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UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

AB-2004-2

Report of the Appellate Body

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 "Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" of 21 March 2002 (Exhibit CDA-2 submitted by Canada to the Panel)
Tembec	Tembec Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
GATT 1994	*General Agreement on Tariffs and Trade 1994*
USDOC	United States Department of Commerce
West Fraser	West Fraser Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/7, 1 May 2003
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

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 softwood lumber, USDOC limited its investigation to the six largest Canadian producers and exporters of that product, namely, Abitibi, Canfor, Slocan, Tembec, West Fraser, and Weyerhaeuser Canada.[3] On 2 April 2002, USDOC published, in the United States Federal Register, a final anti-dumping duty order, which was

[1]WT/DS264/R, 13 April 2004.

[2]Panel Report, para. 2.2.

[3]*Ibid*.

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 detail in paragraphs 2.1 to 2.6 of the Panel Report.

3. The Panel considered claims by Canada that, in imposing anti-dumping duties on softwood lumber from Canada, the United States acted inconsistently with Articles 2, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 2.4.2, 3, 5, 5.2, 5.3, 5.8, 6.10, 9, 9.3, and 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), as well as with Articles VI:I and VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Canada asked the Panel to recommend that the Dispute Settlement Body (the "DSB") request the United States to bring its measure into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), to revoke the anti-dumping order in respect of softwood lumber from Canada, and to return the cash deposits collected pursuant to the investigation and determination of dumping.[7]

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 13 April 2004. In its Report, the Panel concluded that the United States had 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"[.][8]

[4]USDOC's final anti-dumping determination was published in the United States Federal Register as "Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada" (the "Final Determination"), United States Federal Register, 2 April 2002 (volume 67, number 63), p. 15539 (Exhibit CDA-1 submitted by Canada to the Panel); and as "Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada", United States Federal Register, 22 May 2002 (volume 67, number 99), p. 36068 (Exhibit CDA-3 submitted by Canada to the Panel). Both these Notices make reference to a document entitled "Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" ("IDM") (Exhibit CDA-2 submitted by Canada to the Panel).

[5]Panel Report, para. 2.6.

[6]*Ibid*., paras. 2.6 and 7.139.

[7]*Ibid*., para. 3.1(f).

[8]*Ibid*., para. 8.1(a)(i).

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

(i) Article 5.2 of the [*Anti-Dumping*]

(xi) Articles 1 and 18.1 of the [*Anti-Dumping*] *Agreement*, and Article VI of GATT 1994 with respect to Canada's claims referred to [in items (i)–(iv) above]; and

(xii) Articles 1, 9.3 and 18.1 of the [*Anti-Dumping*] *Agreement*, and Article VI of GATT 1994 with respect to Canada's claims referred to [in items (v)–(x) above].[9]

6. The Panel found that, to the extent the United States had acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it had nullified or impaired benefits accruing to Canada under that Agreement.[10] The Panel recommended that the DSB request the United States to bring its measure into conformity with the *Anti-Dumping Agreement*, but denied Canada's request to make more specific suggestions regarding implementation.[11]

7. On 13 May 2004, the United States notified the DSB, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[12] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 24 May 2004, the United States filed its appellant's submission.[13] On 28 May 2004, Canada filed an other appellant's submission.[14] On 7 June 2004, Canada and the United States each filed an appellee's submission.[15] On the same day, the European Communities and Japan each filed a third participant's submission.[16] On the same day, India notified the Appellate Body Secretariat of its intention to make a statement at the oral hearing as a third participant.[17]

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[9]Panel Report, paras. 8.1(b)(i)–(xii). The Panel decided to exercise judicial economy and not to rule on Canada's claim under Article 2.4 of the *Anti-Dumping Agreement* in respect of zeroing. The Panel also exercised judicial economy in not ruling on Canada's claims under Articles 1, 9.3, and 18.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 with respect to determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing". (Panel Report, para. 8.1(c))

[10]Panel Report, para. 8.2.

[11]*Ibid.*, paras. 8.3–8.6.

[12]WT/DS264/6, 18 May 2004, attached as Annex 1 to this Report.

[13]Pursuant to Rule 21(1) of the *Working Procedures*. The United States appeals the Panel's finding that the United States acted inconsistently with Article 2.4.2.

[14]Pursuant to Rule 23(1) of the *Working Procedures*. In its other appellant's submission, Canada challenges the Panel's findings related to the allocation of financial expenses for Abitibi and the calculation of by-product revenue for Tembec.

[15]Pursuant to Rules 22(1) and 23(3) of the *Working Procedures*.

[16]Pursuant to Rule 24(1) of the *Working Procedures*.

[17]Pursuant to Rule 24(2) of the *Working Procedures*.

8. The oral hearing was held on 22 June 2004. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

9. During the oral hearing, Canada requested authorization to file the preliminary results of an anti-dumping duty administrative review, concerning softwood lumber from Canada, conducted by USDOC and, according to Canada, published in the United States Federal Register on 14 June 2004, as well as a memorandum of USDOC of 2 June 2004.[18] Canada argued that these documents "directly contradict the United States' assertions concerning its own practice and put into question the Panel's acceptance of the United States' position on the valuation of inter-divisional transfers of by-products".[19] The United States objected to this request, arguing that the introduction of these materials would be inconsistent with Article 17.5(ii) of the *Anti-Dumping Agreement* and with the *Working Procedures*. The United States submitted that these materials constituted new factual evidence; concerned a preliminary determination which did not have a "separate legal status"; and were "not relevant" to USDOC's practice at the time when the determinations subject to the present appeal were made.[20] In response to the United States' objections, Canada argued that the documents it wished to introduce constituted "additional proof" that there was no consistent practice on the part of USDOC and, therefore, the documents "pertained directly to a legal point raised by the Panel".[21] The Division agreed that the materials at issue constituted new factual evidence and, therefore, pursuant to Article 17.6 of the DSU, fell outside the scope of the appeal. Accordingly, the Division informed the participants in the course of the oral hearing that it denied Canada's request.

II. Arguments of the Participants and the Third Participants

A. *Claim of Error by the United States – Appellant*

10. The United States challenges 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 (hereinafter "zeroing"). The United States argues that the Panel committed the following specific errors in its interpretation of Article 2.4.2.

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[18]Canada noted that these documents only became available after the filing of Canada's other appellant's submission.

[19]Canada's statement at the oral hearing. Canada stated that it made this request pursuant to Rule 16 of the *Working Procedures*.

[20]United States' statement at the oral hearing.

[21]Canada's statement at the oral hearing.

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" that a permissible interpretation of the term "margins of dumping" in Article 2.4.2 "is that it refers to the results of comparing averages 'for each category of product/transaction compared'."[23] Accordingly, "the only comparison results identified in Article 2.4.2 are the results ('margins of dumping') derived from the multiple comparisons of the various groups of comparable transactions."[24] The United States concludes that "[t]here is, therefore, no basis to read into Article 2.4.2 a requirement for an *additional* result derived from aggregating those margins of dumping."[25] In other words, Article 2.4.2 "simply does not address the issue of aggregating the results of multiple comparisons."[26] According to the United States, the term "margins of dumping" in Article 2.4.2 refers to the results of "comparisons in which the normal value *exceeds* the export price".[27] Comparison results in which the weighted average normal value is *less than* the weighted average export price are, "by definition, *not* margins of dumping."[28] The United States concludes from this that, *even if* "Article 2.4.2 could be read to implicitly require an aggregation, the only candidates for inclusion in that aggregation, by the Article's own terms, are *margins of dumping*."[29]

13. The United States asserts, further, that, in finding that Article 2.4.2 addresses the issue of aggregating the results of multiple comparisons, the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*, which "requires panels to recognize that a given provision of the [*Anti-Dumping*] *Agreement* may be susceptible to multiple permissible interpretations, and to find a Member's actions consistent with its obligations if those actions are based on one of those permissible interpretations."[30]

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[22]United States' appellant's submission, para. 28.

[23]*Ibid*., para. 37.

[24]*Ibid*.

[25]*Ibid*. (original emphasis)

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

[27]*Ibid*., para. 23. (emphasis added)

[28]*Ibid*., para. 39. (original emphasis) The United States, refers in this regard, to the description of dumping contained in Article 2.1 of the *Anti-Dumping Agreement*.

[29]*Ibid*. (emphasis added)

[30]*Ibid*., para. 31.

