WORLD TRADE ORGANIZATION

WT/DS264/AB/R
11 August 2004

(04-3385)

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Shrimp (Article 21.5– Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, 13 April 2004
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Abitibi	Abitibi-Consolidated Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
COGS	Cost of Goods Sold
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
IDM	USDOC's

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Final Dumping Determination on Softwood Lumber from Canada

United States, *Appellant/Appellee*
Canada, *Appellant/Appellee*

European Communities, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*

AB-2004-2

Present:

Ganesan, Presiding Member
Baptista, Member
Janow, Member

I. Introduction

1. The United States and Canada appeal certain issues of law and legal interpretations in the Panel Report *United States – Final Dumping Determination on Softwood Lumber from Canada* (the "Panel Report").[1] The Panel was established to consider a complaint by Canada concerning anti-dumping duties imposed by the United States on imports of certain softwood lumber products ("softwood lumber") from Canada. Before the Panel, Canada challenged a number of aspects of the Final Determination by the United States Department of Commerce ("USDOC") that led to the imposition of anti-dumping duties.

2. On 23 April 2001, USDOC initiated an anti-dumping investigation of imports of softwood lumber from Canada.[2] Due to the large number of exporters of TD /F00a.75 Tf 0.3753 April5ping

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subsequently amended on 22 May 2002.[4] This order imposed anti-dumping duties on imports of softwood lumber from Canada, ranging from 2.18 per cent to 12.44 per cent.[5] The final anti-dumping order contained a number of product exclusions.[6] The factual aspects of this dispute are set out in greater

5. The Panel further concluded that the United States had *not* acted inconsistently with:

(i) Article 5.2 of the [*Anti-Dumping*] *Agreement* in determining that the application contained such information as is required by Article 5.2;

(ii) Article 5.3 of the [*Anti-Dumping*] *Agreement* by determining that there was sufficient evidence of dumping to justify the initiation of the investigation;

(iii) Article 5.8 of the [*Anti-Dumping*] *Agreement* by not rejecting the application prior to initiation of the investigation, or by not terminating the investigation, due to the alleged insufficiency of the evidence on dumping;

(iv) Article 2.6 of the [*Anti-Dumping*] *Agreement* by determining there to be only a single like product and product under consideration;

(v) Article 2.4 of the [*Anti-Dumping*] *Agreement* by not granting an adjustment for differences in physical characteristics (differences in dimensions), as requested by some respondents;

(vi) Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the [*Anti-Dumping*] *Agreement* in its calculation of the amounts for financial expense for softwood lumber in the case of Abitibi;

(vii) Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the [*Anti-Dumping*] *Agreement* in its calculation of the amounts for general and administrative costs for softwood lumber in the case of Tembec;

(viii) Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the [*Anti-Dumping*] *Agreement* in its calculation of the amounts for general and administrative costs for softwood lumber in the case of Weyerhaeuser;

(ix) Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 of the [*Anti-Dumping*] *Agreement* in its calculation of the amounts for by-product revenue from the sale of wood chips as offsets for Tembec and West Fraser;

(x) Article 2.4 of the [*Anti-Dumping*] *Agreement* by not granting Slocan an adjustment for the net revenue earned on its trading of softwood lumber futures contracts, or Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the *Anti-Dumping Agreement* by not taking this net revenue into

(xi) Articles 1 and 18.1 of the [*Anti-Dumping*] *Agr.5325 1sment25 0 1TD /F3 11.25 T*

11. First, according to the United States, Article 2.4.2 provides no guidance as to how results of multiple comparisons are to be aggregated in order to calculate an overall margin of dumping for the product under consideration. The United States submits that, in fact, "Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all."[22]

12. The United States contends that the Panel "acknowledged

14 Article 2.4.2 imposes an ob sults of other comparisons is ons are permissible. A re s would deprive the term "c ority "to compare non- co fset requirement would be "e y, be incorporated into a sin

15 is not supported by the co t average-to-average and tra th respect to aggregation, th ge-to-average comparison m s no textual equivalent for th no rational basis for an in of margins (in particular, of e methodologies."[34] The U rity chose to avoid this ar

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17. With respect to the relevance of the Appellate Body Report in *EC – Bed Linen*, the United States refers to the Appellate Body Report in *Japan – Alcoholic Beverages II*, in which the Appellate Body found that dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[38] The United States submits that, similarly, the findings of the Appellate Body in *EC – Bed Linen* "do[] not govern the present appeal."[39] The United States explains that it was not a party to that case and observes that the United States' practice of zeroing was not at issue in that appeal. In addition, the United States points out that in the *EC – Bed Linen* dispute, the Appellate Body was not asked to, and therefore did not, address a number of

B. *Arguments of Canada – Appellee*

19. Canada requests the Appellate Body to uphold the Panel's finding that the United States' practice of zeroing as applied in this case was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

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20. Canada emphasizes that the Appellate Body addressed the same issue in *EC – Bed Linen* and found that zeroing non-dumped transactions in a calculation to determine the existence and amount of dumping for the product under investigation as a whole is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*dumpi TD /F364ng.3e5- *0*

not only the magnitude of a dumping margin, but also a finding of the very existence of dumping'."[49] According to Canada, "[i]gnoring certain transactions that demonstrate an absence of dumping cannot be considered fair, for it serves to *prejudge* the outcome of the required analysis of whether dumping exists for the product under consideration as a whole."[50] Thus, Canada does not agree with the United States that "'fairness' refers to 'in accordance with the rules or standards' [set out in Article 2.4]."[51] Instead, "fair", as used in Article 2.4, has a broader meaning. According to Canada, "[t]here can be no fair comparison when an investigating authority does not actually average all model-specific values, but instead disregards those values calculated in respect of non-dumped models."[52]

22. Canada agrees with the Panel that there was no need to rely upon negotiating history to interpret Article 2.4.2 because of "the clear meaning of the language of Article 2.4.2."[53] Moreover, the "historical circumstances", to which the United States refers, establish nothing more than that zeroing was an issue during the Uruguay Round negotiations.

