BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Final Dumping Determination On Softwood Lumber from Canada

(AB-2004-2)

APPELLEE'S SUBMISSION OF THE UNITED STATES OF AMERICA

June 7, 2004

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Final Dumping Determination
On Softwood Lumber from Canada

(AB-2004-2)

SERVICE LIST

OTHER APPELLANT

H.E. Mr. Sergio Marchi, Permanent Mission of Canada

THIRD PARTIES

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. K.M. Chandrasekhar, Permanent Mission of India
H.E. Mr. Shotaro Oshima, Permanent Mission of Japan

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In its other appellant's submission,[1] Canada appeals two of the Panel's conclusions in *United States – Final Dumping Determination On Softwood Lumber from Canada*,[2] each relating to calculation of the cost of production and constructed (normal) value for a Canadian lumber producer involved in the underlying antidumping investigation. The first conclusion at issue is that the United States acted consistently with Article 2.2.1.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") in determining financial expense attributable to lumber production by the Abitibi company. The second conclusion at issue is that the United States acted consistently with those same provisions in determining an offset to the cost of lumber production for the Tembec company, based on that company's revenues from sales of wood chips, which are a by-product in lumber production.

2. Each of the Panel's legal findings and conclusions that Canada appeals was proper and, accordingly, should be upheld.

3. With respect to the first issue, Canada's argument is based on two equally erroneous propositions, coupled with a mischaracterization of the Panel's findings. Canada focuses on the second sentence in Article 2.2.1.1, which reads as follows:

> 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] *Other Appellant's Submission of Canada*, May 28, 2004 ("Canada Appellant Submission").

[2] *United States – Final Dumping Determination On Softwood Lumber from Canada*, WT/DS264/R, circulated April 13, 2004 ("*Lumber Panel Report*").

4. Canada's first erroneous proposition is that the obligation to "consider all available evidence" is unlimited. To assert that proposition, however, Canada must contend with the phrase "provided that such allocations have been historically utilized by the exporter or producer," which plainly limits the requirement to consider a particular type of evidence – *i.e.*, evidence "which is made available by the exporter or producer in the course of the investigation." Canada purports to get past that limitation by arguing that this is not really a limitation on an obligation to consider certain evidence; rather, Canada asserts, it is a limitation on an investigating authority's discretion to deny "controlling weight" to that evidence. Canada fails to identify any support for this novel, "controlling weight" interpretation (an interpretation that was not advanced by Canada or considered by the Panel during the underlying panel proceedings and is thus not subject to appeal). In fact, Article 2.2.1.1 makes no reference at all to the weight to be accorded to *any* evidence and certainly does not require that *controlling weight* be accorded to one particular type of evidence.

5. Canada's second erroneous proposition is that the requirement to "consider" certain evidence is really a requirement to make express findings about the relative merits of alternative methodologies for allocating costs. Canada purports to invest the verb "consider" with a meaning other than its ordinary meaning. It attempts to bolster this proposition by portraying the Panel's interpretation of the requirement to consider certain evidence as leading to absurd results – in effect, vitiating the obligation of any meaning at all. But, that portrayal is based on a gross mischaracterization of the Panel's findings. For example, contrary to Canada's assertion, the Panel did not read Article 2.2.1.1 as setting an "extremely low threshold" for investigating

authorities.[3] Nor did the Panel interpret the obligation to consider evidence as mere "procedural evidentiary requirements."[4]

6. As the United States demonstrates below, the Panel correctly interpreted the obligation on investigating authorities to "consider all available evidence on the proper allocation of costs" in accordance with its ordinary meaning and in light of its context. It did not, as Canada's summary implies, vitiate the obligation in Article 2.2.1.1 of any meaning. The Panel also correctly found that the obligation is not absolute, as the obligation only applies to certain evidence if ("provided") certain conditions are met.[5] Further, the Panel scrutinized the relevant portions of the determination by the United States Department of Commerce ("Commerce") and was left with "no doubt" that Commerce had fulfilled its obligation to "consider all available evidence on the proper allocation of costs."[6] Accordingly, the Panel's legal findings and conclusions with respect to the Abitibi interest expense issue should be upheld.

7. With respect to the question of Commerce's valuation of a by-product revenue offset for Tembec, Canada has failed to raise an issue within the scope of appellate review. Instead, it has asked the Appellate Body to review the purely factual question of whether the Panel erred in finding Commerce to have assessed Tembec's by-product revenue offset in "an objective and 'even-handed' manner."[7] While Canada purports to have framed its argument in terms of consistency with Article 2.2.1.1 of the AD Agreement, the link to that provision is tenuous at

---

[3]Canada Appellant Submission, para. 33.

[4]*Id.*, para. 38.

[5]*Lumber Panel Report*, para. 7.237.

[6]*Id.*, para. 7.238.

[7]Canada Appellant Submission, para. 12.

best. As Canada has failed to raise an issue of law covered by the Panel report or a legal interpretation developed by the Panel, the Appellate Body should reject its appeal on the Tembec by-product issue as beyond the scope of appellate review as set out in Article 17.6 of the DSU.

8. Even if the Appellate Body were to reach the merits of Canada's Tembec by-product argument, it should reject that argument and uphold the Panel report. Canada's argument that Commerce failed to value Tembec's by-product offset in an even-handed manner because it used a different approach than it used to value the by-product offset of another producer, West Fraser, is based on a fatally flawed premise. Canada assumes, without any substantiation, that Tembec and West Fraser were similarly situated and, accordingly, should have had their by-product offsets valued in an identical fashion.

9. As a factual matter, and as the Panel correctly found, Tembec and West Fraser were not similarly situated.[8] In Tembec's case, the question for Commerce was how to value transfers of a by-product between divisions of a single company. In West Fraser's case, the question was how to value sales of the by-product from one company to an affiliated company. Even-handedness did not require treating these different factual situations the same way.