14. Secondly, the United States contends that the Panel's finding that Article 2.4.2 imposes an obligation to apply the results of certain comparisons as "offsets"[31] to the results of other comparisons is inconsistent with the Panel's earlier finding that multiple comparisons are permissible. A requirement to offset the amount of dumping found on certain comparisons would deprive the term "comparable" of any meaning and would require an investigating authority "to compare non-comparable transactions."[32] Moreover, according to the United States, an offset requirement would be "equivalent to a requirement that all transactions, regardless of comparability, be incorporated into a single average-to-average comparison."[33]

15. Thirdly, the United States contends that the Panel's interpretation is not supported by the context of Article 2.4.2. Thus, although the Panel appeared to agree that average-to-average and transaction-to-transaction comparisons should be subject to the same rule with respect to aggregation, the text on which the Panel relied in finding a rule applicable to the average-to-average comparison methodology—namely, the phrase "all comparable export transactions"—has no textual equivalent for the second methodology. According to the United States, "[t]here is no rational basis for an interpretation that assumes that Members intended to address aggregation of margins (in particular, offsets), but then only did so with respect to one out of three permissible methodologies."[34] The United States suggests that "[p]erhaps that explains why the Panel majority chose to avoid this argument all together."[35]

16. Fourthly, the United States argues that an examination of the historical background of the *Anti-Dumping Agreement* demonstrates that two practices employed by individual Contracting Parties to establish margins of dumping at the time of the Uruguay Round negotiations are relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical"[36] comparisons, that is, comparisons between individual export transactions and weighted average normal values. The second relevant practice was zeroing. At the conclusion of the negotiations, negotiators were able to agree only on the issue of "asymmetry".[37] Thus, according to the United States, it would be reasonable to expect that, absent modified text, zeroing would continue to be found consistent with the *Anti-Dumping Agreement*.

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[31]See for instance United States' appellant's submission, para. 4.

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

[33]*Ibid*., para. 45.

[34]*Ibid*., para. 47.

[35]*Ibid*., para. 47.

[36]*Ibid*., paras. 52 and 54.

[37]*Ibid*., paras. 51, 54, 63, as well as footnote 52 to para. 52 and footnote 56 to para. 54.

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 the arguments advanced by the United States in the present case. For example, in this dispute, both parties and the Panel agree that multiple comparisons are consistent with Article 2.4.2. According to the United States, this finding by the Panel and "its fundamental importance to the issue at hand ... are cause for giving fresh consideration to the legal issues and arguments presented in this dispute."[40]

18. Finally, the United States requests that, in the event the Appellate Body reaches the question of whether the aggregation methodology applied by the United States is consistent with Article 2.4 of the *Anti-Dumping Agreement*, the concept of a "fair comparison" under that provision should be interpreted as referring to a comparison that is made in accordance with the specific rules set out in Article 2.4. Thus, a "fair comparison" is ensured by making due allowance for differences that affect price comparability, including the level of trade, physical characteristics as well as terms and conditions of sale. According to the United States, "[t]hese parameters are the sole textual basis for establishing the extent of the 'fair comparison' requirement".[41] By making the required adjustments, the United States claims that it made a "fair comparison" in this investigation within the meaning of Article 2.4.

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[38]United States' appellant's submission, para. 56 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108).

[39]*Ibid.*

[40]*Ibid.*, para. 62.

[41]*Ibid.*, para. 66.

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*.

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*. According to Canada, "[t]here is no distinction to be drawn between *EC – Bed Linen* and the present dispute."[42] Canada submits that, as the Appellate Body found in *EC – Bed Linen*, although "[a]n investigating authority enjoys considerable discretion in defining the scope of the product under consideration ... a final determination of dumping must still be based on all of the export sales for the product under consideration."[43] Thus, the *Anti-Dumping Agreement* "does not permit a determination of dumping for models of the product under consideration."[44] In other words, "margins of dumping" within the meaning of Article 2.4.2 "can only mean the margins determined for the product as a whole."[45] Canada concludes that "[i]n view of the legal and factual similarities between this case and *EC – Bed Linen* ... there is no legally justifiable reason for the Appellate Body to arrive at a conclusion in this case that would be materially different from that in its report in that case."[46] In support of its argument, Canada notes that "the Appellate Body has developed a coherent body of case-law or jurisprudence that provides guidance to WTO panels and also gives rise to 'legitimate expectations' as to how the Appellate Body will rule in future cases."[47]

21. Canada finds contextual support for its interpretation in Article 2.4 of the *Anti-Dumping Agreement*. Canada argues that "zeroing should be found inconsistent with the terms of Articles 2.4 and 2.4.2 because it 'distorts' dumping findings, and therefore does not permit a 'fair' comparison."[48] In this regard, Canada refers to the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, in which the Appellate Body found that "zeroing produces 'an inherent bias' that 'may distort

[42]Canada's appellee's submission, para. 16.

[43]*Ibid*., para. 17.

[44]*Ibid*.

[45]*Ibid*., para. 40.

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

[47]*Ibid*., para. 19.

[48]*Ibid*., para. 25.

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's appellee's submission, para. 25 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135).

[50]*Ibid*. (emphasis added)

[51]*Ibid*., para. 26 (quoting United States' appellant's submission, para. 67).

[52]*Ibid*. (footnote omitted)

[53]*Ibid*., para. 27. (footnote omitted)

[54]*Ibid*., para. 47.

[55]*Ibid*., para. 48. (footnote omitted)

[56]*Ibid*.

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's view, the phrase in Article 2.2.1.1 that begins with "including" does not impose a limitation on the consideration, by the investigating authority, of evidence submitted by a producer. Instead, this phrase "limits the circumstances under which a producer's evidence must be given controlling weight."[60] The use of the word "including", according to Canada, confirms that this clause, rather than defining evidence that may be excluded from consideration, "defines particular evidence to be given particular weight".[61]

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[57]Canada's appellee's submission, para. 58 (quoting United States' appellant's submission, para. 43).

[58]*Ibid*., para. 61.

[59]Canada's other appellant's submission, para. 2.

[60]*Ibid*., para. 43.

[61]*Ibid*., para. 44.

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 in so far as those determinations *themselves* were insufficient.

[66]Canada's other appellant's submission, para. 53.

[67]*Ibid*., para. 54.

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 the United States did not act inconsistently with Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement*. According to Canada, USDOC treated Tembec differently from all other respondents in the underlying investigation, on the ground that Tembec was organized as a single corporation, as opposed to being divided into legally separate entities. In so doing, USDOC, in Canada's view, "fail[ed] to assess Tembec's by-product offset in an objective and even-handed manner".[69]

32. Canada argues, first, that the test applied by USDOC with regard to Tembec—as compared to all other respondents in the underlying investigation—"operates systematically to inflate dumping margins".[70] According to Canada, USDOC, in the investigation at issue, created a "new test" for internal transfers that relies upon the records kept by a producer only if the internal transfer prices were "significantly lower" than market value.[71] In Canada's view, this test "systematically lowers the by-product offset, but never raises it."[72] As a result, USDOC's test, according to Canada, serves only to lower the by-product offset for corporations with internal transfer values; therefore, by applying that test, USDOC did not exercise its discretion in an objective and even-handed manner.

33. Secondly, Canada argues that USDOC's treatment of Tembec was not even-handed because USDOC applied the so-called "arm's-length test" in the case of some companies, but did not apply this test in the case of Tembec. The justification for this "uneven treatment"[73], according to Canada, was related solely to Tembec's corporate structure. Canada submits that the Panel did not consider whether the different factual situations of the two respective companies provided reasonable justification for the differential treatment at issue.

34. Canada also relies on the Appellate Body Report in *US – Hot-Rolled Steel* as support for its proposition that the different factual situations at issue in the present case do not justify the use of

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[68]Canada's other appellant's submission, para. 5.

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

[70]*Ibid*., para. 57. In response to questioning at the oral hearing, Canada stated that Canada bases its claim on appeal in this respect on "Article 2.2 in the context of Article 2.2.1.1".

[71]*Ibid*., para. 61.

[72]*Ibid*.

[73]*Ibid*., para. 62.

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's arguments concerning the Panel's discussion of "generic" and "specific"[82] reasoning used by USDOC also incorrectly imply that the Panel read Article 2.2.1.1 as permitting strict adherence to a methodology without any consideration of alternative methodologies. The United States submits that the Panel "carefully analyzed [USDOC's] determination to use the COGS methodology and properly concluded that [USDOC] had fulfilled its obligation to 'consider' all available evidence on the proper allocation of costs."[83]

40. With respect to Canada's interpretation of Article 2.2.1.1, the United States first takes issue with the proposition that the clause of the second sentence of Article 2.2.1.1 beginning with the word "including" limits the circumstances under which a producer's evidence must be given "controlling

[78]Canada's appellee's submission, para. 66. See also Canada's other appellant's submission, para. 76. In response to questioning at the oral hearing, Canada confirmed that this request had been made pursuant to Article 19.1 of the DSU.

