
>
> In calculating the overall dumping margin of the producer under investigation, *certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis*. For transactions where normal value is higher than the export price (*i*.e., dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. *For transaction where normal value is lower than the export price (i.e., no dumping occurs), the "negative" dumping margin by which the normal value falls*

[202] *See Japan – Alcoholic Beverages II (AB)*, p. 10.
[203] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, para. 14 (December 22, 1989) (Exhibit USA-15).

> *below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin*. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.
>
> We propose that such practices should be discontinued and that the Code be amended to require comparison to be made between the weighted average normal value and the weighted average export price.[204]

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

> Price comparison in cases where sales prices vary
>
> In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.
>
> Consequently, dumping margins occur in cases where export prices vary over time (Figure 2) or where export prices vary due to different routes of sale (Figure 3), even if the average level of export prices is equal to that of domestic sales prices.[205]

Japan proposed that its concern be addressed as follows:

> (b) The Code should set out clear guidelines that ensure symmetrical comparison of "normal value" and "export price" at the same level of trade, and eliminate the possibility of asymmetrical comparison, in disregard of certain costs actually incurred, and thereby artificially creating "dumping" when none actually exist. *The Code should also be clarified, as another aspect of "symmetrical comparison", to disallow the practice of calculating "normal value" on an average basis and then to compare it to "export price" on an individual basis.*[206]

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

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[204] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, paras. 14-15 (December 22, 1989) (Exhibit USA-15) (italics added; underlining in original).
[205] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/30, p. 3 (June 20, 1988) (Exhibit USA-16) (underlining in original).
[206] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-17) (italics added; underlining in original).

> Use of weighted averages in the comparison of export price and normal value
>
> The following were among comments made:
>
> - *the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis*. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, *any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased*;
>
> - *if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted* to a particular portion of a product line or to a particular region; *sales at fair value in one region or in one portion of a product line did not offset injury caused in the other*;
>
> - given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);
>
> - *the issue at stake was masked, selective dumping, the effects of which could be considerable*;
>
> - an important question was whether non-dumped imports should also have to be included in the examination of injury.[207]

204. The Panel did not refer to the negotiating history documents referenced above when it considered the permissibility of the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology. Elsewhere in the panel report, however, the Panel found that its understanding of the "object and purpose" of the second sentence of Article 2.4.2 is confirmed by the negotiating history.[208] In the Panel's view, the "object and purpose of the second sentence of Article 2.4.2 is to enable investigating authorities to 'unmask' so-called 'targeted dumping'."[209] The Panel cited to a document from the negotiating history, "which shows that 'the issue at stake [when negotiating the second sentence of Article 2.4.2] was masked, selective dumping'."[210]

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[207] *Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989*, MTN.GNG/NG8/13, p. 10 (November 15, 1989) (Exhibit USA-18) (italics added; underlining in original).
[208] *See* Panel Report, para. 7.26. As explained above, the United States considers that the Panel's reliance on the "object and purpose" of the second sentence of Article 2.4.2, rather than on the "object and purpose" of the AD Agreement itself, is inconsistent with the customary rules of interpretation of public international law. *See* Vienna Convention, Article 31.
[209] Panel Report, para. 7.26.
[210] Panel Report, para. 7.26 (citing Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989, MTN.GNG/NG8/13 (15 November 1989), (Exhibit USA-18), p. 11).

205. It is unfortunate that the Panel acknowledged the relevance of the negotiating history of the second sentence of Article 2.4.2 of the AD Agreement but failed to recognize that that negotiating history confirms that the Panel's understanding of the operation of the alternative, average-to-transaction comparison methodology was not the understanding of the drafters of the second sentence of Article 2.4.2.

206. 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."[211] The negotiating history documents referenced above confirm that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

g. Conclusion with Respect to Zeroing and the Second Sentence of Article 2.4.2 of the AD Agreement

207. For the reasons given above, the Panel erred in finding that the second sentence of Article 2.4.2 of the AD Agreement prohibits the use of zeroing in connection with the alternative, average-to-transaction comparison methodology set forth therein when the conditions for the use of that alternative comparison methodology have been established.

208. Accordingly, the United States respectfully requests that the Appellate Body reverse the Panel's findings in paragraphs 7.192, 8.1.a.xii, and 8.1.a.xiv of the panel report that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement, and that the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement by using zeroing in the washers antidumping investigation.