10. In sum, Canada's claims of error by the Panel are based on mischaracterizations of the Panel's analysis and findings in this dispute. In the analysis and findings actually made, the Panel correctly found that Commerce's determinations regarding the calculation of Abitibi's financial expenses and Tembec's by-product revenue offset are not inconsistent with the relevant provisions of Article 2 of the AD Agreement. Accordingly, the Appellate Body should uphold

[8] *See Lumber Panel Report*, para. 7.320.

the Panel's findings on these issues.

II. ARGUMENT

A. The Panel Correctly Found That The United States' Allocation Of Abitibi's Financial Expenses Was Consistent With Article 2.2.1.1 Of The AD Agreement.

1. Commerce's Methodology

11. In calculating cost of production for Abitibi, Commerce allocated financial costs (*i.e.*, interest on borrowed funds) based on a "cost of goods sold" ("COGS") methodology. Under the COGS methodology, Commerce first determines a company's total financial cost.[9] Second, Commerce takes total financial cost and compares it, as a ratio, to the company's total cost of goods sold. The resulting quotient is the company-wide financial cost ratio and represents the overall borrowing needs of the company. Third, this ratio is applied to the total cost of manufacturing for the product under investigation, in order to calculate a financial cost specific to that product. Thus, total financial costs are attributed proportionately to the product under consideration.[10]

12. As fully explained in the Issues and Decisions Memorandum accompanying its determination, Commerce allocated interest expense based on the COGS methodology after considering Abitibi's arguments that its lumber producing division was less asset-laden than its other divisions.[11] Commerce used a COGS allocation, rather than an alternative, asset-based

---

[9] *See Section D Questionnaire - Cost of Production and Constructed Value*, D-13 (Exhibit US-46).

[10] *First U.S. Written Submission*, para. 188.

[11] Issues and Decision Memorandum ("IDM")(Exhibit CDA-2).

allocation urged by Abitibi, because the COGS allocation better reflected the fact that financial costs are general costs, relating to the overall cash needs of the company as a whole. Also, Commerce determined that its method better accounted for the fact that money is fungible. That is, borrowed funds are not available for one purpose to the exclusion of all other purposes; rather, they may as easily be used to purchase assets as to fund ongoing operations. Moreover, Commerce's allocation method accounted for differing asset values, inasmuch as more asset-laden divisions would have higher depreciation expenses, which would increase the cost of manufacturing products in those divisions, resulting in a proportionately greater allocation of financial cost than to less asset-laden divisions.[12]

13. While Canada agrees that Article 2.2.1.1 does not impose on investigating authorities any particular methodology for the purpose of allocating costs,[13] it challenges Commerce's application of a COGS allocation methodology, arguing that Commerce should have used the alternative methodology urged by Abitibi.

2. The Panel's Legal Findings And Conclusions

14. In evaluating Canada's claim, the Panel made nine essential findings. First, the Panel found that neither of the two obligations in Article 2.2.1.1 at issue – *i.e.*, the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation, and the obligation to consider all available evidence on the proper allocation of costs – is absolute. Rather, each obligation is conditioned. The obligation relating to exporter or producer records is

[12]U.S. Answer to Panel's 19 June 2003 Questions, para. 111.

[13]Canada's Responses to the Panel's Questions From the First Substantive Meeting, June 30, 2003, para. 117.

conditioned on such records having been kept in accordance with the generally accepted accounting principles of the exporting country and reasonably reflecting the costs associated with the production and sale of the product under consideration. The obligation relating to consideration of evidence is conditioned with respect to exporter and producer evidence on cost allocation; the obligation applies only where "such allocations have been historically utilized by the exporter or producer."[14]

15. Second, the Panel found that, based on Commerce's discussion in the IDM, there is "no doubt that [Commerce] made case-specific factual findings with respect to Abitibi's financial expense determination." In other words, contrary to Canada's claim, Commerce did not blindly adhere to a default cost allocation methodology, simply ignoring Abitibi's arguments on the merits of an alternative methodology.[15]

16. Third, the Panel rejected Canada's argument that Commerce used the COGS methodology "because it is consistent and predictable." While Commerce did note that the COGS methodology constitutes "'a consistent and predictable practice,'" this was not the reason for its rejection of Abitibi's alternative methodology. Indeed, the Panel then referred to discussion in the IDM evidencing Commerce's consideration of Abitibi's arguments.[16]

17. Fourth, the Panel found that Article 2.2.1.1 "does not require that investigating authorities compare various allocation methodologies to assess their advantages and disadvantages but to

---

[14]*Lumber Panel Report*, para. 7.237.

[15]*Id.*, para. 7.238.

[16]*Id.*

'consider' all available evidence on the proper allocation of costs."[17]

18. Based on its first four findings, the Panel rejected "Canada's contention that the United States failed to 'consider all available evidence on the proper allocation of costs.'"[18]

19. Fifth, the Panel found that Canada misinterpreted Article 2.2.1.1 as imposing an unconditional obligation to establish an interest expense for Abitibi that "'reasonably reflects the costs associated with the production and sale of the product under consideration.'" What Article 2.2.1.1 required was that Commerce calculate Abitibi's costs on the basis of Abitibi's records if, *inter alia*, those records "reasonably reflect the costs associate with the production and sale of the product under consideration."[19]

20. Sixth, the Panel found that the allocation methodology proposed by Abitibi had not been "historically utilized" by Abitibi. In fact, it appeared to have been "developed by Abitibi for the purposes of the anti-dumping investigation at issue." Accordingly, under the limitation in Article 2.2.1.1, Commerce was not required to consider the allocation methodology proposed by Abitibi.[20]

21. Seventh, the Panel found that both the COGS methodology and the alternative methodology proposed by Abitibi had "shortcomings and advantages," and that it was Commerce's role, not the Panel's, to choose a reasonable cost allocation methodology. It found that, even under the interpretation of Article 2.2.1.1 urged by Canada, Canada had not met its

---

[17] *Id.*

[18] *Id.*, para. 7.239.

[19] *Id.*, para. 7.241.