[79]United States' appellee's submission, para. 24.

[80]*Ibid*., para. 25 (referring to Canada's other appellant's submission, paras. 33 and 34).

[81]*Ibid*., para. 26 (quoting Canada's other appellant's submission, para. 23).

[82]*Ibid*., para. 28 (quoting Panel Report, para. 7.238).

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

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 investigating authority may refuse to regard as controlling, on the ground that the exporter or producer did not historically utilize the allocation methodology. Instead, the clause at issue describes the types of cost allocations that authorities are required to consider. The United States supports this reading with an analysis of the punctuation of that phrase that, in its view, identifies the phrase at issue as a "parenthetical phrase"[87]; thus, according to the United States, the "including" phrase is a stand-alone phrase, not modified by the "in particular" phrase.

43. The United States submits furthermore that the Panel correctly found that USDOC had considered Abitibi's proposed cost allocation methodology. The United States disagrees with Canada's assertion that USDOC had an obligation to make "factual findings as to the advantages or disadvantages of either of the methodologies that it was required to 'consider'."[88] A requirement to "consider" is not a requirement to make express factual findings. In any event, it was apparent from USDOC's determination that USDOC had given attention to and had taken into account the evidence

[84]United States' appellee's submission, para. 32 (referring to Appellate Body Report, *US – FSC*, para. 102).

[85]*Ibid*., para. 38.

[86]*Ibid*., para. 39.

[87]*Ibid*., para. 42.

[88]*Ibid*., para. 46 (quoting Canada's other appellant's submission, para. 40).

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 Tembec and West Fraser, respectively, justified the use of different methodologies by USDOC, because "the different corporate structures raised different questions for purposes of valuing by-product offsets".[93]

49. In the United States' view, Canada's reliance on the Appellate Body Report in *US – Hot-Rolled Steel* is misplaced. According to the United States, the Appellate Body Report in that dispute stands for the proposition that the same rule should apply in an "apples-to-apples" comparison—in that dispute, specifically, when comparing affiliated transactions to affiliated transactions. By contrast, Canada's even-handedness argument in the present case is not based on an "apples-to-apples" comparison. This is because, in the United States' view, Canada is not arguing that USDOC treated *inter-divisional transfers* for one company differently from how it treated *inter-divisional transfers* for another company; instead, Canada is arguing that USDOC treated *inter-divisional transfers* for one company differently from how it treated *sales to affiliated entities* for another company. The United States maintains that Canada has failed to substantiate its assertion that Tembec and West Fraser were similarly situated. As a result, 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; therefore, in the United States' view, Canada's even-handedness argument "must fail"[94], even on Canada's own terms.

50. In sum, in the United States' view, the Panel correctly concluded that an unbiased and objective authority could have determined that the valuation in Tembec's books for internal transfers of wood chips was not unreasonable.

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[92]United States' appellee's submission, para. 69.

[93]*Ibid.*, para. 71.

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

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. Article 2.4.2 of the *Anti-Dumping Agreement* – The Practice of Zeroing

A. *Introduction*

63. We begin by identifying the precise scope of the appeal before us. First, we note that both Canada and the United States agree that this dispute relates to the consistency, with Article 2.4.2 of the *Anti-Dumping Agreement*, of a methodology incorporating the practice of zeroing (hereinafter "zeroing") *as applied* in the anti-dumping investigation at issue in this case. In other words, no methodology, *as such*, has been challenged in this appeal.[118] Secondly, we understand that Canada's claim before the Panel was limited to the consistency of zeroing when used in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions (the "weighted-average-to-weighted-average methodology") under Article 2.4.2 of the *Anti-Dumping Agreement*. Therefore, in this appeal, we are not required to, and do not address, the issue of whether zeroing can, or cannot, be used under the other methodologies prescribed in Article 2.4.2, namely, comparing normal value and export prices on a transaction-to-transaction basis (the "transaction-to-transaction methodology"), or comparing a normal value established on a weighted average basis to prices of individual export transactions (the "weighted-average-to-individual methodology").[119]

64. We next set out a brief description of zeroing as applied by the United States Department of Commerce ("USDOC") in this case. First, USDOC divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. Within each sub-group, USDOC made certain adjustments to ensure price comparability of the transactions and, thereafter, calculated a weighted average normal value and a weighted average export price per unit of the product type. When the weighted average normal value per unit exceeded the weighted average export price per unit for a sub-group, the difference was regarded as the "dumping margin" for that comparison. When the weighted average normal value per unit was equal to or less than the weighted average export price per unit for a sub-group, USDOC took the view that there was no

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[118]Canada's response to questioning at the oral hearing. See also Panel Report, footnote 341 to para. 7.187 and footnote 343 to para. 7.196. See also Canada's appellee's submission, para. 2, in which Canada submits that the Panel found that the United States' practice of "zeroing" "as applied" was inconsistent with the requirements of the *Anti-Dumping Agreement*.

[119]The Panel found in paragraph 7.219 of the Panel Report that:

> ... it is not within the Panel's terms of reference to rule on whether zeroing can, or cannot, be used when determining the overall margin of dumping under the other comparison methodologies set forth in Article 2.4.2, i.e., transaction-to-transaction and weighted average normal value-to-individual transaction export price. (footnote omitted)

"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*.

72. Based, *inter alia*, on this analysis of Article 2.4.2, the Panel concluded, *and agreed with the parties to the dispute*, that the use of "multiple averaging is not prohibited"[130] by the *Anti-Dumping Agreement*.

73. The Panel next turned to examine whether zeroing, as applied by USDOC in this case when aggregating the results of multiple comparisons, is permissible under Article 2.4.2. The Panel explained that it saw the calculation of margins of dumping for a product under investigation as a "coherent process"[131], which starts with the determination of normal value, and continues with the establishment of the export price. The Panel further opined that Article 2.4.2 applies to the process of calculating a margin of dumping *as a whole*, and not merely to one stage of that process, namely, multiple averaging. Relying on the Appellate Body Report in *EC – Bed Linen*, the Panel emphasized that "Article 2.4.2 requires that all comparable export transactions have to be taken into account when the weighted average normal value is compared to the weighted average of prices of all comparable export transactions."[132] The Panel noted that "[t]hrough the use of zeroing ... the entirety of the prices of some export transactions, i.e., those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, in the second stage of the process, are not taken into account."[133]

74. The Panel concluded that, when calculating margins of dumping for the product under investigation, the United States was required, by virtue of Article 2.4.2, to establish such margins "on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation."[134] By not "taking into account all comparable export transactions"[135] in its calculation of the overall margin of dumping, the United States had, according to the Panel, acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.

75. We begin our analysis of Article 2.4.2 in the light of the arguments raised on appeal.

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[130]Panel Report, para. 7.211.

[131]*Ibid*., para. 7.214.

[132]*Ibid*., para. 7.215.

[133]*Ibid*., para. 7.216. (footnote omitted)

[134]*Ibid*., para. 7.224.

[135]*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.

79. The position of the United States hinges on two distinct propositions. *First*, that multiple averaging is permitted under Article 2.4.2 and that the term "all comparable export transactions" refers *only* to all comparable export transactions *within each sub-group*. *Secondly*, that the term "margins of dumping" in Article 2.4.2 does not refer to margins of dumping for the product as a whole, but instead refers to "margins of dumping" for individual product types in cases in which the investigating authority conducts multiple averaging. Thus, the United States argues that Article 2.4.2 deals only with multiple comparisons at sub-group levels, and does not address the issue of how the results of such comparisons are to be aggregated in order to calculate an overall margin of dumping for the product as a whole.

80. We note that there is no disagreement among the participants in this dispute as to the permissibility of "multiple averaging" under Article 2.4.2. All participants agree that an investigating authority may choose to divide the product under investigation into product types or models[142] for purposes of calculating a weighted average normal value and a weighted average export price for the transactions involving each product type or model or sub-group of "comparable" transactions.[143] In addition, we note that Canada has not claimed, with regard to the investigation at issue, that the United States has acted inconsistently with Article 2.4.2 when calculating the weighted average normal value and weighted average export price for each sub-group of comparable transactions.