3. The Panel Erred in Finding 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

209. The United States seeks review of the Panel's finding that "the use of zeroing in the context of the [average-to-transaction] comparison methodology is 'as such' inconsistent with Article 2.4" of the AD Agreement and its finding that "the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation."[212]

210. The Panel's brief evaluation of Korea's claims under Article 2.4 of the AD Agreement, which consists of a single paragraph in the panel report, begins with the Panel observing that "the Appellate Body has in a number of cases upheld Article 2.4 claims against the use of zeroing after finding that zeroing is inconsistent with the first sentence of Article 2.4.2."[213] The Panel went on

[211] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[212] Panel Report, para. 7.206.
[213] Panel Report, para. 7.206.

to state that it considers that "the use of zeroing in the context of the [average-to-transaction] comparison methodology would not lead to a fair comparison, since individual pattern transactions priced above normal value would not be properly taken into account when an investigating authority has particular regard to the exporter's pricing behaviour within that pattern."[214] In other words, the Panel found 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 because it is inconsistent with Article 2.4.2 of the AD Agreement.

211. As explained above, the Panel erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4.2 of the AD Agreement. Since the Panel's findings under Article 2.4.2 are erroneous and should be reversed, the Panel's findings under Article 2.4, which are based on those earlier flawed findings, likewise are erroneous and should be reversed.

212. 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. Korea argued before the Panel that "[t]he Appellate Body has found, based on the ordinary meaning of the term 'fair', that Article 2.4 requires investigating authorities to be 'impartial, even-handed, or unbiased' when comparing the export price and normal value."[215] The United States agrees with Korea's suggestion that the Appellate Body's reasoning "applies with equal force to all three comparison methodologies provided in Article 2.4.2."[216] It does not follow from this, 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 for its use have been established.

213. As explained above, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[217] in "exceptional"[218] 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.[219]

214. For these reasons, the United States respectfully requests that the Appellate Body reverse the Panel's findings in paragraphs 7.206, 8.1.a.xiii, and 8.1.a.xv of the panel report that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent, "as such," with Article 2.4 of the AD Agreement, and that the

[214] Panel Report, para. 7.206.
[215] Korea First Written Submission, para. 75.
[216] Korea First Written Submission, para. 75.
[217] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[218] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[219] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 138.

USDOC acted inconsistently with Article 2.4 of the AD Agreement by using zeroing in the washers antidumping investigation.

4. The Panel Erred in Finding that the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology in Administrative Reviews is Inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

215. The United States seeks review of the Panel's finding that "the use of zeroing by the USDOC when applying the [average-to-transaction] comparison methodology in administrative reviews is inconsistent 'as such' with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994."[220]

216. Like its findings under Article 2.4 of the AD Agreement, the Panel's findings under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 are based on the Panel's earlier flawed findings under Article 2.4.2 of the AD Agreement. The Panel stated this explicitly:

> In respect of Korea's "as such" claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the United States' defence is based exclusively on its argument that zeroing is not inconsistent with Article 2 of the Anti-Dumping Agreement. We have already rejected this argument in the context of our findings that the use of zeroing is inconsistent with Articles 2.4 and 2.4.2 (second sentence). Article 9.3 stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Since the use of zeroing in the context of the [average-to-transaction] comparison methodology would artificially inflate the margin of dumping, any duties collected would necessarily be excessive. Thus, bearing in mind our findings under Articles 2.4 and 2.4.2 (second sentence), taking account of the findings of the Appellate Body against the use of zeroing in administrative reviews, and in the absence of any additional argumentation by the United States, we find that the use of zeroing by the USDOC when applying the [average-to-transaction] comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[221]

217. As explained above, the Panel erred in finding 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, and those findings should be reversed. A margin of dumping determined through the application of the alternative, average-to-transaction comparison methodology (using zeroing), when the conditions for the use of that alternative methodology have been established, is a margin of dumping properly "established under Article

[220] Panel Report, para. 7.208. *See also id*., para. 8.1.a.xvi.
[221] Panel Report, para. 7.208 (citations omitted).

2."[222] Accordingly, levying an antidumping duty in the amount of such a margin of dumping would not breach Article 9.3 of the AD Agreement, nor would it breach Article VI:2 of the GATT 1994.