[20] *Id.*, para. 7.242 and note 378.

burden to demonstrate that an unbiased and objective investigating authority could not have used the methodology actually applied by Commerce.[21]

22. Eighth, the Panel rejected Canada's argument that Commerce had attributed to softwood lumber interest costs "beyond those 'pertaining to' softwood lumber," in violation of Article 2.2.2. It found that, since an unbiased and objective investigating authority could have used the allocation that Commerce actually used, Commerce did not violate Article 2.2.2.[22]

23. Finally, the Panel found that Canada's other claims with respect to the interest allocation methodology used for Abitibi were derivative of Canada's claims under Articles 2.2.1.1 and 2.2.2. Having rejected the latter claims, the Panel rejected the derivative claims as well.[23]

3. Canada's Mischaracterization Of The Panel's Legal Findings And Conclusions

24. Canada describes the Panel report with respect to Abitibi's interest allocation in a way that distorts the Panel's legal findings and conclusions. Canada's statements concerning those findings and conclusions are more a caricature than an accurate representation of what the Panel actually did.

25. In several places, Canada erroneously portrays the Panel as having rendered meaningless the term "consider" in Article 2.2.1.1. For example, it states that the Panel found Commerce to have met "the minimum requirements" in Article 2.2.1.1, implying incorrectly that the Panel found that provision to contain different levels of requirements.[24] Canada goes on to state, again

---

[21] *Id.*

[22] *Id.*, para. 7.244.

[23] *Id.*, para. 7.245.

[24] Canada Appellant Submission, para. 33.

incorrectly, that "the Panel determined that this provision [Article 2.2.1.1] imposed an extremely low threshold on investigating authorities; in effect, the Panel's interpretation would mean that merely accepting evidence is sufficient to meet the investigating authority's obligation to determine the proper allocation of costs."[25] Nowhere does the Panel describe the obligation to consider certain evidence as "an extremely low threshold." Nor does the Panel find that the obligation could be satisfied by "merely accepting evidence." In fact, the Panel carefully analyzed the IDM and, based on its analysis, reached the conclusion that Commerce had fulfilled its obligation under Article 2.2.1.1.[26] A careful analysis of the IDM would not have been necessary if, as Canada alleges, the Panel had actually concluded that Commerce's only obligation was "merely accepting evidence."

26. Another example of Canada's misrepresentation of the Panel's findings and conclusions is its characterization of the Panel's discussion of why Commerce used the COGS methodology. Canada states that "the Panel accepted Commerce's claim that it was permitted to select its cost allocation method *because* the method was 'consistent and predictable'. . . ."[27] In fact, the Panel did no such thing. Rather, the Panel correctly found that Commerce never claimed that it was permitted to use the COGS methodology *because* it was "consistent and predictable." It stated, "The statement in the IDM that DOC [Commerce] as developed 'a consistent and predictable practice for calculating and allocating financial expenses' does not prove in our view that DOC's

---

[25]*Id. See also id.*, para. 34 (asserting incorrectly that Panel equated the obligation to "consider" with "a mere requirement for an investigating authority to take notice of evidence presented to it"); para. 36 (suggesting incorrectly that Panel interpreted Article 2.2.1.1 as requiring only "a perfunctory examination of the evidence").

[26]*See Lumber Panel Report*, para. 7.238.

[27]Canada Appellant Submission, para. 23 (emphasis added).

'established practice would be followed in Abitibi's case because it is consistent and predictable.'"[28] In other words, contrary to Canada's assertion, the Panel found that Commerce's observation about the consistency and predictability of the COGS methodology was unrelated to its reasons for rejecting Abitibi's alternative methodology in favor of COGS.

27. In asserting incorrectly that the United States had argued and the Panel accepted that Commerce could use the COGS methodology because of its consistency and predictability, Canada appears to imply that the Panel upheld a slavish adherence to one methodology absent any consideration of an alternative methodology. That implication is a distortion of both the United States' argument and the Panel's finding.

28. Yet another mischaracterization of the Panel's findings and conclusions is Canada's statement that "the Panel concluded that an investigating authority could use generic reasoning, applicable in all cases irrespective of the facts, to explain its selection of a cost allocation methodology."[29] What the Panel actually said was,

> We do not consider that using generic reasoning in support of a specific determination constitutes, in and of itself, a reason which would justify a conclusion that the United States has failed to comply with Article's 2.2.1.1 requirement that '[a]uthorities shall consider all available evidence on the proper allocation of costs'. In our view, reasoning – whether generic or specific – is similarly valid and both can be used in support of any given conclusion. In the case before us, the IDM shows that not only generic but also specific reasoning was used by DOC in support of its conclusion as to how financial expense should be allocated. . . .[30]

29. Canada's distortion of the Panel's discussion of generic and specific reasoning is similar

---

[28]*Lumber Panel Report*, para. 7.238.

[29]Canada Appellant Submission, para. 23.

[30]*Lumber Panel Report*, para. 7.238.

to its distortion of the Panel's discussion of Commerce's observation about the consistency and predictability of the COGS methodology. In both cases, Canada erroneously implies that the Panel read Article 2.2.1.1 as permitting slavish adherence to a particular cost allocation methodology without any consideration of alternative methodologies. The Panel did nothing of the sort. While it disagreed with Canada's proposed interpretation of the word "consider," it did not interpret that word in a way that would render it meaningless. And, as discussed in section A.5, below, the Panel carefully analyzed Commerce's determination to use the COGS methodology and properly concluded that Commerce had fulfilled its obligation to "consider" all available evidence on the proper allocation of costs.

4. Canada Misinterprets Article 2.2.1.1 As Containing No Condition On The Requirement To Consider Certain Evidence.

30. In addition to mischaracterizing the Panel's legal findings and conclusions, Canada's other appellant's submission offers up a new interpretation of Article 2.2.1.1 that has no basis in the text or context of that provision. Canada argues that "[t]he clause which begins with 'including' does not impose a limitation on the consideration due evidence submitted by a producer. Instead, it limits the circumstances under which a producer's evidence must be given controlling weight."[31]

31. Preliminarily, it should be noted that Canada's "controlling weight" theory was never presented to the Panel. It is presented for the first time in Canada's other appellant's submission.