81. We agree with the participants in this dispute that multiple averaging is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. We disagree with those who suggest that the Appellate Body Report in *EC – Bed Linen* is premised on an assumption that multiple averaging is prohibited. The issue of multiple averaging was not before the Appellate Body in *EC – Bed Linen* and the reasoning of the Appellate Body in that case should therefore not be read as prohibiting that practice. This is not to say that *EC – Bed Linen* is not

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[142]In this regard, the Panel notes that:

> [a]lthough multiple averaging based on different types or models may be particularly common, multiple averaging may also be used in other contexts. For example, an investigating authority might perform multiple averaging in respect of sales made at different levels of trade (e.g., retail versus wholesale) or on the basis of sub-periods of the period of investigation (the latter may arise in cases where hyper-inflationary economies are involved). Thus, an investigating authority might well resort to multiple averaging to ensure comparability even in a case of absolute product homogeneity, i.e., where all of the product under investigation is identical and is being compared to transactions involving identical goods in the market of the exporting country.

(Panel Report, para. 7.201 (footnote omitted))

[143]See United States' appellant's submission, para. 23; European Communities' third participant's submission, para. 30. See also Panel Report, para. 7.211. See also Panel Report, para. 7.202, where the Panel notes that there was no dispute as to the "appropriateness or consistency" with the *Anti-Dumping Agreement* of multiple averaging as such.

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 *EC – Bed Linen*.

82. Although all participants in this dispute agree on the permissibility of multiple averaging, they disagree as to the proper interpretation of the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2 as they relate to zeroing. The United States argues that once "all comparable export transactions" have been taken into account at the sub-group level, the requirement of Article 2.4.2 is satisfied and that, therefore, the obligation to consider "all comparable export transactions" does not extend to the aggregation stage. A contrary interpretation of Article 2.4.2 would, according to the United States, require investigating authorities to compare "dumped" and "non-dumped" transactions, which the United States considers to be non-comparable, at the aggregation stage.

83. In contrast, Canada argues that the "word 'all' operates to ensure that every transaction is fully included in the calculation of the dumping margin"[145] and that the word "'comparable' must relate to the entire product under consideration."[146] Canada further submits that the United States' definition of the word "comparable" is "inconsistent with its own practice"[147] and that "[t]here is no difference as to comparability between different models that are dumped versus those that are not dumped."[148] The European Communities similarly submits that "[t]he United States misinterprets the term 'comparable transactions' in Article 2.4.2"[149], and that "[o]nce the multiple averaging methodology has been applied, all transactions are considered 'comparable'."[150]

84. The second area of their disagreement concerns the proper interpretation of the term "margins of dumping" as used in Article 2.4.2. That disagreement turns on the question of whether that term applies to the product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken.

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[144]United States' appellant's submission, para. 60.

[145]Canada's appellee's submission, para. 23.

[146]*Ibid*., para. 24.

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

[148]*Ibid*., para. 37.

[149]European Communities' third participant's submission, para. 29.

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

85. With these considerations in mind, we turn next to examine the terms "all comparable export transactions" and "margins of dumping" as they apply to this dispute. As both of these terms occur in the same sentence and relate to establishing the existence of margins of dumping under Article 2.4.2, we emphasize that they should be interpreted in an integrated manner.

2. "All Comparable Export Transactions" in Article 2.4.2

86. Article 2.4.2 requires that the existence of margins of dumping "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*". (emphasis added) It is clear from the language of Article 2.4.2 that a weighted average normal value is to be compared with a weighted average of the prices of "comparable" export transactions, and not with prices of "non-comparable" export transactions. At the same time, the word "all" in "all comparable export transactions" makes it clear that Members cannot exclude from a comparison any transaction that is "comparable". Thus, we agree with the Panel that the term "all comparable export transactions" means that a Member "may only compare those export transactions which are comparable, but [] it must compare *all* such transactions."[151]

87. It is not in dispute in this case that, in the calculation of the weighted average export price for each sub-group, USDOC took into account "all comparable export transactions", and thus no comparable export transactions were excluded at the sub-group level.[152]

88. However, the participants have divergent views with respect to the aggregation of the results of the multiple comparisons of "all comparable export transactions". The United States is of the view that Article 2.4.2 does not require the aggregation of the results of such comparisons, and that, even if there were such a requirement, it would be permissible to exclude the results of those comparisons where the weighted average normal value is less than the weighted average export price (which comparisons according to the United States constitute "non-dumped comparisons"). The United States emphasizes that Article VI:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") "explicitly condemns dumping"[153] and that the *Anti-Dumping Agreement* "does not recognize a 'negative dumping margin'."[154] As we understand it, the United States is of the view that a

[151]Panel Report, para. 7.204. (original emphasis) In response to questioning at the oral hearing, all the participants and third participants indicated that they agreed with this interpretation.

[152]The United States stated at the oral hearing that the United States and Canada "both agree that the United States made comparisons between comparable subsets of export and normal value transactions based on distinctions in level of trade and physical characteristics. Additionally, the United States and Canada both agree that when these comparisons were made, all comparable transactions were included in the subsets." (United States' statement at the oral hearing)

[153]United States' appellant's submission, para. 44. (original underlining)

[154]*Ibid*., para. 38.

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" the outcome of an analysis to determine whether dumping exists for the product under investigation as a whole.

90. There is no basic disagreement among the participants that "all comparable export transactions" must be taken into account in establishing margins of dumping. Rather, the participants' disagreement centres on how the results of multiple comparisons are interpreted and aggregated when all comparable transactions have admittedly been taken into account at the sub-group level.[155] And this disagreement flows, in essence, from the participants' respective interpretations of the terms "dumping" and "margins of dumping" in the *Anti-Dumping Agreement*—whether these terms apply at the product or sub-product level. We therefore turn now to an analysis of these terms as used in Article 2.4.2 of the *Anti-Dumping Agreement*.

3. "Margins of Dumping" in Article 2.4.2

91. As we noted above, the United States' position rests on the proposition that "margins of dumping" can be established, and "dumping" can be found, at the *sub-group level*. According to the United States, the term "margins of dumping" in Article 2.4.2 refers to the results of those multiple comparisons "in which the normal value exceeds the export price".[156] In addressing this argument, we turn first to Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, which define "dumping" in the context of the GATT 1994 and the *Anti-Dumping Agreement*, respectively.

92. Specifically, Article VI:1 defines "dumping" as occurring where "*products* of one country are introduced into the commerce of another country at less than the normal value of the *products*".

[155]See *supra*, footnote 152.

[156]United States' appellant's submission, para. 22. At the oral hearing the United States stated that "'margins of dumping' is the term used in Article 2.4.2 to describe the results of those multiple comparisons when the normal value is greater than the export price. If the normal value is less than or equal to the export price, that comparison did not involve dumping and there is no margin of dumping for that comparison." (United States' statement at the oral hearing)

(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 the opening phrase of Article 2.1—"[f]or the purpose of this Agreement"—indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2. "Dumping", within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.

94. Other provisions of the *Anti-Dumping Agreement* confirm this view. For example, Article 9.2 (as well as Article VI:2 of the GATT 1994) stipulate that an anti-dumping duty is to be imposed in respect of the *product* under investigation.[157] In addition, Article 6.10 of the *Anti-Dumping Agreement* provides 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)

[157] Article 9.2 of the *Anti-Dumping Agreement* provides in relevant part:

> *Article 9*
>
> *Imposition and Collection of Anti-Dumping Duties*
>
> ...
>
> 9.2 When an anti-dumping duty is imposed in respect of any *product*, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury ... . (emphasis added)

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 found in *EC – Bed Linen* that "[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole."[158] While "dumping" refers to the introduction of a product into the commerce of another country at less than its normal value, the term "margin of dumping" refers to the magnitude of dumping. As with dumping, "margins of dumping" can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.

97. It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not "margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.

98. We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2. Thus we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons.

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[158] Appellate Body Report, *EC – Bed Linen*, para. 53. (original emphasis) The Appellate Body further explained in *US – Hot-Rolled Steel* that "'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product." (Appellate Body Report, *US – Hot-Rolled Steel*, para. 118) (footnote omitted)

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*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and export transactions in the so-called "non-dumped" sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes. Indeed, in the anti-dumping investigation at issue in this dispute, the product as a whole—softwood lumber—has been treated as a "dumped" product, except at the stage of zeroing.

100. Moreover, we observe that Article 2.4.2 contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage. Other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 2.2.1 of the *Anti-Dumping Agreement*, which deals with the calculation of normal value, sets forth the *only* circumstances under which sales of the like product may be disregarded.[159] Similarly, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to "disregard" zero and *de minimis* margins of dumping, under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters or producers that have not been individually investigated. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.