218. For these reasons, the United States respectfully requests that the Appellate Body reverse the Panel's findings in paragraphs 7.208, and 8.1.a.xvi of the panel report that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in administrative reviews is inconsistent, "as such," with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

E. The Panel Erred in Finding that the USDOC's Differential Pricing Analysis Is Inconsistent, "As Such," with the Second Sentence of Article 2.4.2 of the AD Agreement

219. The United States seeks review of the Panel's finding that the USDOC's differential pricing analysis "is inconsistent 'as such' with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'."[223] For the reasons given below, the Panel's finding is erroneous and should be reversed.

1. The Panel's Finding that the USDOC's Differential Pricing Analysis Is Inconsistent, "As Such," with the Second Sentence of Article 2.4.2 of the AD Agreement Is Based on the Panel's Flawed Understanding of the Relevant "Pattern"

220. Korea advanced various arguments against the USDOC's differential pricing methodology.[224] The Panel understood the "recurring theme" of Korea's criticisms to be that the differential pricing methodology "does not identify a 'pattern' for a particular purchaser, region or time period."[225] As explained above in section II.B.1, the Panel, in connection with its evaluation of Korea's claims against the differential pricing methodology and elsewhere in the panel report, set forth its reasons for concluding that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 of the AD Agreement comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions.[226] In the Panel's view, its reading of the terms of the "pattern clause" of the second sentence of Article 2.4.2 "excludes the possibility of establishing a 'pattern' *across* the three categories cumulatively."[227] The Panel further reasoned that "it follows from the definition of 'pattern'" that "prices that are too high and prices that are too low do not belong to the same pattern."[228]

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[222] AD Agreement, Article 9.3.
[223] Panel Report, para. 7.147.
[224] *See, e.g.*, Panel Report, para. 7.138.
[225] Panel Report, para. 7.139.
[226] *See, e.g.*, Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.
[227] Panel Report, para. 7.141 (emphasis in original).
[228] Panel Report, para. 7.144.

221. "With the above analysis [concerning the relevant 'pattern'] in mind," the Panel found "the United States' approach of identifying one single pattern by aggregating six different types of price variation to be inconsistent with the text of the second sentence of Article 2.4.2."[229] The Panel reasoned that the U.S. approach "effectively identifies a 'pattern' of export prices *across* different categories (purchasers, regions or time periods), rather than 'among' the constituents of each category, as we understand the second sentence of Article 2.4.2 to require."[230]

222. It is evident from the Panel's explanation that its finding was premised on its understanding of the relevant "pattern." As demonstrated above in section II.B, the Panel's understanding of the relevant "pattern" is erroneous and not consistent with a proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement pursuant to the customary rules of interpretation. Accordingly, the Panel's finding concerning the USDOC's differential pricing analysis is likewise erroneous and should be reversed.

2. The Differential Pricing Analysis Is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

223. As just demonstrated, the Panel's finding that the USDOC's differential pricing analysis is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement should be reversed because it is premised on an erroneous understanding of the relevant "pattern." Furthermore, the Panel's finding should be reversed because the USDOC's differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2, when that clause is properly interpreted in accordance with the customary rules of interpretation.

224. We demonstrate above in section II.B.2 that a proper analysis pursuant to the customary rules of interpretation reveals that the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. As explained below, the USDOC has done this when it has applied a differential pricing analysis in antidumping proceedings.

a. The Differential Pricing Analysis Explained

225. When it has applied a differential pricing analysis, the USDOC has used analytically sound methods that relied upon objective criteria and verified factual information. Specifically, the USDOC used the "Cohen's *d* test," which is "a generally recognized statistical measure of the extent of the difference in the means between a test group and a comparison group," to "evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise."[231] The USDOC also used the "ratio test" "to assess the extent of the significant price differences for all sales as

[229] Panel Report, para. 7.143.
[230] Panel Report, para. 7.143 (emphasis in original).
[231] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. 26,720, 26,722 (May 9, 2014) (Exhibit KOR-25).

measured by the Cohen's *d* test."[232] These tests and the USDOC's analysis are fully described in the USDOC's request for public comment on the differential pricing analysis,[233] and we summarize them below.

226. Under a differential pricing analysis, the USDOC does not require an allegation from the domestic industry to consider whether there exists a pattern of export prices which differ significantly among purchasers, regions, or time periods. This contrasts with the "targeted dumping" analysis (*i.e.*, the *Nails* test), which the USDOC used, for example, in the washers antidumping investigation.[234] The *Nails* test required an allegation that dumping was "targeted" to a certain purchaser or purchasers (or region(s) or time period(s)). The USDOC applies a differential pricing analysis in an antidumping proceeding as a matter of course to assess whether use of the normal, average-to-average comparison methodology is appropriate or whether the USDOC should consider use of the alternative, average-to-transaction comparison methodology.