32. In *United States – Tax Treatment for "Foreign Sales Corporations"* ("*United States – FSC*"), the Appellate Body confirmed that, while "'new arguments are not *per se* excluded from

[31]Canada Appellant Submission, para. 43.

the scope of appellate review, simply because they are new,'" the Appellate Body's ability to consider new arguments "is circumscribed by [its] mandate under Article 17 of the DSU."[32] That mandate, set out in Article 17.6 of the DSU, is to address "issues of law covered in the panel report and legal interpretations developed by the panel."

33. Canada's "controlling weight" argument involves neither an "issue of law covered in the panel report," nor a "legal interpretation developed by the panel." Underscoring the point that this argument is entirely new is the fact that nowhere in its presentation of this argument does Canada even refer to the Panel's discussion of Article 2.2.1.1.[33]

34. As noted in paragraph 14, above, the Panel began its analysis by observing that the two relevant obligations in Article 2.2.1.1 are conditioned by clauses beginning with the word "provided." In its discussion of the obligation for an investigating authority to consider certain evidence, the Panel did not suggest that the "provided" clause might have any meaning other than its ordinary meaning.[34] Presumably, this was because the point was obvious, was not disputed, and did not warrant a more elaborate discussion. It is only now that Canada is placing in dispute this aspect of the interpretation of Article 2.2.1.1.

35. As it did in the *United States – FSC* dispute, the Appellate Body should decline to examine an argument presented for the first time on appeal. However, even if it were to reach this new argument, the Appellate Body should find that it is without merit.

36. Canada's "controlling weight" argument is flawed for several reasons. First and

---

[32]Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted Feb. 24, 2000, para. 102 ("*United States – FSC*").

[33]*See* Canada Appellant Submission, paras. 41-51.

[34]*Lumber Panel Report*, para. 7.237.

foremost, Article 2.2.1.1 contains no reference at all to the weight to be given to any evidence, let alone to the *controlling* weight to be given to a particular category of evidence. Article 2.2.1.1 contains three sentences. The first sentence identifies the basis on which authorities normally will calculate production costs, while the second sentence pertains to the evidence that authorities will consider in calculating costs. The third sentence (not relevant here) pertains to certain adjustments to costs. The weight accorded to evidence simply is not the subject of this provision. Not surprisingly, Canada supplies no citation for the proposition that the phrase at issue "limits the circumstances under which a producer's evidence must be given controlling weight."[35]

37. Canada goes on to state that, "[t]he use of the word 'including' confirms that the clause only defines particular evidence to be given particular weight, and not evidence that may be excluded from consideration."[36] There are two problems with this statement. First, it is not at all evident what it is about the word "including" that suggests the meaning Canada asserts. As relevant here, "including" means "inclusive of."[37] Canada fails to explain how it derives the concept of controlling weight from a term that means "inclusive of." Second, the word in the clause at issue that limits the consideration due evidence submitted by a producer is not the word "including," as Canada mistakenly suggests, but rather, the word "provided," as the Panel correctly found.[38]

38. The Panel's finding that the requirement in Article 2.2.1.1 to consider exporter or

---

[35]Canada Appellant Submission, para. 43.

[36]*Id.*, para. 44.

[37]*The New Shorter Oxford English Dictionary* at 1337 (1993).

[38]*Lumber Panel Report*, para. 7.237.

producer evidence on allocation of costs is a requirement subject to a condition is consistent with the ordinary meaning of the term "provided." That term means "on the condition, supposition, or understanding that."[39] Thus, with respect to cost allocations made available by exporters or producers, investigating authorities are obligated to consider such allocations "on the condition, supposition, or understanding that" such allocations have been historically utilized by the exporter or producer. In this case, Canada concedes that Abitibi's proposed allocation was not historically utilized by Abitibi.[40] Pursuant to Article 2.2.1.1, therefore, Commerce was not obligated to consider the allocation methodology created by Abitibi for purposes of the antidumping investigation on softwood lumber from Canada (though, as discussed in section A.5, below, it did, in fact, consider that methodology).

39. An additional flaw in Canada's "controlling weight" argument is that it appears to hinge largely on a strained and illogical reading of the clause at the end of the sentence at issue that begins with the words "in particular." The full sentence reads:

> 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.

40. Canada asserts that the "in particular" phrase modifies the words "historically utilized by

---

[39] *The New Shorter Oxford English Dictionary* at 2392 (1993).

[40] *See* Canada Appellant Submission, para. 49 ("the evidence relates to the allocation of a general expense for which there has been no historic utilization"). Canada also concedes that the proposed allocation is not consistent with Canadian GAAP. *See* Second Written Submission of Canada, July 9, 2003, para. 183 ("Canadian GAAP do no not permit companies to report interest expenses incurred by business segment or product. Instead, all financial expenses must be aggregated and reported separately as a distinct line item on the Income Statement.").

the exporter or producer."[41] It claims that the phrase "narrows the scope of the evidence that an investigating authority may refuse to regard as controlling because the exporter or producer did not historically utilize the allocation methodology."[42] It then contends that, because the expense at issue here – interest expense – is not one of the expenses enumerated in the "in particular" phrase, the "historically utilized" limitation simply does not apply to it.[43]

41. However, Canada's interpretation of the "in particular" phrase is neither the exclusive interpretation, nor the most obvious, based on sentence structure. A more obvious and logical reading of this phrase, in the context of Article 2.2.1.1, is that it describes with particularity the types of cost allocations that authorities are required to "consider." Thus, subject to the condition set forth in the "including" phrase, an investigating authority is required to consider "all available evidence on the proper allocation of costs, . . . in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs."

42. The latter reading is strongly suggested by the marking off by commas of the phrase "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." This punctuation distinguishes the phrase as a parenthetical phrase.[44] That is, the

---

[41]Canada Appellant Submission, para. 46.

[42]*Id.*

[43]*Id.*, para. 49.

[44]*See The New Shorter Oxford English Dictionary* at 2101 (1993) (defining "parenthesis," as relevant here, to mean "[a] word, clause, sentence, etc., inserted (as an explanation, *qualification*, aside, or afterthought) into a passage which is already grammatically complete, and usu. marked off by brackets, dashes, or commas" (emphasis added)).

sentence is grammatically complete without the phrase, and the insertion of the phrase between commas simply qualifies the sentence. It conditions, as the Panel correctly found, an obligation that otherwise would pertain to "all available evidence on the proper allocation of costs."

