

***UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY
FOR CALCULATING DUMPING MARGINS (“ZEROING”)***

WT/DS294

**ANSWERS OF THE UNITED STATES TO THE PANEL’S QUESTIONS
TO THE PARTIES IN CONNECTION WITH THE SECOND
SUBSTANTIVE MEETING**

May 13, 2005

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Short Form	Full Citation
<i>US – Softwood Lumber (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R

To both parties:

1. Please comment on whether the meaning of the first sentence of Article 2.4 is limited by the second sentence of Article 2.4, which provides that "this comparison shall be made ...". In other words, please comment on the supposition that the "fair comparison" referred to in Article 2.4, first sentence, is only that which is contemplated in Article 2.4, second sentence.

1. The “fair comparison” referred to in Article 2.4, first sentence, is informed by the second sentence of Article 2.4, which provides that “[t]his comparison shall be made ...”. In this way, the second sentence of Article 2.4 describes the basic framework by which fair comparisons between export price and normal value must be made. However, the remaining sentences of Article 2.4 also inform the meaning of the first sentence of Article 2.4. Those remaining sentences of Article 2.4 (dealing, *inter alia*, with terms of sale, taxation, and physical characteristics) provide additional, relevant discussion of allowances that may be due in order that the comparison to be made between export price and normal value will be fair. Thus, the second sentence, along with the remaining sentences, “limit” the first sentence.

2. Where, if anywhere else, can the meaning of the notion of fairness contained in Article 2.4, first sentence, be derived from other than the subject matter of Article 2.4?

2. As discussed in response to questions 26, 29, 36, 40 in the Panel’s first set of questions, any substantive meaning to the notion of fairness contained in the first sentence of Article 2.4 is derived from the remaining provisions of Article 2.4. This relationship between the notion of fairness and the provisions of Article 2.4 is confirmed by the initial phrase of Article 2.4.2 (“Subject to the provisions governing fair comparison in paragraph 4 ...”). That phrase indicates that the drafters, rather than adopting a vague, subjective notion of fairness, adopted specific provisions governing fair comparison and specified that those provisions are found in Article 2.4 of the Antidumping Agreement.¹

¹ As the dissenting panelist in *US – Softwood Lumber (Panel)* noted:

The concept of fairness in the abstract is highly subjective, and a too-ready reliance on the “fair comparison” requirement could result in interpretations that were highly unpredictable. Further, I am not inclined to accept that the drafters intended that the Members abdicate their responsibility to negotiate rules in this area and leave the rule-making function in the hands of the dispute settlement system.

3. Does Article 2.4 prohibit a Member from making adjustments for differences which do not affect price comparability? Please explain your answer.

3. While Article 2.4 does not contain any such express prohibition, the implication from the text is that adjustments for differences that do not affect price comparability could not be justified. The relevant language of Article 2.4 (found in its third sentence) states that “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.) The specific wording of this provision is relevant to this question (although not relevant to the issues in this dispute) to the extent that the provision suggests that the enumerated differences (e.g., differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics) presumably affect price comparability. To that extent, the United States does not believe that the enumerated differences necessarily must be demonstrated to affect price comparability prior to making an adjustment for such differences.

4. The United States would reiterate that so-called “zeroing” does not constitute an adjustment to price within the meaning of Article 2.4.

To the United States:

7. Please explain how final determination of dumping liability in the first administrative review following the imposition of measures relates to the application of provisional measures. Do the entries covered by the final assessment of liability at the end of the first administrative review include entries that were subject to provisional measures? Is the level of the final assessment of liability limited by the level of the provisional measures?

5. When the United States conducts a “first administrative review,” the period examined begins on “the date of suspension of liquidation”² In other words, if provisional measures were imposed, then the entries subject to provisional measures will be examined during any first administrative review.

6. Consistent with Article 10.3 of the AD Agreement, U.S. law provides that the liability of an importer for antidumping duties for entries subject to provisional measures may not exceed the provisional antidumping duty established by the Department of Commerce. Of course, if the final liability determined pursuant to the first administrative review is less than the provisional

² 19 C.F.R. 351.213(e)(1)(ii).

antidumping duty, that difference between the amount of the final liability and any cash deposit collected as a provisional duty will be refunded to the importer.³

³ Section 737(a) of the Act.