227. As just noted, the differential pricing analysis consists of two distinct steps: the "Cohen's *d* test" and the "ratio test." The Cohen's *d* test considers whether price differences exhibited among different purchasers, regions, or time periods are significant. The ratio test evaluates the extent that these price differences are exhibited in the exporter's pricing behavior to determine whether the "pattern clause" of the second sentence of Article 2.4.2 has been satisfied.

i. The "Cohen's *d* Test"

228. The central feature of the Cohen's *d* test is the calculation of the Cohen's *d* coefficient. The Cohen's *d* coefficient is a measure of "effect size," which quantifies the importance, usefulness, or significance of the differences between two sets of observations by gauging the difference in the means of two groups based on the degree of variance in the underlying data. The measurement of effect size is completely different from and independent of the measurement of the statistical significance of the differences between two sets of observations.

229. In order to make "intermediate" comparisons of export prices among different purchasers, regions, or time periods, the USDOC defines default definitions for these three groups as well as for comparable merchandise. For example, in the preliminary results of the first administrative review of the washers antidumping order, which Korea placed on the panel record, for purchasers, the USDOC defined groups using customer code information reported by LG. Regions were defined by the destination codes reported by LG and sales were grouped into regions based on standard definitions published by the United States Census Bureau, a sub-agency of the USDOC. Time periods were defined by quarter (*i.e.*, by three month periods), starting from the beginning of the administrative review period. Comparable merchandise was defined using the CONNUM, as well as all other characteristics of the sales, other than purchaser, region, and time period. The USDOC used the CONNUM and the same characteristics when it made intermediate comparisons

[232] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. 26,720, 26,722 (May 9, 2014) (Exhibit KOR-25).
[233] *See* Differential Pricing Analysis Request for Comments, 79 Fed. Reg. 26,720, 26,722-26,723 (May 9, 2014) (Exhibit KOR-25).
[234] *See* Washers Final AD I&D Memo, pp. 19-20 (Exhibit KOR-18).

between export prices and normal values for the purpose of calculating LG's margin of dumping.[235]

230. A fundamental difference between the *Nails* test, as applied in the washers antidumping investigation, and the differential pricing analysis that was applied in the preliminary results of the first washers administrative review is that, under the differential pricing analysis, the USDOC tested *all* purchasers, regions, or time periods against other purchasers, regions, or time periods.[236] For export sales to each purchaser, region, and time period of comparable merchandise (*i.e.*, the test group), the USDOC calculated a Cohen's *d* coefficient, which quantifies the difference in the weighted-average export price to the test group with the weighted-average export price of export sales of comparable merchandise to all other purchasers, regions, or time periods (*i.e.*, the comparison group). The USDOC placed additional conditions on this intermediate comparison in that there must have been at least two export sales to both the test group and to the comparison group, and the export sales volume to the comparison group must have been at least five percent of the export sales volume to the test group.

231. To calculate the Cohen's *d* coefficient in the preliminary results of the first washers administrative review, the USDOC first calculated a weighted-average export price of the export sales to a test group, as well as a weighted-average export price of the export sales to the corresponding comparison group. Next, the USDOC also calculated the variance of the export prices within the test group and within the comparison group. From these two variances, the USDOC calculated the "pooled standard deviation" as the square root of the simple averages of these two variances. The Cohen's *d* coefficient was then calculated as the quotient of the difference between the weighted-average export prices of the test group and the comparison group, and the pooled standard deviation. This calculation is stated in the equation below.

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

232. The calculated Cohen's *d* coefficient was then examined to determine whether the difference was significant. The extent of these differences could be quantified by one of three fixed thresholds: small, medium, or large. Of these thresholds, the USDOC determined that the large threshold provided the strongest indication that there was a significant difference between the weighted-average export prices of the test group and the comparison group, while the small threshold provided the weakest indication that such a difference was meaningful.[237] For the USDOC's analysis in the preliminary results of the first washers administrative review, the difference in the weighted-average export prices was considered significant when the absolute

[235] Washers AD Administrative Review Preliminary Decision Memo, at 7-8 (pp. 6-7 of the PDF version of Exhibit KOR-96).
[236] Washers AD Administrative Review Preliminary Decision Memo, at 7 (p. 6 of the PDF version of Exhibit KOR-96).
[237] Washers AD Administrative Review Preliminary Decision Memo, at 8 (p. 7 of the PDF version of Exhibit KOR-96).

value of the Cohen's *d* coefficient was equal to or exceeded the large threshold, and the export sales within the test group were then considered to have passed the Cohen's *d* test.