43. That the "including" phrase is a stand-alone parenthetical phrase, not modified by the "in particular" phrase, is evidenced by the *absence* of a comma *within* the phrase, between the words "investigation" and "provided." By contrast, in the first sentence of Article 2.2.1.1, the main obligation and the condition on that obligation (signaled by the word "provided") are separated by a comma. The absence of any internal punctuation in the "including" phrase makes its status as a distinct unit within the second sentence particularly stark.

44. In short, Canada's attempt to limit the scope of the "historic utilization" condition in Article 2.2.1.1 by arguing that it is qualified by the "in particular" phrase is based on a strained reading of the sentence at issue. Under a more obvious and logical reading, the "in particular" phrase modifies the evidence on the proper allocation of costs that an investigating authority is to consider. For this reason, as well as the other reasons set forth in this section, the Appellate Body should reject Canada's argument that the "historic utilization" condition does not apply.[45]

5. The Panel Correctly Found That Commerce Considered Abitibi's Proposed Cost Allocation Methodology.

45. As set forth in section A.3, above, Canada mischaracterizes the Panel's legal findings and conclusions in a number of important respects. The common thrust of Canada's

[45]Even if the "in particular" clause modifies the proviso, it merely provides emphasis to the importance of historical utilization for particular data. It does not in any way limit or negate the proviso with respect to all other types of information made available by a producer or exporter.

mischaracterizations is to suggest, incorrectly, that the Panel would deprive the verb "consider" of any meaning. Canada then offers up its own interpretation of "consider," which has no basis in the text or context of Article 2.2.1.1.

46. Canada suggests that Commerce had an obligation to make "factual findings as to the advantages or disadvantages of either of the methodologies that it was required to 'consider.'"[46] However, a requirement to "consider" is not a requirement to make express factual findings. Indeed, in the recently adopted Panel report in a related *Lumber* dispute between the United States and Canada (*United States – Investigation of the International Trade Commission in Softwood Lumber From Canada*), the Panel had occasion to analyze the meaning of the word "consider" in another part of the AD Agreement and in a corresponding provision of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). It found that to determine that investigating authorities had "considered" certain factors,

> it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors. That consideration must go beyond a mere recitation of the facts in question, and put them into context. However, the investigating authorities are not required by Articles 3.7 [of the AD Agreement] and 15.7 [of the SCM Agreement] to make an explicit 'finding' or 'determination' with respect to the factors considered.[47]

47. While the panel in that dispute was analyzing a requirement to consider certain factors (as opposed to the requirement at issue here, to consider certain evidence), the difference in context

---

[46]Canada Appellant Submission, para. 40. *See also id.*, para. 21.

[47]Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber From Canada*, WT/DS277, adopted April 26, 2004, para. 7.67 (citations omitted) (relying on Panel Report, *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122, adopted April 5, 2001, paras. 7.161 and 7.170).

does not appear to bear on the proper interpretation of the term "consider." Accordingly, by analogy, in this case, the Panel properly found that Commerce considered Abitibi's evidence of an alternative cost allocation methodology if it was apparent from Commerce's determination that it gave attention to and took that evidence into account. As with "consider" in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, "consider" in Article 2.2.1.1 of the AD Agreement did not require the investigating authority to make an explicit finding or determination with respect to this evidence.

48. In fact, as the Panel found, it was apparent from Commerce's determination that it gave attention to and took into account Abitibi's evidence on an alternative cost allocation methodology.[48] In response to Abitibi's assertion that the COGS methodology was inappropriate and that Commerce instead should use an asset-based allocation methodology, Commerce stated, in its IDM:

> we disagree with Abitibi that the Department 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, the Department 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 the Department'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, the Department's method addresses Abitibi's concern that those activities are more

[48] *See Lumber Panel Report*, para. 7.238 ("There are several references in the IDM that indicate to us that DOC considered at the time of determination evidence and arguments put forth by Abitibi on the issue at stake.").

> 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.[49]

49. As this extended quotation from the IDM illustrates, and as the Panel correctly found, Commerce's consideration of Abitibi's proposed methodology went beyond the mere recitation of facts. Commerce addressed each aspect of Abitibi's argument for applying an asset-based cost allocation methodology.[50] Thus, the Panel correctly concluded, "[T]he IDM shows that not only generic but also specific reasoning was used by DOC in support of its conclusions as to how financial expense should be allocated."[51]

50. In sum, Canada's argument that the Panel erred in finding Commerce's allocation of Abitibi's interest expense to be consistent with Article 2.2.1.1 of the AD Agreement is unfounded. It rests on a mischaracterization of the Panel's legal findings and conclusions, a flawed interpretation of the proviso in the second sentence in Article 2.2.1.1, and an equally flawed interpretation of the requirement under that provision to "consider" certain evidence. Moreover, it completely ignores findings by the Panel demonstrating Commerce's consideration of Abitibi's alternative methodology.

51. Because Canada's argument with respect to Article 2.2.1.1 is without merit, its argument that the Panel erred in finding that an unbiased and objective investigating authority could have

---

[49] *IDM* (Exhibit CDA-2) (footnote omitted).

[50] It is worth noting that Canada continued to raise new justifications for the Abitibi allocation before the Panel that were not raised during the administrative proceeding. *See* U.S. Comments on Canada's 8/26/03 Responses to Panel Questions, Sep. 5, 2003, paras. 8-12.

[51] *Lumber Panel Report*, para. 7.238.

used the allocation that Commerce actually used also must fail, as that argument necessarily stands or falls on the strength of the first argument.[52]

52. For all of the reasons set forth in this part A, the Panel's legal findings and conclusions with respect to Commerce's cost allocation for Abitibi should be upheld.

B. The Appellate Body Should Reject Canada's Appeal Concerning Calculation Of A By-Product Offset For Tembec, Because It Fails To Raise An Issue Of Law Covered In The Panel Report Or A Legal Interpretation Developed By The Panel. In Any Event, The Panel Correctly Found That Commerce's Calculation Of The Offset Was Consistent With Article 2.2.1.1 Of The AD Agreement.