23. Canada further asserts that the Panel correctly restricted its analysis to the weighted-average normal value to weighted-average export price methodology, because that is the only methodology at issue in this dispute. In any event, "[e]ven if it were appropriate to consider the permissibility of zeroing in transaction-to-transaction comparisons, the transaction-to-transaction analysis does not support the U.S. interpretation of Article 2.4.2."[54] According to Canada, "the transaction-to-transaction methodology requires that each transaction-specific comparison of an export price and a normal value be included in the calculation of the overall margin."[55] If it did not, an investigating authority could "select arbitrarily" the comparisons it uses to calculate the overall margin of dumping and thus "vitiate" the results of the transaction-to-transaction methodology.[56]

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[49]Canada specific comparison of an export price and a 2dded)

24. Finally, Canada submits that the example provided by the United States seeking to demonstrate that "averaging of multiple comparisons will always be equivalent to 'comparing a single average normal value to a single average export price'"[57] is "wrong" "as a mathematical matter".[58]

C. *Claims of Error by Canada – Appellant*

1. Allocation of Financial Expenses for Abitibi

25. With respect to the allocation of financial expenses for Abitibi, Canada argues, first, that the Panel erred in finding that the requirement in Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs" does not require an investigating authority to assess the advantages and disadvantages of alternative proposed cost allocation methodologies. Canada submits that the Panel's interpretation implies that the investigating authority's obligation can be met by simply "receiving evidence", as opposed to undertaking "meaningful consideration of that evidence."[59]

26. In Canada's view, a "proper" allocation of costs within the meaning of Article 2.2.1.1 demands a case-by-case examination, using the appropriate methodology, on the basis of "all available evidence". USDOC made no factual findings as to the advantages or disadvantages of either of the methodologies that it was required to "consider". In the absence of any such fact-finding, explanation, or reasoning, the Panel, according to Canada, had no basis on which to conclude that USDOC had met the requirements of Article 2.2.1.1.

27. Secondly, Canada submits that the Panel erred in finding that Article 2.2.1.1 does not require an investigating authority to consider evidence on the allocation of a specific cost where that allocation has not been historically utilized by the producer or exporter. Canada maintains that Article 2.2.1.1 does not impose a strict requirement that all types of cost allocation evidence provided by the producer or exporter must have been historically utilized. In Canada'""by

28. Canada reads Article 2.2.1.1 as containing an "express preference"[62] for the use of allocation methodologies used by producers, to the extent that these methodologies have been historically utilized. Canada argues that the phrase "in particular in relation to", in the second sentence of Article 2.2.1.1, identifies the cost allocations to which the historic utilization requirement applies; the phrase furthermore narrows the scope of the evidence that an investigating authority may refuse to regard as "controlling"[63] on the ground that the exporter or producer did not historically utilize this allocation methodology. Furthermore, in Canada's view, the historic utilization requirement does not apply in the present case because the evidence at issue "relates to the allocation of a general expense for which there has been no historic utilization".[64]

29. Thirdly, Canada takes issue with the Panel's conclusion that an unbiased and objective investigating authority could have allocated Abitibi's financial expenses on the basis of USDOC's methodology. This conclusion, according to Canada, is based on an incomplete evaluation of the evidence, as the Panel did not evaluate USDOC's factual determinations concerning the advantages and disadvantages of the different cost allocation methodologies.[65] Rather, the Panel reached this conclusion as a result of its finding that no evaluation of the merits of alternative cost allocation methodologies was required, as well as on its own finding that both USDOC's and Abitibi's methodologies had shortcomings. In Canada's view, the Panel's interpretation of the phrase "consider all available evidence"—such that no comparison of methodologies is required—is too narrow, and the shortcomings of the two methodologies identified by the Panel were not identified in USDOC's final determination. Canada therefore requests the Appellate Body to declare the relevant conclusion of the Panel to be "without effect"[66] and to "direct the United States to weigh the advantages and disadvantages of these methodologies in order to reach a 'proper' determination on an accurate allocation of financial costs".[67]

30. Canada also requests that the Appellate Body reverse the Panel's conclusion that the United States had not acted inconsistently with Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*. In Canada's view, given the legal errors of the Panel with respect to Article 2.2.1.1, the Panel's

[62]Canada's other appellant's submission, para. 48.

[63]*Ibid*., para. 46.

[64]*Ibid*., para. 49.

[65]In response to questioning at the oral hearing, Canada clarified that the Panel could not evaluate USDOC's determinations properly

findings in relation to Canada's claims of "consequential violations"[68] of Articles 2.2, 2.2.1, and 2.4 are also incorrect.

2. Calculation of By-Product Revenue for Tembec

31. With respect to the calculation of the by-product revenue for Tembec, Canada argues that the Panel erred in finding that

different methodologies. Canada argues that, in *US – Hot-Rolled Steel*, the Appellate Body found that the fact that certain sales were more highly priced than others did not permit the use of a different test by USDOC. Canada claims that, despite differences in their respective corporate structure, Tembec and West Fraser, another respondent in the underlying investigation, were similarly situated, in that they both had the ability to determine pricing in wood chips transactions between related parties. The fact that USDOC, in the instance of West Fraser, measured cost of production by subtracting there from the value of all by-product revenue (market value), while, in the case of Tembec, USDOC subtracted the "surrogate cost"[74], or internal transfer value, of the by-product, demonstrates that USDOC failed to exercise its discretion in an even-handed fashion.

35. Canada is of the view that USDOC's treatment "penalizes corporations that consume their own by-products rather than selling them to a wholly-owned affiliate for consumption in the same manner."[75] The fact that USDOC may value interdivisional sales of input products in the same manner in which it treated Tembec's offset sales has, in Canada's view, "no bearing"[76] on whether USDOC's treatment of Tembec was even-handed when compared to other similarly-situated respondents. Canada argues that USDOC has consistently applied the so-called arm's length test for the valuation of by-products. Canada points out that USDOC applied this test to Tembec at the preliminary stage in the anti-dumping proceedings, but subsequently found that its "normal" practice for valuing by-product offsets was to accept "low book values within a single corporation."[77] In Canada's view, USDOC's departure from its normal practice in this case demonstrates USDOC's failure to provide even-handed treatment.

36. Finally, Canada submits that, because the Panel erred in finding that the United States did not act inconsistently with Article 2.2.1.1, the Panel also erred in failing to address Canada's claims of consequential violations of Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*.

37. In addition to its arguments concerning the Panel's findings, Canada requests the Appellate Body "to recommend that the DSB request that the United States bring its measures into conformity with its WTO obligations, including by revising the anti-dumping order and returning cash deposits

[74]Canada's other appellant's submission, para. 67 (referring to Panel Report, para. 7.318 which in turn quotes United States' response to Question 42 posed by the Panel, para. 98; Panel Report, pp. A-103 and 104).

[75]*Ibid*., para. 68.

[76]*Ibid*., para. 70.

[77]*Ibid*., para. 74. (footnote omitted)

imposed as a result of the investigation, the Final Determination and the anti-dumping order concerning certain softwood lumber from Canada."[78]

D. *Arguments of the United States – Appellee*

1. Allocation of Financial Expenses for Abitibi

38. The United States requests the Appellate Body to uphold the Panel's finding on the issue of allocation of financial expenses for Abitibi.