101. We now turn to the implications of zeroing as applied in this case.[160] Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups

[159] Article 2.2.1 of the *Anti-Dumping Agreement* stipulates that:

> [s]ales of the like product in the domestic market of the exporting country ... *may be disregarded* in determining normal value *only if* the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. (footnotes omitted; emphasis added)

[160] For a description of zeroing, see *supra*, para 64.

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 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole and do not apply to sub-group levels. The treatment of comparisons for which the weighted average normal value is less than the weighted average export price as "non-dumped" comparisons is therefore not in accordance with the requirements of Article 2.4.2 of the *Anti-Dumping Agreement*.

103. For all these reasons, we do not agree with the United States that the results of comparisons at the sub-group level constitute margins of dumping. Nor do we agree with the United States that the results of the comparisons in which the weighted average normal value is less than the weighted average export price could be excluded in calculating a margin of dumping for the product under investigation as a whole.

4. Other Methodologies as Context

104. We recall that the issue of whether zeroing is permitted under the transaction-to-transaction methodology or the average-to-individual methodology is not before us in this appeal. The United States does not argue otherwise[162], but it emphasizes that this issue must be considered as it provides "important context"[163] for consideration of the permissibility of zeroing under the average-to-average methodology.

105. We fail to see how we could find that the transaction-to-transaction and average-to-individual methodologies could provide contextual support for the United States' interpretation of Article 2.4.2 without examining first whether zeroing is permitted under those methodologies.[164] Indeed the United

[161]We note that the Panel reached the same conclusion in para. 7.216 of its Report.

[162]United States' response to questioning at the oral hearing. The United States acknowledged that "there is not a formal claim before you under these two methodologies."

[163]United States' response to questioning at the oral hearing.

[164]In response to questioning at the oral hearing, the United States asserted that, in its view, zeroing is permitted under all three methodologies set out in Article 2.4.2. In contrast, Canada argued that zeroing is permitted under the third methodology but prohibited under the first two methodologies set out in Article 2.4.2.

States faulted the Panel for making observations in this regard.[165] As we have observed, the United States acknowledged at the oral hearing that the issue before us is confined to determining whether zeroing is prohibited under the average-to-average methodology.[166]

106. We turn now to examine the United States' arguments concerning the relevance to this case of the historical background of Article 2.4.2.

5. Historical Background of Article 2.4.2

107. The United States argues that recourse to the circumstances of the conclusion of the *Anti-Dumping Agreement* is appropriate in this case as a supplementary means of interpretation under Article 32 of the *Vienna Convention on the Law of Treaties*.[167] Specifically, the United States argues that an examination of the historical background[168] of the *Anti-Dumping Agreement* demonstrates that two practices employed by WTO Members to establish "margins of dumping" at the time of the Uruguay Round negotiations are relevant for an interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, that is, comparisons between individual export transactions and weighted average normal values in anti-dumping investigations. The second practice was zeroing. The United States asserts that, because the negotiators were able to agree only on the issue of "asymmetry"[169] at the conclusion of the negotiations, it would be reasonable to expect, that, absent modified text in the *Anti-Dumping Agreement* addressing zeroing, that practice would continue to be consistent with the *Anti-Dumping Agreement*.

108. We are unable to agree with the United States. The material to which the United States refers does not, in our view, resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing. In any event, we have concluded, based on the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology.

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[165]See United States' appellant's submission, para. 47 (referring to Panel Report footnote 361 to para. 7.219).

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

[167]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[168]The "historical background" that the United States invokes as support for its position consists of prior GATT panel reports and certain proposals submitted by various delegations in the context of the negotiations on the *Anti-Dumping Agreement*. (See United States' appellant's submission, paras. 50–54) At the oral hearing, the United States acknowledged that these materials do not constitute "travaux préparatoires".

[169]By "asymmetry" the United States refers to the practice of establishing margins of dumping by comparing "an average on one side of the comparison [to] a single transaction on the other side [of the comparison]" (United States' appellant's submission, para. 51)

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

109. With regard to the relevance to this appeal of the Appellate Body Report in *EC – Bed Linen*, the United States has requested that the Appellate Body not "import wholesale the findings and reasoning"[170] from that case. In making this request, the United States underlines that it was not a party to the dispute in *EC – Bed Linen*, that the arguments raised in that case were different, and that the United States' practice of zeroing was not at issue in that appeal.[171]

110. Canada acknowledges that the "Appellate Body is not subject to a strict doctrine of *stare decisis*", but adds that "the suggestion that each case stands on its own and should be decided without regard to the recommendations and rulings of the Dispute Settlement Body in other WTO cases would deny the major achievement of a coherent body of WTO case-law or jurisprudence."[172]

111. The Appellate Body found in *Japan – Alcoholic Beverages II* that:

> [a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[173]

The Appellate Body further clarified in *US – Shrimp (Article 21.5 – Malaysia)* that:

> [t]his reasoning [from *Japan – Alcoholic Beverages II*] applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report — a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it — the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning.[174]

112. Bearing these previous findings in mind, and noting Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), which states that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system," we have given full consideration to the particular facts of this case and to the arguments raised by the United States on appeal, as well as to those raised by Canada and

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[170]United States' appellant's submission, para. 58.

[171]We note that the United States was a third participant in that dispute.

[172]Canada's appellee's submission, para. 19.

[173]Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108. (footnote omitted)

[174]Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

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, "margins of dumping" is in the plural because a

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[175]We note that neither the United States nor Canada has argued that the reasoning and findings of the Appellate Body should *not* be taken into account in this case. (United States' appellant's submission, paras. 55–58; Canada's appellee's submission, paras. 18–21)

[176]United States' appellant's submission, para. 34 (quoting Panel Report, para. 7.210). (emphasis added)

[177]*Ibid*.

[178]Panel Report, para. 7.210. (emphasis added)

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).

119. The issue on appeal pertains to the allocation of financial expenses for Abitibi for its softwood lumber production. In its investigation, USDOC, "consistent with its 'established practice'"[183] adopted the so-called cost-of-goods-sold ("COGS") methodology to calculate and allocate financial expenses.[184] In essence, this methodology allocates the total financial expenses for the company as a whole to the product under investigation (softwood lumber in this case) on the basis of a comparison of the total cost of goods sold for the entire production of the company, on the one hand, and the total cost of goods sold for the product under investigation, on the other. Hence its nomenclature, the "cost of goods sold" methodology.[185]

120. In its questionnaire, USDOC requested Abitibi to calculate and allocate its financial expenses on the basis of the COGS methodology. However, in its response to the questionnaire, Abitibi used a different methodology for calculating and allocating financial expenses for its softwood lumber production, namely a "total assets-based methodology".[186] Abitibi claimed that softwood lumber production requires fewer assets than production of Abitibi's other products (that is, it is less capital intensive) and, therefore, requires less financing than the production of Abitibi's other products, such as newsprint, pulp, and other paper products. Under this alternative methodology, Abitibi allocated its financial expenses "among its different business segments based on the total assets required to produce and sell each different product as a *percentage* of the *total* assets used to produce and sell *all* [Abitibi's] products."[187] From this asset-based ratio, Abitibi then derived its financial expenses for its softwood lumber production and then divided this amount by the cost of goods sold for that production.[188]

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[183]Panel Report, para. 7.228.

[184]Although in describing the methodologies at issue we use the term "financial expenses", which may include many types of financial expenses, the financial expense at issue in this case is, in essence, the net interest expense of Abitibi for its softwood lumber production.

[185]For details on the COGS methodology followed by USDOC, see United States' appellee's submission, para. 11.

[186]Canada's other appellant's submission, para. 20. See also Canada's other appellant's submission, para. 17.

[187]*Ibid*., para. 19. (emphasis added)

[188]With respect to Abitibi's allocation methodology, see also Canada's other appellant's submission, para. 18.

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. 7.228 (quoting USDOC Issues and Decision Memorandum, Comment 15, p. 77). (Exhibit CDA-2 submitted by Canada to the Panel) (footnote omitted)

[190]Panel Report, para. 7.238.

[191]Canada's other appellant's submission, para. 34.

[192]*Ibid*., para. 48.

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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[193]In this regard, we note footnote 17 to para. 19 of Canada's other appellant's submission which states:

> As required by both Canadian and U.S. generally accepted accounting principles, Abitibi reports in its financial statements and normal accounting the total amount of financial expense incurred in a given period as a distinct income statement line item, "Interest on long term debt," without allocation to particular products. Abitibi Section A Questionnaire Response (June 22, 2001), Annex 12, at 249 (Exhibit CDA-82).