53. The issue that Canada raises in its other appellant's submission with respect to Tembec concerns Commerce's calculation of an offset to Tembec's cost of lumber production attributable to its sales of wood chips. As the Panel explained, in calculating Tembec's cost of lumber production, Commerce took into account its revenue from sales of wood chips – a by-product of lumber production – by applying those amounts to reduce the overall cost of production.[53] To determine the value of the wood-chip offset, Commerce relied on Tembec's own records.

54. Canada contends that it was improper for Commerce to rely on Tembec's own records, because those records pertain to transfers of wood chips between divisions within Tembec and, Canada alleges, understate the value of the wood chips (thus lessening the amount of the offset to cost of production). Before the Panel, Canada argued that Article 2.2.1.1 "mandates rejection of an exporter's records where calculation of costs for the product under consideration would be

---

[52] *See* Canada Appellant Submission, para. 52 (describing second argument as "a corollary" of the first, to be reached "[i]n the event that the Appellate Body concludes that the Panel's interpretation of Article 2.2.1.1 is overly restrictive").

[53] *Lumber Panel Report*, para. 7.298.

overstated or understated if the investigating authority were to use those records as a basis for the purpose of determining the cost of production for the product under consideration."[54] The Panel rejected that argument,[55] and Canada does not appeal that legal conclusion. Instead, the only question Canada raises in its other appellant's submission is whether Commerce's wood chip offset calculation for Tembec was "objective and 'even-handed.'"[56] That factual question is not an appropriate issue for Appellate Body review. Moreover, the Panel correctly found Commerce's offset calculation to be consistent with Article 2.2.1.1 of the AD Agreement.

1. Canada Fails To Raise An Issue Of Law Covered In The Panel Report Or A Legal Interpretation Developed By The Panel.

55. The question that Canada raises with respect to Tembec is a factual one and, accordingly, is beyond the scope of appellate review. Article 17.6 of the DSU defines the scope of appellate review, stating, "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." The question Canada raises does not fall under either category.

56. The Appellate Body had occasion to analyze Article 17.6 in the *EC – Hormones* dispute. There, it explained,

> Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. . . . Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization

---

[54] *Id.*, para. 7.315 (summarizing Canada's argument).

[55] *Id.*, para. 7.316.

[56] Canada Appellant Submission, para. 12.

issue. It is a legal question.[57]

57. In *Argentina – Footwear*, the Appellate Body expressly declined to consider Argentina's arguments on "the Panel's evaluation of the evidence considered by the Argentine authorities," on the ground that such arguments "relate to matters of fact which are not within [the Appellate Body's] mandate, under Article 17.6 of the DSU, to examine on appeal."[58]

58. Similarly, here, Canada's argument relates to the Panel's evaluation of evidence considered by Commerce. The question, according to Canada, is whether "Commerce assessed the by-product revenue offset for Tembec in an objective and 'even-handed' manner. . . ."[59] That was a question of fact for the Panel to review, under the standard set forth in Article 17.6(i) of the AD Agreement, not the Appellate Body.

59. The question raised by Canada is *not* a question of "the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision."[60] Canada does make a pretense of framing the question as one of consistency with Articles 2.2 and 2.2.1.1 of the AD Agreement.[61] However, that pretense quickly collapses.

---

[57]Appellate Body Report, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, adopted Feb. 13, 1998, para. 132. Unlike *EC – Hormones*, the present dispute involved panel review of an investigating authority's determination based on an administrative record. Accordingly, the Panel here was not the trier of fact, but was reviewing the investigating authority's findings of fact under the standard of review in Article 17.6(i) of the AD Agreement. Nevertheless, the analysis of Article 17.6 of the DSU described in the Appellate Body report in *EC – Hormones* is no less applicable in this context.

[58]Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted Jan. 12, 2000, para. 136.

[59]Canada Appellant Submission, para. 12.

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

[61]*See* Canada Appellant Submission, paras. 12, 59, and 75.

60. Canada begins its argument with an out-of-context quotation from the Panel report, mischaracterizing it as a finding "that Article 2.2.1.1 imposed requirements on the valuation of by-product offsets."[62] In fact, as the sentence preceding the text quoted by Canada makes clear, the Panel's statement was *not* about requirements on valuation. Rather, it was about the circumstances under which an investigating authority is required to rely on a producer's own records. In the sentence preceding the text quoted by Canada, the Panel said, "We recall that Article 2.2.1.1 requires an investigating authority to calculate costs on the basis of records kept by an exporter or producer *provided that such records inter alia reasonably reflect the costs associated with the production and sale of the product under consideration*."[63] In fact, later in its analysis, the Panel made a point of recalling its interpretation that "the role of the conditions set forth in the proviso of Article 2.2.1.1 is *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply."[64]

61. Thus, Canada builds its argument by taking a statement of the Panel out of context and mischaracterizing it as finding a positive obligation with respect to valuation when, in fact, it did just the opposite. Canada then extrapolates from the statement a proposition with no foundation in the text of Article 2.2.1.1. It states, "Canada submits that Commerce must exercise its discretion to make [the by-product revenue offset] calculation in an objective and even-handed manner."[65] However, the requirement is not grounded in the text of Article 2.2.1.1. It is merely a

---

[62] *Id.*, para. 59 (quoting *Lumber Panel Report*, para. 7.312).

[63] *Lumber Panel Report*, para. 7.312 (emphasis added).

[64] *Id.*, para. 7.316 (emphasis in original).

[65] Canada Appellant Submission, para. 59.

hypothesis that "Canada submits."[66]

62. 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 Commerce did in this case. What the United States disputes is Canada's suggestion that such an obligation is found in Article 2.2.1.1 as construed by the Panel.[67]

63. 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 Commerce's actions. Under Article 17.6 of the DSU, that question is not subject to appellate review. Therefore, 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.

2. The Panel Correctly Found That Commerce's Calculation Of The Offset Was Consistent With Article 2.2.1.1 Of The AD Agreement.