233. The analysis discussed above is performed for the export sales to each purchaser, region, and time period based on the intermediate comparisons of the export prices for comparable merchandise.

ii. The "Ratio Test"

234. The second step in a differential pricing analysis is the "ratio test." The USDOC uses the ratio test to evaluate the extent that the price differences are exhibited in the exporter's pricing behavior to determine whether the "pattern" clause of the second sentence of Article 2.4.2 is satisfied.

235. For the ratio test, the results of the Cohen's *d* test are aggregated to determine the extent of the export prices which differ significantly among different purchasers, regions, or time periods.[238] In other words, the USDOC aggregates the results of the Cohen's *d* test among different purchasers, regions, or time periods found to pass that test. The USDOC does not double count export sales that pass the Cohen's *d* test for more than one category, *i.e.*, by purchaser, region, or time period. To clarify, if an export sale passes the Cohen's *d* test by purchaser and region, then the USDOC would only count it once in the aggregation of the results for the purpose of the ratio test. The USDOC aggregates the results of the Cohen's *d* test so that it may consider the exporter's pricing behavior in the United States market for the product as a whole. This is because the Cohen's *d* test results are simply different aspects of an exporter's pricing behavior. Aggregating the results allows the USDOC to more holistically review the exporter's pricing behavior in the export market. The differential pricing analysis looks for a "pattern," but does not require a "target."

236. The ratio test was applied in the preliminary results of the first washers administrative review as follows. If 33 percent or less of the total value of all export sales by LG for the product as a whole passed the Cohen's *d* test, then the USDOC would not have considered whether the application of the alternative, average-to-transaction comparison methodology was necessary. If between 33 percent and 66 percent of the total value of all export sales by LG for the product as a whole passed the Cohen's *d* test, then the USDOC would consider whether the application of the alternative, average-to-transaction comparison methodology was warranted, based on the application the average-to-transaction comparison methodology to the export sales that passed the Cohen's *d* test and the application of the average-to-average comparison methodology to the remaining export sales that did not pass the Cohen's *d* test. If 66 percent or more of the total value of all export sales by LG for the product as a whole passed the Cohen's *d* test, then the USDOC would consider whether the application of the alternative, average-to-transaction comparison methodology was warranted based on the application of that methodology to all export sales.

[238] *See* Washers AD Administrative Review Preliminary Decision Memo, at 8 (p. 7 of the PDF version of Exhibit KOR-96).

b. The Differential Pricing Analysis is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

237. When it conducts a differential pricing analysis, the USDOC undertakes a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there exists 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. Whenever it applies a differential pricing analysis, in addition to explaining its analytical approach in the final issues and decision memorandum, the USDOC addresses arguments that have been raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices which differed significantly among different purchasers, regions, or time periods. The issues and decision memoranda that Korea placed before the Panel demonstrate that the USDOC's application of the differential pricing analysis constitutes a reasoned and adequate application of the "pattern clause" of Article 2.4.2 of the AD Agreement.[239]

238. As explained above, a differential pricing analysis seeks to identify a "pattern," but does not require a "target."[240] Contrary to the Panel's view, discussed earlier, this reflects an understanding that an analysis based on allegedly "targeted" groups (*i.e.*, purchasers, regions or time periods) is just one example of how a "pattern" may be identified. 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,"[241] the United States agrees with the Panel and most of the third parties to this dispute, who have indicated their understanding that "targeted dumping" is merely a shorthand reference to the terms of the second sentence of Article 2.4.2.[242] However, the terms "targeting" and "targeted dumping" are not present in Article 2.4.2 or 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