39. At the outset, the United States argues that Canada, in its arguments, "distorts"[79] the Panel's legal findings and conclusions. Contrary to Canada's claim, the Panel did not reduce the obligation to "consider all available evidence" to an "extremely low threshold level", nor did the Panel find that this obligation could be satisfied by "merely accepting evidence".[80] Equally, contrary to Canada's arguments, USDOC did not use USDOC's cost of goods sold ("COGS") methodology simply because that methodology was "consistent and predictable".[81] Instead, the Panel found that USDOC's observation about the consistency and predictability of the COGS methodology was unrelated to USDOC's reasons for rejecting Abitibi's proposed alternative methodology. Finally, in the United States' view, Canada'

weight". The United States submits, as a preliminary matter, that this is a new argument that Canada did not present to the Panel; the United States contends that the Appellate Body should decline to examine an argument presented for the first time on appeal and relies, for this purpose, on the Appellate Body's findings in *US – FSC*.[84]

41. On the substance of Canada's argument, the United States submits that Article 2.2.1.1 contains no reference to the weight to be given to any particular piece of evidence. The United States also disagrees with Canada's proposition that the use of the word "including" confirms that the clause beginning with this word only defines particular evidence to be given particular weight, and does not define evidence that may be excluded from consideration. Instead, as the Panel found, the word in the clause at issue that limits the consideration of due evidence submitted by a producer is the word "provided". Moreover, according to the United States, as Abitibi's proposed allocation had not been "historically utilized" by Abitibi, USDOC was not "obligated"[85] to consider this alternative allocation methodology.

42. The United States also submits that Canada's "controlling weight" argument rests on a "strained and illogical reading"[86] of the clause that begins with the words "in particular". The United States disagrees with Canada's reading of this clause as narrowing the scope of the evidence that an

made available by Abitibi[89]; the United States relies on the findings of the panel in *US – Softwood Lumber VI*, concerning the meaning of the word "to consider", as support for its argument.[90]

44. In the United States' view, because Canada's argument with respect to Article 2.2.1.1 is without merit, Canada's dependent argument that the Panel erred in finding that an unbiased and objective investigating authority could have used the allocation used by USDOC must also be rejected.

2. Calculation of By-Product Revenue for Tembec

45. The United States requests that the Appellate Body reject Canada's appeal concerning the Panel's finding on the by-product revenue offset calculation for Tembec.

46. First, the United States argues that the question raised by Canada—whether USDOC's by-product offset calculation was objective and even-handed—is a factual matter falling outside the scope of appellate review. The United States quotes the Appellate Body Reports in *EC – Hormones* and *Argentina – Footwear (EC)* as support for its proposition. Although the United States does not dispute the general proposition that an investigating authority must make its determination in an objective and even-handed manner, the United States submits that this obligation is not grounded in the text of Article 2.2.1.1. As a consequence, Canada's argument should not be construed as raising a question about the consistency or inconsistency of a given fact or set of facts with the requirements of Article 2.2.1.1. Instead, in the United States' view, the question raised by Canada is a factual question of how the Panel assessed USDOC's actions and, therefore, pursuant to Article 17.6 of the DSU, a question not subject to appellate review.

47. Secondly, the United States submits that, even if the Appellate Body were to consider the merits of Canada's arguments, the Appellate Body should nevertheless dismiss Canada's appeal. The United States notes that the Panel made the contested finding only assuming, *arguendo*, that Article 2.2.1.1 does impose an obligation posited by Canada regarding rejection of a producer's records in particular circumstances, and that Canada did not appeal that Panel finding. The United States also argues that Canada's argument on even-handedness is "internally inconsistent"[91], because

[89]In response to questioning at the oral hearing, the United States submitted that Canada's understanding of the term "consider" relates to the investigating authority's weighing of the evidence, which, according to the United States, is a factual question and not a question of law or legal interpretation that is within the scope of appellate review.

[90]United States' appellee's submission, para. 46 (referring to Panel Report, *US – Softwood Lumber VI*, para. 7.67).

[91]*Ibid.*, para. 70.

Canada argued, before the Panel, that the approach used by USDOC for West Fraser should have been used for Tembec, and the approach used for Tembec should have been used for West Fraser.

48. The United States further submits that Canada's argument that the Panel erred in finding USDOC's by-product valuation to be objective and even-handed is based on the "flawed premise"[92] that Tembec and West Fraser were similarly situated and that, therefore, USDOC should have valued each company's by-product offset using the same methodology. According to the United States, Canada offers no support for the proposition that West Fraser and Tembec were similarly situated. In the United States' view, the different corporate structures of T

51. In the event that the Appellate Body were to reverse, in the light of Canada's other appellant's submission, any aspect of the Panel Report, the United States requests the Appellate Body to decline Canada's request for specific recommendations. The United States submits that Canada's request for an Appellate Body recommendation that the United States amend the final anti-dumping duty order, reduce the anti-dumping duties, and return cash deposits would "go beyond anything relevant to implementing a recommendation and ... seeks action nowhere called for under the WTO Agreement."[95]

E. *Arguments of the Third Participants*

1. European Communities

52. The European Communities asserts that the zeroing methodology as used by the United States in this case "differs in no meaningful way"[96] from the methodology previously employed by the European Communities and found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in *EC – Bed Linen*.

53. The European Communities asserts that the United States misinterprets the term "comparable transactions" in Article 2.4.2. According to the European Communities, "comparable transactions" within the meaning of Article 2.4.2 "assumes that the transactions used to compute the margin of dumping have been made 'comparable' in an intermediary step by cleansing them from any other factors than dumping that might have influenced the prices."[97]

54. The European Communities agrees with the United States, Canada, and the Panel that multiple averaging is permitted under Article 2.4.2 but submits that "[t]he key flaw in the US argument is the assumption that it is not possible to aggregate the results of the model by model comparisons, because the different models are not 'comparable' between themselves."[98] According to the European Communities, "[t]his is false because the multiple averaging methodology is precisely the means to render transactions involving sub-products with different characteristics comparable."[99] Multiple comparisons are "nothing but intermediary steps leading to the calculation of an overall margin for all transactions for the whole product."[100] Once multiple averaging has been applied, all transactions are considered to be "comparable" within the meaning of Article 2.4.2 of the *Anti-*

[95]United States' appellee's submission, para. 80.

[96]European Communities' third participant's submission, para. 4.

[97]*Ibid*., para. 29.

[98]*Ibid*., para. 32 (referring to the United States' appellant's submission, para. 22).

[99]*Ibid*., para. 33.

[100]*Ibid*.

Dumping Agreement. According to the European Communities, "[t]he US argument that ... different models are not 'comparable' is tantamount to saying that dumping is a factor affecting price comparability that requires an adjustment, the adjustment being zeroing."[101] However, "[a]n adjustment for 'non-dumping', is not permitted by the *Anti-Dumping Agreement* and [would be] contrary to the text and purpose of Article 2.4 and 2.4.2."[102]

55. The European Communities points out that it is clear from the text of Article 2.4.2 that the calculation of the weighted average export price for the product as a whole must include *all* comparable export transactions. Article 2.4.2 of the *Anti-Dumping Agreement* "is, therefore, not 'silent' on the obligation to aggregate or a requirement to offset negative margins of dumping."[103] The European Communities asserts that this obligation flows "from the obligation to make a *fair* comparison on the basis of *all* comparable export transactions."[104]

56. The European Communities also argues that the term "margins of dumping" in Article 2.4.2 "relates to the entire subject product."[105] Moreover, according to the European Communities, Article 2.4.2, "and particularly the word 'margin', requires a simple and *complete* comparison between normal value and export price, being one that does not prejudge how the two elements to be compared are juxtaposed".[106] In addition, the European Communities submits that "investigating authorities applying 'zeroing' necessarily act inconsistently with Articles 3.1, 3.2 and 3.5 [of the] *Anti-Dumping Agreement*, because they examine the impact of non-dumped imports on domestic producers, when they are only entitled to examine the impact of dumped imports."[107]

57. With respect to Article 2.4, the European Communities asserts that Article 2.4 creates an "overarching and independent obligation"[108] to make a "fair comparison" between normal value and export price. Relying on the "ordinary meaning" of the word "fair", the European Communities asserts that the obligation to make a fair comparison "must involve a balanced comparison ... that is, a symmetrical comparison absent the specific conditions provided in Article 2.4.2, second sentence."[109] According to the European Communities, by using "a model zeroing method without any

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[101]European Communities' third participant's submission, para. 34.

[102]*Ibid*. (footnote omitted)

[103]*Ibid*., para. 36.

[104]*Ibid*. (original emphasis)

[105]*Ibid*., para. 46.

[106]*Ibid*., para. 50. (original emphasis; underlining added)

[107]*Ibid*., para. 53.

[108]*Ibid*., para. 63.

[109]*Ibid*., para. 65.

justification"[110], the United States acted inconsistently with its obligation to make a "fair comparison" under Article 2.4 of the *Anti-Dumping Agreement*.

2. Japan

58. Japan requests that the Appellate Body reject the arguments raised by the United States on appeal and find that USDOC acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by applying the practice of zeroing to determine the existence of "margins of dumping" in this case.

59. Japan submits that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* clarify that the determination of dumping must be made on the basis of the product under consideration as a whole and "not on a transaction-specific or model-specific basis."[111] Japan adds that those provisions, read together with Article 6.10 of the *Anti-Dumping Agreement*, require that the "determination of dumping must be based on an overall dumping margin for all export sales by an exporter/producer."[112] Thus, there is an "abundant textual basis" in the *Anti-Dumping Agreement* to conclude that "the overall margin of dumping must be the aggregate of both negative and positive margins, and that zeroing is prohibited in establishing the margin of dumping."[113]

60. Japan moreover disagrees with the United States' interpretation of the word "comparable" as used in Article 2.4.2. According to Japan, that word confirms that the investigating authority is under an obligation to make due allowance for differences which affect price comparability and to make a fair comparison between normal value and export prices pursuant to Article 2.4. Having defined the scope of the product under consideration, investigating authorities must then determine the existence of dumping and injury with respect to that same product. Japan further refers to the Appellate Body Report in *EC – Bed Linen* and asserts that "[v]arious models of the 'product' are, by definition, comparable".[114] Accordingly, Japan disagrees with the United States that certain product types "must be treated differently from other types"[115] of the same product. For these reasons, the United States' interpretation of the word "comparable", which contradicts other provisions of the *Anti-Dumping Agreement*, should be rejected.

61. Japan submits moreover that zeroing is also prohibited by virtue of the requirement in Article 2.4 to conduct a "fair comparison" between the export price and the normal value of the

[110]European Communities' third participant's submission, para. 65.

[111]Japan's third participant's submission, para. 6.

[112]*Ibid*., para. 21.

[113]*Ibid*.

[114]*Ibid*., para. 26.

[115]*Ibid*.

product under investigation. This is so because, "[b]y artificially decreasing prices of certain export sales, the zeroing method inflates, and in some cases, creates, a positive margin of dumping."[116] In this regard, Japan refers to the Appellate Body Report in *US – Corrosion Resistant Steel Sunset Review*, in which the Appellate Body found that "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[117]

III. Issues Raised in this Appeal

62. The issues raised in this appeal are:

(a) whether the Panel erred in finding, in paragraphs 7.224 and 8.1(a)(i) of the Panel Report, that the United States acted inconsistently with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing";

(b) whether the Panel erred in finding, in paragraphs 7.238–7.245 and 8.1(b)(vi) of the Panel Report, that the United States did not act inconsistently with Articles 2.2, 2.2.1, 2.2.1.1, and 2.4 of the *Anti-Dumping Agreement* in its calculation of the amount for financial expenses for softwood lumber in the case of Abitibi; and

(c) whether the Panel erred in finding, in paragraphs 7.319–7.326 and 8.1(b)(ix) of the Panel Report, that the United States did not act inconsistently with Articles 2.2, 2.2.1, 2.2.1.1, and 2.4 of the *Anti-Dumping Agreement* in its calculation of the amount for by-product revenue from the sale of wood chips in the case of Tembec.

[116]Japan's third participant's submission, para. 12.

[117]*Ibid*., para. 13 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135).

IV.

"dumping margin" for that comparison. USDOC aggregated the results of those sub-group comparisons in which the weighted average normal value exceeded the weighted average export price—those where the USDOC considered there was a "dumping margin"—after multiplying the difference per unit by the volume of export transactions in that sub-group. The results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price were treated as zero for purposes of this aggregation, because there was, according to USDOC, no "dumping margin" for those sub-groups. Finally, USDOC divided the result of this aggregation by the value of all export transactions of the product under investigation (*including the value of export transactions in the sub-groups that were not included in the aggregation*). In this way, USDOC obtained an "overall margin of dumping", for each exporter or producer, for the product under investigation (that is, softwood lumber from Canada).[120]

65. Thus, as we understand it, by zeroing, the investigating authority treats as zero the difference between the weighted average normal value and the weighted average export price in the case of those sub-groups where the weighted average normal value is less than the weighted average export price. Zeroing occurs only at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product under investigation as a whole.

66. We now turn to the interpretations and findings of the Panel regarding the consistency of zeroing with Article 2.4.2 of the *Anti-Dumping Agreement.*

B. *The Panel's Findings*

67. The Panel[121] found that zeroing as applied in this case is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, which provides:

[120]For a description of the methodology at issue in this dispute, see United States' response to Question 109 posed by the Panel, paras. 52–56; Panel Report, pp. B-49 and B-50. Zeroing as applied by USDOC is also described in paragraph 7.185 of the Panel Report.

[121]One member of the Panel dissented with respect to the finding of the Panel that zeroing is not permitted under Article 2.4.2.

Article 2

Determination of Dumping

...

> 2.4.2 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.

68. The methodology followed by USDOC in this case involved "multiple averaging", by which we mean the practice of investigating authorities of sub-dividing the product under investigation into sub-groups of comparable transactions and determining a weighted average normal value and a weighted average export price for the transactions in each sub-group.[122] The Panel stated that "in practice, the issue of zeroing arises in the context of the weighted average-to-weighted average methodology only where the investigating authority engages in so-called 'multiple averaging'."[123]

69. The Panel's approach was to consider first whether multiple averaging is permissible under Article 2.4.2, and, if so, whether zeroing as applied in this case is permissible. In considering whether multiple averaging is permissible under Article 2.4.2, the Panel examined the text of that provision and concluded that "[i]f the drafters [of the *Anti-Dumping Agreement*] had intended to require that the existence of a dumping margin for a product always be calculated by comparing a single weighted average normal value and a single weighted average of prices of *all* export transactions"[124], the word "comparable" would not have been included in Article 2.4.2, as it "would serve no purpose in the text."[125] The Panel observed that "[t]he word 'comparable', in its ordinary meaning, indicates that a weighted average normal value is not to be compared to a weighted average export price that includes

[122]For the sake of clarity, we point out that "multiple averaging" occurs at the level of sub-groups prior to the stage of aggregation, whereas zeroing, as noted above, occurs at the stage of aggregation.

[123]Panel Report, para. 7.200. See also *infra*, footnote 142.

[124]*Ibid*., para. 7.203. (emphasis added)

[125]*Ibid*.

non-comparable export transactions".[126] The Panel went on to find that the term "all comparable export transactions" in Article 2.4.2 would "appear to signify that Members may only compare those export transactions which are comparable, but that it [sic] must compare *all* such transactions."[127]

70. The Panel then turned to Article 2.4 of the *Anti-Dumping Agreement*, which provides in relevant part:

> *Article 2*
>
> *Determination of Dumping*
>
> ...
>
> 2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance shall be made in each case, on its merits, for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (footnote omitted; emphasis added)

71. The Panel noted that one way to ensure "price comparability" between transactions is to make "due allowance[s]" pursuant to Article 2.4. The Panel emphasized, however, that it was "not convinced that this method ... is the exclusive means allowed by the [*Anti-Dumping*] *Agreement* to ensure comparability."[128] The Panel explained that:

> [w]hile some differences, such as differences in taxation, may be easy to quantify and adjust for, adjustments for differences in physical characteristics may be complex and highly uncertain, depending upon the number and extent of the differences in physical characteristics, and the extent to which those reflect differences in costs of production. .... It is therefore not surprising that many investigating authorities – and respondent exporters – prefer to limit to the extent possible the need for such adjustments by performing their comparisons on the basis of groups of transactions sharing common characteristics.[129]

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[126]Panel Report, para. 7.203.

[127]*Ibid*., para. 7.204. (original emphasis)

[128]*Ibid*., para. 7.207.

[129]*Ibid*.

C. *Interpretation of Article 2.4.2*

1. Introduction

76. Article 2.4.2 of the *Anti-Dumping Agreement*[136] permits the use of three methodologies, applicable during the investigation phase, for establishing the existence of "margins of dumping". The first two methodologies are set out in the first sentence of Article 2.4.2, which provides that the existence of "margins of dumping" during an 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." The third methodology is set out in the second sentence of Article 2.4.2, which provides that, under the specified circumstances, the existence of "margins of dumping" may be determined by comparing a weighted average normal value with prices of individual export transactions.

77. As stated above[137], this appeal is concerned with USDOC's use of zeroing in establishing the existence of "margins of dumping" using the first methodology specified under the first sentence of Article 2.4.2—"a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions". On this issue, the participants disagree as to the proper interpretation of the terms "margins of dumping" and "all comparable export transactions".

78. The United States asserts that, after having correctly found that "multiple averaging" is permitted under Article 2.4.2, the Panel erred in proceeding further and finding that the United States acted inconsistently with Article 2.4.2 "in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing'."[138] The United States argues that the term "margins of dumping" in Article 2.4.2 does not refer to margins of dumping for the product under investigation as a whole, but instead refers to "the results of comparing averages 'for each category of product/transaction compared'."[139] More specifically, "margins of dumping", according to the United States, is used in Article 2.4.2 to refer to the results of multiple comparisons "in which the normal value exceeds the export price".[140] Finally, the United States posits that Article 2.4.2 "does not address the issue of aggregating the results of multiple comparisons."[141]

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[136]This provision is set out in para. 67 of this Report.

[137]See *supra*, para. 63.

[138]United States' appellant's submission, para. 73 (quoting Panel Report, para. 8.1(a)(i)).

[139]*Ibid*., para. 37 (quoting Panel Report, para. 7.210).

[140]*Ibid*., para. 22.

[141]*Ibid*., para. 28.

relevant in this appeal. Indeed, there are a number of relevant findings to which we refer to below. However, the Appellate Body did not rule on multiple averaging in that case and therefore it is incorrect to argue, as the United States does, that "[t]he agreement of both parties to this dispute and a unanimous Panel that Article 2.4.2 permits multiple comparisons is a fundamental departure from the premise"[144] of the Appellate Body Report in

requirement to include results of "non-dumped" comparisons at the aggregation stage would amount to giving offsets unjustifiably to "dumped" amounts from "non-dumped" amounts.

89. In contrast, Canada, the European Communities, India, and Japan are of the view that the terms "dumping" and "dumping margins" in the *Anti-Dumping Agreement* apply to the product under investigation *as a whole*, and that, therefore, the results of multiple comparisons must be aggregated in their entirety to establish the existence of margins of dumping for the product *as a whole*. In their view, the *Anti-Dumping Agreement* does not permit a determination of "dumping" at the level of a product type or model. Moreover, according to Canada and the European Communities, treating comparisons at the sub-group level as "dumped" or "non-dumped" is inconsistent with Article 2.4.2 and amounts to "prejudging"

(emphasis added) This definition is reiterated in Article 2.1 of the *Anti-Dumping Agreement,* which provides that:

> *Article 2*
>
> *Determination of Dumping*
>
> 2.1 For the purpose of this Agreement, a *product* is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the *product* exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like *product* when destined for consumption in the exporting country. (emphasis added)

93. It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that .5867 372 0 TD -0.1353 T toe of

95. Having examined the definition of "dumping", we now turn to examine the term "margin of dumping" as defined in Article VI:2 of the GATT 1994, second sentence, which provides that:

> ... the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the GATT 1994]. (footnote omitted)

96. The Appellate Body

99. Our view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, e product

in which the weighted average normal value is less than the weighted average export price.[161] Zeroing thus inflates the margin of dumping for the product as a whole.

102. We understand the United States to argue that a prohibition of zeroing would amount to a requirement to compare "dumped" and "non-dumped" transactions at the aggregation stage. The United States contends that results of multiple comparisons in which the weighted average normal value exceeds the weighted average export price may be excluded because they do not involve "dumping". As we have stated earlier, the terms "dumping" and "margins of dumping" in Article VI of the GATT 199

6. Relevance of Appellate Body Report in *EC – Bed Linen*

109. With regard to the relevance to this appeal is 553.5 0 late Body

the third participants. In doing so, we have taken into account the reasoning and findings contained in the Appellate Body Report in *EC – Bed Linen*, as appropriate.[175]

7. Article 17.6(ii) of the *Anti-Dumping Agreement*

113. The United States claims that, in finding that "zeroing" is prohibited under Article 2.4.2, the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*, which provides, in relevant part, that:

> ... the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

114. The United States also claims that "the Panel *acknowledged* that the term 'margins of dumping' in Article 2.4.2 may be in the plural 'precisely because multiple averaging produces a dumping margin for each category of product/transaction compared ... '."[176] Thus, according to the United States, the Panel "effectively acknowledged that it was *permissible* to interpret Article 2.4.2 as addressing only the manner in which comparisons between export price and normal value are to be made."[177] The United States submits that if the Panel had applied the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*, it would have ended its analysis of Article 2.4.2. with that acknowledgment.

115. We do not agree with the United States. Our reading of the Panel Report does not indicate to us that the Panel *acknowledged* that margins of dumping can be established for sub-groups. Rather, the Panel emphasized that "[*a*]*lthough it could be argued* that this phrase is in the plural precisely because multiple averaging produces a dumping margin for each category of product/transaction compared, it could just as well be the case that it is in the plural because in many cases there will be multiple exporters or producers."[178] In our view, "cuT04j 69.75 0 las76 -0.09 compared, it coulthe pluaf -0.167812

single investigation may involve establishing margins of dumping for a number of exporters or producers[179], and may relate to more than one country.[180]

116. The United States also claims that its interpretation of Article 2.4.2 is "permissible", *inter alia*, on the ground that "margins of dumping" within the meaning of Article 2.4.2 can be established for product types. In our view, the *Anti-Dumping Agreement*, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), does not permit establishing margins of dumping for product types when the product as a whole is under investigation. The United States' interpretation of Article 2.4.2 is, therefore, *not* a "permissible interpretation" of that provision within the meaning of Article 17.6(ii).[181] Hence, we see no error on the part of the Panel with respect to the Panel's obligations under Article 17.6(ii) of the *Anti-Dumping Agreement*.

8. Conclusion

117. In the light of the foregoing, we uphold the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing".[182]

V. Allocation of Financial Expenses for Abitibi

A. *Introduction*

1. Factual Background

118. Before we begin our analysis, we review the background information that is relevant to the issue raised by Canada on appeal.

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[179]In this regard, we observe that Article 6.10 of the *Anti-Dumping Agreement* requires that the investigating authorities "shall, as a rule, determine an individual margin of dumping *for each known exporter or producer* concerned of the product under investigation." (emphasis added)

[180]See Article 3.3 of the *Anti-Dumping Agreement*.

[181]We note that the Panel referred in footnote 343 to para. 7.196 of the Panel Report to the IDM's references to Sections 771(35)(A) and 771(35)(B) of the United States' Tariff Act. Our task in this appeal is confined to clarifying certain provisions of the WTO *Anti-Dumping Agreement* as applied by USDOC in the anti-dumping investigation at issue.

[182]Panel Report, paras. 7.224 and 8.1(a)(i).

121. USDOC nevertheless applied its own methodology and, in doing so, stated:

> [USDOC] disagree[s] with Abitibi that [it] should depart from its established practice of calculating the financial expense ratio based on the financial expenses and cost of goods sold from the parent company's audited consolidated financial statements (i.e., based on the concept that money is fungible). Because there is no bright-line definition in the Act of what a financial expense is or how the financial expense rate should be calculated, [USDOC] has developed a consistent and predictable practice for calculating and allocating financial expenses. This method is to calculate the rate as the percentage of net interest expense over cost of sales, based on the consolidated financial statements of the respondent's parent company. Further, the record of this investigation does not support the conclusion that [USDOC]'s methodology distorts the allocation of Abitibi's financial expenses. Setting aside Abitibi's assumptions that the debt of the company only relates to assets belonging to the pulp and paper activities, [USDOC]'s method addresses Abitibi's concern that those activities are more capital intensive. Specifically, those activities would have a higher depreciation expense on their equipment and assets. Thus, when the consolidated financial expense rate is applied to the cost of manufacturing of lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense. In view of the above factors, [USDOC has] used the verified cost of goods sold including depreciation submitted as part of Abitibi's revised financial expense ratio calculation to allocate the company's net financial expenses.[189]

2. Canada's Appeal

122. On appeal, Canada raises three issues: *first*, Canada refers to the finding of the Panel that the phrase "consider all available evidence on the proper allocation of costs", in the second sentence of Article 2.2.1.1, "does not require that investigating authorities compare various allocation methodologies to assess their advantages and disadvantages but to 'consider' all available evidence on the proper allocation of costs."[190] Canada argues that this finding of the Panel equates the requirement to "consider" to a "mere requirement for an investigating authority to take notice of evidence presented to it".[191] *Secondly*, Canada reads Article 2.2.1.1 as containing an "express preference" for the use of allocation methodologies used by the producers, in so far as they have been historically utilized[192]; however, Canada would not agree that investigating authorities are *never* required to

[189]Panel Report, para. 7.

consider available evidence provided by a producer that has not been "historically utilized".[193] Canada relies for this position on the phrase "in particular in relation to", which follows the "historically utilized" phrase, arguing that it "narrows the scope of the evidence that an investigating authority may refuse to regard as 'controlling'."[194] *Thirdly*, with respect to Article 2.2.2 of the *Anti-Dumping Agreement*, Canada appeals the Panel's finding that an unbiased and objective investigating authority could have allocated Abitibi's financial expenses on the basis of USDOC's methodology. Canada requests that the Appellate Body declare this conclusion of the Panel to be "without effect"[195] and "direct the United States to weigh the advantages and disadvantages of these methodologies in order to reach a 'proper' determination on an accurate allocation of financial costs".[196]

123. The United States requests the Appellate Body to uphold the Panel's findings concerning the allocation of financial expenses for Abitibi. According to the United States, Canada's appeal is based in part on a mischaracterization of the Panel's findings; for instance, the Panel did not, according to the United States, find that the obligation to "consider" could be satisfied by "merely accepting evidence". The United States further submits that the phrase in the second sentence of Article 2.2.1.1—"including that which is made available by the exporter or producer"—*limits* the requirement to consider evidence submitted by a producer to circumstances where a proposed allocation has been historically utilized. As for the phrase beginning with "in particular in relation to", in the second sentence of Article 2.2.1.1, the United States contends that it relates to the first part of the second sentence of Article 2.2.1.1, and not to the phrase beginning with "including". Consequently, the phrase beginning with "in particular in relation to" does not modify the requirement with respect to using historically utilized allocations. The United States furthermore argues that USDOC was not obligated to make factual findings as to the advantages or disadvantages of either of the methodologies that it considered. According to the United States, it is evident from USDOC's determination that USDOC gave attention to and took into account the evidence presented by Abitibi. In the United States' view, the Panel therefore correctly found that USDOC had "considered" Abitibi's proposed cost allocation methodology within the meaning of Article 2.2.1.1.

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124. We will address these issues in turn.

B. *Analysis*

125. Before we begin our analysis, it is useful to set out the full text of the first and second sentence of Article 2.2.1.1.

126. Article 2.2.1.1, first sentence, stipulates that:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

Article 2.2.1.1, second sentence provides:

> Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.

1. "Consider All Available Evidence on the Proper Allocation of Costs" in Article 2.2.1.1

127. Canada argues that the Panel erred in finding that the second sentence of Article 2.2.1.1 "does not require that investigating authorities compare various allocation methodologies to assess their advantages and disadvantages but to 'consider' all available evidence on the proper allocation of costs."[197]

[197]Canada's other appellant's submission, para. 24 (quoting Panel Report, para. 7.238).

128. The Panel found, in this respect, as follows:

> Finally, Canada argues that DOC could not have complied with its obligations under Article 2.2.1.1 without assessing the advantages and disadvantages of the methodology used by DOC and asset-based allocation methodologies in light of the evidence submitted by Abitibi. In our discussion of Article 2.2.1.1 in paragraphs 7.236-7.237 *supra*, we have set out our understanding with respect to the obligations imposed by that provision. In our view, Article 2.2.1.1, when stating that "[a]uthorities shall consider all available evidence on the proper allocation of costs", does not require that investigating authorities compare various allocation methodologies to assess their advantages and disadvantages but to "consider" all available evidence on the proper allocation of costs. We find that DOC met the requirement set forth in Article 2.2.1.1.[198]

129. We observe, as a preliminary matter, that we disagree with Canada's claim that the Panel reduced the requirement to "consider all available evidence" to a mere procedural requirement that can be fulfilled, to use Canada's language, by simply "receiving evidence"[199] or "tak[ing] notice of evidence".[200] We do not see anything in the Panel report that would suggest that the Panel intended to interpret the phrase "consider all available evidence" in the manner identified by Canada.

130. Nevertheless, our reading of the Panel Report on this question shows that the Panel gave scant attention to the interpretation of the word "consider" when dealing with Canada's specific argument that USDOC "could not have complied with its obligations under Article 2.2.1.1 without assessing the advantages and disadvantages of the methodology used by

alia, to "look at attentively", "reflect on", or to "weigh the merits of ".[208] In the context of the second sentence of Article 2.2.1.1, we read the term "consider" to mean that an investigating authority is required, when addressing the question of proper allocation of costs for a producer or exporter, to "reflect on" and to "weigh the merits of" "all available evidence on the proper allocation of costs". As we stated above, the requirement to "consider" evidence would not be satisfied by simply "receiving evidence" or merely "tak[ing] notice of evidence".[209] [209]

case, should have "compared" its own and Abitibi's methodologies and, assuming USDOC was under such an obligation, whether USDOC in fact complied with it.

141. At the oral hearing, Canada clarified that it was

2.2.1, and 2.4 as "dependent"[218] on a violation of Article 2.2.1.1; indeed, Canada itself describes these claims of violations as "consequential".[219] Canada submits that "given the legal errors made by the Panel in respect of Article 2.2.1.1, the Panel's determinations with respect to Article 2.2, 2.2.1 and 2.4 are also incorrect."[220]

144. As we have reversed the Panel's findings under Article 2.2.1.1, we must, as a consequence, reverse the Panel's findings that rest upon a finding of a violation of Article 2.2.1.1. We therefore reverse the Panel's findings pursuant to Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*.

145. We note that Canada requests us not only to reverse the Panel's findings under Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*, but also to find that the United States acted inconsistently with these provisions. At the oral hearing, Canada confirmed that it wished us to complete the Panel's legal analysis to this effect. However, there is no finding by us of a violation of Article 2.2.1.1—which violation would constitute the premise for a violation of Articles 2.2, 2.2.1, and 2.4—and, therefore, there is no basis for us to determine as a consequence whether the United States has acted inconsistently with Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*.

VI. Calculation of By-Product Revenue for Tembec

A. *Introduction*

1. Background

146. Before we begin our analysis, we review the background information that is relevant to the issue raised by Canada on appeal.

147. As explained by the Panel, wood chips are one of the by-products of the process of sawing logs into softwood lumber.[221] These wood chips are subsequently sold by sawmills, for example, to pulp mills to produce paper. In calculating the cost of production of softwood lumber for Tembec and West Fraser, two companies under investigation, USDOC treated the revenue generated by those companies' "sales"[222] of wood chips as income and subtracted from the cost of production of softwood lumber the amount of that income. The issue raised by Canada before the Panel concerned the de

West Fraser.[223]

sale of the product under consideration". Canada argued that Article 2.2.1.1 obliges an investigating authority to *reject* such records.

152. The Panel disagreed with Canada's contention that Article 2.2.1.1 *requires* that an investigating authority *reject* the records of an exporter or producer, where calculation of costs for the product under investigation would be overstated or understated if the investigating authority were to use those records as a basis for its cost calculations. The Panel therefore rejected Canada's claim.[229] The Panel proceeded, however, with its analysis, in addressing other arguments made by Canada, *on the assumption* that Article 2.2.1.1 imposes on an investigating authority the obligation posited by Canada, that is, to reject an exporter's record when the records do not "reasonably reflect the costs associated with the production and sale of the product under consideration."

153. Canada also argu

unbiased and objective investigating authority "could have used the actual cost of the input as recorded in Tembec's books as a benchmark for valuing internal transfers of wood chips" and that such an authority "could have determined that the valuation in Tembec's books for internal transfers of

to "accept low book values within a single corporation."[241] In Canada's view, USDOC's departure from its normal practice in this case demonstrates USDOC's failure to provide even-handed treatment.

158. The United States "does not dispute the general proposition that an investigating authority must make its determinations in an objective and even-handed manner"[242]; however, the United States submits that the question whether USDOC's by-product offset calculation was objective and even-handed is a *factual* matter falling outside the scope of appellate review. The United States argues that, if the Appellate Body were not to agree that this is a factual matter and thus decides to consider the merits of Canada's appeal, it should reject the claim. The United States asserts that Canada's argument is based on the "flawed premise"[243] that Tembec and West Fraser were similarly situated and that, therefore, USDOC should have valued each company's by-product revenue using the same methodology. According to the United States, the different corporate structures of these two companies justified the use of different methodologies by USDOC. Canada's reliance on the Appellate Body Report in *US – Hot-Rolled Steel* is thus misplaced, because in that dispute the Appellate Body found that the same rule should apply when comparing similar things, that is, when comparing affiliated transactions to affiliated transactions. However, according to the United States, in this case, "Canada has not demonstrated that the things being compared—interdivisional transfers, on the one hand, and sales between affiliated entities, on the other hand—are similar".[244]

B. *Analysis*

159. Before addressing the substance of Canada's appeal, we address the argument by the United States concerning our jurisdiction on this aspect of the appeal.

1. The United States' Argument That the Issue Raised by Canada Is an Issue of Fact

160. The United States submits that the issue raised by Canada on appeal—whether USDOC exercised its discretion in calculating wood chip offset revenue for Tembec in an "objective" and "even-handed" manner—is "a factual [issue] and, accordingly, is beyond the scope of appellate review".[245]

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[241]Canada's other appellant's submission, para. 74. (footnote omitted)

[242]United States' appellee's submission, para. 62.

[243]*Ibid*., para. 69.

[244]*Ibid*., para. 75.

[245]*Ibid*., para. 55. The United States maintains that the Appellate Body should decline to consider Canada's argument for failure to raise an issue of law covered in the Panel Report or a legal interpretation developed by the Panel, within the meaning of Article 17.6 of the DSU. (United States' appellee's submission, paras. 55 and 63)

161. As we have noted, the United States does "not dispute the general proposition that an investigating authority must make its determinations in an objective and even-handed manner, as the Panel correctly found that [USDOC] did in this case"[246], but does not find such an obligation in Article 2.2.1.1 of the *Anti-Dumping Agreement*. The United States further asserts that:

> Given that Canada's argument is premised on an obligation not found in Article 2.2.1.1, Canada's argument should not be construed as raising a question about the consistency or inconsistency of a given fact or set of facts with the requirements of that provision. Rather, it is a pure factual question of how the Panel assessed [USDOC's] actions.[247]

162. We also note that, in *US – Hot-Rolled Steel*, the Appellate Body stated:

> Although we believe that the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary course of trade", that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation.[248] (original italics; underlining added)

163. In our view, the issue raised by Canada—whether an investigating authority has exercised its discretion in an even-handed mis a pure flaw noTh.7049 8 Tc underli6radeAm 42.78.25 -31 (-) TD -0.05such06 To

discretion in an even-handed manner. In this respect, we understand Canada to argue that USDOC's treatment of Tembec was other than even-handed because Tembec and West Fraser were "similarly situated" and were treated differently in the valuation of their by-product revenue (that is, wood chips)[250]; Canada also argues that USDOC failed to provide even-handed treatment to Tembec because USDOC, in this case, "depart[ed] from normal practice"[251], which practice, according to Canada, is to apply the "arm's length test for the valuation of by-products".[252]

2. Differential Treatment of Tembec and West Fraser

166. The first sentence of Article 2.2.1.1, the provision under which the Panel made the contested finding, stipulates:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

167. Canada contends that USDOC's treatment of Tembec was not even-handed because Tembec was treated unlike any other respondent (more specifically, that Tembec was treated differently from West Fraser) and that USDOC's "internal transfer test systematically increases dumping margins".[253] Canada relies upon the Appellate Body's findings in *US – Hot-Rolled Steel* as the basis for its claim, and argues that in that case, the Appellate Body rejected the proposition that "high-priced sales were a different factual situation [from low-priced sales] to which a different test would apply".[254] Canada submits that the "essence of the Panel's error in the instant case was no different", because the Panel accepted USDOC's contention that the "different factual situations" at issue permitted differential treatment of different respondents.

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[250]Canada's other appellant's submission, para. 67.

[251]*Ibid*., para. 74.

[252]*Ibid*., heading II.A.3, p. 26. See also Canada's other appellant's submission, para. 72. We note that Canada's appeal relates to the Panel's *arguendo* finding, which the Panel made on the assumption that Article 2.2.1.1 contains the obligation—previously rejected by the Panel—for an investigatin authority to reject, as the basis for cost calculations, the records of an exporter or producer that do not "reasonably reflect" the cost of production of the product under consideration. (See Panel Report, paras. 7.316 and 7.317)

[253]Canada's other appellant's submis sion, heading II.A.1, p. 22.

[254]*Ibid*., para. 64.

168. We recall the following statement of USDOC:

> [w]ith respect to Tembec, the facts of this case differ slightly [from the situation of West Fraser] in that the wood chip transactions are between divisions of the same legal entity.[255]

169. In this regard, the Panel stated that:

> West Fraser and Tembec were in different factual situations. While Tembec was a single entity including, *inter alia*, sawmills and pulp mills, West Fraser was divided into legally separate companies. For

Panel, in exercising its function as the trier of facts, committed an error that warrants disturbing the Panel's factual finding.

175. We further recall that the logic of Canada's position is that if two respondents are not similarly

179. The Panel found, *as a matter of fact*, that the methodology applied by USDOC to Tembec's wood chip sales was the same as that normally applied by USDOC for "valuing costs in interdivisional sales".[274] We understand the Panel to find that USDOC had not departed from its normal practice regarding valuations in interdivisional transactions in the case of Tembec.

180. Here again, we are not persuaded that there is any reason that warrants disturbing the Panel's factual finding with respect to consistency of the methodology applied in the case of Tembec.

4. Conclusion

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181. We recall that in this case Canada' articulation of the elements of even-handed treatment depends on factual findings that the two companies are "similarly situated" and that USDOC "depart[ed] from [its] normal practice". On these two elements the Panel made factual findings to the contrary, and we have not disturbed these factual findings. Therefore, even assuming for the sake of argument that the two elements put forward by Canada in this case could possibly serve as a basis for even

VII. Findings and Conclusions

183. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraphs 7.224 and 8.1(a)(i) of the Panel Report, that the United States

Signed in the original at Geneva this 22nd day of July 2004 by:

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A.V. Ganesan
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

Merit E. Janow
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS264/6
18 May 2004

(04-2166)

Original: English

UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 13 May 2004, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264/R) and certain legal interpretations developed by the Panel.

The United States seeks review by the Appellate Body of the Panel's legal conclusion in