64. For the reasons described in the preceding section, the Appellate Body should not consider the merits of Canada's argument with respect to calculation of Tembec's by-product revenue offset. However, even if it were to decide to consider the merits, the Appellate Body should nonetheless dismiss Canada's argument, because the Panel correctly found Commerce's

---

[66] *Id.*

[67] As the Panel noted, Canada did not raise any claim under Article 6.9 or 12.2 of the AD Agreement. To the extent the obligation asserted by Canada may stem from either of those provisions, the Panel correctly concluded that it was "precluded from examining the consistency of DOC's determination in light of the obligations imposed under those provisions." *Lumber Panel Decision*, para. 7.322.

calculation to be consistent with Article 2.2.1.1 of the AD Agreement.

a. The Panel's Analysis

65. As noted in paragraph 54, above, Canada argued to the Panel that Article 2.2.1.1 "mandates rejection of an exporter's records where calculation of costs for the product under consideration would be overstated or understated if the investigating authority were to use those records as a basis for the purpose of determining the cost of production for the product under consideration."[68] That argument was based on the first sentence of Article 2.2.1.1, which reads:

> 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.

66. The Panel rejected Canada's legal argument. It found, correctly, that the proviso in the first sentence of Article 2.2.1.1 does not impose a positive obligation. Rather, it sets a condition on the requirement to calculate costs on the basis of records kept by the exporter or producer under investigation. That requirement does not apply where, *inter alia*, such records do not reasonably reflect the costs associated with the production and sale of the product under consideration. In those circumstances, an investigating authority is not obligated to rely on the exporter or producer's records. However, Article 2.2.1.1 does not prescribe a rule that an investigating authority *must* reject an exporter or producer's records in particular circumstances.[69]

67. Having made that legal conclusion (which Canada does not appeal), the Panel could have dismissed Canada's claim without further discussion. However, the Panel went on to analyze

---

[68] *Id.*, para. 7.315 (summarizing Canada's argument).

[69] *Lumber Panel Report*, para. 7.316.

Commerce's by-product offset calculation assuming, *arguendo*, that Article 2.2.1.1 imposes the positive obligation that Canada posits. In the course of that analysis, the Panel made the following findings:

- First, the Panel found 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 in legally separate companies." Accordingly, the Panel rejected Canada's "even-handedness" argument. It did not "consider that DOC discriminated against Tembec by treating it differently from West Fraser."[70]

- Second, the Panel noted that it was undisputed that Commerce's methodology for valuing Tembec's by-product offset was the same methodology it used for valuing Tembec's costs in interdivisional sales. The cost of production for a product consists of both particular costs, which add to the total cost of production, and offsets, which subtract from the total cost of production. The Panel found that, as both disputing parties acknowledged, Commerce used the same methodology for valuing the additions to and subtractions from total cost of production. This finding led the Panel to conclude that Commerce's methodology for valuing Tembec's by-product offset was not "biased, non-objective, or non-even-handed."[71]

- Third, the Panel rejected Canada's contention that Article 2.2.1.1 requires the value of a by-product offset to reflect the *market* value of the by-product.[72] What is relevant for cost calculation purposes is the cost associated with the by-product. Market value, by contrast, typically reflects a combination of profit and cost.[73]

- Fourth, the Panel found that while the production of a by-product such as wood chips may not entail particular costs, strictly speaking, it was not unreasonable for Commerce to treat inter-divisional transfer prices recorded in Tembec's records as "a surrogate for cost."[74]

68. In light of these findings, the Panel concluded that "an unbiased and objective

---

[70] *Id.*, para. 7.320.

[71] *Id.*

[72] *Id.*, para. 7.321.

[73] *Id.*, para. 7.322.

[74] *Id.*, para. 7.323.

investigating authority, based on the facts before DOC at the time of determination, could have determined that the valuation in Tembec's books for internal transfers of wood chips was not unreasonable."[75] Accordingly, even assuming for purposes of argument that Article 2.2.1.1 contains the positive obligation that Canada posits, the Panel rejected Canada's claim that the United States had acted inconsistently with Article 2.2.1.1.[76] It also rejected Canada's claim that the United States had violated other AD Agreement articles as a consequence of a violation of Article 2.2.1.1.[77]

b. Canada's Claim That The Panel Erred In Finding Commerce's By-Product Valuation To Be Objective And Even-Handed Is Based On A Flawed Premise.

69. Canada's argument that the Panel erred in finding Commerce's by-product valuation to be objective and even-handed is based on the flawed premise that Tembec and another Canadian lumber producer, West Fraser, were similarly situated. Canada asserts repeatedly, without any discussion, that Tembec and West Fraser were similarly situated.[78] It argues that, therefore, Commerce should have valued each company's wood chip offset in the same manner.

70. Preliminarily, it should be noted that Canada's argument is internally inconsistent. In proceedings before the Panel, Canada did not argue that Commerce should have taken a common approach to valuing Tembec's wood chip sales and West Fraser's wood chip sales. Instead, it argued that the approach used for West Fraser should have been used for Tembec, and the

---

[75] *Id.*, para. 7.324.

[76] *Id.*

[77] *Id.*, paras. 7.325-7.326.

[78] *See*, *e.g.*, Canada Appellant Submission, paras. 58, 66, 67, and 70.

approach used for Tembec should have been used for West Fraser. As the Panel explained, "In the case of West Fraser, DOC declined to value wood chip revenue based on sales to affiliated parties, while, in the case of Tembec, DOC relied upon internal transfers to value wood chip revenue. *Canada in effect, argues that DOC should have done precisely the opposite.*"[79] Thus, Canada has been inconsistent in arguing that even-handedness required treating Tembec and West Fraser identically.