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[239] Korea referred to four antidumping proceedings in which the USDOC issued final determinations over a four-month period from December 2013 to April 2014, and put before the Panel excerpts from the final issues and decision memoranda in those proceedings. Even with such a limited sample, the excerpts Korea offered are sufficient to show that, in applying the differential pricing analysis, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information. *See* Korea First Written Submission, para. 191; *see also Stainless Steel Plate in Coils from Belgium, Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 Fed. Reg. 79,662 (December 31, 2013), Issues and Decision Memorandum (excerpted), pp. 15-16 (Exhibit KOR-60); *Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 Fed. Reg. 79,665 (December 31, 2013), Issues and Decision Memorandum (excerpted), pp. 40-41 (Exhibit KOR-61); *Polyethylene Terephthalate Film from India, Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 Fed. Reg. 11,406 (February 28, 2014), Issues and Decision Memorandum (excerpted), pp. 5-6 (Exhibit KOR-62); *Certain Steel Nails from the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 Fed. Reg. 19,316 (April 8, 2014), Issues and Decision Memorandum (excerpted), pp. 30-31 (Exhibit KOR-63).

[240] *See* "AD Agreement and Article 2.4.2 – 'Differential Pricing'"; Presentation prepared by the U.S. Department of Commerce, p. 4 (Exhibit USA-36).

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

[242] *See* Panel Report, para. 7.26.

periods." Investigating authorities might take other approaches to analysing a "pattern" that also are consistent with the terms of the "pattern clause."

239. Under the "targeted dumping" approach that the USDOC applied in the washers antidumping investigation, the "targeting" concept focused only on lower-priced export sales. Underlying this approach was the understanding that lower-priced export sales that are below normal value may be evidence of "targeted dumping." However, Article 2.4.2 does not require this particular approach to a "pattern" analysis. Indeed, the "pattern clause" includes no reference to normal values, and does not require that evidence of dumping be considered as part of an examination pursuant to the "pattern clause."

240. In contrast to a "targeted dumping" approach, a differential pricing analysis looks 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. The conceptual framework of that analysis is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2, which calls upon the investigating authority 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.

241. Of course, either lower-priced or higher-priced export sales may be less than normal value and may constitute evidence of dumping. Similarly, either lower-priced or higher-priced export sales may also be greater than normal value and may mask the evidence of dumping exhibited by other export sales. Put succinctly, normal values and "dumping" are not necessarily relevant to the question of the existence of a pattern of export prices which differ significantly. A pattern of export prices which differ significantly does not provide evidence of dumping, nor does it indicate whether that evidence of dumping is being masked. Such a pattern only establishes that conditions exist in the export market in which "masked dumping" could occur.

242. The Panel reasoned that "prices that are too high and prices that are too low do not belong to the same pattern."[243] However, as explained above in section II.B.3, the relevant "pattern" within the meaning of the second sentence of Article 2.4.2 is "a pattern of <u>export prices which differ significantly</u> among different purchasers, regions, or time periods."[244] Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" <u>from each other</u>. 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 from each other significantly. Such an analysis is entirely consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2.

243. Under a differential pricing analysis, the results of the Cohen's *d* test are aggregated as part of the ratio test to determine the extent of the export prices which differ significantly among different purchasers, regions, or time periods. In other words, the USDOC aggregates 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 aggregates the results

[243] Panel Report, para. 7.144.
[244] AD Agreement, Article 2.4.2, second sentence (emphasis added).

of the Cohen's *d* test in this manner so that it can 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 accords with the USDOC's understanding that the Cohen's *d* test results reflect different aspects of an exporter's overall pricing behavior.[245]

244. The Panel's finding that the differential pricing analysis breaches the second sentence of Article 2.4.2 appears to focus on the issue of aggregation. The Panel concluded that "the DPM is inconsistent 'as such' with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'."[246]

245. The differential pricing analysis does not aggregate "random and unrelated price variations."[247] The results of the Cohen's *d* test by purchaser, region, or time period represent different aspects of the exporter's overall pricing behavior. Through the Cohen's *d* and ratio tests, a differential pricing analysis considers the pricing behavior of the exporter in the United States market as a whole. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories (*i.e.*, purchasers, regions, or time periods) when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

246. The Panel suggested that "the phrase 'among different purchasers, regions or time period' determines the question of how the relevant pattern must be identified."[248] The Panel's analysis focused, in particular, on the words "or" and "among."[249] With respect to the word "or," the Panel declared that:

> The use of the disjunctive "or" in this phrase is significant, as its ordinary meaning indicates that a "pattern" can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods. This excludes the possibility of establishing a "pattern" across the three categories cumulatively.[250]

247. The Panel's reading of the word "or" is exceedingly narrow. 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 Panel's conclusion appears to have been colored by its