[194]Canada's other appellant's submission, para. 46.

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

[196]*Ibid*., para. 54.

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 [US]DOC and asset-based allocation methodologies in light of the evidence submitted by Abitibi".[201]

131. The Panel refers to paragraphs 7.236 and 7.237 of its Report as "set[ting] out [its] understanding"[202] of the obligations[203] imposed by Article 2.2.1.1. A plain reading of those paragraphs reveals, however, that the Panel did not examine either the meaning or scope of the word "consider" as used in the second sentence of Article 2.2.1.1. The Panel merely restated the text of Article 2.2.1.1 and did not offer any analysis of the phrase "consider all available evidence". In paragraph 7.238, before addressing Canada's argument concerning the requirement to compare

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[198]Panel Report, para. 7.238. (original italics; underlining added)

[199]Canada's other appellant's submission, para. 2.

[200]*Ibid*., paras. 2 and 34.

[201]Panel Report, para. 7.238.

[202]*Ibid*.

[203]The obligations in the Panel's view are: that costs be calculated on the basis of records kept by the exporter or producer under investigation; that investigating authorities consider all available evidence on the proper allocation of costs including that which is made available by respondents in the context of an anti-dumping investigation; and that costs be adjusted under certain circumstances.

alternative allocation methodologies, the Panel addressed certain other arguments by Canada relating to the second sentence of Article 2.2.1.1, but not relating to the issue whether a comparison of allocation methodologies was required under that provision. The Panel then made the broad and unqualified statement that "Article 2.2.1.1 ... does not require that investigating authorities compare various allocation methodologies to asses their advantages and disadvantages."[204]

132. We are unable to discern any reasons in the Panel Report for the Panel's assertion that Article 2.2.1.1, in requiring an authority to "consider all available evidence", does not require the comparison of allocation methodologies to asses their advantages and disadvantages. Nor can we infer the Panel's reasoning from its findings addressing other arguments made by Canada with respect to the requirement to "consider all available evidence", which findings Canada does not appeal. None of the statements made by the Panel on the other arguments made by Canada[205], taken separately or read together, discloses the Panel's view as to the proper interpretation of the phrase "consider all available evidence on the proper allocation of costs". Nor do we see a finding or statement by the Panel that, in this particular case, USDOC's consideration of evidence included explicitly or implicitly a comparison of alternative allocation methodologies.[206] The Panel simply concluded, without providing any reasoning, that the phrase "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".[207] By not qualifying the statement in any way, we cannot but read the Panel to mean that a comparison of allocation methodologies is *never* "require[d]" by the second sentence of Article 2.2.1.1.

133. Having explained our understanding of the Panel's approach to the phrase "consider all available evidence on the proper allocation of costs", we turn to our own analysis of that phrase. We begin, as always, with the ordinary meaning of the terms of the provision in question, in their context and in the light of their object and purpose. The ordinary meaning of the term "consider" is, *inter*

[204]Panel Report, para. 7.238.

[205]These statements by the Panel are as follows: that "using generic reasoning in support of a specific determination [does not] constitute[], in and of itself, a reason which would justify a conclusion that [the requirement to 'consider all available evidence' has been violated]"; that USDOC's statement that the "record of this investigation does not support the conclusion that [USDOC's] methodology distorts the allocation of Abitibi's financial expenses" "could not have been made without [US]DOC having examined the evidence and considered the arguments relevant to the issue"; and that an examination of the discussion, in the USDOC's Issues and Decision Memorandum, following that statement, "shows that [US]DOC considered the main argument that Abitibi put forward in support of its proposed allocation methodology". (Panel Report, para. 7.238)

[206]In this regard, see *supra*, para. 121.

[207]In this regard, we note that Canada has, however, not made a claim under Article 12.7 of the DSU that the Panel failed to set out a "basic rationale" for its finding.

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]

134. We observe that the second sentence of Article 2.2.1.1 requires the consideration of "all available evidence on the *proper* allocation of costs". (emphasis added) The word "*proper*", in our view, supports our reading of the word "consider", because it suggests some degree of deliberation on the part of the investigating authority in "consider[ing] all available evidence", so as to ensure that there is a proper allocation of costs. The nature of this deliberative process will depend on the facts of a particular case before the investigating authority.

135. We are aware that the term "comparison", which is derived from the verb "compare", is used in other provisions of the *Anti-Dumping Agreement*. For instance, Articles 2.4 and 2.4.2 refer to the "comparison" of export prices and normal value, for purposes of establishing the existence of margins of dumping. As both the word "consider" and the word "comparison" are used in the *Anti-Dumping Agreement*, it follows, in our view, that the non-inclusion, by the drafters of the *Anti-Dumping Agreement*, in Article 2.2.1.1 of the word "compare" is not a mere oversight, but rather a purposeful act of drafting.[210] However, as we explain below, we do not believe that this requires an interpretation that the second sentence of Article 2.2.1.1 does not, *under any circumstances*, require an investigating authority to compare methodologies.

136. At the oral hearing, we requested the participants to clarify their understanding of the word "consider" for purposes of interpreting the second sentence of Article 2.2.1.1. Canada stated that "consideration" and "comparison" "are very close." The United States, in turn, stated that "one way to consider might be to in fact compare different allocations. There might be other ways in which those types of allocations could be considered".

137. The second sentence of Article 2.2.1.1 requires an investigating authority to "consider" all available evidence on the proper allocation of costs, which in certain circumstances may require the

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[208] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 493.

[209] See *supra*, para. 129 as well as footnotes 199 and 200 thereto.

[210] The French and Spanish versions, which are equally authentic, also employ different terms in this regard. Whereas Article 2.2.1.1 uses the terms "prendre en compte" and "tomar en consideración", respectively, Article 2.4.2 uses the terms "comparaison" and "comparación", respectively.

investigating authority to consider alternative allocation methodologies. Therefore, the issue before us is not simply whether the word "consider", in and of itself, entails a requirement to "compare". Rather, the issue before us is whether a requirement to "consider all available evidence on the proper allocation of costs" does or does not require an investigating authority to "compare" advantages and disadvantages of alternative cost allocation methodologies.

138. In our view, the parameters of the obligation to "consider all available evidence" will vary case-by-case. It may well be that, in the light of the facts of a particular case, the requirement to "consider all available evidence" may be satisfied by the investigating authority without comparing allocation methodologies or aspects thereof. However, in other instances—such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs—the investigating authority may be required to "reflect on" and "weigh the merits of" evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to "consider all available evidence". Thus, although the second sentence of Article 2.2.1.1 does not, as a general rule, require investigating authorities to compare allocation methodologies to assess their respective advantages and disadvantages in each and every case, there may be particular instances in which the investigating authority may be required to compare them in order to satisfy the explicit requirement of the second sentence of Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs".

139. In the light of the foregoing analysis, we disagree with what we understand to be the Panel's interpretation of the phrase "consider all available evidence", namely, that an investigating authority is *never* required, by virtue of the requirement to "consider all available evidence", to "compare various allocation methodologies to assess their advantages and disadvantages".[211] In our view, that interpretation will not always hold true. We therefore reverse the Panel's finding that "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".[212]

140. We emphasize that our reversal of the Panel finding is limited to a disagreement with the Panel's interpretation of the *legal standard* against which the Panel assessed USDOC's approach to this issue. We are *not* expressing a view or making any finding on whether USDOC, in the instant

[211]See *supra*, para. 132.

[212]Panel Report, para. 7.238.

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 *not* requesting us to *both* reverse the Panel's finding on Article 2.2.1.1 *and* to find that the United States acted inconsistently with Article 2.2.1.1.[213] Instead, Canada stated that it requested us *only* to *reverse* the Panel's aforesaid finding under Article 2.2.1.1.[214] We therefore do not proceed to complete the legal analysis and examine whether the United States did or did not act consistently with Article 2.2.1.1 in relation to the phrase "consider all available evidence".

142. As we have reversed the Panel's finding under Article 2.2.1.1 on the basis of the Panel's interpretation of the phrase "consider all available evidence on the proper allocation of costs", we are not required to address Canada's related arguments concerning the phrase "historically utilized", or its argument relating to the sufficiency of factual evidence on the basis of which the Panel concluded that an unbiased and objective investigating authority could have used USDOC's cost allocation method.

2. Consequential Claims

143. Canada has also appealed the Panel's findings that the United States did not act inconsistently with Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*.[215] The Panel found that Canada's claims before it under Articles 2.2, 2.2.1, and 2.4 "rest upon a finding of violation of either Article 2.2.1.1 or 2.2.2 or of both."[216] As the Panel found that the United States had violated neither Article 2.2.1.1 nor Article 2.2.2, it rejected Canada's "dependent"[217] claims under Articles 2.2, 2.2.1, and 2.4. Canada does not disagree with the Panel's characterization of its claims under Articles 2.2,

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[213]In its other appellant's submission, Canada requested the Appellate Body to:

> reverse the Panel's finding in paragraphs 7.236-7.245 and 8.1(b)(vi) of its report and find, instead, that the United States violated Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 of the [*Anti-Dumping*] *Agreement* by imposing anti-dumping duties without properly weighing evidence on the proper allocation of costs under Article 2.2.1.1 and determining that an unbiased and objective investigating authority could make this determination without considering factual findings made by that investigating authority[.]

(Canada's other appellant's submission, para. 76)

[214]Canada's opening statement at the oral hearing. Moreover, Canada stated that "the facts were heavily contested ... and Canada does not believe that this is a point on which the Appellate Body can complete the analysis."

[215]Panel Report, paras. 7.245 and 8.1(a)(vi).

[216]*Ibid*., para. 7.245.

[217]*Ibid*.

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 determination of the appropriate amounts to be attributed to the sales of wood chips by Tembec and

[218]Panel Report, para. 7.245.

[219]Canada's other appellant's submission, para. 5.

[220]*Ibid*.

[221]Panel Report, para. 7.306.

[222]In this Report, we refer to the sales to affiliated parties by West Fraser, as well as the interdivisional transfers by Tembec, as "sales".

West Fraser.[223] More specifically, the issue before the Panel was "the extent to which [USDOC] was required to, or precluded from, deriving wood chip revenue from valuations in the records of the producers in question."[224]

148. The Panel observed that Tembec and West Fraser had different corporate structures. The Panel stated that Tembec was a single entity including, *inter alia*, sawmills and pulp mills, and that Tembec's sawmills sold wood chips to Tembec's pulp mills through "*interdivisional transactions*"[225], that is, through *transactions within the same company*. In contrast, West Fraser, according to the Panel Report, "was divided in legally separate companies"[226], and sold wood chips to "*affiliated parties*"[227] (and not to entities *within the same company*).

149. In the case of West Fraser, USDOC valued sales transactions to *affiliated* parties based on the price of wood chips sold by West Fraser to *unaffiliated* parties because the transactions between affiliated parties did not occur at "arm's length prices". In contrast, in the case of Tembec, USDOC concluded that the values contained in Tembec's records for *interdivisional transfers* (that is, transfers between various divisions of the company) of wood chips were *reasonable* and *non-preferential*; USDOC therefore rejected Tembec's arguments that these internal transfer prices were below market prices, and declined to value the wood chips transactions according to actual market prices derived from arm's length sales made by Tembec to unaffiliated parties.[228]

2. The Panel's Findings

150. We next review briefly the Panel's findings concerning the valuation of wood chip revenue for Tembec.

151. Canada claimed before the Panel that, in valuing wood chip revenue on the basis of the values recorded in Tembec's books, USDOC acted inconsistently with Article 2.2.1.1, because it used records kept by the exporter which did not "reasonably reflect the costs associated with the production and

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[223]Before the Panel, Canada argued that USDOC should have used, with respect to West Fraser, the values included in that company's records for sales of wood chips to affiliated parties in British Columbia. With respect to Tembec, Canada argued that USDOC was required to disregard the values recorded in Tembec's books for internal transfers of wood chips and, instead, to use the values of transactions with unaffiliated parties. (Panel Report, para. 7.307)

[224]Panel Report, para. 7.307.

[225]*Ibid*., para. 7.299.

[226]*Ibid*., para. 7.320.

[227]*Ibid*., para. 7.299.

[228]USDOC IDM, Comment 11, pp. 60 and 61. See also Panel Report, paras. 7.307, 7.314, and 7.327.

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 argued before the Panel that USDOC applied a different methodology in the case of Tembec than in the case of West Fraser and thereby failed to act in an even-handed manner. Canada asserted that, by applying a different methodology to Tembec than to West Fraser, USDOC acted in an other than "even-handed" manner. According to Canada, the methodology applied to Tembec would "penalize" corporations that consume their own by-products rather than selling these by-products to other separate entities.[230] The Panel observed that West Fraser and Tembec "were in different factual situations"; specifically, that Tembec was a "single entity including, *inter alia*, sawmills and pulp mills", while "West Fraser was divided in legally separate companies."[231] The Panel found that, in the light of the different factual situations of the two companies, USDOC did not "discriminate[] against Tembec by treating it differently from West Fraser."[232] Moreover, the Panel found that USDOC's treatment of Tembec was the same as that normally applied by USDOC for "valuing costs in interdivisional sales."[233] As a result, the Panel rejected Canada's claim that USDOC "acted in a biased, non-objective or non-even-handed manner in applying a methodology to Tembec different from that used with respect to West Fraser."[234]

154. The Panel furthermore rejected Canada's claim that Article 2.2.1.1 requires that a by-product offset must reasonably reflect the *market value* for that by-product. The Panel also concluded that an

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[229]Panel Report, para. 7.316.

[230]In addition, Canada claimed that Article 2.2.1.1 requires that a by-product offset must reasonably reflect the *market value* of this by-product, and that USDOC's valuation was incorrect because it assumed—erroneously, according to Canada—that by-products have costs and can yield profits. Finally, Canada also brought claims under Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*. (Panel Report, paras. 7.321–7.325)

[231]Panel Report, para. 7.320.

[232]*Ibid*.

[233]*Ibid*.

[234]*Ibid*.

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 wood chips was not unreasonable."[235]

3. Canada's Appeal

155. Canada appeals only the Panel's conclusions concerning Tembec, and does not appeal those concerning West Fraser.[236] However, in its arguments on appeal, Canada refers to USDOC's approach to valuing by-product revenue for West Fraser in support of its argument that USDOC failed to treat Tembec in an even-handed manner. Canada argues that corporate structure provides "no rationale"[237] for the use of different tests in the valuation of by-products. USDOC's "new test"—the test it applied to Tembec—is not even-handed because "it serves only to lower the by-product offset for corporations with internal transfer values."[238]

156. Canada further argues that USDOC applied its arm's-length test to West Fraser to determine whether affiliated by-product sales reflected "market value", but did not apply that test in the case of Tembec. The reason for this uneven treatment, in Canada's view, was related solely to Tembec's corporate structure.

157. Canada submits that the Panel did not consider whether the "different factual situations" provided a reasonable justification for the different treatment by USDOC and relies on the Appellate Body's ruling in *US – Hot-Rolled Steel* to argue that USDOC "failed to exercise its discretion in an even-handed fashion".[239] Canada argues that USDOC's "only normal practice with by-products is to use the arm's length test to value these offsets at market value"[240], but that, in the underlying investigation, USDOC determined that "its new 'normal' practice" for valuing by-product revenue was

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[235]Panel Report, para. 7.324. The Panel also rejected Canada's claims regarding Articles 2.2, 2.2.1, and 2.4 because Canada had based these claims on the premise that the United States had acted inconsistently with Article 2.2.1.1. Given that Canada had not established that the United States had acted inconsistently with Article 2.2.1.1, the Panel rejected Canada's claims under Articles 2.2, 2.2.1, and 2.4 as well. (Panel Report, paras. 7.325 and 7.326)

[236]Before the Panel, Canada claimed that USDOC erred both in its valuation of the by-product revenue for Tembec, as well as for West Fraser. The Panel examined separately the conclusions of USDOC in relation to Tembec and West Fraser, respectively, and concluded that, with respect to both companies, USDOC had not acted inconsistently with Article 2.2.1.1 of the *Anti-Dumping Agreement*. (See Panel Report, paras. 7.314–7.326 for Tembec and paras. 7.327–7.348 for West Fraser)

[237]Canada's other appellant's submission, para. 57.

[238]*Ibid*., para. 61.

[239]*Ibid*., paras. 64 and 67 (referring to Panel Report, para. 7.320)

[240]*Ibid*., para. 72.

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 manner—is a question of law. The fact that such an "obligation [is] not found in Article 2.2.1.1" is not dispositive. Whether a particular approach of an investigating authority is, or is not, even-handed is, ultimately, a matter of the "legal characterization"[249] of facts and, as such, a matter of law. We are thus unable to agree with the United States that the issue raised by Canada with respect to the lack of even-handed treatment on the part of USDOC is beyond the scope of appellate review.

164. We now turn to the two factual assertions that serve as the basis for Canada's legal argument concerning even-handed treatment, namely that the two companies, Tembec and West Fraser, were "similarly situated" and that USDOC acted inconsistently with its "normal practice" for valuing by-products in the case of Tembec. Without embracing Canada's articulation of the elements of even-handed treatment, we examine Canada's arguments on appeal.

165. Canada argues that USDOC, in evaluating whether Tembec's records "reasonably reflect" the cost of production of the product under consideration (that is, softwood lumber), failed to exercise its

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

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

[248]Appellate Body Report, *US – Hot-Rolled Steel*, para. 148.

[249]Appellate Body Report, *EC – Hormones*, para. 132.

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 this reason, we do not consider that [US]DOC discriminated against Tembec by treating it differently from West Fraser.[256]

170. As both parties have referred to certain findings in the Appellate Body Report in *US – Hot-Rolled Steel*, we briefly turn to consider the relevance of that appeal for the issue before us. In *US – Hot-Rolled Steel*, the Appellate Body addressed USDOC's approach to determining whether sales to affiliated parties were or were not made in the ordinary course of trade. The analysis in that case did not involve the issue of whether two different respondents were or were not similarly situated, or whether the investigating authority was required to act in an even-handed manner in its treatment of two such respondents. It is necessary to bear these factual differences in mind when relying on the Appellate Body Report in *US – Hot-Rolled Steel* in this appeal.

171. Canada acknowledged at the oral hearing that neither the methodology applied by USDOC to Tembec, nor the methodology applied by USDOC to West Fraser, taken separately and independently of each other, is incompatible with the *Anti-Dumping Agreement*.[257] Canada's claim is that USDOC's approach to valuation of by-product revenue in the case of Tembec stands in "unjustifiable contrast"[258] to USDOC's approach in the case of West Fraser. Canada contends that there is no reason "why Tembec, in its inter-divisional transfers, should be treated differently from the affiliated transactions between West Fraser and its affiliates, some of which were wholly-owned subsidiaries."[259] Canada also argues that, if two respondents in an anti-dumping investigation are "similarly situated, then there is no reason to differentiate."[260] However, Canada said that if we were to find that the two respondents *were not* "similarly situated", Canada would "insist only on a consistency

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[255]USDOC IDM, Comment 11, p. 60.

[256]Panel Report, para. 7.320.

[257]Canada's response to questioning at the oral hearing.

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

[259]Canada's response to questioning at the oral hearing.

[260]*Ibid*.

requirement".[261] The logical consequence of Canada's position, therefore, is that if the two respondents are *not* similarly situated, the application of the same methodology to both respondents would not *necessarily* be required.

172. Canada further submits that the Panel "did not consider whether the 'different factual situations' provided a reasonable justification for the different treatment".[262] Canada argues that, although Tembec and West Fraser differ in their corporate structure, this difference is not a reasonable justification for applying different methodologies to the two companies, because both companies also *share* certain characteristics. According to Canada, Tembec is a "large corporation that has many divisions that operate for the most part as independent entities" and West Fraser "operates sawmills and controls wholly owned subsidiaries".[263] As a result, according to Canada, "both companies have the ability to determine related-party pricing for wood chips".[264]

173. In our view, Canada objects to the Panel's characterization of the two companies, which led the Panel to conclude that the two companies were differently situated (such that, as a consequence, the application of different methodologies was justified). We note that the Panel, in its brief analysis of this issue, based itself on the fact that Tembec was a "single entity including, *inter alia*, sawmills and pulpmills", while West Fraser was "divided in legally separate companies". On the basis of these facts, the Panel drew the conclusion that West Fraser and Tembec were "in different factual situations", such that USDOC "[did not] discriminate[] against Tembec by treating it differently from West Fraser" and that, therefore USDOC had not "acted in a biased, non-objective or non-even-handed manner".[265]

174. We recall our view[266] that the question whether an investigating authority exercised its discretion in an even-handed manner is a *legal* issue; in contrast, the underlying question in the case before us whether two companies were or were not in "different factual situations" is a question of *fact*. This being a factual question, we must determine whether there is any reason for us to interfere with the Panel's factual finding on this point. As the Appellate Body has often observed, it will not interfere lightly with a Panel's assessment of the facts.[267] We are not persuaded that in this case the

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[261]Canada's response to questioning at the oral hearing.

[262]Canada's other appellant's submission, para. 63 (quoting Panel Report, para. 7.320).

[263]*Ibid*., para. 66.

[264]*Ibid*.

[265]Panel Report, para. 7.320.

[266]*Supra*, para. 163.

[267]Appellate Body Report, *US – Wheat Gluten*, para. 151. See also Appellate Report, *EC – Hormones*, para. 132 and Appellate Body Report, *Chile – Price Band System*, para. 224.

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 situated, the application of the same methodology to both respondents would not *necessarily* be required. As we do not disturb the Panel's factual finding that Tembec and West Fraser were "in different factual situations", the basis for Canada's appeal regarding lack of even-handed treatment of Tembec has not been established.

176. We now turn to Canada's argument that USDOC "has consistently applied the arm's length test for the valuation of by-products"[268] and that, by departing from this "normal practice"[269] in the case of Tembec, USDOC failed to accord even-handed treatment to Tembec.

3. The "Requirement" to Apply a Methodology Consistent with "Normal" Practice

177. As we have noted above, Canada argues that, if the Appellate Body were to find that Tembec and West Fraser were *not* similarly situated, Canada would "only insist on a consistency requirement".[270] According to Canada, USDOC's "only normal practice with by-products is to use the arm's length test to value these offsets at market value".[271] To address this argument, we will assume, *arguendo*, that Canada's "consistency with normal practice" criterion is applicable when determining whether the exercise of discretion by an investigating authority is even-handed.

178. As stated above, Canada is of the view that in its approach to valuing Tembec's by-product revenue, USDOC "depart[ed] from [its] normal practice"[272] of valuing by-products. The participants disagree on what constitutes USDOC's "normal" practice in this regard. Canada argues that this "normal practice" is that used by USDOC in a previous case to value *by-products*[273], while the United States contends that the appropriate practice is USDOC's general approach to valuing *inputs in interdivisional transfers*. The facts concerning USDOC's normal practice on by-product revenue valuation in interdivisional transfers are thus contested.

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[268]Canada's other appellant's submission, heading II.A.3, p. 26.

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

[270]Canada's response to questioning at the oral hearing. We again recall Canada's argument that USDOC's "departure from normal practice in this case demonstrates its failure to provide even-handed treatment". (*Ibid*., para. 74)

[271]*Ibid*., para. 72.

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

[273]Canada refers to the Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 Fed. Reg. 49349 (Dept. Comm. Sept. 27, 2001). (*Ibid*., para. 72)

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

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-handed treatment, Canada's case falls on its own grounds. We wish to make it clear that we are not making a finding as to whether Canada has correctly articulated the elements of even-handed treatment for the purposes of this case. Accordingly, we uphold the Panel's findings that the United States did not act inconsistently with Article 2.2.1.1 of the *Anti-Dumping Agreement*.

5. Consequential Claims

182. Canada submits that "[a]s a result of the Panel's findings in relation to Article 2.2.1.1, the Panel concluded that the United States did not act inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the [*Anti-Dumping Agreement*]."[275] As we have upheld the Panel's finding under 2.2.1.1, we consequently uphold the Panel's findings that the United States did not act inconsistently with Articles 2.2, 2.2.1, and 2.4 of the *Anti-Dumping Agreement*.

[274]Panel Report, para. 7.320.

[275]Canada's other appellant's submission, para. 75.

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 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";

(b) reverses the Panel's 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 expense for softwood lumber for Abitibi, but does not make findings on whether the United States acted consistently or inconsistently with these provisions; and

(c) upholds the Panel's findings, in paragraphs 7.319–7.326 and 8.1(b)(ix) of the Panel Report, that 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 as offsets in the case of Tembec.

184. The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.

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 paragraphs 7.224 and 8.1(a)(i) of the Panel's Report, and the reasoning leading thereto. Therein, the Panel found that the determination of the U.S. Department of Commerce was inconsistent with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* inasmuch as it was based on a methodology whereby sales in the United States of different models or types of merchandise at above their normal value were not accounted for by offsetting or reducing the amount of dumping found to have occurred with respect to other models or types (a methodology referred to by the Panel as "zeroing"). This finding is in error and is based on erroneous findings on issues of law and related legal interpretations contained in paragraphs 7.213 through 7.223 of the Panel's Report.