71. More fundamentally, Canada offers no support for the proposition that Tembec and West Fraser were similarly situated. The Panel found "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 in legally separate companies."[80] In responding to a question from the Panel, the United States explained the relevance of this difference, as follows:

> In the case of sales to affiliated companies, the question is whether those sales reflect a true market price, unaffected by the affiliation between the buyer and seller. In the case of internal transfer prices between divisions, the question is whether the internal transfer price used by the company reasonably reflects the company's cost of producing the by-product being used as an offset.[81]

The fact that the different corporate structures raised different questions for purposes of valuing by-product offsets justified the different approaches that Commerce took in the case of Tembec and West Fraser. Canada suggests that the differences in corporate structure are irrelevant, but fails to explain why. The absence of any justification for its assertion that Tembec and West Fraser are similarly situated is fatal to its "even-handedness" argument.

---

[79] *Lumber Panel Report*, para. 7.307 (emphasis added).

[80] *Lumber Panel Report*, para. 7.320.

[81] U.S. Answers to Panel's 13 August 2003 Questions, para. 85.

72. Canada purports to rely on the Appellate Body report in *United States – Hot-Rolled Steel* to support its argument. However, that reliance is misplaced. The issue in *United States – Hot-Rolled Steel* concerned Commerce's method for determining whether transactions were outside the ordinary course of trade and thus should be excluded from the calculation of normal value in an antidumping investigation. The particular question was the treatment of an exporter or producer's sales to an affiliated entity at prices above a certain threshold as compared with sales to an affiliated entity below that threshold. Commerce's practice had been to treat sales at prices below the threshold one way and sales at prices above the threshold another way. The Appellate Body found this difference in treatment to be inconsistent with Article 2.2.1 of the AD Agreement.[82]

73. The essential point of the Appellate Body's conclusion in *United States – Hot-Rolled Steel* is a point about symmetry. The same rule should apply to affiliated transactions below the threshold as applies to affiliated transactions above the threshold. What is important, for present purposes, is that in assessing the even-handedness of Commerce practice, the Appellate Body was making an "apples-to-apples" comparison. It was comparing affiliated transactions to affiliated transactions.

74. By contrast, in the present dispute, Canada's "even-handedness" argument is *not* based on an apples-to-apples comparison. Canada is not arguing that Commerce treated inter-divisional transfers for one company differently than it treated inter-divisional transfers for another

[82]Appellate Body Report, *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted Aug. 23, 2001, paras. 131-158 ("*United States – Hot-Rolled Steel*").

company. Rather, it is arguing that Commerce treated inter-divisional transfers for one company differently than it treated sales to affiliated entities for another company. Therefore, the analogy to *United States – Hot-Rolled Steel* is inapposite.[83]

75. Because Canada has failed to substantiate its assertion that Tembec and West Fraser were similarly situated, its "even-handedness" argument must fail, even on its own terms. As Canada has not demonstrated that the things being compared – interdivisional transfers, on the one hand, and sales between affiliated entities, on the other – are similar, it cannot logically contend that even-handedness requires that they be treated similarly.

76. In sum, the Panel correctly concluded that "an unbiased and objective investigating authority, based on the facts before DOC at the time of determination, could have determined that the valuation in Tembec's books for internal transfers of wood chips was not unreasonable."[84] For the reasons set forth in section B.1, above, the Appellate Body should not even reach the question Canada poses. But, if it were to do so, it should reject Canada's argument and uphold the findings and conclusions of the Panel.

---

[83]Canada also purports to rely on statements by Commerce in an antidumping duty determination in the investigation *Pure Magnesium from Israel*. (*Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel*, 66 Fed. Reg. 49349 (Dept. Comm. Sept. 27, 2001).) Canada claims that these statements show that in the case of Tembec, Commerce departed from its "only normal practice with by-products." (Canada Appellant Submission, para. 72.) Commerce's determination in *Pure Magnesium from Israel* does not support Canada's argument. In that case, Commerce addressed the valuation of by-products by examining transactions between affiliated and unaffiliated, *i.e.*, legally separate, entities. The case does not speak to the valuation of by-products where, as here, there are transfers between divisions of the same company. Therefore, the case does not address Commerce's distinction between interdivisional transfers and affiliated party transactions.

[84]*Lumber Panel Report*, para. 7.324.

C. In The Event That It Reverses Any Aspect Of The Panel Report In Light Of Canada's Other Appellant's Submission, The Appellate Body Should Decline Canada's Request For Specific Recommendations.

77. In addition to seeking the reversal of certain of the Panel's findings, Canada asks the Appellate Body to "recommend" that the United States take specific actions to bring its measures into conformity with WTO obligations, including amending the final affirmative antidumping duty order, reducing antidumping duties, and returning cash deposits.[85] The United States understands that request to be a request for a suggestion, as provided for in the second sentence of Article 19.1 of the DSU.

78. For the reasons set forth in this submission, the Appellate Body should reject Canada's arguments and uphold the Panel report with respect to the issues Canada has appealed. However, in the event that it reverses an aspect of the Panel report pursuant to Canada's request, it nevertheless should decline Canada's request for a suggestion of ways to implement.

79. In general, Article 19.1 of the DSU provides that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." This facilitates the goal of encouraging parties to reach mutually satisfactory solutions. It also recognizes, as the Appellate Body and panels have explained, that a Member generally has many options available to it to bring a measure into compliance.[86]

---

[85]Canada Appellant Submission, para. 76.

[86]*See, e.g.,* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted Jan. 19, 2001, para. 185; Appellate Body Report, *United States – FSC*, WT/DS108/AB/R, adopted Mar. 20, 2000, para. 175; Panel Report, *United States–Hot-Rolled Steel*, WT/DS184/R, adopted Aug. 23, 2001, paras. 8.5-8.14.

80. Since the U.S. measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. However, the United States would also note that even under Canada's claims and arguments in this dispute, Canada's request for a suggestion would go beyond anything relevant to implementing a recommendation and instead seeks action nowhere called for under the WTO Agreement.[87]

III. CONCLUSION

81. For the reasons set forth in this submission, the United States requests that the Appellate Body reject the arguments of Canada in their entirety and uphold the Panel's findings and conclusions in paragraphs 7.236-7.245, 7.320-7.326, 8.1.(b)(vi), and 8.1.(b)(ix) of its report.

[87]For example, even if Canada were to prevail, WTO rules would not compel a return of cash deposits, as Canada requests.