[245] *See* Responses of the United States to the Panel's First Set of Questions to the Parties (March 31, 2015) ("U.S. Responses to the Panel's First Set of Questions"), paras. 61-67.
[246] Panel Report, para. 7.147.
[247] Panel Report, para. 7.147.
[248] Panel Report, para. 7.141.
[249] *See* Panel Report, paras. 7.141-142.
[250] Panel Report, para. 7.141.

misunderstanding of the relevant "pattern" as being limited to low-priced sales to a "target." This is suggested by the Panel's statement that it found support for its approach:

> in the Appellate Body's previous clarification that there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods". The Appellate Body did not identify any other types of "targeted" dumping.[251]

We have demonstrated above that the Panel's understanding of the relevant "pattern" as being limited to a particular "target" (*i.e.*, purchaser, region, or time period) is erroneous.

248. The Panel's understanding of the implications of the word "among" also appears to have been colored by its misunderstanding of the relevant "pattern." The Panel noted that a dictionary definition of "among" indicates that the term "is 'used when you are mentioning a particular person or thing *in relation to the rest of the group they belong to*'."[252] The Panel reasoned that:

> a "pattern" of significant price differences "among" different purchasers must be found in the price variation within a group of purchasers, as between one or more particular purchasers in relation to all other purchasers of the same group. The same is true for a "pattern" of significant price differences "among" different regions or time periods.[253]

249. We recall that the differential pricing analysis involves 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 to each time period with export prices to the other time periods. This is logical and consistent with the Panel's understanding of the meaning of the word "among."

250. The differential pricing analysis also seeks 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 are 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. The term "among" is only used one time in the second sentence 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 Panel'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 purchases, *among* different regions or *among* different time periods." That is not how the "pattern clause" is written.

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[251] Panel Report, para. 7.141.
[252] Panel Report, para. 7.142 (quoting McMillanDictionary.com) (emphasis added by Panel).
[253] Panel Report, para. 7.142.

251. 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 that a dumping margin must be exporter-specific and determined for the product as a whole.[254] That is what the differential pricing analysis seeks to accomplish.

252. For the reasons given above, the United States respectfully requests that the Appellate Body reverse the Panel's findings in paragraphs 7.147, and 8.1.a.ix of the panel report that the USDOC's differential pricing analysis is inconsistent, "as such" with the second sentence of Article 2.4.2 of the AD Agreement.

III. CONCLUSION

253. For the foregoing reasons, the United States respectfully requests that the Appellate Body:

a. find that the Panel erred in its interpretation of the second sentence of Article 2.4.2 of the AD Agreement[255] when it found that the relevant "pattern" for the purpose of that provision comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions;

b. modify the Panel's legal findings relating to the relevant "pattern"[256] and find that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 is 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;

c. reverse the Panel's finding in paragraph 7.29 of the panel report that "the [average-to-transaction] comparison methodology should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'";

d. reverse the Panel's finding in paragraphs 7.29 and 8.1.a.i of the panel report that, by applying the average-to-transaction comparison methodology to all transactions in the washers antidumping investigation, the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement;

e. reverse the Panel's finding in paragraphs 7.119.c and 8.1.a.vi of the panel report that the USDOC's differential pricing analysis, because it applies the average-to-transaction comparison methodology to all transactions under certain

[254] *See, e.g., US – Softwood Lumber V (AB)*, paras. 97-102; *US – Zeroing (EC) (AB)*, para. 132.
[255] *See, e.g.*, Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.
[256] *See, e.g.*, Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.

circumstances, is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement;

f. reverse the Panel's findings in paragraphs 7.192, 8.1.a.xii, and 8.1.a.xiv of the panel report that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement, and that the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement by using zeroing in the washers antidumping investigation;

g. reverse the Panel's findings in paragraphs 7.206, 8.1.a.xiii, and 8.1.a.xv of the panel report that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent, "as such," with Article 2.4 of the AD Agreement, and that the USDOC acted inconsistently with Article 2.4 of the AD Agreement by using zeroing in the washers antidumping investigation;

h. reverse the Panel's findings in paragraphs 7.208, and 8.1.a.xvi of the panel report that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in administrative reviews is inconsistent, "as such," with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994;

i. reverse the Panel's findings in paragraphs 7.147, and 8.1.a.ix of the panel report that the USDOC's differential pricing analysis is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement.