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UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA (WT/DS264)

Report of the Panel

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EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2319
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
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
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Guatemala – Cement I	Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
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Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201
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
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345

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Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Softwood Lumber II	Panel Report, *United States – Measures Affecting Imports of Softwood Lumber from Canada* ("*US – Softwood Lumber II*"), adopted 27 October 1993, BISD 40S/358
US – Stainless Steel	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1537
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Title / Meaning
Abitibi	Abitibi-Consolidated Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
BC	British Columbia
Canfor	Canfor Corporation, one of the Canadian producers and exporters of softwood lumber subject to investigation
CME	Chicago Mercantile Exchange
COGS	Cost of Goods Sold
Commerce or DOC	United States Department of Commerce
DIFMER or difmer	Differences in Merchandise
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
ESPF	Eastern spruce-pine-fir, a type of three
Final Determination	Decision imposing definitive anti-dumping measures on certain softwood lumber products from Canada as published in p. 15539 *et seq.* of the Federal Register on 2 April 2002 (Exhibit CDA-1), as amended by a notice published in p. 36068 *et seq*. of the Federal Register on 22 May 2002 (Exhibit CDA-3)
FPG	Tembec's Forest Product Group division, which includes Tembec's softwood lumber business
GAAP	Generally Accepted Accounting Principles
G&A	General and Administrative costs (Article 2.2.2 of the *AD Agreement*)
GATT 1994	*General Agreement on Tariffs and Trade 1994*
IDM	DOC's "Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" of 21 March 2002 (Exhibit CDA-2)
IP	International Paper, one of the applicant companies
ITC	United States International Trade Commission
MBF	Thousand Board Feet, unit used to measure softwood lumber's volume

Abbreviation	Full Title / Meaning
Panel Request	Request for the Establishment of a Panel contained in document WT/DS264/2
PIR	Pacific Inland Resources, is a sawmill owned by West Fraser in BC
POI	Period of Investigation
Preliminary Determination	Decision imposing preliminary anti-dumping measures on softwood lumber products from Canada as published in p. 56062 *et seq.* of the Federal Register on 6 November 2001 (Exhibit CDA-11, as re-submitted on 30 June 2003)
QRP	Quesnel River Pulp, a paper mill affiliated to West Fraser
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SG&A	Selling, General and Administrative costs (Article 2.2.2 of the *AD Agreement*)
Slocan	Slocan Forest Products Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
SPF	Spruce-pine-fir, a type of tree
Tariff Act	United States Tariff Act of 1930, as amended (Exhibit CDA-7)
Tembec	Tembec Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
Vienna Convention	*Vienna Convention on the Law of Treaties* (see footnote 168 of this Report)
West Fraser	West Fraser Mills Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
Weldwood	Weldwood of Canada Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
WSPF	Western-spruce-pine-fir, a type of tree
Weyerhaeuser Canada	Weyerhaeuser Canada Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
Weyerhaeuser US or Weyerhaeuser Company	Weyerhaeuser Company, parent company of Weyerhaeuser Canada
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

I. INTRODUCTION

A. COMPLAINT OF CANADA

1.1 On 13 September 2002, Canada requested consultations with the Government of the United States pursuant to Article 4 of the *DSU*, Article XXII of the *GATT 1994* and Article 17 of the *AD Agreement*, concerning the Final Determination of sales at less than fair value with respect to certain softwood lumber products from Canada published in the Federal Register on 2 April 2002, and amended on 22 May 2002, pursuant to section 735 of the Tariff Act.[1]

1.2 On 11 October 2002, Canada and the United States held the requested consultations, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 6 December 2002, Canada requested the establishment of a panel to examine the matter.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 8 January 2003, the DSB established a Panel in accordance with Article 6 of the *DSU* and pursuant to the request made by Canada in document WT/DS264/2.

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "[t]o examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS264/2, the matter referred by Canada to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 On 25 February 2003, the parties agreed to the following composition of the Panel:[3]

Chairman: Mr. Harsha V. Singh

Members: Mr. Gerhard Hannes Welge
Mr. Adrián Makuc

1.7 The Panel was formally composed on 4 March 2003.

1.8 The European Communities, India and Japan reserved their third-party rights.

C. PANEL PROCEEDINGS

1.9 The Panel met with the parties on 17-18 June 2003 and 11-12 August 2003. The Panel met with third parties on 18 June 2003.

1.10 On 16 January 2004, the Panel provided its interim report to the parties. See Section VI, *infra*.

II. FACTUAL ASPECTS

2.1 On 2 April 2001, an anti-dumping application was filed with DOC and the ITC by the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and

[1] WT/DS/264/1.
[2] WT/DS/264/2.
[3] WT/DS/264/3.

Joiners and the Paper, Allied-Industrial, Chemical and Energy Workers International Union, with the subject merchandise certain softwood lumber products imported from Canada.

2.2 On 23 April 2001, DOC initiated the investigation and published the Notice of Initiation on 30 April 2001.[4] Due to the large number of exporters of the subject merchandise, DOC limited its investigation to the six largest producers and exporters of Canadian softwood lumber, namely, West Fraser, Slocan, Tembec, Abitibi, Canfor and Weyerhaeuser Canada.

2.3 The scope of the investigation was defined in the Notice of Initiation as follows:

> "[t]he products covered by this investigation are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the HTSUS, and any softwood lumber, flooring and siding described below. These softwood lumber products include:
>
> (1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;
>
> (2) Coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or fingerjointed;
>
> (3) Other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and
>
> (4) Coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or fingerjointed".[5]

2.4 The period of investigation for the dumping determination was established as 1 April 2000 to 31 March 2001.

2.5 DOC issued its Preliminary Determination on 31 October 2001, which was published in the Federal Register on 6 November 2001.[6] It issued a determination on the scope of the products covered by the investigation on 12 March 2002, and held a hearing on the matter on 19 March 2002.[7]

2.6 The final anti-dumping duty order was published in the Federal Register on 2 April 2002[8], and amended on 22 May 2002[9], imposing anti-dumping duties, ranging from 2.18 per cent to 12.44 per cent on Canadian softwood lumber producers and exporters. The final scope of the anti-dumping order included a number of product exclusions.[10]

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[4] Exhibit CDA-9, Initiation, p. 21328 *et seq*.
[5] *Id.*, p. 21329.
[6] Exhibit CDA-11, Preliminary Determination, p. 56062 *et seq*.
[7] Exhibit CDA-1, Final Determination, Federal Register, Vol. 67, No. 99, p. 15539.
[8] *Id.*, p. 15539, *et seq*.
[9] Exhibit CDA-3, Amended Final Determination. *See* para. 7.139, *infra*, for the amended scope of the final anti-dumping duty order.
[10] *Ibid.*

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

3.1 Canada requests the Panel in its first written submission to:

(a) find that the Petition filed by the US domestic industry did not contain "such information as [was] reasonably available" to the Petitioner, nor did it contain adequate and accurate evidence of dumping sufficient to justify the initiation of the investigation, thereby rendering the initiation inconsistent with US obligations under Articles 5.2 and 5.3 of the *AD Agreement*;

(b) find that DOC failed to terminate the investigation for lack of sufficient evidence of dumping thereby rendering the conduct of the dumping investigation inconsistent with US obligations under Article 5.8 of the *AD Agreement*;

(c) find that DOC erroneously determined there to be only one like product and product under consideration, thereby rendering the conduct of the investigation inconsistent with US obligations under Articles 2, 3, 4.1, 5, 6.10 and 9 of the *AD Agreement*;

(d) find that DOC applied a number of improper methodologies in calculating normal value and export price that resulted in unfair comparisons between the two, thereby rendering dumping determinations inconsistent with US obligations under Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, and 2.4.2 of the *AD Agreement*. In particular DOC:

(i) failed to make due allowance for differences that affected price comparability, in particular differences in physical characteristics (i.e., thickness, width and length) of softwood lumber products;

(ii) illegally "zeroed" negative margins of dumping;

(iii) failed to calculate and/or allocate reasonable amounts for administrative, selling and general expenses in computing costs for specific exporters, including an improper allocation for financial expenses and for litigation settlement expenses involving product liability claims for a non-investigated product;

(iv) failed to apply reasonable amounts for by-product revenues from the sale of wood chips, as offsets in calculating costs; and

(v) failed to offset a difference in price comparability arising from futures contracts profits after concluding that such a difference existed.

(e) find that the United States acted inconsistently with its obligations under Articles VI:1 and VI:2 of GATT 1994 and Articles 1, 9.3 and 18.1 of the *AD Agreement*;

(f) recommend to the DSB that the United States bring its measure into conformity with its obligations under the WTO, that it revoke the anti-dumping order in respect of softwood lumber from Canada, and that it return the cash deposits collected pursuant to an illegal investigation and an illegal determination of dumping.

B. UNITED STATES

3.2 The United States requests that the Panel reject Canada's claims in their entirety.[11]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set forth in their written and oral submissions to the Panel, and in their answers to questions and in their comments thereon. The parties' arguments as presented in their submissions are summarised in this section. The summaries are based on the executive summaries submitted by the parties. The parties' written answers to questions and comments thereon are set forth in the Annexes to this Report. (*See* list of annexes at page vii, *supra*)

A. FIRST WRITTEN SUBMISSION OF CANADA

4.2 The following are Canada's arguments in its first written submission:

4.3 On 21 March 2002, for the first time in the long-standing softwood lumber dispute between Canada and the United States, a final dumping finding was announced against Canadian imports of softwood lumber into the United States.

4.4 More particularly, on 2 April 2002, DOC's[12] final affirmative determination of dumping against certain softwood lumber products from Canada was published in the Federal Register.[13] The "softwood lumber products" covered by DOC's single-determination were defined extremely broadly, and covered multiple tariff classifications and diverse products ranging from standard dimension framing lumber used in home construction, to engineered wood products such as finger-jointed flangestock, and further manufactured products including mattress box spring frame components, as well as railroad ties, shelving, siding, decking, flooring and moulding.

4.5 Notwithstanding that there are hundreds of Canadian exporters of softwood lumber to the United States, only six Canadian exporters namely, West Fraser, Slocan, Tembec, Abitibi, Canfor and Weyerhaeuser Canada (6 mandatory respondents or respondents) were assessed individual margins of dumping.[14] The average margin of dumping for these 6 respondents was used to establish the "all others" rate for all other exporters.[15]

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[11] US first written submission, para. 254.

[12] DOC is the investigating authority in the United States that determines whether dumping exists.

[13] Exhibit CDA-1, Final Determination. The notice was accompanied by DOC's IDM (Exhibit CDA 2), dated 21 March 2002. On 22 May 2002, the United States published the Amended Final Determination (Exhibit CDA-3).

[14] Article 6.10 of the *AD Agreement* provides that:

> "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

In the Final Determination, the six mandatory respondents were assessed the following margins of dumping: Abitibi – 12.44 per cent; Canfor – 5.96 per cent; Slocan – 7.71 per cent; Tembec – 10.21 per cent; West Fraser – 2.18 per cent; Weyerhaeuser – 12.39 per cent (Exhibit CDA-3, Amended Final Determination).

[15] An "all others" margin of dumping of 8.43 per cent was applied to all other Canadian exporters of certain softwood lumber products. *Ibid*.

4.6 Article VI:2 of *GATT 1994* allows Members of the WTO to impose anti-dumping duties to "offset or prevent dumping". Article 1 of the *AD Agreement* requires that anti-dumping measures be applied only under the circumstances provided for in Article VI of *GATT 1994* and pursuant to investigations initiated and conducted in accordance with the provisions of the *AD Agreement*.

4.7 Canada requested consultations with the United States on 13 September 2002 pursuant to Article 4 of the *DSU*, Article XXII of *GATT 1994* and Article 17 of the *AD Agreement*. Consultations were held on 11 October 2002. Unfortunately, those consultations failed to settle the dispute. On 19 December 2002, Canada made its first Panel Request pursuant to Articles 4 and 6 of the *DSU*, Article XXIII of *GATT 1994* and Article 17 of the *AD Agreement*. The DSB established the Panel on 8 January 2003. The terms of reference of the Panel are as set out in Article 7.1 of the *DSU*.

4.8 In the Final Determination, DOC committed a number of fundamental errors that render the imposition of anti-dumping duties on softwood lumber from Canada by the United States inconsistent with US obligations under both *GATT 1994* and the *AD Agreement*:

(a) the Petition[16] filed by the US domestic industry did not contain "such information as [was] reasonably available" to the Petitioner[17], nor did it contain adequate and accurate evidence of dumping sufficient to justify the initiation of the investigation, thereby rendering the initiation inconsistent with US obligations under Articles 5.2 and 5.3 of the *AD Agreement*;

(b) DOC failed to terminate the investigation for lack of sufficient evidence of dumping thereby rendering the conduct of the dumping investigation inconsistent with US obligations under Article 5.8 of the *AD Agreement*;

(c) DOC erroneously determined there to be only one like product and product under consideration, thereby rendering the conduct of the investigation inconsistent with US obligations under Articles 2, 3, 4.1, 5, 6.10 and 9 of the *AD Agreement*; and

(d) DOC applied a number of improper methodologies in calculating normal value and export price that resulted in unfair comparisons between the two, thereby rendering dumping determinations inconsistent with US obligations under Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, and 2.4.2 of the *AD Agreement*. In particular DOC:

(i) failed to make due allowance for differences that affected price comparability, in particular differences in physical characteristics (i.e., thickness, width and length) of softwood lumber products;

(ii) illegally "zeroed" negative margins of dumping;

(iii) failed to calculate and/or allocate reasonable amounts for administrative, selling and general expenses in computing costs for specific exporters, including an improper allocation for financial expenses and for litigation settlement expenses involving product liability claims for a non-investigated product;

[16] The "Petition" is the written application filed on behalf of the domestic industry in the United States to initiate a dumping investigation.

[17] The major applicant (or "Petitioner", as referred to in the United States) was the "Coalition for Fair Lumber Imports Executive Committee", an association of US softwood lumber producers established for the purposes of pursuing trade actions against Canadian softwood lumber products. The petition was also filed by the United Brotherhood of Carpenters and Joiners; and the Paper, Allied-Industrial, Chemical and Energy Workers International Union.

(iv) failed to apply reasonable amounts for by-product revenues from the sale of wood chips, as offsets in calculating costs; and

(v) failed to offset a difference in price comparability arising from futures contracts profits after concluding that such a difference existed.

4.9 With respect to Canada's first claim regarding the failure of DOC to initiate the investigation in accordance with US WTO obligations, the Petitioner offered no specific evidence related to any particular company in Canada to show actual dumping. The Petitioner provided no evidence of actual Canadian producer prices or costs to support its dumping allegations. Yet, evidence showed that one of the leading members of the petitioning coalition's Executive Committee, IP, wholly owned Weldwood, one of the major Canadian exporters of softwood lumber to the United States. The Petitioner had in its possession and control Weldwood data. For this reason alone, DOC ought to have concluded that the Petitioner had in its possession detailed and better data on actual Canadian producer prices and costs, and that, therefore, the Petition did not contain such information as was reasonably available to the Petitioner. DOC's decision to initiate the investigation was based on the Petitioner's misrepresentation that it did not have access to such information, and, therefore, that it was entitled to rely on other less probative information to support its dumping allegation. Even when DOC learned of the existence of such information, DOC failed to seek to obtain such information. DOC itself admitted that it did not seek further information.[18]

4.10 An objective investigating authority evaluating all of this evidence could not have determined that the Petition contained (i) such information as was reasonably available to the Petitioner, or (ii) adequate and accurate evidence of dumping sufficient to initiate the investigation. Failure to meet these two requirements meant that DOC had an obligation not to initiate the investigation, and where the investigation had already been initiated, DOC had an obligation to terminate it upon learning of the deficiencies in the information put forward by the Petitioner, or, at the very least, to address the deficiencies in the Petition. The WTO has ruled that an applicant cannot provide just any information or documentation to justify the initiation of an investigation.[19]

4.11 Notwithstanding the disparate nature of different softwood lumber products covered by the Petition, DOC determined there to be only one "product under consideration" and one "like product" (i.e., all "softwood lumber products"). DOC, therefore, conducted only one investigation on all softwood lumber products ranging from dimensional lumber to further manufactured products and even engineered wood products. The exporter parties to the investigation (i.e., the respondents) requested DOC to determine that certain products were so distinct from the general category of "softwood lumber" that they deserved to be recognized as distinct "products under consideration" and "like products" from softwood lumber, with different attributes, requiring distinct analysis and treatment. DOC either ignored these requests or dismissed them without proper justification. DOC's finding that all softwood lumber products are part of a "continuum of products" is an obvious contradiction to the evidence of record, and is contrary to the *AD Agreement*.

4.12 DOC further erred by failing to make due allowance in normal values for physical differences in softwood lumber products to maintain price comparability and to ensure a fair comparison between normal value and export price. The evidence before DOC showed that the value of softwood lumber varies depending on the size of the product (including differences in thickness, width and length), and DOC itself acknowledged this to be the case.[20] There was, therefore, no justification for ignoring

[18] Exhibit CDA-4, NAFTA Anti-Dumping Panel Hearing Transcript, Vol. 1, p. 158.

[19] Regarding the standard of sufficiency of evidence to justify initiation of an investigation, the panel in *Mexico – Corn Syrup*, para. 7.94, considered "instructive" the panel's reference in *Guatemala – Cement I*, para. 7.55 to the GATT panel's decision in *US – Softwood Lumber II* that "'sufficient evidence' clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just 'any evidence.'"

[20] Exhibit CDA-2, IDM, Comment 8, p. 51 when it states that:

these differences, and comparing prices for different-sized products without adjusting for such product differences. An objective investigating authority evaluating the evidence could not have determined that size differences in softwood lumber were irrelevant and that adjustments were, therefore, not necessary. The WTO has ruled that all differences affecting price comparability must be accounted for.[21]

4.13 In *EC – Bed Linen*, the Appellate Body found the practice of "zeroing" negative margins of dumping to be inconsistent with the *AD Agreement*. The Appellate Body held that the requirement in Article 2.4.2 of the *AD Agreement* to compare weighted average normal values and weighted average export prices of "all comparable transactions" precludes the practice of "zeroing" by which negative margins of dumping are disregarded.[22] The Appellate Body also ruled that "zeroing" results in an "unfair comparison" between normal value and export price, and is, therefore, inconsistent with Article 2.4 of the *AD Agreement*. DOC admits that it "zeroed" negative margins of dumping in the anti-dumping investigation against all softwood lumber imports from Canada.[23] As a result, the dumping margins found by DOC for each company investigated and the "all others rate" were inflated. The US practice is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* for the same reasons the Appellate Body condemned the EC's practice in *EC – Bed Linen*.

4.14 A number of other calculations, comparisons and determinations made by DOC rest on impermissible interpretations of the *AD Agreement*, were made without a proper establishment of the facts and/or were based on an evaluation of the facts that was neither unbiased nor objective. Accordingly, these methodologies and the ultimate determinations cannot be upheld by the Panel in light of the applicable standard of review under Article 17.6 of the *AD Agreement*.

4.15 DOC computed costs of production for individual softwood lumber products both for purposes of determining whether sales in the Canadian domestic market were made at prices below costs of production under Article 2.2.1 of the *AD Agreement* and for purposes of computing normal value under Article 2.2 when there were no sales of softwood lumber in the Canadian domestic market or where such sales did not permit a proper comparison. In computing such costs of production DOC was obligated to include reasonable amounts for SG&A costs.

4.16 The *AD Agreement* provides that such costs must be calculated on the basis of records kept by the exporter and/or data made available by the exporter to the investigating authority during the course of the investigation. In each case, the amounts for SG&A costs must be based on actual data and must reasonably reflect the costs associated with the production and sale of the product under consideration in the country of origin. Where cost allocations become necessary, the investigating authority must consider all available evidence on the proper allocation of costs. Thus, G&A expenses

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> "[s]pecifically, in this case, where products have differences in dimension (i.e., length, width or thickness) we recognize that these physical differences could result in differences in market value."

[21] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 176-177, where the Appellate Body found that "Article 2.4 expressly requires that 'allowances' be made for '*any other differences* which are also demonstrated to affect price comparability". (emphasis added) There are, therefore, no differences "affec[ting] price comparability" which are precluded, as such, from being the object of an "allowance". *See* also Panel Report, *Argentina – Ceramic Tiles*, paras. 6.113-6.116, where the panel found that the investigating authority "acted inconsistently with Article 2.4 by failing to make adjustments for physical differences affecting price comparability".

[22] Appellate Body Report, *EC – Bed Linen*, para. 66. *See* also Panel Report, *EC – Tube or Pipe Fittings*, where the panel found at para. 7.218 that: "[r]egardless of the magnitude of its effects, "zeroing" constitutes a violation of the obligations imposed by Article 2.4.2 of the Agreement *per se*".

[23] *See* Exhibit CDA-2, IDM, Comment 12, pp. 65-66 and Exhibit CDA-5, NAFTA Anti-Dumping Panel Hearing Transcript, Vol. I, pp. 231-233.

not associated with the production or sale of the product must not be included in the calculation of the exporter's costs. DOC committed several egregious errors in its calculations, which, in all instances, resulted in an inflation of individual exporters' costs of production and margins of dumping.

4.17 In regard to Abitibi, DOC allocated financial expense to softwood lumber that did not "reasonably reflect the costs associated with the production and sale of the product under consideration". DOC incorrectly deemed financial costs to be allocable to all aspects of Abitibi's operations in proportion to cost of sales, notwithstanding un-rebutted evidence that all its production and sale of non-subject products, including newsprint, pulp and value-added papers, were significantly more capital intensive relative to cost of sales than was lumber.

4.18 DOC's calculations of Tembec's "administrative, selling and general costs" were not reasonable in that they were not based on actual data that Tembec had provided to DOC in relation to the production and sale of the product under consideration. Instead, DOC calculated these costs based on the production of all products produced worldwide by Tembec, the major proportion of which consisted of pulp, paper and chemicals, which incurred significantly different G&A expenses than the production and sale of softwood lumber in Canada.

4.19 In regard to Weyerhaeuser Canada, DOC allocated a portion of certain charges associated with the settlement of legal claims of Weyerhaeuser Company's (Weyerhaeuser Canada's parent company) sales of hardboard siding (not a softwood lumber product) in the United States, as part of Weyerhaeuser Canada's G&A costs. These costs bore no relationship whatsoever to Weyerhaeuser Canada's cost of production of softwood lumber. As the record demonstrates, the litigation settlement expenses were not a company-wide expense that related to the production and sale of softwood lumber; rather they were related to the production and sale of an unrelated product, hardboard siding.

4.20 DOC treated revenue offsets from wood chip sales from West Fraser and Tembec in a manner that did not "reasonably reflect the costs associated with the production and sale of the product under consideration," as required under Article 2.2.1.1 of the *AD Agreement*. In West Fraser's case, DOC failed to calculate revenues from wood chip sales on the basis of records kept by the company, even though those records showed that West Fraser's sales were made at "market prices" and reasonably reflected the costs associated with the production and sale of softwood lumber. In Tembec's case, DOC rejected fully documented actual market prices from arm's length transactions entered into by Tembec with third parties, and instead used internal transfer prices that were arbitrary and well below market prices.

4.21 Finally, DOC improperly refused to allocate Slocan's futures contract revenues that were related to the production and sale of softwood lumber. DOC was required to make an adjustment to take into account these revenues. DOC was required to account for these revenues, as an offset to financial or selling expenses, or through some other reasonable method.

4.22 It is clear that the investigation should not have been initiated. Moreover, rectification of other errors reveal either that imports of Canadian softwood lumber into the United States are not being dumped, or that the margins of dumping established by DOC for each respondent and the "all others rate" have been artificially inflated. Consequently, the United States acted inconsistently with its obligations under Articles VI:1 and VI:2 of *GATT 1994* and Articles 1, 9.3 and 18.1 of the *AD Agreement*. The Panel should, therefore, recommend to the DSB that the United States bring its measure into conformity with its obligations under the WTO, that it revoke the anti-dumping order in respect of softwood lumber from Canada, and that it return the cash deposits collected pursuant to an illegal investigation and an illegal determination of dumping.

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.23 The following are the arguments of the United States in its first written submission:

4.24 Pursuant to a properly initiated investigation, Commerce concluded, in its Final Determination published on 2 April 2002, that softwood lumber from Canada was being sold in the United States for "less than fair value".[24] Commerce found dumping with respect to each of the six Canadian respondents accounting for the largest amount of production in Canada: (1) Abitibi, (2) Canfor, (3) Slocan, (4) Tembec, (5) West Fraser, and (6) Weyerhaeuser Canada.[25]

4.25 In general, Canada's claims of error in the initiation and conduct of the softwood lumber investigation concern the sort of fact-bound decisions that any investigating authority must make in the course of an anti-dumping investigation. Among other things, Canada challenges how Commerce defined the scope of the product it investigated, how it determined the sufficiency of the evidence to initiate an investigation, and how it calculated various costs and adjustments. The claims are disparate, but they share a common theme. In much of its argument, Canada is asking the Panel to place itself in the shoes of Commerce and make new determinations, as if it were the investigating authority. As such, these claims are inconsistent with the applicable standard of review.[26]

4.26 An anti-dumping proceeding is a complex matter, involving hundreds, if not thousands, of individual decisions that come together to yield a final determination. It is not inconceivable that two different investigating authorities would look at the same facts and reach different conclusions. Recognizing that possibility, the *AD Agreement* provides that an authority's proper establishment of the facts and unbiased and objective evaluation "shall not be overturned" "even though the panel might have reached a different conclusion".[27] Nevertheless, in this dispute, Canada raises a number of claims that effectively ask this Panel to substitute its evaluation of the facts for Commerce's evaluation of the facts. Canada has even sought to introduce new claims not contained in its Panel Request and new evidence not made available to Commerce in the underlying investigation.

4.27 The Panel first should rule, as a preliminary matter, that certain claims Canada makes in connection with its argument concerning the scope of the "product under consideration" are beyond the Panel's terms of reference. In its Panel Request, Canada claimed that Commerce "erroneously determined there to be a single like product (under US law, termed 'class or kind' of merchandise) rather than several distinct like products", and that this determination violated Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4, and 5.8 of the *AD Agreement* and Article VI:1 of the *GATT 1994*.[28] In its first written submission, Canada adds to this claim, now alleging that "in defining the 'product under consideration'," Commerce violated all of Article 2 of the *AD Agreement* (not just Article 2.6), Article 3, all of Article 4 (not just Article 4.1), all of Article 5 (not just Articles 5.1, 5.2, 5.3, 5.4, and 5.8), Article 6.10, and Article 9."[29] Canada's expansion of its claim through its first written submission is fundamentally at odds with the requirement that a complaining Member state its claims clearly in its panel request, citing the particular provisions it alleges to have been violated.[30] That requirement "defin[es] the terms of reference of a panel and ... inform[s] the respondent and the third parties of the claims made by the complainant".[31] Here, Canada did not claim violations of provisions

[24] Exhibit CDA-1, Final Determination, and Exhibit CDA-2, IDM, as amended (Exhibit CDA-3). "Fair value" is the US law term corresponding to "normal value," as that term is used in Article VI of the *GATT 1994* and in the *AD Agreement*.

[25] Exhibit CDA-3, Amended Final Determination.

[26] Article 17.6(i) of the *AD Agreement*.

[27] *Ibid*.

[28] WT/DS264/2, para. 2.

[29] Canada first written submission, paras. 115 and 142.

[30] Article 6.2 of the *DSU* states that a request for a panel "shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

[31] Appellate Body Report, *Korea – Dairy*, para. 124.

other than those cited in its Panel Request. Accordingly, the Panel should decline to consider the additional claims raised for the first time in Canada's first written submission.

4.28 As a second preliminary ruling, the Panel should decline to consider Exhibit CDA-77. In introducing this exhibit, Canada improperly asks the Panel to consider evidence that was not made available to Commerce in the underlying investigation. Specifically, this evidence consists of a regression analysis performed by one of the Canadian respondents that purports to manipulate certain data used in Commerce's normal value and net realizable value calculations. It is presented here to support Canada's claim that Commerce erred in not making due allowance for particular physical differences in softwood lumber that Canada alleges affect price comparability.[32] However, it was not made available to Commerce during the underlying investigation. Under Article 17.5(ii) of the *AD Agreement*, a panel's review of an anti-dumping investigation is to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Consideration of Canada's new evidence is inconsistent with that provision. Further, in asking the Panel to consider this new evidence, Canada effectively is asking the Panel to undertake its own establishment and evaluation of the facts, contrary to Article 17.6(i) of the *AD Agreement*. Accordingly, the Panel should decline to consider Exhibit CDA-77.

4.29 The standard of review applicable to the present dispute is set forth in Article 17.6 of the *AD Agreement*. With respect to findings of fact, Article 17.6(i) provides that the question is whether an investigating authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. Conversely, the question is *not* whether a panel would have established the facts or evaluated those facts in the same way as the investigating authority. As the Appellate Body and other panels repeatedly have observed, a panel's role is not to find and evaluate facts *de novo*.[33]

4.30 With respect to interpretations of the *AD Agreement*, the question under Article 17.6(ii) is whether an investigating authority's interpretation is permissible. Article 17.6(ii) acknowledges that there may be provisions of the *AD Agreement* that "admit[] of more than one permissible interpretation". Where that is the case, and where an investigating authority has adopted one such interpretation, the panel should find that interpretation to be consistent with the *AD Agreement*.[34]

4.31 Canada's first claim is that Commerce should have declined to initiate its investigation (or terminated the investigation once it did initiate) because the application for relief by US softwood lumber producers (in US law terms, "the petition") did not include certain information alleged to have been reasonably available to the petitioners (specifically, cost and price data for Weldwood, a subsidiary of petitioner IP). The Panel should reject this argument, because the applicable standard for initiation under Article 5.3 of the *AD Agreement* (and for continuation of an investigation under Article 5.8) – the "sufficient evidence" standard – was met. There is no obligation under the *AD Agreement* for an investigating authority to decline to initiate or to decline to continue an investigation on the grounds that the application did not include evidence beyond what is sufficient to warrant initiation or continuation.

4.32 In this case, petitioners included in their petition evidence from multiple, independently reliable sources demonstrating prices for which softwood lumber was being sold in Canada, costs of production of softwood lumber in Canada, and prices for which softwood lumber was being sold for

[32] Canada first written submission, para. 148, note 139.

[33] *See, e.g.*, Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *Thailand – H-Beams*, paras. 114 and 117; Panel Report, *US – Steel Plate*, para. 7.6.

[34] Panel Report, *Argentina – Poultry*, para. 7.341 and note 223:

> "[w]e recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it".

export to customers in the United States. This evidence demonstrated, first, that softwood lumber was being sold in Canada for prices below cost of production. Accordingly, pursuant to Article 2.2 of the *AD Agreement*, the evidence substantiated reliance on constructed (normal) value as a basis for determining whether there was dumping of softwood lumber. Second, the evidence in the petition demonstrated that export prices for softwood lumber were below constructed normal value – i.e., that softwood lumber was being dumped in the United States.

4.33 The Weldwood data could not have contradicted the data included in the petition, or otherwise detracted from its adequacy and accuracy. At most, the Weldwood data would have given Commerce information about a single producer in a market consisting of hundreds of producers. This would have been in addition to the country-wide data from diverse sources actually included in the petition. Whatever a single company's data might have shown, it could not have negated the sufficiency of the country-wide data actually in the petition demonstrating dumping of the subject product.

4.34 Article 5.2 of the *AD Agreement* does not require Commerce to reject a petition that excludes some data, even though the data included are sufficient to warrant initiation of an investigation, and even though the excluded data could not have negated the sufficiency of the included data. The question for Commerce in deciding whether to initiate an investigation is set forth in Article 5.3. That question is whether the evidence in the petition is sufficient to warrant initiation. Similarly, under Article 5.8, the question whether to continue or terminate an investigation hinges on sufficiency. Canada's suggestion that the *AD Agreement* contains a standard for initiation and continuation of an investigation other than sufficient evidence is unfounded and should be rejected.

4.35 Canada's second claim is that Commerce defined the scope of the "product under consideration" (by which Canada appears to mean the product under investigation – in this case, softwood lumber) too broadly. Canada cites no provision of the *AD Agreement* governing the way in which an investigating authority defines the product under investigation. Instead, it asserts the existence of an obligation to explain how different articles within the product under consideration "closely resemble each other"[35], contends that Commerce violated that obligation, and maintains that violation of that obligation violated various articles of the *AD Agreement* (several of which were not identified in Canada's panel request, and none of which provide rules for identifying the product under investigation).

4.36 The short answer to Canada's scope argument is that there is no obligation under the *AD Agreement* to define the "product under consideration" in the manner Canada proposes. The absence of an obligation is demonstrated by the diverse practice of WTO Members, including Canada. Without an obligation there can be no violation.

4.37 Furthermore, the test actually applied by Commerce in defining the scope of the product under consideration in this case was clearer and more detailed than the vague "close resemblance" test that Canada proposes. In determining whether particular products were properly within the scope, Commerce considered (1) the general physical characteristics of the product, (2) the expectations of the ultimate purchaser, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. With respect to the particular softwood lumber products that Canada claims should have been excluded – Western Red Cedar, Eastern White Pine, softwood lumber boards used in bed frames, and softwood lumber boards used in finger-jointed flangestock – Commerce evaluated the five factors and found the resemblances to other examples of softwood lumber sufficiently great to preclude subdivision into multiple products under consideration.

[35] Canada first written submission, para. 125.

4.38 Canada's third claim is that, in comparing (normal) value to export price, Commerce violated Article 2.4 of the *AD Agreement* by not adjusting for differences in the dimensions of softwood lumber. The Panel should reject this claim, because Canadian respondents failed to show that differences in the dimension of the softwood lumber compared in this case affected price comparability. Commerce's decision not to make due allowance absent such a showing did not violate Article 2.4.

4.39 Article 2.4 requires that, in comparing export price and normal value, an investigating authority make "[d]ue allowance" for certain differences in the particular products being compared. The requirement to make due allowance applies only to "differences which affect price comparability," and the determination whether to make due allowance is to be made "in each case, on its merits". Other panels have explained that due allowance for physical or other differences that affect price comparability is not automatic.[36] Any claimed adjustment must be established on a case-by-case basis and is warranted only to the extent the differences affect price comparability.

4.40 In this case, the evidence made available to Commerce did not substantiate an adjustment for dimensional differences. Commerce did take dimensions – along with eight other categories of physical traits – into account in developing "matching" criteria (i.e., criteria for determining which articles to compare in the first place). Applying these criteria, Commerce compared transactions with identical product characteristics wherever possible. Where an identical match was not available for a given transaction, Commerce relied on a transaction with the next most similar product characteristics. This process minimized product physical differences, including dimensional differences, in the transactions being compared. Ultimately Commerce concluded that "there appears to be little, if any difference in home market prices that is attributable to differences in dimensions of the products compared, especially where those dimensional differences were minor".[37]

4.41 In stark contrast to the investigating authority in *Argentina — Ceramic Tiles*[38], a case on which Canada relies heavily[39], the investigating authority in the present case sought and evaluated extensive data regarding many physical characteristics, including dimensional differences. However, the Canadian respondents failed to make the requisite showing that the dimensional differences affected price comparability. Therefore, under Article 2.4, Commerce was not required to make any adjustment for such differences.

4.42 Canada's fourth claim is that, in combining individual dumping margins to determine an overall dumping margin, Commerce did not properly take account of non-dumped products, inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. The Panel should reject this claim, because Articles 2.4 and 2.4.2 do not address the manner in which particular model-specific or level-of-trade-specific dumping margins, for example, are combined to determine an overall dumping margin. Moreover, by arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation"[40], Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all", which immediately precedes it.

4.43 The comparison obligations contained in Article 2.4.2 are "[s]ubject to the provisions governing fair comparison in paragraph 4". Thus, Article 2.4 provides explicit context for the methods for establishing the existence of dumping under Article 2.4.2. This context means that, under the instruction in Article 2.4.2 to compare "weighted average normal value with a weighted average

[36] *See, e.g.*, Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158; Panel Report, *Egypt – Steel Rebar*, para. 7.352.
[37] Exhibit CDA-2, IDM, Comment 8.
[38] Panel Report, *Argentina – Ceramic Tiles*.
[39] *See, e.g.*, Canada first written submission, para. 150.
[40] *Id.*, para. 171.

of prices of all comparable export transactions", not all export transactions will be equally comparable with all normal value transactions. Consequently, once the comparison has been identified pursuant to Article 2.4, it would be improper to compare a weighted average normal value with respect to one model or one level of trade to a weighted average of prices for a different model or different level of trade. Yet, Canada's prescription for combining particular dumping margins for purposes of developing a single, overall dumping margin would require precisely that, contrary to Articles 2.4.2 and 2.4.

4.44 That Articles 2.4.2 and 2.4 do not mandate a particular method for combining model-specific, level-of-trade-specific individual dumping margins to establish a single, overall margin is corroborated by the negotiating history of the *AD Agreement*. The negotiating history demonstrates that the question whether to address the methodology at issue here was squarely presented to the negotiators, and that the text was not modified (as compared to the *AD Agreement*'s predecessor, the *GATT Anti-Dumping Code*) to prohibit this methodology. Further, the negotiating history demonstrates that insertion of the word "comparable" into Article 2.4.2 was intended precisely to ensure that the term "all" not be interpreted as implying that average export price is to be established on the basis of sales both within and outside of the category of comparison.

4.45 Canada's claim relies exclusively on the Report of the Appellate Body in *EC – Bed Linen*. The United States was not a party to that dispute and is not bound by the report in that matter. As the Appellate Body has explained, dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[41] Moreover, the Appellate Body Report in *EC-Bed Linen* did not address several of the textual arguments presented by the United States in this matter. That is additional reason not to treat that Report as dispositive.

4.46 Finally, Canada makes six company-specific claims, five of which relate to Commerce's calculations of cost of production and constructed (normal) value, and one of which relates to Commerce's denial of a claim for an adjustment for differences in terms and conditions of sale. These claims improperly urge the Panel to adopt alternative evaluations of the facts, rather than demonstrate that Commerce improperly established the facts or evaluated them in a biased and non-objective way.

4.47 Commerce computed cost of production for individual softwood lumber articles for purposes of (a) determining whether sales in the Canadian domestic market were made at prices below cost of production, and (b) computing normal value, in accordance with Article 2.2 of the *AD Agreement*, when there were no sales of softwood lumber in the Canadian domestic market or when such sales did not permit a proper comparison. In computing these costs, Commerce included reasonable amounts for SG&A costs, as provided under Articles 2.2, 2.2.1 and 2.2.1.1.

4.48 Canada argues that, in calculating G&A costs, Commerce violated Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, and 2.4 of the *AD Agreement*. Many of Canada's arguments erroneously assume that Commerce applied its standard cost calculation methodologies to individual lumber producers without determining the appropriateness of these methodologies in light of the circumstances of each producer. However, as discussed at length in the Final Determination, Commerce only applied its standard methodologies after careful consideration of the facts in each case.

4.49 As a general matter, Canada's claims that Commerce's calculations of normal value violated Article 2.4 of the *AD Agreement* are misplaced. Article 2.4 relates to a fair comparison between

[41] Appellate Body Report, *Japan–Alcoholic Beverages*, p. 14 (footnote omitted); *see* also, Appellate Body Report, *US – Shrimp*, paras. 107-109 (extending the reasoning of *Japan – Alcoholic Beverages* to Appellate Body reports); Panel Report, *Argentina - Poultry*, para. 7.41 (panel not bound by adopted WTO panel reports).

normal value and export price *once normal value has been properly determined*. Article 2.4 does not relate to what is at issue here – i.e., the proper determination of normal value in the first instance.[42]

4.50 In calculating cost of production for Abitibi, Commerce allocated financial costs (i.e., interest on borrowed funds) based on COGS (the same allocation method used for all respondents). Commerce made this allocation after considering Abitibi's arguments that its lumber producing division was less asset-laden than its other divisions. Commerce used a COGS allocation, rather than the 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 whole. Also, Commerce determined that its method better accounted for the fact that money is fungible – that is, that borrowed funds may be used to purchase assets or 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.

4.51 In calculating cost of production for Tembec, Commerce determined a reasonable amount for G&A costs based on Tembec's books and records that were shown to be in accordance with Canadian GAAP, consistent with Article 2.2.1.1 of the *AD Agreement*. Canada argues that, instead of relying on Tembec's books and records, Commerce should have relied on a separate statement of division-specific costs. However, as that separate statement was unaudited and never shown to be in accordance with Canadian GAAP, Commerce appropriately declined to rely on it. Finally, G&A costs are, by definition, company-wide costs, rather than costs attributable to a particular product or division. Thus, it was proper for Commerce to rely on Tembec's company-wide books and records, rather than a separate, division-specific statement.

4.52 In calculating cost of production for Weyerhaeuser Canada, Commerce included within G&A costs an apportioned amount of litigation settlement costs reported in the books and records of the company's parent, the Weyerhaeuser Company. Canada argues that these costs related to production of goods other than softwood lumber and, therefore, should not have been allocated to the cost of producing softwood lumber. However, litigation costs are quintessential general costs, relating to a company as a whole. In this case, the litigation costs were incurred years after production of the good at issue (hardboard siding) and could not reasonably be considered a cost of producing that good. Indeed, Weyerhaeuser Company's own audited financial statement treated these costs as general costs. Thus, it was appropriate under Articles 2.2, 2.2.1, and 2.2.1.1 for Commerce to allocate a portion of Weyerhaeuser Company's company-wide legal costs to Weyerhaeuser Canada's cost of producing softwood lumber.

4.53 In calculating respondents' costs of production of softwood lumber, Commerce treated sales of wood chips (a by-product in the production process) as an offset, reducing a given respondent's total cost of production. Canada claims that Commerce erred in its calculation of the wood chip offset for respondents West Fraser and Tembec. In both cases, Commerce's calculation was consistent with Articles 2.2, 2.2.1, and 2.2.1.1 of the *AD Agreement* and should be upheld.

4.54 In the case of West Fraser, the issue for Commerce was how to measure sales of wood chips by the company to affiliated companies. To determine whether sales to affiliates reflected market prices for wood chips, Commerce compared those sales to West Fraser's sales to non-affiliated entities, as recorded in West Fraser's records. Commerce found that West Fraser's sales to non-affiliated entities were at market prices and that these sales, therefore, represented an appropriate benchmark for determining whether sales to affiliated entities were at market prices. Applying this benchmark, Commerce found certain of West Fraser's sales to affiliated entities (in Alberta) to be at market prices, and relied in part on those sales in calculating the offset. Commerce found other sales

[42] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

to affiliated entities (in BC) not to be at market prices, and made adjustments based on the benchmark of non-affiliated sales. Consistent with Article 2.2.1.1, Commerce made its calculation based on data from the producer's own records.

4.55 In the case of Tembec, the issue was how to measure the value of transfers of wood chips between divisions within the company. Commerce analyzed the wood chip sales transactions between Tembec's sawmills and its pulp mill division to evaluate whether the internally set transfer prices were reasonable. Commerce found that prices recorded in Tembec's books for the transfer of wood chips between Tembec divisions reasonably reflected the actual cost of producing wood chips and, therefore, consistent with Article 2.2.1.1, relied on those prices in establishing a wood chip offset for Tembec.

4.56 Finally, Canada argues that Commerce failed to properly account for profits from respondent Slocan's sales of lumber futures contracts. In Commerce's investigation, Slocan requested two directly contradictory treatments for these profits. First, Slocan asked that the profits be treated as an offset to direct selling expenses in the US market, as an adjustment for the conditions and terms of sale. Alternatively, Slocan asked that the profits be treated as an offset to financing costs in the calculation of cost of production. However, as Commerce found, Slocan's futures contract profits were not directly related to any particular sales of softwood lumber and, therefore, were not an appropriate basis for adjustment under Slocan's first theory. On the other hand, since the profits amounted to sales revenue (albeit, not *direct* sales revenue), they would not have been an appropriate basis for offsetting cost of production. As Slocan failed to substantiate an offset under either theory, Commerce properly declined to grant an offset.

4.57 For the foregoing reasons, the US requests the Panel to reject Canada's claims in their entirety.

C. FIRST ORAL STATEMENT OF CANADA

4.58 In its first oral statement, Canada made the following arguments:

4.59 The Panel's role pursuant to Article 17.6(i) is to determine whether Commerce properly established the facts and evaluated the facts in an objective and unbiased manner. By reviewing the record pursuant to Article 17.6(i), the Panel is not engaging in a *de novo* review. The rule of Article 17.6(ii) only comes into play when a Panel concludes that there is "more than one permissible interpretation," after the application of the customary rules of treaty interpretation codified in Articles 31 and 32 of the *Vienna Convention*. An approach of total deference is inconsistent with the WTO jurisprudence on this issue.

1. Initiation and Termination of the Investigation

4.60 Articles 5.2 and 5.3 are separate obligations. Under Article 5.2, the investigating authority must decide whether to accept or reject the application on the basis of whether it contains such information as is reasonably available to the applicant on dumping, injury and causation. Only once the investigating authority has determined that the requirements of Article 5.2 have been met, can it move on to Article 5.3 to conduct a further examination of the information in the application to assess whether it is adequate and accurate and, therefore, sufficient to initiate the investigation.

4.61 Article 5.2(iii) requires that, if the information is of a kind or category of information set out in Article 5.2 and it is reasonably available to the applicant, then it is of the kind or category that must be included in the application. Article 5.2(iii) requires information on prices; it does not allow an applicant to pick and choose what information on prices it provides. Actual transaction prices for sales of lumber in the relevant markets was "reasonably available" to the Petitioner and ought to have been provided to the investigating authority. The application did not contain transaction-specific

evidence identifying a single Canadian exporter or provide any specific examples of price or cost. The Petitioner's claim that such information was not "reasonably available" is simply not credible and should never have been accepted by Commerce.

4.62 Commerce also initiated the investigation based on insufficient evidence of dumping, contrary to Article 5.3. Article 5.3 requires that an investigating authority objectively judge whether the application contains sufficient evidence of dumping, injury and causal link between the two. The investigating authority cannot simply accept the evidence in the application. Had Commerce fulfilled this obligation, it would have discovered that the Petitioner failed to provide extremely important information. A further examination of the information in the application should have revealed that one of Canada's largest producers, Weldwood, is wholly owned by the leader of the Petitioner, IP. Weldwood's data, if obtained, would have provided specific instances of Canadian and US prices and Canadian costs for the identical merchandise, and would have enabled Commerce to properly assess the adequacy and accuracy, and, therefore, the sufficiency of the information provided in the application.

4.63 The information included in the application essentially amounted to nothing more than surrogate or secondary information considering what could and should have been provided. For instance, it was demonstrated that the *Random Lengths* data contained in the application commingled Canadian and US producer prices, and, thus, were not representative of Canadian sale prices. An objective and unbiased investigating authority could not have concluded that there was "sufficient evidence" of dumping to initiate.

4.64 Pursuant to Article 5.8, the investigating authority must terminate the investigation as soon as it is satisfied that there is not sufficient evidence of dumping or injury to justify proceeding with the case. This obligation applies both prior to initiation and throughout the investigation. A Canadian respondent informed Commerce of the nature of the relationship between Weldwood and IP, two days after initiation. Commerce did nothing with this information. Commerce also rejected Weldwood's subsequent attempt to file data regarding actual sales transactions. Thus the United States failed to comply with Article 5.8.

2. Like Product and Product under Consideration

4.65 Commerce defined the "product under consideration" and the "like product" as "all softwood lumber" and conducted a single anti-dumping investigation. Commerce's broad definitions did not identify a cohesive group of products that share common characteristics for either the "product under consideration" or the "like product". Consequently, Commerce did not meet the requirements of Article 2.6.

4.66 The Article 2.6 definition of "like product" limits its scope and diversity. When, as here, the scope and diversity of the "product under consideration" is overly broad, the "like product" may be neither identical to, nor have characteristics closely resembling, the product under consideration and the requirement of Article 2.6 cannot be satisfied. The terms "product under consideration" and the "like product" must be limited to a single group of products sharing common characteristics. Otherwise Article 2, which describes the dumping comparison between the "like product" and the "product under consideration" would allow dumping comparisons between sales of products that have no close resemblance to each other. Similarly, Articles 3, 4 and 5 would permit injury analyses that would cover multiple industries.

4.67 Canada's interpretation of Article 2.6 would not yield dozens or hundreds of discrete products. The United States found that at least 90 per cent of the products covered in the "product under consideration" consist of commodity dimension lumber. The application presented data only on the pricing of standard 2x4 SPF products that the United States has characterized as "representative softwood lumber products". The "product under consideration" should have been limited to

commodity dimension lumber, which is a defined and cohesive group of products according to the applicable legal criteria in the United States of physical characteristics, end uses, purchaser expectations, channels of distribution, advertising and display, and price. Instead, Commerce added in another 10 per cent of products that do not resemble commodity dimension lumber, including especially the four products in dispute.

4.68 Commerce erroneously identified isolated characteristics of different products within the "product under consideration" and then determined whether there was a comparable "like product" with the same isolated characteristics within the diverse group. This test, as applied, is not legally permissible under Article 2.6 because it fails to limit the anti-dumping investigation to a grouping of imported products that all share characteristics closely resembling each other. Bed frame components, finger-jointed flangestock, Eastern White Pine, and Western Red Cedar do not share common characteristics with commodity dimension lumber, and are substantially unlike 90 per cent of the products in the application.

3. Failure to Account for Dimensional Differences

4.69 When comparing normal value to export price, Article 2.4 requires an adjustment for all differences that affect price comparability. Differences in physical characteristics are identified as a difference affecting price comparability. The United States incorrectly argues that the evidence before Commerce did not support the conclusion that dimension affected price. The record before Commerce consisted of complete sales data for the six largest producers in Canada, showing all prices of all different products differentiated by dimension, among other characteristics. These data demonstrated that dimensional differences affected price. Canadian companies and US petitioners agreed on this point.

4.70 Indeed, Commerce determined that, when comparing domestic and export selling prices between markets, products had to be matched based on width, thickness, and length, among other matching criteria. Given that the only differences that matter for matching purposes are those that affect price, Commerce effectively determined that dimensional differences affected price comparability. It conducted itself accordingly during the investigation. Commerce's position that dimension affects price for matching but not for the adjustment for dimensional differences indicates a failure of objectivity.

4.71 Despite acknowledging that physical differences could result in differences in market value, Commerce concluded that there was no information on the record by which it could calculate an adjustment for differences in dimension based either on cost or value. Thus it did not say that such an adjustment was not warranted, but that it could not calculate one. Commerce also asserted that the adjustment it could not calculate would, in any event, be minor. However, Article 2.4 makes no distinction for minor price effects, nor is there evidence that the price effects were minor.

4.72 The United States presented two diversionary arguments. First, it argues that Article 2.4 applies only when there is a particular pattern in the pricing. That prices do not match in a single procession of lower prices for smaller pieces and higher prices for larger pieces of softwood lumber is irrelevant to the premise that dimensions affect price. Second, the United States argues that price differences based on dimension fluctuated. Article 2.4 does not require a uniform price differential as a precondition to "due allowance" for differences which affect price comparability. The issue is whether differences in physical characteristics affect price comparability and thus have a distorting effect. Moreover, since annual average prices for each product of each exporter were compared, an annual average adjustment could reasonably have been made, and was required to be made by Article 2.4. Commerce did not consider fluctuation in prices to be an obstacle for other price comparison purposes. Just as annual average export prices and normal values were computed, so too could Commerce have calculated an annual average adjustment for dimensional differences between two non-identical products.

4. Zeroing of Negative Margins

4.73 Canada has demonstrated that the US practice of "zeroing" negative margins of dumping contravenes Articles 2.4 and 2.4.2 of the *AD Agreement*. The United States is now saying that the interpretation by the Appellate Body in *EC – Bed Linen* is a misinterpretation of Articles 2.4 and 2.4.2 and that the Report of the Appellate Body in *EC – Bed Linen* should not be relied upon by the Panel. However, the United States itself has acknowledged that adopted reports should be taken into account where they are relevant to any subsequent dispute, especially where a report of the Appellate Body is concerned. The zeroing methodology applied by Commerce in this case is the same as was considered by the Appellate Body in *EC – Bed Linen*.

4.74 The United States looks to the negotiating history of the *AD Agreement*. However, pursuant to Article 32 of the *Vienna Convention*, the negotiating history of the text of an agreement is only relevant as a supplementary means of interpretation. In Canada's view, the text itself of Articles 2.4 and 2.4.2 is clear and the Appellate Body so found in *EC – Bed Linen*.

5. Company-specific Issues

4.75 Under Articles 2.2.1.1 and 2.2.2 a cost is "associated with" and data will "pertain to" production where the cost and data relate to the costs for producing and selling the product. Article 2.2.1.1 also requires that "[a]uthorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter and producer..". Article 2.4 requires that the comparison between export price and normal value shall be "fair". Commerce failed to meet these requirements.

4.76 Commerce miscalculated Abitibi's interest expenses to softwood lumber by (1) failing to comply with its obligations under Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs", and by (2) failing to comply with its obligations under Article 2.2.1.1 and 2.2.2 to use a methodology that resulted in an allocation that "reasonably reflects" the costs "associated with" and "pertaining to" the "production and sale of softwood lumber". The US submission confirms that Commerce did not consider the merits of the record evidence regarding Abitibi in selecting its COGS allocation methodology. Moreover, the record evidence establishes that a COGS-based allocation was distortive and over-allocated interest expenses to Abitibi's softwood lumber operations relative to its non-investigated products – pulp, paper, and newsprint.

4.77 In calculating Tembec's G&A expenses, Commerce rejected G&A data from Tembec's FPG (which was accurate and reliable and used by Commerce for all purposes except for calculating G&A) in favour of company-wide G&A data that overwhelmingly reflected the cost of producing pulp, paper and chemicals worldwide, not only softwood lumber produced in Canada. In doing so, Commerce failed to calculate a G&A amount that "reasonably reflected" Tembec's cost of production and sale of softwood lumber contrary to Article 2.2.1.1 and included costs in Tembec's G&A that did not pertain to Tembec's cost of producing and selling softwood lumber contrary to Article 2.2.2.

4.78 For Weyerhaeuser Canada, Commerce improperly included an amount for litigation settlement costs incurred by Weyerhaeuser Company for claims related to its hardboard siding products sold in the United States in prior years. The G&A expense Commerce calculated did not reasonably reflect Weyerhaeuser Canada's costs for producing and selling softwood lumber, but included data that pertained to the production and sale of other products than softwood lumber, contrary to Articles 2.2.1.1 and 2.2.2. Commerce incorrectly found that Weyerhaeuser Company treated the settlement claims as G&A on its records. The US first written submission does not point to any relationship between the hardboard siding settlement costs and Weyerhaeuser Canada's softwood lumber production.

4.79 For Tembec, Commerce improperly established a by-product offset by relying on internal transfer prices that were significantly lower than unaffiliated sales prices. In doing so, Commerce acted inconsistently with Article 2.2.1.1 because the record evidence clearly established that the internal prices were undervalued. The significant difference between internal prices and market prices cannot be attributed to profit as the US purports. By-products have neither profits nor costs and Commerce made no findings about profits. The US assertions that Tembec provided inadequate and "self-serving" data on purchases from unaffiliated companies are untrue and were never raised by Commerce. Commerce had the burden to advise Tembec if it found any data were inadequate.

4.80 For West Fraser, Commerce improperly rejected data recorded on West Fraser's books for wood chip sales made to affiliated parties in BC on the grounds that the sales underlying those data were made at inflated non-market prices. This was not an unbiased and objective examination of the record as a whole and resulted in a determination of costs, contrary to Article 2.2.1.1. Commerce ignored 99.7 per cent of the record evidence on BC market prices in finding incorrectly that West Fraser's affiliated sales were not reflective of BC market prices. The United States blames West Fraser for Commerce's own failure in evaluating the evidence. The tiny quantity of West Fraser's unaffiliated chip sales in BC on which Commerce relied was self-evident and Commerce's own verification report shows that it was put on notice by West Fraser's officials that over half of those sales were made early in the period of investigation, when prices were lowest. Commerce also re-valued certain sales to an affiliated pulp mill that Commerce verified reflected market prices. Commerce never raised an issue that any of these data was selectively provided and West Fraser never had the opportunity to provide any further evidence.

4.81 In calculating Slocan's costs and margin of dumping, Commerce ignored revenues generated from Slocan's futures contracts and failed to make an adjustment for a difference that affected the price comparability of Slocan's sales, contrary to Article 2.4. Alternatively, Commerce calculated an amount for Slocan's financial costs that failed to reasonably reflect its costs for producing and selling lumber contrary to Article 2.2.1.1. Commerce completely discarded these data, effectively rejecting data on Slocan's records despite an express finding that those records related to Slocan's lumber activities. This was neither an unbiased nor objective evaluation of the facts.

D. FIRST ORAL STATEMENT OF THE UNITED STATES

4.82 The following summarizes the United States' arguments in its first oral opening and closing statements:

1. Opening Statement of the United States of America at the First Meeting of the Panel

4.83 In its first written submission, the US requests two preliminary rulings. First, Canada has, in its first written submission, improperly added to the list of provisions it claimed in its Panel Request were violated by virtue of Commerce's definition of the product under consideration. In response, Canada protests that it has not added any claims but only "additional arguments".[43] However, statements that actions were "inconsistent with US obligations" under particular articles of a WTO agreement plainly amount to claims under those articles.

4.84 The requirement that treaty provisions forming the basis of a claim be expressly identified in a panel request is by now well-established. The Appellate Body made a finding on this exact issue in its recent report in *US – Carbon Steel*.[44]

4.85 Canada purports to rely on the Appellate Body report in *Korea – Dairy*. In that case, the Appellate Body took it as a given that listing of the treaty provisions at issue was "a minimum

[43] Canada response to the US preliminary objections, paras. 2 and 13.
[44] Appellate Body Report, *US – Carbon Steel*, para. 172.

prerequisite".[45] The factors that Canada cites in paragraph 6 of its 10 June 2003 response come into play only if that minimum prerequisite has been met, which was not the case here.

4.86 The United States' second request for a preliminary ruling is with respect to Canada's improper introduction in its first submission of facts not available to Commerce in the underlying investigation. Specifically, Canada put before the Panel Exhibit CDA-77, a regression analysis. This analysis was prepared by respondent Tembec six months after the investigation was completed. Canada's attempt to have the Panel consider this exhibit is simply not consistent with Article 17.5(ii) of the *AD Agreement*.

4.87 Canada claims that respondents did not present the exhibit to Commerce, because Commerce's decision to deny a price-based adjustment for dimensional differences was "unexpected". That claim is not credible. Commerce's requirements for establishing such an adjustment are clear from its questionnaire and its regulations. Had the Tembec regression been presented to Commerce during the investigation, Commerce could have evaluated it to clarify and identify the data used as well as the fundamental assumptions employed.

4.88 Contrary to Canada's assertion[46], this regression analysis is not the "exact same type of document" that was at issue in the *EC – Bed Linen* case. At issue in *EC – Bed Linen* was a table summarizing the declarations of industry support, evidence that had always been available to the EC investigating authority.[47] The regression analysis is not a mere summary table.

4.89 On Canada's challenge to Commerce's initiation of its investigation, the standard, in Article 5.3 of the *AD Agreement*, is "whether there is sufficient evidence to justify the initiation of an investigation". A similar sufficiency standard governs a determination of whether to terminate an investigation under Article 5.8. Neither provision requires evidence greater than sufficient evidence.

4.90 Canada relies primarily on Article 5.2, arguing that an investigating authority should decline to initiate an investigation unless the application contains *all* information reasonably available to the petitioners regarding dumping, injury, and causal link. However, Article 5.2 describes the contents of an application for a dumping investigation. It does not contain a standard for accepting or rejecting an application. That standard is set forth in Article 5.3.

4.91 Canada rests its argument on the reference in the *chapeau* of Article 5.2 to "such information as is reasonably available to the applicant" on matters listed in the four sub-paragraphs that follow. Canada improperly reads the word "all" into this phrase. In fact, the reference to information "reasonably available" simply sets a limitation on what is expected of petitioners. Yet, Canada turns this limitation into a limitless obligation.

4.92 The evidence of dumping in the softwood lumber petition was sufficient to support initiation.[48] The evidence included country-wide, industry-wide cost and price data from multiple reliable sources.[49] The information that Canada claims was improperly excluded could not have altered the adequacy and accuracy of the information actually included.

4.93 On "product under consideration", Canada rests its argument primarily on Article 2.6 of the *AD Agreement*. Yet, Article 2.6 contains no obligation at all on how an investigating authority is to

[45] Appellate Body Report, *Korea – Dairy*, para. 124.
[46] Canada response to the US preliminary objections, para. 27.
[47] Panel Report, *EC – Bed Linen*, paras. 6.42-6.43 and Annex 2-2 thereto.
[48] Canada does not challenge the sufficiency of the application with regard to injury and causal link. Accordingly, the US confines its discussion to evidence of dumping.
[49] US first written submission, paras. 50-62.

define the product under consideration in an investigation. That understanding of Article 2.6 is reflected in the diverse practices of many WTO Members, including Canada itself.

4.94 Under Article 2.6, the existence of a "product under consideration" is taken as a given. No matter how an investigating authority defines the product under consideration, that becomes the basis for determining whether other products are "like products".

4.95 Canada appears to turn the text of Article 2.6 on its head. Instead of taking "product under consideration" as the starting point, Canada seems to take "like product" as the starting point and argue that "like product" constrains how an investigating authority defines the product under consideration.

4.96 Canada contends that the Canadian respondents were entitled to an adjustment to home market softwood lumber prices whenever the products compared had any dimensional differences. However, the Canadian respondents were unable to substantiate price adjustment claims during the investigation.

4.97 Consistent with Article 2.4, Commerce makes price adjustments for differences in the physical characteristics of merchandise when a party demonstrates that a physical difference between the product sold in the US market and the product sold in the foreign market has an effect on prices. But such an Article 2.4 adjustment is not automatic.[50]

4.98 In the majority of product comparisons, Commerce compared softwood lumber products of identical thickness, width and length. If identical products were not available for comparison, Commerce matched products with the most similar dimensional characteristics available.

4.99 On the question of calculation of the overall dumping margin for a given producer, Article 2.4.2 does not require Commerce to offset a dumping margin found on one particular model with non-dumping amounts found on another model. When the criteria of Article 2.4 are considered, not all export transactions will be equally comparable with all normal value transactions. Moreover, Canada's concept of a "negative margin" or an offset appears nowhere in the *AD Agreement*.

4.100 Under the *Tokyo Round Anti-Dumping Code*, many Contracting Parties made dumping calculations by comparing weighted-average normal values to individual export transactions, granting no offset for any export transaction that was not dumped. Article 2.4.2 required Members to change the dumping margin calculation, but not in the way Canada asserts. With respect to the methodology at issue here, Article 2.4.2 requires Members to establish margins of dumping by comparing weighted-average normal values with weighted averages of "all comparable export transactions".

4.101 Rather than calculating dumping margins for each individual export transaction, as before, Members are now required to weight average "all comparable export transactions" – in other words, all export transactions of the same model sold at the same level of trade. Improperly focusing on the word "all" deprives the term "comparable" of any meaning. It also nullifies the opening phrase in Article 2.4.2, which reads: "Subject to the provisions governing fair comparison in paragraph 4".

4.102 Canada relies heavily on the Appellate Body Report in *EC – Bed Linen.* While that Report dealt with the calculation of the overall dumping margin by the EC, the Report is not an interpretation of the *AD Agreement* with any broader applicability. Taking a fresh look at the issues is particularly appropriate in this case, because the United States was not a party to the *EC – Bed Linen* dispute, and that Report does not address many of the textual arguments presented by the United States in its first written submission.

[50] Panel Report, *EC – Tubes or Pipe Fittings*, para. 7.158.

4.103 Canada makes a number of company-specific claims. The *AD Agreement* provides only general guidance on how an investigating authority is to establish a producer's cost of production. There are no specific rules on issues such as allocation of general and administrative costs and calculation of offsets. What Canada seeks is to have the Panel re-weigh the evidence.

2. Closing Statement of the United States of America at the First Meeting of the Panel

4.104 Canada's acknowledgement that facts are always relevant in considering the issues presented underscores that this Panel is not considering questions in the abstract but in a particular factual context.

4.105 On its requests for preliminary rulings, the United States noted with interest Canada's statement that it will be submitting a seven page expert's memorandum explaining the methodology applied to create Exhibit CDA-77. The very fact that Canada's expert requires seven pages to explain the methodology underscores the US point that the exhibit is new evidence.

4.106 There has been some discussion of standard of review. Contrary to Canada's assertion, the United States does not advocate "total deference". US discussion on this point has emphasized the highly fact-specific nature of the issues presented and observed that re-weighing the evidence, as Canada has urged, finds no basis in Article 17.6 of the *AD Agreement*.

4.107 On Commerce's methodology for calculating an overall dumping margin for a given producer, Canada took issue with US reliance on negotiating history as additional support for US interpretation of Article 2.4.2. Canada argues that, in light of *EC – Bed Linen*, the ordinary meaning of Article 2.4.2 is clear, but is contrary to US interpretation, and, therefore, US recourse to negotiating history is not appropriate. The flaw in this reasoning is the premise that the meaning of Article 2.4.2 is clear simply because the Appellate Body has spoken to the question.

4.108 On initiation, as Canada acknowledged during US discussion of *Guatemala – Cement*, no panel has found an obligation on investigating authorities separate from the obligation under Article 5.3. This is with good reason, as Article 5.2 imposes no such obligation.

4.109 Also on initiation, discussion before the Panel highlighted the flaw in Canada's contention that Commerce did not rely on "actual transactions" in its decision to initiate. It *did* rely on actual transactions, as reflected in published data and affidavits from US producers.

4.110 When asked about its own practice regarding initiation, Canada stated that once the investigating authority is seized of jurisdiction over an investigation, it does not "look back" to the petition. That strikes us as being at odds with the rule of continuous evaluation of a petition that Canada advocates under Article 5.8.

4.111 With respect to product under consideration, Canada argues that the concept "like product" delimits the concept "product under consideration". But, it is undeniable that, under Article 2.6, "product under consideration" is the point of reference for defining like product. Under Canada's interpretation, there is no logical end to this loop.

4.112 Moreover, in its presentation, Canada went beyond arguing that Article 2.6 imposes limits and asserted where those limits should have been drawn in this case. Without any basis in the *AD Agreement*, it purported to identify a "core" category comprising "90 per cent of the products covered," and alleged that "Commerce added in another 10 per cent of products".[51] In telling the Panel where to draw the line, Canada is improperly urging the Panel to find facts as if it were the investigating authority.

[51] Canada first oral (opening) statement, paras. 34 and 35.

4.113 Canada suggests that the absence of any limits on an investigating authority's definition of the "product under consideration" could lead to "absurd result[s]". However, the absurd circumstances that Canada hypothesizes simply are not at issue here.

4.114 Regarding Canada's claim for an adjustment for differences in dimension, Canada has made several misleading and unsubstantiated assertions. For example, Canada's oral statement claims that, "[t]he United States contravened Article 2.4 by not taking into account dimension of softwood lumber in comparing export price to normal value". However, Commerce took dimension into account by accepting dimension in its model match methodology.

4.115 Similarly, Canada argues that all the parties, including the US petitioners, asserted that dimension affected price[52], but cites to no record evidence of this. The parties did not express a common view. Canada now concedes that "the market established prices based on the supply and demand for each product, not because one product is smaller or larger than the other".[53]

4.116 Canada argues that the United States must be found to have concluded, in effect, that differences in dimension affected price comparability because Commerce accepted dimension in its product matching hierarchy. However, Commerce's matching criteria do not dictate what price adjustment it must make. Canada confuses two separate decisions made by Commerce. The product matching decision is made early in the investigation, before facts relevant to price comparability are gathered and evaluated.

E. SECOND WRITTEN SUBMISSION OF CANADA

4.117 In its second written submission, Canada made the following arguments:

1. Initiation and Termination of the Investigation

4.118 In initiating and later failing to terminate the investigation, Commerce violated Articles 5.2, 5.3 and 5.8 of the *AD Agreement*.

4.119 The United States violated Article 5.2 because Commerce initiated the investigation in spite of the undisputed fact that the Applicant had information about costs, as well as home market and export prices reasonably available to it that it did not provide to Commerce as part of its "Application".

4.120 The United States asserts that Article 5.2 does not impose an obligation on investigating authorities. The US position is untenable because the *AD Agreement* only concerns obligations on Members. Its position is also belied by the decision in *US – 1916 Act (Japan)* in which the United States itself was held to violate Article 5.2.

4.121 The United States also asserts that a breach of Article 5.2 has no consequences and that the sole obligation on investigating authorities under the combination of Articles 5.2 and 5.3 is to ensure that an application contains sufficient evidence to justify initiation. To the contrary, a *Vienna Convention* analysis of Article 5.2 demonstrates that it is an independent obligation and further, that the failure to comply with Article 5.2 means that an investigating authority cannot initiate an investigation.

4.122 The United States violated Article 5.3 because an objective investigating authority could not have found that there was sufficient evidence to justify initiating the investigation based on the Application. Under Article 5.3, Commerce was required to assess whether the evidence provided by

[52] *Id.*, para. 54.
[53] *Id.*, para. 59.

the Applicant on home market prices, export prices, and costs were adequate, accurate and therefore sufficient, to justify initiation.

4.123 The Applicant's cost data were flawed in at least four ways: first, the Applicant based its allegations of BC and Quebec producers' costs on US surrogate companies that were not representative of Canadian companies based on size; second, Commerce initiated the investigation without any evidence before it of how the Applicant calculated the manufacturing costs of the US surrogate companies for the SPF species or of how company costs were then allocated to the specific products for which the cost models had been constructed; third, both the BC and Quebec cost models used data from less than a full year despite the known seasonality of lumber mills' operations; fourth, there were no home market prices for western SPF available to test whether sales of this product were below cost.

4.124 The home market and export price information in the Application were also insufficient to justify initiation. Commerce initiated the investigation despite the fact that the Application contained no evidence of any actual sales transactions involving identified Canadian companies either in the domestic Canadian market or the American export market. Despite US assertions to the contrary, the Application contained no evidence of western SPF transaction prices in BC. The evidence on prices consisted of estimates from an industry publication and unsubstantiated anecdotal reports in two affidavits. Such evidence is not sufficient to justify initiation.

4.125 The United States violated Article 5.8 because Commerce failed, after initiation, in its ongoing obligation to assess the sufficiency of the evidence of dumping in the light of the Weldwood information provided to it and to terminate the investigation as an objective investigating authority would have. Contrary to the US view, the obligation in Article 5.8 cannot be made to depend on an *ex post facto* assessment of the relative merits of information, particularly where, as here, the information at issue has never been analyzed.

2. Like Product

4.126 An application for the imposition of anti-dumping duties must identify the proposed "product under consideration". Article 2.6 expressly requires that a like product be "identical" to the product under consideration, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

4.127 The plain language of Article 2.6 suggests a multi-step process. First, the investigating authority must identify the characteristics of the product under consideration. Second, it must identify the characteristics of each product proposed for inclusion in the like product. Third, it must determine whether the characteristics of each are identical or, if not, then closely resembling those of the product under consideration.

4.128 Commerce never defined the characteristics of the product under consideration, nor did Commerce compare the characteristics of each challenged product with those of the product under consideration as a whole. Instead, Commerce identified as subsets of the product under consideration various softwood lumber products. It then compared isolated characteristics of each challenged Canadian product to isolated characteristics of products selected from within the "product under consideration", considered to be "like" the challenged products. That analysis failed to establish the single, closely resembling, "like product" required by Article 2.6. No "close resemblance" exemplified by a set of shared common characteristics, was established between the challenged products and the product under consideration.

4.129 The United States uses the *Diversified Products* criteria to determine whether the product under consideration described in an anti-dumping petition comprises one or multiple "classes or

kinds" of merchandise but subordinated these criteria to a "no clear dividing line"/"continuum" test. For bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar, the United States examined whether each of these closely resembled a limited (and varying) subset of products belonging to the product under consideration (i.e., those products "nearby on the continuum").

4.130 Commerce found a single product under consideration based on the common "characteristic" of the diversity – non-commonality – of the products sought to be covered by the applicant. A proper like product analysis in respect of the US market was never done.

4.131 The ordinary meaning of "characteristics closely resembling those of the product under consideration" requires a comparison of the characteristics of the putative like product to the characteristics of the product under consideration. In order to determine the ordinary meaning of "characteristics closely resembling those of the product under consideration", one must compare the characteristics of the putative like product to those of the product under consideration. The characteristics, defined as essential or distinctive traits, must be those of the "like product," and must be "very nearly identical" to the characteristics of the "product under consideration". This understanding is consistent with that expressed in the panel decision in *Indonesia – Autos*, in the context of the term "like product" in the *SCM Agreement*.

4.132 Article 2.6 establishes a preference for "alike in all respects". This context reinforces the ordinary meaning of "characteristics closely resembling". When the products are not "alike in all respects," then their characteristics (i.e., essential or distinctive traits) must resemble each other so closely (i.e., as near as can be) that the products are nearly identical.

4.133 The application requirements in Article 5.2(i) and (iv) and the industry support requirements of Article 5.4 depend upon the definition of the "like product". Were the like product defined too broadly, then it would lead to irrational results.

4.134 The "continuum" or "no clear dividing line" test is contrary to the plain meaning of Article 2.6. It tests only whether the item claimed to be a separate product shares some characteristics with some other item in the "diversity of product". It does not test whether the item claimed to be a separate product has characteristics (i.e., essential or distinctive traits) that closely resemble those of the product under consideration.

4.135 A failure to define the like product in accordance with the criteria of Article 2.6 means also that the product under consideration has not been properly defined. This leads to other violations of the *AD Agreement*. The investigating authority must assess industry support and the other application requirements of Articles 5.2, 5.3, and 5.4 separately for each like product. Should those requirements not be met with respect to a like product, the investigating authority may not initiate an investigation with respect to the product under consideration and must redefine the scope of the product under investigation. The improper definition of the like product, contrary to Article 2.6, would also vitiate the investigation, the establishment of dumping, the calculation of the anti-dumping margins and the imposition of anti-dumping duties in respect of the product under consideration, in violation of Articles 1, 9.3 and 18.1 of the *AD Agreement*. Therefore, a failure to define like products in accordance with the requirements of Article 2.6 must be corrected.

3. Due Allowance for Dimension Differences

4.136 Dumping is a measure to counter price discrimination between markets. To measure price discrimination, one must compare prices that are comparable, such that any difference in the price of goods in two markets cannot be attributed to other factors, such as differences in taxes, or physical differences in the products compared. In the absence of such a "fair comparison," in which differences in products are adjusted, one cannot possibly measure price discrimination. Article 2.4 of

the *AD Agreement* expressly requires not only a "fair comparison (...) between the export price and the normal value", but also that "[d]ue 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".

4.137 The present case involves the requirement of "due allowance" for differences in physical characteristics; specifically, differences in the thickness, width, or length (collectively, "dimension") of products sold in the United States and Canada that Commerce compared without any adjustment and thus without "due allowance". With respect to differences in physical characteristics, Article 2.4 imposes an affirmative obligation upon the investigating authority; it does not establish an evidentiary standard for an individual respondent in domestic proceedings.

4.138 In making price-to-price comparisons, Articles 2.1 and 2.6 require the investigating authority to compare identical products sold in the importing country and in the home market, and permits comparisons of prices of non-identical products only if identical products cannot be compared. When prices of identical products are compared, there is no issue. When prices of non-identical products are compared, "due allowance" for the difference must be made under Article 2.4.

4.139 The United States acted inconsistently with Article 2.4 in making price comparisons of products with differences in dimension that Commerce quite explicitly identified as non-identical products, yet treating them as if they were identical by failing to make an adjustment for such dimensional differences.

4.140 Commerce used each of the three dimension characteristics to distinguish between identical and non-identical products. Based on its so-called "matching criteria", Commerce regarded lumber products to be identical only if they were identical with respect to all eleven characteristics, which included the same thickness, the same width, and the same length.

4.141 Dimension affects both supply and demand, and thus price. The physical dimensions of a particular lumber product affect the use to which the lumber can be put, thereby creating different demand for different dimensions. On the supply side, the raw materials used to produce lumber vary in diameter and length, and trees of different diameter and length will have different costs and yield lumber of different dimension. Dimension thus affects both demand and supply, which, elementary economics teaches, necessarily affects price and price comparability.

4.142 The United States provides to the Panel computer output showing a sample of average gross unit prices of random products in the Canadian home market for different respondents in the proceedings before Commerce. The United States also points the Panel to the gross prices in the home market, which are rather meaningless as they are unadjusted for other differences affecting price comparability, including differences in freight charges, volume discounts, selling expenses, and the like among individual sales. In any event, in every instance in which products vary only by dimension, the prices to which the United States looks differ. They are never the same.

4.143 Canada has also provided the Panel with further graphical representations of Commerce's own pricing data (using the meaningful, net prices after adjustments) as well as statistical representations of Commerce's Tembec data, demonstrating, through regression analyses, that dimension affects price. In addition, instead of the random product examples Commerce selected, Canada provided examples of non-identical products Commerce actually compared, along with their net Canadian prices. These charts and graphs of data already before Commerce are simply illustrative and cumulative.

4.144 Commerce unwaveringly accepted thickness, width, and length as important matching characteristics throughout its investigation, from its questionnaire, to its Preliminary and Final

Determinations. Because Commerce refused to compute either a cost-based or price-based adjustment for differences in dimension, Commerce refused to compare prices of any products that differed in any dimension characteristics. No one subsequently challenged or disputed this express factual finding that dimension affected price, nor did Commerce abandon it in its Final Determination.

4.145 The very same evidence that established that thickness, width, and length should be used as matching characteristics, and their order in the matching hierarchy, establishes that an adjustment was necessary before prices of non-identical products could be compared.

4.146 Based on its failure to adjust for dimensional differences, Commerce made a substantial number of non-identical comparisons that, in turn, significantly distorted the margins Commerce computed using such comparisons. Canada also provided examples of some of the non-identical comparisons Commerce actually made. This information quickly dispels the suggestions made by the United States that few non-identical comparisons were made, that the dimensional differences in these comparisons all were "minor", and that these "minor" differences did not impact price comparability. Commerce did not do any analysis.

4.147 The data first show that, for each company, Commerce made significant numbers of non-identical comparisons. Indeed, for two companies, the number of non-identical comparisons exceeded the number of identical comparisons. More importantly, for every company, the dumping margin calculated for non-identical companies far exceeded the margin calculated for identical comparisons. For every single company, the non-identical margin was at least double that for identical comparisons. In some cases it was four to seven times as high.

4.148 Canada has established its *prima facie* case that Commerce compared prices of products Commerce itself defined as non-identical, without due allowance for physical differences as required by Article 2.4. Canada has also supplied evidence, from the record before Commerce, that dimensional differences affect price comparability, and that all parties before Commerce agreed that this was so.

4.149 The argument that Canadian respondents did not meet the burden of proof is an *ex post facto* justification for the Commerce determination and, as such, cannot be considered by the Panel. The Panel is to review the decision "made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature", as was confirmed by the panel in *Argentina – Poultry*.

4.150 The United States offers no alternative explanation for the fact it implicitly acknowledges, i.e., that lumber products of different dimension exhibited different prices at any given time. There is no alternative theory for why the prices of softwood products of different dimension differ – other than that dimension affects price comparability.

4.151 The US argument that the evidence showed that prices for different dimension lumber "were not stable or predictable" cannot derive from any failure of the Canadian respondent companies to provide evidence or analysis. Thus, the United States, without notice to the parties, established a specific evidentiary burden, inconsistent with Article 2.4 that would be virtually impossible to meet.

4.152 The fact that neither Canadian nor US prices for any investigated lumber product were predictable or stable over the POI did not prevent Commerce from comparing prices for purposes of measuring dumping, and it cannot be allowed to prevent Commerce from making due allowance for product differences, particularly, where, as here, the comparisons made are of annual weighted-average prices. Commerce has not required showings of consistent and predictable price differences for any of the other product characteristics for which it did make an adjustment for product differences.

4.153 Commerce had the necessary evidence; it simply resisted basing any adjustment for dimension on differences in value (price).

4. Commerce's Practice of "Zeroing" Violated Articles 2.4 and 2.4.2 of the *AD Agreement*

4.154 Commerce violated Article 2.4.2 in calculating margins of dumping for Canadian lumber when it changed to zero any intermediate stage margins resulting from comparisons in which export price exceeded normal value. In conducting this zeroing, it failed to consider fully "all comparable export transactions" as required by Article 2.4.2 in conducting its comparison of weighted average export price with weighted average normal value.

4.155 The mechanics of the US practice as described by Canada are not contested by the United States, and were acknowledged by Commerce during the investigation. Furthermore, the United States has not denied that its practice is identical to that engaged in by the EC and found by the Appellate Body in *EC – Bed Linen* to be inconsistent with the terms of Article 2.4 and 2.4.2 of the *AD Agreement*.

4.156 The terms "[a]ll comparable export transactions" require inclusion of export transactions that result in positive intermediate margins as well as those that result in negative intermediate margins. The US practice of zeroing, which introduces an artificial distinction between positive and negative intermediate margins, fails to account for all comparable export transactions, in violation of Article 2.4.2. By converting intermediate margins from model comparisons to zero where export price exceeds normal value, the United States gives less weight to these models and transactions in conducting its overall comparison. Converting negative margins to zero in effect decreases the true export price, which was greater than normal value to a value equal to the normal value.

4.157 Furthermore, zeroing fails to compare a "weighted average" normal value with a "weighted average" of prices of all comparable export transactions, as required by Article 2.4.2. Due to the conversion of some intermediate margins to zero, the overall margin of dumping that results does not reflect an actual average, in violation of Article 2.4.2.

4.158 However, the US claim that Article 2.4.2 only addresses intermediate stage calculations is contradicted by the express terms of Article 2.4.2, which establishes a single standard for the margin calculation applicable to all stages of the calculation.

4.159 When Article 2.4.2 is read in conjunction with the terms of Article 2.1, the implausibility of the US interpretation of Article 2.4.2, as limited to intermediate stage calculations, is revealed. These margins, aptly described by the Panel in *EC – Bed Linen* as margins of price difference, are of only secondary importance to Article 2.4.2. To suggest that they are the sole concern of its requirements is to ignore the most basic purpose of these provisions: to set rules governing how investigating authorities are to determine margins of dumping.

4.160 The same claim made by the United States in this case was considered and rejected by the Appellate Body in *EC – Bed Linen*. Adopted Appellate Body reports should be taken into account where, as in this case, they are relevant to a subsequent dispute.

4.161 The *AD Agreement* expressly provides that a comparison be made of weighted averages of US price and normal value for "all comparable export transactions". The ordinary meaning of these terms supports a finding that zeroing violates the *AD Agreement*. Any ambiguity or manifest absurdity that the United States might claim derives not from the text but from its own unilateral interpretation of Article 2.4.2.

4.162 Canada's interpretation of Article 2.4.2 does not deprive the term "comparable" of operative meaning. Canada agrees with the United States that Article 2.4.2 applies to intermediate stage

comparisons. For those comparisons, "comparable" ensures that model-specific comparisons only include transactions meeting the requirements of "price comparability" contained in Article 2.4. "[All]" ensures that all the transactions meeting those requirements of comparability are used.

4.163 For final stage comparisons, "comparable" describes the transactions compared at the intermediate stage and the nature of the transactions within the like product. "[All]" operates to ensure that all transactions are considered, and none are excluded. The United States argued in its first written submission that Article 2.4.2 "mak[es] plain that not all export transactions are 'comparable'." The United States now claims that all export transactions are comparable, although not "equally comparable". If all export transactions were comparable, then it would be hard to understand how the inclusion of the word "comparable" could, as the United States contended in its first written submission, demonstrate that the word "all" has a limited application, namely only to a subset of transactions which are "comparable". Ultimately, the United States fails to refute Canada's demonstration that Commerce's overall comparison, including at the final stage of the process, did not result in a "fair comparison" within the meaning of Article 2.4.

5. Company-specific Issues

(a) The Allocation of Interest Expense for Abitibi

4.164 In making this claim, Canada does not ask that the Panel choose between methodologies as the United States contends. Rather, Canada argues that Commerce failed to meet its express obligations under Articles 2.2.1.1 and 2.2.2. At the outset, in its determination, Commerce offers generic rationales that fail to show that it considered the evidence before it. Abitibi demonstrated that its newsprint and pulp and paper operations were far more capital intensive and required more financing than its lumber operations and that this difference was not captured in a COGS allocation. It also demonstrated that including depreciation expense in COGS in no way corrects this distortion or in any way adjusts for differences in asset requirements. Commerce was not guided in its selection of an allocation methodology by the specific evidence that had been submitted in this case. The evidence showed that the investigating authority: (1) mandated an allocation methodology at the outset of a case before even gathering information, (2) failed to make case-specific factual findings, (2) applied generic reasoning in defence of its methodology, and (4) asserted that established practice would be followed because it is consistent and predictable. This constitutes a failure to "consider all available evidence on the proper allocation of costs" as required by Article 2.2.1.1.

4.165 Further, Abitibi's assets are predominantly long-term and the asset requirements of its different business segments are very different, which differences are not reflected in COGS. The fatal problem with a COGS methodology is that it considers only current expenses, and effectively ignores the true, full costs of long-term capital assets. Further, the Panel must consider that Abitibi will sell the lumber soon after it is produced and then get paid. Thus, unlike capital assets which need to be financed for the full year and longer, current production expenses only need to be financed until payment is received. Thus, the "cash needs" or capital needed to finance current expense is an amount much less than the annual total of those expenses because it takes into account inventory turnover time. This is shorter for lumber than other products Abitibi sells. In ignoring this for Abitibi, Commerce grossly over-weighted current expenses in its allocation, since the working capital "cash needed" to finance current expenses over one year is not the total of such expenses, but rather that total divided by the inventory turnover time. Failure to consider these factors resulted in an interest expense that was not related to Abitibi's cost to produce softwood lumber, contrary to Article 2.2.1.1.

4.166 Commerce's COGS methodology also skewed the allocation of interest expenses to lumber in this case because Abitibi's lumber operations require 7.6 per cent of the company's total assets and therefore 7.6 per cent of its total financial expense. By allocating to lumber 13.6 per cent of total

expense, as demonstrated, Commerce included costs that did not "pertain to" the production and sale of lumber contrary to Article 2.2.2.

4.167 To date, the United States has failed to address any of the factual evidence or arguments presented above. It has responded by offering generalizations that do not withstand scrutiny, or by mischaracterizing Canada's or Abitibi's arguments.

(b) The Allocation of G&A Expenses for Tembec

4.168 The United States continues to seek to justify Commerce's findings by arguing that Commerce's method was predictable and therefore more reliable, that the FPG data were unreliable because they were unaudited and divisional data. These arguments do not support Commerce's rejection of the FPG's data as a basis for determining Tembec's G&A.

4.169 Article 2.2.2 of the *AD Agreement* requires Commerce to calculate G&A expenses based on actual data pertaining to the production and sales of the like product. The G&A expenses from both the FPG and the overall company are verified and on the record (i.e., they both satisfy the "actual data" requirement). Commerce defended the use of Tembec's company-wide data by stating that its "consistent and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company…" In this case, however, its method effectively required reliance on data that did not pertain to the production and sale of softwood lumber and distorted Tembec's margin of dumping in violation of Article 2.2.2. It also resulted in the calculation of costs that were not "associated with" the actual cost to Tembec for producing and selling softwood lumber, contrary to Article 2.2.1.1.

4.170 Commerce calculated Tembec's G&A rate based on the company-wide G&A expenses even though Tembec submitted documented evidence that its pulp and paper operations incurred significantly higher G&A expenses than its lumber operations, as well as evidence on the reliability of the FPG data. Using the more accurate and reflective data from the FPG would have resulted in lower costs which, ultimately, would have resulted in a lower margin for Tembec. The United States now offers, as an additional defence of its practice, that Tembec's FPG G&A data were "not audited" and not kept in accordance with Canadian GAAP. First, this defence is a *post hoc* rationalization of Commerce's determination. Second, as elaborated in Canada's response to question 54 of the Panel, the FPG data were audited. Finally, the FPG data were maintained in accordance with GAAP.

(c) The Allocation of G&A Expenses for Weyerhaeuser

4.171 The United States argues that the hardboard siding charge is a general expense attributable to Weyerhaeuser Canada's cost of producing softwood. The United States' only support for this claim is that the hardboard siding expense is really a "legal" expense. However, the USD130 million charge for hardboard siding settlements does not reflect lawyer salaries, copying of briefs, travel to court, or other types of "legal" expenses that are often considered to be "general". As described on page 51 of Weyerhaeuser Company's financial statement, the hardboard siding charge was unique. The charge was specifically meant to fund future claims related to hardboard siding. The expense was not even incurred in the year Weyerhaeuser Company took the charge; it was simply meant to reflect the contingency on its books. In reality, the expense affected one line of business, in the United States, that was unrelated to Canadian softwood lumber – nothing more.

4.172 The United States further tries to justify Commerce's classification of the hardboard siding expense as a general expense based on the claim that doing so is "supported by Weyerhaeuser Company's own books and records" and that Weyerhaeuser Company describes the expense as "generally incidental to its business". On the contrary, Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A expenses and its hardboard siding settlement expense. The evidence also demonstrates only one other line-item

expense (the integration expense) was included in Commerce's G&A calculation. Further, the language that the costs are "generally incidental to its business", as the full quote demonstrates, was referenced in terms of pending and threatened environmental litigation.

4.173 Finally, the United States hinges its entire argument on the belief that Canada cannot demonstrate that the settlement charge relates to the production and sale of hardboard siding. Such an approach is inconsistent with Articles 2.2.2 and 2.2.1.1, the findings of the panel in *Egypt – Steel Rebar*, and Commerce's own practice. As stated in *Egypt – Steel Rebar*, a cost may be attributed to the production and sale of the like product only if the facts of the case point out that the cost was associated with the product under investigation. Applied to the hardboard siding settlement charge, the United States may not base its decision to include the charge on the fact that Weyerhaeuser Company did not demonstrate that the charge relates to production activity, or that it normally treats these types of expenses in this manner. The hardboard siding expense is a settlement fund concerning a product unrelated to the like product, produced in the United States by Weyerhaeuser Company. Accordingly, the hardboard siding expense did not "pertain to" the production and sale of softwood lumber as required by Article 2.2.2. Nor did including this expense result in a cost that "reasonably reflected" Weyerhaeuser Canada's costs "associated with" the production and sale of softwood lumber in accordance with Article 2.2.1.1. US findings in this regard were neither a proper establishment of the facts nor an evaluation of the facts that was unbiased and objective.

4.174 The US arguments also fail to properly identify Weyerhaeuser Company's burden during the investigation. Weyerhaeuser Company was required to demonstrate that the expense was not related to the production and sale of Canadian softwood lumber, nothing more. Commerce never requested additional information to add to this record evidence. Finally, the US argument violates Commerce's own practice. When Commerce calculates G&A for a parent company that owns the producer or exporter under investigation, as here, Commerce has recognized that G&A expense items are not considered fungible in nature. The United States never addresses this policy in its first written submission or response to the Panel's questions. The record in this case demonstrates that for other "general" expenses, Commerce in fact followed this policy.

(d) West Fraser's By-product Revenue Offset

4.175 Canada argues that Commerce improperly ignored relevant record evidence concerning 99.7 per cent of BC wood chip prices. In response, the United States characterizes Canada's claim as an "argument that Commerce should have preferred one source of evidence," and alleges that such an argument is a "request to find facts *de novo*". This characterization is incorrect. Canada argues that Commerce was required to consider all relevant record evidence. A panel must "consider whether all the evidence was considered, including facts which might detract from the decision actually reached" in determining whether an investigating authority was unbiased and objective. The United States also is incorrect in alleging that Canada is seeking a *de novo* review of the record evidence. Canada has made a *prima facie* case showing that the evidence on BC market prices is inconsistent with Commerce's determination that West Fraser's chip sales to affiliated parties were made at inflated prices. It falls within the Panel's competence to find that this determination does not constitute an "unbiased and objective" evaluation of that evidence.

4.176 Canada demonstrated that the data Commerce relied upon did not provide a reasonable benchmark for BC market prices. Canada showed that the majority of West Fraser's wood chip sales to unaffiliated parties were made through the McBride mill pursuant to a pre-existing contract early in the POI, when prices were lowest. Canada also showed that the volume of West Fraser's sales to unaffiliated parties represented just 0.28 per cent of West Fraser's total BC wood chip sales.

4.177 First, the United States argues that these are new arguments that were not advanced by West Fraser itself. As Commerce used a country-wide comparison in its Preliminary Determination, however, there was no reason why West Fraser would have argued that its sales to unaffiliated parties

in BC were too small or unrepresentative. Second, the United States asserts that Commerce acted reasonably because West Fraser's unaffiliated transactions within BC were found to be commercial transactions. As record evidence shows that the majority of West Fraser's BC sales to unaffiliated parties were made during the first two months of the POI, when prices were lowest, the average price of those sales cannot reflect market prices for the POI. Third, the United States claims that "[s]o long as the wood chip transactions were commercial in nature, the actual volume of those transactions is irrelevant". This assertion, however, is not consistent with an investigating authority's obligations under the *AD Agreement*. Under Commerce's interpretation, even one non-representative arm's length transaction could serve as a reasonable benchmark for market prices for a POI of an entire year. Finally, the United States observes that Canada has not made arguments concerning West Fraser's unaffiliated sales from its PIR sawmill. That observation is correct, and the reason for this is simple: unaffiliated sales from PIR did not distort Commerce's analysis.

4.178 Commerce applied inconsistent benchmarks to Canfor and West Fraser in determining whether their respective chip sales to unaffiliated parties were made at market prices. The United States defends this action by arguing "[unaffiliated] sales in BC made by West Fraser were of its own product mix, and thus the best evidence of the value of an offset in West Fraser's process". This argument is a false, *post hoc* justification for Commerce's dissimilar treatment of West Fraser. Commerce did not find that West Fraser's wood chip sales to unaffiliated parties provided a better benchmark because they reflect West Fraser's "own product mix", and identified no evidence that West Fraser's wood chips somehow differed from those of Canfor or other producers.

4.179 Canada also showed that Commerce re-valued certain chip sales made by West Fraser to an affiliate, QRP, even though Commerce recognized that those sales had been made at market prices. In response, the United States argues Canada is requesting the Panel to find that data from QRP was "more relevant". Canada does not argue that these data were "more relevant". Rather, Canada argues that Commerce unreasonably revalued wood chip sales made by this large sawmill to an affiliated customer, even though Commerce itself specifically recognized that the prices QRP paid West Fraser were not inflated. The US argument does not address this inconsistency. At the very least, this evidence must be considered in determining whether the finding was based on an unbiased and objective evaluation of the record evidence as a whole.

(e) Tembec's By-product Revenue Offset

4.180 Commerce had two alternatives for the data it would use to calculate Tembec's by-product revenue offset. Commerce had to choose between using internal transfer prices or unaffiliated prices for wood chip purchases. Commerce used one approach for Tembec and the opposite approach for West Fraser for the same overall purpose: artificially inflating both companies' margins.

4.181 The United States argues that "the difference between the (...) internal surrogate for cost and the external market price is the equivalent of "profit" in the normal setting where costs and sales prices are known". This *post hoc* rationalisation must be rejected. The difference between internal prices and market prices cannot be attributed to profit. By-products, by definition, have neither profits nor costs. Furthermore, Commerce made no findings about profits.

4.182 Canada submits that market price is the appropriate benchmark for valuing by-product revenue offsets. Article 2.2.1.1 requires Commerce to base its cost calculations on the records kept provided that they "reasonably reflect the costs associated with the production and sale of the product". The internal transfer pricing in Tembec's books and records does not reasonably reflect the costs associated with the production of softwood lumber because the wood chip pricing therein does not reasonably reflect the market value of the by-product.

4.183 There are three flaws in the US argument that Tembec made its best assessment of a surrogate for cost when it set its internal transfer price. First, Commerce made no such finding. Second, there

is no record evidence upon which such a finding could have been made. Third, the argument assumes that Tembec's accountants would assign a cost to a by-product when GAAP provides that no costs are assigned to by-products.

4.184 The United States claims that "there are no easy methods to assess value under such conditions" and that, because Commerce used the company's own valuation, it determined a reasonable figure for by-product revenue. These claims were not advanced by Commerce in the IDM, and they are not correct. It would have been very easy to assess the value of the wood chips by using the records kept by Tembec of its unaffiliated sales and purchases of wood chips.

(f) Slocan's Futures Revenue Offset

4.185 Commerce rejected Slocan's position that futures revenue formed part of direct selling expenses. In doing so, Commerce asserted that it did not consider the revenue to "result from and bear a direct relationship to [a] particular sale in question". This is not correct. Article 2.4 requires that "[d]ue allowance shall be made … for differences which affect price comparability". The ordinary meaning of this provision cannot support the US interpretation. Article 2.4 does not refer to "particular sales transactions", and no reasonable interpretation of the textual language of this provision would read in such a specific requirement.

4.186 The United States argues that Article 2.4 presumes a request for adjustment and a demonstration of effect on price comparability. This interpretation contradicts the ordinary meaning of Article 2.4. The United States was required to make due allowance for all differences that affected price comparability. In this context, the "differences" referred to include the "conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics and any other differences".

4.187 Article 2.4 provides a non-exhaustive list of differences that affect price comparability. It is apparent that there is a broad requirement to adjust for any differences affecting price comparability. Moreover, Article 2.4 clearly envisages overlap between the "differences" under this provision. In other words, it would not matter whether Slocan separately demonstrated that its futures revenue was a "condition of sale" in the US market. Slocan's futures trading activity was either a "condition" of US sales, an "other difference" affecting price comparability, or both.

F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.188 In the second written submission, the United States addresses points raised by Canada at the first substantive meeting and in Canada's 30 June responses to the Panel's questions. The United States asserts that statements made by Canada at the first substantive meeting and in its responses do nothing to change the conclusion the Panel should reach. With respect to each claim, the United States contends that Canada either has failed to identify an obligation implicated by Commerce's action, or, where it has identified an obligation, it has failed to demonstrate how Commerce's actions were inconsistent with that obligation, and it has asked the Panel to engage in *de novo* fact-finding.

1. Initiation

4.189 Canada's argument regarding Article 5.2 of the *AD Agreement* is flawed for at least two reasons. First, Canada incorrectly reads into that provision an obligation on investigating authorities independent of the obligation under Article 5.3 to determine whether there is sufficient evidence to initiate an investigation. Where Article 5 imposes an obligation on investigating authorities, the obligation is unmistakable. By contrast, Article 5.2 makes no reference at all to the authorities, but simply describes the contents of an application. This fact is not inconsequential given that this description of the application's contents necessarily informs the inquiry into accuracy and adequacy and sufficiency under Article 5.3.

4.190 The second flaw in Canada's argument is that it improperly reads the word "all" into the phrase "such information as is reasonably available". It suggests that the exclusion of any reasonably available information from the application, no matter how minor, would be grounds for declining to initiate, even if the information included in the application were sufficient to demonstrate dumping, injury, and causal link.

4.191 Under Article 5.3, Canada disputes the sufficiency of the evidence supporting initiation and argues that the Weldwood data would have provided a superior basis for deciding whether to initiate.[54] However, the Weldwood data necessarily would have represented the experience of only a single company, rather than the diverse cost and price data actually set forth in the application. But, even assuming, *arguendo*, that Canada's assessment in this respect is correct, it has no bearing on the question before this Panel.

4.192 The evidence that Commerce relied upon to initiate included data from the lumber industry publication *Random Lengths*. Canada incorrectly asserts that *Random Lengths* "commingles" Canadian and US data. Its assertion that the *Random Lengths* data are "not actual transaction prices" but "informal estimates" is also incorrect. Moreover, Canada's questioning of the reliability of *Random Lengths* data is contradicted by its own reliance on that very same source.[55]

4.193 Canada also argues that the application demonstrated dumping of only a limited number of categories of lumber.[56] Canada's argument assumes the correctness of its own claim regarding the product under consideration; that is, it assumes that each "category" of softwood lumber in fact constitutes a separate "product under consideration" and thus requires a separate demonstration of dumping for purposes of initiation. However, Canada's product-under-consideration argument has no basis in the *AD Agreement*.

4.194 Finally, Canada argues that Commerce's initiation was tainted by a lack of evidence of home market sale prices in BC.[57] The application contained evidence of home market sales below cost in Quebec. This provided a basis for using constructed value to establish normal value. The *AD Agreement* does not require investigating authorities to conduct separate cost tests on different markets within "the domestic market of the exporting country".

4.195 Commerce's establishment of the facts with respect to softwood lumber costs was also proper. Canada's claim that the application "fail[ed] to have costs of significant or representative producers" is incorrect for two reasons.[58] First, with respect to the vast majority of costs, data from US mills were used only to provide production factors, which were then valued using data Canada does not dispute are representative of Canadian costs of production.[59] Second, the US mills whose data were used in the cost model were themselves significant and representative producers of softwood lumber.

4.196 Finally, Canada's allegation that "Commerce relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces"[60] is demonstrably false. The cited affidavit provides *separate* per-MBF freight rates for shipment to Boston from four regions, one of which is the Maritime Provinces.[61]

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[54] *See, e.g.*, Canada first written submission, paras. 86, 95, and 99; Canada response to question 9 of the Panel, paras. 45-49.

[55] Canada response to question 4 of the Panel, paras. 6-7.

[56] Canada response to question 8 of the Panel, paras. 28-30.

[57] *See, e.g.*, Canada response to question 19 of the Panel, para. 61.

[58] Canada response to question 8 of the Panel, paras. 34-35.

[59] *See* US first written submission, paras. 53-54 and exhibits cited therein.

[60] Canada response to question 8 of the Panel, para. 40.

[61] Exhibit CDA-41, Petition Exhibit VI.C-9, para. 4.

2. Product under Consideration

4.197 Canada has not identified an obligation arising out of Article 2.6 of the *AD Agreement* that the United States violated in this case. Canada's shift from one theory to another reflects its inability to identify any violation.

4.198 This is underscored by its 30 June 2003 response to a question on this very subject. Canada first attempts to parse the phrase "characteristics closely resembling" in Article 2.6. It concludes that the phrase "must mean that the essential, distinctive traits of one product must be very nearly identical to the essential, distinctive traits of the other product".[62] In fact, this conclusion is not borne out by the definitions of key terms Canada cites.

4.199 Canada then proceeds to posit a problem that might occur if the product under consideration in a given case were defined too broadly, using a hypothetical case comprising automobiles and bicycles.[63] There are several problems with this hypothetical example. First, whatever the appropriate analysis of an investigation that might treat automobiles and bicycles as a single product under consideration would be, that is not the case presented here. Second, Canada's own analysis of its hypothetical begs the question of how Article 2.6 directs an authority to determine the appropriate number of products under consideration in a given case. Third, Canada fails to consider the implications that a narrow definition of product under consideration would have on the very same standing and injury determinations to which it alludes.

3. Due Allowance for Dimensional Characteristics

4.200 Commerce acted consistently with Article 2.4 of the *AD Agreement* in its consideration of the dimensional characteristics of softwood lumber. Canada contends that the respondent companies had no notice of Commerce's intent to consider whether or not a price adjustment should be granted for dimensional differences.[64] Its claim of procedural unfairness – specifically, that the United States violated Article 6 of the *AD Agreement* – is a new claim that falls outside the Panel's terms of reference.

4.201 In its response to the Panel's questions, Canada provided a seven-page consultant's report (contained in Exhibit CDA-129) to explain the regression analysis contained in Exhibit CDA-77. Canada's reason for presenting the regression analysis (and the consultant's background report) for the first time in this dispute, instead of during the investigation, is that "no one reasonably doubted that the inclusion of dimension for model matching would not mean its inclusion in adjustments for physical differences".[65] Canada's position is belied by the record. The parties' submissions during the investigation evidence their awareness that whether or not an adjustment would be made for differences in dimension was an open question.

4.202 Canada misinterprets Commerce's inclusion of physical characteristics in the product matching methodology as an acknowledgement that dimensional differences had an effect on price comparability, requiring "due allowance" under Article 2.4.[66] However, Commerce cannot be deemed to have concluded that dimension affected price comparability simply by having made a product matching determination. Commerce accepted that dimensional characteristics were significant for product matching purposes, at the behest of the parties, but without scrutiny of the price or cost data specifically relevant to dimension. Even assuming *arguendo*, that Commerce implicitly acknowledged that dimension affects price comparability, it made the due allowances that Article 2.4

[62] Canada response to question 20 of the Panel, para. 64.
[63] *Id.*, para. 65.
[64] Canada response to question 4 of the Panel, paras. 4 and 5.
[65] *Id.*, para. 4.
[66] Canada response to question 22 of the Panel, para. 86.

requires by comparing products on the basis of criteria that included dimension. In contrast to the Argentina authority in *Argentina – Ceramic Tiles*, by conducting a model-by-model comparison, and matching not only identical softwood lumber dimensions, but also, where identical dimensions were not available for matching, the most similar dimensions possible, Commerce *fully* accounted for dimensional differences.

4.203 For "affect price comparability" under Article 2.4 to have any meaning, there must be some connection established between the differences in physical characteristics at issue and prices. As the respondents were aware, differences in dimension did not yield variable cost of manufacturing differences, and therefore Commerce did not have the means to connect differences in price with differences in dimension according to its normal practice. The connection between physical differences and price had to be established in some other fashion in order to justify an adjustment.

4.204 This is not a case in which Commerce either failed to ask for data, or asked for data the respondents never provided, and therefore record evidence does not exist. Commerce reached its conclusion based on a review of the information contained in the respondents' cost and sales databases conducted in the normal course of the investigation.[67]

4.205 In response to the Panel's request to the United States for the "number of comparisons" of softwood lumber made involving different dimensions, Canada provided its own distorted response. First, Canada presented only the number of comparisons made, without weighting the results by volume.[68] Because the dumping margins are calculated according to the volume of US sales, a simple number of comparisons does not reflect the relative significance of the identical, similar, and constructed value comparisons in the margin.

4.206 Canada also provided several charts showing price differences in the Canadian market for several softwood lumber products. However, the price differences reflected in those charts may not be attributable to differences in dimension, but to the fact that the sales were made outside the ordinary course of trade.[69] Other comparisons on the record show no discernible pattern between dimension and price. They show minimal price differences for differences in dimension, significant fluctuations, and smaller lumber pieces selling for higher prices than large lumber pieces. This other record evidence demonstrates the selective nature of Canada's charts.

4. Calculation of Overall Dumping Margin

4.207 On the issue of Commerce's calculation of the overall dumping margin, the issue is whether Articles 2.4 and 2.4.2 of the *AD Agreement* contain an affirmative obligation for Members to offset margins of dumping established after comparing weighted-average normal values to weighted averages of all comparable export transactions with any non-dumping amounts found in such comparisons. There is no basis for such an obligation in the *AD Agreement*.

4.208 While it is clear that Canada disagrees with the United States on the existence of such an obligation (for purposes of this dispute), it is not clear that the disagreement extends beyond this dispute. Canadian administrative practice shows that Canada's interpretation of Articles 2.4 and 2.4.2 is similar to the United States' interpretation.[70] It is not clear how Canada reconciles its interpretation of Articles 2.4 and 2.4.2 for purposes of its own investigations with its interpretation of those provisions in the present case.

[67] Exhibit CDA-2, IDM, Comment 4, note 60.
[68] Canada response to question 25 of the Panel, para. 97.
[69] *See* Exhibit US-76, pp.1-4 illustrating this point.
[70] *See* Exhibit US-78, "Margins of Dumping" section of "Statement of Reasons, Concerning the making of a final determination of dumping with respect to Fresh Tomatoes, Originating in or Exported from the United States of America, Excluding Tomatoes for Processing".

4.209 Further, Canada has stated positions that are: (a) inconsistent with the *EC – Bed Linen* Report and (b) internally inconsistent. First, after relying heavily on the Appellate Body Report in *EC – Bed Linen*, Canada is now espousing positions at odds with that report. Canada now agrees with the United States that a two-stage process for determining whether a producer or exporter has engaged in dumping is appropriate under Articles 2.4 and 2.4.2 of the *AD Agreement*.[71] However, the Appellate Body, in arriving at its finding in *EC – Bed Linen* found "nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished [...], nor to justify the distinctions [...] among *types or models* of the same product on the basis of these 'two stages'".[72] Thus, Canada now appears to agree with the United States that the reasoning in *EC – Bed Linen* does not account for the need to make multiple comparisons in order to comport with Articles 2.4 and 2.4.2 of the *AD Agreement*.

4.210 Second, Canada is not completely consistent in its position regarding a two-stage dumping analysis. In particular, at paragraph 109 of its response to question 31 of the Panel, Canada seems to take the position that a two-stage analysis is required by the *AD Agreement*. Yet, in the same response, and without citation or explanation, Canada claims that "the resulting dumping margin should be the same whether the authority carries out its calculation in one stage or two"[73] and that, in this case, the first stage "divided the single like product into multiple models *as an expedient* that permitted appropriate comparisons between identical or most similar products".[74] (emphasis added) Nowhere does Canada reconcile these positions.

4.211 Although Canada took issue with the appropriateness of the United States' reference to negotiating history of Articles 2.4 and 2.4.2 of the *AD Agreement*[75], Article 32 of the *Vienna Convention* expressly provides for recourse to the negotiating history in order to confirm the ordinary meaning of treaty terms in their context and in light of the treaty's object and purpose. Canada does not refute the substance of the relevant negotiating history.

5. Company-specific Issues

4.212 Canada misconstrues Articles 2.2.1.1 and 2.2.2 of the *AD Agreement* as mandating particular methodologies other than the methodologies Commerce actually used. In fact, Articles 2.2.1.1 and 2.2.2 provide investigating authorities with general guidance as to the calculation of production costs and constructed value.

4.213 Canada raises the issue whether Commerce's decision to allocate **Abitibi's financial costs** using a COGS methodology was consistent with Articles 2.2.1.1 and 2.2.2. Commerce fully considered Abitibi's "asset-based" allocation proposal, but disagreed that assets alone should govern how financial costs were allocated.[76] Canada argues that the COGS allocation is unreasonable, not because it fails to include a value for capital assets, but because it fails to consider all assets to a sufficient degree.[77] For example, Canada argues that the COGS methodology fails to consider non-depreciable assets. However, the record reflects that the vast majority of Abitibi's assets – and all of its "capital assets" – were depreciable assets.[78]

4.214 Whether or not Abitibi's asset-based cost allocation methodology was a reasonable alternative to Commerce's COGS methodology is not the issue before this Panel. However, even on its own terms, Canada's argument is flawed, because it is based on the unsubstantiated premise that Abitibi's

[71] Canada responses to questions 28, 29, 30 and 31 of the Panel, paras. 101, 105-107, and 109.
[72] Appellate Body Report, *EC – Bed Linen*, para. 53.
[73] Canada response to question 31 of the Panel, para. 110.
[74] *Id.*, para. 111.
[75] Canada first oral (opening) statement, paras. 67-68.
[76] Exhibit CDA-2, IDM, Comment 15.
[77] Canada response to question 52 of the Panel, para. 146.
[78] Exhibit CDA-82, Abitibi's Consolidated Financial Statement, p. 35.

financial costs relate solely to its assets. Because money is fungible, financial costs cannot be attributed to any one expenditure – whether to asset purchases or to any other particular investment.[79] Rather, and consistent with Canadian GAAP's treatment of financial costs as a general cost, Commerce concluded that financial costs relate to Abitibi as a whole and are reflective of Abitibi's overall borrowing needs.

4.215 Canada raises the issue whether Commerce's calculation of **Tembec's G&A costs** – based on the company-wide costs reported in Tembec's audited financial statement – was inconsistent with Articles 2.2.1.1 and 2.2.2. Canada cites to no authority for the proposition that, as an accounting matter, a company can incur G&A costs on a divisional basis.

4.216 Canada was unable to provide evidence that Tembec's "divisional G&A" was in accordance with Canadian GAAP.[80] Instead, Canada argues that an assertion in an unaudited portion of Tembec's financial statement establishes that the "divisional G&A" is in accordance with Canadian GAAP.[81] However, this note to the audited financial statements does not address directly Tembec's treatment of its G&A costs, nor does the record establish that Tembec's "divisional G&A" was among the items audited.[82] Canada argues that, because Tembec's overall G&A cost was audited, the G&A cost that Tembec attributed to various divisions must also have been audited[83], but that conclusion does not logically follow. The fact that an audited financial statement properly records a company's total G&A costs does not mean that the company's internal allocation of those costs among divisions has been audited.

4.217 Regarding **Weyerhaeuser Canada's G&A costs**, Canada appears to reason that G&A costs that are not related *exclusively* to the production and sale of softwood lumber must not be included in a calculation of those production costs.[84] This reasoning misapprehends the very nature of G&A cost. General expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole and are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable. This would render meaningless the requirement of Article 2.2 that "a reasonable amount for administrative, selling and general costs" be included in a company's cost calculation.

4.218 In previous submissions, the United States has referred the Panel to Note 14 of Weyerhaeuser Company's audited financial statement, explaining the general nature of the company's litigation costs.[85] In its most recent submission, Canada replies that the statement in Note 14 "was not made in the context of the hardboard siding claim".[86] However, Note 14 plainly is attached to the line item in Weyerhaeuser Company's financial statement pertaining to the hardboard siding litigation. Canada also adds that Note 14 "neither attributes the expenses to any particular portion of Weyerhaeuser's business nor the business as a whole. It simply acknowledges that the company incurred certain costs".[87] But, this is not a basis for excluding the cost from G&A costs. If it were, then litigation expenses and other expenses that are general in nature would avoid inclusion in calculation of a company's total SG&A cost simply by virtue of their characterization on a company's books and records.

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[79] US first written submission, paras. 192-193.
[80] Canada response to question 53 of the Panel, paras. 149-154.
[81] *Id.*, para. 149.
[82] Exhibit US-12, Tembec's Annual Report, "Auditors' Report," p. 34.
[83] Canada response to question 53 of the Panel, para. 150.
[84] *See, e.g.*, Canada response to question 60 of the Panel, paras. 163-64.
[85] *See* US response to question 41 of the Panel, para. 65, note 41, citing Exhibit CDA-101, Weyerhaeuser 2000 Annual Report, note 14, p. 75.
[86] Canada response to question 60 of the Panel, para. 164.
[87] *Ibid.*

4.219 Canada maintains that these costs had a "clear association with the production and sale of non-like product…"[88] What Canada does not explain is how litigation occurring years after a good's production can be clearly associated with its production.

4.220 The *AD Agreement* is silent as to how investigating authorities should calculate **by-product offsets to production costs.** Article 2.2.1.1 addresses the "costs associated with the production and sale" of the product under consideration and does not address consideration of the "market value" of offsets to those costs. "Market value" is different from "cost". Market value will include the cost of a good, but it will also include other elements, such as selling expenses and profit.

4.221 Applying market value as a benchmark, Commerce determined that West Fraser's BC affiliated transactions did not reasonably reflect the value of the wood chips.[89] Thus, Commerce valued the **by-product** offset for both affiliated and unaffiliated transactions using the "average sales price" for wood chips derived from the unaffiliated BC transactions.[90]

4.222 Canada now acknowledges that West Fraser never argued to Commerce that some of its unaffiliated (McBride mill) transactions were unrepresentative of a market value for wood chips.[91] It argues that, because West Fraser had a large amount of affiliated transactions during the period of investigation, it is "self-evident" that Commerce should have questioned the use of West Fraser's unaffiliated transactions for valuing wood chips in BC.[92] However, West Fraser's unaffiliated transactions were significant in number and value. Even if the quantity of transaction had been smaller, this fact, in and of itself, would not have called into question the commercial nature of the unaffiliated transactions.

4.223 Canada also argues that Commerce should have compared the values of West Fraser's wood chips to the values of *all* wood chips on the record, including those values reflected in the books and records of Tembec, Canfor, Abitibi, and Weyerhauser Canada.[93] Canada cites to no provision of the *AD Agreement* requiring that analysis.

4.224 Finally, Canada argues that Commerce "blindly adhered" to its methodology for valuing affiliated transactions.[94] However, Commerce's methodology in BC (and applied to Alberta transactions as well) was based on an objective review of the firm's books and records.[95]

4.225 In the case of Tembec, the question is Commerce's valuation of interdivisional transfers of wood chips. A value for an interdivisional transfer of a by-product recorded on a company's books and records may be a reasonable reflection of the "costs associated with the production and sale" of the by-product, even if that value is less than market value. In this case, Commerce determined that the price paid by Tembec's pulp mills to its sawmills was a reasonable amount.[96]

4.226 Canada claims that Tembec's inter-divisional transactions were "arbitrary".[97] But, no provision in the *AD Agreement* requires an investigating authority to replace a company's own valuation of inter-divisional transfers of a product with the market value for sales of the same product. Costs of production are commonly lower than the market value of a product, due to profit paid by an unaffiliated purchaser to its supplier.

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[88] Canada response to question 58 of the Panel, para. 159.
[89] Exhibit CDA-2, IDM, Comment 11. *See* also US first written submission, paras. 218-229.
[90] *Ibid.*
[91] Canada response to question 65 of the Panel, para. 168, note 168.
[92] *Ibid.*
[93] Canada response to question 66 of the Panel, paras. 170-171.
[94] *Id.*, paras. 170 and 172.
[95] Exhibit CDA-2, IDM, Comment 11.
[96] *Id. See* also US first written submission, paras. 230-244.
[97] Canada response to question 71 of the Panel, para. 179.

4.227 With respect to **Slocan**, Canada asserts that Commerce should have made some adjustment for futures contract profits, even though Slocan itself failed to substantiate either of the alternative treatments it sought. As the panel in *Egypt – Steel Rebar* noted, responding parties have an obligation to assert and to justify the information and arguments required to prove their claims.[98] Slocan requested two alternative and directly contradictory treatments of its hedging profits, but the evidence did not support either claim.[99]

4.228 Neither Slocan nor Canada has explained how Slocan's futures contracts could "affect" any specific prices to US customers, given that no sale or shipment of softwood lumber and no payment for lumber actually occurred under the contracts.[100] Canada has not identified a sale of lumber to a customer in the United States for which Slocan's futures contracts were a condition and term of sale.[101] Absent such a showing in the investigation, there was no basis for an adjustment for differences in conditions and terms of sale under Article 2.4.

4.229 Commerce also found, consistent with Article 2.2 of the *AD Agreement*, that the futures contracts were not linked to production, since the profits amounted to sales revenue (even though they were not tied to any particular sale of lumber in the United States). Thus, Commerce properly declined to use selling revenue to offset finance expenses included in Slocan's production costs.[102]

G. SECOND ORAL STATEMENT OF CANADA

4.230 In its second oral statement, Canada made the following arguments:

1. Initiation and Termination of the Investigation

4.231 The United States breached the *AD Agreement* because the investigation was initiated and then continued in a manner that did not respect US obligations under Articles 5.2, 5.3 and 5.8.

4.232 The panel in *Guatemala – Cement I* held that, even though the evidence needed to justify initiation is not the same as that needed to justify a preliminary or final determination, the "subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of dumping". (emphasis in original)

4.233 The United States has claimed that the application "contained data on cost of production, home market sales, and export price for many companies in the two largest lumber-producing provinces in Canada". However, the United States has now conceded this statement is untrue.

4.234 Commerce initiated the investigation without any domestic sales information from BC – by far the largest lumber-producing province in Canada. The sole allegation of dumping against BC producers was based on a constructed value comparison. Article 2.2.1 permits an authority to disregard price-to-price comparisons and resort to constructed value comparisons "only if" the authority has properly determined that home market sales are made below cost. As there were no BC home market prices, Commerce had no legal basis for using the BC constructed value comparison as evidence of dumping to justify initiation.

4.235 With respect to Quebec, the decision to initiate was improper because the estimate of producers' costs rested on assertions and not on evidence. When the applicant's Quebec home market sales information is compared with its export price information, there is no dumping. Initiation rested

[98] Panel Report, *Egypt – Steel Rebar*, para. 7.3.
[99] *See* Exhibit CDA-2, IDM, Comment 21.
[100] *See* US first written submission, paras. 249-250.
[101] *Ibid.*
[102] *Id.*, para. 252.

on constructed value comparisons, which, in turn, rested on the Applicant's estimate or model of Quebec producer costs.

4.236 There were no data on how costs of production were incurred by Canadian mills before Commerce at initiation. The Applicant's cost model was based, in significant part, on information from two US mills chosen as surrogates to model the costs of Quebec mills.

4.237 The Applicant noted that softwood lumber manufacturing costs vary significantly by producer based on a number of identified factors. Commerce failed to ensure that the two US surrogate mills chosen were representative of Quebec mills, at least regarding the factors identified by the Applicant. The Applicant simply asserted, and Commerce accepted, that the US surrogate mills were representative. Commerce had no evidence before it to support such a conclusion.

4.238 Further, the Applicant did not provide any information on how the costs of the US surrogate mills were allocated to the products at issue.

4.239 The United States, hiding behind the pretense of confidentiality, has not provided the Panel with any information that was before Commerce about the two US surrogate mills. These US mills were at the heart of Commerce's decision to initiate. Canada has not seen, and the Panel still does not have before it, basic information in the hands of the United States, such as the names of the US mills and what Commerce knew about those mills. The United States has responded to Canada's claims with nothing but assertions.

4.240 The cost information that formed the basis of Commerce's decision to initiate was neither accurate nor adequate. Therefore, it was not sufficient to justify initiation under Article 5.3.

4.241 Turning to Article 5.2, these are the facts: the United States has admitted that the Application contained information indicating that Weldwood, a major Canadian producer, was owned by the Applicant IP; the Weldwood-IP relationship establishes that actual cost and price information from a major Canadian producer was readily available to the Applicant; and the Applicant did not provide such information to Commerce. The undisputed facts establish a breach of Article 5.2.

4.242 Concerning Article 5.8, given the lack of actual Canadian transaction price and cost data in the Application, Commerce was required to consider the Weldwood information. Any other result renders ineffective the ongoing obligation to terminate an investigation in Article 5.8.

2. Zeroing

4.243 The logic of the Appellate Body in *EC – Bed Linen* is clear. However, the United States argues that this clearly established interpretation should be rejected. Yet the United States does not deny that its practice is identical to that formerly used by the EC, until ruled inconsistent with Article 2.4.2.

4.244 In its essence, the US argument attempts to take Article 2.4.2 out of context, to read meaning into individual words when a plain reading of the whole of the article establishes a meaning that the United States does not wish to support. The plain meaning of "all comparable export transactions" requires inclusion of export transactions that result in positive margins as well as those that result in negative margins.

4.245 The Appellate Body, in *EC – Bed Linen*, noted that the language of Article 2.4.2 did not fragment the margin calculation process, as the United States suggests it does. Article 2.4.2, seen in the light of Article 2.4, requires that Members conduct a fair comparison of all comparable export transactions when determining the margin of dumping, regardless of methodology. Article 2.4.2 is

not limited to a particular methodology, or to a particular stage of a methodology. Rather, it is general in its terms, applying universally to dumping comparisons.

4.246 The United States asks this Panel to turn to negotiating history. The text of Article 2.4.2 is clear and requires no resort to negotiating history. Besides, the negotiating history does not sustain the US position.

3. Like Product

4.247 The Application in this case covered a wide range of products. It covered not only construction lumber, but also each of the four products at issue – bed-frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar. Under Article 2.6, Commerce was obligated to determine the corresponding "like product" produced in the United States. It must do so, among other reasons under Articles 5.2, 5.3 and 5.4, to assess the thoroughness and accuracy of the application and the level of industry support.

4.248 The plain and controlling language is the text of Article 2.6. By virtue of this provision, it is necessary that all products within the like product have identical or closely resembling characteristics. Thus, the investigating authority must either determine that the like product and the product under consideration are "identical in all respects", or determine that the like product has "characteristics closely resembling those of the product under consideration".

4.249 Thus the investigating authority must identify the characteristics of the product claimed to be a separate like product, identify the characteristics that define the product under consideration, and compare the characteristics of the claimed separate like product to those of the product under consideration. This is not what Commerce did.

4.250 The United States can only offer its so-called "class or kind" analysis, pursuant to the *Diversified Products* criteria, as its Article 2.6 determination. That determination contains no relevant analysis or determination justifying its treatment of all softwood lumber products in the United States as like the product under consideration.

4.251 In this case, the United States subordinated its use of the *Diversified Products* criteria to a "no clear dividing line"/"continuum" test and used such criteria only to examine whether characteristics of each of the challenged products resembled some characteristics of an isolated product chosen for its similarity to the challenged products. Commerce found a single like product based on the common "characteristic" of the very *diversity* – the great variety – of the products that the applicant sought to cover. The effect of the test applied by Commerce was that the more that was included in the product under consideration, the more likely there would be discrete characteristics somewhere within that great pool of products to match against some disputed product.

4.252 The United States never tested, as it was required to do under Article 2.6, whether bed-frame components, finger-jointed flangestock, Eastern White Pine or Western Red Cedar were identical to the product under consideration, or had characteristics closely resembling those of the product under consideration.

4.253 Commerce's failure to compare, in a consistent manner, bed-frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar to all of the products covered by the product under consideration is a breach of Article 2.6. These four imported products do not closely resemble the rest of the product under consideration, and thus Commerce should have considered separately whether the application was adequate to initiate an investigation of them.

4.254 Once Commerce recognized that there were multiple, distinct "like products" supposedly corresponding to the product under consideration, there should have been several consequences.

Under Articles 5.2, 5.3 and 5.4, the investigating authority must examine the sufficiency of the application and the level of industry support separately for each of these distinct like products. Commerce did neither.

4. The Adjustment for Dimension Required by Article 2.4 of the *AD Agreement*

4.255 In the underlying investigation, the Applicant asserted that, to develop a useful price analysis, "[a] very precise comparison of products is necessary". It then specified products by thickness, width and length, among others, as factors essential to price analysis. The ITC, in the injury inquiry, determined that "lumber prices generally differ substantially depending on grades and dimensions". Canadian and US producers alike commented that thickness, width and length affect prices at which they sell lumber. Industry publications showed different values for lumber of different dimensions. Commercial invoices specify dimension. The pricing data collected by Commerce from each of the six companies investigated show each producer selling lumber of different dimensions for different prices. The evidence of record for the impact of dimension was incontrovertible. In contrast, there is no evidence to support the notion that dimension does *not* affect price.

4.256 Commerce made a significant number of price comparisons between products sold in the United States and Canada that differed in dimension, whether measured by volume or number of comparisons. The facts establish a *prima facie* breach of the requirement of Article 2.4 that the investigating authority make due allowance for differences in physical characteristics affecting price comparability. The United States does not refute these facts. Instead, the United States appears to assert that there are exceptions to the requirement of Article 2.4. The United States argues that Article 2.4 does not apply when there has been an attempt to match products by model; the differences among the products are minor; or the price relationships among physically different products are not "stable or predictable". Alternatively, the United States suggests that the Canadian respondents did not meet their burden of providing a "means to connect" differences in price to differences in dimension. None of these putative exceptions or requirements can be sustained.

4.257 First, the "due allowance" requirement in Article 2.4 is comprehensive. It does not permit an authority to ignore differences remaining after model matching, or otherwise. Second, as to "minor" differences in physical characteristics, Canada has already shown that Article 2.4 contains no such exception. Third, nothing in the language of Article 2.4 permits an investigating authority to limit due allowance to those differences that "affect price comparability in a stable and predictable manner". Finally, the new putative "means to connect" requirement is an *ex post facto* rationalization by the United States of its refusal to make an adjustment.

5. Company-specific Issues

4.258 For Abitibi, Canada has demonstrated that Commerce's reasons for using a COGS methodology contain no analysis of Abitibi's evidence and cannot meet the standard imposed by Article 2.2.1.1 or the Appellate Body's ruling in *US – Cotton Yarn* that an authority consider all facts. Canada has also demonstrated that the COGS approach, as applied to Abitibi, is contrary to Articles 2.2, 2.2.1.1 and 2.2.2. Interest expense is a function of two things: the amount of money needed to produce a product, and the amount of time for which that money is needed. Cash is needed to fund both current manufacturing costs *and* asset acquisitions. Commerce's COGS methodology, however, considers the financing of only current manufacturing costs, and does not fully consider financing needs, nor accurately reflect the length of time for which that financing is required. A COGS-based allocation does not reflect all cash needs in general, or the relative cash needs of Abitibi's product lines in particular. In Abitibi's case, the asset category was far more significant – Abitibi had to finance CAN$11 billion in assets but only CAN$4 billion in current manufacturing costs. Moreover, Abitibi's production of pulp, paper and newsprint required significantly greater assets than did its production of softwood lumber. A total asset-based allocation, by comparison, considers not just fixed or capital assets but the financing of all current manufacturing expenses *plus*

all assets. It also considers the amount of time that money is needed for each type of expense. All current production expenses are fully taken into account because every expense incurred to produce a good is included in the value of assets. Given Abitibi's facts, the COGS methodology resulted in an allocation of financial expenses that were not associated with and did not pertain to the production and sale of softwood lumber.

4.259 For Tembec, Commerce improperly rejected FPG G&A data to establish G&A expense, using company-wide data instead. The FPG's data were actual amounts pertaining to the production of softwood lumber, including a portion of company headquarters G&A expense. There is no evidence to suggest that Tembec used distortive procedures to allocate the company-wide expenses to the division nor did Commerce point to any. Commerce rejected those recorded data, not because of any fault with the data itself, but because it has a standard practice of using company-wide G&A data. The majority of Tembec's products were pulp, paper and chemicals, were sold outside North America and incurred proportionately higher G&A expenses compared to lumber. Commerce, therefore, did not use an alternative reasonable set of data – it chose distorted costs that overstated G&A attributable to lumber and calculated costs that failed to "pertain" only to softwood lumber, contrary to Articles 2.2.1.1 and 2.2.2. US arguments for rejecting the FPG data are undermined by the fact that Commerce used divisional data for all lumber cost calculations except G&A and financial expenses. Further, the United States ignores the fact that different business segments producing different products can incur G&A, in addition to G&A for the company as a whole, and record it as Tembec does. The US position that the FPG data were unusable because they were unaudited has no basis in Article 2.2.1.1. A note in Tembec's financial report indicates that the data were maintained in accordance with GAAP. Moreover, Commerce itself never made any reference to the statements being unaudited in its Final Determination, and the Panel should disregard this *ex post facto* justification by the United States.

4.260 For Weyerhaeuser, Commerce included a hardboard siding cost, related exclusively to Weyerhaeuser US's production and sales activities in the United States, in Weyerhaeuser Canada's G&A cost for softwood lumber, contrary to Articles 2.2.2 and 2.2.1.1. Canada has shown that Weyerhaeuser Company's records did not treat the hardboard siding expense as G&A allocable to all of its subsidiaries. Cost Verification Exhibit 26 breaks down the elements of Weyerhaeuser Company's G&A expense and does not include the hardboard siding expense. Moreover, Canada has shown that whether a cost is G&A does not eliminate the need to show a connection between a portion of that cost and the product under investigation, as required by Articles 2.2.1.1 and 2.2.2. An expense must at the very least relate to the cost of producing and selling the product. The US position assumes that *any* G&A cost, including all those incurred by companies merely affiliated with the producer or exporter in question, *benefits* the company as *a whole* and is allocable to all subsidiaries. This also breaches the Article 2.2 requirement that the amount allocated for G&A must be "reasonable". In this instance, the hardboard expense related only to the production and sales activities of Weyerhaeuser US in the United States, and was not a G&A expense incurred on behalf of its subsidiaries. Finally, the United States never responds in any of its submissions to the fact that Commerce's traditional practice has been to *exclude* unrelated parent company G&A, finding on numerous occasions that not all G&A is fungible.

4.261 The **by-product** offset claims turn on the level of reliance that should be placed on the records of a producer. In relation to West Fraser, the United States asserts that it was acceptable for Commerce to use unrepresentative unaffiliated sales as the basis for rejecting all of West Fraser's records for affiliated sales in BC. In contrast, the United States insists that it must use Tembec's records even though its internal transfer prices were set far below market value.

4.262 Canada first turns to the by-product offset claim relating to West Fraser. Article 2.2.1.1 states that the records kept by a producer are the preferred source for cost of production data provided that these records reasonably reflect the cost of production. The cost of production is calculated by aggregating the costs and offsets associated with the production of the product under consideration.

As a consequence, the records relating to the costs and offsets that comprise the cost of production must also be accurate. Commerce rejected West Fraser's records for affiliate wood chip sales in BC after determining that they did not reflect market value. The issue in this case is whether an unbiased and objective investigating authority could have found that these affiliate wood chip sales did not reflect market value.

4.263 The United States continues to emphasise that West Fraser never argued that its unaffiliated sales were unrepresentative. This argument, however, is incorrect. In fact, West Fraser's officials stated at verification that McBride sales were unrepresentative of the period of investigation. Moreover, Commerce's conduct also led West Fraser to believe that it had accepted these affiliated transactions.

4.264 The United States also asserts that Commerce reviewed West Fraser's unaffiliated transactions and found them to be commercial transactions that reflected a market value. There is no evidence of any such "review" by Commerce. Commerce's own verification report shows that it was aware that the majority of West Fraser's unaffiliated sales were suppressed by a long-term contract. The record also shows that unaffiliated sales from McBride occurred only during the first two months of the period of investigation, when wood chip prices were at their lowest. If Commerce had reviewed this evidence, it could not have concluded that these sales were representative of "market value".

4.265 The second by-product offset claim relates to Tembec. Commerce's reliance on Tembec's records to calculate the by-product offset for wood chips violates Article 2.2.1.1. In the underlying investigation, Commerce ignored verified record evidence concerning the market value of wood chips. Instead, Commerce relied on Tembec's internal transfer prices that were set far below market value.

4.266 Article 2.2.1.1 requires an investigating authority to calculate costs and offsets that reasonably reflect the cost of production of the product under consideration, in this case softwood lumber. When calculating costs, the offsets to those costs, such as those for by-products, must be reflected accurately. Thus, to reasonably reflect the cost of production for softwood lumber, it is necessary to determine the value for the by-products, which is their market price.

4.267 The United States asserts that Commerce is only required to determine the "surrogate" cost of an offset in inter-divisional transfers. The US position ignores the critical distinction between a by-product and a co-product. By-products do not have their own costs, nor do they generate their own profits. If they did, there would be no practical difference between by-products and co-products. The US position is also inconsistent with Article 2.2.1.1 because the fiction of a "surrogate" cost for an offset ignores the requirement that the costs must reasonably reflect the cost of production of the product under consideration. The offset for by-products is market value. Article 2.2.1.1 does not waive this requirement for internal transfers.

4.268 Article 2.4 requires Commerce to make due allowance for any differences that affect price comparability. Slocan provided Commerce with evidence concerning the revenues it earns through futures hedging activities in the US market. These futures contracts affect price comparability between the Canadian and US markets. Commerce's failure to make *any* adjustment for these revenues is inconsistent with Article 2.4.

4.269 Article 2.4 is open-ended and requires an investigating authority to adjust for *any* difference that affects price comparability. Moreover, Article 2.4 also envisages overlap between a *listed difference* and any *"other" difference* under this provision. Footnote 7 provides "that some of the *above factors* [in Article 2.4] *may overlap* …". Applied to the present situation, Slocan's futures activities may constitute a "condition" of sale, an "other" difference affecting price comparability, or both. The relevant point is that Slocan sought an adjustment for an identified difference. Even if the

concept of "direct selling expenses" as defined under US domestic law has a more restrictive meaning, it is irrelevant and not before this Panel.

H. SECOND ORAL STATEMENT OF THE UNITED STATES

4.270 In its second oral opening and closing statements, the United States made the following arguments:

1. Opening Statement

4.271 At this stage in the proceedings, the United States recognizes that the issues have been laid out in great detail and are well known to the Panel. However, in its responses to questions and in its rebuttal submission, Canada has made numerous statements that (1) wrongly assert that the United States concedes or acknowledges certain points; (2) take US statements out of context; or (3) otherwise mischaracterize the arguments of the United States. The effect of these misstatements is to seriously distort the facts and issues. The United States will address Canada's most significant misstatements to clarify the facts and the issues in this dispute.

4.272 First, it is necessary to revisit briefly the issue of the appropriate **standard of review**. In the first written submission of the United States, the United States recalled the explanation of the Appellate Body and several panels that Article 17.6(i) precludes *de novo* review of an investigating authority's findings of fact. The United States also noted that, notwithstanding this limitation, Canada seemed to be asking the Panel to decide certain questions as if *it* were the investigating authority. For example, the United States pointed to Canada's request that the Panel examine "whether the authority has given proper weight to the facts". In the US answers to the Panel's questions, the United States identified other instances in which Canada appears to be asking for *de novo* review of Commerce's findings of fact. The United States cited, for example, Canada's presentation to the Panel of a regression analysis that was not before Commerce in the softwood lumber investigation, along with a seven-page expert's memorandum. The United States also cited arguments Canada made in connection with certain company-specific calculation issues. Now, in its rebuttal submission, Canada accuses the United States of arguing "that Commerce has absolute discretion and must be accorded absolute deference on questions of fact".[103] This accusation is patently false. The United States has never urged the standard Canada alleges.

4.273 On the question of Commerce's **initiation of the softwood lumber investigation** Canada has made arguments under Articles 5.2, 5.3, and 5.8 of the *AD Agreement*. Canada argued that Commerce violated Article 5.2 by initiating on the basis of an application that lacked certain information alleged to be reasonably available to one of the applicant companies. The US response was two-fold. First, the United States argued that Article 5.2 does not impose an obligation on investigating authorities independent of the obligation under Article 5.3 to "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". Where various paragraphs of Article 5 impose obligations on investigating authorities, they do so in unmistakable terms. Article 5.2 contains no such mandate. It describes the contents of an application and thereby provides context for an authority's obligation under Article 5.3.

4.274 Second, the United States argued that Canada improperly read into Article 5.2 a requirement that an application contain *all* information reasonably available to the applicant on the subjects enumerated in that provision. However, Article 5.2 states only that "[t]he application shall contain such information as is reasonably available to the applicant" on certain specified matters. The phrase "such information as is reasonably available" does not mean *all* information that is reasonably available.

[103] Canada second written submission, para. 6.

4.275 In its rebuttal submission, Canada made several statements regarding the US argument on Article 5.2 that call for reply. First, Canada incorrectly asserted that Commerce "admits knowing at the time of initiation" that the Application "did not contain certain highly pertinent transaction-specific information, reasonably available to the Applicant in violation of Article 5.2".[104] The statement from which Canada infers this supposed admission is not an admission of the relevance of the Weldwood data, nor of any obligation on the investigating authority under Article 5.2.

4.276 Second, Canada erroneously characterizes the US argument as rendering Article 5.2 a nullity. Canada argues that, unless Article 5.2 imposes a free-standing obligation on investigating authorities it is "reduced to redundancy and inutility". This theory fails to read Article 5.2 in its context. In particular, it fails to consider the relationship between Article 5.2 and Article 5.3. By specifying the information that must be contained in an application, Article 5.2 informs the sufficiency inquiry an authority must undertake pursuant to Article 5.3. Therefore, Article 5.2 is not rendered a nullity, as Canada contends.

4.277 In its rebuttal submission, Canada argues that if a document purporting to be an "application" under Article 5.1 does not contain "such information as is reasonably available to the applicant" on the matters described in Article 5.2, then it is not in fact an "application" and cannot serve as the basis for initiation by way of "application".[105] This is a variation on Canada's argument that an investigating authority must prove a negative before initiating. Aside from its impracticability, Canada's suggestion would require a pre-initiation investigation that simply is not contemplated by the *AD Agreement*.

4.278 Next, the United States responds to Canada's contention that its interpretation of Article 5.2 is supported by the panel report in *US – 1916 Act (Japan)*.[106] The report in that matter is not relevant to this dispute and certainly does not support the proposition that Article 5.2 imposes an independent obligation on investigating authorities. The panel in the *US – 1916 Act (Japan)* dispute said nothing about obligations of investigating authorities under Article 5.2. It spoke of a *complainant* respecting obligations under that provision.

4.279 As a final note on this provision, the United States observe that Canada persists in its argument that Article 5.2 requires an applicant to provide *all* information reasonably available to it on the specified subjects. It bases this assertion entirely on the word "such" in the phrase "such information as is reasonably available to the applicant". Nothing in the definition of that word even suggests the word "all". Thus, even if the Panel were to find an obligation on investigating authorities under Article 5.2, that obligation would not be violated by an initiation based on an application that did not contain *all* information reasonably available to the applicant.

4.280 Canada has also argued that Commerce initiated the softwood lumber investigation based on insufficient evidence of dumping, in violation of Article 5.3. On rebuttal, Canada raises new objections to the evidence of dumping in the application. For example, Canada misleadingly asserts that there was no actual cost data for purposes of initiation. It is true that, in evaluating the petition, Commerce relied on *usage factors* from US mills. However, all significant *production costs* were valued on the basis of actual cost data from Canadian sources. Canada's claim that the usage factor data in the petition were "not representative" is equally misleading. Canada purports to measure representativeness of the data in the application relative to the six companies that were ultimately examined during the investigation. But, the selection of companies after initiation to serve as respondents has nothing to do with the data relied on prior to initiation. Commerce's decision to initiate was based on costs and prices for a broad range of producers. Canada also continues to assert that the application contained insufficient evidence on prices to justify initiation, dismissing

[104] *Id.*, para. 10.
[105] *Id.*, para. 21.
[106] *Id.*, paras. 16, 24.

applicant's use of *Random Lengths* data by questioning whether they represent actual transactions. The United States has responded to this allegation in prior submissions, demonstrating that *Random Lengths* data do represent actual transactions.

4.281 Finally, Canada continues to argue that Commerce violated Article 5.8 by declining to evaluate "the Weldwood data or any other data that may have been available in the light of the ongoing sufficiency of evidence requirement".[107] This argument is flawed for several reasons. First, the United States explained that these data *could not* have negated the sufficiency of the data on which Commerce relied at the time of initiation because they reflect the experience of a single company, whereas the data actually relied upon for initiation reflected the experience of a broad cross-section of Canada's lumber producing and exporting industry. Second, Canada ignores the fact that Weldwood's data were submitted two months after the initiation of the investigation, as a "voluntary" response. The data were received concurrently with the submissions of the six examined Canadian respondents, each of whose data demonstrated dumping. In light of the evidence of dumping obtained during the investigation, it is not at all clear how Canada believes the United States violated its obligation under Article 5.8. That provision requires termination of an investigation "as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". Yet, here, the evidence accumulated during the investigation reenforced rather than weakened the basis for concluding that there was dumping. Canada seems to argue that, having received the Weldwood data, Commerce should have looked back to determine whether there would have been sufficient evidence to initiate had the data been included in the petition. But, Article 5.8 contains no such look-back requirement.

4.282 Turning to Canada's **product-under-consideration claim**, Canada claims that Commerce's identification of "softwood lumber products" as a single product under consideration amounted to a violation of Article 2.6. The United States has responded by explaining that Article 2.6 contains no obligation on how an investigating authority is to identify the product under consideration in an anti-dumping investigation. This point is underscored by the fact that, in pending negotiations, certain WTO Members have proposed that there should be such an obligation. Such a proposal would be superfluous if the obligation already existed. Even Canada acknowledges that the support for its theory is mere inference, rather than any express rule.[108]

4.283 In its rebuttal submission, Canada focuses on two US statements. In each case, Canada mischaracterizes the statement, reading it in isolation and assigning a significance clearly not warranted when the statement is read in context. First, Canada focuses on the US statement that "[a]s part of its analysis in determining whether 'clear dividing lines' exist within the product under consideration identified within the petition, Commerce reviews [the] five [*Diversified Products*] factors".[109] Canada asserts that this means that Commerce "subordinated its use of the *Diversified Products* criteria to a 'no clear dividing line'/'continuum' test".[110] But, Canada misunderstands the analysis that was actually applied. It is clear from both the Scope Memorandum and the Final Determination that Commerce applied the *Diversified Products* criteria to each of the four products at issue. In other words, Commerce's assessment of whether there are "clear dividing lines" between products is *part of* the *Diversified Products* analysis, not subordinate to that analysis.

4.284 The second statement on which Canada focuses in its rebuttal is Commerce's statement that "[p]aradoxically, it is as much the *diversity* of lumber production as the characteristics that all softwood lumber have in common that leads us to continue to treat all softwood lumber as a single class or kind of merchandise".[111] Canada erroneously takes a passing observation by Commerce and

[107] Canada second written submission, para. 63.
[108] *Id.*, para. 70.
[109] *Id.*, para. 70 and note 66 (*citing* US first written submission, para. 103).
[110] *Id.*, paras. 70, 87.
[111] *Id.*, paras. 71, 87.

treats it as if it were the very foundation for Commerce's decision. Read in context, it is clear that this is not the case. Commerce expressly acknowledged that it could not base its determination on the diversity of characteristics among lumber products. Rather, it recognized an obligation under its own practice to apply the *Diversified Products* factors.

4.285 Moreover, even on its own terms, Canada's product-under-consideration claim must fail. Canada infers from Article 2.6 a rule governing the definition of the product under consideration. Although none of the key terms in Article 2.6 refer to the quality of two things being identical, Canada somehow infers a requirement "that the essential, distinctive traits of one product must be very nearly *identical* to the essential distinctive traits of the other product".[112] (emphasis added) Not only is such a requirement entirely absent from Article 2.6, even an inference of such a requirement is not supported by the language of Article 2.6.

4.286 Finally, in its rebuttal submission, Canada seeks support for its position from the panel report in *Indonesia – Autos*.[113] Its reliance on that case is misplaced for at least two reasons. First, and most importantly, the panel in *Indonesia – Autos* was not reviewing an investigating authority's determination under the standard in Article 17.6 of the *AD Agreement*. Second, unlike the present case, there was no question in *Indonesia – Autos* as to the identity of the product under consideration.

4.287 The next issue is Canada's **"due allowance for physical differences" claim**. Canada's claim under Article 2.4 of the *AD Agreement* is that Commerce was required to make calculation adjustments to account for certain dimensional differences in the transactions it compared. But Canada omits critical pieces of the puzzle which, when put in their proper place, reveal that width, thickness and length *were* taken into account in the product comparisons.

4.288 Canada's submissions also contain significant distortions of fact and mischaracterizations of the US position. For example, Canada continues to grossly misrepresent the impact on the margin of the non-identical dimensional comparisons made. Understood correctly, the vast majority of comparisons weighted by volume were of identical softwood lumber products, thereby significantly limiting the impact of these non-identical comparisons. Second, Canada mistakenly claims that the United States has created a new, unattainable standard for establishing price adjustments for physical differences, requiring a showing of stable prices. Canada has entirely misread the US submissions. In doing so, it is asking this Panel to find that Article 2.4 mandates an automatic price adjustment for physical differences, irrespective of the impact of such differences on price comparability. As the panel in *Egypt – Rebar* explained, under Article 2.4, a due allowance is warranted only if an effect on price comparability is demonstrated.[114]

4.289 What the United States has argued, and what Canada is unable to refute, is that prices of softwood lumber products of different dimensions *relative to each other* must show *some discernible relationship*. The only specific evidence Canada arguably provided demonstrating an effect on price comparability is a regression analysis based on data of one respondent company. It was presented for the first time to this Panel, and thus, as the United States explained in prior submissions, may not be considered by the Panel in its examination, under Article 17.5(ii). For all physical characteristics, except dimension, Commerce had cost data to connect the physical differences to the impact on price, pursuant to its normal methodology. Therefore, Commerce's treatment of dimension was necessarily distinct from its treatment of other physical characteristics. Because the Canadian respondents failed to demonstrate that dimensional differences affected price comparability, Commerce was not required to make a price adjustment under Article 2.4.

[112] Canada second written submission, para. 76.
[113] *Id.*, paras. 78-81 (discussing Panel Report, *Indonesia – Autos*).
[114] Panel Report, *Egypt–Steel Rebar*, para. 7.352.

4.290 The United States turns now to Canada's claim regarding **calculation of the overall dumping margin**. Canada has failed to establish that the *AD Agreement* requires Members to offset dumping margins with non-dumping amounts found in distinct comparisons. Throughout this proceeding, the United States has maintained that (1) Articles 2.4 and 2.4.2 do not create an offset obligation; (2) the *EC – Bed Linen* Appellate Body Report is not binding on the Panel, and the Panel should not rely on it; and (3) the negotiating history confirms the US interpretation, that Article 2.4.2 was crafted to address the symmetry of comparisons in dumping calculations, not the offset issue.

4.291 In its rebuttal submission, the United States demonstrated that Canada effectively is seeking to isolate different parts of the phrase "all comparable export transactions" for different purposes. Under Canada's theory, the term "comparable" export transactions would apply in the first stage of the dumping calculation, and "all" export transactions would apply in the second stage. In its rebuttal submission, rather than explain or justify this position, Canada takes a new position. Now, it would have the Panel find that the meaning of each term – "all" and "comparable" – changes depending on the stage of the calculation. Canada's theory that the same word takes on a different meaning depending on the stage of the dumping calculation at issue finds no support in ordinary rules of treaty interpretation.

4.292 Moreover, Canada's new theory fails to address the fact that under Article 2.4.2 there are three alternative bases for establishing dumping margins. Two of those bases provide for comparisons using individual export transactions. The availability of these transaction-specific options makes it clear that Article 2.4.2 applies to the first stage of the calculation – that is, prior to the establishment of an overall margin. At the same time, it is equally clear that Article 2.4.2 does not address how these transaction-specific margins are to be combined to establish an overall margin. Under Canada's argument, the first basis for establishing dumping margins – the weighted average-to-weighted average basis – would apply to both stages of the calculation. However, the other two bases for establishing dumping margins plainly apply only to the first stage. Thus, Canada's theory leads to an interpretation of Article 2.4.2 in which the scope of the obligation differs depending on the basis for establishing dumping margins. Yet, the provision itself does not support such differential interpretation.

4.293 With respect to the Appellate Body Report in *EC – Bed Linen*, the United States has just two points to make. First, Canada mistakenly asserts that the United States has not denied that its practice is identical to the EC's practice addressed in *EC – Bed Linen*. Here again, Canada mischaracterizes a statement by the United States where the United States explained that, without access to the details of the EC calculation, the US could not assess the similarities or differences in the practices. Second, Canada argues that as an adopted Appellate Body Report, *EC – Bed Linen* should be taken into account where it is relevant. As discussed in the US first written submission, the concept of *stare decisis* does not apply to WTO disputes.[115] This Panel is not bound to follow *EC – Bed Linen*. Like the panel in *Argentina – Preserved Peaches*[116], the Panel should not refrain from re-evaluating an adopted report where appropriate. The United States respectfully suggests that, in this case, such re-evaluation is appropriate. The Panel should find that *EC – Bed Linen* is not persuasive.

4.294 With respect to the negotiating history of Article 2.4.2, there are two points to make. First, Canada does not dispute that the *AD Agreement* negotiations clearly distinguished between two separate issues: (1) the symmetry of comparisons, and (2) whether offsets would be required when combining the results of comparisons. Canada improperly seeks to use language addressing the symmetry issue to create an obligation with respect to offsets. Second, Canada suggests that the United States' reference to the negotiating history is based upon an ambiguity or manifest absurdity, which Canada claims derives from "the United States' own unilateral interpretation of

[115] US first written submission, paras. 173-177.
[116] Panel Report, *Argentina – Preserved Peaches*, para. 7.24.

Article 2.4.2".[117] To the contrary, the United States refers to the negotiating history to confirm the ordinary meaning of the terms of Article 2.4.2. Given Canada's own practice and the practice of other Members in calculating overall dumping margins[118], the US interpretation can hardly be described as "unilateral".

4.295 Finally, in its rebuttal submission, Canada asserts that offsets are required by the "fair comparison" language in Article 2.4. However, Canada has not articulated the basis for this argument, other than its reliance on *EC – Bed Linen*. The fair comparison language does not stand alone but is contained within Article 2.4. That provision tells an authority how to achieve a fair comparison by making due allowance for differences in comparisons which affect price comparability. By making Article 2.4.2 subject to Article 2.4, the Members ensured that any transactions being compared, either individually or as a weighted average, would have been identified and, as appropriate, adjusted in accordance with the provisions of Article 2.4. Nothing in Article 2.4 requires an offset of non-dumped amounts against dumping margins.

4.296 Canada makes a number of **company-specific claims**. Throughout these claims, Canada argues that the United States ignored record evidence and instead, blindly applied standard methodologies. Commerce applied its standard methodologies only after careful consideration of the record evidence. In addition, it is important to make clear that Commerce did in fact depart from its standard methodologies, and in significant respects, where the facts warranted.

4.297 In its first written submission, Canada argued that the COGS methodology for allocating **Abitibi's financial expenses** was unreasonable, because it ignored the lower capital asset requirements of its softwood lumber division. Canada now argues that an allocation based on COGS that included depreciation costs was unreasonable, because it did not consider asset values to a *sufficient* degree. Specifically, Canada argues that financial costs must be allocated based solely on total asset values. However, Canada's argument only has merit if one accepts the underlying assumption that financial costs are related *only* to assets. The United States rejects this assumption because of the fungibility of money, a concept with which Canada explicitly agrees. COGS includes all the direct production costs associated with producing goods, as well as accounting for most assets through the inclusion of depreciation expenses. Depreciation expenses reasonably account for Abitibi's assets because, as Canada admits, the vast majority of Abitibi's assets are capital assets that are depreciated.

4.298 Canada also argues that Commerce over-allocated general costs for Tembec. Canada rests its argument on the fact that Commerce refused to base **Tembec's G&A costs** on division-specific accounting records. As the United States has explained, Commerce properly rejected this argument, because general costs relate to the company as a whole rather than a particular product or division. Moreover, even if the United States assumed that general costs could be attributed to divisions within a company, neither Tembec nor Canada has presented any evidence to suggest that Tembec's division-specific internal books were a reasonable basis upon which to calculate costs. First, Tembec's division-specific records were not audited. Morever, unlike audited financial statements, internal, division-specific records are not intended as objective measures of a company's performance.

4.299 Canada also argues that Commerce over-allocated G&A expenses when it allocated a portion of **litigation costs incurred by Weyerhaeuser** Canada's parent company to softwood lumber. Canada argues that even if these settlement costs were general costs, they did not pertain to softwood lumber. Canada's argument is inconsistent with the basic definition of "general cost," because general costs do not pertain more or less to a particular product but instead relate to a company as a whole. It is uncontested that Weyerhaeuser Canada's parent company performed functions on behalf of Weyerhaeuser Canada. Thus, consistent with this fact, Commerce included an apportioned amount of

[117] Canada second written submission, para. 149.
[118] US second written submission, paras. 60-63.

the parent company's G&A expenses, including a portion of the litigation costs, within Weyerhaeuser Canada's G&A, resulting in a reasonable allocation of Weyerhaeuser Company's general costs to softwood lumber consistent with the *AD Agreement*.

4.300 During the period of investigation, **West Fraser** sold **wood chips** to affiliated companies in BC. In determining whether a company's records reasonably reflect costs associated with production and sale of a product, Commerce considers whether transactions between affiliated parties occurred at arm's length prices. Here, it concluded that West Fraser's affiliated sales did not occur at arm's length prices. Thus, it relied on West Fraser's unaffiliated sales of chips in valuing the offset. It found these sales to non-affiliates to be arm's-length commercial transactions at market prices and, as such, the best benchmark for West Fraser's affiliated sales. Canada now acknowledges that West Fraser indeed never argued to Commerce that some of its unaffiliated (McBride mill) transactions were unrepresentative of a market value for wood chips. It now argues that, because West Fraser had a large amount of affiliated transactions during the period of investigation, it is "self-evident" that Commerce should have questioned the use of West Fraser's unaffiliated transactions for valuing those wood chips in BC. Contrary to Canada's assertions, however, West Fraser's unaffiliated transactions were significant in number and value relative to West Fraser's total wood chip sales. Moreover, the mere existence of a large volume of affiliated transactions in BC during the period of investigation does not call into question the legitimacy of the market value of wood chips that West Fraser sold to unaffiliated parties. Nor are they called into question by the fact that sales from one of the two mills occurred early in the period of investigation, pursuant to a pre-existing contract.

4.301 Canada also challenges how Commerce measured the value of transfer prices of **Tembec's wood chips** between its divisions. Commerce analyzed the wood chip sales transactions between Tembec's sawmills and its internal pulp mill division to evaluate whether the internal transfers of wood chips were reasonable approximations of the wood chips' cost. Commerce found that those internal transfer prices were reasonable and not preferential. Canada claims that Tembec's inter-divisional transactions were "arbitrary". In fact, Canada's only real argument is to insist that the United States acted in a biased and non-objective manner by not assessing all costs on a market value basis.[119] But no provision in the *AD Agreement* requires an investigating authority to replace a company's own valuation of inter-divisional transfers of a product with a market value for sales of the same product. Costs of production are lower than a market value of a product, due to profit paid by an unaffiliated purchaser to the producer. Once Commerce determined that the difference between the market value and the inter-divisional transfer value of Tembec's wood chips was reasonable, the analysis ended, and Article 2.2.1.1 did not require Commerce to do more.

4.302 Commerce properly accounted for **Slocan's lumber futures hedging profits**, finding, consistent with Article 2.4, that these futures hedging profits are not a part of any conditions and terms of sale of lumber to the United States. Indeed, these profits had no connection with any sales transaction or any customer. Neither Slocan nor Canada has explained how the futures contracts at issue were terms and conditions related to particular sales of lumber in the United States. Absent such a showing in the investigation, there was no basis for an adjustment for differences in conditions and terms of sale under Article 2.4. Commerce also found, consistent with Article 2.2 of the *AD Agreement*, that the futures contracts were not linked to production, since the profits amounted to revenue related to sales (even though they are not tied to any particular sale of lumber in the United States). Canada asserts that Commerce should have done *something*, even though Slocan itself failed to substantiate either of the alternative treatments that it sought.[120] As the panel in *Egypt – Steel Rebar* noted, responding parties have an obligation to assert and to justify the information and the arguments required to prove their claims.[121] Contrary to Canada's assertions, there is no undefined

[119] Canada responses to questions 70 and 72 of the Panel, paras. 178 and 180.
[120] Canada second written submission, paras. 340-342.
[121] Panel Report, *Egypt– Steel Rebar*, para. 7.3.

duty to grant adjustments that have been neither requested nor demonstrated by the respondent.[122] Therefore, Commerce properly did not grant the two offsets requested by Slocan.

2. Closing Statement

4.303 The United States seeks to make clear its position on the recommendation Canada is asking the Panel to make that the United States revoke the anti-dumping duty order and return all cash deposits collected.[123] Canada apparently is seeking a suggestion rather than a recommendation, under Article 19.1 of the *DSU*. In *US – Hot-Rolled Steel*, the panel rejected a request by Japan similar to Canada's request in this case.[124] Since the US measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. However, 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.

4.304 Stepping back to consider the big picture, the United States is struck by a pattern, in which Canada initially takes one position, then alters that position following US responses demonstrating the flaws in the initial position. This is particularly noticeable when it comes to initiation, product under consideration, and calculation of an overall dumping margin.

4.305 The inconsistency in Canada's argumentation is telling, because Canada appears to have brought this case without knowing whether and how the United States violated its WTO obligations. This should give the Panel pause. For the reasons set forth in US submissions and statements, applying the Article 17.6 standard of review, the Panel should find Commerce's initiation and conduct of the lumber investigation to have been consistent with WTO obligations.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the EC and Japan are set forth in their written and oral submissions to the Panel, which are summarized below. The summaries are based on the executive summaries that the EC and Japan submitted to the Panel. The third parties' written answers to questions posed by the Panel are set forth in the Annexes to this report (*see* list of annexes at page vii, *supra*). India, also a third party in this dispute, did not make any written and oral submissions to the Panel, nor it answered to questions posed by the Panel.

A. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.2 In its third party written submission, the EC made the following arguments:

1. The Legal Scope of Article 5.2 of the *AD Agreement*

(a) The Obligations under Article 5.2 of the *AD Agreement*

5.3 In its first written submission, Canada did not identify the specific paragraph of Article 5.2 of the *AD Agreement* which the United States has allegedly violated. Canada thus seems to infer from Article 5.2 of the *AD Agreement* a general and overall obligation to provide any "reasonably available" information.

5.4 The EC would oppose such an interpretation of Article 5.2 of the *AD Agreement*. Taking into account the wording and the structure of the provision it is evident that Article 5.2 of the

[122] US responses to questions 81 and 84 of the Panel, paras. 132-138, and 146.
[123] Canada first written submission, para. 280; Canada second written submission, para. 346.
[124] Panel Report, *US – Hot-Rolled Steel*, paras. 8.5-8.14.

AD Agreement does not contain an obligation of the applicant to provide any information that is reasonably available but only to the extent that it would fall under one of the paragraphs (i) to (iv).

5.5 While the EC acknowledges that Article 5.2(i) or (ii) of the *AD Agreement* ("identity of the applicant" and "identity of each known exporter" respectively) could be pertinent in a case where one of the companies subject to the anti-dumping investigation is a wholly-owned subsidiary of one of the applicant companies it would, however, take no view given the rather peculiar circumstances of the case.

(b) Article 5.2 of the *AD Agreement* Only Imposes an Obligation on the Applicant

5.6 Canada argues that Article 5.2 of the *AD Agreement* imposes an obligation on the investigating authority. The EC takes issue with this conclusion. Subject of Article 5.2 of the *AD Agreement* is "the application". Under the third sentence of Article 5.2 of the *AD Agreement* the application shall contain information that is "reasonably available to the applicant". Thus, according to the wording of Article 5.2 of the *AD Agreement* the obligation is solely addressed to the petitioner.

5.7 In this context, Article 5.1 of the *AD Agreement* provides also relevant guidance. Under this provision an application should be made "by or on behalf of the domestic industry". Therefore, any objective requirements that the application has to meet should be discharged by the domestic industry, i.e., the applicant.

5.8 The *Guatemala – Cement I* Panel Report, quoted by Canada, does not support Canada's argument. The Panel merely stated that an investigating authority may be "allowed" to reject an application. However, such a possibility to reject an application does not imply that there is any obligation under Article 5.2 of the *AD Agreement* on the investigating authority to do so. Furthermore, in the respective passage of the *Guatemala – Cement I* Report the panel concluded that Article 5.2 of the *AD Agreement* imposes a requirement "on the applicant", while Article 5.3 of the *AD Agreement* is addressed to the "investigating authority". The panel thus made clear that the content of the obligation and the addressees are different and should be distinguished.

5.9 The EC notes that the question of whether Article 5.2 of the *AD Agreement* imposes an obligation on the investigating authority has been briefly addressed in the recent case *Argentina – Poultry*. While the panel declined to rule on this matter, as both parties affirmatively agreed to such an obligation, the EC, for the reasons set out above, considers that Article 5.2 imposes no such obligation on the investigating authority. As the EC will explain below, the issue must be addressed under Article 5.3 of the *AD Agreement*.

5.10 Canada maintains that the United States violated Article 5.3 of the *AD Agreement* by relying solely on the evidence and information in the application and by failing to objectively judge that information. Even if the applicant had provided all "reasonably available" information under Article 5.2 of the *AD Agreement*, this was insufficient to justify the initiation of the investigation.

5.11 In the EC's view, Article 5.3 of the *AD Agreement* imposes a comprehensive obligation on the investigating authority to determine whether the initiation of an investigation would be justified in view of the objectively available evidence. This obligation does not only encompass an examination of the application and whether it fulfils for instance the requirements under Article 5.2 or Article 5.4 of the *AD Agreement* but it may also require the investigating authority to take further steps in assembling the necessary evidence before initiating an investigation.

5.12 In this respect, the EC would concur with the panel findings in the recent *Argentina – Poultry* case under paragraph 7.60.

5.13 Furthermore, the EC would agree with the panel findings in *Guatemala – Cement I*, whereby the question of the existence of "sufficient evidence " in a particular case has to be adjudicated in the light of the standard set in Article 17.6(i) of the *AD Agreement*.

5.14 As a third party, the EC does not comment on whether the DOC effectively discharged its obligations under Article 5.3 of the *AD Agreement*.

2. The Scope of Article 5.8 of the *AD Agreement*

5.15 Canada argues that the United States did not abide by its obligations under Article 5.8 of the *AD Agreement* because DOC did not terminate the investigation on the ground of insufficient evidence. Even if DOC had initiated the investigation in accordance with Article 5.3 of the *AD Agreement* it should have terminated the examination at a later stage in the light of the insufficient evidence on the commercial relationship and the cost and pricing data.

5.16 Article 5.8 of the *AD Agreement* thus distinguishes two scenarios:

- either the application did not contain sufficient evidence in which case it should be rejected; or

- during the investigation it becomes apparent that evidence is insufficient thus requiring a prompt termination of the proceedings.

5.17 Regarding the first alternative, the EC would agree with the panel findings in *Mexico – Corn Syrup* whereby Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of the investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application.

5.18 To put it differently, the EC concurs that before an investigation is initiated Articles 5.3 and 5.8 of the *AD Agreement* have the same scope of application with regard to the question of whether there is "sufficient evidence".

5.19 As to the second alternative, i.e., after the initiation of the investigation, it is evident that the investigation must reveal "sufficient evidence" of dumping, injury and a causal link to proceed with the investigation and, eventually, to impose measures. If the investigation fails to produce this evidence the authorities should terminate the examination as promptly as possible. Under this scenario, the question of whether "sufficient evidence" exists would have to be adjudicated in a more flexible way depending on the respective state of investigation.

3. The Practice of "Zeroing" – Violation of Articles 2.4 and 2.4.2 of the *AD Agreement*

5.20 The EC submits that the Panel should find that the US practice of "zeroing" is incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement*. The European Communities considers that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology already found to be incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement* in *EC – Bed Linen*. The EC compared the weighted average normal value and export price of different product types within the like product. It attributed a zero value to any types for which the resulting dumping margin was negative, while aggregating the positive dumping margins and dividing them over the total value of the export sales to obtain a percentage rate of dumping. It, thus, allowed no "offset" for negative dumping across product types. The United States has done exactly the same in this case.

5.21 The United States does not dispute the similarity of the two methodologies, but confines itself to rejecting the precedential value of the decision of the Appellate Body in *EC – Bed Linen* and attempts to reargue the case. Although the Appellate Body's decision in *EC – Bed Linen* only binds the parties to that case, the Appellate Body expects Panels to take account of the legal clarifications concerning Articles 2.4 and 2.4.2 of the *AD Agreement*. Of course, the panels and the Appellate Body may reconsider or refine certain legal interpretations on the basis that certain legal arguments were not made by the parties and therefore not addressed by the Appellate Body. However, the arguments advanced by the United States in addition to those already addressed in *EC – Bed Linen* to defend its "zeroing" methodology are not of such a nature.

5.22 Most of the arguments have already been addressed by the Appellate Body, in particular those relating to the relevance of the product definition. As a new argument, the United States seeks to question the interpretation by the Appellate Body of the first symmetrical method set out in Article 2.4.2 of the *AD Agreement* by arguing that Canada's arguments lead to an anomalous result in so far as it would lead to a prohibition of "zeroing" in the first symmetrical method of comparison while the use of "zeroing" would be left to the discretion of Members in the two other methods. Furthermore, the United States argue that the negotiators did not intend to address the offset issue. Those arguments cannot be accepted.

5.23 "Zeroing" is prohibited when resorting to the first symmetrical method of comparison as a result of the word "all" in the sentence "a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions" in Article 2.4.2 of the *AD Agreement* (emphasis added). The second and third methodology, however, concern situations not relevant to this case. Canada's claim is explicitly confined to the first symmetrical methodology (weighted average normal value/weighted average export prices). The EC further notes that, in any case, the use of the third methodology is only allowed in well defined circumstances and is subject to strict conditions.

5.24 As to the reference to the negotiating history of the *AD Agreement*, the EC considers that according to Article 32 of the *Vienna Convention*, there is no need for considering the negotiating history of a text where the interpretation thereof can be based on the letter as is the case for Article 2.4.2, first paragraph. Therefore, the arguments advanced by the United States are of no relevance to the matter before this Panel.

B. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

5.25 In its third party written submission, Japan made the following arguments:

1. Article 2 of the *AD Agreement* Prohibits the Authorities from Zeroing Negative Margins

5.26 Japan agrees with Canada that use of dumping margins with "zeroed-out" negative margins for the purpose of "dumping" determination is inconsistent with the *AD Agreement*. The practice of "zeroing" selectively calculates margins only for those sales of products with positive margins and rejects sales with negative margins. This methodology thus creates an artificially high margin. As discussed below, the existence of dumping margins, which is the basis of the "dumping" determination under the *AD Agreement*, must be established by making a "fair comparison" across all product types under consideration, not some of these types.

5.27 Article 2.1 defines that a product is dumped if the export price is lower than its normal value. "A product" under Article 2.1 incorporates all types of the product that are subject to a particular anti-dumping proceeding, not some types of the product. The Appellate Body in *EC – Bed Linen* confirmed this. *See* paragraph 53 of the *EC – Bed Linen* Appellate Body Report.

5.28 Article 2.1 informs the interpretation of Article 2.4 and the "fair comparison" and "price comparability" requirements. Essentially these requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body in *EC – Bed Linen*, *id.*, paragraph 58, stated "[h]aving defined the product at issue and the 'like product' on the Community market as it did, the European Communities could not, as a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not 'comparable'. All types or models falling within the scope of a "like" product must necessarily be 'comparable'".

5.29 The practice of zeroing in establishing dumping margins of a product under consideration, therefore, is inconsistent with Article 2.4 of the *AD Agreement* in conjunction with Article 2.1 thereof.

5.30 The established practice of DOC is, however, to apply the zeroing methodology to the calculation of dumping margins. The DOC's dumping determination, which is based on dumping margins used by DOC, thus is inconsistent with Article 2.4 in conjunction with Article 2.1 thereof.

5.31 Importantly, if zeroing had not been applied in this case, certain Canadian respondents in this softwood lumber case would have had *de minimis* dumping margin. *See* Exhibit CDA-3, and Canada's first written submission, footnote 3. This could affect not only DOC's "dumping" analysis but also the "injury" determination, including the finding of "dumped imports", by the ITC under Article 3 of the *AD Agreement*.

2. DOC's Calculation of Selling, Administrative and General Expenses is Inconsistent with Article 2.2.1.1. of the *AD Agreement*

5.32 Japan respectfully requests that this Panel carefully review whether DOC satisfied its burden to find that respondents' SG&A in their ordinary accounting records did not reasonably reflect the costs associated with the production and sale of softwood lumber. Japan also respectfully requests that the Panel carefully examine whether DOC correctly considered and evaluated all evidence submitted by respondents when DOC calculated the respondents' SG&A.

5.33 As Canada correctly argued, Article 2.2.1.1 requires the authorities to base costs calculation on the "records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles". The authorities, however, may decide to deviate from these accounting records if the authorities find that these records do not "reasonably reflect the costs associated with the production and sale of the product under consideration," as provided in Article 2.2.1.1. In order for the authorities to reject a respondent's accounting records, therefore, the authorities must first determine based on the accounting records of a specific respondent on a case-by-case basis that the respondent's records do not "reasonably reflect" the costs of the product under consideration.

5.34 In the instant case, DOC would have acted inconsistently with Article 2.2.1.1, if DOC requested Canadian softwood lumber respondents to recalculate their SG&A in a predetermined methodology without first reviewing their recorded SG&A.

5.35 Furthermore, also as Canada correctly stated, Article 2.2.1.1 provides "[a]uthorities 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...". Thus, the authorities are required to base their determination on the proper allocation of costs, including the SG&A, upon reviewing all evidence made available by respondents.

5.36 In this connection, Article 17.6(i) of the *AD Agreement* provides that the authorities' establishment of facts must be proper and their evaluation of the facts must be unbiased and objective.

Although this Article is directed to the panel, the obligation of unbiased and objective evaluation of facts applies equally to the authorities because the panel reviews the authorities' evaluation of facts through this standard. *See* Appellate Body Report in *US – Hot-Rolled Steel*, paragraph 56.

5.37 The authorities, therefore, must determine the SG&A based on all evidence submitted by respondents, and on unbiased and objective evaluation of facts. If DOC applied its pre-determined methodology to a particular respondent without reviewing any evidence submitted by the respondent, such application would be inconsistent with Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof.

3. DOC's Practice on Valuation of by-products Revenues is Inconsistent with Article 2.2.1.1 of the *AD Agreement*

5.38 Japan agrees with Canada that the DOC's established practice with respect to valuation of by-products revenues, as applied to this case, is inconsistent with Article 2.2.1.1 of the *AD Agreement*. Japan considers that the DOC's valuation practice of by-products sales prices to affiliated parties is inconsistent with Article 2.2.1.1 in conjunction with Article 17.6(i) thereof because the DOC's practice works only unfavourably to respondents.

(a) DOC's Established Practice on Valuation of Sales of by-products to Affiliated Parties

5.39 It is a DOC's established practice that, where a respondent evaluates by-product value based on sales prices from the respondent to its affiliated party ("affiliated sales price") in its cost accounting records, DOC considers whether it should adjust the recorded by-products value based on the weighted-average sales price of identical by-product from a respondent to unaffiliated parties ("unaffiliated sales price"). DOC disregards the recorded by-product value based on the affiliated sales price, and instead uses an unaffiliated sales price, if the affiliated sales price is higher than the unaffiliated sales price. DOC performs this revaluation, even if the respondent's accounting records are in accordance with the GAAP of the respondent's country. DOC, however, does not adjust the recorded by-product value, if the recorded affiliated sales price is lower than the unaffiliated sales price.

5.40 The value of by-product revenues offsets the total production cost of the product under consideration. *See* Canada's first written submission, paragraph 233. Thus, the lower the amount of the offset, the higher the cost of production of the product under consideration. Thus, DOC's established practice to adjust by-product value works only to increase respondents' cost of production.

(b) The Limit on the Authorities' Discretion under the *AD Agreement*

5.41 The authorities have discretion to recalculate the respondent's recorded cost of production in certain situations under Article 2.2.1.1, as discussed above. This discretion, however, is not unlimited. The *AD Agreement* does not confer unfettered discretion on the authorities to pick and choose whatever the methodology they fit. As discussed in the previous section, such discretion must be exercised based on proper establishment of facts and on an unbiased and objective evaluation of established facts as set forth in Article 17.6(i) of the *AD Agreement*. The *Vienna Convention*, Article 26, further requires that the discretion must be exercised in good faith.

5.42 To be unbiased, objective and fair, the authorities must exercise its discretion in an even-handed manner without favouring the interest of any particular party in an anti-dumping proceeding. In this regard, the Appellate Body in *US – Hot-Rolled Steel* explained at paragraph 148 "[i]f a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.'" The Appellate Body also stated in the other

context at paragraph 193 "[i]n short, an 'objective examination' requires that the domestic industry,..., be investigated in an unbiased manner, without favouring the interests of any interested party".

5.43 This rule in the *AD Agreement*, as explained by the Appellate Body, squarely applies to the authorities' discretion on how to construct a respondent's cost of production.

(c) DOC's Valuation of Wood Chips, to which DOC Applied its Established Practice, is Inconsistent with Article 2.2.1.1 of the *AD Agreement*

5.44 DOC's established practice, as applied to this softwood lumber case, is contrary to this even-handed rule. Canada demonstrated that DOC applied its established practice in the instant case. DOC re-evaluated the respondents' cost of production only when a recorded affiliated sales price of the wood chips, a by-product, was higher than the unaffiliated sales price of wood chips. DOC did not re-evaluated the recorded affiliated sales price when the affiliated sales price was lower than the unaffiliated sales price. (*See* Canada's first written submission, paragraphs 237-265) DOC's practice thus works only to increase the respondents' cost of production.

5.45 If DOC considers that the unaffiliated sales price must be the appropriate benchmark to value by-products, DOC then should substitute the unaffiliated sales price for all affiliated sales prices, irrespective of whether the affiliated sales price was either higher or lower than the unaffiliated sales price. DOC's picking and choosing method, which was designed only to increase the cost of production and to increase the likelihood of DOC's finding of dumping in favour of the domestic industry, is not even-handed, and does favour the domestic industry. Such practice is beyond the permissive exercise of DOC's discretion, and thus is, and was, as applied to this instant case, inconsistent with the authorities' obligations under Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof.

5.46 For the reasons set forth above, Japan respectfully requests this Panel to review the inconsistency of DOC's practices with Article 2.4 of the *AD Agreement* in conjunction with Article 2.1, as well as with Article 2.2.1.1, in conjunction with Article 17.6(i).

C. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.47 The EC, in its oral statement, made the following arguments:

1. Article 5.2 of the *AD Agreement*

5.48 Canada argued that the United States initiated its investigation contrary to Article 5.2 of the *AD Agreement* because the applicant did not provide all "reasonably available" information, i.e., the commercial relationship between the various companies and the pricing and cost data of the exporting company.[125]

5.49 The EC disagrees with such an interpretation of Article 5.2 of the *AD Agreement*. As already explained in its third party submission the EC considers that neither the wording nor the context does lend support for the idea that Article 5.2 of the *AD Agreement* imposes a *direct* obligation upon the investigating authority.

5.50 First, the EC would highlight that under the third sentence of chapeau of Article 5.2 of the *AD Agreement* the application "shall contain such information as is reasonable available *to the applicant*" (emphasis added). Accordingly, Article 5.2 of the *AD Agreement* provides for minimum requirements for an application that only the applicant can fulfil. The language of Article 5.2 of the

[125] Canada first written submission, paras. 89 *et seq.*

AD Agreement thus demonstrates that the requirements thereunder are addressed to the applicant but not to the investigating authority.

5.51 Second, Article 5.1 of the *AD Agreement* elucidates that the application is made "by or on behalf of the domestic industry". Therefore, any shortcoming of the application falls within the sphere of responsibility of the applicant but not of the investigating authority. The authority is simply not responsible for submitting an application that fulfils the requirements under Article 5.2 of the *AD Agreement.*

5.52 The EC would therefore concur with the US position that Article 5.2 of the *AD Agreement* does not impose a specific obligation on investigating authorities.[126]

2. Article 5.3 of the *AD Agreement*

5.53 Canada claimed that the United States violated its obligations under Article 5.3 of the *AD Agreement* because the application did not contain "sufficient evidence" to justify the initiation of the investigation.[127]

5.54 The EC would refrain from commenting on the substance of this claim. However, from a systemic point of view, the EC would submit that Article 5.3 of the *AD Agreement* is a pivotal provision in determining whether the investigating authorities correctly initiated an anti-dumping investigation. In this context, other requirements for the application, such as those referred to under Article 5.2 of the *AD Agreement*, may also become relevant. Thus, in order to discharge its obligations under Article 5.3 of the *AD Agreement* the investigating will also have to take into account whether the application contains all necessary information as required under Article 5.2 of the *AD Agreement.*

3. Article 5.8 of the *AD Agreement*

5.55 Canada claimed that even if the US authorities had initiated the investigation in accordance with Article 5.3 of the *AD Agreement* it should have terminated the examination at a later stage in the light of the insufficient evidence on the commercial relationship and the cost and pricing data.[128] In Canada's view the United States, therefore, violated its obligations under Article 5.8 of the *AD Agreement.*

5.56 The EC would recall that Article 5.8 of the *AD Agreement* provides for two alternative scenarios: Either the application did not contain sufficient evidence from the outset or during the investigation it becomes apparent that evidence is insufficient.

5.57 As concerns the first alternative, the EC would agree with the Panel findings in *Mexico – Corn Syrup* which determined that Article 5.8 of the *AD Agreement* did not impose an additional substantive obligation beyond those in Article 5.3 of the *AD Agreement.*[129]

5.58 With regard to the second alternative, the investigating authorities are called upon to decide at the end of the anti-dumping investigation whether the imposition of anti-dumping measures would be justified or not. This necessitates a determination on whether the investigation reveals "sufficient evidence" of dumping, injury and a causal link.

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[126] US first written submission, paras. 73 *et seq.*
[127] Canada first written submission, paras. 100 *et seq.*
[128] *Ibid.*
[129] Panel Report, *Mexico – Corn Syrup*, para. 7.99; confirmed by Panel Report, *Guatemala – Cement II*, paras. 8.72 *et seq.*

5.59 The EC would note that once an investigation has been initiated (in accordance with Article 5.3 of the *AD Agreement)* these questions typically evolve in the course of the investigation. Therefore, an obligation to terminate an ongoing investigation under Article 5.8 of the *AD Agreement* due to lack of "sufficient evidence" should be interpreted in a more flexible manner. This view is corroborated by the first sentence of Article 5.8 of the *AD Agreement* which provides that any termination is contingent upon whether the "authorities concerned *are satisfied* that there is no sufficient evidence of either dumping or of injury to justify proceeding with the case" (emphasis added). Accordingly, investigating authority have a considerable margin of discretion whether to terminate an investigation due to lack of sufficient evidence or not.

4. The Practice of "Zeroing" – Violation of Articles 2.4 and 2.4.2 of the *AD Agreement*

5.60 Turning now to the US "practice of zeroing", the EC understands that the scope of this complaint does not concern the US statute *per se*. Canada only appears to attack the practice of "zeroing" as relevant for original investigations.

5.61 The EC considers that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology already found to be incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement* in *EC – Bed Linen*.[130] The EC compared the weighted average normal value and export price of different product types within the like product. It attributed a zero value to any types for which the resulting dumping margin was negative, while aggregating the positive dumping margins and dividing them over the total value of the export sales to obtain a percentage rate of dumping. It, thus, allowed no "offset" for negative dumping across product types. The United States has done exactly the same in this case.

5.62 The United States does not dispute the similarity of the two methodologies, but confines itself to rejecting the precedent value of the decision of the Appellate Body in *EC – Bed Linen* and attempts to reargue the case.[131] Although the Appellate Body's decision in *EC – Bed Linen* only binds the parties to that case, the Appellate Body expects Panels to take account of the legal clarifications concerning Articles 2.4 and 2.4.2 of the *AD Agreement*. Of course, panels and the Appellate Body may reconsider or refine certain legal interpretations on the basis that certain legal arguments were not made by the parties and therefore not addressed by the Appellate Body. However, as already explained in its written brief the EC considers that none of the arguments advanced by the United States in addition to those already addressed in *EC – Bed Linen* to defend its "zeroing" methodology are of such nature.

5.63 As regards the US arguments relating to the product definition[132], the EC notes that the Appellate Body clarified that the rules governing comparison under Articles 2.4 and 2.4.2 of the *AD Agreement* are legally separate from those concerning the definition of the product under consideration (and the like product according to Article 2.6 of the *AD Agreement*).

5.64 It is true that a broad determination of the product under consideration and the like domestic product may lead the authority to make multiple comparisons, some of which can show negative dumping margins. However, the prohibition of zeroing by virtue of Articles 2.4 and 2.4.2, first paragraph of the *AD Agreement*, as interpreted in *EC – Bed Linen*, ensures that negative dumping margins found for some product types will offset the positive dumping margin of others when the margin of dumping is established for the product under consideration *as a whole*. As noted by the Appellate Body, to address in particular dumping of certain types or models of products, the United States investigating authorities "could have defined, or redefined the product under

[130] Appellate Body Report, *EC – Bed Linen*, para. 47.
[131] US first written submission, para. 175.
[132] US first written submission, paras. 160-164.

investigation in a narrower way".[133] Yet, once the product under consideration has been defined broadly as in this investigation, a margin of dumping based on the first symmetrical method of Article 2.4.2 of the *AD Agreement* must take full account of negative amounts of dumping.[134]

5.65 As to the textual, contextual arguments and those relating to the negotiating history[135], the EC refers to its third party brief.[136]

5.66 In short, the EC fully supports Canada's request that the Panel should find that the US practice of "zeroing" is incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement*.

D. THIRD PARTY ORAL STATEMENT OF JAPAN

5.67 Japan, in its oral statement, made the following arguments:

1. The Basic Principle of Good Faith

5.68 Japan would like to bring the attention of this Panel to the bedrock principle of good faith under Articles 26 and 31 of the *Vienna Convention*. As the Appellate Body has repeatedly recognized, Members are obliged to perform their WTO treaty obligations in good faith.[137] In *US – Hot-Rolled Steel*, for example, the Appellate Body stated that the "organic principle of good faith" is "a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*..".[138] In *US – Shrimp*, the Appellate Body has explained that this general principle "prohibits the abusive exercise of a state's rights"[139], and that the exercise of a state's right should be "*fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed".[140] (emphasis in original) As clarified by the Appellate Body, the basic principle of good faith requires the authorities to act in an even-handed manner that respects fundamental fairness.[141]

5.69 One of the expressions of this principle is Article 17.6(i) of the *AD Agreement*. While this Article instructs the Panel to review whether the authorities evaluated facts in an unbiased and objective manner, this Article, at the same time, "in effect defines when investigating authorities can be considered to have acted inconsistently with the *AD Agreement* in the course of their "establishment" and "evaluation" of the relevant facts".[142] The principle of good faith therefore requires the authorities to exercise its discretion in an even-handed, fair, unbiased and objective manner under the *AD Agreement*.[143]

5.70 This basic principle of good faith is particularly important in the interpretation and application of the *AD Agreement* because the authorities exercise substantial discretion under the *AD Agreement*. Keeping this in mind, individual issues should be reviewed.

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[133] Appellate Body Report, *EC – Bed Linen*, para. 62.
[134] The EC does not address the issue of product definition in this submission, but reserves its position.
[135] US first written submission, paras. 161 and 167 *et seq*.
[136] EC third party submission, paras. 36-39.
[137] *See, e.g.*, Appellate Body Report, *US – Line Pipe*, para. 110 and note 117; Panel Report, *US – Hot-Rolled Steel*, para. 101.
[138] Panel Report, *US – Hot-Rolled Steel*, para. 101.
[139] Appellate Body Report, *US – Shrimp*, para. 158.
[140] *Id*., note 156, quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), p. 125.
[141] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 and note 142. *See* also Appellate Body Report, *EC – Hormones*, para. 133.
[142] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[143] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, as modified by the Appellate Body, paras. 132-133.

2. Prohibition of Zeroing

5.71 Japan demonstrated in its third party written submission that the zeroing practice is inconsistent with Article 2.4 of the *AD Agreement* in conjunction with Article 2.1 thereof.

5.72 It appears that the United States ignored the significance of the chapeau of Article 2.4. The general obligation of "a fair comparison" set forth in the chapeau is another expression of the basic principle of good faith and fundamental fairness with respect to the calculation of the margin of dumping. In order for a comparison to be "fair", the authorities may not exercise its discretion in a manner that gives "unfair advantage" to one interested party. DOC's practice of zeroing, which replaces negative margins with zero to calculate the margin of dumping of a product, works only to create and inflate the margin of dumping. This practice cannot be viewed as "fair" under Article 2.4 of the *AD Agreement*, nor consistent with the basic principle of good faith.

5.73 The United States seems to argue that Article 2.4.2 provides for calculation of the margin of dumping only on a model-specific basis.[144] The United States attempted to justify this argument, reading that the term "margin" in Article 2.4.2 out of context.

5.74 Japan disagrees. The *AD Agreement* requires the authorities to establish a single margin of dumping of a product, and accordingly to determine "dumping" of "a product", on a company-specific basis. This requirement is explicit in Article 6.10, which states "[t]he Authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".[145] (emphasis added) The Appellate Body in *EC – Bed Linen (Recourse to Article 21.5 DSU)* confirmed this, stating "'dumping is a determination made with reference to a product from a particular producer [or] exporter[.]'"[146] Japan also would like the Panel to recall that Article 2.1 informs Article 2.4 that the "fair comparison" must be made with respect to the product under consideration as a whole, as discussed in Japan's written submission. In sum, the *AD Agreement* requires the authorities to calculate the margin of dumping for the product under consideration as a whole on a company-specific basis, not on a model-specific basis.

5.75 The term "margins" in Article 2.4.2 is not an indication that the practice of zeroing is permitted. A multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of the administrative convenience to take into account the differences in physical characteristics among several models of a product.[147] Such multiple comparisons are, however, just in the middle of the entire process to calculate an individual margin of dumping for an exporter/producer. At the end, the authorities must aggregate all of these intermediate margins obtained from multiple comparisons to arrive in a single margin for a producer. The principle of good faith, as expressed in Article 2.4 which was informed by Article 2.1, requires that the authorities calculate the margin in an even-handed manner without giving unfair advantage to one interested party. Article 2.4.2 is also subject to this principle, as the chapeau of this Article expressly provides "subject to the provisions governing the fair comparison in paragraph 4". The practice of zeroing, which ignores all negative margins and uses only positive margins for such calculation, is against the basic principle of good faith and Article 2.4.

5.76 Finally, the argument by the United States on "comparable" products is without merits. The authorities may not be permitted to argue in a segment of the proceeding that "product under consideration" consisted of multiple types because they are not "comparable", and then argue in other segments of the proceeding that these types constitutes a comparable single product. Throughout the

[144] US first written submission, paras. 150-155.
[145] Article 6.10 of the *AD Agreement*.
[146] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 143, quoting the original Panel Report, para. 6.136.
[147] US first written submission, para. 154.

investigation in question, the United States treated the various models of softwood lumber as "a product" under Article 2.1 and as the like product under Article 2.6, or in US term "a class or kind of merchandise".[148] The United States also based its determination of the US domestic industry and its injury on the like product of softwood lumber, a single product. In the US first written submission, responding to Canada's claim that certain types of softwood lumber differ from others, the United States argued "none of these products were so essentially different from other products covered by the investigation as to warrant drawing 'clear dividing lines' between those products".[149] The United States then may not be allowed to argue conveniently only in the zeroing issue that the certain types of softwood lumber must be treated differently from other types.

5.77 As such, Japan submits that the Panel reject arguments by the United States, and this Panel find that the zeroing practice is prohibited under Article 2.4 in conjunction with Article 2.1.

3. Calculation of Selling, General and Administrative Expenses

5.78 The second issue that Japan would like to address is the SG&A calculation methodology adopted by DOC. Again, Japan would like to emphasize that the authorities are required to conduct an anti-dumping investigation in an even-handed, fair, unbiased and objective manner. In this connection, Article 2.2.1.1 requires the authorities to "consider all available evidence on the proper allocation of costs". Consequently, to act in a fair and objective manner, the authorities must determine the proper allocation method of SG&A upon reviewing all evidences presented by an exporter or producer. The requirement for the authorities to base its determination of the allocation method on all evidence presented by a producer means that the determination must be made on a company-specific basis.

5.79 In this investigation, it appears that the United States preferred to apply its established "standard methodology"[150], which allocates financial expenses based on COGS. The United States argues that the COGS method is proper. The US argument, however, missed the point. The question here is not whether the COGS method is proper. The question is whether DOC determined an appropriate method to calculate SG&A based on all the evidence on a company-specific basis, or DOC applied its own established method without considering all the evidence.

5.80 Japan respectfully requests that the Panel review DOC's application of its own SG&A calculation methodology to Canadian respondents from this viewpoint.

4. Revaluation of by-product

5.81 Finally, Japan submits that DOC's revaluation of by-product, wood chip, for the purpose of the production cost of softwood lumber is contrary to Article 2.2.1.1 of the *AD Agreement* and the good faith obligation.

5.82 It appears that the United States misunderstands the limit on the authorities' discretion under Article 2.2.1.1 of the *AD Agreement*. Article 2.2.1.1 permits the authorities to deviate their production cost calculation from the respondent's recorded costs, if the recorded costs do not reasonably reflect the costs associated with the production of the product under consideration. Article 2.2.1.1 does not confer complete and unfettered discretion to the authorities to determine what "reasonably reflect" the production of the product under investigation. As discussed during the first substantive meeting and in Japan's third party written submission, the basic principle of good faith, which informs the provisions of the *AD Agreement*, including Article 2.2.1.1, obliges the authorities

[148] *Id.*, para. 104. *See* also paras. 103-106.
[149] *Id*., para. 105.
[150] *Id*., para. 191.

to exercise their discretion in an even-handed and fair manner without giving "unfair advantage" to one interested party.

5.83 DOC, applying its established practice in this case, determined that certain respondents' recorded wood chip values based on sales price to affiliated parties did not "reasonably reflect" the production of softwood lumber. DOC made such revaluation, however, only where the recorded value was higher than the sales price to unaffiliated parties. In such case, DOC lowered the recorded chip value down to the sales price to unaffiliated parties. DOC did not revaluate the recorded wood chip value, where the recorded value was lower than the sales price to non-affiliated parties. According to the United States, such "understated" value is not unreasonable.[151] As the wood chip value offsets the production cost of softwood lumber, DOC's affiliated party rule, as applied to this case, is designed to work only to increase the production cost of softwood lumber, and thus increase the margins of dumping of respondents.

5.84 The basic principle of good faith and fundamental fairness target precisely this situation: the authorities' practice, which creates an "unfair advantage" to one interested party. To act in good faith and to avoid creating an "unfair advantage," the authorities' decision standard must be even-handed and fair to all parties. DOC's practice, as applied to this softwood lumber case, is contrary to this good faith obligation.

5.85 Moreover, DOC's practice did not take account of usual variation of prices in the marketplace. The Appellate Body has explained in *US – Hot-Rolled Steel*, "the sales price may be *lower* than the "ordinary course" price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price".[152] DOC's practice simply re-evaluated the chip costs without considering any other factors affecting the sales price to affiliated party. The DOC's practice thus has no justification.

5.86 DOC's application of its own method to re-evaluate the wood chip value is, therefore, impermissible exercise of its discretion under Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof and the basic principle of good faith and fundamental fairness. Japan thus submits that the Panel find that the DOC's practice as applied to this case is inconsistent with Article 2.2.1.1.

5. Conclusion

5.87 As such, Japan asks this Panel to find that the United States violated its WTO obligations under Articles 2.4 and 2.2.1.1 of the *AD Agreement* in conjunction with Articles 2.1 and 17.6(i) thereof, and the basic principle of good faith and fundamental fairness.

VI. INTERIM REVIEW

6.1 On 30 January 2004, both Canada and the United States submitted written requests for the Panel to review precise aspects of the Interim Report issued on 16 January 2004. As Canada did not direct us to the record to substantiate its comments and proposals regarding changes to the text of the Interim Report, we requested Canada on 4 February 2004 to identify exactly where in the record support for its requested adjustments to the Interim Report could be found. Canada submitted its response on 6 February 2004. On 9 February 2004, both parties submitted written comments on the other party's request for interim review. Neither party requested an interim review meeting. The

[151] *Id*., para. 241.
[152] Appellate Body Report, *US – Hot-Rolled Steel*, para. 141.

Panel has carefully reviewed the arguments and proposed amendments to the text of the Interim Report, and addresses them *ad seriatim*, in accordance with Article 15.3 of the DSU.[153]

6.2 The **United States** requests us to amend paragraph 7.32 of the Interim Report to reflect the fact that the regression analysis was in fact never submitted to DOC. **Canada** did not comment on this issue.

6.3 We agree with the United States and, accordingly, amended paragraph 7.32 of this Report.

6.4 **Canada** requests us to make some amendments to the fifth sentence of paragraph 7.159; fifth, sixth and seventh sentences of paragraph 7.171; and fifth sentence of paragraph 7.173 of the Interim Report regarding our examination of "Claim 5: Article 2.4 – Adjustment for Differences in Physical Characteristics". Canada asserts that our description of DOC's methodology used at the preliminary stage was not accurate and proposed wording to correct it. The **United States** asserts that, through its proposed changes to the above-cited paragraphs of the Interim Report, Canada apparently intended to clarify that certain similar product matches were possible and were made by DOC in the Preliminary Determination. In the view of the United States, Canada's proposed changes do not accurately describe the methodology used by DOC at the preliminary stage. In particular, the United States asserts that Canada's proposals are unclear and misleading, because they fail either to identify the similar matches that DOC made in the Preliminary Determination or to adequately explain that similar matches were made only where DOC was able to quantify an appropriate adjustment. Bearing in mind the alleged purpose of Canada's comments, the United States requests us not to accept the changes proposed by Canada but suggests some adjustments to the above-referred paragraphs of the Interim Report.

6.5 The gist of Canada's comment is that DOC's approach at the preliminary stage be reported accurately in certain paragraphs of this Report. We agree with this comment and made certain changes, which can be found in paragraphs 7.159, 7.171, and 7.173, *infra*, of this Report. Footnotes 310-312, 323-325 and 329, *infra*, have been added to those paragraphs to indicate the source of the information referred to in those paragraphs.

6.6 Regarding "Claim 6: Articles 2.4 and 2.4.2 – Zeroing", the **United States** requests us to delete footnote 341 of the Interim Report (footnote 361 of this Report). The United States argues that it is not within the Panel's terms of reference to rule on whether an offset for non-dumped comparisons is required when determining the overall margin of dumping under the transaction-to-transaction and weighted average normal value-to-individual export transaction methodologies set forth in Article 2.4.2 of the *AD Agreement*. In the view of the United States, that question need not be answered to resolve this dispute. The United States asserts that the statement contained in the footnote is of additional concern because it states a conclusion without setting forth any reasons for that conclusion. Finally, the United States asserts that the discussion in footnote 341 seems to misconstrue the US references to the transaction-to-transaction and weighted average normal value-to-individual export transaction methodologies. Thus, the United States asserts that the purpose of the references that it made to those two methodologies in its submissions to us was "simply to illustrate that Article 2.4.2 contemplates multiple stages to arrive at a single anti-dumping duty margin and speaks only to alternative methodologies for performing the first stage."[154] **Canada** asserts that Article 11 of the *DSU* gives the Panel full scope to express, in footnote 341, its views as to whether zeroing would be permitted in the determination of a margin of dumping based on the other two methodologies referred to in Article 2.4.2 of the *AD Agreement*. In Canada's view, a panel is free to set forth its interpretation of parts of a provision that are not the object of litigation when such interpretation is useful or necessary for the interpretation of the provision in question – in the case at

[153] Section VI of this Report entitled "Interim Review" therefore forms part of the findings of the final panel report, in accordance with Article 15.3 of the *DSU*.

[154] US Comments on the Interim Report, par. 6.

issue, Article 2.4.2 – as a whole. In the view of Canada, the Panel's statement in footnote 341 is connected logically and directly to the Panel's explanation of its legal reasoning. Therefore, footnote 341 should not be removed. Canada further argues that, it was the United States, in paragraph 151 and following of its first written submission, that referred to the other two methodologies provided for in Article 2.4.2 and first raised the issue of the relevance of these methodologies. Finally, **Canada** argues that, the United States is making a legal argument seeking to have the Panel reconsider a substantive position related to the core of submissions on this matter. Canada submits that this goes beyond the scope of the requirement of Article 15.2 of the *DSU* that a request for review pertain to "precise aspects of the interim report".

6.7 We have considered the parties' comments and have adjusted the text of the relevant footnote (*see* note 361, *infra*, in this Report). We are of the view that we are not precluded by any provisions of the *DSU* to make the comments as reflected in this footnote.

6.8 With respect to "Claim 7: Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 – Allocation of Financial Expenses: Abitibi", **Canada** requests us to amend the sixth sentence of paragraph 7.227 of the Interim Report. Canada asserts that the parties' positions, in relation to Abitibi's net interest allocation, are not reflected in that sentence. In its first written submission, Canada submits that the United States asserted that "Abitibi's theory (...) incorrectly assumed that fixed-asset purchases are the principal activities of a company requiring working capital".[155] Canada contends that the US position assumes that net interest allocation is limited to fixed assets. In contrast, Canada asserts that it argued that allocated net interest expense was based on total assets, which included non-fixed assets such as inventories and accounts receivable.[156] Canada proposes the addition of a sentence to that paragraph to reflect the parties' position. The **United States** asserts that Canada is correct that Abitibi's allocation methodology was based on total assets, not fixed assets. In the view of the United States, the Panel should nonetheless reject Canada's proposed adjustment, because it states incorrectly and without citation that it was DOC's position that Abitibi's interest expense allocation methodology was based on fixed assets, instead of total assets. In fact, DOC discussed Abitibi's methodology with regard to "assets", not "fixed assets".[157] The United States asserts that Canada does not dispute this point in its letter dated 6 February 2004. In this letter Canada refers only to a statement in the US first written submission about the theory underlying Abitibi's argument on allocation of interest expense. That sentence does not purport to describe how Abitibi allocated interest expense, according to the United States. To clarify the sixth sentence in paragraph 7.227 accurately, the United States proposes that the Panel simply strike the term "fixed."

6.9 At the outset, we note that paragraph 7.227 of the Interim Report (identical paragraph in this Report) falls under the section "Factual Background". This section purports to report facts that are relevant to our examination of the issues before us, rather than the arguments of the parties. The purpose of the sixth sentence *et seq.* is therefore only to describe how Abitibi computed the portion of the company's net interest expense related to lumber assets and operations in its questionnaire response. Keeping this in mind, we do not consider it appropriate to include in this section the different positions of the parties on the issues at stake. The arguments are reflected in the section "Arguments of the parties".[158] In addition, the description of the methodology contained in the sixth sentence *et seq.* of paragraph 7.227 of the Interim Report was taken directly from Abitibi's questionnaire response.[159] Thus, we regard this to be the most objective description of how Abitibi proposed DOC to determine the portion of that company's net interest expense related to lumber. For the foregoing reasons, we have not made any changes to paragraph 7.227 of this Report.

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[155] US first written submission, para. 192.

[156] Canada second written submission, para. 212; and Canada response to question 52 of the Panel, para. 146.

[157] *Final Determination*, Comment 15, (Exhibit CDA-2).

[158] *See* paras. 7.230-7.232, *infra*.

[159] Exhibit CDA-83, Abitibi's Questionnaire response, p. D-44.

6.10 In addition to the above, the **United States** requests us to clarify that the statement contained in the third sentence of paragraph 7.243 of the Interim Report (identical paragraph in this Report), that DOC allocated 13.6 per cent of the total amount for financial expense to softwood lumber, was an assertion made by Canada. **Canada** did not comment on this point.

6.11 After examining the comment of the United States, we have concluded that it is appropriate to make the requested amendment to paragraph 7.243 of this Report.

6.12 Regarding "Claim 8: Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 – Determination of General & Administrative Expenses: Tembec", **Canada** asserts that the fifth sentence of paragraph 7.246 of the Interim Report (identical paragraph in this Report) contains a clerical error which has modified the meaning of this sentence. According to Canada, the internal divisional financial statements included *all* amounts for G&A costs charged by Tembec to each of its divisions, plus a properly allocated portion of overall corporate G&A. Thus, Canada requests us to replace the word "some" in "including some amounts for G&A costs that are charged directly by Tembec" with the word "all".[160] In so requesting, Canada refers us to a citation in paragraph 209 of its first written submission. The **United States** asserts that Canada's proposed insertion of the word "all" in the fifth sentence is misleading. In the view of the United States, Canada did not provide evidence that the FPG divisional G&A properly included *all* the G&A attributable to softwood lumber. The United States asserts that Canada's citation, in its 6 February 2004 letter, to its own first written submission does not change the fact that there was an absence of evidence in the record on this point. The United States, however, appears to propose that the term "some" is deleted.

6.13 After considering the comments of the parties, we are of the view that the words "some", as reflected in paragraph 7.246 of the Interim Report (identical paragraph in this Report), and the word "all", as proposed by Canada now, might be understood to contain a value judgement on the part of the Panel. In light of our discussion of this issue in paragraphs 7.250-7.269, *infra*, which goes to the heart of the claim, we have replaced the word "some" with the neutral word "those" in the fifth and seventh sentences of paragraph 7.246, *infra*, of this Report. In addition to the above, we have added footnotes 382 and 383 to paragraph 7.246 of this Report to indicate the source of the information referred to in that paragraph.

6.14 **Canada** also refers to minor clerical errors in the fifth sentence in paragraph 7.246 of the Interim Report and requests us to correct them, that is, to add the word "its" and to change the term "division" to "divisions". The **United States** agrees.

6.15 We have therefore corrected the errors and have changed the wording accordingly (*see* fifth sentence of paragraph 7.246, *infra,* of this Report).

6.16 In addition, **Canada** requests us to replace the words "[i]nstead of" in the seventh sentence of paragraph 7.246 of the Interim Report, by the words "[i]n addition to".[161] The **United States** agrees with this request.

6.17 We agree with Canada's proposal and made the requested change to the seventh sentence of paragraph 7.246 of this Report.

6.18 **Canada** requests us to add in paragraph 7.299 of the Interim Report (identical paragraph in this Report) – addressing "Claim 10: Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 – Reasonable Amounts for By-Product Revenues from the Sale of Wood Chips: Tembec and West Fraser" – that Tembec had submitted information on arm's length sales by its sawmills. In support of its request, Canada refers to statements contained in paragraphs 256 and 302 of its first and second written submissions,

[160] Canada first written submission, para. 209.
[161] Canada refers to Exhibit CDA-160, Tembec's Case Brief, p.4.

respectively. Canada also refers to DOC's discussion and analysis found in Tembec's Cost Verification Report.[162] The **United States** asserts that, although it is true that Tembec submitted examples of sales by some of its sawmills to unaffiliated purchasers of wood chips produced by its sawmills, as DOC explained in the IDM, these reported sales and comparisons with other prices were selectively chosen by Tembec and were not based on a sample chosen by DOC. The United States that, if the Panel were to make a modification based on Canada's proposal, the modification should make clear comparisons with other prices were selectively chosen by Tembec.

6.19 We note Canada's statement in paragraph 256 of its first written submission that "Tembec (...) makes arm's length sales of wood chips at market prices in Western Canada." The correctness of this statement is not disputed by the United States. Bearing this in mind, we agree with the change, as shown in paragraph 7.299 of this Report, *infra*. We note the US request that we add a reference to the fact that Tembec had submitted a selective number of examples of arm's length sales by its sawmills to unaffiliated purchasers. The United States directs us to DOC's findings in Comment 11 of the IDM.[163] However, the only reference we could find in the section containing DOC's findings on this issue to data selectively provided by Tembec concerns information regarding prices for wood chip purchases made by its pulp mills from unaffiliated parties. For this reason, the addition proposed by the United States has not been accepted.

6.20 For the sake of clarity, we have made minor adjustments to paragraphs 7.24, 7.30, 7.98, 7.168, 7.255, 7.260, 7.263, 7.285, 7.331, 7.344, 7.366, and 7.373-7.374 of the Interim Report (which correspond to paragraphs 7.24, 7.30, 7.98, 7.168, 7.255, 7.260, 7.263, 7.285, 7.333, 7.336, 7.368 and 7.376-7.378 of this Report, respectively). Moreover, we have slightly amended and moved the fifth sentence of paragraph 7.312 of the Interim Report (identical paragraph in this Report) to paragraph 7.317 of this Report. We have also amended paragraph 7.316 of the Interim Report (identical paragraph in this Report) in order to take into account our interpretation of the obligation imposed by the proviso of Article 2.2.1.1, as set forth in paragraphs 7.236-7.237 of the Interim Report (identical paragraphs in this Report). As a consequence of our amendments, we have also adjusted "Section VIII. Conclusions and Recommendations".

6.21 In addition to the above-cited amendments, we have added and amended a number of footnotes to indicate sources of the information of record. Footnote 406, setting forth the scope of the examination undertaken by the Panel, has been added to this Report. Finally, we have deleted some footnotes which we considered redundant.

6.22 Finally, we have made some typographical and style-related improvements to the Interim Report.

VII. FINDINGS

A. INTRODUCTION

7.1 Canada challenges DOC's final anti-dumping duty determination with respect to certain softwood lumber from Canada published in the Federal Register on 2 April 2002[164], as amended on 22 May 2002.[165] Canada asserts numerous claims against the Final Determination. Canada's first seven claims refer to the *AD Agreement*. The first three claims relate to the initiation and non-termination of the anti-dumping investigation. With respect to these claims, Canada alleges violations of Articles 5.2, 5.3 and 5.8 of the *AD Agreement*. Canada's fourth claim is that DOC erroneously determined that there was a single "like product", in violation of Article 2.6 of the *AD Agreement* and

[162] Exhibit CDA-112, Tembec's Cost Verification Report, p. 23-25.
[163] Exhibit CDA-2, IDM, pp. 57-62.
[164] Exhibit CDA-1, Final Determination.
[165] Exhibit CDA-3, Amended Final Determination.

that this non-compliance with Article 2.6 caused non-compliance with other substantive obligations of the *AD Agreement*, e.g., Articles 5.1, 5.2, and 5.4. The fifth claim is that DOC erred by failing, in comparing non-identical types, to make "due allowance" for certain physical differences in softwood lumber products to maintain price comparability and to ensure a fair comparison between normal value and export price, in violation of Article 2.4 of the *AD Agreement*. The sixth claim relates to DOC's "zeroing" of margins in comparisons where the export price was higher than the normal value, a methodology which Canada claims is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. The seventh claim consists of six company-specific issues. Canada claims that DOC (i) failed to calculate and/or allocate reasonable amounts for administrative, selling and general expenses in computing costs for specific exports, including an improper allocation for financial expenses and for litigation settlement expenses involving product liability claims for a non-investigated product; (ii) failed to apply reasonable amounts for by-product revenues from the sale of wood chips as offsets in calculating costs; and (iii) failed to offset a difference in price comparability arising from futures contracts profits after concluding that such a difference existed, in violation of the provisions of Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement*. Canada also claims that the above-described violations constitute violations of the US obligations under Articles 1, 9.3 and 18.1 of the *AD Agreement*, as well as Article VI of *GATT 1994*.

7.2 As we noted in Canada's first written submission that the provisions allegedly violated by the United States in some instances did not include all the provisions cited in the Panel Request, we requested Canada to confirm the provisions forming the basis of its claims.[166] We therefore limit our analysis and findings only to those provisions which were referred to in Canada's restatement of its claims.[167]

B. GENERAL ISSUES

1. Rules of Treaty Interpretation

7.3 Article 3.2 of the *DSU* indicates that Members recognize that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the *Vienna Convention*[168], which is generally accepted as reflecting such customary rules, reads as follows:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

7.4 It is clear that interpretation must be based, first and foremost, on the text of the treaty, while context and object and purpose may also play a role.[169] It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[170] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*".[171]

[166] Question 1 of the Panel to Canada.
[167] Canada response to question 1 of the Panel.
[168] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 *International Legal Materials* 679.
[169] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11. The Appellate Body has recently emphasized the importance of the "ordinary meaning" of the terms used in the treaty text in, for example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*.
[170] Appellate Body Report, *India – Patents (US)*, para. 45.
[171] *Id.*, para. 46.

2. Standard of Review

7.5 In light of the claims and arguments made by the parties in the course of these Panel proceedings, we recall, at the outset of our examination, the standard of review we are required to apply to the matter before us.

7.6 Article 11 of the *DSU*[172] sets forth the appropriate standard of review, in general, for panels for all covered agreements. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.7 Furthermore, Article 17.6(i) of the *AD Agreement* sets forth the special standard of review applicable to anti-dumping disputes. It provides with regard to factual issues that:

> "in its assessment of the facts of the matter, the panel shall determine whether the *authorities' establishment of the facts was proper* and whether their *evaluation of those facts was unbiased and objective*. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned". (emphasis added)

7.8 Assuming that we conclude that the establishment of the facts with regard to a particular claim in this case was proper, we then may consider whether, based on the evidence before the US authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the US authorities reached on the matter in question.[173]

7.9 Article 17.6(i) requires us to determine whether the investigating authority's establishment of the facts was proper, and whether their evaluation of those facts was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves, that is, we may not engage in a *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the *AD Agreement* establishes that we are to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.10 With respect to questions of the interpretation of the *AD Agreement*, Article 17.6(ii) provides:

> "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*

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[172] Article 11 of the *DSU*, entitled "Function of Panels", states:

> "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…"

[173] We note that this is the same standard as that applied by the panels in *Argentina – Poultry*, paras. 7.43-7.49; and *US – Stainless Steel*, para. 6.3.

> *the Agreement if it rests upon one of those permissible interpretations*". (emphasis added)

7.11 Article 17.6(ii) requires us to apply the customary rules of interpretation of treaties, which are reflected in Articles 31-32 of the *Vienna Convention*. As noted above, Article 31 of the *Vienna Convention* provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Thus, our task is in this respect no different from the task of all panels in interpreting the text of the WTO agreements pursuant to Article 3.2 of the *DSU*. What Article 17.6(ii) of the *AD Agreement* adds is an explicit acknowledgement that the relevant provision/s of the *AD Agreement* may admit of more than one permissible interpretation, and an instruction that, if this process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity with the *AD Agreement* if it is based on that permissible interpretation.

7.12 Together, Article 11 of the *DSU* and Article 17.6 of the *AD Agreement* set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[174] Therefore, we see our task as not to perform a *de novo* review of the information and evidence on the record of the underlying final anti-dumping determination, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.

3. Burden of Proof

7.13 We recall that, in WTO dispute settlement proceedings, the burden of proof rests with the party that asserts the affirmative of a particular claim or defence.[175] Canada as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements, which the respondent must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[176] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".[177]

4. Presentation of Facts in Proceedings

7.14 During these proceedings we were on a number of occasions directed, through footnotes, to annexes attached to the relevant submissions, in a general way, without clear and precise indications of exactly where in the annex at issue the referenced evidence could be found. Because some of the annexes contained lengthy documents, it was not always easy to find the evidence referenced. Furthermore, the arguments and/or facts were sometimes presented in the annexes, rather than in submissions themselves.

7.15 In our view, an annex to a submission should serve only to direct the reader to the underlying substantiating evidence of what has been presented in the main document, or in other words, to enable the reader to verify the facts. We therefore requested the parties during the first substantive meeting with the parties to "present the facts and legal arguments in their written and oral statements so that they are understandable and exhaustive by themselves" and that "the references to annexes should not

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[174] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 54-62.
[175] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, *et seq*.
[176] *See* note 175, *supra*.
[177] Appellate Body Report, *Thailand – H-Beams*, para. 136.

add facts or arguments only contained in those annexes, but just give the possibility to confirm what was contained in the main presentations".

7.16 We are of the view that panels should not be expected to ferret out the facts and arguments from annexes to submissions, even in fact-intensive cases such as the one at issue. Parties should present the relevant facts and make their legal arguments in submissions which are exhaustive in themselves, with annexes attached thereto only to substantiate the facts and/or arguments already presented in the submissions to which they are attached.

C. PRELIMINARY OBJECTIONS

1. Introduction

7.17 The **United States** raised two preliminary objections, but did not request us to rule on them on a preliminary basis. The two objections raised are: (i) that Canada has included in its first written submission claims with respect to a number of provisions of the *AD Agreement* that were not included in its Panel Request[178] and are therefore outside our terms of reference[179], and (ii) that Canada has introduced certain new evidence in the context of these proceedings which was not before the investigating authority during the course of the investigation.[180]

2. Terms of Reference

(a) Factual Background

7.18 In paragraph 2 of its Panel Request[181], Canada states that:

> "[DOC] erroneously determined there to be a single like product (under US law, termed "class or kind" of merchandise) rather than several distinct like products, thereby failing to assess domestic industry support in respect of each distinct like product and failing to assess the sufficiency of evidence of dumping in respect of each distinct like product, thereby resulting in violations by the United States of *Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 [of the AD Agreement] and Article VI:1 of the GATT 1994*. The like product and industry support determinations by [DOC] were made without a proper establishment of the facts, were based on an evaluation of the facts that was neither unbiased nor objective and do not rest on a permissible interpretation of the [*AD Agreement*]. Accordingly, the like product and industry support determinations by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6".[182] (emphasis added)

7.19 In its first written submission, concerning the "like product" determination, Canada requests the Panel to find that:

> "DOC erroneously determined [there] to be only one like product and product under consideration, thereby, rendering the conduct of the investigation inconsistent with US obligations under *Articles 2, 3, 4.1, 5, 6.10 and 9* [of the *AD Agreement*]…"[183] (emphasis added)

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[178] WT/DS264/2. This document is included in Annex D to this Report.
[179] US first written submission, para. 15.
[180] *Id.*, para. 22.
[181] WT/DS264/2.
[182] *Ibid.*
[183] Canada first written submission, para. 279(3).

(b) Arguments of the Parties

7.20 The **United States** asserts that Canada claims in paragraph 2 of its Panel Request that the United States has violated Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *AD Agreement* and Article VI:1 of *GATT 1994*. However, according to the United States, Canada has added claims in its first written submission, by alleging that the following provisions of the *AD Agreement* have also been violated: Article 2 (not just Article 2.6), all of Article 4 (not just Article 4.1), all of Article 5 (not just Articles 5.1, 5.2, 5.3, 5.4 and 5.8), as well as Articles 3, 6.10, and 9.[184] The United States considers that these claims fall outside the Panel's terms of reference under Article 7 of the *DSU*. The United States points to Article 6.2 of the *DSU*, which states that a panel request "shall (...) identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The United States considers that a panel request must always identify the treaty provisions claimed to have been violated[185] and that, if a *claim* is not specified in the panel request, it cannot be subsequently "cured" by a complaining party's argumentation in its submissions to a panel.[186] The United States therefore requests us to rule that Canada's claims of violations of provisions other than those set forth in its Panel Request are beyond our terms of reference.

7.21 **Canada** contends that it has not added new claims in addition to those contained in its Panel Request by referring to additional provisions of the *AD Agreement* in its first written submission. Rather, Canada has made arguments in support of the claim clearly identified in its Panel Request (i.e., the over-broad product coverage of the investigation resulting from an improper application of Article 2.6 "like product" definition). Canada asserts that in order to address whether and how the definition of Article 2.6 delimits the scope and range of different products an investigating authority may cover in a single investigation, the Panel must explore the full context of Article 2.6, including the manner in which the term "like product" is used throughout the *AD Agreement*. The additional provisions referred to in its first written submission provide context for the interpretation of Article 2.6 and arguments for its claim that DOC erred in finding only one "like product" and conducting only one investigation. Furthermore, Canada asserts that the United States did not suffer any identifiable prejudice as Canada has not supplemented its claim or altered the nature of the alleged error in the Panel Request. The legal basis for Canada's claim in its first written submission remained Article 2.6 of the *AD Agreement* and the United States was clearly able to respond to Canada's arguments.[187] Canada therefore requests us to reject the US preliminary objection.

(c) Evaluation by the Panel

7.22 The issue that we need to decide is whether the provisions of the *AD Agreement* identified in Canada's first written submission as allegedly being violated by the United States, but which were not included in Canada's Panel Request, are within our terms of reference.

7.23 In examining this matter, we note the following *differences* between the provisions of the *AD Agreement* quoted by Canada in its Panel Request with regard to the "like product" issue and those provisions claimed by Canada as being violated in its first written submission, and in its subsequent replies to questions 1 and 85 of the Panel to confirm which provisions have allegedly been violated by the United States:

[184] US first written submission, para. 17 which refers to Canada first written submission, paras. 11, 115, 118, 119 and 142.

[185] Appellate Body Report, *Korea – Dairy*, para. 124, and also Panel Report, *EC – Bed Linen*, para. 6.17.

[186] Appellate Body Report, *EC – Bananas III*, para. 143.

[187] Canada response to the US preliminary objections, para. 15, and note 5 thereto.

Panel Request[188]	**First Written Submission**[189]	**Replies to questions 1 and 85**
Article 2.6	Article 2	Article 2.6
-	Article 3	-
Articles 5.1, 5.2, 5.3, 5.4 and 5.8	Article 5	Articles 5.1, 5.2 and 5.4[190]
-	Article 6.10	-
-	Article 9	-

* This table refers to those provisions of the *AD Agreement* falling within the terms of reference of the Panel regarding the "like product" issue only

7.24 In examining these differences, it appears to us, on its face, that Canada has, in its first written submission, alleged violations of Articles 2 and 5 as a whole, rather than only the sub-sections claimed to have been violated in the Panel Request. In Canada's first written submission, violations of provisions not included at all in the Panel Request, specifically Articles 3, 6.10 and 9, are also alleged. We note that, in its restatement and confirmation of its claims contained in its replies to questions 1 and 85, respectively, Canada has limited the scope of its claim to an alleged violation of Article 2.6 and, "*e.g.*, Articles 5.1, 5.2, and 5.4".[191]

7.25 It is now well-established that a panel's terms of reference are governed by the panel request. These terms of reference define the scope of the dispute, and serve the due process objective of notifying the parties and third parties of the nature of the complainant's case.[192] It is also well-established that the identification of the treaty provision in the panel request is the minimum prerequisite for defining the terms of reference. [193] Finally, we note that defects in a panel request

[188] WT/DS264/2.

[189] This table reports the provisions claimed by Canada as being violated in Canada first written submission, Section IV. Relief Requested, paras. 279(3) and 280, rather than those referred to by the United States in para. 7.20, *supra*.

[190] We note that, in its response to question 1 of the Panel, para. 1(iii), Canada claims that:

> "[n]on-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *Anti-Dumping Agreement*, e.g., Articles 5.1, 5.2, and 5.4".

[191] *Ibid.*

[192] We note the Appellate Body statement in *US – Carbon Steel* that:

> "… pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests.
>
> (....)
>
> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU". (Appellate Body Report, *US – Carbon Steel*, paras. 124-127)

[193] As the Appellate Body stated in *Korea – Dairy*:

> "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such

cannot be "cured" in subsequent submissions to a panel. Thus, a statement in a written submission can be "consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced", but not to "cure" deficiencies in the panel request, or to add additional provisions of a treaty allegedly being violated or to add additional sub-sections of a provision included in the panel request.[194]

7.26 Canada does not contest that additional provisions of the *AD Agreement* have been included in its first written submission that were not identified in its Panel Request with regard to its claim on the scope of the investigation. However, Canada asserts that these "additional provisions" are cited only in support of its claims as set out in the Panel Request, and to put the interpretation of the provisions allegedly being violated in context.

7.27 We also note that, in response to our request to Canada to list the provisions of the *AD Agreement* allegedly violated by the United States[195], Canada states, with regard to its claim[196] on the "like product" and "product under consideration" issue, that:

> "[t]his claim is grounded in Article 2.6. (...) Non-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *Anti-Dumping Agreement, e.g.*, Articles 5.1, 5.2, and 5.4".[197]

7.28 From this statement by Canada, it is clear to us that Canada does *not* request us to make findings on the additional provisions cited in its first written submission with regard to the claim under paragraph 2 of its Panel Request.

7.29 The Appellate Body has made it clear that the minimum requirement that a complainant has to meet is the identification of the treaty provisions at issue, and that any deficiencies in this regard cannot be "cured" at a later stage. We note Canada's clarification that the additional provisions of the *AD Agreement* identified in its first written submission, in addition to those quoted in its Panel Request, are not the basis for additional claims, but are merely quoted in support of its arguments and to give context to the interpretation of the Article 2.6. We also note Canada's confirmation that the legal basis for its claim regarding the "like product" issue is an alleged violation of "*e.g.*, Articles 5.1, 5.2, and 5.4" of the *AD Agreement*.

> identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all". (Appellate Body Report, *Korea – Dairy*, para. 124)

[194] As the Appellate Body explained in *US – Carbon Steel*:

> "compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the *First Written Submission* of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances". (footnotes omitted) (Appellate Body Report, *US – Carbon Steel*, para. 127)

[195] Question 1 of the Panel to Canada.
[196] WT/DS264/2, Claim under para. 2 of the Panel Request.
[197] Canada responses to questions 1 and 85 of the Panel.

7.30 We therefore find that the alleged violation of Articles 2 (with the exception of Article 2.6), 3, 5 (with the exception of Articles 5.1, 5.2, 5.3, 5.4 and 5.8), 6.10 and 9 of the *AD Agreement* do not fall within the scope of our mandate as set out in the Panel Request.

3. Introduction of Evidence that was not before the Investigating Authority

(a) Factual Background

7.31 Canada claims that the United States has violated Article 2 of the *AD Agreement* in that DOC failed to make due allowance for differences that affect price comparability when comparing prices of products sold in the United States and prices of products with different physical characteristics sold in Canada. In support of its claim Canada attached a document, Exhibit CDA-77, purporting to substantiate its view that the record data show that the relevant physical differences between the products affect price comparability. Exhibit CDA-77 is a regression analysis of the record data, produced by Tembec, one of the respondent companies.

7.32 However, Exhibit CDA-77 was not submitted to DOC during the investigation. The record of the underlying investigation shows that DOC announced the Final Determination in March 2002, whereas the document now submitted to us as Exhibit CDA-77, appears to have been prepared for Tembec on 4 October 2002, that is, 6 months after the conclusion of the investigation.

(b) Arguments of the Parties

7.33 The **United States** asserts that Exhibit CDA-77 did not form part of the record of the underlying investigation, and therefore does not constitute "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" as required by Article 17.5(ii) of the *AD Agreement*. According to the United States, Exhibit CDA-77 contains a statistical regression which was created more than six months after the investigation was completed.[198] The United States asserts that "Exhibit CDA-77 presents newly derived data calculated and reorganized in a different manner than was available to the US investigating authority in the original investigation".[199] As the information contained in Exhibit CDA-77 was not made available to the investigating authority in conformity with the appropriate domestic procedures during the investigation, the United States asserts that considering it would be inconsistent with Article 17.5(ii). In addition, the United States contends that, in asking us to consider this new evidence, Canada effectively is requesting the Panel to undertake its own establishment and evaluation of the facts, contrary to Article 17.6(i). The United States therefore requests us to decline to consider Exhibit CDA-77.

7.34 **Canada** responds that, although Exhibit CDA-77, as such, was not on the record when DOC made its final determination, all of the underlying data used in the regression analysis were on the record before DOC. [200] Thus, according to Canada, Articles 17.5(ii) and 17.6(i) do not prevent us from considering Exhibit CDA-77. The purpose of submitting Exhibit CDA-77 was to enable the Panel to determine whether DOC's establishment of the facts was proper and whether its evaluation of the facts before it was unbiased and objective, pursuant to Article 17.6(i). Canada asserts that a similar issue arose before the *EC – Bed Linen* panel, which found that, although Article 17.5(ii) requires a panel to examine the matter based upon the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member, it does not require that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority.[201] Canada also argues that, if the United States had respected its obligation

[198] The lumber regression analysis contained in Exhibit CDA-77 is dated 4 October 2002.
[199] US first written submission, para. 27.
[200] Canada response to the US preliminary objections, para. 20.
[201] Panel Report, *EC – Bed Linen*, paras. 6.41-6-43.

under Article 6.1 of the *AD Agreement* "to give all parties notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation..", Exhibit CDA-77 would have been put on the record of the investigation prior to the Final Determination by DOC.

(c) Evaluation by the Panel

7.35 The issue that we need to decide is whether Exhibit CDA-77 is properly before us as evidence to substantiate Canada's claim with regard to an Article 2.4 adjustment for physical differences affecting price comparability, that is, whether Exhibit CDA-77 complies with the requirements of Article 17.5(ii) of the *AD Agreement*.

7.36 Article 17.5(ii) of the *AD Agreement* provides that:

> "[t]he DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:
>
> (…)
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.37 Article 17.5(ii) makes clear that we must examine the matter before us based on facts made available to DOC in accordance with the US domestic procedures, and that we cannot base our findings on any other facts not complying with this requirement. Thus, we agree with a previous panel that we "may not, when examining a claim of violation of the *AD Agreement* in a particular determination, consider facts or evidence presented (…) by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country *during the investigation*".[202] (emphasis added; footnote omitted) If this were not the case, we find it difficult to envisage how an investigating authority could be expected to have taken these facts into consideration when making its relevant determinations – the very reason why facts are submitted to an investigating authority.

7.38 Canada does not dispute that CDA-77 was submitted to DOC only on 4 October 2002, that is, more than 6 months after DOC published its Final Determination. It argues, however, that the underlying data on which Exhibit CDA-77 was based were taken from the database that DOC used in calculating the dumping margin for Tembec[203], and that it therefore contains no new facts – the facts of the case are therefore similar to those in *EC – Bed Linen.* We therefore need to determine whether Exhibit CDA-77 contains facts that were not before DOC and therefore constitutes evidence in its own right, and whether the relevant finding of the panel in *EC – Bed Linen* is applicable to the case in hand.

7.39 It is undisputed that Exhibit CDA-77 contains the results of a regression analysis performed by a consultant on instruction from Tembec, one of the mandatory respondent Canadian companies. We note that multiple regression is a statistical method for studying the relationship between a single dependent variable and one or more independent variables.[204] The use of regression allows the user to infer whether there is a positive, inverse (negative) or no relationship between the explanatory and dependent variables. The procedure also enables the relationship to be measured – how will a unit change in the independent variable affect the value of the dependent variable. The method involved

[202] Panel Report, *US – Hot-Rolled Steel*, para. 7.6.
[203] This fact is not contested by the United States.
[204] Allison, Paul A., *Multiple Regression: A Primer* (Pine Forge Press, 1998).

in establishing this relationship is fitting a line through the set of points made by the independent or explanatory variables. The line is fit by minimising the squared distance between itself and the points. This methodology is called the Ordinary Least Square regression (OLS) and was used to produce Exhibit CDA-77.[205] When a regression analysis is done, one has a choice whether it should involve a single equation or more, whether the model is linear or non-linear. Furthermore, there is a choice of the explanatory variables to be included in the analysis.

7.40 In our view, a regression analysis involves an analysis of data which could be done in many different ways, and the choices made may have a significant impact on the conclusions drawn. A regression analysis is not mere data which can be taken at face value. Rather, further clarification is required, and an evaluation must be made of the probative value of such an analysis in light of such factors as the data chosen, the precise methodology used and the variables selected. It is the role of an investigating authority to perform such an evaluation of the evidence placed before it, and the role of a panel to review whether the investigating authority's evaluation was proper in light of the standard of review set forth in Article 17.6(i) of the *AD Agreement*. For us to consider a regression analysis that was not placed before the investigating authority would require us to perform a *de novo* review rather than to determine whether the investigating authority's evaluation of the facts was proper. Thus, while a regression analysis may be based upon data which are "evidence" before an investigating authority, we consider that the result of a regression analysis using those data is "evidence" in its own right, distinct from the underlying data on which it is based.

7.41 Canada relies upon the panel report in *EC – Bed Linen* for the proposition that Article 17.5(ii) does not preclude a panel from reviewing data which are presented to it in a different format than they were presented to the investigating authority.[206] We note, however, that the exhibit at issue in that dispute was a recapitulative table of the declarations of support for the application received from other domestic EC producers. The exhibit was therefore a "marshalling" of the already submitted evidence and *not* a manipulation thereof. It seems clear to us that that factual situation differs substantially from the facts of this case: the evidence at issue was before the investigating authority during the investigation itself, and the very same information was submitted to the panel in a different format only – nothing was added to it, nor was anything subtracted from it. It was therefore merely a "mechanical" exercise. The same cannot be said of the evidence in Exhibit CDA-77 – we note that the memorandum by the consultant who developed the regression analysis explaining how Exhibit CDA-77 was developed, covers seven pages, explaining the methodologies employed and the different options used.[207] This, in itself, confirms to us that Exhibit CDA-77 contains more than the mere data which were already before DOC. We are therefore of the view that Canada's reliance on *EC – Bed Linen* is misplaced.

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[205] Exhibit CDA-129, Memorandum on the Regression Analysis, p. 2.

[206] The panel in *EC – Bed Linen* found that:

> "Article 17.5(ii) of the AD Agreement provides that a panel shall consider a dispute under the AD Agreement 'based upon: … the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member'. It does not require, however, that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion in support of their arguments and to elucidate the parties' positions. Based on our review of the information ... we conclude that the Exhibit in question does not contain new evidence. Thus, we conclude that the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation. There is in our view no basis for excluding the document from consideration in this proceeding, and we therefore deny India's request". (emphasis in original) (Panel Report, *EC – Bed Linen*, para. 6.43.)

[207] Exhibit CDA-129, Memorandum on Regression Analysis.

7.42 Canada contends that the regression analysis contained in Exhibit CDA-77 could not have been submitted earlier, as the parties were not put on notice by DOC that it might determine to exclude dimension of softwood lumber as a factor requiring a price-based Article 2.4 adjustment, contrary to DOC's recognition, at the preliminary determination stage, of the need for an adjustment for dimension.[208] Canada requests us to "bear in mind the US obligations under Article 6.1 of the *AD Agreement* to give all parties notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation".[209] If, however, Canada believed that the United States improperly limited the evidence that was placed in the record of the underlying investigation on this issue, the proper course of action would have been to assert a claim in that regard. Canada did not, however, advance any such claim in its Panel Request. As there is no such claim under Article 6.1 within our terms of reference, we will not further consider Article 6.1.

7.43 We therefore find that the evidence submitted to us as Exhibit CDA-77 represents facts which were not made available in conformity with appropriate domestic procedures to the authorities of the importing Member in accordance with the provisions of Article 17.5(ii) of the *AD Agreement*, and we will not take it into consideration.

D. CLAIM 1: ARTICLE 5.2 – APPLICATION DID NOT CONTAIN INFORMATION "REASONABLY AVAILABLE TO THE APPLICANT"

(a) Factual Background

7.44 DOC received an application for the initiation of an anti-dumping investigation concerning certain softwood lumber products from Canada. The application contained certain information on prices at which the product in question was sold when destined for consumption in Canada, on the constructed value of the product, as well as on export prices of softwood lumber exported from Canada to the United States. The application was examined by DOC and in the process a deficiency letter was sent to the applicant with the request to submit additional data and provide clarifications with respect to certain matters. The applicant responded to the request by submitting additional data and clarifications.

(b) Arguments of the Parties/Third Parties

7.45 **Canada** asserts that Article 5.2 of the *AD Agreement* requires that an application for initiation of an anti-dumping investigation contain such information on prices "as is reasonably available to the applicant". Canada asserts that the applicant misrepresented to DOC that it: (1) did not have access to Canadian producer transaction prices for softwood lumber sales in Canada; (2) had only limited information on prices at which Canadian softwood lumber was exported to the United States and (3) did not have access to detailed Canadian producer costs of production. Specifically, Canada asserts that, because Weldwood is a wholly-owned subsidiary of an Executive Committee member of the Coalition, sales price and cost data of a major Canadian exporter were "reasonably available to the applicant". Canada further alleges that the record subsequently established that four members of the Coalition had in fact imported softwood lumber from Canada. There was therefore no justification for failing to include the pricing and cost data on actual sales of softwood lumber in Canada and to the United States, and no need for the applicant to construct prices or costs of Canadian softwood lumber sales to support the application. Because the application did not include all the information that was reasonably available to the applicant, it failed to meet the requirements of Article 5.2. Canada also argues that DOC's failure to seek further information (i.e., actual price and cost data), including its blind acceptance of the applicant's claim that it did not have such information, although aware of the relationship between Weldwood and IP, did not comply with the obligation under Article 5.2 to

[208] Canada response to the US preliminary objections, para. 21.
[209] *Id*., para. 22.

ensure that the application contains information which is "reasonably available" to the applicant. According to Canada, an unbiased and objective investigating authority would not have concluded that the applicant had submitted information that was "reasonably available" to it.

7.46 The **United States** argues that the information submitted by the applicant was sufficient to support a decision to initiate an investigation and that the Weldwood cost and price data to which Canada refers could not have detracted from the sufficiency of the evidence in the application. According to the United States, Article 5.2 does not require that an applicant submit certain information which is reasonably available to it in the application if the information submitted as part of the application is sufficient to support initiation of an investigation. The United States also asserts that the information on prices which the applicant did submit was more representative of the prices of the Canadian exporters of softwood lumber products than that of only one Canadian producer, Weldwood, would have been, had it been submitted, or required to be submitted.

7.47 As a third party, the **EC** argues, firstly, that Article 5.2 does not contain an obligation for the applicant to submit to the investigating authority *any* information reasonably available, but only to the extent that it falls under one of the elements identified under the paragraphs (i) to (iv) of Article 5.2, and secondly, that Article 5.2 imposes an obligation only on the applicant, but not on the investigating authority.

(c) Evaluation by the Panel

7.48 The issue before us is whether the application for the initiation of the investigation underlying this dispute is consistent with Article 5.2 of the *AD Agreement.* It seems to us that the relevant threshold issue is whether an application that contains information on all the specific items specified in Article 5.2 may nevertheless be inconsistent with Article 5.2 because additional information regarding those specific items and which was reasonably available to the applicant was not included in the application. Once we have resolved this question, we will review the information in the application with a view to determining whether it included the required information.

7.49 As a starting point, we note that Article 5.1 of the *AD Agreement* provides that:

> "[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry".

7.50 The application is therefore normally the starting-point in the process, activated by the domestic industry of the importing country, for examining whether "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated" by the investigating authority.

7.51 We next examine the requirements, established by Article 5.2, with which an Article 5.1 written application to initiate an investigation must comply. Bearing in mind the rules of treaty interpretation referred to in section B.1, *supra,* we start our analysis with the text of Article 5.2, looking at the ordinary meaning of the provision. Article 5.2 reads in relevant part as follows:

> "[a]n application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:
>
> (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written

application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3".

7.52 From the wording of the chapeau of Article 5.2, it is clear that "an application … *shall* include evidence of *(a*) dumping, *(b)* injury … and *(c)* a causal link between the dumped imports and the alleged injury". (emphasis added) The mandatory requirement that evidence of dumping be included in the application is therefore quite clear. Furthermore, it is also clear that a simple assertion of dumping which is not substantiated by relevant evidence, "cannot be considered sufficient to meet the requirements of this paragraph". Article 5.2 further provides that "[t]he application shall contain such information as is reasonably available to the applicant" on the matters set out in sub-paragraphs (i)-(iv).

7.53 Canada initially asserted that the applicant did not submit "all of the information that was reasonably available to it" with respect to cost and price evidence.[210,211] "The Petition, therefore, did not contain "such information as [was] reasonably available to the applicant" concerning prices at which Canadian softwood lumber was being sold in the US and Canadian markets".[212] From these statements, we infer that Canada initially argued that an application should contain *all* information which is reasonably available to the applicant.[213] However, from its subsequent submissions we do not understand Canada to further pursue the argument that the word "such" in "such information as is reasonably available to the applicant" means "all" or "any" information as is reasonably available to the applicant.[214] Nevertheless, for the sake of certainty, we set out below the reasons why we do not believe

[210] Canada first written submission, para. 97.

[211] We do not understand Canada to dispute that the application contained information referred to in sub-paragraphs (i) to (iv) of Article 5.2. Canada contests the adequacy and accuracy of some of the information contained in the application. This issue is addressed under Claim 2, *infra.*

[212] Canada first written submission, para. 97. In the same vein, WT/DS264/2, para. 1(a).

[213] Similar understanding is expressed by the United States and the EC. (*See* US second written submission, para. 8 and EC third party submission, paras. 7-8)

[214] Canada second written submission, paras. 18-25.

that Article 5.2 requires an applicant to submit "all" information on the matters identified in Article 5.2 as is reasonably available to it.

7.54 We note that the words "such information as is reasonably available to the applicant", indicate that, if information on certain of the matters listed in sub-paragraphs (i) to (iv) is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the "reasonably available" language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* information reasonably available to it to substantiate its allegations.[215] This is particularly true where such information might be redundant or less reliable than, information contained in the application. Of course, this does not mean that such information will necessarily be sufficient to justify initiation under Article 5.3 – that is a separate question, not encompassed by the issue before us here, but which is the subject of our examination in paragraphs 7.71-7.127, *infra*.

7.55 We therefore disagree with Canada's initial view that the inclusion of the term "reasonably available" places an additional requirement on an applicant. In light of our analysis above, it is clear that Article 5.2 requires that an application contain relevant evidence of dumping, injury and causation and that it sets forth a list of the types of information it must contain. We believe that the words "reasonably available" mean that the specified information must be submitted *to the extent* reasonably available to the applicant. It is therefore a modulation of the requirement to provide such information in light of its availability, so as to make the application compliant with Article 5.2 even if it does not include all the specified information if such information was simply not reasonably available to the applicant.

7.56 Canada's interpretation would require us to conclude that the "reasonably available" language serves to *toughen* the obligation, to such an extent that, even if all specified information is provided, the application would not meet the requirements of Article 5.2 if *all* relevant information that is "reasonably available" is not provided in the application. If this is what the drafters had intended, they could have included "shall contain *all* such information as is reasonably available", rather than "such information". We are of the view that the drafters had good reasons why they did not include the word "all" in the text as it would mean that an investigating authority would have to review even the best-documented application to make sure some additional information could not have been provided. In this very case, with Canada stating that the applicant companies do regular business with Canadian companies which results in thousands of transactions[216], it would have meant that the applicant had to submit information and documents covering all these transactions. Furthermore, the investigating authority would then be required to review the information covering all these transactions for purposes of the initiation of an investigation, and furthermore, to ascertain whether all transactions were covered by this process. In our view, such a requirement would render the provision totally unworkable.

7.57 Considering the requirements of Article 5.2, we are of the view that we have to establish, when considering the specific facts of this case, whether the application contained information on the matters specified in Article 5.2, in particular as required by sub-paragraph (iii) thereof, and not whether it contained all such information as is reasonably available to the applicant.

[215] If the requirement were to be that all information reasonably available to the applicant must be submitted in the application, it could lead to absurd results in that the applicant might be required to submit a large volume of information for purposes of the initiation of the investigation.

[216] Canada first oral (opening) statement, para. 17.

7.58 We note that Article 5.2(iii) requires in this case that the application should contain information on prices at which softwood lumber is sold when destined for consumption in Canada – or, where appropriate, information on the constructed value of softwood lumber in Canada – and information on export prices to the United States.

7.59 We therefore now turn to the specific facts of this case to determine whether the required information was contained in the application. On 2 April 2001, DOC received an application containing the following information:[217]

- Information on prices in the Canadian market:
  - Average MBF prices[218] for WSPF sold in BC during the last three quarters of 2000;[219]
  - MBF prices, as published in *Random Lengths*, a reputable industry publication, for the year immediately preceding the application for ESPF kiln dried, 2"x4" by thickness and width, in various lengths, delivered to Toronto.[220]
- Information on export prices based on *Random Lengths* data on multiple sales of WSPF for delivery to the United States:[221]
  - An overall average of weekly prices reported throughout the period of 1 April 2000 through 31 March 2001, for a softwood lumber product: kiln-dried WSPF 2x4s "standard and better" in random lengths delivered to two major markets, Chicago and Atlanta, respectively;
  - An average transaction price for kiln-dried WSPF 2x4 "standard and better" in random lengths delivered to Chicago during the week ending 19 January 2001;[222]
  - A price quotation affidavit from a knowledgeable industry source testifying on an offer from a US trading company for Canadian WSPF kiln-dried random length 2x4s from BC for sale in March 2001, at a delivered price to a specified destination in the US market.[223] The affidavit contained information on the historical mark-up received by lumber wholesalers (5 per cent), and on the likely means of shipment;[224]
  - A "lost sales" affidavit from a US lumber producer, reporting four separate instances in which the affiant lost sales on 15 December 2000, to potential customers in the

[217] Exhibit CDA-9, Initiation, p. 21328.

[218] "MBF prices" are prices per thousand board feet. A "board foot" is a three dimensional unit described as the quantity of lumber contained in a piece of lumber 1 inch thick, twelve inches wide, and 1 foot long, or the equivalent in other dimensions. (Exhibit CDA-37, Application, p. III-9.)

[219] Exhibit CDA-10, Initiation Checklist, p. 7. Information sourced from the BC Ministry of Forest's published market pricing system lumber values.

[220] *Id.*, pp. 7-8.

[221] Exhibit CDA-10, Initiation Checklist, pp. 6-7.

[222] *Ibid.*, and CDA-41, Application – Freight Affidavit. The applicant originally based the WSPF freight adjustment on the same freight expense they had used for the much shorter distance between Quebec and Boston for the ESPF adjustment. In the application amendments of 10 April 2001, the applicant submitted another, allegedly "more accurate, but still very conservative", rate for freight between BC and US destinations (Exhibit CDA-40, Application Amendments). The rate is regarded as "conservative" because it is calculated based on a shorter distance than distances from any BC point of origin to the markets to which the WSPF products were delivered.

[223] Exhibit CDA-10, Initiation Checklist, pp. 7-8, and Exhibit CDA-40, Application Amendments.

[224] In calculating that ex-factory price, the applicant made an adjustment by backing out the freight between less-distant locations, resulting in removing less than the actual freight charge would likely have been.

United States (the buyers) because those buyers reported that "Quebec producers" offered the same product at a price which was lower than the affiant's offering price. The terms were the same for both the Canadian and the US product;[225]

- *Random Lengths* data on export prices on multiple sales of ESPF during the period April 2000 to March 2001 for delivery to two different US localities:[226]

  (i) A POI average of weekly reported prices for kiln-dried ESPF 2x4s in random lengths delivered to Boston and the Great Lakes region, respectively;

  (ii) A POI average of weekly reported prices for kiln-dried ESPF 2x4 8-foot studs delivered to Boston and the Great Lakes region, respectively;

  (iii) An average transaction price for kiln-dried ESPF 2x4 8-foot PET studs delivered to Boston during the week of 19 January 2001.[227]

- Information on the constructed value of the product:

  - Provincial stumpage charges in BC and Quebec in 2000;[228]

  - Data on harvesting costs in BC from a 1999 independent study by a consultant of BC sawmills;[229]

  - Data on harvesting costs for Quebec during the last quarter of 2000, from a market research report;[230]

  - Data on direct labour costs for BC and Quebec, from surveys of sawmills by the BC government and Canadian Federal government, respectively;[231]

  - Data on electricity costs from a Canadian Federal Government survey of electrical suppliers;[232]

  - Data on per-unit financial expenses from the public 2000 financial statements for Canadian lumber producer Tembec;[233]

  - Press-clippings from daily newspapers in various Canadian cities describing widespread below-cost sales of softwood lumber in Canada;[234]

  - An amount for profit was substantiated by the public financial statements of Tembec, a major Canadian producer – the same financial statements used when calculating the cost of production.[235]

[225] Exhibit CDA-10, Initiation Checklist, pp. 7-8.
[226] *Ibid.*
[227] *Ibid.*
[228] Exhibit US-4, Application – Exhibit VI.C-2; and Exhibit US-59, Application – Exhibit VI.D-2.
[229] Exhibit US-5, Application – Exhibit VI.D-4; and Exhibit US-6, Application – Exhibit VI.D-5.
[230] Exhibit US-7, Application – Exhibit VI.C-4.
[231] Exhibit US-8, Application – Exhibit VI.C-5; and Exhibit US-9, Application – Exhibit VI.D-6.
[232] Exhibit US-10, Application – Exhibit VI.C-6; and Exhibit US-11, Application – Exhibit VI.D-7.
[233] Exhibit US-12, Application – Exhibit VI.B-1; Exhibit US-13, Application – Exhibit VI.B-2; and Exhibit CDA-40, Application Amendments (revised Tembec financial calculations from Exhibit VI.B).
[234] Exhibit CDA-37, Application – Volume III; Exhibit CDA-40, Application Amendments; and Exhibit US-14, Application – Exhibit III-14.

7.60 Based on this information the applicant calculated estimated margins of dumping, ranging from 22.5 per cent to 72.9 per cent.[236]

7.61 We consider it evident from the above enumeration that the application in this investigation contained information on prices at which softwood lumber is sold when destined for consumption in Canada, on the constructed value of softwood lumber in Canada, and on export prices to the United States. In light of our conclusions regarding the requirements of Article 5.2, we therefore find that the application contained the information required by Article 5.2(iii). Accordingly, we conclude that Canada has failed to establish that the United States has acted inconsistently with Article 5.2.[237]

E. CLAIM 2: ARTICLE 5.3 – ALLEGEDLY INSUFFICIENT EVIDENCE TO JUSTIFY INITIATION OF AN INVESTIGATION

(a) Factual Background

7.62 DOC received an application requesting it to initiate an anti-dumping investigation concerning allegedly dumped imports of softwood lumber from Canada. The application contained certain information on prices at which the product in question was sold when destined for consumption in Canada, on the constructed value of the product, as well as on export prices of softwood lumber products exported from Canada to the United States. The application did not contain any price or cost information from Weldwood, a significant Canadian producer and exporter to the US which is wholly owned by IP, one of the applicant companies, nor did it contain any export price information on any imports of the subject product by other applicant companies from Canadian exporters. The application was examined by DOC and in the process a deficiency letter was sent to the applicant with the request to submit additional data and provide clarifications with respect to certain matters. The applicant responded to the request by submitting additional data and clarifications. DOC subsequently prepared a document in which it explained its analysis of the application and the basis for its decision to initiate the investigation.

(b) Arguments by the Parties/Third Parties

7.63 **Canada** claims that DOC did not properly examine the accuracy and adequacy of the information provided in the application and did not properly determine, based on the facts before it, that there was sufficient evidence to justify the initiation of the investigation, in violation of Article 5.3 of the *AD Agreement*.

7.64 Canada asserts that an unbiased and objective investigating authority would have known that certain highly pertinent transaction-specific information reasonably available to one of the applicant companies (IP) through its wholly-owned Canadian company, Weldwood, was not submitted, as the application contained a Canadian newspaper article referring to the relationship between the two companies.[238] Canada also asserts that, given the magnitude of the cross-border trade in lumber and the well-recognised fact of cross-border ownership, DOC ought to have concluded on further examination of the application that the evidence on dumping was inadequate, as the applicant companies had access to more price and cost information. Furthermore, Canada posits that, at least four members of the Executive Committee of the Coalition for Fair Lumber Imports, one of the applicants, purchased and imported softwood lumber products from three of the mandatory Canadian respondents during the period of the investigation and therefore had access to export prices.[239] It was

[235] Exhibit US-12, Application – Exhibit VI.B-1; Exhibit US-13, Application – Exhibit VI.B-2; and Exhibit CDA-40, Application Amendments.

[236] Exhibit CDA-37, Application – Volume III.

[237] In light of our findings, we need not and do not address the question, raised by the EC, as to whether Article 5.2 imposes an obligation on the Member or on the applicant itself.

[238] Confirmed by the United States in its response to question 12 of the Panel, para. 12.

[239] Canada response to question 8 of the Panel, para. 17 and Canada second written submission, note 7.

therefore clear that the applicant had actual transaction prices and cost data reasonably available to it that were not provided to DOC in its application, a fact that DOC should have been aware of when it examined the accuracy and adequacy of the evidence provided in the application to determine whether there was sufficient evidence to justify the initiation of the investigation.

7.65 According to Canada, price and cost information were required to justify initiation under Article 5.3. Finding support for its position in the *Guatemala – Cement I* and *Guatemala – Cement II* panels, Canada is of the view that an investigating authority must have regard to the manner in which the applicant justifies its allegation of dumping in order to determine whether there is sufficient evidence of dumping to justify initiation.[240] That is, Canada asserts that, as Article 2.2 permits a dumping margin to be based on a constructed value comparison (as was done in the investigation at issue) only where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, and as Article 2.2.1 sets out how the cost calculation is to be done, DOC was required to assess whether the evidence provided by the applicant on each of the relevant elements – home market prices, export prices and costs – was adequate, accurate and sufficient, to justify initiation under Article 5.3.[241]

7.66 Canada states that using the applicant's *Random Lengths* price data for Quebec, a comparison of all of the Quebec ex-factory price data for ESPF (2X4, Studs&Btr, KD, RL and 2X4-8', PET, KD) products sold in Quebec and in the United States, shows that the US price was consistently higher during the period and that there was therefore no price-to-price dumping demonstrated by the evidence in the application.[242] There was, therefore, no basis upon which to initiate the investigation without adequate and accurate cost data.[243] Canada also challenges the accuracy and adequacy of certain information submitted by the applicant as evidence to substantiate the allegation of dumping.

7.67 According to the **United States**, the information actually included in the application provided sufficient evidence to form the basis for initiation of the investigation[244], and the Weldwood data – that Canada alleges were reasonably available to the applicant – could not have negated the sufficiency of the data included in the application.[245]

7.68 The United States asserts that the Weldwood data would have represented only the experience of a single company and would not have represented the diverse cost and price experience actually set forth in the application. The Weldwood data may or may not have constituted evidence of dumping. Whichever conclusion the data supported, they could not have changed the fact that other information in the application constituted evidence of dumping. Even if it is assumed, *arguendo*, that the Weldwood data were of a better quality than the data contained in the application, this has no bearing on the question before the Panel – Article 5.3 does not speak to the quality of the data that form the basis for initiation other than requiring that they be accurate and adequate and there be sufficient evidence to justify initiation. According to the United States, the data submitted by the applicant were sufficient for purposes of initiating an investigation.

7.69 According to the United States, DOC examined the application closely for purposes of evaluating the accuracy and adequacy of the information submitted to it, compared the application's assertions to the evidence submitted in support of those assertions, and analyzed the application step-by-step to ascertain whether there was sufficient evidence to initiate an investigation. As a result of this process, DOC required the applicant to provide additional data and clarifications. DOC

[240] Canada second written submission, paras. 30-32.
[241] *Id.*, paras. 34-35.
[242] *Id.*, para. 37 and Canada response to question 8 of the Panel, para. 33 and note 32 thereto. In the footnote, Canada compares the prices to substantiate its point.
[243] *Id*, para. 38.
[244] US first written submission, paras. 52-62, and US response to question 13 of the Panel, para. 14.
[245] US first written submission, paras. 65-69, and US response to question 16 of the Panel, paras. 25-30.

summarized its analysis of the application in a nineteen-page analysis memorandum after having conducted its own independent analysis, which included adjustments to the applicant's margin of dumping calculations. DOC satisfied itself as to the accuracy and adequacy of the evidence of dumping submitted to it and found that the information submitted was sufficient to support the decision to initiate the investigation.

7.70 As a third party to this dispute, the **EC** submits that Article 5.3 of the *AD Agreement* obliges an investigating authority to determine whether the initiation of an investigation would be justified in view of the objectively available evidence. This obligation not only encompasses an examination of the application and whether it fulfils for instance the requirements under Articles 5.2 or 5.3 of the *AD Agreement*, but may also require the investigating authority to take further steps to assemble the necessary evidence before initiating an investigation. The EC therefore agrees with the Panel in *Argentina – Poultry* that it is not merely the accuracy and the adequacy of the evidence *per se* which is the legal standard under Article 5.3, but the sufficiency of that evidence.[246] The EC also agrees with the panel in *Guatemala – Cement I* that the existence of "sufficient evidence" in a particular case has to be adjudicated in the light of the standard set forth in Article 17.6(i) of the *AD Agreement* and that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.[247]

(c) Evaluation by the Panel

7.71 The issue which we need to address under this claim is whether DOC acted consistently with the requirements of Article 5.3 of the *AD Agreement* when it decided that there was sufficient evidence to initiate the investigation. In other words, could an unbiased and objective investigating authority have concluded that the application contained accurate and adequate evidence sufficient to justify the initiation of the anti-dumping investigation?[248] We need, therefore, to address the nature of the obligation contained in Article 5.3 before we consider the facts of the case in light of these obligations to determine whether Article 5.3 has been violated by the United States.

7.72 We start our analysis by looking at the text of Article 5.3, which provides as follows:

> "[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

7.73 As Article 5.2 of the *AD Agreement* deals with the information required to be submitted as evidence to substantiate the allegation of dumping, and in light of our finding that the United States did not violate the provisions of Article 5.2, we need to address the context of Article 5.3, as well as the relationship between Article 5.2 and Article 5.3.

7.74 We note that a number of panels have addressed the different obligations contained in and the functions of Article 5.2 and Article 5.3 of the *AD Agreement*. Article 5.2 provides that the written application shall contain certain evidence of dumping, injury and causality in the form of specified information to be submitted to the extent such evidence is reasonably available to the applicant. At this stage, the only requirement is that information described in the sub-paragraphs of Article 5.2 has been included in the application. This does not mean that the investigation can be initiated on the basis of compliance with Article 5.2 only, as Article 5.3 makes it clear that a further step is required, that is, that the investigating authority has to examine the accuracy and adequacy of the evidence

[246] Panel Report, *Argentina – Poultry*, para. 7.60.
[247] Panel Report, *Guatemala – Cement I*, para. 7.57; confirmed in Panel Report, *Mexico – Corn Syrup*, paras. 7.94, *et seq.*
[248] There is no assertion in this case that DOC obtained any information independently; thus, its decision to initiate was based solely on the information in the application.

provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation. It is therefore clear that, an application might satisfy the requirements of Article 5.2, but *not* necessarily those of Article 5.3 as the evidence contained in the application might be judged by the investigating authority not to be sufficient to form the basis for initiating the investigation. Although we recognize that, because the Appellate Body reversed the panel's conclusions in *Guatemala – Cement I* on the issue of whether the dispute was properly before it, that panel's conclusions in this regard have no legal status, we find its statements on this issue instructive and we agree with it when it states that:

> "… the fact that the applicant has provided, in the application, all the information that is "reasonably available" to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied"[249],

and:

> "Article 5.3 is a requirement imposed on the investigating authority: once it has accepted the application, that is, determined that it contains evidence on dumping, injury, and causal link, as well as "such information as is reasonably available to the applicant" on the factors set forth in Article 5.2 (i) - (iv), the investigating authority must undertake a further examination of the evidence and information in the application. If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation. Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant."[250]

7.75 Although the information contained in the application therefore forms the basis for the determination of sufficiency of the evidence for purposes of the initiation of the investigation, an investigating authority is not precluded from gathering information itself to ensure that it is satisfied that it has sufficient evidence before it, although it is not obliged to do so.[251]

7.76 In this case, we have found that the requirements of Article 5.2 have been satisfied, as set forth in paragraph 7.61, *supra*. The next question we therefore have to address is whether DOC was entitled to conclude that there was sufficient evidence to justify the initiation of the investigation. We note that DOC did not gather information on its own, in addition to the information in the application as submitted to it, but that it based its decision to initiate the investigation on the information in the application, as supplemented by additional information and clarifications submitted by the applicant as requested by DOC.

7.77 Before addressing the issue of what constitutes sufficient evidence, we first need to address the question of "sufficient evidence" of what? In this regard, we find the first part of Article 5.3 instructive, where it states that "[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application", as well as the chapeau of Article 5.2 which states that "[a]n application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury ... and *(c)* a causal link between the dumped imports and the alleged injury". We are therefore of the view that, although

[249] Panel Report, *Guatemala – Cement I*, para. 7.49.
[250] *Id.*, para. 7.50. (emphasis in original omitted)
[251] Panel Report, *Guatemala – Cement II*, para. 8.62.

Article 5.3 contains no express reference to evidence of dumping, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. Article 5.2 makes it clear that the application has to contain evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that is sufficient to justify the initiation of the investigation. Reading Article 5.3, in the context of Article 5.2, the evidence mentioned in Article 5.3 can only mean evidence of dumping, injury and causation.

7.78 What constitutes sufficient evidence to justify the initiation of an anti-dumping investigation, is not defined in the *AD Agreement*. However, in addressing this issue, we consider it appropriate to follow the approach taken by previous panels which have examined claims under Article 5.3 of the *AD Agreement* in that we will determine whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify the initiation of the investigation.[252]

7.79 Having regard to our standard of review, we shall therefore examine whether an objective and unbiased investigating authority, looking at the facts before DOC at the time of the initiation of the investigation, could properly have determined that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation. In making this determination, Article 5.3 requires an investigating authority to examine the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authority's determination whether there is sufficient evidence to justify the initiation of an investigation. However, it is not merely the fact of the accuracy and adequacy of the evidence *per se* which is the legal standard under Article 5.3, but the *sufficiency* of that evidence.[253] In analysing the sufficiency of evidence, we agree with previous panels that statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence within the meaning of Article 5.3.[254]

7.80 We note that, although Article 5.2 does not define the term "dumping", Article 2 provides guidance regarding the meaning of that term for the purpose of the *AD Agreement*. We agree with the findings of the *Guatemala – Cement II* panel on this issue[255], which were also followed by the panel in *Argentina – Poultry*, that, in order to determine whether there is sufficient evidence of dumping, an investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Article 2.[256] This does not, of course, mean that an investigating authority must perform a full-blown determination of dumping in order to initiate an investigation. Rather, it means simply that an investigating authority should take into account the general parameters as to what dumping is when inquiring about the sufficiency of the evidence. The requirement is that the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation. We will therefore follow the same approach in our analysis of Canada's claims. With these considerations in mind, we now turn to the examination of Canada's claim.

7.81 According to Canada, cost and price information were required to justify initiation of the investigation under Article 5.3. Canada is basing this assertion on the contextual relevance of Article 2 of the *AD Agreement* to an interpretation of Article 5.3, as discussed in paragraph 7.80, *supra*. An investigating authority must therefore have regard to the basis of the allegation of dumping in order to determine whether there is sufficient evidence of dumping to justify initiation. As the

[252] Panel Reports, *Mexico – Corn Syrup*, paras. 7.91-7.110; *Guatemala – Cement II*, paras. 8.29-8.58; and *Argentina – Poultry*, paras. 7.60-7.89.
[253] Panel Report, *Argentina – Poultry*, para. 7.60.
[254] Panel Reports, *Guatemala – Cement II*, paras. 8.51-8.53; and *Argentina – Poultry*, para. 7.60.
[255] Panel Report, *Guatemala – Cement II*, para. 8.35.
[256] Panel Report, *Argentina – Poultry*, para. 7.62.

applicant in this case alleged that sales in Canada were made below cost, they submitted information regarding constructed (normal) value in support of its allegation that dumping existed.

7.82 According to Canada, Article 2, and specifically Article 2.2, permits a dumping margin to be calculated based on a constructed (normal) value where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country. In order to disregard home market sales, Article 2.2.1 requires that there be an analysis of costs and a determination that the home market sales "are at prices which do not provide for the recovery of all costs within a reasonable period of time". These provisions provide context for the sufficiency determination under Article 5.3 in this case. Therefore, Canada argues, DOC was required to assess whether the evidence provided by the applicant on each of the relevant elements – home market prices, export prices and costs – were adequate, accurate and therefore sufficient, to justify initiation under Article 5.3. In Canada's view, an objective investigating authority could not have determined that the evidence on each of the necessary elements provided by the applicant was sufficient to justify initiation.

7.83 Although we agree that Article 2 provides context for the interpretation of Article 5.3, we are of the view that a clear distinction should be made between the determination of a margin of dumping according to the requirements of Article 2.2 for purposes of a preliminary or a final determination, and the evaluation of evidence of dumping for purposes of determining whether there is sufficient evidence to justify initiation of an investigation. We note that several panels have noted the difference between evidence required to initiate an anti-dumping investigation and evidence required to make an affirmative determination of dumping. For example, in *Guatemala – Cement II*, the panel stated:

> "[w]e do not mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward".[257]

7.84 We agree with the above position taken by panels on this issue, namely that the quantity and quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination of dumping.

7.85 In applying these considerations to the case before us, the issue we need to address is therefore whether an unbiased and objective investigating authority, could have come to the same conclusion as DOC did, after examining the evidence on which DOC relied for purposes of determining the sufficiency of the evidence before it in terms of Article 5.3 of the *AD Agreement*.

7.86 We will first examine the issue regarding the Weldwood data. We recall that Canada argues that the price and cost data of Weldwood, which were reasonably available to the applicant company "IP", should have been submitted in the application.[258] Canada implies that the Weldwood data were of a superior quality to that which were contained in the application and on which DOC based its decision to initiate the investigation. The position of the United States is that the information contained in the application was examined by DOC and found to be sufficient to justify the initiation

[257] Panel Report, *Guatemala – Cement II*, para. 8.35. *See* also Panel Reports, *Argentina – Poultry*, para. 7.67 (finding evidence that sales in a major market of exporting country, though not the entire country, was sufficient for initiation); and *Guatemala – Cement I*, para. 7.64 (evidence at initiation need not be of same quantity or quality as would be necessary to support preliminary or final determination).

[258] The United States did not argue that the Weldwood data was not reasonably available to the applicant.

of the investigation. According to the United States, the Weldwood data related only to one specific company and could therefore not detract from the more representative data which were actually submitted and which formed the basis for the DOC's decision regarding the sufficiency of the evidence to justify initiation of the investigation.

7.87 We recall our finding above that Article 5.2 of the *AD Agreement* requires that the application shall contain such information which is reasonably available to the applicant to substantiate its claim of, *inter alia*, alleged dumping, meaning that the application need not contain *all* information reasonably available to the applicant, but only information to support a *prima facie* case. We further note that Article 5.3 requires that the investigating authority "shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation". From the wording of Article 5.3, it is clear that the requirement is that there should be *sufficient* evidence to justify the initiation of the investigation. The requirement is therefore not to examine whether more probative evidence is reasonably available to the investigating authority, but whether an unbiased and objective investigating authority could have found that the evidence before it is sufficient to justify initiation of the investigation.

7.88 The application contained certain cost data which were constructed on the basis of part Canadian data and part US data and information, and price data sourced from *Random Lengths*, a reputable industry publication. Canada posits that actual Canadian cost data and price information were available through Weldwood. We note that the Weldwood data would have related to only one company, whereas the *Random Lengths* price information covered a large number of transactions by different sellers and could therefore be regarded as more representative. As the Weldwood data were not examined by the DOC, it is not known whether it would have shown dumping or not. Even if it is assumed that it would have shown no dumping, we are of the view that, in principle, it could not have detracted from the sufficiency of the data actually submitted in the application and the decision of DOC to base its initiation decision on that evidence. However, if the data in the application had been shown to suffer from inadequacy and inaccuracy to such an extent that an unbiased and objective investigating authority could not have found that the application in this case contained sufficient evidence to justify its decision to initiate the investigation, the Weldwood data would have become relevant.

7.89 Canada claims that, in a number of instances, the price and cost information which was submitted to DOC, and on which it relied to determine whether the evidence was sufficient, was challengeable to such an extent that an unbiased and objective investigating authority could not have found that the evidence before it was sufficient to justify the initiation of the investigation and that Article 5.3 of the *AD Agreement* was therefore violated by the United States.

7.90 Although we are mindful when examining Canada's assertions regarding the sufficiency of the evidence on which DOC based its decision to initiate an investigation, that we are not to do a *de novo* review of the facts, we are of the view that, considering Canada's challenge of various aspects of the cost and price evidence, we need to examine the specific facts of this case in some detail in order to determine whether an unbiased and objective investigating authority could have come to the same conclusion that DOC did.

7.91 According to Canada, the cost evidence in the application was flawed in a number of ways which rendered it insufficient to support the decision to initiate the investigation:

(i) Efficiencies of scale of Canadian sawmills in cost calculation

7.92 The applicant did not provide actual cost data for significant or representative Canadian producers, but based the allegations regarding the cost of BC and Quebec producers on four US mills' costs as surrogates. Canada asserts that reliance on the data regarding these four mills was justified

by "nothing more than unsubstantiated assertions about the appropriateness of the mills chosen".[259] DOC accepted the cost data on the basis on the applicant's assertions. Canada asserts that these mills were not representative of Canadian mills based on size, as the US companies chosen as surrogates for Quebec costs were less than one-tenth the size of any of the six largest Canadian companies and smaller than over 75 per cent of all Canadian companies that export to the United States. The US mills therefore could not have had the efficiencies of scale of the Canadian companies, and the applicant's cost model therefore overestimated the costs which resulted in an inflated constructed (normal) value calculation.

7.93 The United States responded that, with respect to the majority of the costs, data from US mills were used only to provide production factors, which were then valued using cost data of a Canadian producer. Canada does not dispute that these cost data were representative of Canadian costs of production. However, with regard to certain cost factors, US data were used as the basis, and then adjusted to reflect Canadian costs. According to the United States, the US mills whose information was used as surrogates in this calculation were themselves significant and representative producers of softwood lumber in the United States, two in a lumbering area in the eastern United States, and two in a major lumbering area in the western United States. Given the great disparity in size of lumber mills in both Canada and the United States, a particular US mill need not be among the largest to be both a significant and representative producer of softwood lumber for purposes of being used as a source of data representative of an equally broad range of Canadian mills.

7.94 In considering this issue, we are mindful that we are dealing with the initiation of an investigation, and furthermore, we keep in mind the Article 17.6 standard of review that we have to apply. It seems to us that Canada's argument revolves mainly around its assertion that the Canadian mills are much larger, and therefore have greater efficiencies of scale than the US mills could have. Although we agree that efficiency of scale does have an impact on cost, we also note that the applicant stated in the application that "softwood lumber manufacturing costs vary significantly by producer depending upon a number of factors, such as each producer's level of efficiency, type of equipment, physical location and wood fibre source material".[260]

7.95 In light of the nature of the lumber industry in both the United States and Canada, and the dynamic interrelationship of the different cost elements, we are of the view that it would almost be impossible for an applicant to be able to submit information to address all these variables for purposes of the initiation of an investigation. We are therefore of the view that an unbiased and objective investigating authority could have accepted the evidence of the four surrogate mills in the context of the normal value calculation in the application, and therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(ii) Calculation / allocation of costs

7.96 Canada states that DOC initiated the investigation without any evidence before it of how the applicant calculated the cost of manufacturing of the US surrogate companies for the SPF species or of how company costs were then allocated to the specific products (2x4 kiln-dried dimension or stud lumber) for which the cost models had been constructed. The United States responds that, as most costs were calculated on a per-species, per-MBF basis, the applicant followed the normal industry practice, and also that the issue of precisely how to allocate costs to products is not an issue that needed to be definitively resolved prior to initiation of the investigation.[261] Canada challenges this statement and asserts that DOC never made such a finding.[262]

[259] Canada second written submission, para. 39.
[260] Exhibit CDA-134, Application – Exhibit VI.A, p. 4-5.
[261] US second written submission, p. 9.
[262] Canada second oral (opening) statement, para. 19.

7.97 Recalling the fact that this issue relates to the initiation of the investigation and the standard of review which we have to apply, we are of the view that it cannot be expected from an investigating authority to do a cost allocation in the same way as it is required to do when making a preliminary or a final determination of dumping. We agree with the United States that the issue of precisely how to allocate costs to different products is not an issue that needs to be definitively resolved prior to initiation of an investigation – the cost allocation in any anti-dumping investigation is normally of a very contentious nature, as is also evident from this case. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(iii) Period covered by the cost model data

7.98 Canada states both the cost models constructed for Quebec and BC relied on certain manufacturing and cost data for less than a full year (2000). Canada contends that the failure to capture costs associated with a full operating cycle for the purposes of initiation is clearly insufficient. Canada asserts that home construction, and thus dimensional and stud lumber sales, is a seasonal business. According to Canada, such reliance on a period less than one fiscal year is misleading and provides a distorted view of unit production costs. There is no evidence on the record of any analysis by DOC of the adequacy of these "abbreviated" cost reporting periods.[263] The United States responded that the application contained cost data from four US mills, of which data for one covered the whole year, and taken as a whole, the data from these four mills covered the entire calendar year 2000.[264] The applicant also explained why each of the four companies provided data for particular months, mainly because those were the only periods for which the specific companies had audited data available.[265]

7.99 In considering this issue, we note that DOC had cost data which, taken together, covered a whole year, and the cost data of one company covered the whole period. Although Canada implies that the seasonality of the lumber industry would affect the information to such an extent as to render it insufficient, Canada has not proffered any arguments or evidence to substantiate this view so as to enable us to come to a conclusion that an unbiased and objective investigating authority could not have found that the information available to it was sufficient to justify initiation on this basis. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(iv) Home market sales information for Quebec as a basis to conclude that constructed value could be used to establish normal value for purposes of initiation

7.100 Canada asserts that, as DOC rejected the price information on western SPF submitted by the applicant as support for the allegation that western SPF softwood lumber was being sold below cost, there were no home market prices for western SPF available to test whether sales of this product were below cost.[266] As there were no home market prices, or surrogate prices, for sales of western SPF, there was no basis for a finding that these sales were below the calculated costs – therefore DOC could not objectively have based its decision to initiate the investigation on the constructed value comparison for eastern SPF offered by the applicant. The United States responds that Canada's argument incorrectly implies that the quality and quantity of evidence at initiation should be the same as at the conclusion of an investigation. As the application contained evidence of home market sales below cost in Quebec, it provided a basis for using constructed value to establish normal value.

[263] Canada response to question 8 of the Panel, para. 36.

[264] The mills provided cost data for the following periods: East-1: July-December 2000, East-2: January-September 2000, West-1: July-December 2000, West-2: January-December 2000.

[265] Exhibit CDA-135, Application – Exhibit VI.C-1 and Exhibit CDA-136, Application – Exhibit VI.D 1.

[266] DOC rejected the submitted price information, sourced by the applicant from the BC Ministry of Forestry's published market pricing system, as the applicant did not indicate that the prices were restricted to sales in Canada only. (Exhibit CDA-9, Initiation, p. 21330)

7.101 The issue that we need to address in this instance is whether the home market sales information for Quebec was sufficient as a basis to conclude that constructed value could be used to establish normal value for purposes of initiation. In other words, is the information on eastern SPF sufficient as a basis to determine that a constructed (normal) value should be calculated for all subject softwood lumber products. We note that a similar issue was addressed by the panel in *Argentina – Poultry* when it considered whether an application containing data on home market prices in a particular region of the exporting country was sufficient, or whether additional price data should have been submitted. The panel concluded that "it is sufficient for an investigating authority to base its decision to initiate on evidence concerning domestic sales in a major market of the exporting country subject to the investigation, without necessarily having data for sales throughout that country".[267] Although we are conscious that the facts of *Argentina – Poultry* differ from the facts of the case at hand, we nonetheless consider that they are sufficiently analogous to be relevant to our analysis here. We note that eastern SPF softwood lumber products constitute one of the two major categories into which the subject product was divided, and we are of the view that there is no requirement that evidence of dumping of all categories or sub-sets of the imported product is necessary to justify a decision to initiate. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(v) Evidence on prices of domestic sales transactions

7.102 According to Canada, DOC initiated the investigation despite the fact that the application did not contain evidence of actual sales transactions involving identified Canadian companies in the domestic Canadian market. The evidence on prices consisted of estimates from an industry publication, *Random Lengths*, which in some instances commingled Canadian and US price data. Canada states that the *Random Lengths* data could therefore not have been regarded as sufficient to justify the initiation of the investigation. The United States contests these allegations and asserts that the *Random Lengths* data are based on actual prices and that the data do not commingle US and Canadian data.

7.103 We note that there is no disagreement between the parties regarding the reliability of the *Random Lengths* data as such. Rather, they disagree as to whether the data refer to prices or informal estimates of prices, and whether they commingle US and Canadian price data.

7.104 We note that *Random Lengths* explains how it determines the reported price information as follows:

> "[t]he staff conducts hundreds of telephone interviews with sellers and buyers each week. (…) Information is also obtained via e-mail and fax.
>
> Based on information gathered from these sources, we determine the prices that appear in the Random Lengths price Guide. These prices reflect sales from producers to their customers.
>
> Because of these variables, a price reported in Random Lengths is not the only price at which an item has traded. Each price shown falls within the range of prices reported by our sources. A reported price is a representative trading level for the item just prior to publication. The reported prices reflect levels at which stock has actually traded between manufacturers and their customers.
>
> But keep in mind that there is no single price that can fully describe the market for an item at a given moment, let alone on weekly basis. (…) Only through our telephone

[267] Panel Report, *Argentina – Poultry*, para. 7.67.

> interviews can the many variables be tracked and accounted for in determining the representative prices that are reported in the Price Guide"[268],

and:

> "[a] price reported by Random Lengths is a benchmark, or indicator, of the general trading level of an item at the time of publication.
>
> A reported price is not an arithmetic average of the prices reported to the Random Lengths staff. It is not the price for the item for the week following publication (that is, it is not a projected price for future transactions). It is not the only price at which transactions took place during the week of publication.
>
> Prices reported in Random Lengths represent transactions between manufacturers and their customers.".[269]

7.105 After considering these explanations on how the *Random Lengths* price information is actually collected and reflected in the weekly publication, we are of the view that the published price information, although it reflects a number of sales, and is not related to a specific sale, does reflect actual sales prices that indicate price levels at which softwood lumber has actually traded between manufacturers and their customers. Thus, in our view, the *Random Lengths* data certainly qualifies as the type of price information contemplated in Article 5.2(iii) of the *AD Agreement*. We are furthermore of the view that, in the case of a commodity product, such as softwood lumber, a reputable industry price publication, covering a wide range of products, with price data over a period of time, might be preferable as a more representative source of price information than price data sourced from a single exporter or importer.

7.106 Canada also asserts that the *Random Lengths* data commingle US data with Canadian data[270], as *Random Lengths* defines eastern SPF as:

> "[l]umber of the Spruce-Pine-Fir group produced in the eastern provinces of Canada, including Saskatchewan and Manitoba. Also used in references to some lumber produced in the northeastern United States".[271]

7.107 The United States counters this statement by referring to a letter received from the publishers of *Random Lengths* which states:

> "[e]astern S-P-F prices reported in the weekly Random Lengths Price Guides are representative of lumber produced in the Eastern Canadian provinces".[272]

7.108 According to the United States, this definition itself reflects the fact that the *primary* meaning of the term SPF is limited to certain Canadian-produced lumber. Its use as a "term of the trade" in connection with US-produced lumber is not only secondary, but also separate. As confirmation of this interpretation by the United States, the United States referred to a letter from *Random Lengths* which had been placed on the record of the case in a submission made by the applicant, which states:

> "[w]e do receive information about production and prices of S-P-F dimension coming out of mills in the New England states. However, as we discussed, the current

[268] Exhibit CDA-133, Random Lengths – How Reported Prices are Determined, p. 1.
[269] *Id.*, p. 6.
[270] Canada first oral (opening) statement, para. 23.
[271] Exhibit CDA-147, Application – Exhibit III.9, p. 114.
[272] Exhibit US-1 mistakenly included a different submission made by the applicant on the same date. The United States provided the correct record document to the Panel as Exhibit US-60, p. 79.

> grading rules require that this output be designated as "SPF-S". (…) While "SPF-S" sales and prices can and do affect "Eastern S-P-F" prices and markets, we focus our information gathering and price reporting on Eastern S-P-F coming out of Eastern Canadian sawmills".[273]

7.109 Canada interprets the word "focus" as indicating an "unexplained degree of focus on Canadian data" which would lead an objective investigating authority to determine that these data should be rejected in considering whether to initiate an anti-dumping investigation.[274]

7.110 According to the United States, however, the combination of evidence shows that *Random Lengths* recognizes a market distinction between Canadian-produced and US-produced SPF and does not commingle data on the Canadian-produced "Eastern S-P-F" with data on US-produced (Eastern) "S-P-F-south" lumber.[275]

7.111 Taking the facts into account, as well as that this issue relates to the initiation of the investigation, and as it is clear to us that the investigating authority considered this matter carefully, and requested clarification from the applicant[276], with which it was satisfied, we are of the view that an unbiased and objective investigating authority could reasonably have concluded that the potential for commingling of the data did not detract from its reliability for purposes of initiation.

7.112 We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(vi) Affidavits containing export price information

7.113 Canada asserts that the two affidavits on export price information submitted by the applicant and relied upon by DOC for purposes of initiation of the investigation were inadequate. With respect to the affidavit containing BC price information, the "price quote" refers to a price quote for western SPF from a trading company and does not identify any individual Canadian producer or exporter as the supplier of the product.[277] According to Canada, neither a Canadian producer/exporter, nor a US company affiliated with a Canadian producer/exporter provided the quote. With respect to the affidavit containing a "price quote" for Quebec sales, it does not identify a Canadian producer as the seller of the merchandise, identifies no buyer and contains little information about the terms of the sale.[278] According to Canada, these price quotes are little more than unsubstantiated assertions which an objective investigating authority would have rejected as a basis for initiation of an investigation.

7.114 The United States asserts that the affidavit containing the BC price information was made by a knowledgeable industry source testifying to an offer from a US trading company for Canadian western SPF kiln-dried random length 2x4s from the interior of BC for sale in March 2001 at a delivered price to a specified destination in the US market.[279] The affidavit also contained information on the historical mark-up received by lumber wholesalers, and on the likely means of shipment. The "lost sales" affidavit regarding price information from Quebec was, according to the United States, from a US lumber producer reporting four separate instances in which the affiant lost sales on 15 December 2000 as the potential buyers reported that Quebec producers offered eastern SPF kiln-dried 2x4s in mid-December 2000 at the board foot price as reflected in the affidavit, which

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[273] *Ibid*.

[274] Canada second written submission, para. 54.

[275] US response to question 15 of the Panel, para. 23.

[276] Exhibit CDA-86, Letter from DOC to the applicant requesting information/clarification; and Exhibit CDA-40, Applicant's response.

[277] Exhibit US-16, Application – Exhibit VI.D-14.

[278] Canada second written submission, paras. 55-56.

[279] US first written submission, para. 59; Exhibit CDA-10, Initiation Checklist; and Exhibit US-16, Application – Exhibit VI.D-14.

was lower that the affiant's price, with the terms of sale being the same, being FOB-Boston for both products.

7.115 As it is not clear to us whether the Canadian claim rests on the fact that the affidavits were relied upon as evidence, or on the fact that certain information in the affidavits was not disclosed to interested parties, we will address both issues.

7.116 We consider first the question whether an affidavit can be regarded as evidence regarding prices for purposes of the decision whether to initiate an investigation. We note that the *AD Agreement* does not prescribe the nature and form of the information or evidence applicants are required to submit, and which the investigating authority must consider in deciding whether to initiate an investigation. We note the statement by the United States that:

> "[a]ffidavits from persons in the industry are frequently used in petitions to present company or industry information. The reliability of the information derives not only from the fact that it is sworn testimony, but also, in a different sense, from the fact that an affiant's professional position and expertise in the industry gives that person access to such information and permits that person to speak credibly to general industry practices";[280]

and that:

> "'[l]ost sales' affidavits are another common way of establishing prices of merchandise imported into the United States. One way in which a producer may learn of non-published prices being quoted by foreign competitors in the U.S. market is when habitual customers advise that the same goods are available at a given lower price from the foreign competitor. Such communications may permit the domestic producer to try to match that price, but if it is unable to sell that low, this can also become evidence of both export prices and injury."[281]

7.117 We note that the *AD Agreement* does not contain any guidance on this issue and that affidavits are accepted in the legal systems of many jurisdictions as evidence. In light of the explanations submitted by the United States, we therefore see no reason why affidavits regarding price information may not be considered as relevant evidence in deciding whether there is sufficient evidence to justify the initiation of the investigation.

7.118 On the second issue, that is, the non-disclosure of certain information regarded as confidential by the investigating authority, we note the following explanation submitted by the United States:

> "[a]s is generally the case, to avoid retaliation, the name, affiliation, location and other potential identifying characteristics of the affiant, as well as proprietary details with respect to the transactions at issue are given only in the Business Confidential versions of the exhibits. The United States has provided only the public versions of such documents, as they are sufficient to demonstrate the nature of the evidence contained in the Business Confidential versions, and because Canada has never contested the *bona fides* of the confidential affiant."[282]

7.119 We note that Article 6.5 of the *AD Agreement* specifically requires the non-disclosure of confidential information, as follows:

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[280] US first written submission, para. 61, note 60.
[281] *Id.*, para. 60, note 62.
[282] *Id.*, para. 59, note 60.

> "[a]ny information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it." (footnote omitted)

7.120 Canada has made no assertion that the information that was not disclosed was incorrectly deemed confidential by the DOC in this instance. Nor has Canada provided us with any evidence or arguments that would suggest that the information contained in the affidavits is untrue and therefore not reliable. In examining the affidavits at issue[283], we note that the information disclosed, indicates the dates, the products, the origin of the products as Canada, the terms of sale and prices. The only information deleted from the confidential versions of the affidavits are the names of the affiants, their positions, their employers, and, in one case, who made the offer to sell. In our view, all the information material to the issue has been disclosed. In these circumstances, we can see no basis for a conclusion that the obligatory non-disclosure of certain confidential information in the affidavits somehow undermined their reliability or relevance as evidence of prices. If Canada is of the view that the affidavits contain false or misleading information, we are of the view that they should have pursued the matter in the appropriate forum in the United States. Canada did not submit any evidence to this effect. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation of the investigation on this basis.

(vii) Price information covered only two categories of softwood lumber

7.121 Canada claims that the application contained price information only on two of the seven categories of softwood lumber identified by the applicant. The seven categories are: (1) studs; (2) boards; (3) dimension lumber; (4) timbers; (5) stress grades; (6) selects, and (7) shop.[284] Pricing information and dumping calculations in the application, and on which DOC based its decision to initiate an investigation, covered only two narrowly defined products, namely, SPF 2x4 kiln-dried dimension lumber, and SPF kiln-dried stud lumber, although the applicant requested DOC to initiate an investigation covering numerous softwood lumber products.[285] Canada therefore asserts that the evidence was not sufficient for purposes of an Article 5.3 determination.

7.122 The United States asserts that, as there is no obligation to treat each "category as a separate product under consideration, it had no obligation to find evidence of dumping in each category in order to initiate an investigation."[286]

7.123 Article 5.3 requires that, at initiation, there must be sufficient evidence of dumping of the product as a whole that an unbiased and objective investigating authority could conclude that there was sufficient evidence to justify initiation. Clearly, evidence of dumping regarding an insignificant sub-set of the imported product would not be sufficient in this context, an argument not made by Canada. We note that, in the case at hand, the categories for which pricing information was submitted, including 2x4s kiln-dried dimension softwood lumber and 2x4 kiln-dried studs, falls within commonly traded softwood lumber product categories which together form the product under investigation.[287] We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

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[283] Exhibits US-16, Application – Exhibit VI.D-14, and Exhibit CDA-45.
[284] Exhibit CDA-36, Application – Volume I.
[285] Canada response to question 8 of the Panel, para. 29.
[286] US second written submission, para. 20.
[287] US first written submission, paras. 52 and 58.

(viii) Information on freight costs

7.124 Canada asserts that the application did not contain adequate information regarding freight costs.[288] Although freight is a significant component of the price for lumber, Canada asserts that the application lacked reasonably obtainable Canadian freight information from either of the two Canadian national railways and instead relied on freight information that was not even for Canadian rail or international freight. Canada cites the following examples in support of its allegation:

- In the case of Quebec, DOC relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces. In doing so, it included freight costs unrelated to transport between Quebec and the United States.[289] There was also no evidence to support the applicant's allegation that truck rather than rail is used by Quebec producers to ship lumber.

- In the case of BC, DOC relied on an affidavit indicating that rail freight charges incurred for what appears to be a Southern-Yellow-Pine shipment which weighs considerably more than the WSPF for which the applicant purported to be creating a cost model.[290]

7.125 The United States responds that the relevant exhibit simply provided a rate for truck freight, one of the shipment methods used, based on the affiant's experience in using truck freight for softwood lumber in the region in question. As no evidence was submitted to DOC that the producers ship lumber only by rail, or predominantly by rail, the evidence was adequate for purposes of initiation. With regard to the allegation about the differences in weight between western SPF and the heavier southern Yellow Pine, the United States asserts that the affidavit provided a rail freight rate for softwood lumber.[291] The United States stated further that it was not necessary for DOC to search out information on the relative weights of different groups of pines, all of which are softwood lumber, for purposes of initiation of an investigation.[292] On the issue of the freight costs from the Maritime Provinces, the United States contends that the freight affidavit that Canada relies upon provides separate per-MBF freight rates for shipment to Boston from four regions, one of which is the Maritime Provinces. The average per-MBF freight cost DOC relied upon for sales from Quebec to the United States was US$29, the average of the cost for shipment from Northern Quebec, Southern Quebec and the Gaspe Peninsula (also part of Quebec). Had the cost for the Maritime Provinces been included, the average would have been US$30 per MBF.[293]

7.126 We note that nothing before the investigating authority indicated that only rail was used to transport softwood lumber, or even that rail was mostly used. In these circumstances, we consider that an objective and unbiased investigating authority could reasonably have relied on information regarding truck freight rates in the context of an initiation determination. In addition, it seems clear that the inclusion of some freight costs for transport of US produced lumber did not materially affect the information relied upon. We therefore conclude that an unbiased and objective investigating authority could reasonably have concluded that the information was sufficient to justify initiation on this basis. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

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[288] Canada response to question 8 of the Panel, paras. 39-42.

[289] Exhibit CDA-41, Application – Exhibit VI.C-9.

[290] Exhibit CDA-40, Application Amendments, Attachment 1 "Average MBF per rail car is 92,160 MBF. Average weight is approximately 195,000 lbs", and Exhibit CDA-51, Request for Termination, pp. 29-30.

[291] US second written submission, para. 31.

[292] We also note the following statement by the United States in para. 31 of its second written submission: "…the freight calculation was conservatively based on costs for transport over significantly shorter distances than those for delivery of the US sales in the application (including from the interior of BC to Chicago (at least 1800 miles) and to Atlanta (at least 2444 miles))".

[293] US second written submission, para. 32.

(ix) Conclusion

7.127 After examining Canada's assertions regarding the sufficiency of the information contained in the application and on which DOC based its decision to initiate the investigation, and considering our comments above regarding the nature of the obligations under Articles 5.2 and 5.3 of the *AD Agreement*, we conclude that an unbiased and objective investigating authority could have concluded that there was sufficient evidence on dumping in the application to justify the initiation of the softwood lumber anti-dumping investigation at issue. We therefore find that the United States has not violated the provisions of Article 5.3 of the *AD Agreement*.

F. CLAIM 3: ARTICLE 5.8 – "SUFFICIENCY OF EVIDENCE" OF DUMPING AT AND AFTER INITIATION OF INVESTIGATION

(a) Factual Background

7.128 DOC initiated the anti-dumping investigation on the basis of the evidence submitted to it by the applicant and did not terminate the investigation once it became known to DOC that Weldwood, a major Canadian producer and exporter of softwood lumber, was wholly-owned by IP, one of the applicant US producers.

(b) Arguments of the Parties/Third Parties

7.129 **Canada** argues that Article 5.8 applies both prior to initiation and throughout the investigation. Canada claims that DOC failed, after initiation, in its ongoing obligation to assess the sufficiency of the evidence of dumping and to terminate the investigation.[294] Canada asserts that, although evidence might have been judged sufficient at the time of initiation, it does not mean that throughout the investigation there necessarily is sufficient evidence to justify proceeding with the investigation. DOC was notified by the respondents of the deficiencies in the application resulting from the omission of the Weldwood pricing information. An objective judgement of the sufficiency of the evidence of dumping required DOC to take into account the impact of this omission, which was not done. The relevance of evidence should not be prejudged without first having given proper consideration to that evidence. Canada therefore claims that DOC acted inconsistently with Article 5.8 as an objective judgement of the sufficiency of the evidence was not done once the more probative information was brought to the attention of DOC.

7.130 The **United States** asserts that, as the Weldwood data were not necessary to support either DOC's initiation, or its continuation, of the investigation, Canada's claim that DOC was required to terminate the investigation once DOC became aware of the IP/Weldwood relationship, and therefore the availability of Weldwood price information, has no support in Article 5.8. According to the United States, the application contained sufficient information to justify the initiation of the investigation and the availability of the Weldwood data did not and could not render inadequate the information initially provided to DOC by the applicant. DOC's decision not to terminate the investigation is therefore consistent with Article 5.8.

7.131 According to the **EC**, as third party to the proceedings, Article 5.8 distinguishes two scenarios: either the application did not contain sufficient evidence in which case it should be rejected; or during the investigation it becomes apparent that evidence is insufficient thus requiring a prompt termination of the proceedings. On the first scenario, the EC argues that before an investigation is initiated Articles 5.3 and 5.8 of the AD *Agreement* have the same scope of application with regard to the question of whether there is 'sufficient evidence'. As to the second alternative, i.e., after initiation, it is evident that the investigation must reveal "sufficient evidence" of dumping, injury and a causal link to proceed with the investigation. If the investigation fails to produce this evidence,

[294] Canada second written submission, para. 58.

the authorities should terminate the examination as promptly as possible. Under this scenario, the question of whether "sufficient evidence" exists would have to be adjudicated in a more flexible way depending on the respective state of investigation.

(c) Evaluation by the Panel

7.132 The primary issue before us, is whether Article 5.8 of the *AD Agreement* imposes an ongoing obligation on an investigating authority to examine the sufficiency of the evidence on which its decision to initiate the investigation was based during subsequent stages of the investigation and to terminate the investigation, if it has concluded that the evidence on which the initiation decision was based, was not sufficient in light of additional information which has come to light.

7.133 Article 5.8 of the *AD Agreement* provides in relevant part as follows:

> "[a]n application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

7.134 From the wording of Article 5.8, it is clear that it addresses two situations. The first one addressing the situation where the application is to be rejected before the initiation of the investigation, and the second dealing with the termination of the investigation after it has been initiated. In addressing the first part of Canada's claim, relating to the initiation of the investigation, we note that a similar issue, was addressed by the panel in *Mexico – Corn Syrup*. That panel stated the following regarding the obligations under Article 5.8, after having found no violation of Article 5.3:

> "[i]n our view, Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of the investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application."[295]

7.135 We agree with this statement. As we found that an unbiased and objective investigating authority could have found that there was sufficient evidence to justify the initiation of the investigation, and that the United States has therefore not violated Article 5.3, we find that the United States has not violated Article 5.8 with regard to the initiation of the investigation.

7.136 We now turn to the second part of Canada's claim, that is, whether DOC should have terminated the investigation on the basis that more "probative" evidence available in the form of the Weldwood data, rendered the evidence on the basis of which DOC justified the initiation of the investigation insufficient, and that the investigation should have been terminated in terms of Article 5.8 of the *AD Agreement*.

7.137 When examining the plain meaning of the relevant text of Article 5.8, we note that it states that "an investigation shall be terminated as soon as *the authorities concerned are satisfied that there is not sufficient evidence of dumping*". (emphasis added) In our view, this means that the investigating authority has to terminate the investigation, as soon as it is satisfied that its *investigation* shows that there is not sufficient evidence of dumping. We can however find no basis to conclude that Article 5.8 imposes upon an investigating authority a continuing obligation after initiation to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence. Once an investigation has been initiated on the basis of sufficient evidence of dumping, the application has

[295] Panel Report, *Mexico – Corn Syrup*, para. 7.99; confirmed by Panel Report, *Guatemala – Cement II*, paras. 8.72 *et seq.*

served its purpose. Logically, the continuing obligation to terminate an investigation where an investigating authority is satisfied that there is not sufficient evidence to justify proceeding must be based on an assessment of the overall state of the evidence deduced before it in the investigation, not on an assessment of the continuing sufficiency of the information in the application. We are of the view that it could not have been the intention of the drafters of Article 5.8 that its interpretation could result in that an investigation could have been initiated on the basis of sufficient evidence, but that the very same investigation had to be terminated if additional evidence was made available by the respondents at a later stage, while the evidence being gathered during the course of the investigation, indicates dumping.

7.138 Canada's claim of a violation of Article 5.8 therefore fails.

G. CLAIM 4: ARTICLE 2.6 - "LIKE PRODUCT" AND "PRODUCT UNDER CONSIDERATION"

(a) Factual Background

7.139 The final scope of the anti-dumping duty order was determined by DOC to be as follows:

> "[t]he products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090 and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:
>
> > (1) coniferous wood, sawn or chipped lengthwise, slice or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimetres;
> >
> > (2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;
> >
> > (3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and
> >
> > (4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed."[296]

(b) Arguments of the Parties

7.140 **Canada** claims that DOC erroneously determined there to be a single like product notwithstanding the disparate nature of the softwood lumber products covered by the investigation. This claim is grounded in Article 2.6, in particular, the ordinary meaning of the words "characteristics

[296] Exhibit CDA-3, Amended Final Determination, p. 36068.

closely resembling". Canada's position is that the group of products within the "like product" as defined by DOC did not have "characteristics closely resembling" those of the group of products in the "product under consideration". The facts of the case before DOC demonstrated that bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar did not have characteristics closely resembling those of the product under consideration and, therefore, should have been dealt with separately. Non-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *AD Agreement*, e.g., Articles 5.1, 5.2, and 5.4.[297]

7.141 Canada asserts that an application must identify the proposed "product under consideration". Article 2.6 expressly requires that a like product be "identical" to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. According to Canada, the plain language of Article 2.6 suggests a multi-step approach: *First*, the investigating authority must identify the characteristics of the product under consideration. *Second*, it must identify the characteristics of each product proposed for inclusion in the like product. *Third*, it must determine whether the characteristics of each are identical or, if not, then closely resembling those of the product under consideration.

7.142 According to Canada, DOC never defined the characteristics of the product under consideration, nor did DOC compare the characteristics of each challenged product with those of the product under consideration as a whole. Instead, DOC identified as subsets of the product under consideration various softwood lumber products. It then compared isolated characteristics of each challenged Canadian product to isolated characteristics of products selected from within the "product under consideration", considered to be "like" the challenged products. That analysis failed to establish the single, closely resembling, "like product" required by Article 2.6. No "close resemblance" exemplified by a set of shared common characteristics was established between the challenged products and the product under consideration.

7.143 Canada further asserts that a failure to define the like product in accordance with the criteria of Article 2.6 means also that the product under consideration has not been properly defined. This leads to other violations of the *AD Agreement*. The investigating authority must assess industry support and the other application requirements of Articles 5.2, 5.3, and 5.4 separately for each like product. Should those requirements not be met with respect to a like product, the investigating authority may not initiate an investigation with respect to the product under consideration and must redefine the scope of the product under consideration.

7.144 According to the **United States,** Canada cites no provision of the *AD Agreement* governing the way in which an investigating authority must define the product under investigation. Therefore Canada has not identified an obligation arising out of Article 2.6 of the *AD Agreement* that the United States violated in this case. Instead, it asserts the existence of an obligation to explain how different articles within the product under consideration "closely resemble each other" and asserts that DOC has violated that obligation.[298] The United States posits that the *AD Agreement* contains no rules on how the product under investigation should be defined and that Canada has therefore not made a *prima facie* case of a violation of a provision of the *AD Agreement*.

(c) Evaluation by the Panel

7.145 We first note that Canada's claim, as set out in its Panel Request, is posited on violations of Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *AD Agreement* and Article VI:1 of *GATT 1994*.[299]

[297] Canada response to question 1 of the Panel, para. 1(iii).
[298] Canada first written submission, para. 125.
[299] WT/DS264/2.

However, in response to a question from the Panel, Canada restated its claim as based on Article 2.6 of the *AD Agreement* only, with consequential violations of "*e.g.*, Articles 5.1, 5.2, and 5.4".[300]

7.146 We note that Article 2.6 is a definitional article, and as such it is not clear to us that it contains *in itself* obligations on Members, or in any event that it could be the basis for an *independent* violation. On the other hand, it appears to us that Canada's claim is predicated on the proposition that DOC took an approach to the definition of like product which deviated from that in Article 2.6. Thus, a threshold and potentially dispositive issue is whether DOC in fact took an approach to like product which deviated from that of Article 2.6. In the event that we were to determine that it did not, Canada's claim would fail with regard to the consequential violations.[301] Accordingly, we turn to an examination of Article 2.6.

7.147 Article 2.6 of the *AD Agreement* provides as follows:

> "[t]hroughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

7.148 From the wording of Article 2.6, it is clear that it addresses the issue of the definition of the product which is to be regarded as "alike" to the product under consideration. The question then arises as to what is the product referred to as the "product under consideration"?

7.149 We find guidance on this issue in the wording of Article 2.1 of the *AD Agreement*, which provides in relevant part as follows:

> "[f]or the purpose of the Agreement, a product is to be considered as being dumped, (...) if the export price of the product exported from one country to another is less that the comparable price, in the ordinary course of trade, for *the like product when destined for consumption in the exporting country*." (emphasis added)

7.150 We note that similar terminology is used in the relevant provisions of the *AD Agreement* dealing with the injury analysis – Article 3.1 of the *AD Agreement* states that:

> "[a] determination of injury ... shall be based on positive evidence and involve an objective examination of both (a) the volume of the *dumped imports* and the *effect of the dumped imports on prices in the domestic market for like products*, and (b) the consequent impact of these imports on domestic producers of such products." (emphasis added)

7.151 More generally, the term "domestic industry" in Article 4.1 of the *AD Agreement* is defined in relevant part as referring to "domestic producers as a whole *of the like product*, or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products…". Similarly, Article 5.4 provides that an investigation is not to be initiated unless the investigating authority determines, "on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers *of the like product*" that the application has been made by or on behalf of the domestic industry. (emphasis added, footnote omitted)

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[300] Canada response to question 1 of the Panel, para. 1(iii).

[301] In light of this, we will not address at this stage the exact provisions included in our mandate with regard to the alleged consequential violations (*see* paras. 7.22-7.30, *supra*).

7.152 In our view, this means that the "like product", for purposes of the dumping determination, is the product which is destined for consumption in the exporting country. The "like product" is therefore to be compared with the allegedly dumped product, which is generally referred to in the *AD Agreement* as the "product under consideration".[302] In the case of the injury determination (and the determination of domestic industry support for the application), the word "like product" refers to the product being produced by the domestic industry allegedly being injured by the dumped product. In both instances it is clear that the starting point can only be the product allegedly being dumped and that the product to be compared to it for purposes of the dumping determination, and the product the producers of which are allegedly being injured by the dumped product, is the "like product" for purposes of the dumping and injury determinations, respectively.

7.153 Article 2.6 therefore defines the basis on which the product to be compared to the "product under consideration" is to be determined, that is, a product which is either identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of "like product" implies a comparison with another product, it seems clear to us that the starting point can only be the "other product", being the allegedly dumped product. Therefore, once the product under consideration is defined, the "like product" to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the "product under consideration" should be determined.

7.154 DOC defined the product allegedly being dumped, and therefore the "product under consideration", as certain softwood lumber, flooring and siding (softwood lumber products), as fully described in the Notice of Initiation.[303] During the course of the investigation, DOC considered a number of requests to exclude certain products from the investigation. According to the United States, these scope-related "requests could be classified into one of two categories: (1) scope exclusion requests, and (2) scope exclusion requests premised upon the theory that various products constitute separate classes or kinds of merchandise when analyzed under the *Diversified Products* criteria, and as such, are outside the scope of the petition".[304] As a result of these requests, certain softwood lumber products were excluded from the scope of the investigation.[305] DOC did not, however, exclude bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar from the scope of the investigation.

7.155 We note that Canada is not claiming that any of the individual softwood lumber products, constituting collectively the product under consideration, were not identical, or not having characteristics closely resembling those of the product under consideration when taken on an individual basis. In fact, we do not understand Canada to argue that, having determined the product under consideration, DOC defined the "like product" differently in any respect. Canada's argument is rather that the range of products included in the scope of the investigation, being the product under consideration, was so broad that all the individual products, constituting collectively the "like product", were not alike to each and every of the products collectively forming the product under consideration as they did not have characteristics closely resembling those of each and every of the

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[302] *See* also footnote 2 to the *AD Agreement* which states:

> "[s]ales of the *like product* destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of *the product under consideration* to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison". (emphasis added)

[303] Exhibit CDA-9, Initiation.
[304] Exhibit CDA 2, IDM, p. 139.
[305] *Id.*, p. 141 and note 391.

individual products constituting collectively the product under consideration. In particular, it considers that DOC should for this reason have excluded bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar from the scope of the investigation.

7.156 As stated in paragraph 7.153, *supra*, we could find no explicit guidance in the *AD Agreement* as to how the investigating authority should define the product under consideration. In this case, DOC defined the product under consideration, certain softwood lumber, on the basis of a technical definition involving narrative description and tariff classification. For the purpose of establishing normal value, DOC based itself upon goods destined for consumption in the exporting country which fell within exactly the same definition. Similarly, when considering whether the application was made by, or on behalf of, the domestic industry, DOC identified the domestic industry on the basis of the same definition. Canada has not identified any instance in which DOC has defined the like product differently than it has defined the product under consideration. Specifically, Canada has not suggested that there was any difference between the product under consideration and the like product in respect of bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar. In other words, having defined the "product under consideration", it seems to us that DOC has used an identical definition for the "like product".[306] In particular, both the product under consideration and the like product included the products Canada argues should have been excluded from the investigation. On its face, therefore, it would appear that DOC has defined the "like product" in this investigation in a manner consistent with the definition found in Article 2.6.

7.157 Canada has a different interpretation of Article 2.6. In effect, Canada considers that, rather than comparing the overall scope of the product under consideration with the overall scope of the like product, Article 2.6 requires that each individual item within the "like product" must be "like" each individual item within the "product under consideration". This in effect means that there must be "likeness" within both the product under consideration and within the like product. As Canada itself has stated, "[t]he terms 'product under consideration' and 'like product' must be limited to a single group of products sharing characteristics".[307] Once again, however, we see no basis to imply such a condition into the *AD Agreement.* While there might be room for discussion as to whether such an approach might be an appropriate one from a policy perspective, whether to require such an approach is a matter for the Members to address through negotiations. It is not our role as a panel to create obligations which cannot clearly be found in the *AD Agreement* itself.

7.158 In light of our analysis, we conclude that the DOC's approach to "like product" was not inconsistent with the definition of "like product" in Article 2.6 of the *AD Agreement.* We further note that all Canada's claims regarding this issue are dependent upon the proposition that DOC deviated from the approach to "like product" set forth in Article 2.6. Accordingly, we conclude that Canada has failed to establish that the United States has acted inconsistently with Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *AD Agreement* and Article VI:1 of *GATT 1994* by failing to exclude bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar from the scope of the investigation.[308]

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[306] As opposed, for example, to defining the product under consideration as lighters and the like product as including both lighters and matches.

[307] Canada first oral (opening) statement, para. 33.

[308] We note that Canada's arguments regarding an alleged violation of Article 2.6 of the *AD Agreement* with regard to the non-exclusion of these products from the scope of the investigation as not being "like products" are based exclusively on the application of the *Diversified Products Doctrine*, a legal concept developed through US domestic courts of law as a methodology to assist DOC in defining the product under consideration in each investigation. As we have found that the *AD Agreement* does not contain any guidance on how the product under investigation should be defined, and as the *Diversified Products Doctrine* is a domestic legal doctrine in the United States, there is no need for us to address the issue whether DOC followed its domestic procedures with regard to these products.

H. CLAIM 5: ARTICLE 2.4 – ADJUSTMENT FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS

(a) Factual Background

7.159 At the outset of the investigation, DOC established – in consultation with the parties – the distinguishing physical characteristics of softwood lumber in order to match products sold in the home market with those exported to the United States. These characteristics were as follows: (1) product category; (2) species; (3) grade group; (4) grade; (5) moisture content; (6) thickness; (7) width; (8) length; (9) surface finish; (10) end trimming; and, (11) further processing. Only where lumber shared the above 11 characteristics was a particular type considered to have *identical* physical characteristics. In the Preliminary Determination, DOC carried out price-to-price[309] comparisons of *identical* types of softwood lumber. For comparisons of *non*-identical types, DOC first attempted to adjust normal value by the net difference in the variable manufacturing costs associated with the differences in the physical characteristics of the two products compared.[310] However, there were a number of actual physical differences between products for which respondents were unable to identify a cost difference.[311] In view of the above, DOC determined that "it [was] not appropriate to match products that do not have the following identical physical characteristics: grade, thickness, width and length."[312] For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases. DOC's approach changed at the definitive stage. At the request of some Canadian exporters, DOC acceded to extend price-to-price comparisons to *non*-identical types. Several Canadian exporters argued that, were DOC to compare *non*-identical types, DOC should make an adjustment for differences in thickness, width, and length (or collectively "differences in dimension").[313] For the reasons explained in the IDM, DOC did not make this adjustment:

> "[a]s the parties have noted, this case involves among the most complex product comparisons [DOC] has faced. Where we do not have identical home market sales within the ordinary course of trade, we have attempted to base normal value on sales of the most similar product and we have attempted to adjust for such physical differences where we have adequate information to do so. Section 773(a)(6)(C)(ii) of the Act provides for an adjustment to normal value for differences in the physical characteristics of the products being compared. The statute grants [DOC] discretion to determine a suitable method to calculate a difmer adjustment and does not restrict [DOC]'s selection of an appropriate methodology to any particular approach. See, e.g., *NTN Bearing Corp. of Am. v. United States*, Slip Op. 2002-07 (CIT, January 24, 2002) at 130.

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[309] By "price-to-price" we refer to comparisons of normal values based on home market (Canadian) lumber prices with export prices to the United States.

[310] Exhibit CDA-11, Preliminary Determination, p. 56,066. *See* also Exhibit CDA-2, Comment 8, p. 51.

[311] *Ibid.*

[312] *Ibid.*

[313] The standard unit of measure in the North American lumber industry is a "board foot". A board foot is the equivalent of a piece of wood 1 inch thick, 12 inches wide, and 1 foot long. In other words, a board foot is 1 square foot of lumber, 1 inch thick. Softwood lumber is therefore commonly measured and sold in terms of volume, usually in thousand board feet, MBF, rather than in pieces of any given dimension (Exhibit CDA-30, "Buying and Selling Softwood Lumber", p. 2). It should also be noted that lumber is extracted from logs, the lumber is then converted into lumber products in a sawmill. The different lumber products resulting from this production process are joint products, as a single process yields multiple products simultaneously. How a piece of lumber is eventually deconstructed into its composite products will to some degree depend, *inter alia*, on market demand. In other words, the same piece of lumber can be deconstructed into different sets of products, depending on the demand and prices of the products which can be produced from the piece of lumber.

As explained in the *Preliminary Determination* and in *Policy Bulletin 92.2: Differences in Merchandise; 20% Rule* (July 29, 1992), [DOC] has "rarely been able to determine the direct price effect of a difference in merchandise". As a result, difmer "adjustments are based almost exclusively on the cost of the physical difference". [DOC] ordinarily calculates its difmer adjustment on the basis of differences in the variable costs of manufacturing between products given that, in the typical antidumping investigation, [DOC] has found that such data approximates the effect that differences in physical characteristics have on product prices. Nevertheless, in addressing comments to its proposed regulations in 1997, [DOC] specifically retained language preserving, as an option, the use of market value in measuring a difmer. We acknowledge that there may be circumstances in which a difmer based on market value may be appropriate. Specifically in this case, where products have differences in dimension (i.e., length, width or thickness) we recognize that these physical differences could result in differences in market value. However, we have concluded in this case that there is no information on the record by which we can calculate a difmer adjustment to account for differences in dimension based either on cost or value.

We disagree with certain respondents' suggestions on how to quantify a value-based difmer adjustment in this case. First, we note that the *Random Lengths* data do not cover all of the products for which an adjustment would be required. Second, as we stated in the *Preliminary Determination*, we do not believe it would be appropriate to use the respondents' prices as a basis for calculating a difmer adjustment where there were home market sales outside the ordinary course of trade during the POI for certain products involved here. To do so would adjust normal values back to prices already determined to be outside the ordinary course of trade, the whole reason why we would be disregarding such prices and comparing to a similar product. Therefore, no value-based difmer adjustment could be calculated for many of the comparisons based on POI sales.

(…)

In the *Final Determination*, as a consequence of our having made a value-based cost allocation for wood and sawmill costs (see Comment 4), [DOC] is now able to make a difmer adjustment for differences in grade. As a result, the only physical differences remaining for which a difmer adjustment was potentially necessary were differences in dimension. Regarding dimensions, however, we have determined that no difmer adjustment is appropriate, given that there is no basis for calculating a difmer for dimensions based on value or cost. There are no cost-based differences with which to calculate a difmer for dimensional differences. Also, for the reasons discussed above, we have not used a value-based difmer. However, in this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as Abitibi argued, the record shows that lumber prices for different products fluctuated in relation to each other over the course of the POI. Consequently, there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared, especially where those dimensional differences were minor.

As a result of [DOC]'s revised methodology, we have made many more comparisons to similar products than in the *Preliminary Determination*. In an effort to match sales of similar merchandise before resorting to constructed value, and consistent with *Cemex*, [DOC] has made no adjustment for differences in dimension among similar products. We agree with West Fraser and Slocan that such an approach is appropriate in these circumstances.

(…)

Therefore, for all the reasons discussed above, we have not made a value-based difmer adjustment for the final determination".[314] (footnotes omitted)

(b) Arguments of the Parties

7.160 In the view of **Canada**, Article 2.4 provides that, in its comparison between export price and normal value, the investigating authority must make due allowance in every instance for differences which affect price comparability, including physical differences. Canada contends that the fact that lumber size affected the price per board foot at which softwood lumber products were sold was undisputed by all parties. Canada asserts that DOC did not conclude that differences in dimension could *not* affect market value. In the view of Canada, DOC's decision not to grant an adjustment was based on the fact that DOC allegedly had no basis to adjust for physical differences between products based on market value rather than because it had not been demonstrated that those differences in dimension affected price comparability. Canada asserts that it was DOC's responsibility to obtain the necessary information to make a fair comparison. In the view of Canada, DOC's premise "that there is no information on the record by which we [DOC] can calculate a difmer" is false. In this regard, Canada contends that the record is replete with transaction and pricing data from the Canadian exporters that would permit the calculation of the adjustment based on differences in market values.

7.161 The **United States** acknowledges that Article 2.4 requires that due allowance be made for certain differences that affect price comparability. However, the United States asserts that Article 2.4 unambiguously provides that due allowance will be made in "each case, on its merits" for differences that are "demonstrated" to affect price comparability. The United States asserts that the Canadian exporters failed to demonstrate that differences in dimension of softwood lumber had an effect on price comparability in this case. In response to an argument of Canada, the United States asserts that DOC cannot be deemed to have concluded that dimension affected price comparability simply by having made a product matching determination. For the words "affect price comparability" under Article 2.4 to have any meaning, the United States claims that there must be some connection established between the differences in physical characteristics at issue and prices. This connection could not be established in this case. The United States asserts that DOC reached its conclusion based on a review of the information contained in respondents' cost and sales databases. The United States argues that Canada has tried to refute DOC's determination by *selectively* pointing to certain record data. In the view of the United States, DOC's conclusion in the Final Determination that differences in prices were not attributable to differences in dimension, especially where those differences were minor, is supported by the record.

7.162 **Canada** asserts that DOC's administrative record reveals that it performed no analysis whatsoever of the *non*-identical comparisons generated by its product matching methodology. According to Canada, DOC never looked at any specific non-identical comparison pair or pairs it used to analyze pricing or other data relating to those two products in order to ascertain whether the actual product differences involved affected price comparability. Canada argues that the US argument that the Canadian respondents failed to meet their burden of proof with respect to the demonstration that differences in dimension affected price comparability constitutes *ex post* justification which cannot be considered by the Panel.

(c) Evaluation by the Panel

7.163 In its Final Determination, DOC made price-to-price comparisons between certain *non*-identical types of softwood lumber without adjusting for differences in dimension. Canada argues that Article 2.4 required DOC to grant an adjustment because those differences in dimension affected

[314] Exhibit CDA 2, IDM, Comment 8, pp. 50-53.

price comparability.[315,316] The issue before us is therefore whether the United States did not act consistently with its obligations under Article 2.4 of the *AD Agreement* when it did not grant the adjustment for differences in dimensions requested by the exporters where price-to-price comparisons of *non*-identical types were made.

7.164 Article 2.4 provides in pertinent part:

> "[a] fair comparison shall be made between the export price and the normal value. (…) 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. (…) The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties". (footnote omitted)

7.165 Article 2.4 requires that, where there are *differences* between export price and normal value which affect the comparability of these prices, "[d]ue allowance shall be made" for those differences. We note that a difference in physical characteristics is one of the factors which *may* affect the comparability of prices.[317] We agree with the panel in *EC – Tube or Pipe Fittings* that the requirement to make due allowance for such differences, in each case on its merits, means that the authority must *at least* evaluate identified differences – in this case, differences in dimension – with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4, and make an adjustment where it determines this to be necessary on the basis of its evaluation. We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability. An interpretation that an adjustment would have to be made automatically where a difference in physical characteristics is found to exist would render the term "which affect price comparability" nugatory.[318]

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[315] We do not understand Canada to claim that the United States acted inconsistently with Article 2.4 in not making an adjustment for differences in physical characteristics when *identical* types or models were compared.

[316] Although there are references in Canada's submissions to the allocation of costs in the case of thickness, length and width (cost vs. value based allocation), we do not understand Canada to have challenged DOC's decision on that matter. (Canada comments on US responses to questions from the Panel, Comments to US response to question 102, note 25)

[317] The panel in *EC – Tube or Pipe Fittings* found that:

> "[d]ifferences in taxation are explicitly listed as a factor that must be taken into account under Article 2.4 *to the extent they may* affect price comparability, and for which due allowance shall be made, in each case, on its merits". (emphasis added) (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157)

[318] The principle that interpretation must give meaning and effect to all the terms of a treaty is well-established in WTO dispute settlement. *See*, for instance, Appellate Body Report, *US – Gasoline*, para. 23. In *EC – Bed Linen*, the Appellate Body reversed a finding of the panel on the ground that that panel "in effect, reads the requirement of calculating a "weighted average" out of the text in some circumstances. In those circumstances, this would substantially empty the phrase "weighted average" of meaning". (Appellate Body Report, *EC – Bed Linen*, para. 75) Thus, we are precluded from adopting an interpretation of a provision in the *AD Agreement* which would substantially empty it of meaning. In the case before us, adopting an interpretation that an adjustment must be made automatically in all cases where a given difference is found to exist would, in our view, empty the phrase "which affect price comparability" of any meaning. We must therefore reject such an interpretation.

Further, such an interpretation would make little sense in practice, as not all differences in physical characteristics necessarily affect price comparability.[319]

7.166 In addition, the panel in *EC – Tube or Pipe Fittings* found that:

> "[t]he issue of which specific "allowances" should be made in any case depends very much on the particular facts of the case. The last part of the last sentence of Article 2.4, that the authorities "shall not impose an unreasonable burden of proof" on interested parties, does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments. In a similar vein, an investigating authority in possession of the requisite information substantiating a claimed adjustment would not be justified in rejecting outright that claimed adjustment.
>
> Thus, while it is incumbent upon the investigating authorities to ensure a fair comparison,[154] so also is it incumbent upon interested parties to substantiate their assertions concerning adjustments as constructively as possible. The duty of an investigating authority to ensure a fair comparison cannot, in our view, signify that an investigating authority must accept *any* claimed adjustment. Rather, the investigating authority must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited. On this basis, we examine Brazil's claim under Article 2.4.
>
> [154] We recall the view of the Appellate Body that the obligation to ensure a fair comparison under Article 2.4 "lies on the investigating authorities" and not on exporters. Appellate Body Report, *US-Hot-Rolled Steel*, *supra*, note 40, para. 178."[320]

7.167 We agree with the panel in *EC – Tube or Pipe Fittings* that the requirement in the last sentence of Article 2.4 that the authorities "shall not impose an unreasonable burden of proof" on interested parties does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments. In line with the views expressed by that panel, we consider that Article 2.4 requires that investigating authorities ensure a fair comparison, and that interested parties substantiate their assertions concerning adjustments as constructively as possible. Based on our understanding of Article 2.4, we consider that the duty of an investigating authority to ensure a fair comparison cannot signify that an investigating authority must grant *any* claimed adjustment. On the other hand, we are of the view that an investigating authority in possession of the requisite evidence substantiating a claimed adjustment would not be justified in rejecting that claimed adjustment. Finally, bearing in mind the text of Article 2.4, we consider that this provision does not impose on investigating authorities any particular method for examining whether any given difference affects price comparability.

7.168 Before proceeding with the analysis, we recall that we have considered the comments of both parties with respect to whether certain evidence presented by the parties in this dispute was properly before us and that we have concluded in paragraph 7.43, *supra*, that we are precluded from taking into consideration the regression analysis contained in Exhibit CDA-77. As Exhibit CDA-186 also contains a regression analysis that neither Canada nor the respondents had submitted to DOC in the context of the investigation, we will not consider Exhibit CDA-186 for the same reasons we have rejected Exhibit CDA-77. In its submission of 5 September 2003, we understand Canada to question whether the charts submitted by the United States as Exhibits US-42, 43, 76 and 81 are properly

[319] For example, a difference in colour between two cars is undeniably a difference in physical characteristics, but that difference would not necessarily have any impact either on the price of the cars nor their cost. The United States has provided its own example in its response to question 27 of the Panel, para. 43.

[320] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.157-7.158. In the same vein, *see* the views expressed by the panel in *Egypt – Steel Rebar*, para. 7.352.

before us.[321] When examining this argument of Canada, we keep in mind our findings contained in paragraph 7.41, *supra*. As it is clear to us that these charts display in graphical form data which was before DOC during the course of the investigation, we are of the view that these exhibits fall within the same category of evidence as discussed by the panel in *EC – Bed Linen*. We therefore find that Exhibits US-42, 43, 76 and 81 are properly before us.

7.169 In this dispute, Canada argues that the fact that differences in dimension affected price comparability, where *non*-identical types or models were compared, was never an issue in the context of the investigation. Canada asserts that, from the very outset, all parties and all US investigating agencies involved[322] agreed that differences in dimension affected price comparability. The United States, on the other hand, argues that neither the Canadian exporters – in the context of the investigation – nor Canada – now before us – demonstrated that differences in dimensions affected price comparability. The parties thus disagree on whether the exporters demonstrated that the differences in dimensions, where non-identical types were compared, affected price comparability between the *non*-identical types compared.

7.170 As previous panels have noted, Article 2.4 requires a fact-based, case-by-case analysis. This is what we will do. We will start setting out the relevant facts as submitted by the parties and, subsequently, we will examine them in light of our understanding of the obligations imposed by Article 2.4, as set forth in paragraphs 7.165-7.167, *supra*. In so doing, we must be mindful of our standard of review and not perform a *de novo* review of the facts.

7.171 Following initiation, DOC established – in consultation with the parties – the distinguishing physical characteristics of softwood lumber in order to match products sold in Canada with those exported to the United States. These characteristics included, *inter alia*, thickness, width, and length. Exporters were requested to construct code numbers in accordance with the agreed product matching mechanism for each distinct product. Therefore, each code number represented a type with physical characteristics differing from products falling under any other code number. Exporters were requested to prepare and submit their cost and sales databases containing information on a per-type basis. At the preliminary stage, DOC carried out comparisons of *identical* types of softwood lumber. For comparisons of *non*-identical types, DOC first attempted to adjust normal value by the net difference in the variable manufacturing costs associated with the differences in the physical characteristics of the two products compared.[323] However, there were a number of actual physical differences between products for which respondents were unable to identify a cost difference.[324] In view of the above, DOC determined that "it [was] not appropriate to match products that do not have the following identical physical characteristics: grade, thickness, width and length."[325] For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases. The issue of the adjustment for differences in dimensions when comparing *non*-identical types was therefore not relevant at that stage.

7.172 In their subsequent comments, various respondents argued that DOC should move away from constructed (normal) values and compare *non*-identical types, making the necessary adjustments where required. The United States asserts that DOC considered the exporters' comments and accepted them.[326] In so doing, DOC examined whether the adjustment for differences in dimensions would be

[321] Canada comments on the US responses to questions from the Panel, Comments to US response to question 97, para. 9 and note 11.

[322] These agencies are the ITC and DOC.

[323] Exhibit CDA-11, Preliminary Determination, p. 56066. *See* also Exhibit CDA-2, Comment 8, p. 51.

[324] *Ibid.*

[325] *Ibid.*

[326] A detailed explanation of how the determination of which non-identical types should be compared for the purposes of the final determination can be found in the US response to question 25 of the Panel, paras. 34-39.

justified. In this regard, we note that, according to US law and practice, DOC will first try to determine whether a given difference yields variable cost of manufacturing differences. If so, a difference in price can be connected with the difference at issue and an adjustment will be granted. However, where a given difference does not yield variable cost of manufacturing differences, DOC examines whether there are differences in market value between the *non*-identical types compared. In the case before us, the United States asserts that DOC determined that there were no differences in variable cost of manufacturing between *non*-identical types compared, i.e., between types compared having different dimensions. DOC also examined whether there were differences in market value, but it concluded that "in this case that there is no information on the record by which we can calculate a difmer adjustment to account for differences in dimension based either on cost or value".[327] In analysing the respondents' request for an adjustment, DOC also found that "in this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as Abitibi argued, the record shows that lumber prices for different products fluctuated in relation to each other over the course of the POI. Consequently, there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared".[328] Quoting the excerpts just cited, the United States argues that DOC could not find that the differences in dimensions were demonstrated to affect price comparability; hence, the rejection of the exporters' request for an adjustment.

7.173 We note that the situation before us is not one in which the investigating authority did not undertake any step in order to ensure a "fair" comparison, as set forth in Article 2.4. Indeed, DOC, in agreement with, *inter alia*, respondents, identified the physical factors which could have an impact on prices and compared, where possible, identical types, that is, types having identical physical characteristics – including identical dimensions – both at provisional and definitive stages. At the provisional stage DOC decided that, because it could not find that certain differences in physical characteristics (grade and the dimensional characteristics at issue) yielded variable cost of manufacturing differences, it would *not* compare *non*-identical types.[329] That is, it would for instance not compare two types belonging to the same product category; species; and grade group; and having the same moisture content; thickness; width; length; surface finish; end trimming; and, further processing characteristics but having different *grade*. For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases.[330] It is also clear to us that DOC changed its approach between the provisional and definitive stages at the request of certain respondents. For the purpose of the Final Determination, where there were no identical types, DOC compared non-identical types. It is undisputed that, in these instances, adjustments were made to account for differences in physical characteristics other than differences in dimensions. For all these differences, the United States argues DOC could determine, based on differences in variable cost among the compared *non*-identical types, that differences in physical characteristics affected price comparability and, consequently, made an adjustment to compare "apples-to-apples". This is not disputed by Canada. All of the above shows to us that DOC made *significant* efforts in order to ensure that, for a very large portion of the comparisons made, a fair comparison was carried out, in spite of the difficulty of the exercise because of the many types involved. The issue before us is therefore very limited, in that it affects only a small share of the comparisons made at the definitive stage – those of *non*-identical types only.[331] It is

[327] *See* para. 7.159, *supra*.
[328] *Ibid.*
[329] Exhibit CDA-11, Preliminary Determination, p. 56066.
[330] We do not understand Canada to have argued that DOC had not made the required adjustments under Article 2.4 when comparing constructed (normal) values and export prices.
[331] Comparisons of *non*-identical types represented less than 20 per cent of the total volume exported by respondents. The precise figure cannot be provided for confidentiality reasons. (US response to question 25 of the Panel, para. 40)

only with respect to these non-identical comparisons that we are called to determine whether the United States acted in conformity with Article 2.4.

7.174 Nor is the situation before us one in which the respondents were passive. Quite on the contrary. In its answer to a question from us limited to the issue of the demonstration that differences in dimension affected price comparability, Canada has referred to (and provided copies of) more than *20* submissions made by parties in the course of the investigation.[332] In addition, Canada provided references of submissions made by the applicant as well as references to documents issued by DOC and ITC in the context of the investigation. The amount of comments and information before the investigating authority was therefore considerable. In our view, the situation before us is therefore quite different from that examined by the panels in *Argentina – Ceramic Tiles* and *Egypt – Steel Rebar*.

7.175 Having set the factual framework under which we are to conduct our examination, we must examine relevant evidence in order to determine whether, based on it, an unbiased and objective investigating authority could have concluded that no adjustment was warranted for differences in dimensions when *non*-identical types of softwood lumber were compared.

7.176 Bearing in mind the discussion in the IDM cited in paragraph 7.159, *supra*, we are in no doubt that DOC "applied its mind" to the facts before it. In particular, DOC examined first whether differences in dimensions yielded variable cost of manufacturing differences.[333] This test did not yield any difference. DOC next examined the sales databases submitted by the respondents, concluding that "in this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as Abitibi argued, the record shows that lumber prices for different products fluctuated in relation to each other over the course of the POI. Consequently, there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared".[334] In support of these conclusions, the United States has provided us with copies of some comparisons looked at by DOC. These are included in Exhibits US-42, 43, 76 and 81. We consider that DOC's finding with respect to the fluctuation of lumber prices for the different types which are compared therein is supported by those charts. A discernible pattern of price differences is in our view necessary for a conclusion that a given difference affects price comparability. If, as here, prices of types compared fluctuated against each other, criss-crossing themselves in many instances, without following any established pattern, we fail to see how an unbiased and objective investigating authority could be obligated to come to a conclusion that differences in dimension affect price comparability. Bearing this in mind, we are of the view that an objective and unbiased investigating authority could have concluded that data before DOC did not demonstrate that the remaining differences in dimensions affected price comparability because those data did not demonstrate how dimensions affected price comparability nor that there was a pattern or standard deviation that would have allowed an adjustment to be made as the correlations ran by DOC showed different results and random as well.

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[332] Canada response to question 22 of the Panel, para. 87 and Exhibit CDA-142, Respondents' Record Data regarding DIFMER.

[333] We note, in this regard, the following statement contained in the IDM:

> "[w]e do not consider it appropriate to use a value-based cost allocation method for allocating different costs to a large number of varying products with only minor physical differences (e.g., the hundreds or even thousands of differing combinations of dimensions and grade of lumber cut from logs) and no clear significant differences in value. Where minor differences in values occur among products having minor physical differences and are inconsistent due to frequent and inconsistent price fluctuations, any resulting cost differences would be artificial and meaningless". (Exhibit CDA-2, IDM, Comment 4, note 60)

[334] *See* para. 7.159, *supra*.

7.177 This conclusion is not altered by Canada's response to question 22 of the Panel, in which Canada refers us to a number of documents in support of its arguments. We have carefully examined them. A first group of documents, relating to the product matching mechanism, contains submissions of respondents and applicant and various communications of DOC. A second group of submissions contains requests for guidance on what additional data should be submitted in order to permit the calculation of value-based adjustments for differences in physical characteristics. A third group contains specific comments on breaks in commercial value of softwood lumber products and on comparisons of prices of individual lumber products. Finally, Canada refers to ITC and DOC's Preliminary Injury and Dumping Determination, respectively.

7.178 With respect to the first group, while Canada may be correct that, if dimension did not affect price comparability, there would have been no reason to include dimension in the product matching mechanism, we find that the question whether those differences are actually demonstrated to affect price comparability must be determined in light of positive evidence before investigating authorities. Thus, even if Canada's argument were correct, a concession at such an early stage of the investigation would not preclude the investigating authority to change its position if positive evidence were to point to another conclusion. In any event, the issue before us is not whether dimensional differences in the abstract could affect price comparability, but whether those *remaining* dimensional differences that existed after DOC engaged in product matching were demonstrated to affect price comparability.

7.179 As far as the second group of submissions is concerned, it is undisputed that DOC had sufficient data before it during the investigation to examine whether differences in dimensions were demonstrated to affect price comparability. We do not consider that there could be data more probative than the actual data on costs and prices of respondents for the POI, and it is undisputed that those were before DOC. In any case, we note that respondents submitted historical average price data as well as *Random Lengths* data. Thus, we do not consider that DOC acted unreasonably in not giving guidance on which other additional data could be submitted.

7.180 Regarding the third group, Abitibi, Slocan and the applicant commented on breaks in commercial value of softwood lumber products, especially with respect to length. Those exporters proposed the establishment of length bands. In our view, the linkage of commercial value considerations and length groupings was a step in the direction of demonstrating that, at least, differences in length could have affected price comparability. However, we note that, when comparing *non*-identical types for the purpose of the Final Determination, DOC first attempted to compare within the bands agreed with exporters, and matched across length bands only when a similar match was not available within the band.[335] Thus, in our view, DOC addressed the concerns of the exporters in that regard.

7.181 Furthermore, Abitibi referred to price comparisons of specific models. Abitibi submitted two graphs with monthly average prices during the POI for four different grades of types 2x4x8 and 2x6x16. "For example, at the beginning, of the period, in April 2000, Abitibi's average net price for No. 2 grade 2x4x8 was around [[****]] whereas the No. 2 2x6x16 price was [[****]]. The comparable figures for economy grade were [[****]] for the smaller size and [[****]] for the larger".[336] It is obvious that, in submitting the referred charts, Abitibi was in fact assessing data it had submitted in its databases. However, we consider that what Abitibi did, was, at most, to advance a possible methodology to marshal the cost and pricing data previously submitted. Canada has not argued, nor shown to us, that Abitibi requested DOC to analyse the data before it in the manner in which Abitibi had presented it, that is on a monthly-basis, nor the reasons why DOC should have analysed it in such a manner.

[335] US response to question 25 of the Panel, para. 38.
[336] For confidentiality reasons, information inside the brackets has been erased.

7.182 Finally, Canada refers to several statements by DOC and ITC that – it considers – concede that the dimensional differences at issue here affected price comparability. Specifically, Canada refers to DOC's finding in the Preliminary Determination that "there are several significant differences in physical characteristics which affect price..."[337] and to the ITC's statement in its Preliminary Injury Determination that "[s]oftwood lumber prices generally differ substantially depending on grades and dimensions".[338] We note that the first statement refers to differences in physical characteristics generally, and the second to grade and dimension together. Both are abstract statements about such differences, rather than specific statements about the particular dimensional differences remaining after DOC performed product matching. We cannot conclude on the basis of these general statements that those US agencies had conceded that the particular differences in dimension remaining for *non*-identical matches were demonstrated to affect price comparability.

7.183 In sum, we do not consider that the above-examined communications show that it was demonstrated in the investigation that the remaining differences in dimension which were not resolved by product matching affected price comparability. In our view, exporters could have been more forthcoming in suggesting ways in which DOC should have marshalled the data before it.[339] Had the respondents argued that DOC should have examined data in a particular way, in light of the specific facts of the case, and had DOC analysed that data in an unreasonable manner, thus determining that differences in dimension were not demonstrated to have affected price comparability, we might have found that the United States acted inconsistently with Article 2.4. This, however, we do not find to be the case.

7.184 For the foregoing reasons, and keeping in mind the standard of review we are bound to apply to the examination of the matter before us, we find that Canada has not established that the United States acted in a manner inconsistent with Article 2.4 of the *AD Agreement* in not granting the requested adjustment for differences in dimension.[340]

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[337] Exhibit CDA-11, DOC's Preliminary Determination, p. 56066.

[338] Exhibit CDA-31, ITC's Preliminary Determination, p. 16.

[339] In so concluding, we note that Canada is of the view that the United States should have conducted its examination differently. In particular, Canada takes issue with the US approach of using individual transaction data in the charts presented in Exhibits US-43, 76 and 81. We are of the view that the United States used one of the possible methodologies to assess the data it had received from respondents. We understand Canada to argue that it would have been more appropriate to use monthly or annual average price data because "averages smooth out data fluctuations caused by the different mechanisms and times at which prices are set in relation to invoice date". (Canada first written submission, para. 148; Exhibit CDA-76, POI Average Prices for Different Lengths and Widths; and Canada comments to the US response to question 97 of the Panel, para. 11) However, Article 2.4 does not mandate the use of any particular methodology. Furthermore, we have found in para. 7.176, *supra*, that an objective and unbiased investigating authority could have concluded that data before DOC did not demonstrate that differences in dimensions affected price comparability. If Canada – or the respondents – considered that DOC should have examined the data in another manner, they should have motivated to DOC why their proposed methodology should have been used.

[340] Canada asserts that:

> "[t]he United States had an affirmative duty under Article 6 to notify Canadian parties that it did not intend to use dimension for price because it had put the Canadian parties on notice to the contrary in the questionnaires and in every other aspect of the investigation. All requisite data for the analysis were on the record. The Canadian parties had no reason to submit analyses of the data to prove a point on which Commerce and all parties seemed to have agreed. Had Commerce put the parties on notice about this issue, as required under Article 6.1, the respondents would have prepared and filed with Commerce analyses similar to the Tembec Regression Analysis, which in any event is derived entirely from record evidence and could have as easily been performed by Commerce itself if it had doubts about the importance of dimension". (Canada response to question 4 of the Panel, para. 5)

I. CLAIM 6: ARTICLES 2.4 AND 2.4.2 – ZEROING

(a) Factual Background

7.185 In the anti-dumping investigation underlying this dispute, DOC divided the product under investigation into groups of identical, or broadly similar, product types. After making certain adjustments within each product type, DOC calculated a weighted average normal value and export price for each product type, and then compared the weighted averages for each product type. This process resulted in multiple values, one for each product type. In some instances this comparison showed that the weighted average export price for a specific product type was less that the weighted average normal value, while in other instances, the comparison showed that the weighted average export price was greater than the weighted average normal value. These values were then aggregated to produce one single value, the margin of dumping for the product under investigation for each investigated exporter. In the aggregation process, a value of "zero" was attributed to those product comparisons where the weighted average export price was greater than the weighted average normal value. DOC then aggregated the positive values from the individual product type comparisons, that is, those instances where the weighted average export price was lower than the weighted normal value, and divided the result by the total value of exports, to arrive at a weighted average margin of dumping.

7.186 For ease of reference of the reader, but without giving any legal status to the concept, we will follow the approach of the parties by referring to those instances where the export price is greater than the normal value, as "negative dumping margins" or "negative dumping".[341] We will refer to the process of attributing a "zero" value to the individual product type comparisons where the weighted average export price is greater than the weighted average normal value for the same product type as "zeroing".

(b) Arguments of the Parties/Third Parties

7.187 **Canada** asserts that the methodology used by the United States in the underlying investigation did not fully take into account "all comparable export transactions", in violation of the requirements of Article 2.4.2 of the *AD Agreement*. Canada notes that the practice of "zeroing", followed by DOC in this case, is identical to that used by the EC, which in *EC – Bed Linen* was found to be inconsistent with that Article. In addition, Canada claims that the methodology applied by DOC did not produce a fair comparison as required by Article 2.4 because it did not in fact average all values.

7.188 Although Canada agrees with the United States that Article 2.4.2 does not preclude an intermediate stage of comparing export prices with normal values on a product type basis before aggregating these values to determine an overall margin of dumping**,** Canada is of the view that Article 2.4.2 establishes a single standard for the calculation of a margin of dumping which is applicable to all stages of the calculation, whether intermediate or final. Canada therefore asserts that Article 2.4.2 requires that all export transactions have to be taken fully into consideration throughout the process of calculating the overall margin of dumping and not only in the first stage.

Canada has not invoked in its Panel Request an Article 6.1 violation with respect to DOC's determination at issue and consequently a claim based thereon is clearly outside the Panel's terms of reference. Hence, we refrain from ruling on whether the United States has acted inconsistently with Article 6.1 or any other provision in Article 6 of the *AD Agreement*.

[341] We note that there might be differences on how this methodology is applied by different investigating authorities. However, when we refer to the term "zeroing", we refer to the methodology as applied by the DOC in the underlying anti-dumping investigation as described by DOC in Exhibit CDA-2, IDM, pp. 65-66.

7.189 The **United States** replies that Articles 2.4 and 2.4.2 do not address the manner in which particular model-specific or level-of-trade-specific dumping margins are to be combined to determine an overall dumping margin. The United States asserts that, by arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation," Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all", which immediately precedes it. In the view of the United States, the comparison obligations contained in Article 2.4.2 are "[s]ubject to the provisions governing fair comparison in paragraph 4". Thus, Article 2.4, which provides explicit context for the methods for establishing the existence of dumping under Article 2.4.2, means that, under the instruction in Article 2.4.2 to compare "a weighted average normal value with a weighted average of prices of all comparable export transactions," not all export transactions will be equally comparable with all transactions used for normal value purposes. Consequently, once the comparison has been identified pursuant to Article 2.4, it would be improper to compare a weighted average normal value with respect to one model or level of trade to a weighted average of prices for a different model or level of trade. According to the United States, Canada's prescription for combining particular dumping margins for purposes of developing a single, overall dumping margin would require precisely that, contrary to the requirements of Articles 2.4.2 and 2.4.

7.190 The United States further argues that the use of plural term "margins" in Article 2.4.2 operates to limit the scope of that provision to intermediate stage calculations only, which confirms its interpretation of Article 2.4.2. The United States also argues that the purpose of an anti-dumping investigation is to determine whether or not dumping exists, and that the *AD Agreement* does therefore not require that "positive" margins of dumping be offset by "negative" margins of dumping.

7.191 In the view of **Canada**, the term "margins" refers to the overall dumping margin for a product, as there is no language in Article 2.4.2 that suggests that the overall dumping margin would not be among the "margins" referred to in Article 2.4.2. Canada also finds support for its position in the function of Article 2. Thus, reading Article 2.4.2 in conjunction with Article 2.1, Canada states the "margins of price difference" calculated in the first stage are of secondary importance to Article 2.4.2, as the sole concern of that provision is to set rules governing how investigating authorities are to determine margins of dumping. Canada asserts that the US reading of Article 2.4.2 would lead to the absurd result that an investigating authority could carefully consider positive and negative margins at the intermediate stage, and then discard all but the single highest positive dumping margin in establishing the overall margin for each exporter. Canada also argues that zeroing is by definition inconsistent with the calculation of a "true "weighted average"".[342]

7.192 In the view of the **United States**, Articles 2.4.2 and 2.4 do not mandate any particular method for combining model-specific, level-of-trade-specific individual dumping margins to establish a single, overall margin. According to the United States, this is corroborated by the negotiating history of the *AD Agreement*. In the view of the United States, that negotiating history demonstrates that the question whether to address zeroing was presented to the negotiators, and that the draft text, as compared to the *AD Agreement*'s predecessor, the *GATT Anti-Dumping Code*, was not modified to prohibit this methodology. Further, the negotiating history demonstrates that insertion of the word "comparable" into Article 2.4.2 was intended precisely to ensure that the term "all" not be interpreted to imply that an average export price is to be established on the basis of sales both within and outside of the category of comparison.

7.193 **Canada** asserts that the negotiating history does not support the US view. In the first place, contrary to the US assertion, Canada contends that participants in the negotiations did not view the term "all" as a mere "drafting error" and understood the text to prohibit zeroing. With respect to the US interpretation of the purpose of the inclusion of the term "comparable", Canada states that the US assertion that its concerns with regard to zeroing were satisfied by the addition of the term

[342] Canada response to question 28 of the Panel, para. 102.

"comparable" offers no indication of how the rest of the participants in the negotiations viewed the addition of this term. Canada also disagrees with the US view that its interpretation of Article 2.4.2 deprives the term "comparable" of any meaning. Canada agrees that "Article 2.4.2 applies to intermediate stage comparisons". For such comparisons, "comparable" ensures that model-specific comparisons only include transactions meeting the requirements of "price comparability" contained in Article 2.4, while "[a]ll" ensures that all transactions meeting those requirements are utilized.

7.194 Referring to the Appellate Body report *in EC – Bed Linen*, **Japan** asserts that the US practice is inconsistent with Article 2.4, read in conjunction with Article 2.1, of the *AD Agreement.*

7.195 The **EC** asserts that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology, already found to be incompatible with Articles 2.4 and 2.4.2. The EC requests the Panel to reject the arguments put forward by the United States concerning the compatibility of that methodology with the *AD Agreement*.

(c) Evaluation by the Panel

7.196 The issue before the Panel is whether the methodology used by DOC in the underlying anti-dumping investigation whereby it attributed a value of zero to those instances where the weighted average export price was greater than the weighted average normal value when aggregating the different values determined for the different product types to compute the overall margin of dumping, is consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.[343,344]

7.197 Article 2.4.2 of the *AD Agreement* provides in relevant part as follows:

> "[s]ubject to the provisions governing fair comparison in [Article 2.4], 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

[343] We note that, in the IDM, DOC justified its use of the methodology at issue by referring to Sections 771(35)(A) and 771(35)(B) of the US Tariff Act as follows:

> "[t]hese sections, taken together, direct [DOC] to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not apply on an aggregate basis". (Exhibit CDA-2, IDM, Comment 12, p. 66)

We do not understand Canada to challenge the above-referred sections of the US statute but DOC's application of zeroing when determining the overall margin of dumping for the Canadian exporters involved in the softwood lumber investigation. For this reason, we do not examine the consistency of Sections 771(35)(A) and 771(35)(B) with relevant provisions of the *AD Agreement*.

[344] We do not understand Canada to dispute that DOC was entitled to make adjustments within each product type to ensure an "apples-to-apples" comparison within that product type, calculate a weighted average normal value and a weighted average export price for each product type, and compare the two.

> appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.198 Article 2.4 provides in relevant part that:

> "[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."

7.199 Article 2.4 of the *AD Agreement* provides that a fair comparison shall be made between export price and normal value, and sets out specific parameters for how such comparisons are to be made. The two sub-paragraphs of Article 2.4 deal with specific aspects of the comparison of normal value and export price. Article 2.4.1 – which is not at issue in this dispute – provides rules for the conversion of currencies, when such conversion is necessary for the purposes of a comparison under Article 2.4. Article 2.4.2 establishes that, subject to the requirement of a fair comparison, dumping margins should normally be established on the basis of a comparison between a weighted average export price to a weighted average normal value, or on the basis of a transaction-to-transaction comparison. A comparison between a weighted average normal value to individual export transactions is allowed only in limited circumstances.

7.200 The issue before us is whether zeroing is allowed when an investigating authority is calculating an overall margin of dumping under the first – weighted average-to-weighted average – methodology set forth in Article 2.4.2. We note 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", that is, where it sub-divides the product under investigation into groups and performs a weighted average-to-weighted average comparison for each group. Specifically, the issue of zeroing arises in the context of aggregating the results of these multiple comparisons into an overall margin for each exporter/producer for the product under investigation. Where only a single weighted average-to-weighted average comparison is performed, it seems to us that the issue of zeroing *per se* could not arise (although there might still be issues about the manner in which the averaging was performed).

7.201 In this case, DOC engaged in multiple averaging on the basis of differing physical characteristics of the product under investigation. As mentioned in paragraph 7.159, *supra*, DOC identified eleven physical characteristics and, with some exceptions, performed weighted average-to-weighted average comparisons only on the basis of transactions involving merchandise which shared these physical characteristics (this could be characterized as multiple averaging based on product type or model). Although 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[345] (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.

7.202 There is no dispute between the parties as to the appropriateness or consistency with the *AD Agreement* of this multiple averaging approach to calculating dumping margins *per se*. To the

[345] Panel Report, *US – Stainless Steel*, paras. 6.105-6.136.

contrary, Canada acknowledges that multiple averaging is permissible.[346] However, in light of the fact that multiple averaging is a prerequisite for the issue of zeroing to arise in the context of applying the weighted average-to-weighted average methodology, and taking into account the arguments of the parties and the reasoning developed by the Appellate Body in *EC – Bed Linen*[347], we consider that we must examine the issue of multiple averaging if we are to arrive at reasoned conclusions regarding the question of zeroing in the context of a weighted average-to-weighted average comparison methodology.

7.203 We begin our analysis with Article 2.4.2, which provides 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 *all comparable* export transactions". (emphasis added) The 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 non-comparable export transactions, but only to comparable export transactions. Further, we are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning.[348] If the drafters 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, we do not believe that they would have included the word "comparable" in Article 2.4.2, as that word would serve no purpose in the text. The fact that the word "comparable" was added to the text of Article 2.4.2 towards the end of the negotiating process, confirms our view that it was included for a purpose and should not simply be disregarded as surplus verbiage.[349]

7.204 We are as treaty interpreters of course required to give meaning to all the terms of a treaty, and we must therefore arrive at an interpretation of Article 2.4.2 that gives meaning both to the words "all" *and* "comparable". In our view, however, there is no need to choose between the two terms. Rather, the phrase "all comparable export transactions" would in its ordinary meaning appear to signify that Members may only compare those export transactions which are comparable, but that it must compare *all* such transactions. Thus, the term "all" plays an important role in the provision by ensuring that Members do not exclude relevant transactions from their comparisons.

7.205 We note that a number of panels have expressed the view that multiple averaging is permitted by Article 2.4.2. The issue has been considered by both the *US – Stainless Steel* and *Argentina – Ceramic Tiles* panels. Both panels concluded that multiple averaging was permitted by Article 2.4.2 in appropriate circumstances.[350]

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[346] Canada response to question 30 of the Panel, para. 106 and Canada second written submission, para. 143.

[347] Appellate Body Report, *EC – Bed Linen*, paras. 46-66.

[348] *See, e.g.*, Appellate Body Report, *US – Gasoline*, p. 23 where it is stated that:

> "... [o]ne of the corollaries of the 'general principle of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty".

[349] The insertion of the word "comparable" into Article 2.4.2 represented the only modification to the draft text of the Article between the date of the Draft Final Act and the text as adopted at the conclusion of the Uruguay Round, reflecting the current Article 2.4.2. (*See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991) We agree with the panel in *US – Stainless Steel* that this suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters. (Panel Report, *US – Stainless Steel*, para. 6.111, note 114)

[350] Panel Report, *US – Stainless Steel*, para. 6.111, where it is stated that:

> "[t]he inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. It flows from this

7.206 We do not consider that, by definition, "all types or models falling within the scope of a 'like' product must necessarily be comparable"[351], nor more generally that all export transactions of the product under investigation will necessarily be comparable to the home market sales against which a comparison is to be made. Leaving aside the issue of the meaning of likeness, the fact that Article 2.4 explicitly provides for due allowances to be made for differences that affect price comparability means to us that, in the absence of such adjustments, certain transactions may not be comparable. In other words, the very reason due allowance may be necessary is precisely because the transactions might not otherwise be comparable. This lack of comparability could be due to differences in physical characteristics – a basis for allowance that is specifically identified in Article 2.4 – but Article 2.4 tells us that non-comparability could also arise from differences in conditions and terms of sale, levels of trade, quantities and other unspecified differences.[352] Thus, we do not believe that the significance of the reference to "comparable" export prices can simply be discounted on the grounds that the products/transactions must "necessarily be comparable".[353]

7.207 Of course, one way to ensure comparability is to make due allowance for certain differences, but given the inclusion of the term "comparable" in Article 2.4.2 we are not convinced that this method, however important, is the exclusive means allowed by the *AD Agreement* to ensure comparability. Nor, from a practical perspective, do we believe that such an approach would be desirable. In theory, of course, any difference between products/transactions can be accounted for by adjustments. In many cases, however, it may be difficult to determine whether a difference affects price comparability such that an adjustment is required, much less to establish the amount of the adjustment that would be appropriate. While 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. The issue of whether or not DOC should have made due allowance for differences in dimension, addressed elsewhere in this Report, is a demonstration of how complex adjustment questions may be. The quantification of other types of adjustments, such as for differences in level of trade, may be even more problematic. 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. Thus, we consider that the use of multiple averaging is consistent with the overall objective of Article 2.4, which is to ensure a fair comparison when comparing export price to normal value.

7.208 We find further support for our view from the fact that Article 2.4.2 allows dumping margins to be calculated on the basis either of weighted-average-to-weighted-average or transaction-to-transaction comparisons. When an investigating authority uses a transaction-to-transaction methodology, it is in a position to select the most similar products/transactions possible for

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> conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value". (footnote omitted)
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> *See* also Panel Report, *Argentina – Ceramic Tiles*, para. 6.99, where it is stated that:
>
> "[w]e consider that the use of types or models is a valid method of ensuring a fair comparison between normal value and export price under Article 2.4".

[351] Appellate Body Report, *EC – Bed Linen*, para. 58.

[352] We are also of the view that the authorization in Article 6.10 of the *AD Agreement* to use certain sampling techniques where "the number of (...) types of products" is too large, confirms our interpretation that there may be differences in physical characteristics between products being compared, and should dispel those doubts entirely.

[353] Appellate Body Report, *EC – Bed Linen*, para. 58.

comparison, and may therefore be able to minimize the extent of the adjustments that need to be made. We consider it unlikely that the drafters would have agreed to allow comparisons only at the most aggregated level (a single weighted-average-to-weighted-average comparison) or the most disaggregated level (transaction-to-transaction) while disallowing the intermediate approach of multiple averaging. Rather, it seems more likely to us that the intention of the drafters in specifying that Members shall normally be restricted to a weighted-average-to-weighted-average or transaction-to-transaction approach was to make clear that a weighted-average-to-transaction approach – a methodology that was widely used before the current *AD Agreement* came into effect – was only permitted in the limited circumstances specified in the second sentence of Article 2.4.2.

7.209 We are, of course, aware that Article 2.4.2 provides for the establishment of the existence of 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, i.e., that the reference to "a" comparison is in the singular rather than in the plural. We note however that the second methodology (transaction-to-transaction) also refers to "*a* comparison of normal value to export prices on a transaction by transaction basis", yet the subsequent reference to export prices makes clear that in such a methodology investigating authorities are not restricted to establishing dumping margins by comparing one single normal value transaction to a single export price, but by definition will, in any case in which there is more than one transaction, be performing multiple comparisons of individual transactions. As for the reference to "*a* weighted average normal value", this use of the singular may be understood to mean that each group of "comparable" export transactions is to be compared to a single weighted-average-normal-value.

7.210 Our analysis of multiple averaging does not rely upon the reference in Article 2.4.2 to the establishment of "margins of dumping". Although 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. We consider however that, assuming that the reference to "margins of dumping" means the margin of dumping for the product under investigation as a whole[354], our analysis above supports the conclusion that multiple averaging is nevertheless not prohibited by Article 2.4.2. In particular, while it may well be that the reference to "margins of dumping" is a reference to the overall margin for the exports of the product under investigation, this would mean simply that Article 2.4.2 provides guidance with respect to the methodologies used for determining the existence of such margins.[355] It would not, in our view, compel the conclusion that such overall margins could not be derived on the basis of multiple averaging.

7.211 In light of our analysis above, we conclude, and agree with the parties to this dispute, that the use of multiple averaging is not prohibited by the *AD Agreement*.

7.212 Having found that multiple averaging, *per se*, is not prohibited by the *AD Agreement*, we next consider whether the methodology applied by DOC in this case when aggregating the values generated from multiple averaging, in which "negative dumping" was attributed a zero value, is inconsistent with Article 2.4.2.

7.213 Bearing in mind our conclusion in paragraph 7.211, *supra*, regarding multiple averaging, we will now consider the obligations of an investigating authority when calculating a weighted-average-

[354] As the Appellate Body concluded in para. 53 of its Report in *EC – Bed Linen*.

[355] We note further that Article 2.4.2 requires that 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. . . ". (emphasis added) We note that the ordinary meaning of the word "basis" is "the underlying support for a process". (*The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 113) This suggests to us that, while the determination of the existence of margins of dumping must be based on weighted average-to-weighted average comparisons, Article 2.4.2 was not intended to spell out in detail all elements of that calculation.

normal-value and a weighted-average-export-price in accordance with Article 2.4.2 of the *AD Agreement* when the product under investigation is divided into sub-categories based on types or models, levels of trade or other differences. The question of zeroing arises in the process of aggregating the weighted averages for the different types or models, levels of trade or other differences, into a single, overall margin of dumping. With regard to this process, parties express diverging views as to whether Article 2.4.2 applies to the determination and comparison of weighted average normal values and weighted average export prices only for each of the types or models (the so-called "first stage") – as the United States argues – or whether it also applies to the aggregation of the results for each of the comparisons made (the so-called "second-stage") – as Canada argues.[356] Thus, the United States asserts that the text "all comparable export transactions" in Article 2.4.2 is – because of the insertion of the word "comparable" – applicable only to the first stage of the calculation process. The United States argues that Article 2.4.2 does not apply to the second stage in the calculation process; thereby not disallowing the use of zeroing by an investigating authority. Canada does not dispute that there are two stages, as asserted by the United States. However, it disagrees with the US argument that Article 2.4.2 does not discipline the second stage.

7.214 In our examination of this question, we keep in mind the Appellate Body's findings with regard to the issue of whether Article 2.4.2 contemplates whether the calculation of the margin of dumping, as envisaged in Article 2.4.2, can be divided into two distinct stages[357], as well as the parties' submissions on this issue. In our view, whether Article 2.4.2 contemplates one or two stages in the calculation of the overall margin of dumping and whether the term "comparable" in "all *comparable* export transactions" relates only to the first stage or to both – in case there were two stages – are related questions. We note that the calculation of the margin of dumping is a process which starts with the determination of the normal value, and it continues with the establishment of the export price. Both prices are subsequently adjusted in order to ensure a "fair comparison", as required by Article 2.4. Finally, these two values – normal value and export price – are compared, for the purpose of computing the overall margin of dumping. Thus, in our view, a determination of the margin of dumping in an anti-dumping investigation could be sub-divided into a whole range of steps or stages, forming a coherent process. At issue are the last two steps in this process of calculating the overall margin of dumping. We do not consider that the question before us is whether there are several steps or stages contemplated in Article 2.4.2 and, if this is the case, whether the obligation imposed by Article 2.4.2 with respect to the calculation of the margin of dumping under the weighted-average-to-weighted-average methodology applies to the first stage only because of the term "comparable" in "all *comparable* export transactions". Rather, we are of the view that the question before us is whether an investigating authority is allowed to partially exclude from the aggregation process those results of comparing types or models for which the weighted-average-normal-value was determined to be less than the weighted-average-export-price in the aggregation process.

7.215 It is clear 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. We note that this interpretation of the requirement of Article 2.4.2 is the same as that of the Appellate Body in *EC – Bed Linen*.[358]

7.216 Through the use of zeroing, it is clear to us that 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.[359]

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[356] The two "stages" are described by the United States in its response to question 109 of the Panel, para. 52.

[357] Appellate Body Report, *EC – Bed Linen*, para. 53.

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

[359] The panel in *EC – Bed Linen* explained how zeroing affects prices of the export transactions to which is applied:

Recalling our view that the calculation of the margin of dumping is a continuous process, we fail to understand why the negotiators of the *AD Agreement* would have included an obligation in the provisions of the *AD Agreement* (the term "all" in "all comparable export transactions"), if, in the very next step of the calculation process – through zeroing – investigating authorities were to be allowed to ignore this very same obligation (certain values which they were obligated to take into account in the first stage of the process). In other words, we do not interpret the requirement of Article 2.4.2 to bear only on the first stage of the process, but rather view that obligation as applying to the process as a whole. We are of the view that, if the drafters had intended that Article 2.4.2 applies only to the first stage of the process, they would have made this clear. The United States has not advanced any argument explaining why an interpretation that Article 2.4.2 is applicable to the pre-aggregation stage should be accepted by us, apart from the argument that the *AD Agreement* does not contain any requirements as to the second stage of the process. We find this argumentation of the United States not convincing.

7.217 Considering the requirement of Article 2.4.2 that the existence of margins of dumping has to be established for softwood lumber 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, we are of the view that the United States did not take into account all comparable export transactions when DOC calculated the overall margin of dumping in the investigation at issue.

7.218 The United States also argues that:

> "[t]hus, interpreting the language of the first methodology [average-to-average] as requiring authorities to offset dumping margins implies that the negotiators addressed the offset issue with respect to that methodology, but not the other two [transaction-to-transaction and average normal value-to-individual transaction export price], leaving the issue to the Members' discretion when utilizing either of the other two methodologies. Canada offers no interpretation of Article 2.4.2 that justifies such an anomalous result, nor does it offer any explanation as to why the negotiators might have intended to create such an anomaly."[360]

7.219 We note that Canada has not raised any claim with regard to DOC's use of "the other two methodologies". Thus, 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

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> "[b]y counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2". (Panel Report, *EC – Bed Linen*, para. 6.115)

We agree with the above explanation of how zeroing manipulates the outcome of what should be a determination of dumping which, up to the point of aggregation of the margins of dumping, is consistent with Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4 and 2.4.1 of the *AD Agreement*.

[360] US first written submission, paras. 158-159.

methodologies set forth in Article 2.4.2, i.e., transaction-to-transaction and weighted average normal value-to-individual transaction export price.[361]

7.220 Finally, the United States asserts that the negotiating history of the *AD Agreement* confirms that the calculation of the margin of dumping using zeroing is consistent with Articles 2.4 and 2.4.2. Canada disagrees.

7.221 We note that Article 32 of the *Vienna Convention* provides that:

> "**Supplementary means of interpretation**
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

7.222 We also note that the Appellate Body has consistently found that:

> "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[362]

7.223 As we consider that the meaning imparted by the text of Article 2.4.2 of the *AD Agreement* itself, is neither equivocal nor inconclusive as to whether zeroing is inconsistent with Article 2.4.2 of the *AD Agreement*, we do not deem it necessary in the case before us to have recourse to the negotiating history in order to confirm the correctness of our reading of the text of that provision.

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[361] Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*. As for the use of zeroing when determining a margin of dumping based on the third (weighted average-to-individual) methodology, we note that this methodology is exceptional in nature and can only be used in specific defined situations. Without intending to express any view as to the permissibility of zeroing when this third methodology is used, we do not agree with the United States that it would be an "anomaly" if zeroing were prohibited in the case of average-to-average comparisons but not in the exceptional case of weighted average-to-individual comparisons.

[362] Appellate Body Report, *US – Shrimp*, para. 114. *See* also Appellate Body Report, *US – Carbon Steel*, paras. 61-62, where it is stated that:

> "… we recall that Article 3.2 of the DSU recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules.
>
> … the task of interpreting a treaty provision *must begin with its specific terms*". (emphasis added)

7.224 We therefore find that the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber 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.

7.225 Canada raises a separate claim of violation of Article 2.4 of the *AD Agreement*. In support of its claim, Canada argues that "[a] "fair comparison" requires equitable, unbiased treatment of all transactions being compared. Zeroing does not produce a fair comparison because it arbitrarily eliminates certain transactions from the calculation, resulting in a margin that does not equally reflect all transactions".[363] The United States disagrees.[364]

7.226 Having found in paragraph 7.224, *supra*, that the methodology applied by DOC when calculating the overall margin of dumping in the investigation on certain softwood lumber products from Canada is inconsistent with Article 2.4.2 of the *AD Agreement*, we consider that it is neither appropriate, nor necessary for us to rule on Canada's Article 2.4 claim.

J. CLAIM 7: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – ALLOCATION OF FINANCIAL EXPENSES: ABITIBI

(a) Factual Background

7.227 In its questionnaire, DOC requested Abitibi to calculate financial expenses based on DOC's normal methodology. In its response, Abitibi did not follow DOC's instructions and used a different methodology. Abitibi argued that lumber production requires fewer assets, and thus less financing, than other products.[365] Abitibi also asserted that the standard terms of sale for lumber require prompter payment than do the terms of sale for newsprint, paper and pulp products. Thus, Abitibi contended that the assets and financing needs of lumber were significantly less than those of pulp, value-added papers, and newsprint. In order to compute the portion of the company's net interest expense related to lumber assets and operations, Abitibi first allocated net interest expense to the fixed assets of each of the company's divisions based on average assets balances for the year 2000. Abitibi then divided the interest associated with its lumber operations by the lumber division COGS for year 2000. Finally, Abitibi multiplied the resulting ratio by the total cost of manufacturing for each product reported in its cost of production database to derive the reported per-unit net interest expense.

7.228 DOC rejected Abitibi's approach and, consistent with its "established practice", derived financial costs attributable to softwood lumber production through a proportionate allocation among all goods, as explained in the following excerpt from the IDM:

> "[DOC] 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, [DOC] has developed a consistent and predictable practice for calculating and allocating financial expenses. This method is to calculate the rate as

[363] Canada response to question 108 (b) of the Panel, paras. 59-61.

[364] US comments on Canada's responses to question 104 of the Panel, para. 7.

[365] Thus, in year 2000, lumber sales were CDN$638 million, requiring assets of CDN$859 million, meaning that each dollar of assets produced CDN$0.74 in sales. Newsprint, however, required assets of CDN$7,276 million to produce CDN$3,438 million in sales, or a ratio of 0.47. Value-added paper and pulp required assets of CDN$3,120 million to produce sales of CDN$1,601 million, for a ratio of 0.51. (Exhibit CDA-83, Abitibi's Questionnaire Response, p. D-45)

> 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 [DOC]'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, [DOC]'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, [DOC 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."[366] (footnote omitted)

7.229 Thus, DOC determined the amount for financial expense for softwood lumber as follows: First, DOC determined Abitibi's total financial cost. Second, DOC took total financial cost and compared it, as a ratio, to Abitibi's total COGS. Third, this ratio was applied to the total cost of manufacturing for the product under investigation (softwood lumber) in order to calculate a financial expense specific to that product.

(b) Arguments of the Parties/Third Parties

7.230 **Canada** asserts that, in disregarding Abitibi's proposed methodology and calculating the financial expense ratio as it did, DOC failed to "consider all available evidence on the proper allocation of costs", as required by Article 2.2.1.1 of the *AD Agreement*. In addition, Canada asserts that, in light of the facts before DOC, the methodology used by DOC over-allocated Abitibi's company-wide interest expense to softwood lumber by attributing to softwood lumber interest expense that related to other products manufactured by Abitibi, and thus failed to result in an allocation that "reasonably reflects the costs associated with the production and sale of the product under consideration" for Abitibi in contravention of Article 2.2.1.1. In support of this claim, Canada identifies a number of problems with the methodology used by DOC. First, it does not include the full value of long-term capital assets, nor does it include non-depreciable capital assets at all. Second, unlike capital assets which need to be financed for the full year and longer, current production expenses do not need to be financed for the full one-year period that DOC considered. According to Canada, they need to be financed until payment is received. Finally, Canada argues that the methodology used by DOC resulted in an inflated interest expense that included cost data on financial expense that did not "pertain to production and sales" of softwood lumber, as required by Article 2.2.2.

7.231 The **United States** replies that the theory underlying the use of the methodology applied by DOC to determine the amount for financial expense is that financial costs should be allocated based on the overall expenses incurred by a company to produce products, because financial costs are directly related to a company's working capital requirements. In the view of the United States, the methodology used by DOC is reasonable, as required by Article 2.2. Specifically related to Canada's claim, the United States asserts that DOC considered Abitibi's arguments on the calculation of the amount for financial expense, but ultimately disagreed with them, and as explained in the IDM allocated Abitibi's financial cost based on its own methodology. The United States notes that DOC found in the IDM that, because money is fungible, a company can use proceeds for a variety of corporate purposes, and it is irrelevant which cash outlay came from a specific loan or sales transaction. What is relevant is the company's overall need to borrow money to fund its overall production operations (i.e., equipment purchases as well as cost of production inputs). Contrary to

[366] Exhibit CDA-2, IDM, Comment 15, p. 77.

Canada's arguments that DOC ignored the asset-laden nature of Abitibi's non-lumber producing divisions, the United States asserts that DOC found in the IDM that DOC's methodology addresses Abitibi's concern that those activities are more asset-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. Thus, the United States argues that the methodology applied by DOC to allocate financial costs to Abitibi's softwood lumber production was based on a proper establishment, and on an unbiased and objective evaluation, of the facts.

7.232 **Japan** asserts that Article 2.2.1.1 imposes an obligation on an investigating authority to accept a respondent's accounting records for the production and sale of the product under consideration, including SG&A, unless that authority finds that those records do not "reasonably reflect" the costs. In the view of Japan, a determination of an investigating authority to depart from the respondent's records must, therefore, be based on its review of the accounting records of a specific respondent on a case-by-case basis. Japan further asserts that, an investigating authority must determine the amounts for SG&A costs based on all evidence submitted by respondents, and on an unbiased and objective evaluation of the facts. Japan argues that, if DOC applied a pre-determined methodology to a particular respondent without reviewing any evidence submitted by that respondent, such application would be inconsistent with Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof.

(c) Evaluation by the Panel

7.233 We note that in the Panel Request Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*.[367] However, in its restatement of claims and in its submissions to the Panel, Canada only asserts violations of Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 with respect to Abitibi's determination of the amounts for financial expense for softwood lumber.[368] Accordingly, we will limit our examination to those claims.

7.234 Bearing this in mind, we note that DOC derived the amounts for financial costs attributable to Abitibi's softwood lumber production through a proportionate allocation among all goods produced by that company, based on COGS.[369] Canada raises several claims in respect of these facts. *First*, Canada asserts that, in selecting its allocation methodology for calculating the amounts for financial/interest costs, DOC failed to "consider all available evidence on the proper allocation of costs", as required by Article 2.2.1.1. *Second*, Canada argues that, in determining the amounts for financial costs as it did, DOC over-allocated Abitibi's group-wide interest expense to Abitibi's cost of production and sale for softwood lumber by attributing to softwood lumber amounts for financial expense that related to Abitibi's other products, and thus failed to result in an allocation that "reasonably reflects the costs associated with the production and sale of the product under consideration" for Abitibi, as required by Article 2.2.1.1. *Third*, the application of DOC's methodology resulted in an inflated amount for interest costs because it included actual cost data on financial expense that did not "pertain to production and sales" of softwood lumber, in breach of Article 2.2.2.

7.235 Because Canada's first two claims relate to Article 2.2.1.1 of the *AD Agreement*, we first examine the nature of the obligations in that article. Article 2.2.1.1 provides in pertinent part:

> "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

[367] WT/DS264/2, para. 3(c).
[368] Canada response to question 1 of the Panel, para. 1(vi).
[369] *See* paras. 7.227-7.229, *supra*.

> generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. 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... "

7.236 Article 2.2.1.1 contains a number of obligations relating to an investigating authority's cost calculations for the purpose of determining whether home market sales are in the ordinary course of trade and for calculating a constructed (normal) value. *First*, it provides guidance regarding the preferred data source for performing such calculations. Specifically, Article 2.2.1.1 requires that costs be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Where records are not kept in accordance with the GAAP of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority may calculate costs on another basis.[370] *Second*, Article 2.2.1.1 requires 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, provided that such allocations have been historically utilised by the exporter or producer. *Third*, and not at issue here, Article 2.2.1.1 provides for the adjustment of costs under certain circumstances.

7.237 In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if ("*provided*") certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, Article 2.2.1.1 does *not* require that all allocations made by an investigating authority have been historically utilised by the exporter or producer; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *insofar as* such allocations have been historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada's arguments relating to Article 2.2.1.1.

7.238 We note that DOC stated in the IDM that it had developed "a consistent and predictable practice for calculating and allocating financial expenses".[371] We also note that, in the questionnaire, DOC directed Abitibi to calculate the finance expense ratio on the basis of that methodology.[372] Canada asserts that DOC failed to make case-specific findings, applied generic reasoning in defence of its methodology and asserted that its established practice would be followed because it is consistent and predictable. In the view of Canada, this proves that DOC failed to "consider all available evidence on the proper allocation of costs", as required by Article 2.2.1.1. After having carefully read the relevant portion of the IDM[373], we are in no doubt that DOC made case-specific factual findings with respect to Abitibi's financial expense determination. We do not consider that using generic reasoning in support of a specific determination constitutes, in and of itself, a reason which would

[370] *See*, in this regard, paras. 169 and 170 of Canada second written submission.
[371] *See* para. 7.228, *supra*.
[372] We do not understand the United States to contest these facts.
[373] *See* para. 7.228, *supra*.

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, as discussed in further detail below. Canada's next argument concerns DOC's alleged assertion that "established practice would be followed because it is consistent and predictable".[374] DOC stated in the IDM that: "[b]ecause there is no bright-line definition in the [Tariff] Act of what a financial expense is or how the financial expense rate should be calculated, [DOC] has developed a consistent and predictable practice for calculating and allocating financial expenses".[375] Having examined this statement in context, we consider that what DOC stated in the IDM is that it disagreed with Abitibi that DOC should depart from its established practice of calculating the amounts for financial costs based on the financial expense and COGS from the parent company's consolidated financial statements. The statement contained in the IDM that DOC has developed "a consistent and predictable practice for calculating and allocating financial expenses" does not prove in our view that DOC's "established practice would be followed in Abitibi's case because it is consistent and predictable." This brings us to the examination of Canada's assertion that DOC did not make case-specific factual findings for Abitibi on this matter. 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. First, DOC asserts that the "record of this investigation does not support the conclusion that [DOC's] methodology distorts the allocation of Abitibi's financial expenses". Such a statement could not be made without DOC having examined the evidence and considered the arguments relevant to the issue at issue. An examination of the ensuing discussion in the IDM shows that DOC considered the main argument that Abitibi put forward in support of its proposed allocation methodology, i.e., that DOC should allocate financial expense on the basis of an asset-based methodology. 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.

7.239 For the foregoing reasons, we cannot agree with the arguments submitted by Canada and therefore we reject Canada's contention that the United States failed to "consider all available evidence on the proper allocation of costs".

7.240 The second issue before us is whether the United States is in breach of Article 2.2.1.1 by failing to make an allocation of financial expense to softwood lumber which "reasonably reflects the costs associated with the production and sale of the product under consideration". Specifically, Canada argues that DOC over-allocated Abitibi's group-wide interest expense to Abitibi's cost of production and sale for softwood lumber by attributing to softwood lumber amounts for financial expense that related to Abitibi's other products. The parties agree on that Article 2.2.1.1 does not impose on investigating authorities any particular methodology for the purpose of allocating costs.[376]

7.241 In examining this issue, we first recall our findings with respect to the obligations imposed by Article 2.2.1.1 in paragraphs 7.236-7.237, *supra*, in particular our conclusion that we do *not* consider that Article 2.2.1.1 imposes positive obligations on investigating authorities other than those explicitly

[374] Canada second written submission, para. 199.
[375] *See* para. 7.228, *supra*.
[376] Canada response to question 38 of the Panel, para. 117 and US first written submission, para. 182.

provided therein. Canada asserts before us that "a COGS allocation methodology for interest expense cannot meet the requirements of Article 2.2.1.1 because it cannot establish interest expense for Abitibi that "reasonably reflects the costs associated with the production and sale of the product under consideration"."[377] In our view, Article 2.2.1.1 does not impose the obligation that Canada seeks us to find. The proviso of Article 2.2.1.1 requires, in our view, that costs must normally be determined on the basis of the records kept by the producer or exporter under investigation *provided* that such records reasonably reflect the costs associated with the production and sale of the product under consideration. Hence, even if Canada's contention that the methodology used by DOC in order to calculate the amounts for financial costs for Abitibi over-allocated financial expense to softwood lumber were to be correct, we would be unable to conclude, on that basis, that DOC's methodology cannot meet the requirements of Article 2.2.1.1. For the foregoing reasons, we must reject Canada's claim.

7.242 Furthermore, even if Article 2.2.1.1 had contained such an obligation, we should still dismiss Canada's claim under Article 2.2.1.1. This provision establishes that authorities must 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". (emphasis added) Canada has not argued that the allocation methodology proposed had been "historically utilized" by Abitibi.[378] In addition, the methodology proposed by Abitibi had a number of shortcomings.[379] During the course of the proceedings, it has become evident to us that DOC's methodology could also be criticised.[380] On balance, however, it is evident to us that both methodologies have shortcomings and advantages and hence, it is up to the investigating authority, as a trier of facts, to decide which one of the possible methodologies would lead to the most accurate result. This is a determination that, we believe, a panel cannot overturn without involving a *de novo* review. In any case, Canada bears the burden to prove that the methodology used by the United States had lead to unreasonable results and that an unbiased and objective investigating authority could not have calculated the amounts for finance expense for softwood lumber for Abitibi on the basis of the methodology used by DOC. We are of the view that Canada has not met this burden. Hence, even if Canada's argument had found support in the text of Article 2.2.1.1 – which as we found in paragraph 7.241, *supra*, does not, we would have rejected it on this ground.

7.243 Canada argues that the calculation of the amounts for financial expense was not based on "actual data pertaining to production and sales" of softwood lumber, as required by Article 2.2.2 of the *AD Agreement*. Canada asserts that, based on evidence from Abitibi's financial statement, Abitibi's lumber operations required 7.6 per cent of the company's total assets; hence, softwood lumber should have been allocated 7.6 per cent of the company's total financial expense. However, Canada asserts that DOC allocated 13.6 per cent of the total amount for financial expense to the product under consideration; thus ignoring the evidence submitted by Abitibi that financial expense was incurred in relation to assets. In so doing, Canada asserts that DOC attributed to softwood lumber amounts for financial expense that did not "pertain" to the production and sale of softwood lumber, contrary to Article 2.2.2.

7.244 The issue before us is therefore whether, in determining the amount for financial expense in the manner DOC did, DOC attributed to softwood lumber interest costs beyond those "pertaining to"

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[377] Canada second written submission, para. 200.

[378] In fact, based on the information made available to us in the context of these proceedings, it would appear that this allocation methodology was developed by Abitibi for the purposes of the anti-dumping investigation at issue. Thus, Canada acknowledges that "Canadian GAAP do 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". (Canada second written submission, para. 183)

[379] *See* e.g. US second oral (opening) statement, para. 68.

[380] *See* e.g. Canada response to question 116 of the Panel, paras. 89-97.

softwood lumber.[381] We understand Canada's argument to rest on the fact that DOC determined the amounts for financial expense for softwood lumber based on an improper allocation methodology. However, bearing in mind our conclusion in paragraph 7.241, *supra*, we consider that, based on the facts before DOC at the time of determination, an unbiased and objective investigating authority could have computed the amount for financial expense to be attributed to softwood lumber on the basis of the methodology used by DOC for Abitibi. Having reached this conclusion, and taking into account that Canada has not advanced any other argument in support of its claim under Article 2.2.2, we conclude that Canada has not established that the United States acted inconsistently with that provision in determining the amount for financial expense for softwood lumber based on the methodology used by DOC.

7.245 Finally, Canada claims violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. With respect to Articles 2.2 and 2.2.1, Canada asserts that an incorrect calculation of costs impacts the determination of which sales may be used in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. With respect to Article 2.4, Canada asserts that, where the calculation of costs results in an improper normal value, a fair comparison will not be possible in violation of Article 2.4. Thus, we understand Canada's claims under Articles 2.2, 2.2.1 and 2.4 to rest upon a finding of violation of either Article 2.2.1.1 or 2.2.2 or of both. Having concluded that, in determining the amounts for financial expense to be attributed to softwood lumber, the United States did not violate Articles 2.2.1.1 and 2.2.2, we find that Canada's dependent claims under Articles 2.2, 2.2.1 and 2.4 fail.

K. CLAIM 8: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – DETERMINATION OF GENERAL & ADMINISTRATIVE EXPENSES: TEMBEC

(a) Factual Background

7.246 Tembec divides its operations into five separate divisions. One of those divisions, the FPG, consists primarily of sawmill operations which produce *inter alia* softwood lumber. In its consolidated audited financial statement for the year 2000, as reflected in its Annual Report, Tembec reports an amount for SG&A costs for the company as a whole. The Annual Report also contains certain segmented information for the five divisions, but does not break out G&A costs by division. However, internal divisional financial statements kept by Tembec report separate amounts for G&A expenses for each division, including those amounts for G&A costs that are charged directly by Tembec to each of its divisions, plus an allocated portion of the corporate-level G&A. DOC's questionnaire requested that the exporter calculate the G&A ratio by dividing total company-wide G&A expenses by total company-wide COGS.[382] In addition to calculating the G&A ratio as requested by DOC, Tembec calculated the G&A ratio by dividing the total amount of G&A expenses for the FPG – which included those amounts for G&A costs directly charged to that division and an allocated portion of the corporate-level G&A expenses – by the total cost of sales (minus packing) for the FPG divisional data.[383] That is, instead of calculating the G&A ratio on the basis of company-wide data, Tembec did so on the basis of divisional data (FPG). For the reasons set out in detail *infra*, DOC rejected Tembec's proposed G&A calculation methodology and determined Tembec's G&A ratio using a factor derived from its company-wide financial earnings statement:

> "[t]he statute at sections 773(b)(3)(B) and 773(e)(2)(A) directs [DOC] to calculate an amount for selling, general and administrative expenses based on actual data pertaining to the production and sale of the merchandise under consideration. The

[381] It is not disputed by parties that the financial expense at issue is part of the SG&A costs referred to in Article 2.2.2.

[382] Canada first written submission, para. 209.

[383] Exhibit CDA-159, Tembec's Questionnaire Response, Section D, p. D-28. *See* also Exhibit US-73, Tembec's Cost Verification Report, p. 26.

> antidumping law does not prescribe a specific method for calculating the G&A expense rate. When a statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of [DOC]. Because there is no definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, [DOC] has developed a consistent and predictable practice for calculating and allocating G&A expenses. This consistent and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a divisional or product-specific basis. This practice is identified in [DOC]'s standard section D questionnaire, which instructs that the G&A expense rate should be calculated as the ratio of total company-wide G&A expenses divided by cost of goods sold. See Section D Questionnaire, page D-14. *This approach is consistent with Canadian GAAP's treatment of such period costs and recognizes the general nature of these expenses and the fact that they relate to the activities of the company as a whole rather than to a particular production process.* [DOC]'s methodology also avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions. Therefore, we normally calculate the G&A expense rate based on the respondent's unconsolidated operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent.
>
> Tembec deviated from [DOC]'s normal methodology and calculated its G&A expenses using an internal accounting methodology, under which the company charged some G&A expenses directly to each of its divisions. However, Tembec divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation. Thus, we agree with petitioners that we cannot consider the divisional P&L statements as "unconsolidated financial statements". For the final determination, we have based Tembec's G&A expense rate calculation on Tembec Inc's company-wide income statement."[384] (footnote omitted; emphasis added)

(b) Arguments of the Parties/Third Parties

7.247 **Canada** asserts that the approach adopted by DOC in order to determine the amounts for G&A costs for Tembec resulted in a distorted allocation of costs associated with the production of softwood lumber. Canada asserts that, by rejecting the verified evidence from Tembec and calculating G&A expenses based on costs incurred on a company-wide basis, DOC allocated G&A expenses in a manner that did not reasonably reflect the costs associated with the production and sale of softwood lumber, in violation of Article 2.2.1.1. In this respect, Canada asserts that DOC did not engage in an unbiased and objective evaluation of the facts presented by Tembec in selecting the methodology for allocating G&A costs in violation of Article 2.2.1.1. Canada further argues that, in adopting the above methodology, DOC acted inconsistently with Article 2.2.2. Referring to the *Thailand – H-Beams* Panel Report, Canada states that DOC's use of company-wide expenses resulted in the inclusion of amounts for G&A costs pertaining to the production of non-investigated products and accordingly, failed to result in total cost figures that accurately represented the cost of producing softwood lumber. Canada requests the Panel to reject the US argument that Tembec's FPG data were not "audited" and not kept in accordance with Canadian GAAP as *ex post* rationalization. In any case, Canada argues that the FPG divisional data were audited and maintained in accordance with GAAP.

7.248 The **United States** replies that DOC refused Tembec's proposed methodology on two grounds. First, DOC determined that, because the division-specific amount at issue was un-audited, it was inherently less reliable than audited books and records that had been certified to be consistent

[384] Exhibit CDA-2, Comment 33, pp. 105-106.

with Canadian GAAP. According to the United States, there was greater certainty that audited GAAP-consistent books and records would "reasonably reflect the costs" of softwood lumber. Second, DOC determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses. The United States takes issue with Canada's statement that "[t]he G&A factor derived from the FPG includes a properly allocated portion of corporate G&A…"[385] In the view of the United States, implicit in this statement is an acknowledgement that the division-specific data, on their own, were an inaccurate basis for allocating G&A. That number had to be supplemented by a portion of company-wide G&A to come up with a "derived" G&A amount for the FPG. With respect to the status of the FPG data, the United States asserts that Canada has been unable to provide evidence that Tembec's FPG divisional G&A records were kept in accordance with Canadian GAAP.

7.249 **Japan** makes general comments on Canada's SG&A-related claims which are contained in paragraph 7.232, *supra*.

(c) Evaluation by the Panel

7.250 Tembec requested DOC to determine the amounts for G&A costs based on its internal accounting methodology, under which the company charged some G&A expenses directly to each of its divisions. In application of DOC's normal practice and DOC's treatment of all other respondents in the investigation, DOC calculated the G&A expense rate for softwood lumber by allocating Tembec's company-wide G&A costs over its production of all products based on company-wide COGS, and disregarded the FPG G&A figures on the basis of which Tembec had calculated the amounts for G&A costs for softwood lumber in its questionnaire response. In determining the amounts for G&A costs based on the company-wide rate, Canada asserts that DOC overstated the costs of producing softwood lumber, resulting in a cost of production that did not reasonably reflect costs associated with Tembec's production of softwood lumber, contrary to Article 2.2.1.1, and included costs that did not pertain to the production and sale of softwood lumber, contrary to Article 2.2.2. In adopting such a methodology, Canada asserts that DOC also violated Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[386]

7.251 Canada argues that the record demonstrated that the FPG G&A data more accurately "pertained to" the production of softwood lumber. By contrast, in the view of Canada Tembec's company-wide data could not be said to "pertain to" the production and sale of the like product in Canada because those figures represent the company's world-wide production of a broader range of products. Canada asserts that DOC's method effectively required reliance on data that did not pertain to the production and sale of softwood lumber and distorted Tembec's margin of dumping in violation of Article 2.2.2. In addition, Canada argues that DOC's methodology resulted in the calculation of costs that were not "associated with" the actual cost to Tembec of producing and selling softwood lumber, contrary to Article 2.2.1.1. The United States replies that DOC determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses.

7.252 We note that parties have differing views regarding the nature of the obligations contained in Articles 2.2.1.1 and 2.2.2, and, in particular, regarding the manner in which an investigating authority is to derive the amounts for G&A costs for the product under investigation. In essence, Canada

[385] Canada first written submission, para. 220.

[386] We note that, in the Panel Request, Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*. (WT/DS264/2, section 3(c)) In its restatement of claims, however, Canada only claims violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement* – in addition to those under Articles 2.2.1.1 and 2.2.2 – with respect to this specific claim. (Canada response to question 1 of the Panel, para. 1(vi)) For the foregoing reasons, we will refrain from addressing claims not contained in the restatement of claims and from ruling on those claims.

contends that Articles 2.2.1.1 and 2.2.2 obliged DOC to base its G&A calculations for softwood lumber on product-specific G&A costs, at least to the extent possible, and that DOC was thus obliged to calculate the amounts for G&A costs for softwood lumber on the G&A data for the narrower FPG division rather than on the G&A data for the company as a whole. The United States on the other hand considers that G&A costs are by definition company-wide, and that neither Article 2.2.1.1 nor 2.2.2 requires an investigating authority to link particular G&A expenses to particular products. We note, however, the US argument that DOC's determination not to use the FPG divisional G&A data was justified under Article 2.2.1.1 because the FPG records did not reasonably reflect the (G&A) costs associated with the production and sale of the product under consideration.

7.253 Article 2.2.1.1 provides, in relevant part, as follows:

> "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. 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... "

7.254 In accordance with this provision, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that, *inter alia*, such records are in accordance with the GAAP of the exporting country.[387] Data which are not GAAP-compliant might be found *not* to be reliable and, hence, not be used as the basis for the cost calculation.

7.255 We note that DOC calculated the amounts for G&A costs for Tembec dividing the company-wide G&A by the total COGS, as explained in the IDM (see paragraph 7.246, *supra*). We do not understand Canada to argue that the use of this methodology is *per se* inconsistent with Article 2.2.1.1. In any case, we do not read in Article 2.2.1.1 a requirement that the determination of the amounts for G&A costs must be done in any particular manner or based on any particular methodology.

7.256 Furthermore, we note that the respondent requested DOC to determine the amount for G&A costs using an "internal accounting methodology", as stated in the IDM.[388] The United States asserts that, because the division-specific amount at issue was unaudited, it was inherently less reliable than audited books and records that had been certified to be in accordance with Canadian GAAP. According to the United States, there was greater certainty that audited GAAP-consistent books and records would "reasonably reflect the costs". Canada notes that Tembec had argued in its Case Brief that the G&A based on data from the FPG was most accurate. According to Canada, data from both the FPG division and the overall company, both fully audited and compiled according to GAAP, were on the record and verified by DOC officials. In addition, Canada argues that the US assertion that Tembec's FPG divisional G&A data were not audited and not kept in accordance with Canadian GAAP constitutes *post hoc* rationalization. Canada asserts that, in the context of the investigation, DOC considered the FPG data reliable for all costs purposes, except for the calculation of the amounts for G&A costs.

7.257 DOC justified its decision not to calculate Tembec's amount for G&A costs on the basis of the methodology proposed by the exporter on two bases.[389] First, DOC calculates the amount for G&A

[387] *See* paras. 7.236-7.237, *supra*.
[388] *See* para. 7.246, *supra*.
[389] It is stated in relevant portion of the IDM (*see* para. 7.246, *supra*) that:

based on the respondent's *unconsolidated* operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent. In the case of Tembec, DOC found that "Tembec['s] divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation". DOC's second justification is that using its methodology "avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions".

7.258 We are therefore faced with a situation where DOC, in the course of the investigation, had examined the methodology proposed by Tembec and, on several grounds, DOC rejected it and used another methodology to determine the amounts for G&A costs for Tembec's softwood lumber operations. DOC's arguments, as we understand them, revolve around the issue of the *incompleteness* of the amounts for G&A costs resulting from the application of the methodology proposed by the exporter. In other words, they reflect the investigating authority's concern that amounts for G&A costs calculated from G&A data for the FPG division, including an allocated amount from the corporate G&A, might not include *all* the G&A costs associated with the production and sale of the product under consideration. Hence, the resulting amounts for G&A costs would not reflect all the G&A costs pertaining to the production and sale of softwood lumber. We can imagine situations where, for various reasons, a company might decide to charge a certain G&A cost item to a particular division, even where other divisions might benefit from that particular item. A good example to illustrate this, might be car park costs. The car park is used by divisions A and B. The costs of the car park are recorded in the books of division A and do not form part of the corporate G&A costs. In the event of an anti-dumping investigation targeting a product manufactured by division B, an amount for G&A costs based on data on G&A costs from division B plus a duly apportioned part of the corporate G&A costs, in our view, would not include all G&A costs associated with the production and sale of the product subject to investigation. For the foregoing reasons, we do not consider that rejecting a methodology that would have the effect of excluding certain G&A cost items from the calculation of the amounts for G&A costs for the product under investigation would not be consistent with Article 2.2.1.1 of the *AD Agreement*. In our view, a determination as to whether such a rejection would be consistent or not with Article 2.2.1.1 can only be made after carefully considering the specific facts before an investigating authority.

7.259 In the case before us, we recall that DOC found that "Tembec['s] divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation".[390] This finding has not been contested by Canada. The question before us is to determine whether Tembec had demonstrated that the G&A data from the FPG division, including an allocated portion from G&A's corporate expenses, was complete. We have examined in particular Exhibits CDA-95, 96 and 149. The "Revised Calculation of the G&A Ratio for the FPG Division", contained in Exhibit CDA-95 shows that G&A cost data for that division was verified and that some

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> "[DOC's] methodology (…) avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions. Therefore, we normally calculate the G&A expense rate based on the respondent's unconsolidated operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent.
>
> Tembec deviated from [DOC]'s normal methodology and calculated its G&A expenses using an internal accounting methodology, under which the company charged some G&A expenses directly to each of its divisions. However, Tembec divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation. Thus, we agree with petitioners that we cannot consider the divisional P&L statements as "unconsolidated financial statements". For the final determination, we have based Tembec's G&A expense rate calculation on Tembec Inc's company-wide income statement". (footnote omitted)

[390] *See* para. 7.246, *supra*.

items were traced to Tembec's year 2000 Annual Report. A verification sheet containing a breakdown of SG&A cost items for each of the five divisions – including the FPG – is also included in Exhibit CDA-95. While the total amounts for SG&A costs for the FPG division contained in this verification sheet coincide with the total amounts for SG&A costs for the FPG division used in the "Revised Calculation of the G&A Ratio for the FPG Division", this does not show that there were no G&A costs under any of the other four divisions that pertained to the production and sale of the product under investigation. Canada has not pointed to any evidence on the record to that effect. We therefore conclude that DOC was entitled to depart from Tembec's FPG division-specific records and calculate the amounts for G&A costs based on Tembec's audited company-wide G&A data.[391,392]

7.260 We therefore find that an unbiased and objective investigating authority could have determined the amounts for G&A expenses for softwood lumber as DOC did and hence reject Canada's claim that the United States acted in violation Article 2.2.1.1.

7.261 Canada claims that Tembec's company-wide G&A data, a portion of which was allocated to softwood lumber, could not "pertain to" the production and sale of the like product in Canada because those figures represent Tembec's worldwide production, including products other than those subject to investigation and that the United States has therefore violated Article 2.2.2. For this reason, Canada argues that DOC's methodology resulted in reliance on data which did not pertain to the production and sale of softwood lumber. The United States replies that DOC determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses.

7.262 Article 2.2.2 provides in relevant part:

> "[f]or the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation".

7.263 We consider that the text of the provision is self-explanatory: investigating authorities are required to calculate the amounts for, *inter alia*, G&A costs based on actual data pertaining to production and sale in the ordinary course of trade of the like product. Article 2.2.2 does not provide for any particular methodology in order to determine those amounts.[393] Canada focuses on the terms "pertain to" in that provision. In our view, it is important however to start our examination from the term "general and administrative costs". We note that this provision does not define "general" and "administrative" costs nor does it state which cost items should be considered to be "general" or "administrative" costs.[394] The term "general" is defined as "**1 b** including or affecting all or nearly all parts or cases of things".[395] Thus, "general costs" would be costs affecting all or nearly all products

[391] The parties disagree as to whether or not the divisional statements – including that of the FPG – were audited. While this might have been relevant, after a careful examination of Tembec's Annual Report contained in Exhibits CDA-94 and 148 and US-12 we cannot conclude that the divisional statements were audited.

[392] Canada argues that DOC considered the FPG data reliable for all costs purposes, except for the purpose of calculating the amounts for G&A costs. We do not consider that this argument would alter our conclusion, even if Canada's statement were to be correct. The fact that DOC might have used cost data from the FPG division for purposes other than calculating the amounts for G&A costs does not constitute an acknowledgement on the part of DOC that the FPG division G&A records were complete. We are of the view that, if they had been complete, Tembec would not have had to allocate a portion of the corporate G&A to the FPG division in order to arrive at the amounts for G&A costs for softwood lumber.

[393] *See* in this regard Canada response to question 38 of the Panel, para. 117.

[394] As the parties' arguments revolve around the terms "general" and "administrative" costs, we will focus our examination on those concepts and will not examine the term "selling" costs.

[395] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 564.

manufactured by a company. On the other hand, "administrative" is defined as "concerning or relating to the management of affairs".[396] "Administrative" costs are therefore costs concerning or relating to the management of the company's affairs. Bearing this in mind, we consider that such costs can only have a bearing on all the products manufactured by a company, although in varying degrees. Thus, by their *nature*, G&A costs are costs that will normally affect all products produced or sold by a company. In this regard, Canada has stated before us that:

> ""Administrative, selling and general costs" (...) are costs that are not directly attributable to the product under investigation or any particular product. They
>
> - include such costs as management salaries and other corporate-level expenses that benefit *all* products that a company (or division within a company) may produce rather than specific products.
> - are usually listed on a company's consolidated financial statement, as a separate line item labelled G&A or SG&A. They are recorded as an aggregate amount and are not attributed to specific products.
> - must be allocated to the product under investigation. Where the company that produces the investigated product is the subsidiary of another company, an amount of the parent company's G&A that is attributable to the subsidiary's production of the investigated product will be allocated to it. These are typically referred to as "headquarters" expenses and are costs that would be incurred by the subsidiary if the parent did not exist (i.e., accounting staff salaries, information technology expenses, etc.). Only G&A costs that actually relate to the investigated product can be allocated to it. An over-allocation of G&A expense that is incurred in relation to its other products results in an inflation of overall costs for the product at issue."[397] (emphasis added)

7.264 Canada acknowledges that, *inter alia*, G&A costs "benefit all products that a company (or division within a company) may produce rather than specific products". This confirms our interpretation about the terms "G&A costs". In addition, Canada asserts that they "are not directly attributable to the product under investigation or [to] any particular product". This is a reflection of the nature of those costs: because they are intended to affect a plurality of products, businesses, etc. within a company, it is normally not possible for a company to attribute these costs directly to any particular product. It is clear that these are costs actually incurred by a company and, hence, that must be recovered by that company in order to make a profit. However, due to the very nature of these costs it is normally not possible to ascertain the precise contribution by each product to these costs. If a company were able to ascertain the precise contribution to these costs by a particular product, one would normally have expected the company to treat these costs as part of the cost of production of that product.

7.265 We next examine the term "pertain to" within the meaning of the chapeau of Article 2.2.2. "Pertain" is defined as "**1 a** relate or have reference to".[398] In our view, a meaningful interpretation of the term "pertain[ing] to" must take into account the nature of those costs because, as Canada acknowledges, they "are not directly attributable to the product under investigation or [to] any particular product". Thus, it would appear to us that, unless a particular G&A cost can be tied to a particular product manufactured by a company, G&A costs – because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods – pertain or relate to all of those goods. Canada's argument that G&A costs "benefit all products that a company (or division within a company) may produce rather than specific products"

[396] *Id.*, p. 18.
[397] Canada second written submission, para. 166.
[398] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 1021.

supports our view. If G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation.

7.266 The next issue we address is the attribution of G&A costs to discrete products produced or sold by a given company. Article 2.2.2 of the *AD Agreement* does not provide any guidance on this issue. Different investigating authorities use different allocation keys. In the case before us, the United States used as an allocation key the following: total company-wide G&A divided by the total company-wide COGS, thereby obtaining the G&A ratio for Tembec. This was then multiplied by the cost of production for softwood lumber in order to obtain the amounts for G&A costs for softwood lumber. As we do not understand Canada to have challenged the allocation methodology *per se* used by the United States, but the use of company-wide G&A data, we will refrain from ruling on whether that allocation methodology is consistent with Article 2.2.2.[399]

7.267 Canada claims that DOC calculated an amount for G&A costs based on (company-wide) G&A data which, at least in part, did not pertain to softwood lumber in violation of Article 2.2.2. Canada refers to the fact that the figures used by DOC to calculate the G&A ratio "represent the worldwide production, 70 per cent of which is made up of paper, pulp and chemicals".[400] Canada argues that DOC should have used instead the G&A ratio provided by Tembec. However, we have found in paragraph 7.260, *supra*, that DOC was entitled not to use the data as proposed by Tembec because of concerns regarding its completeness. Canada has not argued that there was any specific general or administrative cost item that – in its view – did not "pertain to" softwood lumber. Rather, Canada's contention is of a general nature: company-wide figures "represent the worldwide production, 70 per cent of which is made up of paper, pulp and chemicals". As we have noted above and acknowledged by Canada, G&A costs – because of their nature – are in principle intended to have a bearing on all the products produced and sold by a specific company. For this reason, we consider that, unless a producer/exporter can demonstrate that the product under investigation did not benefit from a particular G&A cost item, an investigating authority is not precluded to attribute at least a portion of that cost to the product under investigation. The general assertions of the type made by Canada cannot, in our view, qualify as a demonstration that the amounts for G&A costs as allocated by DOC did not relate to softwood lumber in any way. We therefore find that the United States did not violate Article 2.2.2 by determining the G&A ratio – and the resulting amounts for G&A for softwood lumber – based on Tembec's company-wide G&A data.[401] Canada's claim under Article 2.2.2 therefore fails.

7.268 We next address Canada's claims under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. With respect to Articles 2.2 and 2.2.1, Canada asserts that an incorrect calculation of costs under Articles 2.2.1.1 and 2.2.2 impacts the determination of which sales may be used in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. Regarding Article 2.4, Canada argues that any action taken by the investigating authority that is inconsistent with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 would result in an "unfair comparison" between normal value and export price, in violation of Article 2.4 of the *AD Agreement*.

[399] The methodology proposed by Tembec differs from the one used by DOC in that the numerator would include Tembec's FPG G&A data plus an allocated portion of the "corporate headquarters" G&A data instead of the total company-wide data. In turn, Tembec's denominator would have included the FPG's COGS rather than the total company-wide COGS.

[400] Canada second written submission, para. 221.

[401] We do not understand Canada to argue that the United States could not have complied with the requirement just discussed because Tembec's company-wide figures represent the company's world-wide production, i.e., production and sales outside Canada.

7.269 We recall that, in paragraphs 7.260 and 7.267, *supra*, we have concluded that Canada has not established that the United States has acted inconsistently with Articles 2.2.1.1 and 2.2.2 of the *AD Agreement*. Given that Canada's claims of violation of Articles 2.2, 2.2.1 and 2.4 are premised on violations of Articles 2.2.1.1 and 2.2.2, we conclude that Canada has not established that the United States acted inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[402]

L. CLAIM 9: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – DETERMINATION OF GENERAL & ADMINISTRATIVE EXPENSES: WEYERHAEUSER

(a) Factual Background

7.270 In its questionnaire response, Weyerhaeuser Canada, one of the Canadian producers subject to investigation, reported G&A costs incurred by Weyerhaeuser Canada as well as G&A costs incurred by Weyerhaeuser Company (Weyerhaeuser Canada's parent company located in the United States), which, in its view, related to the production and sale of Canadian softwood lumber, the product under investigation. Charges concerning the settlement of legal claims relating to hardboard siding were *not* included in the G&A costs which Weyerhaeuser Company reported in its questionnaire response.[403] These legal claims originated from sales of hardboard siding in the US between 1981 and 1999. Following verification of the exporter's response, DOC suggested that the amount for settlement of those claims (US$130 million) might be more appropriately included in Weyerhaeuser Company's G&A expenses, rather than in that company's COGS as reflected in the IDM:

> "[s]ettlement claims are not a cost of goods sold, which is the base [DOC] typically uses to allocate G&A expenses. Instead, these costs represent the settlement of claims against products sold in prior years. We note that these costs are included on the consolidated financial statements under the forest products group companies. While the costs relate to non-subject product, hardboard siding, [DOC] typically allocates business charges of this nature over all products because they do not relate to an production activity, but to the company as a whole. We recognize that one time charges like this are ultimately a cost of doing business for the company. Therefore, we have included them in the headquarters G&A, but allocated them over all products in deriving the rate."[404]

7.271 Thus, DOC concluded that the costs relating to the settlement of legal claims on hardboard siding should be included in Weyerhaeuser Company's G&A, and allocated them over all products – including softwood lumber – in deriving the amounts for G&A costs for Weyerhaeuser Canada.

(b) Arguments of the Parties/Third Parties

7.272 **Canada** argues that DOC calculated an inflated amount for the G&A costs included in Weyerhaeuser Canada's cost of producing softwood lumber, contrary to Article 2.2.2, by including in its G&A calculation a US$130 million charge incurred by Weyerhaeuser Company's for costs related exclusively to hardboard siding, a product Weyerhaeuser Company produced and sold in the United States. In the view of Canada, that cost did not "pertain to" Weyerhaeuser Canada's production and sale of Canadian softwood lumber. Canada claims that the finding of the panel in *Egypt – Steel Rebar* that Articles 2.2.1.1 and 2.2.2 advocate a "relationship test" between costs and the production and sale of the like product at issue supports its argument. In addition, Canada argues that

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[402] Accordingly, we need not address the United States' argument, based upon the findings of the *Egypt – Steel Rebar* panel (para. 7.333), that Article 2.4 relates only to the *comparison* of export price and normal value, and does not regulate the establishment of the normal value as such.

[403] Canada first written submission, para. 226.

[404] Exhibit CDA-2, IDM, Comment 48b, pp. 133-134.

DOC improperly ignored Weyerhaeuser Company's books and records and established amounts for G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its cost for producing and selling softwood lumber, contrary to Article 2.2.1.1. In the view of Canada, Weyerhaeuser Company did not treat this settlement cost as a general expense on its records, nor did it reasonably reflect the cost for producing or selling Canadian softwood lumber.

7.273 The **United States** replies that DOC found that the costs concerning the settlement of the hardboard siding claims were incurred years after the production of the hardboard siding at issue and were not part of the production process for that product. Therefore, those costs could not properly be considered a cost uniquely allocable to hardboard siding production, but that it was a cost "of doing business" to the company as a whole. In addition, the United States contends that Weyerhaeuser Company treated those expenses as a general cost in its audited financial statement. The United States asserts that DOC explained that it "typically allocates business charges of this nature over all products because they do not relate to [a] production activity, but to the company as a whole". The United States asserts that DOC's decision on this issue is supported by Weyerhaeuser Company's own books and records, which include these litigation settlement costs as a general cost, as opposed to a COGS. The United States argues that the inclusion of litigation costs reported on a consolidated financial statement in G&A costs does not contradict the reasoning of *Egypt – Steel Rebar*.

7.274 **Japan** submits general comments on Canada's SG&A-related claims which are contained in paragraph 7.232, s*upra*.

(c) Evaluation by the Panel

7.275 The first issue before us is whether DOC acted inconsistently with Article 2.2.2 of the *AD Agreement* in attributing a portion of the charges for the settlement of hardboard siding claims to the G&A amount calculated for softwood lumber, the product under consideration.[405] Canada raises a separate claim under Article 2.2.1.1 and consequential claims based on Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[406]

7.276 We start our examination with Canada's Article 2.2.2 claim. Canada asserts that the United States acted inconsistently with Article 2.2.2 by including cost data that did not "pertain to" the production and sale of the product under investigation. In support of its claim, Canada asserts that the respondent argued before DOC that the hardboard siding cost was not general in nature and therefore not attributable to the company as a whole. In addition, Canada asserts that the charge at issue was a cost that did not pertain to the production and sale of softwood lumber in Canada for Weyerhaeuser Canada and therefore it should not have been taken into account when determining the amounts for SG&A costs to be attributed to softwood lumber's production and sale, i.e., the product under consideration. The United States disagrees.

[405] We do not understand Canada to dispute the consistency with the *AD Agreement* of the methodology used by DOC in order to determine the amounts for G&A costs for Weyerhaeuser Canada. Nor do we understand Canada to dispute the consistency of DOC's inclusion in the calculation of the amounts of G&A expenses for softwood lumber of certain G&A expenses not booked in Weyerhaeuser Canada's records, but in its parent company's (Weyerhaeuser Company) records. We note that, in fact, Weyerhaeuser Canada included these items itself in its response to the questionnaire as G&A expenses which, in part, pertained to the production and sale of the like product. (Canada second written submission, para. 230, first bullet point) Finally, we note Canada's assertion that it does not argue before us that the hardboard siding settlement expense should have been classified as a cost related to the production of hardboard siding rather than as a G&A expense. (Canada second written submission, note 220)

[406] We note that, in the Panel Request, Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*. (WT/DS264/2, section 3(c)) In its restatement of claims, however, Canada only claims violations of the provisions cited in para. 7.275, *supra*, i.e., Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement*. (Canada response to question 1 of the Panel, para. 1(vi)) For the foregoing reasons, we will refrain from addressing claims not contained in the restatement of claims and from ruling on those claims.

7.277 Before considering the facts in the dispute before us, we must examine the relevant provisions of the *AD Agreement* in order to determine what obligations are imposed on investigating authorities. In this regard, we note that Article 2.2 provides in relevant part:

> "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation *or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison*, the margin of dumping shall be determined by comparison (...) with *the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*." (emphasis added, footnote omitted)

7.278 We note that this general provision concerns the establishment of an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used. Furthermore, if an investigating authority resorts to the last methodology contained in Article 2.2 – the construction of normal value – a *reasonable* amount for SG&A costs must be used.

7.279 The chapeau of Article 2.2.2 provides that:

> "[f]or the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation."

7.280 The text of the provision is self-explanatory: investigating authorities are required to calculate the amounts for, *inter alia*, G&A costs based on actual data pertaining to production and sale in the ordinary course of trade of the like product. We recall our views expressed in paragraphs 7.263-7.265, *supra*, with respect to our interpretation of the terms "general" and "administrative" costs in the chapeau of Article 2.2.2, as well as on the nature of such costs. In particular, we recall that such costs normally have a bearing on all the products manufactured by a company, although in varying degrees. By their *nature*, G&A costs are costs that, in our view, will *normally* affect all products produced or sold by a company. Canada's comments, cited in paragraph 7.263, *supra*, support our views. Thus, Canada acknowledges that G&A costs "benefit all products that a company (or division within a company) may produce rather than specific products" and that they "are not directly attributable to the product under investigation or any particular product".[407] We also recall that Article 2.2.2 does not provide for any particular methodology in order to determine those amounts.[408]

7.281 We further recall our finding that, unless a producer/exporter can demonstrate that the product under investigation did not benefit from a particular G&A cost item, an investigating authority is not precluded from attributing at least a portion of that cost to the product under investigation.[409] Both in the underlying investigation before DOC and in the proceedings before us, it is being asserted that the charge at issue does not pertain to the production and sale of the product under investigation. Canada's arguments – and the underlying facts upon which those arguments are based – in this claim thus differ significantly from those in Tembec's claim, where Canada put forward only general arguments in support of its assertion that the amounts for G&A costs calculated for softwood lumber could not be considered to be based on actual data "pertain[ing] to" the production and sale of softwood lumber.[410]

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[407] Canada second written submission, para. 166.
[408] *See* in this regard Canada response to question 38 of the Panel, para. 117.
[409] *See* para. 7.267, *supra*.
[410] *Ibid.*

7.282 Bearing in mind our understanding of this provision, we must first examine Canada's arguments that the US$130 million charge could not be considered a "general" cost within the meaning of Article 2.2.2, and that the charge was not treated as a "general" cost on Weyerhaeuser Company's records. The examination of each of these issues requires us to address the facts involved. We recall that our standard of review is set out in Article 17.6 of the *AD Agreement*. In the case before us, we must determine whether the investigating authority's evaluation of the facts was unbiased and objective.

7.283 As stated in paragraph 7.276, *supra*, parties disagree on whether the cost at issue is a "general" cost within the meaning of Article 2.2.2. The United States argues that the hardboard siding expense is a "general" cost because it does not relate to the production and sale of hardboard siding. In addition, the United States defines "general" costs as ""all expenses incurred in connection with performing general and administrative activities. Examples are executives' salaries and *legal expenses*"."[411] (emphasis in original) Canada contends that the expense at issue was not part of the "legal expenses" of Weyerhaeuser Company, but an "unique charge".[412] Canada further asserts that Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A costs and the settlement of legal claims relating to hardboard siding.[413]

7.284 Article 2.2.2 does not define "general" costs nor does it state which cost items should be considered to be "general" costs.[414] However, we recall that the term "general" is defined as "**1 b** including or affecting all or nearly all parts or cases of things".[415] Thus, "general" costs are costs affecting all or nearly all products manufactured by a company. In our view, and based on this definition, it is difficult to determine whether the charge at issue is a "general" cost. It could be argued that because the charge arises from the sale of hardboard siding, a product which was not subject to investigation, that charge could not possibly affect all products manufactured by Weyerhaeuser Company or its subsidiaries. However, it could also be argued that because of the large amount of the charge, the impact that it might have for instance on the brand name of the company as such, etc. such a charge might affect the lumber operations of the company or perhaps even the company as a whole.

7.285 We do not believe that we are required to define that term "general cost" for the purpose of resolving the dispute before us. Article 2.2 refers to three elements constituting a constructed (normal) value, namely cost of production; SG&A costs; and profits. As stated in footnote 405, *supra*, we do not understand Canada to pursue in this dispute the exporter's argument that the expense at issue was a cost related to the production of hardboard siding.[416] Canada has not claimed that the charge at issue should be considered part of the exporter's "profits", nor can we conclude that. In our view, the expense at issue can therefore only be part of the company's SG&A costs. We therefore agree with DOC's treatment of the expense at issue as part of Weyerhaeuser Company's G&A costs. In reaching this conclusion, we have taken into account the following comment of Canada:

> "the [US$]130 million charge for the hardboard siding settlements does not reflect lawyer salaries, copying of briefs, travel to court, or other types of "legal" expenses that are often considered to be "general". Weyerhaeuser itself [treated] the[] (..) legal

[411] US first written submission, para. 209.
[412] Canada second written submission, para. 235.
[413] Canada second written submission, para. 238 *et seq*.
[414] We do not refer to "selling" and "administrative" costs because parties have focused on the term "general" costs only.
[415] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 564.
[416] Canada second written submission, para. 230, note 220.

> expenses [in question] as "general", and they were included in G&A both in the company's financial statement and for Commerce's G&A calculation."[417]

7.286 In addition, Canada refers to the uniqueness of this charge based on the fact that Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A costs and the settlement of legal claims relating to hardboard siding.[418] In our view, the fact that the cost at issue is reported separately is *per se* not a convincing argument. There might be several reasons for reporting this cost separately, especially in the published financial statements of the company, for example, to increase the transparency regarding a specific non-recurring cost item of a significant amount for the benefit of third parties. Of course, bundling a charge such as the one at issue with other G&A costs could give the misleading impression to any third party (e.g. investors) that G&A costs have extraordinarily increased during the year under review. The uniqueness of the charge at issue, i.e., the fact that it was specifically meant to fund future claims, in our view, does not determine whether this is a "general" cost or not. Unique charges such as the set-up of a new line for the production of the product under consideration during the period of investigation are acknowledged in Article 2.2.1.1 to be part of the cost of production of the product under consideration. Similarly, extraordinary items which cannot be considered part of the cost of production but of the SG&A costs of a company must be able to be taken into account in the calculation of the margin of dumping, provided that other requirements in the *AD Agreement*, in particular Article 2.2.2, are met.

7.287 For the foregoing reasons, we are of the view that an unbiased and objective investigating authority could have treated the cost item at issue as part of the "general" costs of the exporter under consideration.

7.288 Canada's next argument is that the cost item at issue did not relate to the production and sale of softwood lumber, i.e., to the product under consideration. Canada is of the view that:

> "Article 2.2.2 requires that G&A be based on costs "pertaining to production and sales in the ordinary course of trade of the *like product* by the exporter or *producer under investigation*" [emphasis added]. Expenses will "pertain" to the production and sale of a product where they "belong or be attached to, spec. (a) as a part, (b) as an appendage or accessory ..."
>
> As noted, in *Egypt – Steel Rebar*, the panel clearly stated this obligation as a relationship test: that a cost may be attributed to the production and sale of the like product only if the facts of the case point out that the cost was associated with the product under investigation."[419] (footnote omitted; emphasis in original)

7.289 Applied to the specific facts of the case, Canada asserts that:

> "[the] facts (...) demonstrate that the expense is associated with hardboard siding, not Canadian softwood lumber. The hardboard siding expense is a settlement fund concerning a product unrelated to the like product, produced in the United States by Weyerhaeuser US. Accordingly, the hardboard siding expense did not "pertain to" the production and sale of softwood lumber as required by Article 2.2.2.

[417] Canada second written submission, para. 235.
[418] *See* para. 7.283, *supra*.
[419] Canada second written submission, paras. 244-245. *See* also paras. 166 and 174 of Canada second written submission.

> .... there is no evidence on the record to demonstrate that the hardboard siding expense is even remotely related to the production and sale of Canadian softwood lumber."[420]

7.290 By contrast, the United States has consistently argued that "[g]eneral expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole and they are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable".[421]

7.291 The question before us is to determine whether an unbiased and objective investigating authority could have concluded that the hardboard siding charge pertained to the production and sale of softwood lumber. We are of the view that, if it is determined that a given cost item relates to the production and sale of the product under consideration, even if it relates only partly to the product under consideration, a portion of that cost could be attributed to the product under consideration.[422]

7.292 We note that Canada has asserted before us there is no evidence on the record to demonstrate that the hardboard siding expense is even remotely related to the production and sale of Canadian softwood lumber. By contrast, the United States has stated that DOC found that one-time charges like the one at issue are a cost of doing business for the company. The United States further argues that the link between the litigation cost at issue and production of hardboard siding was attenuated because (1) the litigation was not part of the production process of hardboard siding and (2) the expense was incurred anywhere from one year to as long as eighteen years after production and sale of the hardboard siding.[423]

7.293 Bearing in mind the facts before us, i.e., that the expense related to hardboard siding that was produced and sold between one and eighteen years before the period of investigation and that the legal settlement cost did not relate to the production process as such of hardboard siding, facts not being contested by Canada, we consider that an unbiased and objective investigating authority could have refused to treat that charge as part of the cost of production of hardboard siding. Having reached that conclusion, and that this item was correctly characterized as a "general" expense, we consider that DOC was not unreasonable in concluding that the charge at issue was not a cost exclusively attributable to hardboard siding but also benefiting the production and sales of all other products manufactured and sold by Weyerhaeuser Company. We are therefore of the view that an unbiased and objective investigating authority could, in light of the facts before DOC at the time of determination, have determined that a portion of the charge at issue pertained to the production and sale of the product under consideration. For the foregoing reasons, we reject Canada's claim that the United States acted inconsistently with Article 2.2.2 of the *AD Agreement*.

7.294 We note the statement in Weyerhaeuser Company's year 2000 financial statement that the hardboard siding legal claim "is a claims-based settlement, which means that the claims will be paid as submitted over a nine-year period with no minimum or maximum amount".[424] We further note that DOC took into account the entire amount of the charge, i.e., the US$130 million, in the calculation of

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[420] Canada second written submission, paras. 245 and 247.

[421] US second written submission, para. 84. The United States has also acknowledged that it:

> "does not disagree with the general proposition that the words "associated with" and "pertaining to" suggest some relationship between G&A costs and costs of producing and selling the product under consideration". (US response to question 63 of the Panel, para. 121)

[422] *See* para. 7.281, *supra*.

[423] US response to question 62 of the Panel, para. 117.

[424] Exhibit CDA-166, Weyerhaeuser's Annual Report 2000, p. 51.

the G&A ratio for the period under investigation.[425] It appears from the record that the legal claims will be paid as submitted over a nine-year period. It might therefore be questionable whether an unbiased and objective investigating authority could have allocated the total amount of the claim, that is, US$130 million, to a one-year period, the period of investigation, only, even when, as is the case here, Weyerhaeuser Company itself booked the entire litigation cost to one year only. However, Canada has not argued before us on the consistency of this allocation methodology in the context of this claim. We therefore refrain from examining and ruling on this issue.

7.295 Canada also claims that the United States violated Article 2.2.1.1 by improperly ignoring Weyerhaeuser's books and records and establishing G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber. In support of its claim, Canada argues that Weyerhaeuser Company did not treat this settlement fund as a general cost on its records as it was a separate line item in its corporate financial statement, nor should this expense be treated as a general legal cost. Canada asserts that Weyerhaeuser Company characterized its general legal expenses as G&A costs in its financial statement. Canada argues that the exporter recorded the hardboard siding expense as a separate line item – not in G&A – and given its clear association with the production and sale of non-like product, should not have been included in the calculation of the amounts for G&A costs in this case. By including a portion of the legal settlement charge at issue in Weyerhaeuser Canada's cost calculation, Canada asserts that DOC computed a cost that did not "reasonably reflect the costs associated with the production and sale" of softwood lumber.

7.296 In examining this claim, we recall that in our view Article 2.2.1.1 imposes the obligation on the investigating authority to calculate costs based on the records kept by the exporter provided that certain conditions set therein are met.[426] We recall that, in our view, an unbiased and objective investigating authority could have concluded, based on the data before DOC at the time of determination, that the cost at issue was a "general" cost. We further found that such an investigating authority, bearing those facts in mind, could have concluded that the cost at issue was not linked to any particular product and, hence, an unbiased and objective investigating authority could have allocated a portion of the charge to softwood lumber, as DOC did. Bearing this in mind, and that the amount of the charge was taken by DOC from the records kept by the exporter – which is not disputed by Canada, we cannot agree with Canada in that DOC improperly ignored Weyerhaeuser's books and records and established amounts for G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber. Hence, we must reject Canada's claims based on Article 2.2.1.1.

7.297 Canada raises several consequential claims under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. Having rejected the claims on which they are dependent in paragraphs 7.293 and 7.296, *supra*, we must also reject Canada's claims under Articles 2.2, 2.2.1 and 2.4.

M. CLAIM 10: ARTICLES 2.2, 2.2.1, 2.2.1.1 AND 2.4 – REASONABLE AMOUNTS FOR BY-PRODUCT REVENUES FROM THE SALE OF WOOD CHIPS: TEMBEC AND WEST FRASER

(a) Factual Background

7.298 Wood chips are produced as a by-product in the process of producing softwood lumber. These wood chips are subsequently sold by the sawmills to pulp mills through different types of transactions. In the calculation of the cost of production of softwood lumber, DOC took into account the income from sales of wood chips as an offset to softwood lumber's cost of production, i.e., it reduced the cost of producing softwood lumber. This claim concerns the determination of reasonable amounts from the sales of wood chips made by West Fraser and Tembec.

[425] US response to question 124 of the Panel, para. 75.
[426] *See* paras. 7.236-7.237, *supra*.

7.299 Tembec's sawmills sold wood chips to Tembec's own pulp mills through interdivisional transactions, i.e., through sales within the same company. In reporting its cost of producing softwood lumber, Tembec argued against the use of the internal transfer price for wood chips as an offset to the cost of producing softwood lumber because the internal transfer price did not allegedly reflect market prices. Tembec submitted information to DOC on arm's length purchases of wood chips made by its pulp mills and arm's length sales by its Western sawmills. West Fraser, on the other hand, sold most wood chips to affiliated parties in BC. Only a negligible volume was sold by two of its sawmills in BC (McBride and PIR) to unaffiliated parties. West Fraser submitted data for wood chip purchases made by one of its affiliated pulp mills in BC, QRP, to show that prices paid by QRP for wood chips purchased from unaffiliated parties were in line with prices paid by QRP to West Fraser's sawmills.

7.300 We note that DOC stated in the IDM that:

> "[w]e agree with the petitioners that, under section 773(f)(2) of the Act, [DOC] may disregard transactions between affiliated parties if they do not fairly reflect the amount usually charged in the market under consideration. When a respondent sells the same by-product to affiliated and unaffiliated parties at different prices, [DOC] considers the prices received from unaffiliated parties by the respondent to be at arm's-length and to represent market prices. (…)
>
> Specific to Canfor, the verified information shows that the fair market value that Canfor's mills obtain for sales of wood chips to unaffiliated purchasers is clearly distorted due to its contractual agreements. Since Canfor did not have any sales of wood chips to unaffiliated parties in B.C., we have compared Canfor's sales of wood chips to affiliated parties in B.C. to the weighted-average market price of the other respondents' wood chip sales in B.C. Based on this comparison we find that Canfor's sales of wood chips to affiliated parties in B.C. during the POI were made at arm's-length prices and no adjustment is necessary for the final determination.
>
> With respect to West Fraser, for purposes of the final determination, we have compared West Fraser's sales of wood chips to affiliated and unaffiliated parties separately for Alberta and British Columbia. Based on this comparison we find that West Fraser's sales of wood chips to affiliated parties in Alberta during the POI were made at arm's-length prices. We also find, however, that West Fraser's sales of wood chips to affiliated parties in British Columbia during the POI were not made at arm's-length prices. Thus, for sales of wood chips in British Columbia, we used the average sales price for wood chips received from unaffiliated parties to value the sales to affiliated parties and adjusted West Fraser's by-product offset for the final determination.
>
> (…)
>
> With respect to Tembec, the facts of this case differ slightly in that the wood chip transactions are between divisions of the same legal entity. Our practice with regards to transactions between divisions within the same legal entity is to use the actual cost of the input. Due the fact that wood chips are a by-product of the production of softwood lumber, there is no separately identifiable cost associated with the wood chips that are transferred between Tembec divisions. Therefore, we analyzed the wood chip sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices are reasonable.
>
> Based on the comparison of Tembec's B.C. sawmills' internally set transfer prices for wood chips to the B.C. sawmills' chip sales to unaffiliated purchasers, we concluded that the internally set transfer prices are not preferential. Accordingly, we relied on

> the B.C. transfer prices for the final determination. For Tembec's Quebec and Ontario wood chip sales we do not have usable market price data for Tembec. However, since we have determined that its B.C. mills do not sell wood chips to other Tembec divisions at preferential prices, we deem it reasonable to conclude that their Ontario and Quebec saw mills did not receive preferential prices for its internally transferred wood chips. Thus, we relied on their internal transfer prices for the final determination.
>
> (…)
>
> For West Fraser and Tembec we also disagree that the documentation presented at verification demonstrated that the prices it received from its affiliates for sales of wood chips reflected market prices. While we acknowledge that the documentation submitted at verification showed that certain affiliated pulp mills selected by these respondents paid similar prices to their sawmills and to unaffiliated parties for purchases of wood chips, we note that the comparisons provided by each respondent were selectively provided by the companies and not based on a sample chosen by [DOC]. These comparisons represented only a portion of the total wood chip purchases by both Tembec and West Fraser's pulp mills and there is no record evidence to determine what the results might be if all mills were included."[427] (footnotes omitted)

(b) Arguments of the Parties/Third Parties

7.301 **Canada** asserts that, in failing to use reasonable amounts for by-product revenues from the sale of wood chips as offsets in calculating the cost of production of softwood lumber for Tembec and West Fraser, the United States acted inconsistently with Articles 2.1, 2.2, 2.2.1, 2.2.1.1 and 2.4 of the *AD Agreement*. With respect to Tembec, Canada argues that Article 2.2.1.1 requires investigating authorities to disregard the exporter's records where they do not reasonably reflect the costs associated with the production and sale of the product under consideration. Canada asserts that Article 2.2.1.1 reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets, or the calculation of the cost of the main product will be either overstated or understated. According to Canada, the internal Tembec transfer prices as contained in its records and relied upon by DOC do not reasonably reflect the market value of wood chip sales, because Tembec discounts internal wood chip sales below market values. The records, therefore, do not reasonably reflect the costs associated with the production and sale of softwood lumber. Accordingly, Canada argues that DOC was obligated to disregard such internal transfer prices and determine revenues from wood chip sales on the basis of representative market values. In sum, Canada asserts that DOC's use of Tembec's internal transfer prices as an offset did not "reasonably reflect" the costs associated with the production and sale of softwood lumber and violated Article 2.2.1.1. In addition, DOC's use of Tembec's internal transfer prices in lieu of market values, while disregarding West Fraser's affiliated sales prices, also violates DOC's obligation to exercise discretion in an even-handed manner. Finally, Canada asserts that by-products, by definition, have neither profits nor costs. Moreover, Canada points out that the argument of the United States that "the difference between the [internal surrogate for cost and the external market price] is the equivalent of "profit" in the normal setting where costs and sales prices are known" is *ex post* rationalization, which the Panel must reject.

7.302 As far as West Fraser is concerned, Canada puts forward four arguments against DOC's conclusion that West Fraser's affiliated party sales occurred at "non-arm's length" (i.e., at inflated) prices. *First*, Canada argues that DOC's determination was inconsistent with the evidence as a whole concerning market prices in BC. In determining whether West Fraser's sales to affiliates were made at inflated prices, DOC used as its benchmark for market prices *only* West Fraser's BC wood chip sales

[427] Exhibit CDA-2, IDM, Comment 11, pp. 59-62.

to unaffiliated parties, and ignored the evidence of market prices charged by the other respondents for their sales to non-affiliates in BC. *Second*, the benchmark used by DOC for determining whether West Fraser's sales to affiliates were made at inflated prices was unreliable. Canada asserts that DOC relied on West Fraser's tiny quantity of sales to unaffiliated parties as its benchmark for BC market prices. In addition, Canada asserts that over half of the very low volume of sales used by DOC for the benchmark were made early in the POI by West Fraser's McBride mill, when chip prices were lowest and not reflective of BC prices during the entire POI. *Third*, Canada claims that DOC applied different benchmarks for two respondents – Canfor and West Fraser – that were similarly situated. *Finally*, Canada contends that DOC disregarded the figures reported in West Fraser's records even though the verified data demonstrated that its highest priced sales to an affiliate – QRP – had been made at market prices. Presented with the facts on the record, Canada claims that an unbiased and objective investigating authority would not have made the determination made by DOC, selectively disregarding West Fraser's recorded figures for sales which were at market prices and arbitrarily employing different standards for different respondents.

7.303 As a matter of introduction, the **United States** asserts that, in calculating respondents' cost of producing softwood lumber, DOC treated sales of wood chips as an offset, reducing a given respondent's total cost of production. The United States asserts that DOC's calculation of the wood chip offset for West Fraser and Tembec was consistent with Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 of the *AD Agreement*. Consistent with Article 2.2.1.1, the United States contends that DOC determined that the transfer prices between Tembec's BC sawmills to various Tembec-owned pulp mills reasonably reflected Tembec's actual costs associated with wood chip production. The United States asserts that there was no evidence in the record before DOC supporting Canada's contention that Tembec's inter-divisional wood chip sales were "set arbitrarily to provide an internal preference". With respect to Canada's argument that DOC should have used the weighted average sales price received from Tembec's non-affiliates, the United States asserts that that would have been proper under Article 2.2.1.1 only if Tembec's books and records did not reasonably reflect the costs associated with wood chip production. The United States disagrees with Canada's argument that "Article 2.2.1.1 of the *Anti-Dumping Agreement* reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets". In the view of the United States, Article 2.2.1.1 addresses the "costs associated with the production and sale" of the product under consideration and does not address consideration of the "market value" of offsets to those costs. The United States asserts that market value will include the cost of a good as well as other elements such as selling expenses and profit.

7.304 In the case of West Fraser, the United States notes that Article 2.2.1.1 of the *AD Agreement* is silent as to how to assess affiliated party transactions relating to costs. The United States asserts that DOC considers whether transactions between affiliated parties occurred at arm's length prices. This is what, according to the United States, DOC did when determining the value to be attributed to West Fraser's BC sales of wood chips to its affiliated parties. To the specific arguments advanced by Canada, the United States replies as follows. With respect to Canada's first argument, the United States asserts that the evidentiary preference expressed by Canada directly contravenes Article 2.2.1.1, which instructs investigating authorities to rely on an exporter's or producer's records where they are available. To Canada's second argument, the United States replies that it was not raised by West Fraser in the context of the investigation before DOC. The United States asserts that the facts before DOC did not show that the volumes sold by the two West Fraser-owned BC sawmills to unaffiliated parties were "too low". In addition, West Fraser made no argument that the long-term contract by which one of its mills made sales during the investigation period did not represent valid market prices, nor did it make any argument about the arm's length nature of the sales made from its PIR's sawmill. Regarding Canada's argument on the different treatment granted to Canfor and West Fraser, the United States asserts that Canfor was not similarly situated to West Fraser. With respect to Canada's last argument, the United States asserts that DOC found that West Fraser submitted to DOC only selective examples of the secondary evidence on which Canada says DOC should have relied. The United States argues that West Fraser failed to place the entirety of its affiliated pulp mill

purchases on the record. Thus, even assuming that this evidence might have been relevant and more probative than West Fraser's own data, the United States considers that that omission prevented DOC from assessing any sales other than the self-serving examples selectively chosen by West Fraser. Referring to the *Egypt – Steel Rebar* Panel Report, the United States argues that Article 2.4 is concerned exclusively with the comparison between normal value and export price, not with the determination of normal value. For the foregoing reasons, DOC's determination of an offset for West Fraser's wood chip sales was based on a proper establishment of the facts and an objective and unbiased evaluation of those facts. Accordingly, it should be upheld under the standard of review in Article 17.6(i).

7.305 **Japan** asserts that Article 2.2.1.1 of the *AD Agreement* allows the authorities to deviate from a respondent's recorded cost of production if these records do not "reasonably reflect the costs associated with the production and sale of the product under consideration". This discretion must be exercised in good faith based on a proper establishment of facts and on an unbiased and objective evaluation of those facts. Referring to the Appellate Body Report in *US – Hot-Rolled Steel*[428], Japan asserts that, to be unbiased, objective and fair, the authorities must exercise their discretion in an even-handed manner without favouring the interests of any particular party. Japan asserts that DOC's established practice, as applied in this investigation, is contrary to the even-handed rule. Japan further argues that DOC's revaluation of by-product revenues is contrary to a good faith obligation derived from Articles 26 and 31 of the *Vienna Convention* and the Appellate Body Reports in *US – Hot-Rolled Steel* and *US – Shrimp*.

(c) Evaluation by the Panel

7.306 This claim relates to the valuation of by-product revenues for Tembec and West Fraser, two of the Canadian respondents. The sawing of logs into softwood lumber, i.e., the product under consideration, generates by-products such as saw dust, wood chips, etc. Parties acknowledge that these products have commercial value and can be sold to generate revenues. For instance, wood chips are sold to pulp mills in order to produce paper. It is undisputed that DOC took into account the revenue from by-products – including wood chips – in calculating the cost of production for Tembec and West Fraser in this investigation.[429] Specifically, DOC treated the revenues obtained from the sale of these by-products as income that was used to offset the cost of production of softwood lumber.[430] Thus, the only issue before us is the valuation of these by-product revenues, and specifically the revenues from wood chips. This issue of valuation is significant to the calculation of the margin of dumping, as a higher valuation of wood chip revenue means a lower cost of production for softwood lumber, and a lower cost of production generally will entail a lower margin of dumping.[431]

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[428] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 148 and 193. Japan also refers to the Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 132-133.

[429] For the purpose of resolving this dispute, we are therefore not required to examine in – and decide on – which circumstances an investigating authority should offset the cost of production of the product under consideration with revenues from by-products generated in its process of production.

[430] That is, DOC reduced the exporters' cost of production of softwood lumber by the by-product revenue.

[431] This is true for several reasons. First, a lower cost of production will likely mean more sales found to be in the ordinary course of trade. A higher number of sales in the ordinary course of trade would normally result in a lower normal value, which would lower the amount of any margin of dumping. Should an investigating authority construct (normal) value in accordance with Article 2.2, a lower cost of production would result in a lower constructed (normal) value, which would also lower the amount of any margin of dumping. A higher valuation of wood chip revenue would therefore normally be in the interest of an exporter. Conversely, a lower valuation of wood chip revenue would result in a higher cost of production, which would make a finding of sales outside the ordinary course of trade more likely. The lower the number of sales in the ordinary course of trade, the higher the normal value should normally be, which would raise the amount of any

7.307 The issue before this Panel is the extent to which DOC was required to, or precluded from, deriving wood chip revenue from valuations in the records of the producers in question. 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. With respect to West Fraser, Canada asserts that DOC was required by Article 2.2.1 to use the values included in that company's records for sales of wood chips to affiliated parties in BC. With respect to Tembec, by contrast, Canada argues that, because the values recorded in Tembec's books for internal transfers of wood chips were set below prevailing market prices, DOC was required by Article 2.2.1.1 to disregard those values, "since to use th[at] figure[] would result in a calculation that does not reasonably reflect the true cost of producing and selling softwood lumber".[432] In Canada's view, DOC's actions were inconsistent with an unbiased and objective evaluation of the record evidence as a whole and, as such, were inconsistent with the standards set out in Article 2.2.1.1 of the *AD Agreement*.

7.308 At the outset, we note that, with respect to the claims that will be examined in paragraphs 7.314-7.348, *infra*, Canada claims in its Panel Request violations of "Article 2 of the *Anti-Dumping Agreement*, including Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and paragraph 7 of Annex I, and Article VI:1 of the GATT 1994".[433] In addition, Canada asserts that "[a] fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*".[434] With respect to Tembec and West Fraser's claims relating to the valuation of by-product revenues, we understand Canada to assert in its restatement of claims, however, that the United States allegedly violated Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 only.[435] Bearing this in mind, in our examination in paragraphs 7.314-7.348, *infra*, we will refrain from addressing claims not contained in the restatement of claims and from ruling on those claims.

7.309 We note that the main legal basis for Canada's claim is Article 2.2.1.1. Before analysing the specific facts for each of the companies, we have to set out our general understanding of the obligations imposed by Article 2.2.1.1 on investigating authorities with respect to the determination of costs, in general, and, in particular, concerning the valuation of by-product revenues. Article 2.2.1.1 provides in relevant part that:

> "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."

7.310 As noted in paragraphs 7.236-7.237, *supra*, Article 2.2.1.1 requires that costs be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Where records are not kept in accordance with the GAAP of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority may depart from records kept by the exporter. We recall that Article 2.2.1.1 does not in our view require that

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margin of dumping. A higher cost of production would also lead to a higher constructed (normal) value, which would also raise the amount of any margin of dumping. This would therefore not be in the interest of an exporter.

[432] Canada second written submission, para. 256.

[433] WT/DS264/2, para. 3(d).

[434] *Ibid.*

[435] Canada response to question 1 of the Panel, para. 1(vi). In addition, we note that Canada has not advanced any arguments in support of other possible claims of violation other than those examined in this Section of the Report.

costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. It simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Canada appears to have a similar understanding of the obligations under Article 2.2.1.1.[436]

7.311 We note furthermore that there is no reference in the text of that provision to the issue of by-products, much less to the methodology that should be used in order to value them. Both parties agree that Article 2.2.1.1 does *not* prescribe any particular methodology for calculating cost of production.[437] In particular, we note Canada's statement that Article 2.2.1.1:

> "does not set out a specific test or methodology for determining whether transactions between affiliated parties can reasonably be used in determining a respondent's costs for producing and selling the product under consideration. (…) Canada believes that transactions between affiliated parties are subject to the general requirements of Article 2.2.1.1 of the *Anti-Dumping Agreement* and, as such, must be disregarded by an administering authority where a respondent's records for those sales would lead to a calculation of costs that do not "reasonably reflect the costs associated with the production and sale of the product under consideration". Otherwise, such recorded data should be used in the determination of costs of production."[438]

7.312 We agree with the parties. We are of the view that, if negotiators had intended to include in the *AD Agreement* an obligation for an investigating authority to select a particular methodology when determining a by-product revenue offset, such an obligation would be found in Article 2.[439] This does not mean that an investigating authority's decision on the valuation of by-product revenue is not subject to the disciplines of the *AD Agreement*. 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. We fail to see how an unbiased and objective investigating authority could find that records regarding by-product revenue reasonably reflect the costs associated with the production and sale of the product under consideration if those records do not reasonably reflect the extent to which the existence of the by-product reduces the costs to the producer.

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[436] Canada acknowledges that Article 2.2.1.1 expresses

> "a clear preference for the use of actual transaction data from records kept by an exporter. An investigating authority may only disregard such data where the transactions do not accord with GAAP and do not reasonably reflect costs associated with the production and sale of the product at issue. Canada believes that transactions between affiliated parties are subject to the general requirements of Article 2.2.1.1 of the *Anti-Dumping Agreement* and, as such, must be disregarded by an administering authority where a respondent's records for those sales would lead to a calculation of costs that do not "reasonably reflect the costs associated with the production and sale of the product under consideration". Otherwise, such recorded data should be used in the determination of costs of production". (Canada response to question 39 of the Panel, para. 119)

[437] Canada response to question 38 of the Panel, para. 117; US response to question 41 of the Panel, para. 69.

[438] Canada response to question 39 of the Panel, para. 119. In a similar vein, in para. 107 of its response to question 44 of the Panel the United States argues that "Article 2.2.1.1 provides no specific guidance on the question of determining the reasonableness of the costs of by-products or by-product offsets".

[439] We note that the Appellate Body has repeatedly rejected arguments of parties adding to covered agreements obligations or conditions which, in the view of the Appellate Body, could not be found in the text of those agreements. *See*, for instance, Appellate Body Reports, *US – Hot-Rolled Steel* and *EC – Tube or Pipe Fittings*, paras. 166 and 77, respectively.

7.313 Bearing the above general comments in mind, we will examine separately the tests and conclusion of DOC with respect to West Fraser and Tembec.

(i) Tembec

7.314 DOC concluded that the values entered into Tembec's records for internal transfers of wood chips were reasonable. In so doing, DOC rejected Tembec's arguments that the values recorded in its books for internal transfers were well below market prices, and that DOC should therefore value the internally transferred wood chips in accordance with actual market prices from arm's length transactions entered into by Tembec with third parties. Canada asserts that, in valuing wood chip revenue on the basis of the values recorded in Tembec's books, DOC contravened Article 2.2.1.1 by using records kept by the exporter which did *not* reasonably reflect the costs associated with the production and sale of the product under consideration. In addition, Canada argues that an incorrect calculation of costs impacts the determination of which sales are useable in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. Finally, Canada argues that, where the calculation of costs results in an improper normal value, a fair comparison will not be possible and Article 2.4 will also be violated.[440]

7.315 In examining the above issue, we first note that parties have not argued that Tembec's records were not in compliance with Canadian GAAP. Rather, the parties' arguments revolve around the words "reasonably reflect the costs associated with the production and sale of the product under consideration". The United States asserts that DOC examined in the context of the underlying investigation the reasonableness of the valuation of the by-product revenue offset, as reported in Tembec's records. DOC concluded that it was reasonable and rejected Tembec's assertion that by-product revenues on Tembec's books did not reasonably reflect market prices for wood chips because they were internal transfer prices artificially set for accounting purposes. Canada disagrees, and argues 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.[441] In the view of Canada, that would occur where the company's books do not reflect the market value of by-product sales, as was the case for Tembec. In sum, Canada considers that the use of Tembec's internal transfer prices in calculating cost of production violates Article 2.2.1.1.

7.316 We note that Article 2.2.1.1 establishes that costs shall normally be determined on the basis of the records kept by the exporter concerned, provided that such records are in compliance with GAAP principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. We have examined in detail the obligations contained in Article 2.2.1.1 in paragraphs 7.236-7.237, *supra*. We therefore recall our interpretation of Article 2.2.1.1 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. Recalling our interpretation referred to above, we therefore do not agree with Canada's claim 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." Canada's claim therefore fails.

7.317 Even if it is assumed, *arguendo*, that Article 2.2.1.1 imposes on an investigating authority a positive obligation as Canada has argued above, rather than a proviso, we could not agree with Canada that the facts before us support Canada's claim, as our analysis below shows.

[440] *See* para. 7.308, *supra*.
[441] Canada response to question 70 of the Panel, para. 178.

7.318 We start our examination noting that Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records "reasonably reflect the costs associated with the production and sale of the product under consideration". We further note that DOC used the following test in order to determine the reasonableness of Tembec's recorded valuation for internal transfers of wood chips:

> "[i]n determining a "reasonable" amount for valuing the *by-product offset* in interdivisional transactions, [DOC] uses the same methodology that it uses for valuing *costs* in interdivisional transactions. As a standard corporate practice, interdivisional transfer values reflect actual costs of production (since the company does not need to include a profit in its price to itself). With respect to by-products, absent any independent costs, [DOC] normally *takes the internal value assigned by the company to a by-product as a surrogate for an appropriate value for the by-product, and then tests that value for reasonableness*… Because [DOC] normally values interdivisional transfers at actual cost, which is less than market value (because of the existence of profit in market value), a value assigned to a by-product is also commonly less than market value.
>
> Canada argues that this makes no sense, because if a by-product has no cost, then there can be no "profit". However, even a by-product with no independent cost can be assigned a company's best assessment of a surrogate cost. This is what Tembec did when it set its internal transfer price."[442] (emphasis in original)

7.319 Canada's first argument concerns the fact that the methodology used in the case of Tembec was different from that used in West Fraser's determination. Canada asserts that this methodology cannot be applied in an even-handed manner "as it would penalize corporations that consume their own by-products rather than selling them to affiliated or unaffiliated purchasers".[443]

7.320 It is undisputed that two different methodologies were used by DOC for the purpose of determining the reasonableness of the valuation of by-product (wood chip) revenues in West Fraser's records, on the one hand, and Tembec's records, on the other. We note 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. For this reason, we do not consider that DOC discriminated against Tembec by treating it differently from West Fraser. In addition, we note the assertion made by the United States that the methodology used in the case of Tembec is the same DOC uses for valuing costs in interdivisional sales. This has not been disputed by Canada. Thus, DOC's treatment of Tembec is *consistent* with its approach with respect to cost valuations when faced with interdivisional sales. This being the case, we are unable to conclude that DOC 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.

7.321 Canada argues that Article 2.2.1.1 requires that a by-product offset must reasonably reflect the market value for the by-product at issue; otherwise, the cost of production of the main product – in our case, softwood lumber – would be either overstated or understated.[444] The United States disagrees.[445] We do not find any textual basis in Article 2.2.1.1 on which we could conclude – as

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[442] US response to question 42 of the Panel, paras. 97-98. *See* also US response to question 129 of the Panel, para. 85.

[443] Canada second written submission, para. 312.

[444] Canada responses to questions 44 and 70 of the Panel, paras. 123 and 178, respectively. *See* also Canada second written submission, para. 307.

[445] The United States asserts that:

> "Article 2.2.1.1 addresses the "costs associated with the production and sale" of the product under consideration and does not address consideration of the "market value" of offsets to

Canada argues – that, for the requirements of Article 2.2.1.1 to be met, it is necessary that the by-product revenue offset reflect the *market value* of those by-products.[446] Nor, has Canada pointed to any justification.[447] For this reason, we do not consider that DOC was precluded from using the actual cost of the input – as it appeared in Tembec's records – as the benchmark for valuing the by-product revenue offset in the case of Tembec.[448] Nor, we consider that using the actual cost of the input in case of transactions between divisions of the same legal entity – where this is done in a consistent and non-discriminatory fashion – is inconsistent with Article 2.2.1.1 or shows any bias or non-objectiveness on the part of an investigating authority.

7.322 DOC outlined in the IDM the methodology used in order to examine whether the valuation recorded in Tembec's books was reasonable.[449] In particular, we note that the methodology used in this case – the actual cost of the input – was the normal test that DOC applies with regard to transactions between divisions within the same legal entity.[450] The United States explained in its submissions before us that it determined that the value recorded in Tembec's books for internal transfers of wood chips was reasonable once DOC had taken into account "the critical factor of the amount of profit. (...) In th[e] case [of Tembec], an adjustment for profit led to the conclusion that prices for inter-divisional transfers [[**********]] from prices to non-affiliates. In fact, once [DOC] took into account profit and the varying quality and types of wood chips, it determined "no preferential prices" existed".[451] In other words, after applying that test DOC concluded that the value recorded for the internal transfers of wood chips was reasonable. Canada asserts that this constitutes *post hoc* rationalization that must be rejected. In addition, Canada contends that the reference to costs and profits in the case of by-products finds no support in accounting. First, we note that Canada has not raised any claim under Articles 6.9 or 12.2 of the *AD Agreement*. Thus, we are precluded from examining the consistency of DOC's determination in light of the obligations imposed under those provisions. Furthermore, we note that the methodology used by DOC is outlined in the IDM. While we would have preferred that more information had been disclosed in the IDM, we are of the view that the information contained therein is sufficient for us to review the consistency of DOC's determination. We note, in this regard, that DOC's practice is to use the "actual cost of the input". As noted by the United States, the "actual cost of the input" will normally be lower than the market value – as in the case of Tembec. Bearing this in mind, we fail to see how DOC could have determined that the valuation for internal transfers of wood chips recorded in Tembec's books was reasonable – as the IDM shows DOC determined in the context of the investigation at issue – when compared to

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> those costs. "Market value" is different from "cost". Commerce has used market value as a benchmark for determining the reasonableness of prices paid by a company to purchase a by-product from an affiliated company. It also has used market value as a benchmark for determining the reasonableness of values assigned to a by-product in interdivisional-transactions. However, this does not mean that a "reasonable amount" will *equal* "market value". Market value will include the cost of a good, but it will also include other elements, such as selling expenses and profit". (emphasis in original) (US second written submission, para. 92)

[446] Indeed, to accept Canada's argument that Article 2.2.1.1 requires an investigating authority to ensure that the by-product offset reasonably reflects the market value "would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so". (Appellate Body Report, *India – Quantitative Restrictions*, para. 94)

[447] Although we asked Canada to explain its statement that Article 2.2.1.1 requires that market price is the appropriate benchmark for valuing by-product revenue offsets, it did not provide any convincing basis on which we could conclude that Article 2.2.1.1 contains such a requirement. (Canada response to question 70 of the Panel, para. 178)

[448] We recall that the United States normally values interdivisional transfers at actual cost, as stated in the IDM (*see* para. 7.300, *supra*).

[449] Exhibit CDA-2, IDM, Comment 11.

[450] *Id.*, pp. 60-61.

[451] US first written submission, para. 243. Confidential information contained in the bracketed section has been removed.

Tembec's BC sawmills' wood chip sales prices to unaffiliated purchasers, if DOC had not taken into account, at the time of determination, the amount for profit.

7.323 Canada argues that by-products neither have costs nor do they yield profits. We do not understand the United States to argue that by-products have costs. Indeed, the IDM reads: "[d]ue to the fact that wood chips are a by-product of the production of softwood lumber, there is no separately identifiable costs associated with the wood chips that are transferred between Tembec divisions. Therefore, we analysed the wood chips sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices are reasonable".[452] While the IDM could have been more explicit on this point, we are satisfied with the explanations of the United States that the internal transfer price was treated as a surrogate for cost.[453] Canada may be correct in that for accounting purposes by-products do not have a cost. However, we are of the view that when selling wood chips the producer must, at least, recover certain costs it may incur with respect to the by-product. This could include *inter alia* storage and transport of the by-product at issue to the purchasers' premises. Even though for accounting purposes this may not be "costs", *strictu sensu*, for the purposes of the cost determination in an anti-dumping investigation we do not consider it unreasonable for an investigating authority to treat those items as costs. In addition, DOC appears to have taken into account other factors (the varying quality and types of wood chips) when assessing the reasonableness of the valuation of internal transfers in Tembec's books. With respect to the profit, we recall that the United States has asserted that interdivisional transfer values reflect actual costs of production, since a company does not need to include a profit in its price to itself.[454] Canada has not disputed this. As in the case of costs, we are not convinced by Canada's arguments that by-products may not yield profits. While for accounting purposes Canada may be correct in its statement, we do not consider that this would invalidate a determination that the difference between an amount booked in the exporter's records for internal transfers of by-products – the surrogate for costs – and the amount received for sales in the open market – i.e., to unaffiliated parties – can be treated as profit in the context of an anti-dumping determination. Article 2.2.1.1 would not seem to support Canada's position.

7.324 For the foregoing reasons, we consider that an 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. We further consider 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. Hence, we reject Canada's claim that the United States acted inconsistently with Article 2.2.1.1.

7.325 Canada claims that an incorrect calculation of costs impacts the determination of which sales may be used in establishing normal value, contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. It further argues that the use of an amount for costs of production that does not reasonably reflect costs for producing and selling the product under investigation results in an improper calculation of normal value which in turn results in an unfair comparison between that normal value and export price for purposes of Article 2.4.[455]

7.326 We have, however, determined that Canada has *not* established that the United States acted inconsistently with Article 2.2.1.1. Hence, we cannot agree with the premise on which Canada bases the alleged violations, i.e., that DOC calculated the cost of production for Tembec incorrectly. For the

[452] Exhibit CDA-2, IDM, Comment 11, p. 61.
[453] US response to question 42 of the Panel, para. 98.
[454] *See* para. 7.316, *supra*.
[455] Canada response to question 51 of the Panel, paras. 144-145.

foregoing reasons, we consider that Canada has *not* established that the United States acted inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[456]

(ii) West Fraser

7.327 Unlike Tembec's case, DOC rejected the valuation in West Fraser's books for sales of wood chips to affiliated parties (pulp mills) in BC. DOC re-valued those sales transactions based on the price of wood chips in West Fraser's unaffiliated transactions. In so doing, Canada asserts that DOC acted inconsistently with Article 2.2.1.1 of the *AD Agreement*. As in the case of Tembec, Canada claims consequential violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[457]

7.328 The main issue is therefore whether, in re-valuing West Fraser's revenue from sales of wood chips to affiliated parties instead of using the value recorded in West Fraser's books, DOC acted inconsistently with Article 2.2.1.1.[458] In examining this issue, we recall that Article 2.2.1.1 establishes that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation" provided certain conditions are met. In the case at issue, the United States explains that:

> "[i]n determining whether a company's records reasonably reflect costs associated with production and sale of a product, [DOC] considers whether transactions between affiliated parties occurred at arm's length prices. It did that analysis [in the case of West Fraser] and concluded that affiliated sales did not occur at arm's length prices. Accordingly, it relied on unaffiliated sales in valuing the West Fraser's wood chip offset."[459] (footnote omitted)

7.329 We do not understand Canada to argue that the test applied by the United States is *per se* inconsistent with Article 2.2.1.1.[460] For the purpose of resolving this dispute, we therefore assume that the *AD Agreement* did not preclude DOC from carrying out an arm's length test in order to determine whether prices of wood chips charged to affiliated parties are reliable, and therefore can be used as an offset to the cost of production of the product under consideration. We understand Canada's argument to be that, had DOC taken into account information available on the record, it could not have disregarded the revenue for sales of wood chips to affiliated parties in BC appearing in West Fraser's books. It is our task to examine whether, as claimed by Canada, based on the information on the record at the time of determination, an unbiased and objective investigating authority could not have determined that the valuation of sales of wood chips to affiliated parties in BC contained in West Fraser's records was unreasonable.

7.330 In the course of the investigation, West Fraser put forth two arguments in support of its contention that DOC should use the revenue booked by West Fraser from sales of wood chips to

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[456] Accordingly, we need not address the United States' argument, based upon the findings of the *Egypt – Steel Rebar* panel (para. 7.333), that Article 2.4 relates only to the *comparison* of export price and normal value, and does not regulate the establishment of the normal value as such.

[457] *See* para. 7.314, *supra*.

[458] Canada response to question 1 of the Panel, para. 1(vi).

[459] US first written submission, para. 222.

[460] Canada asserts that it:

> "does not dispute that a determination of non-arm's length pricing could support a determination that books and records containing such prices might not reasonably reflect the costs associated with the production and sale of the product under consideration. In such an instance, the investigating authority might legitimately resort to alternative data and disregard the books and records". (Canada first written submission, para. 243)

affiliated parties as an offset to softwood lumber's cost of production.[461] *First*, Canada asserts that, to show that its affiliated sales were made at market prices, West Fraser provided DOC with monthly data for the year 2000 for wood chip purchases made by one of its affiliated pulp mills, QRP. In the view of Canada, these data showed that the prices QRP paid to West Fraser – for wood chip sales from "West Fraser Mills" in Quesnel, BC – were consistent with the prices QRP paid to its principal *unaffiliated* chip supplier. Canada asserts that DOC officials not only verified the above information but also requested – and verified – additional information regarding sales made to affiliated and unaffiliated purchasers by West Fraser's Blue Ridge (Alberta) and PIR (BC) sawmills. Canada asserts that, in its Case Briefs, West Fraser argued that the mill-specific information that had been verified, showed that West Fraser's wood chip sales to affiliated parties had in fact been made at market prices. *Second*, Canada asserts that, immediately after DOC issued its Final Determination, West Fraser submitted a letter to DOC arguing that its use of West Fraser's "*de minimis*" volume of unaffiliated wood chip sales in BC as its exclusive benchmark for BC market prices constituted ministerial error.[462] West Fraser argued that, because its unaffiliated party chip sales in BC were "*de minimis*", DOC should have evaluated whether West Fraser's affiliated party sales were made at arm's length prices using the same method used for affiliated chip sales made by Canfor, which was similarly situated to West Fraser in that Canfor had no chip sales to unaffiliated purchasers in BC.[463] West Fraser requested DOC to compare the price of West Fraser's wood chip sales to affiliated purchasers with the weighted average price of the other respondents' unaffiliated chip sales in BC.[464]

7.331 We found the following statement in the IDM relevant to our examination of Canada's first argument:

> "[f]or West Fraser and Tembec we also disagree that the documentation presented at verification demonstrated that the prices it received from its affiliates for sales of wood chips reflected market prices. While we acknowledge that the documentation submitted at verification showed that certain affiliated pulp mills selected by these respondents paid similar prices to their sawmills and to unaffiliated parties for purchases of wood chips, we note that *the comparisons provided by each respondent were selectively provided by the companies and not based on a sample chosen by [DOC]*. These comparisons represented only a portion of the total wood chip purchases by both Tembec and West Fraser's pulp mills and there is no record evidence to determine what the results might be if all mills were included."[465] (emphasis added)

7.332 We note that Canada has not contested DOC's statements that West Fraser did not provide all the information on the sample chosen by DOC.[466] Nor has Canada pointed to any justification of record for West Fraser's non-submission of the sample data requested by DOC. We do not consider that it could be required from an unbiased and objective investigating authority to use the partial information submitted by West Fraser in order to carry out the arm's length test, especially where no explanation is provided as to why the information requested could not be submitted.[467] Bearing all these facts in mind, we consider that Canada has not established that the United States has acted

[461] Canada response to question 37 of the Panel, Annex I, pp. A8-10.
[462] Exhibit CDA-161, Comments Regarding Ministerial Errors, pp. 4-6.
[463] *Id.*, p. 6.
[464] *Ibid.*
[465] Exhibit CDA-2, IDM, Comment 11, pp. 61-62.
[466] Rather, Canada argues that, had DOC considered the information provided by the exporter inadequate, then DOC should have notified West Fraser of this fact. (Canada second written submission, para. 290)
[467] In so concluding, we have taken into account Canada's argument that West Fraser provided DOC with information by QRP to illustrate that, if West Fraser's highest priced sales to affiliated parties were not made at inflated prices, then its lower priced sales similarly could not have been made at inflated prices. However, Canada has not pointed to any evidence on the record in support of its assertions.

inconsistently with Article 2.2.1.1 in not using the data provided by the exporter concerning QRP. For the foregoing reasons, we reject Canada's first argument.[468]

7.333 In examining Canada's second argument, we note that, in its Comments Regarding Ministerial Errors, West Fraser requested DOC not to use the average prices of the McBride and PIR sawmills to unaffiliated parties in BC as a benchmark against which the average price of wood chips sales to affiliated parties would be compared. Furthermore, we note that the Final Determination and the IDM were issued *before* the submission of West Fraser's Comments Regarding Ministerial Errors.[469] Bearing these facts in mind, we do not consider that it could be required from an unbiased and objective investigating authority to take into account West Fraser's comments. The fact that, at that stage, DOC could still have made changes to the Final Determination – under the form of correction of ministerial errors[470] – does not alter our conclusion. Article 5.10 of the *AD Agreement* imposes strict deadlines on investigating authorities for investigations to be concluded. In our view, the right of exporters to submit new data or arguments must therefore respect that fundamental principle enshrined in the *AD Agreement*. Bearing in mind the timing of West Fraser's submission and the substantive nature of its comments, we consider that DOC was not required to reopen its investigation to analyse the comments submitted by the exporter. In sum, we are of the view that Canada has not established that the United States acted inconsistently with Article 2.2.1.1 of the *AD Agreement* in disregarding West Fraser's arguments contained in its Comments Regarding Ministerial Errors.[471]

7.334 In reaching this conclusion, we have taken into account Canada's comment that, in light of the methodology used by DOC at the preliminary stage for the purpose of valuing the by-product revenue offset, "there was no reason why West Fraser would have (or should have) argued that its sales to unaffiliated parties *in British Columbia* were too small or unrepresentative to constitute reliable evidence of market prices in British Columbia."[472] (emphasis in original)

7.335 In this regard, it is stated in the IDM that:

> "West Fraser maintains that chip prices vary significantly by region and that any comparison in the aggregate is meaningless. West Fraser contends that it explained at verification that chip prices vary significantly between British Columbia and Alberta and that they therefore should not be compared directly."[473]

7.336 In addition, it is stated in West Fraser's Cost Verification Report that:

> "[DOC] noted that the schedule for wood chips was divided between sales in Alberta and sales in British Columbia. For sales in Alberta, the average affiliated per-unit sales value of CAN$ [****] compared to an average unaffiliated per-unit sales of CAN$ [****]. For the sales in British Columbia, the average affiliated per-unit sales

[468] While issues relating to the rejection of data and use of facts available by an investigating authority might fall under the coverage of Article 6.8 and Annex II of the *AD Agreement*, Canada has not made any claim under that provision.

[469] The IDM and the Final Determination were published on 21 March 2002 (Exhibit CDA-2, IDM, cover page) and 2 April 2002 (Exhibit CDA-1, Final Determination), respectively. West Fraser's Comments Regarding Ministerial Errors are contained in a letter addressed to DOC dated 9 April 2002 (Exhibit CDA-161, Comments Regarding Ministerial Errors).

[470] We note that the concept of "ministerial errors" is not contained in the *AD Agreement*. Rather, it reflects a practice of the United States.

[471] We note that a recent panel expressed a similar view. (Panel Report, *Argentina – Poultry*, paras. 7.196-7.197)

[472] Canada second written submission, para. 276.

[473] Exhibit CDA-2, IDM, Comment 11, p. 57.

> value of CAN$ [****] compared to an average unaffiliated per-unit sales of CAN$ [****]."[474]

7.337 The excerpt quoted from West Fraser's Cost Verification Report refers to a schedule contained in an exhibit collected at verification – several months before the IDM and the Final Determination were issued – and included in Exhibit CDA-106. This exhibit reports separately *inter alia* the volume of wood chips sold by type of customer (affiliated and unaffiliated) made by each of West Fraser's sawmills in Canada. Totals (including volume and value) for sales to affiliated and unaffiliated parties are grouped by region, i.e., Alberta and BC.

7.338 We consider that, when arguing during the verification that any comparison in the aggregate is meaningless and that BC and Alberta should not be compared directly because wood chip prices vary significantly between those two regions, West Fraser could have anticipated that, if DOC accepted its argument, it might have considered comparing prices of wood chips sold by West Fraser's BC sawmills to affiliated parties in BC with prices of sales made by those sawmills to unaffiliated parties in that region. Based on its own data, West Fraser could already have seen during verification that the volume of wood chips sold to unaffiliated parties in BC during the POI was tiny (0.28 per cent of total wood chips sales in BC). For the foregoing reasons, we reject Canada's argument that West Fraser did not make certain specific arguments until a late stage in the investigation because there was no reason why West Fraser should have done so before.[475]

7.339 Even if, *arguendo*, we were to consider West Fraser's arguments, we would be unable to conclude that the United States acted inconsistently with Article 2.2.1.1 of the *AD Agreement*. First, Canada argues that the volume of wood chips sold by West Fraser to unaffiliated parties in BC was tiny. The United States replies that, so long the wood chip transactions were commercial in nature, the actual volume of those transactions is irrelevant.

7.340 In our view, the volume of wood chips sold does not determine, in and of itself, whether those transactions constitute an appropriate benchmark against which the average price of wood chips sold to affiliated parties can be compared. Canada appears to acknowledge this fact implicitly when it states that it did not make any arguments concerning West Fraser's sales from its PIR sawmill because sales of wood chips to unaffiliated parties made by PIR[476] "were not made at inflated prices" and "did not distort DOC's analysis".[477]

7.341 Canada argues that its McBride sawmill sold wood chips to unaffiliated parties early in the POI and pursuant to a long-term contract, and thus did not reflect market prices for the POI as a whole.[478] In support of its argument, Canada cites the following excerpt from West Fraser's Cost Verification Report:

> "[c]ompany officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April and May 2000. They explained that the sales value of chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price."[479]

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[474] Exhibit CDA-110, West Fraser's Cost Verification Report, p. 23. Confidential information contained in the bracketed sections has been removed.

[475] In any case, we note that Canada has not raised in the Panel Request any claim under Article 6 of the *AD Agreement*.

[476] We recall that this is one of the two sawmills owned by West Fraser which had sales of wood chips to unaffiliated parties in BC during the POI.

[477] Canada second written submission, para. 281.

[478] Canada first written submission, para. 249.

[479] Exhibit CDA-110, West Fraser's Cost Verification Report, p. 23.

7.342 The United States replies that West Fraser made no argument that the long-term contract by the McBride mill did not represent valid market prices, nor did it make any argument about the arm's length nature of the sales made from its other mill in BC (PIR).

7.343 We recall that West Fraser sold wood chips to unaffiliated parties from two sawmills in BC, namely McBride and PIR. We understand Canada to argue that DOC should not have relied on McBride's sales of wood chips to unaffiliated parties in its arm's length determination because:

- McBride's sales to unaffiliated parties were made pursuant to a long-term contract that prevented raising wood chips prices to its (unaffiliated) customer when market prices for wood chips rose; and

- McBride's sales to unaffiliated parties took place when chip prices were lowest and not reflective of BC prices during the entire POI.[480]

7.344 With respect to the contract, Canada explained that prices under the long-term contract of the McBride mill were recalculated on a quarterly basis in order to reflect developments in market prices for wood chips during the previous quarter.[481] Bearing in mind that prices were periodically recalculated, we do not consider that the terms of the contract are *per se* sufficient justification for a conclusion that prices of wood chips sold by McBride to unaffiliated parties were not reliable. Canada's second argument has to do with the timing of McBride's sales to unaffiliated prices. Thus, Canada asserts that they took place at the beginning of the POI, when wood chips prices were at their lowest. This has not been contested by the United States. We note that West Fraser's average price of wood chips to unaffiliated parties in BC was calculated based on sales of wood chips to unaffiliated parties made by the McBride and PIR sawmills. Therefore, the average price of wood chips to unaffiliated parties included not only data of McBride but also of PIR. Canada has argued and shown that all sales of wood chips to unaffiliated parties in BC made by McBride took place in the first two months of the POI, but has not directed us to any information on the record on the timing and conditions of sale of PIR. We are therefore unable to determine whether the average price calculated by DOC for sales of wood chips to unaffiliated parties was impacted at all by McBride's data to such an extent that an unbiased and objective investigating authority could not have averaged McBride and PIR's sales data, as DOC did. Having reached this conclusion, we reject Canada's argument.

7.345 In addition, West Fraser argued during the investigation that DOC should have evaluated whether West Fraser's affiliated party sales were made at arm's length prices using the same method used for affiliated chip sales made by Canfor. This treatment was justified because, according to West Fraser, both companies were in similar situations. Canada therefore argues before us that DOC should not have applied different benchmarks for West Fraser and Canfor. The United States contends that Canfor was not similarly situated to West Fraser. The United States asserts that West Fraser had sales to unaffiliated parties in BC, while Canfor did not. In addition, the United States argues that sales in BC made by West Fraser were of its own product mix, and thus the best evidence of the value of an offset in West Fraser's process. By contrast, Canfor had no sales in BC, and therefore, the best evidence of the value of an offset for Canfor was other companies' arm's length sales in that market.

7.346 We note that Canada has not disputed the fact that, while Canfor did *not* have any sales of wood chips to unaffiliated parties in BC during the POI, West Fraser did. In our view, the factual situations of Canfor and West Fraser are therefore significantly different. In Canfor's case, there were no sales of wood chips to unaffiliated parties in BC; hence, the investigating authority was left with no choice but to use data other than that of the exporter itself in order to carry out the arm's length

[480] Canada first written submission, para. 249.

[481] Canada asserted that "[t]he McBride contract set prices at the beginning of each calendar quarter based on market conditions in the previous quarter". (Canada response to question 132 of the Panel, para. 120)

test. In West Fraser's case, there was data available for the exporter concerned albeit corresponding to a small portion of West Fraser's total sales of wood chips in BC (0.28 per cent). Canada has not established that the average price data corresponding to sales of wood chips to unaffiliated parties in BC was unreliable. Hence, we do not consider that, based on the facts before us, it could be required from an unbiased and objective investigating authority to have treated Canfor and West Fraser in the same manner. For this reason, we reject Canada's argument.

7.347 For the foregoing reasons, we reject Canada's claim that, in re-valuing West Fraser's revenue from sales of wood chips to affiliated parties, instead of using the value recorded in West Fraser's books, the United States has acted inconsistently with Article 2.2.1.1.

7.348 With respect to Canada's claims regarding violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*, we note that Canada advances arguments identical to those mentioned in paragraph 7.325, *supra*, in support of those claims. This being the case and having found that Canada has not established that the United States acted inconsistently with Article 2.2.1.1 of the *AD Agreement* in re-valuing West Fraser's prices of wood chips sold to affiliated parties in BC, we conclude that Canada has not established that the United States acted inconsistently with Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. For this reason, we reject Canada's claims of violation of Articles 2.2, 2.2.1 and 2.4.

N. CLAIM 11: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – DIFFERENCE IN PRICE COMPARABILITY ARISING FROM PROFITS ON FUTURES CONTRACTS: SLOCAN

(a) Factual Background

7.349 Canada's claim concerns DOC's treatment of Slocan's profits and losses from lumber futures hedging contracts traded on the CME. Slocan entered into two types of lumber futures hedging contracts during the POI. Under the first type of contract, Slocan actually delivered the lumber under the terms of the futures contract. These transactions were included in Slocan's reported sales and are *not* in dispute. Other contracts were sold/traded "before and instead of physical delivery".[482] The revenues obtained through these operations were recorded in Slocan's books as lumber selling activity. In response to DOC exporters' questionnaire, Slocan reported the net revenue earned on futures contracts as an offset to direct selling expenses. DOC rejected the claimed adjustment in its Preliminary Determination on the ground that that income was investment revenue, rather than a direct selling expense; hence, it should not be treated as a sales specific deduction/addition. After DOC's Preliminary Determination, Slocan restated its claim for an adjustment to direct selling expenses or, in the alternative, requested DOC to account for futures profits and losses as an offset to financial expenses. In its Final Determination, DOC rejected Slocan's request as follows:

> "[a]ny sales of subject merchandise that occurred during the POI as a result of a futures contract have been included in Slocan's reported sales list. However, we have not included in our analysis profits on the sale of a futures contracts that did not result in the shipment of subject merchandise. Such profit is realized from Slocan's position on the CME and as a producer of softwood lumber, but not from its actual sale of subject merchandise.
>
> We also have not applied these profits as an offset to Slocan's direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs [DOC] to make circumstance of sales adjustments only for direct selling expenses and assumed expenses. Section 351.410(c) defines direct selling expenses as "expenses . . . that result from and bear a direct relationship to the particular sale in question". Accordingly, where no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct selling expenses.

[482] Canada second written submission, para. 315.

> Slocan suggests that as an alternative, [DOC] apply the profits as an offset to Slocan's financial expenses. In support of this argument, Slocan disputes [DOC]'s statement in its preliminary determination calculation memo that these profits are "investment revenues" by stating that Slocan is engaging in hedging rather then speculative activity, and that sales on the futures market are integral parts of the company's normal sales and distribution process. While we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity. As such, the futures profits should not be used to offset the company's interest expense".[483]

(b) Arguments of the Parties

7.350 **Canada** asserts that DOC used two directly contradictory lines of reasoning to disregard the profits. At the preliminary stage, Canada asserts that DOC had determined that revenue from trading softwood lumber futures contracts was investment revenue, and for that reason, rejected Slocan's claimed adjustment. At the definitive stage, DOC refused to treat those profits as an offset to Slocan's financial expenses, by stating that they related to Slocan's core business of selling lumber rather than to any investment activity. In the view of Canada, at a minimum, one of these determinations cannot stand and is, therefore, based on an evaluation of the facts which is neither unbiased nor objective. Bearing in mind DOC's finding that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, Canada argues that DOC should have granted Slocan an adjustment to direct selling expenses. Canada asserts that Article 2.4 supports its claim. Canada contends that Article 2.4 does not require any price adjustment to be directly related to a particular sales transaction. Canada argues that Article 2.4 required the United States to make due allowance for all differences that affected price comparability. Canada contends that Slocan's futures trading activity was either a "condition" of US sales, an "other difference" affecting price comparability, or both. Canada asserts that it was DOC's responsibility to decide how to classify Slocan's futures revenue and how to make "due allowance" for its effect on price comparability. Should DOC have been of the view that Slocan's request for such an adjustment was not founded, then Canada asserts that DOC could have made the adjustment by offsetting Slocan's financial expense by the income derived from futures contracts. Canada asserts that DOC's failure to make the requested adjustment to selling expense was inconsistent with the US obligation to use a reasonable amount for SG&A costs under Article 2.2 of the *AD Agreement*. Canada asserts that an objective and unbiased investigating authority evaluating the evidence before DOC could not have reached the conclusion that no adjustment was required to offset Slocan's futures contract revenues.

7.351 The **United States** replies that DOC found that Slocan's lumber hedging activity is linked to overall selling activities and reduction of Slocan's exposure to price changes. The United States asserts that hedging is only *indirectly* linked to selling activities, because there is no actual sale and delivery of lumber to a buyer. Because the revenue from trading softwood lumber futures contracts could not be directly related to sales of softwood lumber, the United States asserts that DOC was justified in finding that Slocan's futures hedging contracts are not direct selling expenses. Bearing in mind that futures profits were recorded as lumber sales revenues rather than production expenses, the United States argues that DOC was justified in rejecting Slocan's request for the futures profits to offset financial expenses.

(c) Evaluation by the Panel

7.352 Canada claims that, based on the facts before it, DOC's refusal to grant Slocan an adjustment under Article 2.4 of the *AD Agreement* for the net revenue it earned through its trading of softwood lumber futures contracts on the CME, resulted in the United States being in violation of its obligations

[483] Exhibit CDA-2, IDM, Comment 21, pp. 92-94.

under Article 2.4 of the *AD Agreement*. Canada claims that, if we concluded that the United States has not violated Article 2.4, we should find that DOC should have accounted for that revenue when determining the constructed (normal) value and that the United States, by not doing so, has violated Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2. From the record, it is clear to us that DOC did not dispute the existence of this revenue and that DOC accepted that the revenue was earned from hedging activities, rather than from speculation in futures contracts. The issue before us, is to determine whether DOC should have made an adjustment under Article 2.4 to take the net revenue from Slocan's futures contracts into account, and if we find in the negative, to determine whether the United Stated has acted inconsistently with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 in not having taken that income into account in the dumping calculation. We note that the revenue at issue was generated by the buying and selling of futures contracts that did *not* result in the shipment of subject merchandise.[484]

7.353 We understand Canada's first argument to be that DOC should have granted an adjustment under Article 2.4, either under the language "conditions and terms of sale" or "any other differences which are also demonstrated to affect price comparability". The United States asserts that it was not demonstrated that the differences at issue affected price comparability. In addition, the United States argues that the futures contracts at issue were not conditions and terms of sale related to particular sales transactions of lumber.

7.354 Article 2.4 provides, in relevant portion, as follows:

> "[a] fair comparison shall be made between the export price and the normal value. (…) 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 (…) and any other differences which are also demonstrated to affect price comparability." (emphasis added; footnote omitted)

7.355 We recall our discussion of the obligations imposed by this provision in paragraphs 7.165-7.167, *supra*, and in particular, the Appellate Body statement in *US – Hot-Rolled Steel* that:

> "Article 2.4 of the *Anti-Dumping Agreement* provides that, where there are "differences" between export price and normal value, which affect the "comparability" of these prices, "[d]ue allowance shall be made" for those differences". The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "*any other differences* which are also demonstrated to affect price comparability". (emphasis added) There are, therefore, no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance"".[485] (emphasis in original)

7.356 An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a *difference* between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, an adjustment would not be required to be made by that provision.

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[484] Thus, our examination and conclusions below do not cover Slocan's sales on the CME that resulted in the shipment of subject merchandise.

[485] Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

7.357 The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are all black. The difference is obvious; in fact, it is one of those differences listed in Article 2.4 itself – a difference in physical characteristics. However, there might be no variable cost difference among the two cars because the cost of the paint – whether red or black – might be the same. If instead of differences in cost, we were looking at market value differences, we might reach the same conclusion if, either the seller or the purchaser, would be willing to sell or purchase at the same price, regardless whether the car is red or black.[486]

7.358 It is also important to note that there are no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an *allowance*. In addition, we consider that the obligation on an investigating authority is to examine the merits of each claimed adjustment and to determine whether the difference affects price comparability between the allegedly dumped product and the like product sold on the domestic market of the exporting country.[487]

7.359 Recalling the standard of review which we are applying and the requirement that we are not to perform a *de novo* review, we will examine the submissions of the parties to determine whether an unbiased and objective investigating authority could have concluded that, based on the facts before DOC at the time of determination, the granting of an Article 2.4 adjustment was required.

7.360 The first issue that must be examined, is whether there were *differences* affecting the normal value and the export price in the two markets compared, i.e., the United States and Canada. It is undisputed that Slocan's hedging activities took place in the United States only, that is, on the CME. Neither party has argued that Slocan hedged softwood lumber futures contracts in Canada.

7.361 We note that Canada asserts that:

> "[a]s Slocan demonstrated during the investigation, particularly in Verification Exhibit 21, hedging through futures trading activity affects all sales in a particular market. Slocan Sales Verification Exhibit 21 *Random Length--An Introductory Hedge Guide*, at VE2381 to VE2384 (Exhibit CDA-119). Slocan has greater flexibility to respond to changes in price trends because it knows in advance the minimum price that a certain percentage of its sales, will achieve. This affects the other prices that Slocan is willing to offer and accept in that market.";[488]

and that:

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[486] In our view, whether a particular factor affects price comparability might be considered from the point of view of the purchaser. The question is whether a purchaser would be willing to make a price differentiation between two products. For example, would a purchaser be prepared to pay more for a car painted black than for the very same car when painted red, although the costs for both cars are identical? In other words, if the behaviour of the purchaser would change, depending on the colour of the car, it could be considered that that difference in physical characteristics, that is, the difference in colour, affects price comparability.

[487] In addition to these comments, we recall that we have set out our understanding of Article 2.4 in paras. 7.165-7.167, *supra*.

[488] Canada second written submission, para. 336, note 356.

> "at verification [Slocan] demonstrated the effect on price comparability by proving that Slocan was a "hedger" in the lumber market and that the purpose and effect of hedging contracts is to affect prices in the market by shielding against fluctuations in price. Given the demonstrated purpose of hedging activity, [DOC]'s factual determination that "Slocan's lumber futures hedging activity is related to its core business of selling lumber" *was* a determination that futures revenue affected prices."[489] (emphasis in original)

7.362 Canada argues that Slocan demonstrated that its hedging activity in the United States affected price comparability. In support of this contention, we understand Canada to assert that Slocan's hedging activity only occurs in the United States and that the hedging activity was a deliberate effort to affect the pricing of its products sold in the US market only.

7.363 We note that the revenue at issue does not arise from particular sales transactions of softwood lumber as such, but rather that it is generated from the sale of the contracts, to be executed at a future date, themselves. This means that the very same contract can be sold and bought, or even re-bought by the original seller, a number of times before it is actually resulting in the physical delivery of the softwood lumber. We also note that it is stated in the DOC Verification Report of Slocan that:

> "[e]very futures contract that Slocan enters into carries an obligation to deliver 'physicals' – actual lumber – unless the contract is offset.
>
> When a futures contract expires without being offset, the Chicago Mercantile Exchange (CME) is the customer. Slocan ships the goods as directed by the CME. (...)
>
> Slocan engages in futures trading in order to hedge, not to speculate. The purpose of hedging is to reduce the risk of holding lumber inventory."[490]

7.364 Although the CME is located in the United States, the sellers and buyers of the futures contracts can also be located in Canada itself, as is the case with Slocan. Furthermore, we also note that eventual delivery of the softwood lumber in terms of the futures contracts can also take place in Canada.[491] Although we are aware that the revenue at issue has been generated through futures contracts which were offset and that no delivery has taken place, the product which forms the object of the contract can find its way back to the Canadian domestic market. In light of the above, it seems to us that questions can be raised as to whether the effect of Slocan's hedging activities can be isolated to the US market only, and that it therefore affects price comparability between the normal value and the export price. In addition, we note that the "greater flexibility to respond to changes in price trends" referred to by Canada in its submissions before us cannot, in our view, be isolated to the market of the country in which hedging takes place, i.e., the United States. Other than unsubstantiated assertions that "affects the other prices that Slocan is willing to offer and accept in th[e US] market", Canada has not presented evidence showing that hedging activities only impacted the setting of prices at which softwood lumber products are sold in the United States. In other words, Canada has not convinced us that the "price stability" effect implied in its submissions of the hedging activities did not play a role in the price setting of softwood lumber products when sold in Canada or any other

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[489] *Id.*, para. 342, note 363.
[490] Exhibit CDA-119, Slocan's Cost Verification Report, p. VE02361.
[491] *Id.*, p. VE02366, when it is stated that:

> "[i]f your firm should wish to take delivery and it is in the U.S. or Canada east of the western boundaries of North Dakota, South Dakota, Nebraska, Kansas, Texas and Oklahoma, and the western boundary of Manitoba, Canada, the freight is the lowest published freight rate for 73-foot flatcars from Prince, British Columbia to your location."

market where Slocan sells them. We are therefore of the view that Canada has not established that there are "differences" between export price and normal value, which affect the "comparability" of these prices.

7.365 For the foregoing reasons, we conclude that an unbiased and objective investigating authority could have concluded that the adjustment requested by Slocan under Article 2.4, whether under the "conditions and terms of sale" or under the "any other differences" language, was not warranted and, hence, that such an investigating authority could have refused granting that adjustment. We therefore reject Canada's claim that the United States acted inconsistently with Article 2.4 of the *AD Agreement*.

7.366 In the alternative, Canada argues that, in accordance with Article 2.2.1.1, DOC should have offset financial expense with the futures profits in determining the constructed (normal) value.[492] The United States disagrees. In the view of the United States, it would have been inappropriate for DOC to disregard the treatment of those profits in Slocan's books and, instead, treat them as offsets to cost of production.

7.367 Article 2.2.1.1 reads as follows:

> "[f]or 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. 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. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations." (footnote omitted)

7.368 We recall our understanding of the obligations imposed under Article 2.2.1.1 in paragraphs 7.236-7.237, *supra*. We recall that Article 2.2.1.1 provides that costs must normally be calculated on the basis of records kept by the exporter, 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. In addition, it establishes that investigating authorities must 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 certain conditions are met. Canada asserts that, consistent with Article 2.2.1.1, DOC should have offset financial expense with the futures profits in determining the constructed (normal) value. In light of our analysis of the obligations contained in Article 2.2.1.1, we do not consider that Canada's argument relate to any of the obligations imposed in Article 2.2.1.1. Having rejected the sole basis on which Canada supported its claim of an Article 2.2.1.1 violation, we must reject Canada's claim.[493]

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[492] Canada response to question 1 of the Panel, para. 1(vi).

[493] In addition, we note that Slocan treated this income as "sales revenue" rather than as a COGS or a SG&A item. For DOC to have treated it differently – either as a COGS or SG&A item – Slocan should have argued and shown in the context of the investigation that there were reasons for DOC to depart from "the records kept by the exporter", which we do not have any indication it did. Failing to do so, the proviso of

7.369 Canada argues that DOC's failure to grant an adjustment was inconsistent with the US obligations under Articles 2.2, 2.2.1 and 2.2.2 of the *AD Agreement*.[494] With respect to its Article 2.2 claim, Canada argues that that provision requires an investigating authority to use a reasonable amount for SG&A expenses.

7.370 Article 2.2 reads as follows:

> "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when (…) such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with (…) the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." (footnote omitted)

7.371 In accordance with this provision, the margin of dumping can in certain circumstances be determined by comparing the export price with the constructed (normal) value. This constructed (normal) value is to include the cost of production in the country of origin, plus a *reasonable* amount for SG&A costs, and for profits. While this provision requires that the amount for SG&A costs to be included in the constructed (normal) value must be reasonable, Canada has not argued on which grounds we should find that the amounts for SG&A costs determined by DOC were not reasonable. Canada merely claims that Article 2.2 has been violated by the United States, without providing a basis and arguments for its claim. We recall that, in our finding in paragraph 7.13, *supra*, we stated that it is for Canada, which has challenged the consistency of the US measure, to bear the burden of demonstrating that the measure is not consistent with – in this particular case – Article 2.2 of the *AD Agreement*. Furthermore, we recall that the role of a panel is not to make the case for either party. Canada has failed to present arguments in support of its claim that unreasonable amounts for SG&A costs were used by DOC in the case at issue when constructing (normal) value. We therefore reject Canada's claim that the United States has acted inconsistently with Article 2.2.

7.372 Canada has not advanced any argument in support of DOC's alleged violation of Article 2.2.2 of the *AD Agreement*. We recall that the role of a panel is not to make the case for either party. Canada has failed to present arguments in support of its claim. We therefore reject Canada's claim.[495]

7.373 Finally, Canada raises a consequential claim under Article 2.2.1. Canada asserts that an incorrect calculation of costs impacts the determination of which sales are useable in establishing normal value, contrary to Article 2.2.1. This claim must be rejected because Canada has not established that DOC determined costs incorrectly (*see* paragraph 7.368, *supra*).

Article 2.2.1.1 requires that "costs shall be determined on the basis of the records kept by the exporter", which we find DOC did. Thus, DOC acted in line with the mandate set forth in Article 2.2.1.1.

[494] Canada response to question 1 of the Panel, para. 1(vi). We note that, in the restatement of claims, Canada did not include Article 2.1 of the *AD Agreement* as one of the provisions allegedly violated by the United States. In view of this, we consider that the Article 2.1 claim is not before us and, hence, we will not examine it.

[495] In any case, we understand that Slocan had not treated in its records this income as a SG&A item but rather as a "sales revenue". As discussed in paragraphs 7.236-7.237, *supra*, Article 2.2.1.1 expresses a preference for the costs to be determined on the basis of the records kept by the exporter. In this instance, Canada is requesting us to find that DOC should have departed from the records kept by Slocan and treat the income at issue as part of the company's SG&A costs. However, we recall that Slocan did not treat the revenue at issue as a SG&A item but rather as a "sales revenue". For us to conclude along the lines of Canada's request, we are of the view that Slocan should have argued and demonstrated that there were reasons, based on the proviso of Article 2.2.1.1, for DOC to depart from Slocan's records, that is to treat the income at issue as a SG&A item rather than as a "sales revenue". Canada has not pointed to any evidence on record showing that Slocan did so in the context of the investigation.

O. CLAIM REGARDING ARTICLE VI OF GATT 1994 AND ARTICLES 1, 9.3 AND 18.1 OF THE *AD AGREEMENT*

(a) Arguments of the Parties

7.374 **Canada** argues that, by improperly initiating and continuing the investigation, failing to properly determine the "like product", failing to make an adjustment for physical differences which affected price comparability, zeroing negative margins and improperly calculating each respondent's costs, the United States applied inflated margins of dumping to Canadian softwood lumber products and applied a measure against dumping that was contrary to Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994*.

(b) Evaluation by the Panel

7.375 Under this claim, we understand Canada to argue that, because the United States has acted inconsistently with certain provisions of the *AD Agreement* by improperly initiating and continuing the investigation, failing to properly determine the "like product", failing to make an adjustment for physical differences which affected price comparability, zeroing negative margins and improperly calculating each respondent's costs – which constitute separate claims examined in Sections VII.D-VII.N, *supra* – the United States has also acted inconsistently with Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994*.[496] This is therefore a consequential claim.[497]

7.376 At the outset, we note that, in its Panel Request, a reference to Article 9.3 can only be found in section 3 thereof. This section covers Canada's claims examined in Sections VII.H-VII.N of this Report only. Bearing this in mind, and that there is no general reference to a violation of Article 9.3 elsewhere in the Panel Request, we are of the view that our examination and findings with regard to Article 9.3 must be restricted to the claims examined in Sections VII.H-VII.N of this Report.

7.377 Our decision on this claim of violation of various provisions of the *AD Agreement* and of *GATT 1994* will depend entirely on our findings with respect to the claims to which this claim is related. We recall that in Sections VII.D-VII.N, *supra*, we have ruled that, in using "zeroing" in determining the existence of margins of dumping, the United States has acted inconsistently with Article 2.4.2 of the *AD Agreement* and that we have dismissed the remaining claims of Canada. Bearing in mind our conclusions with regard to the claims examined in those Sections and what is stated in paragraph 7.376, *supra*, we find that:

- Canada's claim of violation of Articles 1 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994* predicated on claims that we have rejected in Sections VII.D-VII.G fails; and that

- Canada's claim of violation of Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994* predicated on claims that we have rejected in Sections VII.H, VII.J-VII.N also fails.

7.378 With respect to the claim regarding "zeroing" – examined in Section VII.I, *supra*, we recall that we have decided that the United States has *not* acted consistently with Article 2.4.2 of the *AD Agreement*. It is therefore with respect to this claim that we must determine whether – as Canada argues – the United States "applied a measure against dumping that was contrary to Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994*". We note that a panel "need only address

[496] Canada response to question 1 of the Panel, para. 1 (vii).

[497] We understand that this is a consequential or dependent claim based on the arguments that Canada has put forward in support of the alleged violations of Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994*. (*See* para. 7.374, *supra* and Canada response to question 1 of the Panel, para. 1(vii))

those claims which must be addressed in order to resolve the matter in issue in the dispute".[498] In light of the dependent nature of Canada's claim, we see no useful purpose to deciding it.[499] In particular, deciding such dependent claim will provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation on which it is dependent. In light of the foregoing, we consider it not necessary to examine Canada's claim under Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994*.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

8.1 In light of our findings, *supra*, we conclude that in the investigation at issue:

(a) the United States has acted inconsistently with:

(i) Article 2.4.2 of the *AD Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing";

(b) the United States has *not* acted inconsistently with:

(i) Article 5.2 of the *AD Agreement* in determining that the application contained such information as is required by Article 5.2;

(ii) Article 5.3 of the *AD Agreement* by determining that there was sufficient evidence of dumping to justify the initiation of the investigation;

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

(iv) Article 2.6 of the *AD Agreement* by determining there to be only a single like product and product under consideration;

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

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

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

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

[498] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

[499] We note that a similar approach was followed by the panels in *Argentina – Poultry*, paras. 7.369-7.370; *Guatemala – Cement II*, para. 8.296; and *US – DRAMS*, para. 6.92.

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

(x) Article 2.4 of the *AD Agreement* by not granting Slocan an adjustment for the net revenue earned on its trading of softwood lumber futures contracts, or Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 by not taking this net revenue into account when determining the constructed (normal) value;

(xi) Articles 1 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994* with respect to Canada's claims referred to in paragraphs 8.1.(b)(i)- 8.1.(b)(iv), *supra*;

(xii) Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994* with respect to Canada's claims referred to in paragraphs 8.1.(b)(v)- 8.1.(b)(x), *supra.*

(c) in light of the findings in Sections 8.1(a) and 8.1(b), *supra*, we apply judicial economy and do not rule on Canada's claims under:

(i) Article 2.4 of the *AD Agreement* ("fair comparison") in respect of zeroing; and

(ii) Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994* with respect to the matter referred to in paragraph 8.1.(a)(i), *supra*.

B. NULLIFICATION OR IMPAIRMENT

8.2 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to Canada under that Agreement.

C. RECOMMENDATION

8.3 In its Panel Request, Canada requested us to recommend the Dispute Settlement Body that "the United States revoke the anti-dumping order in respect of softwood lumber from Canada".[500] In addition to the revocation of the measure at issue, in its first written submission Canada requested us to suggest that the United States could implement the Panel's recommendation by "return[ing] the cash deposits collected pursuant to an illegal investigation and an illegal determination of dumping".[501]

8.4 In considering Canada's request, we first recall that Article 19.1 of the *DSU* provides in relevant part that:

> "[w]hen 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. In addition to its recommendations, the panel or

[500] WT/DS264/2.

[501] Canada first written submission, para. 550. *See* also Canada second oral (opening) statement, para. 112.

> Appellate Body *may suggest ways in which the Member concerned could implement the recommendations*". (emphasis added; footnotes omitted)

8.5 In light of the findings in paragraph 8.1, *supra*, we therefore recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the *AD Agreement*.

8.6 By virtue of Article 19.1, panels have discretion ("may") to suggest ways in which a Member could implement the relevant recommendation. However, a panel is not required to make a suggestion should it not deem it appropriate to do so. We do not consider it appropriate to make any recommendation to the Dispute Settlement Body in this regard.

IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL REGARDING CANADA'S CLAIM ON ZEROING

9.1 Although I join my colleagues on this Panel with respect to the findings on all other claims before us, I must respectfully disagree with the findings regarding zeroing (Claim 6). In my view, Canada has not established that zeroing is inconsistent either with the specific provisions of Article 2.4.2 or with the general "fair comparison" requirement of Article 2.4. At a minimum, I consider that the United States' interpretation of Articles 2.4.2 and 2.4 as not prohibiting zeroing is a permissible one. Accordingly, I would find that the United States did not act inconsistently with Articles 2.4.2 and 2.4 by reason of the zeroing of negative margins in the investigation underlying this dispute.

9.2 At the outset, I recall the standard of review that governs the work of panels (and the Appellate Body) when examining claims that a Member has violated the *AD Agreement*. Article 17.6(ii) provides that, where a provision of the *AD Agreement* admits of more than one permissible interpretation, a measure shall be found to be in conformity with that provision if it rests upon one of those permissible interpretations. Thus, our task is not to choose our preferred interpretation of Articles 2.4.2 and 2.4 of the *AD Agreement*, but to determine whether the interpretation advanced by the United States is permissible, under the rules of treaty interpretation applicable in WTO dispute settlement. Should we so find, then we must rule that the United States' actions in zeroing in this investigation are in conformity with Articles 2.4.2 and 2.4. In my view, Article 17.6(ii) applies at every step of our analysis: if any essential step in our reasoning depends upon an interpretation which is only one of multiple permissible ones, then we cannot find that the United States has acted inconsistently with the *AD Agreement*.

9.3 Although I disagree with my colleagues' findings on zeroing, I agree with their intermediate conclusion that multiple averaging is permitted by Article 2.4.2 of the *AD Agreement*. In my view, this is not a question of multiple permissible interpretations, but rather of the correct interpretation of that provision. My colleagues have fully explained the bases for their conclusions on multiple averaging, including the need to give meaning to the word "comparable", particularly given its inclusion in the text at a late stage in the negotiations; the appropriateness of reading the phrase "all comparable export transactions" as a whole in a manner which gives meaning to all elements; the relevance of the concept of "price comparability" in respect of Article 2.4 adjustments as context for understanding the term "comparable" in Article 2.4.2; the obvious illogic of interpreting Article 2.4.2 to require that comparisons be made either at the most aggregated (average to average) or least aggregated (individual to individual) level, while prohibiting comparisons at intermediate levels of aggregation[502]; and the consistency of multiple averaging with the overall objective of Article 2.4,

[502] It is difficult to understand why an investigating authority would be required either to compare the entire product under investigation to the entire foreign like product or individual export transactions to

which is to ensure a fair comparison. I would only add that the use of the term "margins of dumping", although not conclusive as to whether multiple averaging is allowed, represents an additional element in the overall picture supporting the conclusion that multiple averaging is permitted.

9.4 While I see no need to repeat my colleagues' reasoning, I would like to emphasize the critical importance of multiple averaging in insuring a fair comparison. There will be differences between home market and export transactions in virtually all anti-dumping investigations. These differences may arise from, *inter alia*, physical differences, differences in level of trade, or date of sale.[503] While these differences may in principle be taken into account through adjustments, in many cases it simply will not be possible to identify and quantify their precise effects on price comparability. Further, there are a variety of different ways to get at the issue of price comparability and the making of adjustments. In the case of a wide variety of types or dates of sale, for example, even identifying which of the many groups should represent the standard towards which adjustments should aim will be unclear. Multiple averaging eliminates the need to consider such adjustments, thus reducing the influence of subjective judgment on outcomes. In my view, therefore, multiple averaging not only is not prohibited by the *AD Agreement*, but it is generally the most appropriate, fairest, most precise, most predictable, and in many cases the only possible way to insure a fair comparison.[504] We have to assume that the negotiators were aware of this as they negotiated the *AD Agreement*.

9.5 The reader may ask why it is necessary in this Report to discuss the permissibility of multiple averaging. After all, the parties agree that multiple averaging is permissible under Article 2.4.2[505], and the third parties have not contended otherwise.[506] The reason the discussion is relevant here is that Canada relies upon the Appellate Body ruling on zeroing in *EC – Bed Linen* in this dispute, and in my view that ruling is predicated, at least implicitly, on the conclusion that multiple averaging is prohibited by Article 2.4.2.[507] The Appellate Body's reasoning, which seems ultimately to be based on the view that by zeroing the EC calculated a weighted average that did not fully reflect the prices of some export transactions and thus fell afoul of the requirement to compare a weighted average normal value with a weighted average of all comparable export transactions, simply cannot be squared with a finding that multiple averaging is permitted. Thus, if multiple averaging *is* permitted – and the parties, my colleagues and I all agree that it is – one cannot simply rely upon the Appellate Body Report in *EC – Bed Linen* to conclude that zeroing is prohibited. Rather, we must consider whether there is some *alternative* basis to conclude that zeroing is prohibited by Article 2.4.2.

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individual home market transaction, while not being allowed to compare groups of export transactions to groups of comparable home market transactions.

[503] For purely practical reasons it can be excluded that the need for multiple averaging in the case of multiple models or types can be eliminated by conducting separate investigations for every model or type, since even a product under investigation which is defined in a seemingly narrow fashion, such as television sets or ball bearings of a specific dimension, may involve innumerable models or types.

[504] At the second meeting of the Panel with the parties, we asked representatives of both parties how often they had come across a case where there was only one step to do, i.e. where there was only one model, one level of trade and one period. The US representative responded that he was unaware of any investigation that fit that description, while the Canadian representative stated that he had experienced "one or two" single-stage cases.

[505] Canada argued before the Panel that its interpretation of Article 2.4.2 "... does not prohibit the establishment of margins of dumping with respect to particular models of a product." Canada response to question 31 from the Panel, para. 109.

[506] Japan noted that "[a] multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of administrative convenience to take into account the differences in physical characteristics among several models of a product." (Japan's third party oral statement, para. 5.75, *supra*)

[507] Thus, the Appellate Body stated that "[a]ll types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2." (Appellate Body Report, *EC – Bed Linen*, para. 58)

9.6 My colleagues have attempted to develop such an alternative to the reasoning found in *EC – Bed Linen*. They have concluded that the obligation to include in the weighted average export price "all comparable export transactions" applies not only to the comparison stage but *also* to the aggregation of the results of multiple comparisons. They consider that through zeroing the United States partially excluded from the aggregation process the results of comparisons for types for which the weighted average normal value was less than the weighted average export price. They conclude that the United States therefore violated Article 2.4.2 by not taking into account all comparable export prices when calculating the overall margin of dumping. I must respectfully disagree.

9.7 It will be recalled that, when an investigating authority engages in multiple averaging, it first divides the subject merchandise (and the foreign like product) into groups based upon common characteristics (which may relate to physical characteristics, level of trade, date of sale, etc). It calculates a weighted average normal value and export price for each group, and then compares the weighted averages in order to determine the extent of the dumping, if any, for that group. The result will be multiple margins of dumping (or amounts of dumping, if one prefers), one for each group. In order to determine an overall margin for the product under investigation, however, it will be necessary in some way to aggregate the results from the comparisons for each group. An analogous process will be involved where an investigating authority performs its calculations on a transaction-to-transaction basis. In that case as well, the investigating authority will derive margins (or amounts) of dumping for a number of specific transactions, and will then have to aggregate those margins in order to determine an overall margin of dumping for the product.

9.8 There is no doubt that, as the investigating authority in the case of multiple averaging is calculating weight-averaged normal values and export prices for each group, it is required in the investigation phase to respect Article 2.4.2. This includes the obligation under Article 2.4.2 to include in each of the average-to-average comparisons "all comparable export transactions". In this case, however, there is no suggestion that DOC has failed to include any comparable export transactions in any of the average to average comparisons DOC made in this case. Nor is there any indication that DOC failed to *fully* take into account any export transaction in the conduct of each average to average comparison. Based on the record before us, it must be considered that each and every one of the export transactions considered by DOC was fully taken into account when performing the comparison between normal value and export price for a given type. Rather, the claim of Canada, and the reasoning of my colleagues on this Panel, is based upon the view that the United States breached the obligation to include "all comparable export transactions" as a result of the manner in which the United States aggregated the results of its multiple comparisons.

9.9 It seems to me that my colleagues are trying to reconcile two mutually incompatible positions. They conclude that Article 2.4.2 does not require that the overall margin of dumping for a product be calculated on the basis of a single weighted average export price and single weighted average normal value. At the same time, they seem to conclude that the ultimate result of the aggregation of multiple average to average comparisons must be the same as if DOC had conducted a single average to average comparison, or in any event that once it has performed multiple averages DOC is required to average those averages, using negative dumping margins to offset positive margins. In my view, these conclusions are unconvincing. Article 2.4.2 allows multiple averaging, and the obligations of Article 2.4.2 relate to each of the average to average comparisons performed. This is all the guidance that can be determined from the text of Article 2.4.2. I can see nothing in Article 2.4.2 that specifically dictates how those "intermediate" margins are to be aggregated in order to calculate an overall margin of dumping for the investigated product for a given exporter, any more than I can see anything in Article 2.4.2 that prescribes how the results of transaction-by-transaction comparisons are aggregated.

9.10 In this respect, it is noteworthy that the *AD Agreement* is silent as to aggregation not only with respect to the first (average-to-average) comparison methodology. I note as a matter of relevant

context that Article 2.4.2 is equally silent as to how to aggregate the results of transaction-by-transaction comparisons under the second methodology set forth in that provision. Article 2.4.2 provides that the existence of margins of dumping may be established "by a comparison of normal value and export prices on a transaction by transaction basis". Clearly, nothing in Article 2.4.2 gives specific guidance on how the results of individual transaction comparisons are to be aggregated, and the textual basis relied on by my colleagues for prohibiting zeroing when aggregating the results of multiple average-to-average comparisons ("all comparable export transactions") on its face does not apply to the transaction-by-transaction methodology. It is therefore clear that Article 2.4.2 does not prohibit zeroing in the context of the transaction-by-transaction methodology.[508] It would be very odd indeed for the drafters to have prohibited zeroing when aggregating the results of multiple average to average comparisons, while allowing it to be used when aggregating the results of comparisons performed on a transaction by transaction basis.[509]

9.11 The use of multiple averaging must have been widely known to negotiators, as the practice was the norm under the *Tokyo Round Anti-Dumping Code*. The negotiators should also have been fully aware of the zeroing issue.[510] They certainly should have realized that simply requiring average-to-average or transaction-by-transaction comparisons would not resolve the issue of aggregation in the subsequent stage. But if the drafters did not intend to prohibit zeroing, then what is the purpose of Article 2.4.2? In my view, Article 2.4.2 was intended to address a related but distinct issue from that of zeroing, i.e., the question of average to individual comparisons. Prior to the Uruguay Round, many investigating authorities compared individual export transactions to an average normal value. On its face, the purpose of Article 2.4.2 seems to be to require that, except in specified situations, there be symmetry in the comparisons made by investigating authorities, i.e., that Members *either* compare on an average to average *or* a transaction to transaction basis. Only where particular conditions are met may a Member perform a comparison of prices of individual export transactions to an average normal value.

9.12 I recall that, under Article 17.6(ii) of the *AD Agreement*, a panel may not find a measure to be inconsistent with a provision of the *AD Agreement* if that measure is based on a permissible interpretation of that provision. In this case, I consider that the US interpretation of Article 2.4.2 as not prohibiting zeroing is a permissible one. Thus, for the reasons set forth above, I would find that the application by DOC of "zeroing" in this case was not inconsistent with Article 2.4.2 of the *AD Agreement*.

9.13 Some may be troubled by the prospect that no specific rules exist regarding the manner in which the results of multiple average to average (and transaction-by-transaction) comparisons may be aggregated. The general provision of Article 2.4 is however still available, as discussed infra. In any event, the establishment of an anti-dumping margin is a highly complex exercise. Although Article 2 of the current *AD Agreement* is more detailed that its Tokyo Round predecessor, many aspects of margin calculation are not specifically addressed. If Members consider that the issue of how to aggregate the results of multiple comparisons is a lacuna that needs to be filled, then they should negotiate such rules in the appropriate forum. Dispute settlement involves the interpretation of rules

[508] Nor, for the reasons set forth in paras. 9.14 to 9.24 *infra*, would zeroing be prohibited under a general "fair comparison" requirement under Article 2.4.

[509] My colleagues decline to address the issue of zeroing in the context of individual to individual transactions on the grounds that it is not within the Panel's terms of reference. While it is certainly true that no such claim is before us, I believe that the language in Article 2.4.2 regarding transaction to transaction comparisons is highly relevant context for interpreting other parts of Article 2.4.2.

[510] In fact, the EC and Japan were involved in a high-profile dispute with respect to zeroing throughout the later stages of the anti-dumping negotiations, beginning with a request for consultations on 8 July 1991 and culminating in the circulation of a Panel Report in *EC –Audio Cassettes*. (Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, 28 April 1995, ADP/136.) This Report was never adopted.

agreed by Members. It cannot and must not be used as a substitute for rule-making through negotiation.

9.14 Canada also claims that the United States has violated the "fair comparison" requirement of Article 2.4 of the *AD Agreement* by the application of zeroing in this case, because zeroing unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value than to those for which the export price is greater than the normal value. Canada finds support for its position in a statement by the Appellate Body in *EC – Bed Linen*.[511] Having found that zeroing was inconsistent with Article 2.4.2, my colleagues exercised judicial economy and declined to rule on this claim. In light of my view that Article 2.4.2 does not prohibit zeroing, however, it is appropriate for me to proceed to a consideration of this alternative claim by Canada.

9.15 I recall that Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal value." There has not to date been any substantial analysis in WTO dispute settlement as to the precise legal role of this language, including whether it establishes an independent legal obligation or rather serves only to inform interpretation of other operative provisions of Article 2. Much less has there been any significant consideration of the manner in which it is to be interpreted and applied.[512] Nor did the parties provide significant argumentation on this issue. That said, the first sentence of Article 2.4 appears to be drafted in a manner which implies that it is independently operational and legally binding[513], and I will thus proceed on that assumption for the purposes of my consideration of this claim.

9.16 In terms of approach, I believe that a claim based on a highly general test such as "fair comparison" should be approached with caution by treaty interpreters. 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. Taking this into account, I approach Article 2.4's "fair comparison" requirement with two elements in mind. First, any conception of "fairness" (and "unfairness") should be solidly rooted in the context provided by the *AD Agreement* (and perhaps the *WTO Agreement* more generally). Second, given the subjectivity of the concept of fairness, the principles of Article 17.6(ii) of the *AD Agreement* regarding permissible interpretations are particularly relevant.

9.17 Canada has made only general statements regarding why the application of the zeroing methodology by DOC in this case failed to produce a "fair comparison". In response to a question from the Panel on this issue, Canada responded that a comparison conducted on the basis of zeroing cannot be considered to produce a "fair comparison" within the meaning of Article 2.4, because it unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value, than to those for which the export price is greater than the normal value.[514] In response to another question to Canada regarding the benchmark against

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[511] "We are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and 2.4.2." (Appellate Body Report, *EC – Bed Linen*, para.55)

[512] The Appellate Body has stated that "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'." (Appellate Body Report, *EC – Bed Linen*, para.59)

[513] As compared with the drafting of its predecessor provision in the *Tokyo Round AD Code*, Article 2.6, which provided that ""[i]n order to affect a fair comparison . . . the two prices shall be compared at the same level of trade . . . .".

[514] Canada response to question 108(a) of the Panel.

which Canada would test whether a comparison is fair or unfair[515], Canada responded in general terms and did not explain how it applied its "benchmark" to this case.

9.18 In my view, Canada's explanation amounts to little more than an assertion that because zeroing (when combined with multiple averaging) may result in a margin of dumping which is higher than that which would have resulted from comparing a single weighted average export price to a single weighted average normal value, it does not produce a fair comparison. If Article 2.4.2 required that a margin of dumping be based on a single average to average comparison, then Canada's assertion that greater weight was given to some transactions than to others might be correct (if superfluous). It has however been established that multiple averaging is not prohibited by Article 2.4.2 (as of course neither is a transaction-by-transaction methodology). I further note that Canada does not contend that DOC gave greater weight to certain export transactions than to others in its performance of each average-to-average comparison. Nor did DOC fail to take into account any export transactions, as the overall amount of dumping found was divided over the full amount of all export transactions in order to calculate a margin of dumping. Rather, Canada is simply arguing that it is unfair not to provide credit for negative dumping margins, apparently purely because this results in a higher dumping margin than would be the case if such credit were given.

9.19 I note that the differing views of the parties regarding interpretation of Article 2.4 appear to reflect an underlying difference regarding the concept of "dumping". One school of thought is that "dumping" relates to the average pricing behaviour of an exporter/producer over time. For those who hold this view, the fact that a particular export transaction is made at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost) does not necessarily mean that dumping has occurred, if another export transaction is made at a price which is higher than the home market price. They believe that exporters should be given "credit" for selling above normal value, and consider zeroing to be illogical. Others consider that any time a particular export transaction occurs at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost), dumping has occurred. From this perspective, overall margins of dumping are calculated simply because it is impractical to calculate and impose anti-dumping duties with respect to each export transaction, and the idea that such a transaction should not be viewed as dumped merely because another export transaction occurs at a higher price makes no sense.

9.20 The difference between these two approaches can be understood on the basis of a simple example. Assume there are two home market sales and two export sales of a product during the period of investigation. Both home market sales are made at a price of 100. One of the export sales is made at a price of 50, the other at a price of 150. Under one school of thought, what is relevant is average pricing behaviour. Since the average normal value and average export price are both 100, there is no dumping and no duties should be imposed. Under the second school of thought, one of the two sales was at a dumped price while the other was not. Duties should therefore be collected on the dumped sale. However, a dumping margin should be calculated that would reflect that only some sales were dumped. Using zeroing, the total amount of dumping (50) would be divided by total export sales (200), resulting in a 25 per cent margin. Imposition of a 25 per cent duty on the two export transactions would result in the collection of duties in the amount of 50, the same amount of duties as would have been collected had dumping been determined and duties assessed for each transaction.[516]

9.21 Arguments may be advanced for each of the conceptual approaches identified above. For the "average pricing behaviour" advocates, it is simply not consistent with commercial reality to expect that exporters will be able to fine-tune their pricing on a transaction by transaction basis to avoid

[515] Question 108(b) by the Panel.

[516] *See EC – Audio Cassettes* (unadopted) for an analysis of the "fair comparison" requirement which reflects this analytical approach.

dumping. Advocates of the alternative approach argue that the harm caused to domestic producers by a dumped transaction – e.g., the loss of a sale or sale at a lower price than would have otherwise occurred – is not undone simply because another export transaction is made at greater than normal value, nor is the damage caused by dumping of a particular type or model undone simply because another model is sold at greater than normal value. Both approaches have strengths and weaknesses.

9.22 My task is not of course to decide which conceptual approach *I* prefer, but to examine whether the *AD Agreement* shows such a preference. The Agreement does not contain any preamble or statement of object and purpose[517], and in my view there is no basis to conclude that the Agreement is premised on the "average pricing behaviour" approach. In fact, an early GATT Group of Experts Report on antidumping noted that "the ideal method . . . was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned . . .", and this could be taken to suggest the contrary.[518] The fact that the *AD Agreement* permits the use of variable duties as a basis for duty collection is a further basis to conclude that, at a minimum, the *AD Agreement* is not premised exclusively on an "average pricing behaviour" approach.[519,520] Thus, I fail to see how it may be concluded, based upon the *AD Agreement* itself, that a calculation methodology that does not reflect the "average pricing behaviour" approach is unfair in the sense of Article 2.4.

9.23 I am aware that the Appellate Body in *EC – Bed Linen* expressed the view that zeroing is inconsistent with the "fair comparison" requirement in Article 2.4. I note however that this statement is *obiter dictum*, as Article 2.4 was not part of a claim before the Appellate Body. More importantly, I note that the Appellate Body did not set out any of its reasoning underlying this statement. I do not consider that I would be acting in a manner consistent with my obligations under Article 11 of the *DSU* to perform a "objective assessment of the matter" if I were simply to find in favour of Canada on the basis of such an unsupported statement.

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[517] Article VI of *GATT 1994* does however state that "dumping . . . is to be condemned if it causes or threatens material injury . . . ."

[518] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts adopted by the CONTRACTING PARTIES on 27 May 1960, BISD 9th Supp. p. 194. It is clear that under the "ideal method" identified in the Report non-dumped transactions would neither be subject to anti-dumping duties nor used to offset dumped transactions. In their Report, the Group of Experts however concluded that such a method was "clearly impracticable", in particular as regards injury, and for this reason a pre-selection system – i.e. a system where the margin of dumping for future imports is established, at least provisionally, on the basis of a prior period – seemed to be the most satisfactory. This "pre-selection" approach is the basis for virtually all anti-dumping systems today. The application of an *ad valorem* duty for a product, calculated based on the transaction-by-transaction methodology comparison method in paragraph 2.4.2 combined with the aggregation of the results of the individual comparisons using zeroing, is mathematically equivalent and would result in the collection of anti-dumping duties on the product as a whole in the same amount as if the "ideal method" had been applied. Zeroing when aggregating the results of multiple comparisons under a multiple averaging approach would of course generally result in collection of a *lower* amount of total duties than the "ideal method".

[519] Under a "variable duty" approach to duty collection, a Member that has established in an investigation that injurious dumping exists does not impose an *ad valorem* or specific duty, but rather imposes duties *on a transaction by transaction basis* where the export price is below the normal value determined during the investigation. Under such a system, the fact that one transaction occurs at a price in excess of normal value does not excuse the exporter from paying duties on another transaction that occurs at a price that is less than normal value. This approach which is referred to in Article 9.4(ii) of the *AD Agreement* as a "prospective normal value", has recently been found to be consistent with the *AD Agreement*. *See* Panel Report, *Argentina – Poultry*, paras. 7.345 – 7.367.

[520] It is also interesting to note that, when under Article 9.4 an investigating authority is called upon to determine a rate for un-investigated exporters, it is not required to give credit for any "negative dumping" by investigated exporters. Thus, the *AD Agreement* does not in this context even consider the possibility that negative margins should be taken into account when aggregating the results of dumping calculations for selected exporters or producers in order to establish a margin of dumping for un-investigated exporters or producers.

9.24 For the foregoing reasons, and taking into account the standard of review under Article 17.6(ii), I would conclude that Canada has not established that the application of zeroing in the underlying investigation methodology was inconsistent with the United States' obligation under Article 2.4 to conduct a "fair comparison."

ANNEX A

PARTIES' AND THIRD PARTIES' RESPONSES TO QUESTIONS FROM THE FIRST MEETING

ANNEX A-1

RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(30 June 2003)

GENERAL ISSUES

To Canada:

1. Could Canada please set out in summary format its legal arguments in support of each of its claims, i.e., listing the respective provisions of the Anti-Dumping Agreement and the GATT 1994, and explaining briefly in the light of the Vienna Convention on the Law of Treaties how the cited factual circumstances constitute violations of the specific language in those provisions cited as allegedly being violated.

1. Canada claims that Commerce committed a number of fundamental errors that render the imposition of anti-dumping duties inconsistent with US obligations under both GATT 1994 and the *Anti-Dumping Agreement*. Canada's specific claims are set out below.

(i) Initiation of the Investigation: Canada's claims are that the United States acted inconsistently with Articles 5.2 and 5.3.

Article 5.2 provides that an "application *shall* contain such information as is *reasonably available* to the applicant" on a variety of issues including "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country…of origin or export …and information on export prices". (emphasis added) Article 5.2 requires that information on home market or export prices that is "reasonably available" must be provided in the application. The investigating authority is obligated to examine whether the application conforms to the requirements of Article 5.2. If the applicant fails to provide information that is reasonably available, the investigating authority must reject the proposed application. The ordinary meaning of Article 5.2, together with its object and purpose, make it clear that there is an obligation on the investigating authority to ensure the requirements of Article 5.2 have been met.

The facts of this case demonstrate that actual transaction information was available to the applicant and, therefore, should have been provided. This information was not in the application. Given the magnitude of Canada-US trade in softwood lumber, including the regular purchases by members of the Petitioner of softwood lumber from Canada, an objective investigating authority would have known that the Petitioner in this case had reasonably available information which was not provided. In the facts of this case, Commerce's failure to reject the application was inconsistent with Article 5.2.

Article 5.3 provides that "authorities *shall examine* the accuracy and adequacy of the evidence provided in the application *to determine* whether there is sufficient evidence to justify the initiation of an investigation."(emphasis added) The plain meaning of the text of Article 5.3 demonstrates that an investigating authority must further examine the information in the application to

determine its adequacy and accuracy and, therefore, the sufficiency of evidence. The facts of this case demonstrate that an objective investigating authority conducting a further examination of the evidence would have discovered that the information in the application – consisting of no actual transaction information or Canadian cost data and relying on unrepresentative surrogate and aggregate cost information – was not adequate or accurate, and, therefore, not sufficient to initiate the investigation. Commerce's initiation of the investigation was, therefore, inconsistent with Article 5.3.

(ii) Termination of the Investigation: Article 5.8 provides that "an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case." The ordinary meaning of Article 5.8 is unambiguous. It imposes a continuous obligation on an investigating authority to re-assess the evidence of dumping. Under Article 5.8, Commerce had an obligation to consider the information regarding the relationship between Weldwood and International Paper and the actual cost and price data of Weldwood to determine whether there was sufficient evidence of dumping to justify proceeding with the case. Failure by Commerce to consider the above-noted information rendered it impossible for it to comply with this obligation. Therefore, the United States acted inconsistently with Article 5.8.

(iii) "Like Product" and "Product Under Consideration": Canada's claim is that Commerce erroneously determined there to be a single "like product". This claim is grounded in Article 2.6, in particular, the ordinary meaning of the words "characteristics closely resembling". Canada's position is that the group of products within the "like product" as defined by Commerce did not have "characteristics closely resembling" those of the group of products in the "product under consideration". The facts of the case before Commerce demonstrated that bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar did not have characteristics closely resembling those of the product under consideration and, therefore, should have been dealt with separately. Non-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *Anti-Dumping Agreement*, *e.g.*, Articles 5.1, 5.2, and 5.4.

(iv) Differences in Dimensions: Article 2.4 requires that the investigating authority *shall* make "due allowance" for differences affecting "price comparability". Commerce erred by failing, in comparing non-identical products, to make due allowance in normal values for physical differences in softwood lumber products to maintain price comparability and to ensure a fair comparison between normal value and export price. The evidence before Commerce showed that the value of softwood lumber varies depending on the size of the product (including differences in thickness, width and length), and Commerce itself acknowledged this to be the case. There was, therefore, no justification for ignoring these differences, and comparing prices for different-sized products without adjusting for such product differences. An objective investigating authority evaluating the evidence could not have determined that size differences in softwood lumber did not affect price comparability and that adjustments were, therefore, not necessary. The United States therefore contravened Article 2.4 of the *Anti-Dumping Agreement*.

(v) "Zeroing": Commerce's "zeroing" of negative margins of dumping is inconsistent with the ordinary meaning of the words in Articles 2.4 and 2.4.2 because it fails to take into account a weighted average of all comparable export transactions in determining margins of dumping and fails to produce a "fair comparison". Zeroing fails to take into account "all comparable export transactions", as explained by the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*[1], and results in a dumping margin that does not reflect an "average" of all comparable export transactions. In addition, it fails to produce a "fair

[1] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Appellate Body, WT/DS141/AB/R, adopted 12 March 2001, at para. 55. [hereinafter "EC – Bed Linen"]

comparison" as required by Article 2.4. Thus the United States contravened Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

(v) Company-Specific Issues: Article 2.2.1.1 requires that an investigating authority normally calculate costs (direct and indirect) on the basis of, "records kept by the exporter or producer under investigation" where these records are in accordance with GAAP and "reasonably reflect costs associated with the production and sale" of the product at issue. Therefore, the plain language of this provision requires that the costs an investigating authority determines must reasonably reflect the costs associated with the production and sale of the investigated product.

Article 2.2.2 requires that the investigating authority calculate an amount for general, selling and administrative costs based on actual data "pertaining to" the production and sale of the investigated product. Together, these provisions impose a "relationship test", *i.e.*, the calculated cost must relate to the production and sale of the investigated product.[2] Each of the claims below involves a violation of one or both of Articles 2.2.1.1 and 2.2.2. Further, an incorrect calculation of costs impacts the determination of which sales are useable in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed normal value, contrary to Article 2.2.

Article 2.4 provides an overarching obligation on the investigating authority to ensure a fair comparison between export price and normal value. Where the calculation of costs results in an improper normal value, a fair comparison will not be possible. In this situation, Article 2.4 will be violated. The errors described below resulted in violations of Article 2.4. A distinct violation of Article 2.4 in respect of Slocan is described below.

Abitibi: Commerce allocated Abitibi's financial expenses to its different product lines in proportion to the cost of goods sold (COGS) for each product line. In light of the factual evidence presented by Abitibi, Commerce's selection and application of this methodology to Abitibi contravened Article 2.2.1.1 and 2.2.2. First, in selecting its allocation methodology, Commerce failed to "consider all available evidence on the proper allocation of costs". Commerce applied a standard methodology from which it does not depart. Second, in failing to rely upon audited financial statement data concerning the assets actually used by each product line and ignoring the evidence that financial expenses were incurred in relation to assets, Commerce failed to base its calculation of financial expenses "on actual data pertaining to production and sales . . . of the like product by the exporter or producer under investigation". Third, the use of the COGS methodology failed to result in an allocation that "reasonably reflects the costs associated with the production and sale of the product under consideration."

Tembec: Commerce calculated Tembec's general and administrative costs based on all of the products produced worldwide by Tembec, the major proportion of which consisted of pulp, paper and chemicals. These products incurred significantly different general and administrative expenses than the production and sale of softwood lumber in Canada. In so doing, Commerce ignored the general and administrative costs recorded on the books of Tembec's Forest Products Group, which related primarily to softwood lumber. Commerce thereby contravened Articles 2.2.1.1 and 2.2.2 of the *Anti-Dumping Agreement* by calculating a general and administrative expense cost for Tembec that did not "reasonably reflect" Tembec's costs "associated with" the production of lumber and included data that did not "pertain to" the production and sale of softwood lumber.

Weyerhaeuser: Commerce allocated a portion of certain charges associated with the settlement of legal claims of Weyerhaeuser US's (Weyerhaeuser's parent company) sales of hardboard siding (not a softwood lumber product) in the United States, as part of Weyerhaeuser Canada's general and administrative costs. As the record demonstrates, the litigation settlement

[2] *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R, adopted 1 October 2002, at para. 7.393. [hereinafter "*Egypt – Steel Rebar*"]

expenses were not a company-wide expense that related even in part to Weyerhaeuser Canada's production and sale of softwood lumber; rather they were related exclusively to its parent company's production and sale of an unrelated product, hardboard siding. Commerce thereby contravened Articles 2.2.1.1 and 2.2.2 of the *Anti-Dumping Agreement* by calculating a general and administrative expense for Weyerhaeuser that did not "reasonably reflect" the costs associated with the production and sale of softwood lumber and included costs that did not "pertain to" Weyerhaeuser's costs for producing and selling softwood lumber.

West Fraser and Tembec: Where the production of the investigated product results in the generation of a by-product, any revenues arising from the sale of such by-product must be offset against the cost of the investigated product in order to arrive at a cost which reasonably reflects the cost of production and sale of the investigated product. If an investigating authority improperly determines the amount of an offset (*e.g.*, wood chips), it will necessarily result in a cost for the investigated product (*e.g.*, softwood lumber) which does not properly account for the value of the offset and consequently does not reasonably reflect the costs associated with the production and sale of the investigated product. In relation to West Fraser, Commerce failed to calculate revenues from wood chip sales to affiliated parties on the basis of records kept by the company, as required by Article 2.2.1.1. For Tembec, Commerce rejected fully documented actual market prices from arm's length transactions entered into by Tembec with third parties, and instead used internal transfer prices that were set well below market prices. Commerce thereby contravened Article 2.2.1.1 of the *Anti-Dumping Agreement*.

Slocan: Slocan generated revenues from certain futures contracts for the sale of softwood lumber. Although Commerce accepted that the revenues related to Slocan's core business of selling softwood lumber, Commerce refused to account for these revenues, as an offset to financial or selling expenses, or through some other reasonable method. Commerce thereby contravened Article 2.4 in failing to make an adjustment for futures revenues in the export price, or in the alternative, acted inconsistently with Article 2.2.1.1 of the *Anti-Dumping Agreement* in failing to apply those revenues as an offset to financial expenses in determining the normal value.

(vii) Canada alleges that the above specific claims also result in consequential violations of Articles VI:1 and VI:2 of GATT 1994 and Articles 1, 9.3 and 18.1 of the *Anti-Dumping Agreement*. Article 1 requires that an anti-dumping measure be applied only under the circumstances provided for under Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the *Anti-Dumping Agreement*. Article 18.1 requires that no specific action may be taken against dumping except in accordance with Article VI of the GATT 1994.[3] Article VI provides that a Member may only apply an anti-dumping duty in order to offset dumping in an amount that is not greater than the margin of dumping. Similarly, Article 9.3 requires that the amount of any anti-dumping duty shall not exceed the margin of dumping as established under Article 2 of the Agreement. By improperly initiating and continuing the investigation, failing to properly determine the "like product", failing to make an adjustment for physical differences which affected price comparability, zeroing negative margins and improperly calculating each respondent's costs, the United States applied inflated margins of dumping to Canadian softwood lumber products and applied a measure against dumping that was contrary to Articles 1, 9.3 and 18.1 and Article VI of GATT 1994.

2. With regard to Question 1 above, please explain with reference, where in the Request for Establishment of a Panel these claims have been made. The Panel notes that there are differences, over and above those raised by the US in its *First Written Submission*, between the Articles cited in the Request for Establishment of a Panel and the Articles cited in Canada's *First Written Submission*. Could Canada please clarify?

[3] *United States – Anti-Dumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, at para. 81. [hereinafter "*US – Anti-Dumping Act of 1916*"]

2. Canada's claims are stated in the Panel Request as follows:

- Canada's claims regarding initiation and termination of the investigation under Article 5 are stated in Section 1(a), (b) and (d).
- Canada's claim regarding the erroneous determination of "like product" is found in Section 2.
- Canada's claim relating to Articles 2.4 and 2.4.2 for the failure to make adjustments for physical differences is stated in Section 3(b).
- Canada's claim relating to Articles 2.4 and 2.4.2 for "zeroing" is stated in Section 3(a).
- Canada's claims regarding Commerce's improper costs calculations for individual respondents that were contrary to Article 2 are stated in Section 3(c) - (e).
- Canada's claims under Article 1, 9.3 and 18.1 of the *Anti-Dumping Agreement* and GATT Article VI are stated in Section 3(f) and in the paragraph following Section 3.

3. Please provide the Panel with copies of the complete version of Exhibit CDA-4 and CDA-11.

3. A complete copy of Exhibit CDA-11 is provided with the exhibits to these responses. A complete copy of the 3-volume transcript of the hearing of the NAFTA Chapter 19 binational panel reviewing the final anti-dumping determination containing approximately 1,000 pages, from which Exhibit CDA-4 is taken, is being provided in .pdf format on CD-ROM (Exhibit CDA-128). If requested, Canada will file hard copies with the Panel.

4. In para. 26 of its *First Written Submission*, the US makes the following statement:

> **"Exhibit CDA-77 contains a 'Lumber Regression Analysis' produced by the Canadian respondent, Tembec, which is a statistical regression that was not made available to the US investigating authority during the investigation. Indeed, it was created more than six months after the investigation was completed."**

Could Canada comment on this statement? Please explain in detail how the regression analysis was developed, that is, which methodologies and assumptions were used? In this context, please also comment on the argument put forward by the US that the regression analysis includes new elements which were not presented to DOC. To the extent that Canada's position is that the various components of the regression analysis were presented to DOC, please show this to the Panel by reference to the record of the investigation.

4. As set forth more fully below in response to Questions 21 and 22, the Department of Commerce, from the very beginning of the investigation, agreed with both the respondents and the petitioner that dimension affects price and therefore was an essential criterion to use in Commerce's model matching. (*See*: Response to Question 22). Commerce used dimension for model matching in both the preliminary determination and in the final determination. In Comment 7 of the *Issues and Decision Memorandum*, Commerce set out its position detailing how it was responding to various

respondent's views in organizing different sizes for its product matching.[4] No one reasonably doubted that the inclusion of dimension for model matching would not mean its inclusion in adjustments for physical differences, and Commerce never gave any reason to expect that it would exclude dimension from its adjustments in the final determination. Commerce could have accounted so meticulously for dimension in model matching only because it recognized the importance of dimension for price. Yet, dimension was used throughout for model matching, but not for a price adjustment for price differences in physical characteristics.

5. The United States had an affirmative duty under Article 6 to notify Canadian parties that it did not intend to use dimension for price because it had put the Canadian parties on notice to the contrary in the questionnaires and in every other aspect of the investigation. All requisite data for the analysis were on the record. The Canadian parties had no reason to submit analyses of the data to prove a point on which Commerce and all parties seemed to have agreed. Had Commerce put the parties on notice about this issue, as required under Article 6.1, the respondents would have prepared and filed with Commerce analyses similar to the Tembec Regression Analysis, which in any event is derived entirely from record evidence and could have as easily been performed by Commerce itself if it had doubts about the importance of dimension.

6. In October 2002, Capital Trade, Inc., a Washington consulting firm with extensive experience in statistical analyses, performed the regression analyses with Tembec data (the regressions could have been performed with the data from any one of the companies, all of whom had the requisite data on the record of the investigation) and advised Tembec's counsel in writing and in detail of the methodology it used. Canada provides here a short summary, and offers the panel the Memorandum of October 2002.[5]

7. Capital Trade used the same US and Canadian sales databases that Commerce used in calculating its final determination dumping margins for Tembec. Thus, all of the underlying data used in these analyses were on the record below and actually used by Commerce in its final determination. Capital Trade used a procedure called "Ordinary Least Squared" or "OLS" to conduct four multiple regression analyses. The first analysis was of Tembec's entire home market sales database as used by Commerce in its final determination. Capital Trade found a 99.99 per cent probability that dimension affects price. In Capital Trade's second regression, using the entire US sales database, it found again a 99.99 per cent probability that dimension affects price. Capital Trade's last two analyses were conducted on portions of the first two databases, using the lumber grades that accounted for the largest and second largest, respectively, volume of sales. Again the results showed a 99.99 per cent probability that dimension affects grade. Finally, as an additional check on its model, Capital Trade compared its regression estimates to published data on lumber prices from *Random Lengths*. The published data showed differences in prices that were extremely close to the pricing differences found in the regression analyses, and confirmed that the market recognizes that differences in dimension affect price. Those data showed significant differences in price between otherwise identical products that varied only by length or width.

To both parties:

7. Please comment on the findings contained in para. 7.3 of the *Egypt – Steel Rebar* panel report:

"the actions of an interested party during the course of an investigation are critical to <u>its</u> protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-*

[4] Issues and Decision Memorandum for the Anti-Dumping Duty Investigation of *Certain Softwood Lumber Products from Canada*, dated 21 March 2002, Comment 7, at 39. [hereinafter "IDM"] (Exhibit CDA-2)

[5] Capital Trade Incorporated, *Certain Softwood Lumber Products from Canada – Regression Analysis*, 7 October 2002. (Exhibit CDA-129 – Contains Business Confidential Information)

***Rolled Steel,* "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

8. In *Egypt – Steel Rebar*, the panel found itself repeatedly confronted with the relationship between: (1) the requirements on an investigating authority during an investigation under the *Anti-Dumping Agreement*; and (2) what evidence and argumentation interested parties should contribute during the process of the investigation.[6] Accordingly, in the introduction to its findings the panel considered the broad principles that relate to this relationship. The above excerpt is drawn from this introduction.

9. This excerpt accentuates two important principles relating to evidence provided by interested parties to investigating authorities: communication and co-operation. An investigating authority is required to "provide opportunities" to interested parties to present evidence on given issues. It follows that the investigating authority must communicate with the interested parties to inform them of the issues and how to provide the required evidence. At the same time, interested parties must co-operate with the investigating authorities in making an effort to present this evidence. If interested parties do not present evidence it will not be possible to review whether the investigating authority met the requirements of or properly exercised its discretion under the *Anti-Dumping Agreement*.

10. In this respect, Article 6 and Annex II of the *Anti-Dumping Agreement* provide important context for these principles. Article 6.1, for example, requires that an investigating authority provide interested parties with notice of the information it requires. This requirement is reiterated in paragraph 1 of Annex II, which is incorporated into the *Anti-Dumping Agreement* through Article 6.8. This provision provides that: "As soon as possible after the initiation of the investigation, the investigating authorities should *specify in detail the information required* from any interested party, and the manner in which that information should be structured … ." An investigating authority is also not permitted to consider other available information where a party does not provide certain information because the authorities have failed to specify in detail the information that was required.[7] Moreover, Annex II paragraph 6 provides that an interested party must be immediately informed and afforded an opportunity to provide further explanation when an investigating authority does not accept its information. These provisions demonstrate that there is a strong requirement on the investigating

[6] Egypt – Steel Rebar, at para. 7.1.

[7] In Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, the panel found that:

> [W]e conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided *unless the investigating authority has clearly requested that the party provide such supporting documentation.* (emphasis added)

Report of the Panel, WT/DS189/R, adopted 5 November 2001, at para 6.58.

authority to communicate with interested parties to inform them of required evidence and *whether the evidence they have provided is adequate*.

11. In relation to co-operation, Annex II also specifies that investigating authorities should ensure that an interested party is aware that if it does not provide information that the authority will be free to make a determination on the basis of other evidence.[8] Again, if interested parties do not co-operate with an investigating authority this will detract from their position in both the underlying investigation and any subsequent WTO action.

B. ARTICLES 5.2/5.3

To Canada:

8. If it is, *arguendo*, assumed that there was no relationship between Weldwood and International Paper, would Canada consider that the evidence before the US authorities at the time of initiation was sufficient to justify the initiation of the AD investigation against softwood lumber? Could Canada please explain its position in detail?

12. Assuming that Weldwood was not a wholly-owned subsidiary of International Paper, one of the leading members of the Coalition for Fair Lumber Imports Executive Committee (the Applicant), the information before the US authorities at the time of initiation was not sufficient to justify the initiation of the investigation against Canadian softwood lumber.

13. As discussed below, even though the Application addresses a product that is the subject of billions of dollars of cross-border trade including purchases of imported lumber by several companies that make up the Applicant, the Application provides no information on transaction prices and grossly inadequate information on costs to support its allegations. Even without knowledge of the Weldwood and International Paper relationship, it would be obvious to any reasonable investigating authority that the data provided with the Application was insufficient to justify an investigation and was not all that was reasonably available to the Applicant. Hence Commerce's initiation violated Articles 5.2 and 5.3 of the *Anti-Dumping Agreement*.

14. In its Notice of Initiation, Commerce concluded that "[*b*]*ased on the data provided by the petitioners*, there is reason to believe that certain imports of softwood lumber products from Canada are being, or are likely to be, sold at less than fair value."[9] The information provided by the Applicant and which was relied on by Commerce to initiate the investigation was so inaccurate and inadequate that it was insufficient to justify the initiation of the investigation within the meaning of Article 5.3. Commerce's determination that the evidence was sufficient was not one that an objective investigating authority could properly have made.

15. As will be demonstrated below, there were material deficiencies in the data provided by the Applicant and upon which Commerce relied to reach its decision that there was sufficient evidence to initiate the investigation. It is also readily apparent that Commerce did not sufficiently scrutinize the accuracy or adequacy of the **price** and **cost** information in the Application. In the context of the market for softwood lumber it would have been obvious to any investigating authority acting objectively that additional data on actual transactions had to be available to the Applicant and these

[8] Annex II paragraph 1 provides, in part, that:

… The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

[9] *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21,328, at 21,331 (Dep't Commerce 30 April 2001) (Initiation). [hereinafter "Initiation Notice"] (Exhibit CDA-9)

data might very well have contradicted and nullified the information provided by the Applicant. Further, it would have been obvious that the US mills chosen as surrogates for the cost calculation were unrepresentative and that use of certain cost information was objectively unreasonable.

16. Relying on the Applicant's representation that better data on Canadian producer prices and costs were not reasonably available to it, Commerce *nonetheless* initiated its investigation based on insufficient information contained in the Application which omitted actual transaction prices; provided limited and, at best, imprecise information on prices at which Canadian lumber was exported to the United States; and relied on a hybrid cost model built, in significant part, on aggregate information and non-Canadian cost data from small, unrepresentative surrogate mills.

A. COMMERCE FAILED TO HAVE ACCURATE AND ADEQUATE PRICE INFORMATION BEFORE IT SUFFICIENT TO JUSTIFY THE INITIATION OF THE INVESTIGATION

17. The Application contained no evidence of any actual sales transactions involving identified Canadian companies, despite the fact that five applicant companies (i.e., members of the Coalition for Fair Lumber Imports Executive Committee)[10] themselves purchased from three of the six largest Canadian producers[11] and that there were billions of dollars of cross-border trade in softwood lumber. Instead, the Application relied almost exclusively on information from Random Lengths, an industry publication that provides only price estimates - not prices - for various types of lumber supplemented by a few alleged "price quotes" contained in two affidavits that amounted to mere assertions, unsupported by material facts such as the identity of the purchaser or the circumstances of sale. Finally, although the Application described seven major categories of softwood lumber, it provided no evidence of pricing, of any kind, on five of the seven self-described categories.

(i) Reliance on information contained in Random Lengths

18. Commerce relied on insufficient information represented as US "market prices" reported in *Random Lengths*. First, with respect to the alleged "price quotes", even the Applicant characterized the *Random Lengths* prices as a "derivation of US market prices"[12] or "as a basis for estimating prices in the United States".[13] Thus, even the Applicant concedes that what is provided by *Random Lengths* are neither actual prices nor an average compiled from actual prices.

19. *Random Lengths* itself acknowledges that the prices it publishes are not actual transaction prices or averages of transaction prices. As explained by *Random Lengths* in information included with the Application, its "reported prices are not averages, nor are they determined by a formula or model":[14]

> A reported price is **not** an arithmetic average of the prices reported to the Random Lengths staff. It is **not** the price for the item for the week following publication (that

[10] *Ibid.*, at 21,329 fn 1, and *Petition for the Imposition of Anti-dumping and Countervailing Duties: Certain Softwood Lumber Products from Canada*, Vol. I (2 April 2001), Exhibit 1B-1 [hereinafter "Petition"] (Exhibit CDA-38), Information About Petitioners, for the list of companies that are members of the Coalition for Fair Lumber Imports Executive Committee. The list includes [[ ]]

[11] The record is clear that [[ ]] members of the Coalition for Fair Lumber Imports Executive Committee (the Applicant), purchased Canadian softwood lumber from [[ ]] during the period of investigation and therefore had access to US transaction price data. [[ ]] All exhibits contain Business Confidential Information.

[12] Petition, Vol. VI, Exhibit VI.C-13, "Derivation of US Market Price" (Exhibit CDA-44)

[13] Petition, Vol. III, at III-12 (Exhibit CDA-37).

[14] Petition, Vol. III, Exhibit III.12, "Random Lengths - How Reported Prices Are Determined" and "Random Lengths – Answers to Questions About the Prices Published In Random Lengths", at 1. (Exhibit CDA-133)

> is, it is not a projected price for future transactions). It is **not** the only price at which transactions took place during the week of publication.[15] (emphasis in original)

20. In short, the *Random Lengths* reported prices are estimates or judgments based on informal enquiries conducted by *Random Lengths* personnel. Informal estimates of this sort are not actual transaction prices or price quotations. Such estimates did not amount to sufficient evidence to support the initiation of the investigation especially in a market with billions of dollars of cross-border trade and due to the fact that some of the Applicants are also purchasers of imported Canadian lumber.

21. The eastern spruce-pine-fir (SPF) US "price" data from *Random Lengths* (delivered to Boston and the Great Lakes)[16] that was relied upon by Commerce to initiate the investigation[17], may have suffered from the additional flaw that the data commingled Canadian and US producer data. *Random Lengths* defines eastern SPF as follows:

> Lumber of the Spruce-Pine-Fir group produced in the eastern provinces of Canada, including Saskatchewan and Manitoba. Also used in reference to some lumber produced in the northeastern United States.[18]

22. In addition, and with respect to normal values, Commerce quite rightly concluded that the Application contained no evidence of home market prices for producers located in British Columbia.[19] Commerce was wrong however to conclude that the Application contained home market price information for producers in Quebec sufficient to support the Applicant's allegation of sales below cost.[20] For this determination, Commerce once again relied on monthly average "prices" reported by *Random Lengths* for the six-month period (October 2000 to March 2001) for two eastern SPF 2x4 products.[21] As discussed above with respect to US price information, *Random Lengths* does <u>not</u> provide evidence of actual transaction prices that is sufficient to justify an investigation.

(ii) The alleged US Price Quotes contained in the Application

23. The Notice of Initiation and Initiation Checklist confirm that Commerce, for the purposes of calculating export price for initiation purposes, relied on "POI-average *Random Lengths* prices and actual price quotes from Canadian producers".[22] This information was insufficient as a basis for initiation. There are material deficiencies in the two price quotes, the only other export price

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[15] *Ibid*., at 5 (Page one of the section entitled "Random Lengths – Answers to Questions About the Prices Published In Random Lengths").

[16] Petition, Vol. VI, Exhibit VI.C-13, "Derivation of US Market Price" (Exhibit CDA-44) and Petition, Vol. VI, Exhibit VI.C-11, "*Yardstick* and *Random Lengths*" (various issues) (Exhibit CDA-43). The price data at issue related to ESPF, 2x4, Std&Btr, Kiln Dried, random lengths, delivered to Boston and the Great Lakes respectively.

[17] COMMERCEAD Investigation Initiation Checklist: *Certain Softwood Lumber Products from Canada*, Inv. No. A-122-838, at 6-7 [hereinafter "Initiation Checklist"] (Exhibit CDA-10). and Initiation Notice, at 21,330 (Exhibit CDA-9).

[18] Petition, Vol. III, Exhibit III.9, Random Lengths – Terms of the Trade, 4th ed., at 114. (Exhibit CDA-147)

[19] The Applicant provided data from the British Columbia Ministry of Forests that Commerce rejected because the Application did not indicate that the data were restricted to Canadian sales prices. *See* Initiation Notice, at 21,330 (Exhibit CDA-9). Because there were no prices given for sales in British Columbia at the time of initiation, there is no indication that Commerce even evaluated whether the sales in British Columbia were below cost before calculating normal value based on constructed value.

[20] Initiation Notice, at 21,330 (Exhibit CDA-9) and Initiation Checklist, at 7-9 (Exhibit CDA-10).

[21] Initiation Checklist, at 7-9 (Exhibit CDA-10). On page 8 of the Initiation Checklist, Commerce found that the Application contained "[c]urrent price data" in "Exhibit C-10, (Volume IV)". Petition, Vol. VI, Exhibit VI.C - 10, "Foreign Market Price" (Exhibit CDA-42).

[22] Initiation Notice, at 21,330 (Exhibit CDA-9) and Initiation Checklist, at 6-7 (Exhibit CDA-10).

information outside of the *Random Lengths* data, relied on by Commerce to initiate the investigation.[23]

First US "Price Quote"

24. The first US "price quote" (Quebec Price Quote #1), is supported by an affidavit containing a general allegation of lost sales.[24] The Applicant identifies it as a "transaction price" for eastern SPF[25], but in fact it is not. The price quote in the affidavit does not identify a Canadian producer or producers as the seller of the merchandise, nor is there any information verifying that the purchaser was honestly quoting the Quebec offer (rather than using a phantom quote for negotiation purposes).[26] In particular, there is no evidence as to (i) the name of the producer or exporter providing the quotation; (ii) the names of the customers receiving the quotation; (iii) whether these customers were affiliated or unaffiliated with the producers; and iv) any other relevant information regarding the circumstances of the "alleged" sale, including the volume of the sale, or the circumstances under which the price quote was obtained by the party providing the information.

25. The Application contains nothing more than a simple assertion about a price allegedly offered by what the Applicant claims were Quebec producers. Such assertion does not constitute adequate and accurate evidence sufficient to justify the initiation of the investigation.

Second US "Price Quote"

26. The second US "price quote" (B.C. Price Quote # 1) contained in the Application and upon which Commerce relied, also is supported by an affidavit.[27] The affidavit refers to a price quote for western SPF from a trading company and does not identify any individual Canadian producer or exporter as the supplier of the product. In fact, this price quote was not one offered by a Canadian producer or exporter, or a US company affiliated with a Canadian producer or exporter. Such pricing information cannot justify the initiation of an investigation as it does not reflect the selling practices of Canadian producers or exporters.[28]

27. From such information no investigating authority evaluating the Application objectively could have concluded that the information provided in the Application was sufficient to initiate the investigation.

(iii) The Application provides no pricing data to support initiation on five of the seven softwood lumber categories or for any species other than Eastern SPF and Western SPF

28. At the time of initiation, Commerce did not have before it pricing evidence for five of the Applicant's self-identified seven categories of softwood lumber.

29. While the Application contained pricing information and purported dumping calculations of only two narrowly defined products ((i) SPF 2x4 kiln-dried dimension lumber and (ii) SPF 2x4 kiln-

[23] Ibid.
[24] Petition, Vol. VI, Exhibit VI.C-14, "US Price Quote" (Exhibit CDA-45).
[25] Petition, Vol. III, at III-10 (Exhibit CDA-37).
[26] We note that the International Trade Commission, the US authority which investigates the issue of material injury, routinely deals with lost sales allegations and often finds that the allegation cannot be confirmed.
[27] Petition, Vol. VI, Exhibit VI.D-14 (public version, as originally filed) (Exhibit US-16).
[28] In addition, the affiant assumed that "the mark-up received by lumber wholesalers in the United States has historically been five (5) per cent of the purchase price". See *Ibid*. The Application provided no evidence in support of this assumption.

dried stud lumber)[29], the Application nonetheless requested that Commerce undertake an investigation of virtually all "softwood lumber" which it classified into 7 major categories: (1) studs; (2) boards; (3) dimension lumber; (4) timbers; (5) stress grades; (6) selects and (7) shop.[30]

30. The Application, however, upon which Commerce relied at the time of initiation, contained no evidence of dumping of products falling within five of the Applicant's self-described seven product categories. Specifically, there was no evidence of the dumping of (1) boards; (2) timbers; (3) stress grades; (4) selects; or (5) shop lumber. The limited evidence offered in the Application on two products alone applied solely to "dimension" and "stud" lumber.[31]

31. Commerce relied, without further enquiry, on an Application that contained insufficient information to justify initiation of an investigation with the scope of merchandise proposed by the Applicant.

B. COMMERCE FAILED TO HAVE ACCURATE AND ADEQUATE COST INFORMATION BEFORE IT SUFFICIENT TO JUSTIFY THE INITIATION OF THE INVESTIGATION

32. The cost data – which formed the sole basis for the initiation – were developed from unrepresentative surrogate companies, employed certain costs for less than the full operating cycle, involved aggregate data with no explanation regarding cost allocations, and failed to adequately deal with the freight calculation, among other defects.

33. Cost data were critical to Commerce's initiation findings regarding both Quebec and British Columbia. First, even assuming *arguendo* that the prices cited for Quebec were usable, Commerce would have had to find that there was no dumping unless it also determined Canadian domestic sales were below cost. A price-to-price comparison for the same product in the same month shows that the US price was consistently above the Canadian price.[32] Indeed, the only instance in which Commerce was able to find dumping was when it used the aggregate costs and compared these costs to an

[29] Petition, Vol. III, at III-16 (Exhibit CDA-37). The alleged dumping margins were subsequently revised: Petition, Vol. VI, Exhibits VI.D-15, VI.D-16, VI. C-15, VI.C-16 (Exhibit CDA-40).

[30] Petition, Vol. I, at I-5 - I-6 (Exhibit CDA-36).

[31] Petition, Vol. III, at III-10 – III-16 (Exhibit CDA-37).

[32] A comparison of all of the Quebec ex-factory pricing data for Canadian products sold in Quebec and in the United States consistently shows that the US price was higher, *i.e.*, that there was no price-to-price dumping. In fact, none of the Quebec Derivation of Foreign Market Price data for any of the months Petition, Vol. VI, Exhibit VI.C-10, "Foreign Market Price" (Exhibit CDA-42), when compared to the same product in the same month is higher than the US price data. Petition, Vol. VI, Exhibit VI.C-13, "Derivation of US Market Price" (Exhibit CDA-44).

Product	Date	Quebec Price	US Price
ESPF, 2x4, Std&Btr, KD, RL	October 2000	$199.85	$247.00 $241.09
"	November 2000	$210.20	$263.00 $257.09
"	December 2000	$203.01	$237.00 $232.09
"	January 2001	$199.30	$230.00 $221.09
"	February 2001	212.91	$247.00 $242.09
"	March 2001	$215.19	$257.00 $253.09

A comparison of all reported ex-factory price data for ESPF studs (ESPF, 2x4-8', PET, KD) from the same sources also shows that there was no price-to-price dumping. Petition, Vol. VI, Exhibit VI.C-10, "Foreign Market Price" (Exhibit CDA-42) compared with Petition, Vol. VI, Exhibit VI.C-13, "Quebec Derivation of US Market Price #2" (Exhibit CDA-44).

individual product. Second, there were no Canadian home market prices used to calculate normal value for British Columbia. After Commerce rejected the Applicant's proffered price data from the B.C. Ministry of Forests (on the basis that the Application did not indicate that the prices were restricted to sales in Canada)[33] there were no other British Columbia prices offered or requested. Because there were no prices given for sales in British Columbia, there is no indication that Commerce even evaluated whether the sales in British Columbia were below cost (as Commerce normally does and is anticipated by Article 2.2.1 of the *Anti-Dumping Agreement*) before calculating normal value based on constructed value.

(i) Failure to have costs of significant or representative producers

34. Claiming no better information was available, the Applicant based its estimation of British Columbia and Quebec producers' costs on manufacturing costs of members of the US Coalition. The Applicant asserted and Commerce accepted with no apparent effort at verification that the members of the Coalition whose costs were used were "significant producers" in the United States that were representative of the "Canadian producers being modelled".[34]

35. There is no evidence in the record that Commerce made further enquiries to ascertain the accuracy of these claims prior to initiation. To the contrary, Commerce appears to have assumed the accuracy of the Applicant's claim that no information was available to the Applicant on Canadian costs[35] and that the US companies whose costs were used as surrogates were significant producers of the products for which the cost models were being constructed. A review of the evidence reveals that, in fact, the US mills relied upon by the Applicant were not significant producers of softwood lumber and were not representative of the Canadian mills for which their costs were used as a surrogate.[36] For example, the US mills used as a surrogate were significantly smaller than the Canadian mills and therefore the US mills did not have any of the efficiencies of scale that the Canadian mills have and consequently the cost model from the surrogate mills would have had higher costs. The US surrogate mills used for British Columbia costs were only approximately one-third the size of the Tembec mills in British Columbia used for the calculation, and the US mills used as a surrogate for the Quebec costs were less than one-tenth the size of each of the six largest Canadian mills and smaller than over 75 per cent of all Canadian mills that export to the United States.[37]

(ii) The failure to provide costs for a period of time sufficient to objectively assess the reasonableness of the data submitted

36. Both the cost models constructed for Quebec and British Columbia relied on certain manufacturing and cost data for less than a full year (2000).[38] The failure to capture costs associated with a full operating cycle for the purposes of initiation is clearly insufficient. Home construction, and thus dimensional and stud lumber sales, is a seasonal business. Such reliance on a period less than one fiscal year is misleading and provides a distorted view of unit production costs. There is no

[33] Initiation Notice, at 21,330 (Exhibit CDA-9).

[34] Petition, Exhibt VI.A (public version), at 2 (Exhibit CDA-134); Initiation Checklist, at 8 (Exhibit CDA-10) and Initiation Notice, at 21,330 (Exhibit CDA-9).

[35] Petitioners' April 10 Amendment Letter, at 2 (Exhibit CDA-40).

[36] Request for Termination and Rescission of Investigation, Letter from Weil Gotshal & Manges to COMMERCE(19 July 2001), at 23 - 28 [hereinafter "Request for Termination"] (Exhibit CDA-51). The Government of Canada does not have access to the proprietary information in this document as it is confidential information belonging to the Applicant.

[37] Smaller mills generally have higher costs as they cannot benefit from the efficiencies available to larger mills.

[38] Petition, Exhibit VI.C-1 (public version), at para. 4 (Exhibit CDA-135), of each "Certification"; and Petition, Exhibit VI.D-1 (public version), at para. 4 (Exhibit CDA-136) of the second "Certification". The first "Certification" at para. 4 of Exhibit VI.D-1 is the only one of the cost affidavits relied on that purports to describe costs for a full calendar year.

evidence on the record of any analysis by Commerce of the adequacy of these "abbreviated" cost reporting periods.

(iii) No evidence of the method used to calculate manufacturing costs for the SPF species or of how company costs were allocated to the specific 2x4 kiln-dried dimension or stud lumber

37. There was inadequate and insufficient information before Commerce concerning product-specific costs. Commerce made its initiation decision without any evidence before it of how the Applicant calculated manufacturing costs for the SPF species or of how company costs were allocated to the specific 2x4 kiln-dried dimension or stud lumber.[39] For example, the stumpage costs were based on costs for all species, including the higher valued Douglas fir and cedar timber.[40]

38. The Applicant claimed that it "provided manufacturing costs on a product-specific basis for representative Canadian products", that it provided costs for certain eastern and western SPF products, and that it even "modelled costs for 2x4s that have been kiln-dried."[41] However, there was, in fact, no evidence on the description of the species produced by companies supplying the cost information or of how their manufacturing costs were calculated or allocated to the specific products for which the cost models were constructed. Commerce did not have any information on how the costs for multiple products and species were allocated or whether it was appropriate to take these average aggregate costs to compare to the costs for a single SPF 2x4 product.

(iv) The Application did not contain adequate information regarding freight costs

39. Although freight is a significant component of the price for lumber, the Application lacked reasonably obtainable Canadian freight information from either of the two Canadian national railways and instead relied on freight information that was not even for Canadian rail or international freight.

40. For example, in the case of Quebec, Commerce relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces. In doing so it included freight costs unrelated to transport between Quebec and the United States.[42] There was also no evidence to support the Applicant's allegation that truck rather than rail is used by Quebec producers to ship lumber.

41. In the case of British Columbia, Commerce relied on an affidavit indicating that rail freight charges incurred for what appears to be a Southern-Yellow-Pine shipment which weighs considerably more than the western SPF for which the Applicant purported to be creating a cost model.[43]

42. There are many other examples of inaccuracies and inadequacies in the freight rate calculations provided to and relied upon by Commerce to initiate the investigation.[44]

43. In short, relying on the claim that no better information was reasonably available, Commerce relied on data based on the costs of four unrepresentative US mills and other unrepresentative and unallocated cost information, even though the market situation and purchases by the Applicant

[39] Petition, Vol. III, at III-4 (Exhibit CDA-37); Petition, Vol VI, Exhibits VI.C-12 and VI.D-12 (Exhibit CDA-40). Initiation Checklist, at 8-9 (Exhibit CDA-10); and Initiation Notice, at 21,330-21,331 (Exhibit CDA-9).

[40] Petition, Vol. VI, Exhibits VI.C-2 and VI.D-2 (Exhibit CDA-137).

[41] Petition, Exhibit VI.A, at 4 (Exhibit CDA-134).

[42] Petition, Vol. VI, Exhibit VI. C-9, Freight Affidavit (public version) (Exhibit CDA-41).

[43] Petition, Attachment 1 "Average MBF per rail car is 92,160 MBF. Average weight is approximately 195,000 lbs." (Exhibit CDA-40); Petition, Vol. VI, Exhibit VI.D-13 (revised) (Exhibit CDA-40); and Request for Termination, at 29-30 and Enclosure 7 (Exhibit CDA-51).

[44] Request for Termination, at 28-32 (Exhibit CDA-51).

companies the extensive cross-border trade and cross- border ownership suggested more reliable and more specific information was reasonably available to the Applicant.

44. In summary:

(a) The price information in the Application consisted principally of estimates from an industry publication and unsubstantiated anecdotal reports in two affidavits. In short, there was no information on actual prices.

(b) The cost information in the Application was based on the surrogate costs of four US mills that were unrepresentative of the Canadian mills. Further, there was no explanation for how certain aggregate cost elements were allocated.

(c) This price and cost information was accepted as all that was reasonably available to the Applicant by Commerce in the context of a market Commerce had previously investigated on three occasions[45] which involved billions of dollars in cross-border trade.

(d) The information contained in the Application was inadequate to justify initiation of an investigation. It did not provide evidence that would lead an unbiased and objective investigating authority to determine there was sufficient evidence of dumping within the meaning of Article 2. Moreover, in this context of the market in question, the information provided was obviously not all the information that was reasonably available to the Applicant.

(e) Finally, the data provided were so inadequate that an objective investigating authority would recognize that the Application's information could easily be contradicted and nullified by actual price and cost data that were almost certainly available to the Applicant.

9. In which way was the data from Weldwood more representative of the Canadian exports of the relevant softwood lumber products than the information contained in the application?

45. In a submission to Commerce in connection with this investigation, Weldwood described itself in the following terms:

> Weldwood is the largest producer of softwood lumber in Alberta and one of the largest producers in British Columbia. In addition, Weldwood is one of the largest exporters of subject merchandise to the United States. Weldwood sells a broad range of products throughout the United States and Canada.[46]

[45] First Written Submission of Canada, at 9-11, fn 21, fn, 22, fn 33. In particular, the footnotes refer to previous determinations relating to softwood lumber: *Certain Softwood Products from Canada*, 48 Fed. Reg. 24,159 (Dep't Commerce May 31, 1983) (final determination) ("*Lumber I*"); *Certain Softwood Products from Canada*, 51 Fed. Reg. 37,453 (Dep't Commerce Oct. 22, 1986) (prelim. determination) ("*Lumber II*"); and *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570 (Dep't Commerce 28 May 1992) (final determination) ("*Lumber III*").

[46] Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001, at 3 of the Mini-Questionnaire Response (Exhibit CDA-138 – Contains Business Confidential Information). Weldwood was one of the 15 largest producers and exporters of softwood lumber that received a mini-questionnaire from Commerce on 25 April 2001. *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep't Commerce 6 November 2001) (prelim. anti-dumping determination) (Exhibt CDA-11). Weldwood's response filed with Commerce on 3 May 2001 indicates that Weldwood produces and exports lumber to the US from nine different mills with seven located in British Columbia and two in Alberta (p. 1 of the Mini-Questionnaire response).

46. Similarly, the Applicant itself identified Weldwood as one of the "Top Canadian Exporters of Softwood Lumber" in the Application.[47]

47. As described in Question 8, the export and home market price data submitted by the Applicant and relied on by Commerce to initiate the investigation were not actual transaction prices and were severely flawed. In fact, Commerce apparently initiated the investigation without any home market prices or price information from British Columbia, the province that accounts for well over half of Canadian softwood lumber production and exports to the United States.[48] As for the cost data submitted by the Applicant and relied on by Commerce, among other flaws, they were based on four small US mills that are unrepresentative of the typical Canadian mill. (This flaw and others are described more fully above in response to Question 8).

48. The Weldwood data were actual costs, and actual export and home market transaction prices for softwood lumber, including home market prices from British Columbia. This is not only better and more representative data, it was, as established in Canada's First Written Submission, readily available to the Applicant given Weldwood's status as a wholly-owned subsidiary of International Paper.[49] Further, the availability of Weldwood as a source of data was made clear to Commerce five days before publication of the Notice of Initiation in this investigation.[50]

49. No investigating authority acting objectively could have initiated this investigation on the basis of the data in the Application, particularly in the light of the existence of the better and more representative data that were available in this case – the Weldwood data being only an example of such data.

10. Please comment on the statements contained in para. 70 of the US *First Written Submission*:

> **"[t]hus, for Canada to prevail on its initiation claim, there must be an obligation on the part of an investigating authority to reject a petition that excludes some reasonably available information on matters in Article 5.2(iii) of the AD Agreement, even where the included information is sufficient to support initiation, and even where the excluded information could not lessen the adequacy or accuracy of the included information. There is no such obligation."**

50. The United States fails to differentiate between the obligations of the investigating authority under Articles 5.2 and 5.3.

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[47] Petition, Vol. 1B, Exhibit 1B-9, Top Canadian Exporters of Softwood Lumber to the United States 2000 (Exhibit CDA-39).

[48] The Applicant provided data from the British Columbia Ministry of Forests that Commerce rejected because the Application did not indicate that the data were restricted to Canadian sales prices. *See* Initiation Notice, at 21,330 (Exhibit CDA-9). Because there were no prices given for sales in British Columbia at the time of initiation, there is no indication that Commerce even evaluated whether the sales in British Columbia were below cost before calculating normal value based on constructed value.

[49] First Written Submission of Canada, at paras. 90,94-95.

[50] Quebec Lumber Manufacturers Association Letter to DOC, 25 April 2001 (Exhibit CDA-50). The Notice of Initiation was published in the Federal Register on 30 April 2001 (Initiation Notice, at 21,328, Exhibit CDA-9). Canada also notes that Weldwood provided data and information to Commerce in connection with this investigation on at least two occasions. *See* Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001 (Exhibit CDA-138 – Contains Business Confidential Information) and Cover Letter for Weldwood Sections B, C and D Questionnaire Response from Hunton & Williams to DOC, 16 July 2001 (public version) (Exhibt CDA-49). Commerce never considered the data or information. *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep't Commerce 6 November 2001) (prelim. anti-dumping determination) at 56,064 (Exhibit CDA-11).

51. The obligation on the investigating authority under Article 5.2 is clear. The application must contain all the information that is "reasonably available" to the applicant on the factors set forth in Article 5.2(i) –(iv).

52. The obligation under Article 5.3 is equally clear and distinct from the obligation of the investigating authority under Article 5.2. Article 5.3 imposes an independent obligation on the investigating authority to assess, once it has determined that the requirements of Article 5.2 are met, whether sufficient evidence exists to initiate an investigation.[51] The authority must examine the accuracy and adequacy of the evidence in the application "to determine whether there is sufficient evidence to justify initiation of an investigation".

11. Please comment on the statements contained in paras. 73-74 of the US *First Written Submission*:

> **"Canada appears to suggest that Article 5.2 imposes an independent obligation on investigating authorities to reject petitions that contain evidence sufficient to initiate but that lack some evidence alleged to be available to petitioners, even where such evidence would not negate the sufficiency of the included evidence.**
>
> **However, Article 5.2 of the AD Agreement does not impose such an obligation on investigating authorities. The obligation of an investigating authority regarding initiation is set forth in Article 5.3. Article 5.2 simply describes what information a petition shall contain."**

53. The position of the United States in these paragraphs is incorrect for the same reasons mentioned in response to Question 10. It is true that Article 5.2 describes what information an application shall contain and that there is a requirement on the applicant to provide that information. However, the investigating authority can only accept the application if it determines that that requirement has been met. Moreover, the US reading of Article 5.2 would render the provision inoperative. Even an application that does not conform to Article 5.2, would, under the US interpretation, be capable of supporting initiation meaning that a breach of Article 5.2 would have absolutely no consequences. Article 5.2 would be rendered meaningless. This is an invalid interpretation under the well-established requirement of effectiveness in treaty interpretation. It is also implausible that the negotiators would have drafted such a detailed list of informational requirements for the application in Article 5.2 if they did not intend for authorities to be required to reject applications that did not meet the requirements.

To both parties:

16. In the view of Canada/the US, which obligation(s) are imposed by Article 5.2? Which entity or entities is/are the addressee(s) of the obligation(s)?

54. The obligation under Article 5.2 is on the investigating authority to determine whether the application contains "such information as is reasonably available to the applicant" on the factors set out in Article 5.2(i) to (iv) including on "prices" as required by Article 5.2(iii).[52] The *WTO*

[51] *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/R, adopted as modified 28 November 1998 (WT/DS60/AB/R), at para. 7.50 [hereinafter *Guatemala-Cement I*]. The Appellate Body did not consider the Panel's interpretation of Article 5 of the *Anti-Dumping Agreement.*

[52] Canada notes that in *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, the panel asked both parties, the complainant Brazil and the respondent Argentina, for their views as to the "extent – if any – to which Article 5.2 [of the *Anti-Dumping Agreement*] imposes obligations on Members, as opposed to applicants." Both parties agreed that Article 5.2 imposes obligations on Members. *See Argentina – Definitive*

Agreement, including the *Anti-Dumping Agreement*, sets out the obligations of WTO Members, not private parties.[53]

17. In the view of the Parties, is there a hierarchy in which the applicant should endeavour to submit the information, as is reasonably available to it, required under Article 5.2(iii)? Please motivate your response fully.

55. No. The ordinary meaning of Article 5.2 requires that if the applicant has information on prices that is reasonably available to it, then it must provide it to the investigating authority. Whether the applicant has provided all "reasonably available" information must be determined based on an objective evaluation of the evidence before the investigating authority at the time initiation of an investigation is requested.

C. ARTICLE 5.8

To Canada:

18. Please comment on the statement contained in para. 79 of the US *First Written Submission*:

> **"[t]his is not a case in which information presented later invalidated the information Commerce had relied upon to initiate."**

56. The US statement is premised on its assertion that Commerce initiated "based on the objective adequacy of the data showing dumping".[54] As discussed in the response to Question 8, an "objective" review demonstrates that the data upon which Commerce relied were inadequate and therefore insufficient to justify initiation. The United States also maintains that, in initiating the investigation, Commerce did not rely on the Applicant's statement that it was unable to obtain company-specific cost and price data.[55] However, this is simply a self-serving *post hoc* rationalization. Surely, if Commerce had been aware at the time of initiation of price and cost information in the Applicant's possession that could show there was no dumping, it would not have initiated. Hence at least implicitly Commerce was relying on the Applicant's representation.

57. Viewed in this light it is clear this is a case in which information presented after the decision to initiate could have invalidated the deficient information on which Commerce relied in its initiation. Moreover, it is telling that Commerce was advised of the existence of significant and extensive actual price and cost information readily available to the Applicants five days **before** the notice initiating the investigation was published[56] and 30 days before the respondents were selected and anti-dumping questionnaires were issued. It is apparent Commerce would have had ample time to collect and analyze the price and cost information possessed by Weldwood, for example, and to re-evaluate its decision to initiate. It chose to take no action and now seeks to defend its inaction by asserting that demonstrably inadequate information with no actual Canadian price or cost data was in fact adequate.

Anti-Dumping Duties on Poultry from Brazil, Report of the Panel, WT/DS241/R, adopted 19 May 2003, at paras. 7.96-7.98.

[53] While WTO Members are free to give the *WTO Agreement* direct effect in their domestic law, and thus to apply Article 5.2, for instance, directly to private parties, this is a consequence of their national laws rather than the *WTO Agreement* itself.

[54] First Written Submission of the United States, at para. 80.

[55] *Ibid*.

[56] Quebec Lumber Manufacturers Association Letter to DOC, 25 April 2001 (Exhibit CDA-50). The Notice of Initiation was published in the Federal Register on 30 April 2001 (Initiation Notice, at 21,328, Exhibit CDA-9).

19. Does Canada agree with the statement by the US in para. 81 of the US *First Written Submission* that "the cost and price data regarding Weldwood could not detract from the sufficiency of the data upon which [the IA] had based its initiation"?

58. Canada does not agree with the statement for many of the reasons set out in the response to Questions 8 and 9. As discussed at length above, the information provided with the Application did not satisfy the requirements of Articles 5.2 or 5.3. However, even if the information had been marginally sufficient to justify initiation in a situation where no actual price and cost data were reasonably available to the Applicant, it is apparent that actual sales and cost data information available to the Applicant could have invalidated the information upon which Commerce relied.

59. The United States suggests that the Weldwood cost and price data would not have been significant because it was company-specific data that "could not have contradicted the country-wide price and cost information contained in the petition."[57] This is simply a *post hoc* rationalization for Commerce's inaction. Weldwood is one of Canada's largest producers of softwood lumber with production operations in British Columbia and Alberta.[58] In its 3 May 2001, submission responding to Commerce's mini-questionnaire and as noted in the response to Question 9 above, Weldwood described its operations as follows:

> Weldwood is the largest producer of softwood lumber in Alberta and one of the largest producers in British Columbia. In addition, Weldwood is one of the largest exporters of subject merchandise to the United States. Weldwood sells a broad range of subject products throughout the United States and Canada.[59]

60. In that same submission Weldwood requested that it be selected as a mandatory respondent in the anti-dumping investigation.

61. The United States is arguing that transaction-specific information on Canadian and US sales and on the costs of producing softwood lumber from one of the largest Canadian producers would have been irrelevant to its evaluation of whether to initiate the investigation. In view of the fact that the data on which Commerce did rely contained **no** actual sales data and **no** actual Canadian cost data, the US position is untenable. This is especially true in the light of the fact that Commerce apparently initiated the case without any home market sale prices from British Columbia, by far the largest lumber-producing province in Canada.[60]

D. ARTICLE 2.6

To Canada:

20. Please explain the legal basis for Canada's legal claim in the present case that the US action violation Article 2.6 (following the US argument in para. 26 of its *First Oral Statement* that the product under consideration is the starting point for determining the "like product").

[57] First Written Submission of the United States, at para. 68.

[58] Weldwood was one of the 15 largest producers and exporters of softwood lumber that received a mini-questionnaire from Commerce on 25 April 2001. *See* Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001 (Exhibit CDA-138 – Contains Business Confidential Information). Weldwood's response filed with the Department on 3 May 2001 indicates that Weldwood produces and exports lumber to the US from nine different mills with seven located in British Columbia and two in Alberta (p. 1 of the Mini-Questionnaire response).

[59] *Ibid.*, at 3 of the Mini-Questionnaire.

[60] *See* Canada's response to Question 9 above.

62. Canada does not dispute that "the product under consideration is the starting point for determining the 'like product.'[61] Of necessity, an investigating authority begins with the proposed scope of investigation that an applicant presents to the authority. Although that is the starting point, that is not the end of the authority's responsibilities, however. The authority must proceed to find a like product that conforms to the requirements of Article 2.6.

63. Article 2.6 expressly requires an investigating authority to define the "like product" as "identical, *i.e.*, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

64. The ordinary meaning of Article 2.6 and the terms "characteristics closely resembling" support this interpretation. The *New Shorter Oxford English Dictionary* (1993) defines "characteristic" as "[a] distinctive mark; a distinguishing trait, peculiarity or quality." It defines "close" as "[v]ery near in position, relation or connection", and "resemble" as "[b]e like, have a likeness or similarity to, have a feature or property in common with". When these three words are taken together, as they are in Article 2.6, they must mean that the essential, distinctive traits of one product must be very nearly identical to the essential, distinctive traits of the other product.[62]

65. Thus, if a product under consideration has been proposed that is too broad, it will not be possible to define a single like product that meets the criteria set forth in Article 2.6. A simple example, used in Canada's First Oral Statement, will illustrate this problem. If an applicant proposes that the product under consideration is to consist of "certain vehicles", comprising automobiles and bicycles, then it will not be possible to define a single like product that meets the requirements of Article 2.6. The "like product" cannot be "automobiles and bicycles," because then only some of the items in this proposed "like product" will be identical with or have characteristics that closely resemble the set of items in the proposed "product under consideration." That is, the automobiles will be identical with or have essential, distinctive traits that closely resemble the automobiles, but they will definitely not be identical with or have essential, distinctive traits that closely resemble the bicycles. Each item in the like product class must, however, be identical with or have essential, distinctive traits that closely resemble *all* items in the product under consideration. If this matching were not the case, then a "like product" could consist of any disjointed agglomeration of products whatsoever, as long as it was a "mirror image" of the disjointed agglomeration of products in the proposed product under consideration. That cannot be a correct interpretation of "like product," because it would deprive "like product" of any meaning or coherence whatsoever.

66. It should be recalled that, according to Article 2.6, "like product" has the same meaning throughout the Agreement. As a result, in order to proceed at all, the authority must determine that the applicant represents the majority of producers of the product that is "like" the "product under consideration." See Article 5.4. The applicant must also present evidence that the domestic like product is injured by the product under consideration. See Article 5.2. Adequate evidence of injury in the application depends upon defining an industry that makes the relevant like product.

67. A like product that consists of a disjointed agglomeration of products would lead to irrational results under Articles 5.4 and 5.2. Using the example from above, were bicycle makers to represent more than half of both bicycle and automobile manufacturers, automobile manufacturers would not have to be represented at all among the applicants to satisfy Article 5.4. In such a scenario, an investigation could be initiated and pursued against both bicycle and automobile imports notwithstanding the absence of standing or evidence of injury and causation against automobiles.

[61] First Oral Statement of the United States, at para. 26.

[62] L. Brown, ed., *The New Shorter Oxford English Dictionary*, 3rd Ed. (Oxford: The Clarendon Press, 1993), at 374, ["characteristic"] (Exhibit CDA-139); 421 ["close"] (Exhibit CDA-140); and 2558 ["resemble"] (Exhibit CDA-141).

This results directly from the collapse of two products that do not have closely resembling characteristics into a single like product.

68. An investigating authority that has received a proposed product under consideration that comprises products that do not all share identical or closely resembling characteristics must therefore define multiple like products that will correspond to subsets of the application's product under consideration. Standing, industry support, and other necessary elements of the application must then be evaluated with respect to each of these distinct like products.

69. In the above example, having properly concluded that two like products existed, the authority need also determine that there are two distinct products under consideration, such that separate margins of dumping must be calculated for each: one being bicycles, corresponding to the like product, bicycles; and the other being automobiles, corresponding to the like product, automobiles. In this case, each member of a like product set will be identical with or closely resemble all of the articles in the relevant product under consideration. The bicycles in the "bicycles" like product will, for example, be identical with or closely resemble all of the articles in the product under consideration, thereby satisfying the requirement of Article 2.6 for a properly-defined like product.

70. As a consequence of a separate "like product" determination, the investigating authority would be required to make separate findings, for bicycles and automobiles, of standing under Article 5.1, and industry support under Article 5.2, and the application would have to contain separate evidence under Article 5.3. In addition, because Articles 2.1 and 2.2.2 expressly require comparisons using data only for "the like product", automobile pricing, costs, or profits could play no role in determining the dumping margin for bicycles, and *vice versa*. Thus, dumping could be found to exist for one product and not the other. In these circumstances, it would make no sense to allow for the calculation of a single average margin of dumping, applied equally to bicycles and automobiles.

71. The United States did not even attempt to define a like product or like products that conformed to the requirements of Article 2.6, that each item in the like product be identical with or have essential, distinctive traits that closely resemble the essential, distinctive traits of the product under consideration. In this case, the product under consideration was defined as "certain softwood lumber," and therefore, the like product also was defined as "certain softwood lumber." The like product in this case includes products not identical, not the same, not similar, and not having characteristics closely resembling the essential traits of other products included in the like product. The absence of essential traits in one product closely resembling the essential traits of another is fatal to a definition of like product that comports with Article 2.6.

72. As a result of this breach of Article 2.6, Commerce permitted the US applicants to file an anti-dumping application for products that, in some instances, its members did not even produce, on behalf of industries they did not represent, and as to which they did not demonstrate industry support, dumping, or injury, notwithstanding that the "like product" determination delimits these obligations under Articles 5.1, 5.2, and 5.4.

73. Instead, Commerce included products and species by identifying isolated characteristics of different products within the "product under consideration," and then determined whether **some** of the items comprising the proposed "like product" (which was a "mirror image" of the agglomeration of diverse products that comprised the "product under consideration") shared the same isolated characteristics. The United States refers to this test as the "clear dividing line/continuum" test.[63] (It can be disputed that the United States even applied that test, but that issue is beyond the scope of this question.) This mode of analysis violates Article 2.6 because it fails to determine whether any product's essential, distinctive traits are identical or closely resembling to the essential, distinctive traits of the products making up the product under consideration. The United States never tested, as it

[63] *See*, e.*g.*: First Written Submission of the United States, at para. 103.

was required to do under Article 2.6, whether each item comprising its proposed like product was identical with or closely resembled each of the items comprising the proposed product under consideration. If it had done so (which it could have done by properly applying its "*Diversified Products*"criteria), it would have found that the four categories of products at issue here needed to be treated as separate "products under consideration" and have separate, and corresponding, like products defined for each of them, or else needed to be eliminated from the scope of the investigation as not comprising part of the product under consideration that Commerce undertook to investigate.

74. For the investigating authority to recognize and distinguish like products, it must begin with the product under consideration as defined by the applicant, but it must examine all proposed like products to determine whether they are identical to the product under consideration or have traits closely resembling the essential traits of the product under consideration. Commerce failed to make these comparisons, and consequently failed to conform to the plain language of Article 2.6 in ascertaining the product under consideration and corresponding like product.

E. ALLOWANCE FOR DIFFERENCES IN DIMENSIONS

To Canada:

21. For ease of reference of the Panel, can Canada please provide in summary form the arguments on differences in dimensions, including the date of the relevant documents and reference where they can be found on the record, put forward by respondents in the context of the investigation.

75. See response to Question 22 below.

22. Have exporters demonstrated to DOC that those differences in dimensions affect price comparability? Please refer to relevant documents on the record.

76. Canada will address these two questions together as both address the nature of argument and information presented by the Canadian and other parties in the underlying proceeding before Commerce. Before detailing all of the argument and information presented to Commerce, which encompassed dozens of individual submissions, it is useful to place the issue in context with several summary observations.

77. *First*, whether differences in dimension affected price comparability was not an issue that was in dispute during the proceeding before Commerce. From the very outset, *all* parties and *all* US investigating agencies involved *agreed* that dimension affected price comparability. The Petitioners so stated in their Petition. The US International Trade Commission, which examines injury issues, so stated in its preliminary determination a few weeks after initiation, which determination then was presented to Commerce as evidence that dimension affects price. *All* parties (including all respondents) submitting comments on the product characteristics that should be taken into account in distinguishing products for price comparison purposes identified thickness, width, and length as characteristics that needed to be accounted for (after characteristics like species and grade but ahead of other characteristics such as surface treatment, end trimming, and further processing). And, finally, respondents all argued that an adjustment for dimension (DIFMER) in determining normal value was required by law. Indeed, no submission could be located in which any party, including the applicant, contended that dimension did *not* affect price comparability.

78. *Second*, throughout the proceeding, Commerce indicated to the parties that it agreed that dimension affected price comparability. As shown below, at the very beginning of its investigation, in April 2001, Commerce solicited comments on the physical characteristics that affected price comparability. When all parties agreed in May 2001 that thickness, width, and length each were characteristics that affected price comparability, Commerce on 25 May 2001 issued a questionnaire

requiring respondents to report sales identifying the thickness, width, and length of each product. Respondents were not asked for further justification or data supporting the inclusion of these characteristics; to the contrary, the questionnaire made it clear that parties had to provide supporting information only if they sought consideration of *other* characteristics that Commerce had not identified.

79. In its October 2001 preliminary determination, Commerce confirmed the importance it attached to dimension. In its preliminary determination, Commerce limited its price-to-price comparisons only to identical merchandise, with identical defined so as to include products that had exactly the same thickness width, and length, among other characteristics. Commerce ruled preliminarily that it *would not even compare prices of products with different dimensions*. Because Commerce *agreed* in its preliminary determination that dimension affected price comparability, there was no need for respondents to submit further argument or analysis to Commerce regarding this issue. Commerce's rules require parties only to submit argument and analysis regarding aspects of the preliminary determination with which they disagree.

80. *Third*, because the issue was not disputed, and because Commerce accepted all three dimensional characteristics, individually, as significant in its questionnaire and in its preliminary determination, Commerce *never* requested any additional supporting analyses or documentation, nor did it perform any analysis of its own upon which respondents could comment. This latter point bears emphasis – nowhere in the record is there any evidence that Commerce analyzed the detailed, dimension-specific, sales data respondents had submitted (which included not only data for the period of investigation, but historical data as well), for purposes of reaching its conclusion that the effect of dimensional differences on price were "minor" or "fluctuating" and thus did not have to be adjusted for.

81. Indeed, respondents' arguments regarding dimension were the same as for all other product characteristics. That is, the companies presented exactly the same argument and evidence regarding dimension and price comparability as they did for all other physical characteristics, including species, grade, moisture content, end trimming, surface treatment, and further processing. Commerce performed no analysis, and made no findings that each of these characteristics affected price comparability; yet Commerce included each in its matching characteristics, and either did not permit non-identical comparisons (such as for species) or else computed and applied an adjustment (DIFMER) whenever the characteristic was not identical (such as for grade, moisture content, end trimming, surface treatment, and further processing).

82. In its final determination, and thus after the fact, Commerce effectively established a different standard, and treated dimension differently than all of the other physical characteristics it did fully take into account (for both matching *and* DIFMER purposes), including species, grade, moisture content, surface treatment, further processing, and end trimming. As to each of these other characteristics, the parties agreed that they affected price comparability, just as they had agreed that dimension affected price comparability. No further showing was required, no further evidence was presented, and no further analysis was performed by Commerce. Yet each of these characteristics was fully taken into account, but dimension was not.

83. Because the applicant and Commerce at every step of the investigation had agreed that dimension affected price, just as they had agreed that species, grade, surface treatment, moisture content, further processing and end trimming affected price, respondents had no notice that additional information would be required to satisfy Commerce that dimension affected price comparability, or what such information could be. Commerce never requested additional information, and thus respondents reasonably understood that the undisputed information they had submitted would be sufficient – just as it was for every single other physical characteristic.

84. *Fourth*, the respondents were concerned that Commerce would fail to compute an adjustment (DIFMER) for dimension and other characteristics for which Commerce decided not to compute a cost difference, and blame such failure on respondents' failure to provide adequate data – just as has occurred here. On multiple occasions, on 16 August 2001, 10 September 2001, and 24 September 2001 – well in advance even of Commerce's preliminary determination – respondents expressly requested specific guidance from Commerce as to what data or analysis they could submit for adjustment (DIFMER) purposes. *Commerce never responded to any of these requests.* Respondents nonetheless submitted data they thought might be useful, including historical pricing data going back several years, as well as data from *Random Lengths* going back several years. Commerce ignored these data as well. Again, the record contains no analyses by Commerce of any of these data.

85. *Fifth*, Commerce's final determination not to consider dimension was internally inconsistent. On the one hand, Commerce continued, as it had throughout its investigation, to use all three dimension characteristics – thickness, width, and length – in deciding the products it would compare, and treating as identical products only those with identical thickness, width and length. (If Commerce had decided that dimension did not affect price comparability, it should have eliminated these three characteristics, and compared prices without regard to dimension.) On the other hand, after having defined these characteristics as critical in matching products so as to achieve price comparability, Commerce inconsistently then compared products that differed in dimension characteristics without any adjustment for the difference in the products compared.

86. There simply is no difference between the characteristics that affect price comparability for matching purposes and those that affect price comparability for DIFMER purposes. They are one and the same. Either the characteristic affects price, or it does not. The only reason a characteristic is included for model matching purpose is because it is known to affect price. By including a characteristic that affects price as a matching characteristic, Commerce ensures that it does not compare prices of products the prices of which cannot be compared without adjusting for the product difference.

87. Following, in chronological order, are the detailed references in the record responding to the Panel's requests and supporting the observations above:

1. 2 April 2001: **US Industry Petition**

- The Petition itself acknowledged that dimension affects the price of lumber. It noted that "a very precise comparison of products is necessary if the Commission hopes to develop useful price information."(emphasis in original).[64] The Petition suggested three product comparisons, all of which specified dimension. For example, the proposed Product 1 comparison was of 2x4x8 Engleman spruce and lodgepole pine, kiln dried, PET stud (US) to 2x4x8 western SPF kiln dried, PET stud (Canada).[65] ("2x4x8" means lumber 2 inches thick, by 4 inches wide, by 8 feet long; "stud" is a grade.) Obviously, if dimension did not affect price, the Petitioner would have no reason to differentiate products, for price comparison purposes, by thickness, width, **and** length.

2. May 2001: **ITC Preliminary Injury Determination**

- For purposes of its preliminary injury analysis and determination, the ITC concluded that "[s]oftwood lumber prices generally differ **substantially** depending on grades

[64] DIFMER Exhibit, at 2 (Exhibit CDA-142 – Contains Business Confidential Information) [Petition, Vol. I, at I-29 (Exhibit CDA-37)].

[65] *Ibid*.

and dimensions and may differ by the species and applications involved, with better grades and wider dimensions carrying higher prices than lower grades and narrower dimensions."[66] (emphasis added). The Canadian companies subsequently provided to Commerce this finding by the ITC such that it was made part of the record evidence before Commerce (see below).

3. 3 and 4 May 2001: **Party Comments on Characteristics Affecting Price Comparability Submitted at Beginning of Investigation**

- Commerce, on 24 April 2001, invited comments on the characteristics affecting price comparability that Commerce should include in its questionnaire. By 4 May all interested parties submitted comments. Both the Petitioner and *all* respondents agreed that dimension is a characteristic that must be considered. The *only* differences reflected *how* to take dimension into consideration, not *whether* to do so. For example, while respondents proposed reporting studs in length groupings of either six-inch or 12-inch increments,[67] Petitioner proposed reporting them in one-inch increments.[68] The fact that Petitioner requested that length be reported in one-inch increments reflects its understanding that even very small differences in length can affect price comparability.

- In response to Commerce's questionnaire of 24 April 2001, the Petitioner proposes a list of model matching characteristics, which address "fundamental product characteristics, customer expectations, and production processes that distinguish products within the scope from one another."[69] (In order of importance, these characteristics are: (1) treatment, (2) category, (3) species, (4) grade, (5) moisture content, (6) finger jointed, (7) *width*, (8) *thickness*, (9) *length*, and (10) surface finish.[70] (emphasis added). In the alternative, Petitioner proposes a "condensed" model matching hierarchy for use if Commerce adopts Petitioner's suggestions regarding limited reporting. The condensed model matching hierarchy contains eight characteristics – three of which are related to dimension (width, thickness, and length).

- Respondents all joined in comments provided by the British Columbia Lumber Trade Council ("BCLTC"). The BCLTC identified 10 characteristics affecting price comparability, in order of importance: (1) species, (2) lumber type, (3) treatment (e.g., pressure treated), (4) moisture content (*e.g.*, dried or green), *(5) grade, (6) dimension (i.e., thickness and width), (7) length,* (8) surface trimming (number of

[66] *Ibid.*, at 4 [US International Trade Commission, Pub. No. 3426, *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414- and 731-TA- 928 (Preliminary)(May 2001) at 16. (Exhibit CDA-31)]

[67] *Ibid.*, at 7 [Steptoe & Johnson Letter to the Department of Commerce, "Certain Softwood Lumber from Canada: British Columbia Lumber Trade Council Comments on Procedural and Technical Issues" (3 May 2001), at Enclosure I, 9].

[68] A stud is grade of lumber that requires the product to be precision end trimmed to an exact length. It is used primarily in framing walls, where the builder needs a precise length vertical piece to fit between horizontal supports. *Ibid.*, at 10 (fn 3), 14-15 [Dewey Ballantine Letter to the Department of Commerce, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" (3 May 2001), at Attachment 1, (fn 3), VII, VIII, IX. B].

[69] *Ibid.*, at 9 [Dewey Ballantine Letter to the Department of Commerce, "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (3 May 2001), at 3].

[70] *Ibid.*, at 10-15 [Dewey Ballantine Letter to the Department of Commerce, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" (3 May 2001), Attachment 1]

sides planed), (9) edge trimming (eased or square edges), and end trimming (precision end trimmed or not).[71] (emphasis added)

- Abitibi, in its submission, stated expressly that size affects price. With respect to the "dimension" characteristic, it stated: "Dimension (thickness, and width) is an important physical difference among most softwood lumber product types, with larger products generally commanding higher prices."[72] It then stated that "Length too affects value, with longer length products generally commanding higher prices per foot than shorter length products."[73]

4. 11 May 2001: **Rebuttal Comments on Characteristics Affecting Price Comparability**

- BCLTC responds to the applicant's proposal, and other respondents all adopt the BCLTC response. It notes that both the applicant and respondents have identified thickness, width and length as relevant and important characteristics.

- Respondent's position on the relative importance of characteristics affecting price comparability is as follows: "In sum, the product matching criteria and hierarchy for the products under investigation should be: 1) species; 2) lumber type; 3) treatment; 4) moisture content; 5) grade; *6) thickness and width; 7) length;* 8) surface treatment; and 9) end trim."[74] (emphasis added).

- Weyerhaeuser specifically identified dimension as a physical product characteristic that affects price comparisons, stating: "Petitioners also propose to rank width and thickness separately and apparently propose to rank width first. This does not follow industry practice, nor market valuation. Different size products are generally not substituted for each other and are not directly comparable, and thickness is the more important factor. (For example, a 2x4 is even less similar to a 4x4 than it is to a 2x6.)"[75]:

- The applicant expressly recognizes the link between dimension and price. It addresses so-called "random-length" transactions, circumstances in which a customer purchases, at a single average price, lumber of a specified thickness and width, but with a range of lengths, since it wants to offer a range of lengths to its customer. It contends that "comparisons of transactions sold on a R/L [random length] basis is not appropriate if those comparisons do not take into account the *length* composition of the transaction (number of pieces of each length), and *the different market value for pieces of different lengths* . . . ."[76] (emphasis added). Moreover, with respect to

[71] *Ibid.*, at 6-7 [Steptoe & Johnson Letter to the Department of Commerce, "Certain Softwood Lumber from Canada: British Columbia Lumber Trade Council Comments on Procedural and Technical Issues" (3 May 2001), at Enclosure I, 8-9].

[72] *Ibid.*, at 17 [Arnold & Porter Letter to the Department of Commerce, "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (3 May 2001), at 16].

[73] *Ibid.*, at 18 [Arnold & Porter Letter to the Department of Commerce, "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (3 May 2001), at 17].

[74] *Ibid.*, at 6 [Steptoe & Johnson Letter to the Department of Commerce, "Certain Softwood Lumber from Canada: British Columbia Lumber Trade Council Comments on Procedural and Technical Issues" (3 May 2001), at Enclosure I, 8].

[75] *Ibid.*, at 166 [Rebuttal of Weyerhaeuser Company to Petitioners' Comments in Response to the Request for Information of the Department of Commerce dated 24 April 2001 (11 May 2001), at 2].

[76] *Ibid.*, at 25 [Dewey Ballantine Letter to the Department of Commerce, "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (11 May 2001), at 12].

precision end trimmed ("PET") lumber, the applicant notes that "PET lumber should be separately identified in the model match because the length is specified within narrow tolerance and that distinction *is an important determinant of the customer's choice of product*."[77](emphasis added)

5. 25 May 2001: **Commerce's Initial Questionnaire**

- This questionnaire identified the product characteristics Commerce had determined to be relevant in matching/distinguishing products for price comparison purposes. All respondents were *required* to use these characteristics, and code each of their products and sales accordingly. Thickness, width, and length each were *individually* listed as required product characteristics. [Exact specifications were required for thickness and width (*e.g.*, 2 inches, 3 inches, etc.), but length was required to be reported in two foot increments (*e.g.*, 6 feet to less than 8 feet, 8 feet to less than 10 feet, etc.)][78]

- The questionnaire instructed that respondents could add additional characteristics, "However, if you add characteristics not specified in the questionnaire, describe in the narrative response why you believe the Department should use this information to define **identical** and **similar merchandise**."[79] (emphasis in original). In other words, Commerce told the companies additional factual information was required to justify *only additional* product characteristics, not those Commerce had already selected, which, as noted, included each of the three dimensional characteristics.

6. 8 June 2001: **Comments on Initial Questionnaire**

- Canfor requests that Commerce modify the length break-outs in the Questionnaire for stud lumber because the existing categories fail to comport with the manner in which stud lumber is priced and sold in the North American market and, unless modified, would result in inappropriate product comparisons.[80]

7. 15 June 2001: **Applicant Comments on Respondents' Product Reporting**

- The applicant objects to the reporting used by Weyerhaeuser which, for certain limited sales, stated it could not specify length. Petitioner objects, "given the market reality that different lengths command different prices and the National Lumber Grades Authority of Canada mandates that invoices for lumber measured in MBF [thousand board feet] show the number of pieces of each nominal size and length."[81] (footnote omitted) The applicant emphasizes that "the price of most (if not all) products per MBF varies by length."[82] (emphasis in original).

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[77] *Ibid.*, at 26 [Dewey Ballantine Letter to the Department of Commerce, "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (11 May 2001), at 12].

[78] *Ibid*., at 28-29, 31-32 [United States Department of Commerce, Request for Information Abitibi Consolidated, Inc. (25 May 2001), at B-9 – B-10, C-9 – C-10, Sections: B – 3.5, 3.6 and 3.7; and C – 3.5, 3.6 and 3.7].

[79] *Ibid*., at 30 [United States Department of Commerce, Request for Information Abitibi Consolidated, Inc. (25 May 2001), at C-5].

[80] *Ibid.*, at 34 [Kaye Scholer LLP Letter to the Department of Commerce, "Softwood Lumber Products from Canada: Anti-Dumping Investigation" (8 June 2001), at 5].

[81] *Ibid*., at 36-37[Dewey Ballantine Letter to the Department of Commerce, "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (15 June 2001), at 3-4].

[82] *Ibid*., at 37-38, fn 10 [Dewey Ballantine Letter to the Department of Commerce, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" (15 June 2001), at 4-5, fn 10].

8. 9 August 2001: **Letter from Commerce**

- In early August 2001, Commerce solicited comments on whether and how it should compare prices of non-identical products. As if to highlight how well-established it already was that dimension affected price, Commerce asked parties to "explain whether, in your view, the thickness and width criteria should be combined into a single criterion, rather than considered separately".[83] There was no dispute that both thickness and width had to be considered; the only issue Commerce framed was whether to consider them together or separately.

9. 16 August 2001: **Respondents Comments on Physical Characteristics that Should be considered in Comparing Prices of Non-Identical Products**

- Abitibi reiterated that thickness, width and length each should be taken into account, in that order (and after considering grade and moisture content, but before surface finish, end trimming, and further processing). For width, Abitibi noted that value differences were important, but differed. It noted for example that "the value difference between a 2x6 and a 2x8 is less that the between a 2x6 and a 2x4."[84] For length, Abitibi noted that length affected commercial value, but that there certain break points: "There tend to be significant breaks in the commercial value of softwood lumber products of different lengths at two points: 16-foot lengths and 22-foot lengths. Abitibi suggests, therefore, that the Department divide the length criterion into three groups: less than 16 feet, 16 feet to less than 22 feet, and 22 feet plus."[85]

- As to the calculation of an adjustment (DIFMER) when non-identical products are compared, Abitibi affirmed "its willingness to provide such data as it may have available that the Department might require, but expressly seeks the Department's guidance as to what additional data Abitibi should submit to permit the calculation of the appropriate value-based difmers. We could locate no published decision indicating how the Department calculates value-based difmers, much less what data it requires to do so, and thus need guidance on this issue."[86] Commerce did not respond to this express request for guidance.

- Canfor reiterated that thickness, width and length (family code and length) should be taken into account, in that order (and after considering grade and moisture content, but before surface finish, end trimming, and further processing). Canfor further noted that "[g]iven the significant differences in application, cost and value, among the

[83] *Ibid.*, at 40 [Department of Commerce Letter to Abitibi Consolidated, Inc. "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (9 August 2001), at 2].

[84] *Ibid*., at 43-44 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada; Antidumping Duty Investigation Comments on Use of Similar Merchandise Comparisons and Information Pertaining to Scieres Saguenay Limitee" (16 August 2001), at 19-20].

[85] *Ibid*., at 44 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada; Anti-Dumping Duty Investigation Comments on Use of Similar Merchandise Comparisons and Information Pertaining to Scieres Saguenay Limitee" (16 August 2001), at 20].

[86] *Ibid*., at 42 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada; Anti-Dumping Duty Investigation Comments on Use of Similar Merchandise Comparisons and Information Pertaining to Scieres Saguenay Limitee" (16 August 2001), at 9].

different lengths of lumber sold, Canfor believes it is appropriate to establish groups, or families, of lengths for product matching purposes."[87]

- Slocan noted that thickness and width should be treated as separate characteristics, and also argued for grouping lengths into families: "in general Slocan believes that the 2-foot increments defined by the Department can be compared to their neighbors. However, there is a clear price break between 14' and the highly desirable 16' lengths, and between 16' – 20' lengths and 22' and above. There are consistent price gaps between 14' and under and 16' and higher, and between 16' –20', and 22' and above. Therefore Slocan proposes that the weighting be set up to make allowance for this commercial fact . . . ."[88]

- Tembec pointed to Commerce's legal authority to make allowances for differences in physical characteristics based on market values, and stated that "many of the physical differences between similar lumber products are not reflected in production costs, but result in significant differences in market valuation."[89] Tembec also contended that "when identical matches are not available the Department should base Normal Value on similar matches with DIFMERs calculated based on difference in variable cost supplemented with value-based DIFMERs as needed. Should the Department determine that it needs additional information . . . it should request that information in a supplemental questionnaire . . . ."[90]

- Weyerhaeuser reiterated that width, thickness, and length are physical differences that create differences in realizable value and urged that those characteristics be included in the product characteristics hierarchy. Weyerhaeuser noted again, as it had in its earlier submission, that: "Commercially, thickness is generally more important than width. Products of different thickness are often used for fundamentally different applications and thus are sold under different market conditions."[91]

10. 21 August 2001: **Petitioner Comments on Using Non-Identical Product Comparisons**

- The applicant did not argue that Commerce should compare prices of non-identical products differing in dimension without any DIFMER. To the contrary, the applicant recognized the distortions this would create, and instead argued that if no identical product comparison should be made, US Export Price should be compared to a constructed normal value.[92]

[87] *Ibid*., at 48 [Kaye Scholer LLP Letter to the Department of Commerce "Softwood Lumber Products from Canada: Anti-Dumping Investigation" (16 August 2001), at 5.]

[88] *Ibid*., at 50 [Baker & McKenzie Letter to the Department of Commerce "Certain Softwood Lumber Products from Canada" (17 Aug. 2001), at 7].

[89] *Ibid*., at 52 [Baker & Hostetler, LLP Letter to the Department of Commerce "Certain Softwood Lumber Products from Canada" (16 August 2001), at 7] (Contains Business Confidential Information).

[90] *Ibid*., at 54-55 [Baker & Hostetler, LLP Letter to the Department of Commerce "Certain Softwood Lumber Products from Canada" (16 August 2001), at 14-15] (Contains Business Confidential Information).

[91] *Ibid*., at 60 [Miller & Chevalier Letter to the Department of Commerce "Softwood Lumber Products from Canada: Anti-Dumping Investigation" (16 August 2001), at 9]. The letter responded to the Commerce's letter of 9 August 2001, requesting comments on the matching of similar comparison merchandise in the captioned investigation.

[92] *Ibid*., at 62-64 [Dewey Ballantine Letter to the Department of Commerce "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (21 August 2001), at 3-5].

- The applicant itself presented public data showing significant price differences by length. The applicant argued, however, against the length groupings advocated by respondents, contending, for example, that it was not always the case that 16 foot length was more valuable than 14 foot length lumber.[93] The applicant itself presented the following data from *Random Lengths*[94]:

Species	thickness/width	12 foot long	14 foot long	16 foot long
WSPF	2x8	$244	$198	$227
WSPF	2x10	$228	$340	$291

11. 21 August 2001: **Respondents' Rebuttal Comments on Physical Characteristics that Should be Considered in Comparing Prices of Non-Identical Products**

- Canfor rebuts the applicant's claim that all of the products covered in the investigation are substitutable and reiterates its position (stated in its 16 August Letter to Commerce) that Commerce should establish groups, or families, of lengths for product-matching purposes.[95]

12. 10 September 2001: **Submission of Historical Sales Data**

- Following up on 16 August request for guidance from Commerce regarding the data Commerce would require to compute a DIFMER, Abitibi reiterates its request for guidance. It then provides additional data: "Because the Department has not yet provided such guidance, and because the issue is of such critical importance to Abitibi, we are providing additional data that the Department may find useful in computing value-based difmers. We are providing, both electronically, and in Annex SBC.22, historical, pre-POI pricing data, separately for the years 1999, 1998, and 1997."[96] In other words, when it could not obtain guidance form Commerce, Abitibi proactively submitted three years worth of average sales price data, by product characteristics, that Commerce could use to compute DIFMERs or to analyze, over time, the effect of different characteristics on price.

- Commerce *never* responded to Abitibi's request for guidance, and *never* analyzed Abitibi's pricing data of previous years in examining whether dimension affects price or to compute a value-based DIFMER.

13. September 2001: **Comments in Advance of Preliminary Determination**

- Abitibi remained concerned that Commerce would fail to compute an adjustment (DIFMER), and blame respondents for failing to provide adequate data. It submitted a letter to Commerce, contending, among other things, as follows:

[93] *Ibid*., at 65-66 [Dewey Ballantine Letter to the Department of Commerce "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (21 August 2001), at 25-26].

[94] *Ibid*., at 66 [Dewey Ballantine Letter to the Department of Commerce "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (21 August 2001), at 26].

[95] *Ibid*., at 68-69 [Kaye Scholer LLP Letter to the Department of Commerce "Softwood Lumber Products from Canada: Antidumping Investigation" (21 August 2001), at 4-5].

[96] *Ibid*., at 71 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Investigation" (10 September 2001), at SBC-56].

> In the circumstances of this case, and to the extent the Department relies upon average production costs by mill, the Department should compute difmers based upon differences in market value. *See* 19 C.F.R. § 351.411(b); *U.H.F.C. Co. v. United States*, 916 F.2d 689, 699 (Fed. Cir. 1990). Abitibi reiterates its request, first made on 16 August for guidance from the Department on the data it should submit to enable the Department to compute value-based difmers. Abitibi submitted historical sales data, for 1999, 1998, and 1997, by CONNUM, in its submission of 10 September 2001, that can be used to calculate value-based difmers, but as there is no available precedent as to how the Department computes value-based difmers, Abitibi has no means of identifying what, if any, other data to provide. We do not want to be in the position of having our request for a value based difmer denied based on the inadequacy or incompleteness of the factual record, so, one month after our first request, we again ask the Department to identify any data it would need from Abitibi to calculate and apply value-based difmers so that Abitibi can supply such data.[1]

[1] *See, e.g., Creswell Trading Company, Inc. v. United States*, 15 F.3d 1054, 1062 (Fed. Cir. 1994) ("Commerce is presumably in the best position to know . . . its own requirements and what evidence will satisfy these requirements, and therefore . . . Commerce at a minimum bore a burden of requesting any additional information that it required when it came to its conclusion . . . that the information of record was insufficient."); *NSK Ltd. v. United States*, 910 F.Supp. 663, 671 (Ct. Int'l Trade 1995) ("Respondents should not be required to guess the parameters of Commerce's interpretation of a phrase in the statute");[97]

- Tembec argued that "[s]hould the Department fail to ask for relevant information to aid its decision-making on whether to calculate a value-based DIFMER, it may not avoid a value-based DIFMER calculation based on lack of information or inadequacy of the record." [98]

14. 30 October 2001: **Commerce's Preliminary Determination**

- Commerce explicitly recognizes that grade, thickness, width and length "are significant physical characteristics", for which it should calculate a DIFMER.[99] However, Commerce states that it is unable to calculate a cost-based DIFMER for these "significant differences in physical characteristics *which affect price*."[100](emphasis added) It therefore limits its price-to-price comparisons to products identical in thickness, width, and length, among other characteristics, and resorts to constructed value where it cannot match a US product to a Canadian product identical in thickness, width, and length.

[97] *Ibid*., at 76-77 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation: Abitibi Pre-Preliminary Determination Comments (26 September 2001), at 2-3].

[98] *Ibid*., at 79 [Baker & Hostetler, LLP Letter to the Department of Commerce "Certain Softwood Lumber Products from Canada" (28 September 2001), at 2]. This letter cited *NSK Ltd. v. United States*, 910 F. Supp. 663, 671 (Ct. Int'l Trade 1995) in support of this request.

[99] *Ibid*., at 82 [Department of Commerce, Notice of Preliminary Determination of Sales at Less Than Fair Value and Postphonement of Final Determination: Certain Softwood Lumber Products from Canada (Preliminary Determination) (30 October 2001), at 18].

[100] *Ibid*., at 83 [Department of Commerce, Notice of Preliminary Determination of Sales at Less Than Fair Value and Postphonement of Final Determination: Certain Softwood Lumber Products from Canada (Preliminary Determination) (30 October 2001), at 19].

15. 12 February 2002: **Case Briefs to Commerce**

- Under Commerce regulations, all legal arguments must be made at the time of filing of the so-called "Case Briefs". Legal arguments regarding price comparability, DIFMERS, etc., are not required to have been made earlier.[101]

- Abitibi began its brief as follows: "Three indisputable facts regarding softwood lumber must be taken into account in developing the methodology used to measure dumping in this industry. *First*, softwood lumber is produced and sold in a wide range of grades, dimensions, lengths, and other characteristics, with individual products having widely divergent values due to differences in these product characteristics."[102] As an illustration, it included two charts of monthly prices over the POI – one for 2x3x8 lumber, by grade, and one of 2x6x16 lumber by grade. Although each chart showed price differences by grade, the two charts combined show differences by dimension as well. For example, at the beginning, of the period, in April 2000, Abitibi's average net price for No. 2 grade 2x4x8 was around [[ ]] whereas the No. 2 2x6x16 price was [[ ]]. The comparable figures for economy grade were [[ ]] for the smaller size and [[ ]] for the larger.[103]

- Abitibi also demonstrated that log size affects log value, because larger logs yield more valuable, larger lumber: "Low diameter, shorter trees will produce lower value, smaller lumber products. Large diameter tall trees will produce higher value, bigger lumber products. In addition, small diameter trees will tend to produce lumber with more wane, thereby of lower grade. Trees with decay or rot or other quality defects will also produce lower grade lumber than trees without quality defects. For these reasons, where well-developed log markets exist, logs of the same species sell for different prices per cubic meter depending upon quality and size characteristics.[104] And, timber quality and size do affect the stumpage price companies must pay to harvest.[105]

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[101] 19 C.F.R. § 351.309 (Exhibit CDA-143).

[102] DIFMER Exhibit, at 86 (Exhibit CDA-142 – Contains Business Confidential Information) [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (12 February 2002) enclosing: Case Brief of Abitbi Consolidated Inc. and Affiliates (12 February 2002), at 2 (citing ITC preliminary determination)].

[103] *Ibid*., at 87-88 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (12 February 2002) enclosing: Case Brief of Abitbi Consolidated Inc. and Affiliates (12 February 2002), at 3-4] (Contains Business Confidential Information).

[104] *Ibid*., at 91 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (12 February 2002) enclosing: Case Brief of Abitbi Consolidated Inc. and Affiliates (12 February 2002), at 19] (Contains Business Confidential Information). *See Ibid.*, at 107 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (23 July 2001), enclosing: Response of Abitibi Consolidated, Inc. to the Department's 25 May 2001 Questionnaire (23 July 2001), at D-6 ("logs vary in length, diameter, and quality, and thus in value")]. *Also See Ibid*., at 110-124 [Response of Government of British Columbia to the Department's 1 May 2001 Questionnaire (29 June 2001), Vol. 16, Exh. BC-LER-20, Case No. C-122-839]. Containing publicly available pricing data from Vancouver log market, and showing different prices for different grade logs of the same species.

[105] *Ibid*., at 91 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (12 February 2002) enclosing: Case Brief of Abitbi Consolidated Inc. and Affiliates (12 February 2002), at 19] (Contains Business Confidential Information). Abitibi's Case Brief also cites an excerpt from the Questionnaire Response of the Government of Québec in the countervailing duty investigation which stated that:

For example, Quebec charges different stumpage prices in each of its 161 different tariffing zones. One of the key variables in the stumpage equation is relative operating costs, and tree size in cubic meters is one of the key variables in determining relative operating costs between zones. Moreover, Quebec also makes a

- Based on these facts, Abitibi explicitly contended that (1) Commerce cannot limit its price-to price comparisons to identical merchandise, but must instead use non-identical comparisons when identical comparisons are not possible, and (2) that an adjustment (DIFMER) must be applied to all non-identical comparisons, and that Commerce had the data to do so.[106] Abitibi suggested several alternative data sets and methodologies for computing such an adjustment (DIFMER).[107]

- Canfor noted that "there is no question that these distinct lumber products vary dramatically in their revenue generating capability. Lumber prices vary substantially depending upon the lumber type . . ., grade, dimension, and length of lumber. For example, the average market price for kiln-dried, Western SPF dimension lumber as reported by Random Lengths, recently varied from a high of $485 per MBF for 2x10, 24-foot No.2 & Better grade dimension lumber, to a low of $147 per MBF for 2x6 random length No.3 grade."[108]

- Tembec stated that "the Department may not compare products of different dimensions or grades without adjusting for the substantial difference in the value resulting from those differences in physical characteristics. . . . similar product matches cannot satisfy the statutory and WTO requirements for a fair comparison unless an appropriate Difmer adjustment is made."[109] (footnotes omitted) Tembec also stated that "[t]here are no reported cost differences for characteristics such as length, width, thickness or grade for softwood lumber, all characteristics affecting the market value of distinct products. Should the Department compare products that differ with respect to these characteristics in the final determination, it must calculate a value-based Difmer."[110] (footnote omitted) Tembec suggested several alternative data sets and methodologies for computing such an adjustment (DIFMER).[111]

- West Fraser argued that Commerce must make "similar comparisons in a manner that is in keeping with its statutory obligation."[112] West Fraser then went on to explain what information was on the record and how the adjustment (DIFMER) could be calculated, including properly applying the cost test or using information from *Random Lengths*. West Fraser further pointed out that it had sought guidance from Commerce as to whether Commerce needed addition data and because it received no such guidance, suggests that Commerce was satisfied with the data submitted.[113] Weyerhaeuser pointed out that softwood products "vary by grade, thickness, width, and length" and that these are "all characteristics the Department has identified as

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"quality adjustment" that takes into account the impact on timber value of average diameter, rot percentages, and log taper.

[106] *Ibid*., at 93-101 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (12 February 2002) enclosing: Case Brief of Abitbi Consolidated Inc. and Affiliates (12 February 2002), at 26-34] (Contains Business Confidential Information).

[107] *Ibid*., at 101-105 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Duty Investigation" (12 February 2002) enclosing: Case Brief of Abitbi Consolidated Inc. and Affiliates (12 February 2002), at 34-38] (Contains Business Confidential Information). *Ibid*., at 127-130 [Case Brief of Weyerhaeuser Company (13 February 2002), at 48-51].

[108] *Ibid*., at 138 [Case Brief of Canfor Corporation (12 February 2002), at 13].

[109] *Ibid*., at 161-162 [Case Brief of Tembec Inc. (12 February 2002), at 35-36].

[110] *Ibid*., at 163 [Case Brief of Tembec Inc. (12 February 2002), at 37].

[111] *Ibid*., at 163-164 [Case Brief of Tembec Inc. (12 February 2002), at 37-38].

[112] *Ibid.*, at 140 [Case Brief of West Fraser Mills, Ltd. (12 February 2002), at 17] (Contains Business Confidential Information).

[113] *Ibid*., at 140-152 [Case Brief of West Fraser Mills, Ltd. (12 February 2002), at 17-29] (Contains Business Confidential Information).

affecting value," citing the Department's finding in its Preliminary Determination that thickness, width and length are "significant physical characteristics" affecting value. Weyerhaeuser specifically went on to explain that: "In this case, the Department can and should calculate difmer adjustments based on market value. As was the case in *Nepheline Svnite,* the parties to this proceeding, and the Department itself, agree that physical differences (such as grade, width, length and thickness) exist and affect market value. Further, evidence of the relationship between these factors and market value is apparent from the sales data provided to the Department in the course of this proceeding, as well as from industry pricing indices such as Random Lengths."[114] (footnote omitted)

- Even the applicant acknowledged that when making similar comparisons, Commerce would have to determine "whether a longer or shorter product or a wider or narrower product would be most appropriate to match when the identical product was not available."[115]

16. 19 February 2002: **Rebuttal Briefs**

- In its rebuttal brief to Commerce, Tembec noted that "[w]henever there is a physical difference between products, such as moisture content, grade, dimension or planing, the Department must calculate the appropriate difference in merchandise adjustment ("Difmer") to reflect the difference in value attributable to that difference in physical characteristics."[116]

17. 21 March 2002: **Commerce's Final Determination**

- In the final determination, Commerce, "based upon [the] submissions, as well as the Department's analysis, width and thickness were numbered sequentially and matched to similar products."[117]

- With respect to length, Commerce accepted respondents' arguments, and grouped products into length bands for matching purposes. Specifically, Commerce established three length bands: (1) less than 16 feet, (2) 16 feet to less than 22 feet, and (3) 22 feet and above.[118] For matching purposes, Commerce would first match within a band before matching to a different band. This recognizes that not all lengths are of equal value or are equally comparable. To the contrary, the band approach recognizes the higher value of 16 foot and 22 foot lumber relative to lower length lumber. Thus, 16 foot lumber could not be matched equally to 14 foot and 18 foot lengths – it would be matched to 18 foot only.

- Commerce explicitly recognized that "in this case . . . differences in dimension (*i.e.*, length, width or thickness) . . . could result in differences in market value."[119]

- Inconsistently with its foregoing findings and conclusions, Commerce elected not to calculate a DIFMER for differences in dimension. Although Commerce stated that "there is no information on the record by which we can calculate a difmer adjustment

[114] *Ibid*., at 127 [Case Brief of Weyerhaeuser Company (12 February 2002), at 48].
[115] *Ibid*., at 133 [Case Brief on Behalf of the Petitioner with Respect to Abitibi Consolidated Inc. (12 February 2002), at 14].
[116] *Ibid*., at 136 [Rebuttal Brief of Tembec Inc. (20 February 2002), at 12].
[117] *Ibid*., at 155-156 [IDM, at 45-46 (Exhibit CDA-2)].
[118] Ibid.
[119] *Ibid*., at 158 [IDM, at 51 (Exhibit CDA-2)].

> to account for differences in dimension based either on cost or value."[120] it concluded that "there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared . . . ."[121] Yet the record contains no evidence of any analysis by Commerce of any pricing data to support this conclusion, and it is inconsistent with Commerce's use of thickness, width, and length as matching characteristics, not to mention its adoption of length bands.

23. Please comment on the statements contained in para. 136 of the US *First Written Submission*:

> **"[i]n the latter quote, Canada emphasizes length and grade together, without distinguishing between the two factors, and without any reference to width or thickness. Canada simply could not prove that the minor differences in the size of the products compared in this case had an effect on price comparability."**

88. US paragraph 136 quotes from Canada's paragraph 59. It is true in that quote that Canada mentioned length and grade together. The context of that discussion was a description of the softwood lumber production process, to make the point that different lumber products resulting from the production process are joint products with joint costs. In the very next paragraph, Canada stated "this joint production process simultaneously yields numerous lumber products that, for any given species, vary in a number of respects, the most significant of which are grade and size. Each of these characteristics affect value."

89. While the United States focussed on paragraph 56, paragraphs 143 through 164 of Canada's First Written Submission explain specifically how dimension affects price. Of course, in addition, when the United States in its paragraph 136 asserts that Canada could not "prove" that dimension affects price, it would only accept as proof in that regard a "consistent pattern of price movement" and no fluctuation in relative prices of lumber of different dimension. Since prices through the year-long POI did indeed fluctuate, as is normal in any commodity market, it was impossible for Canada to meet the burden of proof that the United States has now articulated after-the-fact. The *Anti-Dumping Agreement* does not impose such a burden on entitlement to an adjustment for differences in the physical characteristics of the products being compared. It directs that adjustment be made for all physical differences that affect price comparability -- without regard to whether prices are fixed or fluctuate, or whether the difference between any two products is replicated in consistent patterns across all products. As demonstrated in response to Questions 21 and 22 above, the respondents made such a showing, *i.e.*, that differences affect price comparability, with the full agreement of the Petitioner.

90. After substantial submissions by respondents on this issue, Commerce agreed, first in its questionnaire, then in its Preliminary Determination, and again at least in principle in its Final Determination when it stated "specifically in this case, where products have differences in dimension (*i.e.*, length, width, thickness) we recognize that these physical differences could result in differences in market value."[122] The reason therefore that Commerce refused to apply a dimension adjustment was not, as the United States now argues, because the need was not demonstrated but rather because of Commerce's assertion that an adjustment could not be calculated. But this assertion simply is incorrect. Commerce could have made an adjustment based on the value difference between non-identical products, and it had a variety of different data sources available for such a calculation. Alternatively, it could have computed a cost difference, if it had simply extended its cost calculations so as to take dimension into account.

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[120] *Ibid*.
[121] *Ibid*., at 159 [IDM, at 52 (Exhibit CDA-2)].
[122] IDM, Comment 8, at 51 (Exhibit CDA-2).

24. Please comment on the statements contained in para. 137 of the US *First Written Submission*:

> **"Canada's examples of price variability, allegedly based on size, are without any citation to specific pieces of record evidence presented to Commerce. [footnote excluded] To the extent that these claims are based on analyses not presented to Commerce during the investigation, they cannot provide a basis for review of Commerce's conclusion on the record before it."**

91. The evidence and argument before Commerce is reviewed in detail in response to Questions 21 and 22 above. As already noted, the issue was not disputed by any party, and Commerce accepted in its Preliminary Determination and in its Final Determination that dimension affects price comparability.

92. In addition to the evidence reviewed above, Commerce also had before it the complete sales databases for all six respondents. These databases contained pricing data by product, differentiated by thickness, width, and length among other characteristics. Commerce's record reveals that it performed no analyses of these data. The United States refers to CDA-76 that shows that various dimensions had an effect on price. These charts are simply graphical representations of data that were before Commerce -- specifically, the data derived from actual pricing in the final Canadian sales database submitted by individual respondent companies. All of the underlying data were provided to Commerce, including examples provided by both respondents and petitioners.

93. To the extent that the United States is suggesting that respondents did not provide record evidence to Commerce or to this panel showing differences in lumber value based on differences in dimension, the United States is simply in error. Canada cited extensive evidence in its paragraphs 147 and 148 demonstrating that size can and did affect the value of lumber. That evidence was all before Commerce during the investigation.

25. Please explain in detail how DOC carried out the product comparison in case of non-identical CONNUMs. Of the total number of comparisons made, how many were based on identical CONNUMs?

94. For each US product that could not be compared to an identical Canadian product, Commerce selected what it regarded to be the most similar Canadian product, with reference to the ten product matching characteristics it had implemented at the outset of the investigation. Specifically, it ordered these product characteristics from most important to least important, as follows: product category (*e.g.*, boards, dimension lumber, timbers), species, grade, moisture content, thickness, width, length, surface finish the number of sides planed), end trimming (*i.e.*, whether the end were precision trimmed or not), and further processing. Commerce selected the most similar non-identical product by identifying the Canadian product with the fewest, and least important, product differences. Thus, a spruce, pine fir (SPF), No. 2 grade, dried, 2 inch x 4 inch x 8 foot, fully planed, not precision trimmed, and not further processed product would be matched to a spruce, pine fir, No. 2 grade, dried, 2 inch x 4 inch x 10 foot product, ahead of both an SPF No. 1 grade product, and an SPF No. 2, dried, 2 inch x 6 inch x 8 foot product, because length is the least important characteristic among length, width and grade. Commerce applied other matching rules as well. Commerce did not match across categories or species. In addition, it limited comparisons to other products within limited grade groups, where the grade groups were assigned by Commerce based on the commercial applications for the lumber. Finally, as noted in more detail in the response to Questions 21 and 22, Commerce used three length groupings as well for matching purposes, in an effort to match lengths of the closest value, and in recognition of the fact that length affects value.

95. In view of the place in the product matching hierarchy for dimension characteristics, and the fact that virtually all lumber sales reported were lumber without further processing, and with planing,

the vast majority of non-identical comparisons made by Commerce were of products that differed only in length or width.

96. The United States claims that there were few non-identical comparisons made, that the few non-identical comparisons it made were of very similar dimension products, and thus little distortion could exist in the overall margin calculation. The facts show otherwise.

97. Following is a table showing, for each Canadian respondent, the number of price-to-price comparisons of (1) identical products and (2) non-identical products. The table also shows the average margins of dumping found for the identical and non-identical comparisons. As can be seen, the number of non-identical comparisons made by Commerce was significant. Indeed, for several companies Commerce made more non-identical comparisons than identical comparisons. Moreover, the impact of non-identical comparisons on the overall margin of dumping found also was significant. In fact, the non-identical comparisons generated [[ ]] of Tembec's overall margin. The margins of dumping found for non-identical comparisons was far higher, for every company, than the margins of dumping found for identical comparisons, highlighting the very distortion of which Canada complains.

CANADIAN RESPONDENT	MATCH TYPE	NUMBER OF COMPARISONS	WEIGHTED AVERAGE MARGIN
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]

Source: Analysis Memorandum for Abitibi-Consolidated, Output of Margin Programme (unnumbered page) (25 April 2002); Analysis Memorandum for Canfor Corporation did not provide a summary by match type; therefore the data is based on a computer run of Canfor's data; Anti-Dumping Duty Investigation on Certain Softwood Lumber Products from Canada - Analysis Memorandum for the Amended Final Determination for Slocan Forest Products Ltd. (Slocan), Output of Margin Programme at 35 (25 April 2002); Antidumping Duty Investigation on Certain Softwood Lumber Products from Canada – Analysis Memorandum for the Amended Final Determination for Tembec Forest Products Ltd. (Tembec), Output of Margin Programme at 42 (26 April 2002); Analysis Memorandum for West Fraser Mills Ltd., Output of Margin Programme at 25 (25 April 2002);

Analysis Memorandum for Weyerhaeuser Company, Output of Margin Programme (unnumbered page) (25 April 2002).[123]

98. Moreover, contrary to the assertions of the United States, the many non-identical comparisons were not neutral. The non-identical comparisons generally worked against respondents. That is, Commerce tended to compare prices of narrower, shorter, less valuable products sold in the United States with prices of wider, longer, more valuable lumber sold in Canada. (This was a direct result of Commerce's cost allocation methodology which allocated the same costs of production to lumber of different size, with the result that smaller, less valuable lumber tended always to be found to be below cost. Thus, only high value lumber sold in Canada tended to pass the cost test.)

99. To demonstrate this point, we provide below specific examples of non-identical comparisons actually made by Commerce for respondent companies. All products noted are identical in all physical characteristics other than dimension. We show the dimensions of the US product, the dimensions of the Canadian product Commerce used in its price comparison, and the dumping margin that resulted. The Panel should take note of the generally far larger dimensions of the Canadian product. In each case, Commerce compared a US price to a Canadian price of a larger, more valuable product, without adjustment.

100. To illustrate the value difference between the products compared, we have also provided in the table comparable prices for the two products *in the same market*. The prices indicated under the US and Canadian products (reported in Canadian dollars) are the period of investigation weighted average Canadian market price for that product for that company net of all actual billing adjustments, freight expenses, and selling expenses, so as to eliminate all price differences caused by differences in freight and selling expense. The price shown for the US product is *not* the price used in the dumping comparison, as it is the Canadian market price rather than the US market price. The data underlying these charts are the very data respondents submitted to Commerce in their final sales databases – the actual databases used by Commerce in its Final Determination margin calculations. The products were chosen as illustrations from the mandatory respondents.[124] The figures provided show one potential measure of the extent to which the Canadian product used by Commerce in actual dumping comparisons is more valuable than the US product to which it was compared. Because Commerce compared the products without adjustment, it presumed their values to be the same. The tables below show just how far off this presumption was with very concrete examples, instead of the overbroad assertions made by Commerce to the effect that dimension has only a minor impact on price, without reference to any actual product to product comparisons actually made.

[123] Respondents' Analysis Memoranda, Output of Margin Programme at 1-10. (Exhibit CDA-157 – Contains Business Confidential Information).

[124] There are no examples provided for Slocan because Slocan's consultant currently is out of the country and unable to run the calculations for the Home Market (Canadian) Price of the US Product.

ABITIBI

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of U.S. Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]

Code: SPF = spruce, pine, fir = species
dry = kiln dried = moisture content
kiln-wet = does not meet drying specification
PET = precision end trimmed

CANFOR

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of U.S. Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[[[					]]]]
[[[[					]]]]
[[[[					]]]]
[[[[					]]]]

Code: fascia is a type of finish

TEMBEC

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of US Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[					]]
[[					]]
[[					]]

WEST FRASER

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of US Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]

Code: S4S = surfaced on four sides
EE = eased edges

WEYERHAEUSER

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of US Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[[[					]]]]
[[[[					]]]]
[[[[					]]]]
[[[[					]]]]
[[[[					]]]]

[2] The larger product (timber) can be less valuable than a smaller product – *e.g.*, due to rot in the middle, which while it may not affect structural strength, can limit the ability to make smaller pieces from it.

F. ZEROING

To Canada:

28. Please explain the legal basis for the claim that zeroing is inconsistent with Article 2.4 and 2.4.2, in addition to its citations from the *EC – Bed Linen* AB report.

101. Under the first methodology specified in Article 2.4.2, investigating authorities must take into consideration "all comparable export transactions" when calculating margins of dumping. The express language of the agreement does not limit this standard to a particular stage of margin analysis, and therefore it must be understood to apply to both intermediate stage margin calculations and any margin calculation made for the product under consideration as a whole. The report of the Appellate Body in *EC – Bed Linen* supports this interpretation of the Agreement: there, the Appellate Body analyzed the terms of the Agreement and concluded that the requirements of Article 2.4.2 are not limited to the intermediate margin calculations, but rather apply to the final overall margin calculation as well.[125] In Canada's view, this is the best interpretation of Article 2.4.2 because it gives all of the language in that provision operative meaning. When applying this standard to intermediate stage calculations, the term "all" ensures that all relevant transactions are included in the calculations. The term "comparable" is particularly significant because it operates to ensure that model-to-model comparisons include only "comparable" transactions in each given model. In applying this standard to a margin calculation for the product as a whole — such as that at issue in this case — the term

[125] *EC – Bed Linen*, at para. 53.

"comparable" describes the transactions being considered for the product as a whole, and — perhaps most significantly for this case — "all" requires an authority to include every transaction within the terms of that analysis, without qualification or exception. It is Canada's position that the United States failed to comply with this standard when it calculated the overall margin for softwood lumber, because it improperly reduced to zero any negative margins that resulted from model-to-model comparisons, thus failing to fully account for "all comparable export transactions" in its final margin calculation.

102. It is agreed between Canada and the United States that the margins of dumping were to 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". Zeroing is also inconsistent with Article 2.4.2 because it does not fully take into account certain transactions in establishing "a weighted average" (of prices of all comparable export transactions). Zeroing is by definition inconsistent with the calculation of a true "weighted average".

103. In Canada's view, zeroing does not produce a fair comparison consistent with Article 2.4 because it does not average all model-specific margins equally, and thus the US practice is inconsistent with the obligations of the United States under Article 2.4. Canada notes that the Appellate Body agreed with this position in *EC – Bed Linen*, where it stated it was "of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions - such as the practice of "zeroing" at issue in this dispute - is *not* a "fair comparison" between export price and normal value…."[126]

29. Please comment on the statement contained in para. 154 of the US *First Written Submission*:

> **"[n]either Article 2.4, nor Article 2.4.2 contains obligations as to how the single, overall dumping margin is to be calculated and, consequently, the United States' methodology cannot be found to be inconsistent with a non-existent obligation."**

104. This statement by the United States is unsupported by the text of Articles 2.4 and 2.4.2, is inconsistent with the position of the Appellate Body in *EC – Bed Linen*, and would undermine the object and purpose of the *Anti-Dumping Agreement* by effectively allowing investigating authorities limitless discretion in calculating the margin actually applied to a respondent in an investigation. Neither the requirement that "a fair comparison shall be made" contained within Article 2.4 nor the requirement in Article 2.4.2 providing for a comparison using "all comparable export transactions" is limited to those margins an authority may calculate before establishing the final margin. The only permissible reading of Article 2.4.2 is that the "margins" to which it refers are any margins calculated by the investigating authority at any stage in the process of calculating a final antidumping margin, including the final margin itself.

105. The same argument offered here by the United States was considered -- and rejected -- by the Appellate Body in *EC – Bed Linen*. In that case, the EC had claimed, as the United States now does in para. 155 of its First Submission, that Article 2.4.2 provides no guidance to investigating authorities as to how margins of dumping established for particular models should be combined in the second stage to calculate an overall margin of dumping for the product under consideration.[127] The Appellate Body found that the plain meaning of the language of Article 2.4.2, coupled with the reference in Article 2.1 to establishing dumping for "a product" suggested that these provisions were intended to govern any second stage margin determinations, and thus it was "unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an overall margin of

[126] *Ibid.*, at para. 55.
[127] *Ibid.*, at para. 49.

dumping for the product under investigation."[128] Based on this reasoning, the Appellate Body concluded that the *Anti-Dumping Agreement* prohibited the practice of zeroing. Given that the Appellate Body's reasoning in that case was addressed to precisely the same claim raised here, it should be highly relevant to this Panel's assessment of the US position in this case.

30. Please comment on the statements contained in para. 156 of the US *First Written Submission*:

> **"Canada's interpretation of Article 2.4.2 would render the term "comparable" without meaning, inconsistent with this corollary. By arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation," Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all" which immediately precedes it." (footnotes omitted)**

106. Canada has not claimed that Article 2.4.2 does not cover intermediate-stage comparisons (when such comparisons are required to be made); thus, in making those comparisons, Article 2.4.2 would require that comparable transactions be used. But, more importantly, contrary to the position of the United States, nothing in Article 2.4.2 limits the application of that Article to intermediate-stage comparisons. As a result, the requirements of Article 2.4.2, like the requirements of Article 2.4, apply to the calculation of the margin for the product as a whole and also to the calculation of intermediate-stage margins (where it is necessary to calculate such intermediate-stage margins, which will depend on the facts of a given investigation). Thus, for particular intermediate-stage comparisons, some items falling within the like product may not be capable of comparison with other items within the same like product category – because, for example, they do not meet the contemporaneity requirement set forth in Article 2.4. But this does not mean that the requirement of Article 2.4.2 that "a weighted average normal value be compared with a weighted average of prices of all comparable export transactions" does not apply when it comes to aggregating all those intermediate-stage margins, in order to generate a single margin for the like product as a whole; the "all comparable export transactions" requirement must still be preserved. Article 2.4.2 applies to that step also, because the *Anti-Dumping Agreement* does not contain a provision excluding its applicability.

31. Please comment on the statements contained in para. 164 of the US *First Written Submission*:

> **"Canada's reasoning starts from the premise that Article 2.1 defines dumping with respect to "a product"– in the singular– and concludes that, therefore, margins of dumping under Article 2.4.2 may not be established with respect to particular models of a product. This reasoning improperly overlooks the more detailed text of Articles 2.4 and 2.4.2 in favor of the more general text of Article 2.1. It deprives the term "comparable" of any meaning and, accordingly, ought to be rejected in favor of the more natural interpretation of the operative terms." (footnotes omitted)**

107. The United States incorrectly characterized Canada's argument as based on the reference to "a product" under Article 2.1. In fact, Canada believes that Articles 2.4 and 2.4.2 more squarely address the issue, and therefore has focused upon those provisions in its analysis. In Canada's view, zeroing is prohibited under Article 2.4.2 itself because it requires that the investigating authority take into consideration "all comparable export transactions" in calculating margins when the first methodology is used. Moreover, Article 2.4 imposes the additional requirement that comparisons between normal values and export prices must be "fair". Zeroing does not produce a fair comparison under Article 2.4 because it does not average all values, and is thus inconsistent with US obligations under Articles 2.4

[128] *Ibid.*, at para. 53.

and 2.4.2. Thus, Canada has argued that the requirement contained in Article 2.4.2 that an investigating authority consider "all comparable export transactions" in calculating the dumping margin applies both to intermediate stage and final margin calculations, and therefore it is on this ground that zeroing is prohibited under the Agreement.

108. Canada notes that Article 2.1, however, confirms that the final margin determined pursuant to the requirements of Article 2.4.2 must reflect a determination of dumping for "the product" under consideration. It suggests, as Japan's submission notes, that second-stage calculations of the margin for "a product" cannot exclude those subcategories of products which result in zero margins. See Third Party Submission of Japan, at para. 9 ("Article 2.1 thus provides that dumping must be determined on the basis of all types of a product under consideration as a whole, not some types of the product. "). This is consistent with and reinforces Canada's position that the requirements contained in Article 2.4 and 2.4.2 would operate to prohibit zeroing.

109. Contrary to the allegation of the United States, Canada's interpretation of Article 2.4.2 does not prohibit the establishment of margins of dumping with respect to particular models of a product. Rather, the direction to conduct a "comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" involving the like product operates to require the authority to compare each weighted average normal value with all export transactions that are fairly comparable with that normal value, and **not to compare** those export transactions to normal values established for different levels of trade, or based on sales made in a different time period, or against normal values not adjusted for other differences that affect price comparability.

110. In Canada's view, the resulting dumping margin should be the same whether the authority carries out its calculation in one stage or two. In this case the United States used a two-stage method. But at the second stage it changed negative dumping margins (*i.e.*, where weighted average normal value was lower than the weighted average of prices of comparable export transactions) to a dumping margin value of zero, effectively deeming, contrary to fact, that the weighted average of prices of comparable export transactions of such a model was equal to (and not higher than) the weighted average normal value. An "average" cannot be computed without the inclusion of all values. By eliminating some values from the computation of averages, the United States failed to establish margins of dumping in accordance with Article 2.4.2, which, to repeat, requires margins of dumping to be "established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions" of the like product. A "comparison" considers the elements to be compared as they were calculated, and cannot "revise" certain of these elements to reflect a fictional value (zero), when the value in issue was in fact computed to be a negative number.

111. In this case, the first (model-to-model comparison) stage divided the single like product into multiple models as an expedient that permitted appropriate comparisons between identical or most similar products. However, the United States went on to calculate a single overall like product margin for each investigated exporter, in the "second stage" of the margin calculation. In arriving at the overall like product margin of an exporter, which could only originate from the comparison of normal values and export prices done at the first stage, the US was required to continue to take into account all margins so obtained, because Article 2.4.2 requires margins to be established by reference to all comparable export transactions as they occurred, not as revised downward by an investigating authority.

At the first substantive meeting with the Panel, Canada was asked to describe whether it has a multi-stage process and how it arrives at its anti-dumping margins.

112. Canada respectfully refers to the terms of reference of the Panel and notes that these terms cover the measure of the United States referred by Canada to the DSB in document WT/DS264/2, *i.e.*,

the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada.

113. Canada regrets it cannot be of further assistance on this question.

G. COMPANY-SPECIFIC ISSUES

G.1 Common Questions on Various Company-Specific Issues

To Canada:

36. Can Canada explain its own practice concerning the calculation of SG&A, with particular emphasis on the company-specific issues which are at issue before the Panel?

114. Canada respectfully refers to the terms of reference of the Panel and notes that these terms cover the measure of the United States referred by Canada to the DSB in document WT/DS264/2, *i.e.*, the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada.

115. Canada regrets it cannot be of further assistance on this question.

37. For each of the company-specific issues examined below, Canada is requested to summarize the arguments raised by the relevant exporter in the context of the investigation. References to documents on the record should be included (exhibit number, page and paragraph of the document). Canada is also requested to summarize the reasons which were given by DOC, if any, when rejecting the exporter's request. To clarify and summarize the issues, Canada may present the above data in tabular form.

116. Please see attached Annex I.

38. Please comment on the statement contained in para. 185 of the US *First Written Submission*:

> **"[t]his Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as requiring use of particular methodologies."**

117. Articles 2.2.1.1 and 2.2.2 do not specify particular cost calculation methodologies, but instead impose parameters governing the selection of allocation and other calculation methodologies. First, these provisions impose a general preference for the actual data recorded in a respondent's books and records for the amounts actually incurred in producing and selling the product under consideration. This is reflected in Article 2.2.1.1's general requirement that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation . . . ." as well as the requirement of Article 2.2.2 that, where possible, that amounts used for general and administrative expenses "shall be based on actual data pertaining to production and sales. . . of the like product by the exporter or producer under investigation." Thus, for example, where a company maintains administrative, selling and general cost data pertaining to the specific product under consideration, an investigating authority should not disregard such data in favour of more general data that it must then allocate. Second, Article 2.2.1.1 imposes a general requirement that an investigating authority's cost calculation "reasonably reflect the costs associated with the production and sale of the product under consideration." With respect to by-product sales, for example, this means that the revenues recorded in a respondent's books and records must not overstate or understate the actual revenues obtainable through by-product sales, since to do so would lead to an overstatement or understatement of the costs associated with the production and sale of softwood lumber. Third, Article 2.2.1.1 requires that

authorities "consider all available evidence on the proper allocation of costs". This requirement, in combination with the requirement that investigating authorities properly establish the facts and evaluate those facts in an "unbiased and objective" manner, prohibits the use of standard cost calculation methodologies in all cases, without regard to the particular facts of each case. This was confirmed by the panel in *Egypt – Steel Rebar*.[129]

118. Canada's position is that the various methodologies used by Commerce for the company-specific determinations at issue fell outside these express parameters and thus violated explicit obligations in the *Anti-Dumping Agreement*. Canada does not argue that the general language of these articles requires the use of particular methodologies.

39. Please comment on the statement contained in para. 221 of the US *First Written Submission*:

> **"[t]he AD Agreement is silent as to how to assess affiliated party transactions relating to costs."**

119. Canada agrees that Article 2.2.1.1 does not set out a specific test or methodology for determining whether transactions between affiliated parties can reasonably be used in determining a respondent's costs for producing and selling the product under consideration. Article 2.2.1.1 does, however, express a clear preference for the use of actual transaction data from records kept by an exporter. An investigating authority may only disregard such data where the transactions do not accord with GAAP and do not reasonably reflect costs associated with the production and sale of the product at issue. Canada believes that transactions between affiliated parties are subject to the general requirements of Article 2.2.1.1 of the *Anti-Dumping Agreement* and, as such, must be disregarded by an administering authority where a respondent's records for those sales would lead to a calculation of costs that do not "reasonably reflect the costs associated with the production and sale of the product under consideration." Otherwise, such recorded data should be used in the determination of costs of production.

120. By statute the United States has adopted a general rule that transactions between affiliated parties may be disregarded when calculating costs, if those transactions do not fairly reflect market prices. In this case market pricing represents an objective standard against which the investigating authority can assess whether the records reasonably reflect the costs associated with the production and sale of softwood lumber. For the reasons discussed in Canada's First Written Submission and elaborated upon below, Canada does not believe that Commerce satisfied this standard with respect to affiliated chip sales made by West Fraser and Tembec.

40. Please comment on the statements contained in para. 228 of the US *First Written Submission:*

> **"Canada asserts that Commerce's calculation of West Fraser's wood chip offset also violated its obligation to make a "fair comparison." This argument confuses obligations regarding determination of normal value with obligations regarding the comparison between normal value and export price. As the panel in *Egypt - Rebar* confirmed, Article 2.4 is concerned exclusively with the <u>comparison</u> between normal value and export price, not with determination of normal value." (footnote excluded)**

121. Canada's claim under Article 2.4 is addressed in the response to Question 51.

[129] Egypt – Steel Rebar, at para. 7.393

To both parties:

44. What obligations does Article 2.2.1.1 impose: 1) in general on investigating authorities, and 2) with respect to the determination of by-product revenue offsets?

122. Article 2.2.1.1 obligates investigating authorities to examine the books and records of a respondent to determine whether those books and records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. If those two requirements are met, the investigating authority shall normally calculate the cost of the product under consideration on the basis of those books and records. The investigating authority must also consider all available evidence on the proper allocation of costs to the production of the product at issue. The requirements of Article 2.2.1.1 must also be considered in conjunction with Article 6.1, which requires the investigating authority to inform respondents of all information that the investigating authority requires, and provide respondents with a reasonable opportunity to present evidence.

123. By-product revenue offsets are an essential part of the calculation of the costs of the main product, in this case lumber. As noted above, the United States has adopted a general rule that transactions between affiliated parties may be disregarded when calculating costs, if those transactions do not fairly reflect market prices. To ensure that the requirements of Article 2.2.1.1 are met it is necessary for the by-product revenue offset to reflect the market value of those by-products. Indeed, unless the by-product offset reasonably reflects the market value for the by-products at issue, the calculation of the cost of the main product (in this case, softwood lumber) would be either overstated or understated. Thus, when the market value of by-product sales is not reflected in a company's own books and records, as was the case for Tembec, Article 2.2.1.1 requires an alternative valuation. In contrast, where the market value of by-product sales is reasonably reflected in a company's own books and records, as was the case for West Fraser, Article 2.2.1.1 requires Commerce to use the company's own recorded figures.

45. For the terms "actual data pertaining to production and sales (…) of the like product" in Article 2.2.2, please explain the application of this sentence <u>in general</u> and in light of the company-specific issues <u>in this case</u>.

124. This provision in Article 2.2.2 requires an investigating authority to base its cost calculations for administrative, general and selling expenses, on actual data maintained by the producer, specific to (*i.e.*, "pertaining to") the production and sale of the product under investigation, wherever such specific, actual data are available. Expenses will "pertain" to the production and sale of a product where they "belong or be attached to, spec. (a) as a part, (b) as an appendage or accessory . . .."[130] If "actual data" are not available, the remainder of the Article permits the investigating authority to rely on more aggregate data, including data relating to "the same general category of products" of that producer (Article 2.2.2(i)), other producers data (Article 2.2.2(ii)), or "any other reasonable method" (Article 2.2.2 (iii)).

<u>Abitibi</u>:

125. As Canada has explained, Abitibi's audited financial statements contain detailed data on the value of assets required for the production and sale of merchandise in each of its business segments (its three business segments comprise lumber, newsprint, and pulp and paper).[131] In calculating the amount of financial expenses properly allocable to softwood lumber, Commerce used a COGS methodology that relied on Abitibi's "actual data" but over-allocated non-lumber expense data to the

[130] L. Brown, ed., *The New Shorter Oxford English Dictionary*, 3rd ed. (Oxford: The Clarendon Press, 1993), at 2173 ["pertain"]. (Exhibit CDA-144)

[131] Abitibi Section A Questionnaire Response (22 June 2001), Annex 12, at 252 (Exhibit CDA-82).

cost of producing lumber. Commerce therefore calculated Abitibi's financial expenses by including actual cost data that did not "pertain to" the production and sale of lumber contrary to Article 2.2.2.

Tembec:

126. With respect to Tembec's G&A issue, the phrase "actual data" is not relevant because both the company-wide G&A calculation and the Forest Products Group G&A calculation are based on actual data. The key portion of Article 2.2.2 is the phrase "pertaining to production and sales . . . of the like product." The majority of the sales of the Forest Products Group are of products that are identical to the product under consideration and, thus, are the "like product." The Forest Products Group data therefore more accurately "pertained to" the production and sale of the product at issue. By contrast, the Tembec company-wide data cannot be said to "pertain to" the production and sale of the like product in Canada, or even any product in the same general category of products, because those figures represent the company's worldwide production, 70 per cent of which is made up of paper, pulp and chemicals.[132] By using the company-wide data to determine G&A, Commerce over-allocated costs based on data that related to the production of non-lumber goods to softwood lumber and therefore calculated Tembec's G&A for softwood lumber based on data that did not "pertain to" the production and sale of softwood lumber.

Weyerhaeuser Company:

127. Weyerhaeuser Canada Limited, the producer and exporter of Canadian softwood lumber in Commerce's investigation, is a Canadian subsidiary of Weyerhaeuser Company ("Weyerhaeuser US"). Article 2.2.2 requires Commerce to consider only "actual data pertaining to production and sales … of the like product by the *exporter or producer under investigation.*" In accordance with its normal practice, Commerce included a part of the parent-company G&A in the subsidiary's G&A calculation. This is reasonable to the extent that the parent company incurs expenses that would ordinarily fall on Weyerhaeuser Canada if Weyerhaeuser US did not exist (*e.g.*, Director salaries). However, Canada takes issue with the way Commerce classified certain expenses incurred by Weyerhaeuser US as G&A – contrary to Weyerhaeuser US's books and records – that Commerce ultimately attributed to Weyerhaeuser Canada's production and sale of softwood lumber.[133]

128. In particular, Commerce included in its G&A calculation a $130 million charge incurred by Weyerhaeuser US for legal settlement expenses related to hardboard siding, a product produced by the parent company in the *United States,* for claims arising for the period 1981 to 1999 (*i.e.*, years prior to the period of investigation in this case).[134] Weyerhaeuser US's hardboard siding expense does not "pertain to", or "attach" to Weyerhaeuser Canada's production and sale of Canadian softwood lumber; nor is it "a part" of the Canadian softwood lumber production process. By including these expenses in the production of softwood lumber, Commerce included actual data that did not pertain to

[132] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report) at 45 (Exhibit CDA-94).

[133] During the investigation, Weyerhaeuser argued that (1) the hardboard siding expense was not a general expense properly attributed to the production and sale of Canadian softwood lumber, and (2) that the expense is properly characterized as a "cost of sale." Either would have sufficed to reclassify the expense as a "general expense". The DOC rejected both claims. See Weyerhaeuser Case Brief (13 February 2002) at 64 (Exhibit CDA-98 – Contains Business Confidential Information). In this WTO appeal, Canada has raised an issue with the DOC's reasoning with respect to item (1) only.

[134] See DOC Verification Report on the Cost of Product and Constructed Value Data Submitted by Weyerhaeuser Company Ltd. (22 January 2002) at 4, para. 3(2) (Exhibit CDA-97 – Contains Business Confidential Information); Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15 at 53, 74 (Exhibit CDA-101); DOC "Issues and Decision Memorandum for the Antidumping Duty Investigation of *Certain Softwood Lumber Products from Canada*," dated 21 March 2002, Comment 48b, at 136 (Exhibit CDA-2).

the production and sale of softwood lumber and thereby calculated an inflated amount for Weyerhaeuser's G&A costs contrary to Article 2.2.2.

46. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?

129. Both Article 2.2.1.1 and 2.2.2 apply for the "purposes of paragraph 2" of Article 2 (*i.e.*, constructing costs). Article 2.2.1.1 is generally applicable to all cost calculations and determinations, including both costs of production and general selling and administrative costs. Article 2.2.2 only addresses the determination of general, selling and administrative costs. Accordingly, where an authority establishes GS&A costs it must meet the requirements of both Articles 2.2.1.1 and 2.2.2. These provisions together establish certain specific rules for the construction of costs and normal value.

G.2 Calculation Financial Expenses of Abitibi

To Canada:

47. Please comment on the statements contained in p. 77 of DOC's Memorandum of 21 March 2002 (Exhibit CDA-2):

> **"[t]he Department'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."**

130. These assertions are misleading and demonstrably incorrect, as pointed out below. The problem with Commerce's COGS methodology is that it considers only current expenses, and effectively ignores the true, full costs of long-term capital assets. After all, COGS includes *only* current expenses. It does not include the full value of long-term capital assets, nor does it include the value of any non-depreciable capital assets at all. Therefore, for companies such as Abitibi, whose long-term capital assets are far greater than current assets and expenses, a COGS allocation does not reflect a company's "overall cash needs" as the United States repeatedly asserts.

131. To understand this point, and Commerce's misleading response that it considered capital assets by virtue of considering depreciation expense, the Panel need not delve into esoteric accounting concepts. It need only focus on one's own experience in purchasing and financing long-term assets, such as an automobile.

132. When a buyer purchases an automobile, he is required to pay the dealer the full value of the car. Thus, if he buys a $25,000 automobile, he must finance, through borrowing or equity, the full $25,000 purchase price of the car. In Commerce's terminology, the "cash need" is $25,000. Because the automobile can be used for many years, it is a long-term capital asset, and its initial value is $25,000.

133. Assuming that the automobile has a useful life of five years, the depreciation expense associated with that automobile will be one-fifth of the total or $5,000 per year for each of five years. So, when Commerce contends that it considered the automobile purchase through its depreciation expense, the example demonstrates how Commerce *undervalued* long-term capital assets. Commerce valued the automobile for interest expense allocation purposes at $5,000 instead of $25,000, even though it cannot be disputed that the amount that had to be financed – the "cash need" – is $25,000.

134. In the corporate context, distortions arise from considering only depreciation expense because different assets used by different divisions have different useful life periods. For example, a company may purchase a $25,000 five-year asset for one product division, and a $50,000 ten-year asset for a different product division. Both assets have the same annual depreciation expense of $5,000, but the $50,000 asset requires double the cash outlay and thus should bear double the financial expense. The COGS methodology, however, assigns the two divisions the same financial expense for these two assets. This is how the COGS methodology distorts the allocation of interest expense between divisions with respect to capital assets.

135. The question thus is not whether Commerce considered the depreciation expense associated with long-term capital assets in allocating interest expenses. Canada acknowledges that it did. The question is why it considered *only* the depreciation expense, and not the full value of all depreciable assets. Just like an individual must finance the full value of an automobile purchase, so too must a company finance the full value of all its depreciable long-term assets. They cannot pay, and cannot just finance, the depreciation expense.

136. The second problem with Commerce's approach of valuing capital assets for interest allocation purposes only by the depreciation expense is that not all capital assets are depreciable. Commerce's method ignores completely all capital assets that are not depreciated, including land and goodwill. Abitibi has purchased land for its various plants, and has goodwill assets that it acquired for over a billion dollars. The purchase of these assets had to be financed. Yet because these assets are not depreciated, they do not affect COGS at all. These significant assets are not considered at all by Commerce in allocating interest expenses.

137. Now consider the other current expenses included in COGS, like the ongoing labour and materials costs of felling logs and sawing them into lumber. Unlike the capital assets like automobiles and sawmills that Abitibi will use for many years, Abitibi will sell the lumber soon after it is produced and then get paid. Thus, unlike capital assets which need to be financed for the full year and longer, current production expenses *do not need to be financed for the full one-year period* Commerce considered. They only need to be financed until payment is received. Thus, the "cash needs" or capital needed to finance current expense is an amount much *less* than the annual total of those expenses. For example, if on average it takes Abitibi 36.5 days to harvest logs, produce lumber, and receive payment, its inventory will turnover on average 10 times per year. This means that to finance $10,000 in annual current expenses, Abitibi's "cash need" will be only one-tenth of its annual expenses, or $1,000. The same $1,000 in cash will finance ten separate cycles of production and sales within that one year.

138. In sum, while Commerce contends that money is fungible, and that interest expense must be allocated equally among all expenses and capital assets in proportion to all "cash needs" of the company, its COGS allocation methodology does not do so in a case such as Abitibi's where its long-term capital assets are far greater than its current assets needed to finance current production activities. (These include, for example, cash, raw materials inventory, finished goods inventory, and accounts receivable.)[135] As demonstrated, certain capital assets are not considered at all, whereas those capital assets that are considered are grossly under-weighted, as Commerce does not take into account the "cash need" to acquire the asset. Correspondingly, Commerce grossly over-weighted current expenses in its allocation, since the "cash needed" to finance current expenses over one year is not the total of such expenses, but rather the total divided by the inventory turnover time.

[135] As Canada noted in its First Oral Statement at paragraph 83, over 85 per cent of Abitibi's assets are long-term assets, with less than 15 per cent comprising current assets. Also Abitibi Case Brief (12 February 2002) at 54 (Exhibit CDA-81 – Contains Business Confidential Information); Abitibi Section A Questionnaire Response (22 June 2001), Annex 12, at 235, 249, 251 and 252 (Exhibit CDA-82).

48. It is stated in para. 201 of Canada's *First Written Submission* that:

> **"DOC expressly conceded that it did not consider any of the evidence presented by Abitibi or otherwise developed in the case."**

Could Canada please direct the Panel to the basis for this statement, that is, where in the record can the Panel find the document (indicate page, paragraph and sentence) in which DOC made the above-quoted finding? If this document has not been included in the list of exhibits submitted by the Parties so far, could Canada please submit a copy of the document.

139. Canada's argument was tied to the next sentence in paragraph 201 of its First Submission: "COMMERCEstated that its goal was to use a methodology that was consistent and predictable." This statement by Commerce is found in the IDM at Comment 15, page 77, in Exhibit CDA-2. In the same paragraph, Commerce also referred to its COGS allocation methodology as "its established practice". A methodology that is an "established practice" and that is "consistent and predictable" is one that is always followed, and is not one that is selected based on the particular factual circumstances of an individual case. Nor does Commerce ever reference any consideration of Abitibi's evidence in its findings or adequately explain its reasons for rejecting that evidence.

140. Over at least the past fifteen years, Commerce has used its COGS methodology for allocating financial expenses in every single investigation and administrative review, with one lone exception. In *DRAMS from Korea,*[136] Commerce departed from its cost of sales approach and allocated financial expenses to different product divisions based on assets – the methodology advocated by Abitibi. Commerce expressly noted that a disproportionate amount of the respondent's fixed assets related to the production of subject merchandise, therefore, "allocation of interest expense based on cost of sales would not appropriately recognize the expense related to the capital investment necessary for semiconductors (*i.e.*, subject merchandise) compared to the other lines of business."[137] This is the same argument Abitibi is making here. Commerce's first reviewing court, the Court of International Trade, upheld the reasonableness of this methodology in the circumstances of that case.[138] The result in that case was to allocate *more* financial expense to the product under consideration than would be the case using a COGS methodology.

141. Since the 1993 decision in *DRAMS from Korea*, Commerce has not once departed from its COGS methodology, including in later administrative reviews of *DRAMS from Korea.* In case after case, it has indicated that a COGS allocation methodology is its "standard methodology" or "reflects its consistent practice," from which it will not depart.

49. Please comment on the statement contained in para. 184 of the US *First Written Submission*:

> **"[i]n rejecting Brazil's claim, the panel explained that under Article 2.2.2, the investigating authority has discretion in selecting a profit rate for constructed value when actual data are not available, including profit rates derived from sales that were in sufficiently low volumes that they could not themselves serve as a basis for normal value." (footnote excluded)**

[136] Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15,467, 15,467 (Dep't Commerce 23 March 1993) (Exhibit CDA-145).

[137] *Ibid.* at 15,472

[138] *See Micron Technology, Inc. v. United States*, 893 F.Supp. 21, at 9 (Ct. Int'l Trade 1995) (Exhibit CDA-146) ("the court concludes that Commerce provided a reasoned analysis for rejecting its [cost of sale] methodology").

142. The US reference to the findings of the panel does not address any of the claims raised by Canada. The United States uses that case in support of its position that an authority has substantial discretion in calculating general costs. The case in fact stands for nothing more than the fact that an investigating authority's discretion is bound by the language of the *Anti-Dumping Agreement*.

50. Please comment on the statement contained in para. 185 of the US *First Written Submission*:

> **"[t]his Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as requiring use of particular methodologies."**

143. This question is the same as Question 38. In respect of Canada's claim relating to Abitibi, Canada takes the position that Commerce's use of its COGS methodology to allocate Abitibi's financial expense fell outside of the parameters set out in Articles 2.2.1.1 and 2.2.2. While, as stated, those provisions do not require "particular methodologies" they do expressly provide specific requirements. One such requirement is that an authority "shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer." Commerce did not consider Abitibi's evidence in determining the allocation methodology. It made no factual findings specific to Abitibi, but instead resorted to the standard methodology it always applies. The COGS methodology did not result in an amount of interest expense for lumber that reasonably reflects interest expenses associated with the production and sale of softwood lumber. And Commerce impermissibly relied on an overall allocation when the company presented actual data regarding the assets and thus capital required for each of its business segments.

51. Please comment on the statements contained in footnote 207 to the US *First Written Submission*.

144. Canada's claim under Article 2.4 rests on the findings of the Appellate Body in *EC – Bed Linen*. The Appellate Body plainly stated:

> Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. *This is a general obligation that, in our view, informs all of Article 2*, but applies, in particular to Article 2.4.2 . . . ."[139] (emphasis added)

145. Based on this "general obligation", Canada therefore argues that where the United States, in constructing normal value, establishes an unreasonable amount for G&A or an amount for costs of production that do not reasonably reflect costs for producing and selling the product under investigation, this then results in an improper calculation of normal value which in turn results in improper comparison between that normal value and export price for purposes of Article 2.4.

52. Please comment on the statements contained in paras. 192-193 of the US *First Written Submission*.

146. As explained in Question 47 above, Abitibi's methodology equally takes into consideration its actual capital requirements both for current production activities and for the acquisition of *all assets*, not just fixed assets (*i.e.*, land and buildings). Commerce's methodology did not since it ignored completely non-depreciable assets, understated the capital required for depreciable assets (by considering only the depreciation expense instead of the full cost), and overstated the capital required for current production activities (by failing to consider that production is sold and thus is financed only for a short period of time).

[139] EC – Bed Linen, at 59.

147. Canada fully agrees that money is fungible, and thus a proper allocation of financial expense must accurately consider all financing needs including all asset purchases as well as the amount of working capital (*i.e.*, current cash needs) needed to fund ongoing production operations. The problem is that Commerce's methodology fails this standard.

G.3 Calculation of G&A Expenses of Tembec

To Canada:

53. Please comment on the statements contained in paras. 197 and footnote 230 to the US *First Written Submission*:

> **"Canada argues that Commerce should have based Tembec's G&A cost on an unaudited number, even though it had not been substantiated that the number was established in accordance with Canadian GAAP.**
>
> **Canada cites no evidence on the record that the specific lumber division G&A costs were audited. Canada argues that Commerce rejected the division-specific G&A cost data, although it had been verified. Canada First Written Submission, para. 220. While Commerce conducted an on-site verification for Tembec, Tembec did not provide any evidence at verification that the division-specific data at issue had been audited and/or were in accordance with Canadian generally accepted accounting principles."**

148. These statements are untrue and misconstrue the facts with regard to the reliability of Tembec's data. In fact, the Forest Products Group's data were treated by Commerce as reliable for all purposes, except for G&A.

149. First, as Canada has stated in its First Oral Statement, paragraphs 90-91, the Forest Products Group's data, which Commerce rejected, *were* maintained in accordance with GAAP. Tembec's 2000 Annual Report, at page 44 at the bottom of the page, states clearly that "[t]he accounting policies used in [the five business divisions] are the same as those described in the summary of significant accounting policies."[140] As well, the Forest Products Group's profit and loss statement, from which the G&A amount was taken, was maintained in accordance with GAAP. At verification, Commerce traced the profit and loss statement directly to Tembec's audited financial statements.[141] During the investigation, Commerce never questioned whether these data were in accordance with GAAP, nor did it put such questions to Tembec.

150. Second, the books and records of Tembec's Forest Products Group are part of the books and records that Tembec's outside auditors reviewed in order to certify that the consolidated financial statements are in accordance with GAAP. It is impossible to audit the consolidated financial statements of a company without auditing the underlying books and records that feed into those consolidated financial statements.

151. Third, the company-wide G&A factor that Commerce used in its final determination was not derived exclusively from the "audited" consolidated income statement of Tembec Inc. The data from the Tembec Inc. income statement were modified to remove packing expenses. The data on packing

[140] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report) at 44 (Exhibit CDA-94). *See also* Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report), at 33-35 (Exhibit CDA-148).

[141] *See* Tembec Cost Verification Exhibit 20 at 1 and 2 (Exhibit CDA-95 – Contains Business Confidential Information) and Tembec Cost Verification Exhibit 10, at 1 (Exhibit CDA-96 – Contains Business Confidential Information).

expenses had to be compiled by adding up the packing expense information reported in the divisional accounting records for each of Tembec's divisions.[142]

152. Fourth, the evidence indicated that Commerce having connected the G&A amount to the audited financial statements is the Cost Verification Report Exhibit 20, the second page of which is a worksheet tying the Forest Products Group G&A factor to the financial statements in the Annual Report.[143] The rest of the exhibit shows that Commerce also used the Forest Products Group statements to verify the company-wide G&A and demonstrates the linkage between the Forest Products Group Statements to the audited company-wide financial statements. When Commerce makes a document a verification report exhibit, this indicates that Commerce has accepted the content of that document.

153. Another example of the linkage is Cost Verification Report Exhibit 10,[144] which demonstrates that the Forest Products Group statements from which the Forest Product Group G&A factor was derived constituted the key documents through which all of the cost and sales data were linked to the audited financial statements. Commerce at verification tied the cost and sales databases subsequently used in its final determination through the Forest Products Group's profit and loss statement[145] to the accounting record showing the consolidation of all of the divisional P&Ls,[146] which then tied into the Consolidated Statement of Operations in Tembec's Annual Report.[147]

154. For example, Commerce traced the Forest Products Group's cost of sales for fiscal year 2000 of $[[ ]][148] to the same number for the Forest Products Group in the consolidation document. It then noted that sum total of the cost of sales figures for all of the divisions[149] equals [[ ]], which in turn equals the cost of sales figure reported in the Consolidated Statement of Operations in Tembec's Annual Report.[150]

54. Ple**ase comment on the statements contained in para. 201 of the US *First Written Submission*:**

> **"Canada states that '[t]he G&A factor derived from the Forest Products Group includes a properly allocated portion of corporate G&A. . . .' [footnote excluded] Implicit in this statement is an acknowledgement that the division-specific data, on their own, were an inaccurate basis for allocating G&A. That number had to be supplemented by a portion of company-wide G&A to come up with a 'derived' G&A number for the Forest Products Group."**

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[142] *See* Tembec Cost Verification Report Exhibit 20 at 1 (Exhibit CDA-95 – Contains Business Confidential Information)

[143] *See* Tembec Cost Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc., Exhibit 20 (29 January 2002), at 2. (Exhibit CDA-95)

[144] Tembec Cost Verification Exhibit 10, at 1 (Exhibit CDA-96 – Contains Business Confidential Information).

[145] Tembec Cost Verification Exhibit 10, at 3-7 (Exhibit CDA-149 – Contains Business Confidential Information).

[146] Tembec Cost Verification Exhibit 10, at 2 (Exhibit CDA-149 – Contains Business Confidential Information).

[147] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report), at 31, which was on the record below as Cost Verification Report Exhibit 5) (Exhibit CDA-148).

[148] Tembec Cost Verification Exhibit 10, at 3 (Exhibit CDA-149 – Contains Business Confidential Information).

[149] Tembec Cost Verification Exhibit 10, at 2 (Exhibit CDA-149 – Contains Business Confidential Information).

[150] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report), at 31 (Exhibit CDA-148).

155. The Forest Products Group data did not have to be "supplemented" to establish a G&A amount for softwood lumber because Tembec recorded G&A expenses for its headquarters operations on each of its products group's accounting records in the ordinary course of business. Commerce verified that the sum total of the G&A expenses recorded on the books of Tembec's products groups equalled the G&A expense recorded on Tembec's audited financial statements for the company as a whole, thus specifically verifying what it now attempts to deny: that the Forest Products Group G&A included distributed company-wide G&A.[151]

55. Could Canada please indicate whether there is information <u>on the record</u> on the status of the financial statement of the Forest Products Group? (for example, whether it was audited or not, whether it complied with Canadian GAAP, whether the respondent commented on the status of that statement, etc.) If so, please provide copies of the relevant documents.

156. Please see the response to Question 53.

G.4 Calculation of G&A (Legal Costs) of Weyerhaeuser

To Canada:

58. Could Canada please direct the Panel to where in the record it can find Weyerhaeuser's arguments on the treatment of certain legal settlement claims incurred by Weyerhaeuser US. Please include references to documents on the record, identifying <u>with precision</u> where on the document Weyerhaeuser's argument are to be found. Also provide a concise summary of Weyerhaeuser's arguments.

157. The Record evidence is as follows:

- In response to the Department's initial and supplemental questionnaires to the respondents sent July – November 2001, Weyerhaeuser reported its costs of producing softwood lumber, including G&A expenses. This reported information did not include the hardboard siding settlement expenses because they were not treated as a G&A expense by Weyerhaeuser on its books and did not pertain to the production of the like product. Commerce used this reported cost information in its Preliminary Determination. The Preliminary Determination makes no mention of the hardboard siding expense.
- <u>Commerce's Cost Verification Report</u>[152] Commerce did not identify the hardboard siding expense as a potential issue until it released its cost verification report in January 2002. The verification report was not released until after the record of the investigation was closed. Even then, Commerce did not adequately explain why it might reclassify the hardboard siding expense, stating simply that: "[Weyerhaeuser] included in the cost of sales associated with the Product's 'Costs and Expenses', [[ ]] associated with product claims, which might be more appropriately included as G&A, not cost of sales."

[151] Tembec Cost Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc., Exhibit 20 (29 January 2002) (third page – not numbered) (Exhibit CDA-95 – Contains Business Confidential Information).

[152] DOC Verification Report on the Cost of Product and Constructed Value Data Submitted by Weyerhaeuser Company Ltd. (22 January 2002), at 4, para. 3, subpara. 2 (Exhibit CDA-97 – Contains Business Confidential Information).

- Weyerhaeuser's Case Brief to Commerce following the Verification Report.[153] Weyerhaeuser filed several briefs after the verification report was issued. Weyerhaeuser stated that:

  > [the hardboard siding expense] is not general in nature and it does not relate to the operations of the company as a whole. As disclosed in note 14 of Weyerhaeuser's consolidated financial statement, this cost relates to a proposed class action settlement of the hardboard siding claims [footnote omitted]. The settlement class consists of all persons who own or owned structures in the United States on which the company's hardboard siding has been installed. Thus, the facts on the record clearly show that this cost is associated with a specific product line of non-subject merchandise and that the expense does not relate to the operations of the company as a whole. Thus, it should not be included as a component of corporate G&A.

- Final Determination:[154] Commerce rejected this argument in its Final Determination, stating its rationale for reclassifying the expense for the first time:

  > while the costs relate to non-subject product . . . the Department typically allocates business charges of this nature over all products because they do not relate to production activity, but to the company as a whole.' Stated another way, Commerce states that if an expense does not relate to production activity, it must relate to the 'company as a whole.

- In Weyerhaeuser's Ministerial Error Allegation Letter,[155] Weyerhaeuser stated that Commerce's position was in error:

  > In revising Weyerhaeuser's G&A ratio, the Department included claims on hardboard siding . . . as a component of parent G&A. The Department has made a ministerial error by including this amount. The Department does not typically include this type of expense as a component of COP because it has no relationship to the production or sale of the subject merchandise. In this instance, Weyerhaeuser agreed to settle a suit by homeowners who claim that the company sold them faulty hardboard siding. . . Clearly this expense does not relate to the production and sale of Canadian softwood lumber. This expense does not relate to the administrative activities of the company or corporation as a whole and is not specific to the manufacture, design or sale of the product under investigation.

158. Weyerhaeuser's argument before this Panel can be summarized as follows. Commerce improperly calculated Weyerhaeuser's G&A amount for its production of softwood lumber.

- The Facts: As stated previously in the response to Question 43, the producer and exporter of the merchandise subject to Commerce's investigation is Weyerhaeuser Canada Limited. Weyerhaeuser Canada is a subsidiary of a US company, Weyerhaeuser US In calculating G&A expenses for Weyerhaeuser Canada's production and sale of softwood lumber, Commerce will attribute a part of the G&A of the parent company to the subsidiary. At issue is one expense that Commerce

[153] Weyerhaeuser Case Brief (13 February 2002) at 63 and 64 (Section c.) (Exhibit CDA-98 – Contains Business Confidential Information).

[154] IDM, at 134, Comment 48b (Exhibit CDA-2).

[155] Weyerhaueser Comments on Ministerial Errors (8 April 2002), at 6-7 (Exhibit-100 – Contains Business Confidential Information).

classified as parent-company G&A (contrary to Weyerhaeuser US's own books and records) and then attributing that expense to Weyerhaeuser Canada's production and sale of softwood lumber. More particularly, Commerce improperly included in the parent company G&A a $130 million charge for litigation settlement expenses related to hardboard siding (which is unrelated to softwood lumber), a product produced by the parent in the United States in years 1981 – 1999 (before the POI).

159. Weyerhaeuser makes two specific claims:

- Commerce acted contrary to Article 2.2.2 by including cost data that did not pertain to the production and sale of the product under investigation. Weyerhaeuser argued before Commerce that the hardboard siding expense was not general in nature and therefore not attributable to the company as a whole.[156] It was a cost that did not pertain to the production and sale of softwood lumber in Canada for Weyerhaeuser Canada and therefore incorrectly increased the G&A cost attributable to lumber. Commerce's conclusion to the contrary was not a proper establishment of the facts, nor an evaluation of the facts that was unbiased and objective.

- Commerce violated Article 2.2.1.1 by improperly ignoring Weyerhaeuser's books and record and establishing G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber.Weyerhaeuser did not treat this settlement fund as a general expense on its records as Commerce indicated. It is a separate line item in its corporate financial statement.[157] Nor should this expense be treated as a general legal expense. Weyerhaeuser US characterized its general legal expenses as G&A in its financial statement.[158] Rather, the company recorded the hardboard siding expense as a separate line item – not in G&A – and given its clear association with the production and sale of non-like product, should not have been included in Commerce's G&A calculation in this case. By including this cost, Commerce calculated a cost that did not "reasonably reflect the costs associated with the production and sale" of softwood lumber.

59. Please comment on the following statement contained in para. 207 of the US *First Written Submission:*

> **"[DOC] found that because this cost was incurred years after the production of the hardboard siding at issue and was not part of the production process for that product, it could not properly be considered a cost uniquely allocable to hardboard siding production. In addition, Weyerhaeuser had treated it as a general cost on its audited financial statement." (footnotes omitted)**

160. These two sentences express two separate and incorrect points. Commerce makes the first point in order to support its argument that any expense that does not relate specifically to production is "general" and is therefore properly characterized as a general expense attributable to the production and sale of the like product. However, this is not Commerce's traditional practice and it violates Article 2.2.2 of the *Anti-Dumping Agreement*. Contrary to Commerce's statement, Commerce "normally computes . . . an amount of G&A from related companies which pertains to the product

[156] Weyerhaeuser Case Brief (13 February 2002), at 63-64 (Exhibit CDA-98 – Contains Business Confidential Information).

[157] Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).

[158] Weyerhaeuser Cost Verification Exhibit 26, at 26 (Exhibit CDA-121 – Contains Business Confidential Information).

under investigation. G&A . . . expense items are not considered fungible in nature. Thus . . . expenses realized by a related company do[] not necessarily affect the general activity of the respondent."[159] This policy facially comports with Article 2.2.2, which requires "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." However, in this instance, Commerce failed to establish any relationship between the hardboard expense incurred and the production of Canadian softwood lumber. On the contrary, the expense on its face relates to the production and sale of non-subject merchandise.

161. Commerce did follow its policy to only include related cost data with respect to Weyerhaeuser's other non-production related expenses. As noted, Weyerhaeuser US financial statement reports about $1 billion in SG&A expenses.[160] Yet, according to Attachment 2 of Commerce's 21 March 2002 memo[161], only [[ ]] of Weyerhaeuser US's SG&A was included in the parent company G&A calculation. In arriving at a figure of [[ ]] from $1 billion, Commerce excluded numerous expenses because they did not relate to the production and sale of Canadian softwood lumber. Inexplicably, Commerce failed to apply the same rule to the hardboard siding expense.

162. Commerce makes the second point to support its position based on the "fact" that "Weyerhaeuser had treated [the hardboard siding settlement expense] as a general cost on its audited financial statement."[162] That is not true. Weyerhaeuser's consolidated financial statement states that Weyerhaeuser US spent $1 billion in SG&A expenses in 2000. It also identifies a separate line item called "charge for settlement of hardboard siding claims," which reported $130 million in charges for 2000.[163] Had Weyerhaeuser considered the hardboard siding claim expense as a general expense, it presumably would have included that amount as part of the 2000 GS&A expense. Therefore, Commerce's claim that the Company treated this charge as GS&A is false.

60. Please comment on the following statement contained in para. 208 of the US *First Written Submission*:

> **"[DOC]'s decision on this issue is supported by Weyerhaeuser Company's own books and records, which include these litigation settlement expenses as a general expense, as opposed to a cost of goods sold. More specifically, in a note to its financial statement, Weyerhaeuser Company describes litigation costs as "generally incidental to its business." (footnotes omitted)**

163. Again, these sentences address two separate points. The first statement is simply false. As noted in the response to Question 58, Weyerhaeuser's consolidated financial statement provides Weyerhaeuser US's SG&A expenses in 2000 and cites a separate line item called "charge for settlement of hardboard siding claims".[164] Therefore, Commerce's claim that the Company treated this charge as SG&A is incorrect.

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[159] See *Brass Sheet and Strip from Canada*, 61 Fed. Reg. 46,618, 46,619 (Dep't. Commerce) (Final Antidumping Administrative Review) (Exhibit CDA-104). (emphasis added)

[160] Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).

[161] DOC Memorandum on Weyerhaeuser's Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (21 March 2002) at Attachment 2 (Calculation at the Top) (Exhibit CDA-105 – Contains Business Confidential Information).

[162] First Written Submission of the United States, at para. 207.

[163] Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53. (Exhibit CDA-101).

[164] Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).

164. The second statement was not made in the context of the hardboard siding claim that is at issue in this case. Rather, the statement cited to by the United States relates to pending and threatened environmental litigation.[165] Further, this statement does not relate to whether a particular expense should be classified as a general or administrative expense consistent with Article 2.2.2. Article 2.2.2 requires that any expense to be included as a selling, general or administrative expense must relate to the production and sale of the like product. The statement neither attributes the expenses to any particular portion of Weyerhaeuser's business nor the business as a whole. It simply acknowledges that the company incurred certain costs.

G.5 Calculation By-Product Revenue Offset – West Fraser

To Canada:

64. Please comment on the statement contained in para. 223 of the US *First Written Submission*:

> **"Canada claims Commerce should have relied upon sales by other respondents to non-affiliates in B.C. Canada's argument that Commerce should have preferred one source of evidence over another effectively is an improper request for this Panel to find facts *de novo*. Moreover, the evidentiary preference expressed directly contravenes Article 2.2.1.1, which instructs investigating authorities to rely on an exporter's or producer's records where they are available. In this case, such records were available." (footnote omitted)**

165. Contrary to this US assertion, Canada is not asking the panel to find that Commerce should have preferred one source of evidence on BC market prices (*i.e.*, other respondents' woodchip sales to unaffiliated parties) over another source of evidence on BC market price (*i.e.*, West Fraser's tiny quantity of woodchip sales to unaffiliated parties). Rather, Canada argues that Commerce was required to consider *all* record evidence relevant to the issue of whether West Fraser's affiliated woodchip sales were made at inflated, non-market prices, *including* evidence on the prices charged by other respondents in British Columbia for their sales to unaffiliated purchasers. That argument is fully consistent with the finding of the panel in *United States – Hot Rolled Steel* that, in determining whether an unbiased and objective investigating authority could have reached the conclusions at issue, a panel must "consider whether all the evidence is considered, including facts which might detract from the decision actually reached by the investigating authority."[166]

166. Moreover, the United States is incorrect in implicitly suggesting that Article 2.2.1.1 sets out an "evidentiary preference" that instructed it to use West Fraser's own sales data to unaffiliated parties as its exclusive evidence of British Columbia market prices, irrespective of other evidence of market prices. Article 2.2.1.1 makes no distinction between affiliated and unaffiliated sales data. Article 2.2.1.1 requires that the cost calculation reasonably reflect the costs associated with the production and sale of the product at issue. With respect to by-product revenues, this requires that the revenues recorded in an exporter's books and records must reasonably reflect the market values of the by-products so as not to overstate or understate the costs associated with the main product. If the revenues recorded in the books and records meet this requirement, the authority should use such recorded revenues. In this case, the "evidentiary preference" expressed in Article 2.2.1.1 requires, in fact, the use of West Fraser's actual recorded figures for its chip sales to affiliated parties.

[165] Weyerhaeuser Section A Questionnaire Response (25 June 2002), Exhibit A-15 (Audited Financials), at 74 which addresses Weyerhaeuser's separate litigation expenses (Exhibit CDA-101).

[166] United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Panel, WT/DS184/R, adopted 23 August 2001, at para 7.26.

65. In para. 224 of its *First Written Submission*, the US states:

> **"[c]ontrary to the arguments made by Canada, [footnote omitted] West Fraser made no argument that the long-term contract by which one of its mills made sales during the investigation period did not represent valid market prices, nor did it make any argument about the arm's length nature of the sales made from its other mill. [footnote omitted] Thus, if the unaffiliated sales quantities [[ ]] in B.C. were "too low" in the view of West Fraser, it never made that claim to Commerce."**

Could Canada confirm whether West Fraser did raise this claim to DOC, and if so, could Canada please direct the Panel where in the record this evidence can be found?

167. The record shows that West Fraser did expressly point out to Commerce that woodchip sales made from its McBride sawmill (which constituted over 50 per cent of West Fraser's total unaffiliated sales in British Columbia) were not reflective of average market prices for the POI as a whole. This is reflected in Commerce's cost verification report for West Fraser which notes:

> Company officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April and May. They explained that the sales value of the chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price.[167]

168. West Fraser did not make specific arguments in its briefs before Commerce regarding chip sales made by McBride or the tiny quantity of its sales to unaffiliated parties in British Columbia because there was no reason to do so at that time.[168]

66. Please refer to para. 225 of the US *First Written Submission*. Please comment.

169. In its first submission, Canada observed that Commerce applied inconsistent benchmarks to Canfor and West Fraser in determining whether their respective chip sales to unaffiliated parties were made at market prices. In paragraph 225, the United States defends this action by arguing that "[unaffiliated] sales in B.C. made by West Fraser were of its own product mix, and thus the best evidence of the value of an offset in West Fraser's process."[169] In contrast, the United States notes that the best evidence for Canfor was other companies' arm's length sales because Canfor did not have any BC chip sales to unaffiliated parties.[170]

170. The United States creates a false, *post hoc* distinction. Commerce itself did not find that West Fraser's chip sales to unaffiliated parties provided a better benchmark because they reflect West Fraser's "own product mix". Like Canfor, West Fraser sold woodchips from its sawmills located throughout British Columbia, and Commerce identified no evidence that West Fraser's woodchips

[167] DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by West Fraser Mills Ltd. (4 February 2002), at F.3, second paragraph (Exhibit CDA-110 – Contains Business Confidential Information).

[168] The limited volume of unaffiliated sales (1666 ODTS or less than the amount a large pulp mill would use in a single day) was self-evident. The onus was on Commerce to evaluate the usability of the data before it. Moreover, in its preliminary determination Commerce examined West Fraser's woodchip sales on a country-wide basis. For the final determination, West Fraser argued that Commerce should base its determination on the information regarding sales on a *mill - specific* "regional" basis. Commerce provided West Fraser with no indication that it was considering adopting the alternative, *province-specific* methodology in its Final Determination. Certainly, West Fraser was not required to guess that Commerce might adopt such a methodology, and then make arguments that would only be relevant in that eventuality.

[169] US First Written Submission, at para. 225.

[170] *Ibid*., at para. 226.

somehow differed from those of Canfor or any other producer. Indeed, the record shows that [[ ]][171] Nor, for that matter, is there any evidence that the unaffiliated sales made by West Fraser's McBride and Pacific Inland Resources mills were somehow *more* reflective of the woodchips produced and sold by other West Fraser mills in other parts of British Columbia, as the United States alleges. Rather, Commerce's decision to treat West Fraser differently than Canfor was based solely on its blind adherence to its methodology of exclusively using West Fraser's own unaffiliated sales as its benchmark for market price – a methodology that, in this case, is inconsistent with an unbiased and objective examination of the record evidence *as a whole*.

171. Indeed, the contrast with Canfor underscores Commerce's failure to treat West Fraser in an unbiased and objective manner. Both West Fraser and Canfor had sawmills located throughout the province of British Columbia. Both West Fraser and Canfor sold the overwhelming majority (100 per cent in the case of Canfor, 99.7 per cent for West Fraser) of the woodchips produced at their BC mills to affiliated pulp and paper mills.[172] And for both companies the relevant enquiry Commerce was required to perform was the same: whether their BC sales of woodchips to affiliated parties were made at market prices. Notwithstanding these similarities, Commerce applied to West Fraser a significantly lower and less advantageous benchmark for what constituted "market prices" in British Columbia, based solely on the fact that West Fraser sold 1,666 tons of woodchips – approximately the amount used by a large pulp mill in a single day – to unaffiliated parties in British Columbia. Specifically, whereas Commerce used a benchmark of approximately [[ ]] as the market price in reviewing Canfor's affiliated woodchip sales in British Columbia, Commerce applied a benchmark of just [[ ]] as the market price in reviewing West Fraser's affiliated woodchip sales in British Columbia.[173] Canada submits that an unbiased and objective finder of fact could not conclude that this seemingly insignificant distinction justifies Commerce's fundamentally dissimilar treatment of West Fraser. Commerce's finding reduced West Fraser's by-product offset by [[ ]] (CDA-108 Attachment 1 ("Difference")).

172. Finally, in footnotes 267 and 268 to paragraph 225 of its *First Written Submission*, the United States discusses West Fraser's and Canfor's woodchip sales in Alberta, as well as British Columbia, in asserting that "Commerce carefully distinguished the market situation" of these two companies. However, whether West Fraser's sales operations in Alberta were, or were not, similar to those of Canfor is irrelevant. The issue Canada has challenged is Commerce's dissimilar treatment of West Fraser's woodchip sales from mills *in British Columbia*, not Alberta.

67. Please refer to paras. 226-227 and note 270 to the US *First Written Submission*. Please comment.

173. In its First Submission, Canada showed that Commerce revalued (on the basis of the unaffiliated sales price) certain chip sales made by West Fraser to an affiliated customer, Quesnel River Pulp ("QRP"), even though it specifically verified that those sales had been made at market prices, based on a comparison with the prices QRP paid to an unaffiliated chip supplier. In paragraph 226, the United States characterizes Canada's argument as asking the panel to find that data from QRP was "more relevant," and it asserts that such data is not "a better indication of the market value of West Fraser's wood chips than West Fraser's own unaffiliated wood chip sales used by

[171] *See* West Fraser Cost Verification Exhibit C5, WF-Cost-007520-21 showing West Fraser's woodchip swaps with other respondents, including Canfor) (Exhibit CDA-150 – Contains Business Confidential Information).

[172] See DOC Memorandum on Canfor's Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (21 March 2002), Attachment 1 (Exhibit CDA-109 – Contains Business Confidential Information).

[173] *Ibid*. Note that these average prices are calculated from the data in Attachment 1 in Exhibit CDA – 109: for West Fraser, [[ ]] and for Canfor, using total sales [[ ]]. Contains Business Confidential Information.

Commerce."[174] In a footnote, the United States also states that such "additional information" was "superfluous" because "West Fraser's BC chip sales to affiliated parties had already failed Commerce's primary test."[175]

174. The United States' argument misses the point. Canada did not claim that QRP data were "more relevant." Rather, Canada argues that Commerce unreasonably disregarded chip sales made by West Fraser's large sawmill in Quesnel, BC (West Fraser Mills) to QRP, even though Commerce itself specifically recognized that QRP paid West Fraser market prices for those sales.[176] The US argument does not address this basic inconsistency. Nor is it correct to say that such evidence is "superfluous," even with respect to affiliated sales made by other West Fraser sawmills in British Columbia. At the very least, this evidence – which the United States does not deny weighs against Commerce's findings – must be considered in determining whether Commerce's finding was based on an unbiased and objective evaluation of the record evidence *as a whole*.

175. Finally, the United States claims that, even if such information is relevant, West Fraser failed to submit "the entirety of its affiliated pulp mill purchases on the record."[177] During verification West Fraser provided Commerce with information on chip purchases by QRP to illustrate that if West Fraser's highest priced sales to affiliated parties were not made at inflated prices, then its lower priced sales similarly were not inflated. Had Commerce considered this information inadequate, it was Commerce's responsibility to notify West Fraser of this fact. Commerce, however, did just the opposite: it requested samples of affiliated and unaffiliated sales made by West Fraser's Blue Ridge (Alberta) and Pacific Inland (BC) mills, verified that information, and then represented that no further information was necessary on this point. Indeed, Commerce ended cost verification one day earlier than scheduled because it required no further information from West Fraser, and its verification report does not indicate that the information it received with respect to the wood chip issue was in any way inadequate. It was not until Commerce issued its final determination that West Fraser became aware that the information it provided was alleged to be "selective" and "inadequate".

176. In light of these facts, the United States' attempt in paragraph 229 to make it appear that West Fraser failed to provide Commerce with all the information it required should be rejected.

G.6 Calculation of By-Product Revenues – Tembec

To Canada:

69. It is stated in para. 258 of Canada's *First Written Submission* that:

> **"DOC relied on internal transfer prices to calculate the by-product revenue offset for Tembec, notwithstanding ample evidence on the record that established that these internal prices are set significantly below market prices."**

Please state in detail which evidence was on the record showing that internal prices were set significantly below market prices. Refer to specific portions of documents on the record where that evidence was contained.

177. Contrary to US assertions, Tembec did provide Commerce with record evidence that Tembec's internal woodchip prices were set only for internal accounting purposes. Also, contrary to

[174] US First Written Submission, at para. 226.
[175] *Ibid.*, at para. 227 n. 274.
[176] IDM, Comment 11, at 61 (CDA-2); DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by West Fraser Mills Ltd. (4 February 2002), at 23-24 (Exhibit CDA-110 – Contains Business Confidential Information).
[177] USFirst Written Submission, at para. 227 & n.274.

US assertions, Commerce reviewed the data for each of Tembec's unaffiliated party sales in British Columbia (which are the basis of this claim), and verified that those customers paid [[ ]] more than the internal transfer prices.[178] The evidence is as follows:

- The Cost Verification Report at page 25[179] and Exhibit 14 to that Report displays the huge price differential between market prices for woodchips and Tembec's internal transfer price. Exhibit 14 to the Cost Verification Report[180] in its entirety demonstrates that the internal prices were set well below market prices, but the point is most evident on pages 2 and 9, which summarizes the information in the underlying source documents that constitute the bulk of the exhibit. Page 2 is a copy included in the verification exhibits of a by-product revenue calculation worksheet from Tembec's questionnaire response. The third line of the worksheet reports the total quantity of woodchips that each of Tembec's British Columbia sawmills transferred to affiliated parties. The total for all three mills was [[ ]] BDMT (bone dried metric tons). The sixth line reports the sales value based on the internally set transfer prices (as noted in the handwriting of the Commerce verifier) which for the three mills combined equalled $[[ ]]. Dividing the sixth line by the third line equals the transfer price of $[[ ]] per BDMT. The first two lines on page 9 report the total sales value and quantity for Tembec's woodchip sales in British Columbia to unaffiliated parties and the source of that information. The handwriting on this page is that of the Commerce verifier and the letter "I" on these two lines indicates that the verifier traced the amounts reported in these lines to the original invoices. The figure of $[[ ]] per BDMT reported in the third line is the per unit unaffiliated sales price derived by dividing the first line by the second line.[181]

- This price difference had been explained as arising for internal accounting purposes in Tembec's verified Questionnaire Response, dated 23 July 2001, at D-24 where Tembec stated "[[ ]]"[182]

- In its Second Supplemental Questionnaire Response, dated 16 November 2001 at SD-20 through SD-23 Tembec again explained "[[ ]]."[183]

- Tembec's noted in its case brief before the agency, dated 12 February 2002, that "In the Preliminary Determination, the Department correctly recognized that Tembec's intra-company transfers of chips did not reflect market prices."[184]

[178] See Tembec Cost Verification Report, at 25 (Exhibit CDA-112 – Contains Business Confidential Information) and DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (29 January 2002) at Exhibit 14, at 8 (Exhibit CDA-114 – Contains Business Confidential Information).

[179] *Ibid.* (Exhibit CDA-112 – Contains Business Confidential Information).

[180] DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (29 January 2002), at Exhibit 14 (Exhibit CDA-114 – Contains Business Confidential Information).

[181] *Ibid.*, at 9. (Exhibit CDA-114)

[182] Tembec Section D Questionnaire Response (23 July 2001), at D-24. (Exhibit CDA-151 – Contains Business Confidential Information).

[183] Tembec Second Section D Supplemental Questionnaire Response (15 November 2001), at SD-20 – SD-23. (Exhibit CDA-152 – Contains Business Confidential Information).

[184] Tembec Rebuttal Brief (19 February 2002), at 19. (Exhibit CDA-153 – Contains Business Confidential Information).

70. Please explain the statement contained in para. 261 of Canada's *First Written Submission* that:

> **"Article 2.2.1.1 of the *Anti-Dumping Agreement* reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets."**

178. Article 2.2.1.1 specifies that "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*." (emphasis added) There is no dispute that Commerce uses by-product revenues in its cost calculations. Tembec's records are maintained according to GAAP, but by-product revenues on Tembec's books do not reasonably reflect market prices for woodchips because they are internal transfer prices artificially set for accounting purposes. Under Article 2.2.1.1, unless the by-product offset reasonably reflects the market value for the by-products at issue, the calculation of the cost of the main product (in this case, softwood lumber) would be either overstated or understated. Thus, when the market value of by-product sales is not reflected in a company's own books and records, as was the case for Tembec, Article 2.2.1.1 requires an alternative valuation. The use of Tembec's internal transfer prices in calculating lumber costs violates Article 2.2.1.1 because of the requirement that the cost calculation must reasonably reflect the costs associated with the production and sale of the product under consideration.

71. Please comment on the statements contained in para. 235 of its *First Written Submission:*

> **"Canada argues that Commerce should have valued the cost of wood chips transferred to Tembec's pulp mills using the [[ ]] prices for wood chips sold to unaffiliated parties during the period of investigation ("POI"). [footnote excluded] Canada contends that Tembec's inter-divisional wood chip sales were "set arbitrarily to provide an internal preference." [footnote excluded] However, no evidence in the record before Commerce supports that contention."**

179. Please see Canada's answer to Question 69 above, which references the evidence of record demonstrating that Tembec's inter-divisional woodchip sales were set arbitrarily to provide an internal preference for pulp and paper operations. All the Questionnaire Responses; the Verification Report exhibits; and the Tembec case brief were before Commerce and on the record.

72. Please comment on the statements contained in paras. 241-242 and footnote 295 to the US *First Written Submission*:

> **"Canada maintains that Commerce should have used data other than data from Tembec's own books and records. However, that would have been proper under Article 2.2.1.1 only if Tembec's books and records did not reasonably reflect the costs associated with wood chip production.[295]**

The simple fact that Tembec sold wood chips to non-affiliates for prices that [[ ]] the internal transfer prices for wood chips transferred between Tembec divisions, does not mean that the internal transfer price in this case was unreasonable as a surrogate for Tembec's cost. The question is whether the internal transfer price between divisions reasonably reflected the cost of producing the transferred wood chips, not whether such transactions occurred at market prices.

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[295] Furthermore, Canada incorrectly asserts that Commerce "verified that Tembec's internal transfer prices for wood chips are set arbitrarily to provide a preference for Tembec's affiliated pulp mills." Canada First Written Submission, para. 260. Commerce made no such

determination. This alleged fact was <u>not</u> verified by Commerce, it appears nowhere in the Cost Verification Report, it is directly contrary to the Cost Calculation Memorandum (which concluded that "the company's internal transfer prices did <u>not</u> give preferential treatment to the sawmills"), see Commerce Memorandum on Tembec Cost Calculation Adjustments for the Final Determination (21 March 2002), at 2, Exhibit US-58, and is contrary to Commerce's ultimate conclusion." (footnote excluded)

180. First, the US misstates the "question" at issue. As explained, by-products are an unavoidable product from the production of lumber and do not have independent costs (or profits). Rather, the by-product revenue offset must reasonably reflect the market value for the by-products at issue; otherwise the calculation of the cost of the main product (in this case, softwood lumber) would be either overstated or understated.

181. Second, please see Canada's answers to Questions 69 and 71 above for evidence regarding the verification of Tembec's internal transfer prices. The record evidence demonstrates that Tembec's internal transfer prices for woodchips did not reflect market prices, and therefore would not lead to a calculation that reasonably reflects the true costs of producing and selling lumber if used to establish Tembec's by-product offset. The record evidence also is that Tembec sold woodchips to unaffiliated parties for market prices. The record includes both the internal transfer prices and the market prices. Despite a full verification of precisely this issue, Commerce excluded from its report any narrative on the subject, and now attempts to use that deliberate omission to argue that the record does not contain the evidence. The record, and the Verification Report itself, demonstrate the contrary. The record includes Tembec's Questionnaire Responses, which expressly, in the narrative, addresses the issue. The Questionnaire Responses were fully verified. The Cost Verification Report, in Exhibit 14, contains the data that show the discrepancy between internal and market prices. And Tembec's case brief before Commerce, also a record document, shows and explains the differences. Commerce's willful exclusion of the facts from its narrative in its Verification Report cannot overcome the rest of the record evidence that Commerce is trying so hard to avoid..

73. Please comment on the statements contained in para. 243 of the US *First Written Submission:*

> **"[i]n its analysis, Commerce correctly took into account the fact that the price Tembec paid for wood chips to non-affiliated suppliers included an amount for profit. After taking into consideration the critical factor of the amount of profit, if the divisional transfer prices were extremely low or extremely high in comparison to the prices paid by unaffiliated purchasers, then Commerce might determine that the value assigned to the internally transferred wood chips was unreasonable. In this case, however, an adjustment for profit led to the conclusion that prices for inter-divisional transfers [[ ]] from prices to non-affiliates. In fact, once Commerce took into account profit and the varying quality and types of wood chips, it determined "no preferential prices" existed. Accordingly, Commerce concluded that inter-divisional sales as reflected in Tembec's books and records reasonably reflected costs of wood chip production."**

182. The [[ ]] difference between internal prices and market prices cannot be attributed to profit as the United States purports. By-products, by definition, have neither profits nor costs. In this case, Commerce made no findings about profits.[185] The Final Determination includes no evidence of any adjustment for profit in relation to the price differential between recorded woodchip sales. This *post hoc* rationale must therefore be rejected. In addition, Commerce's entire discussion of by-product issues in its final determination is contained in Comment 11 of the Issues and Decision Memorandum.

[185] See IDM, Comment 11, at 60-61. (Exhibit CDA-2)

Nowhere in that discussion does the word "profit" appear, nor is there any mention of any adjustment for profit, nor any taking account of profit. Nowhere in the calculations for Tembec is there any analysis of profit in connection with by-products. Therefore, this rationale does not justify Commerce's determination that Tembec's internal transfer prices did indeed represent market value.

G.7 Futures Contracts

To Canada:

75. Explain, with a numerical example, the basis of Canada's claim argument with respect to the by-product revenue offset.

183. Canada's claim is as follows. A by-product is a product that is produced unavoidably through the production of one or more main or principal products. In this case, woodchips are a by-products of the production of softwood lumber. Woodchips are produced by sawmills and sold to pulp mills for making such things as paper. Because woodchips are produced unavoidably, they have no costs and respondents' records therefore, only reflect revenues and prices at which woodchips were sold.

184. Commerce, in accordance with recognized accounting principles, deducts the revenues that a respondent receives from its sales of a by-product from the costs of producing the main product. Therefore, woodchip by-product revenues will be deducted from respondents' costs of producing and selling lumber.

185. By way of example, assume that it costs a lumber company $150 in both direct and indirect costs to produce 1,000 board feet of lumber. Also assume that the production of that 1,000 board feet of lumber also generated small quantities of woodchip by-products with a value of $10. To calculate that company's cost of production, Commerce will "offset" (*i.e.*, deduct) the $10 in revenues received from the sale of those by-products from the $150 cost of producing the 1,000 board feet of lumber, thus resulting in a cost of production for the lumber of $140.

186. When dealing with sales of woodchips between affiliated or related parties, Commerce will evaluate whether woodchip revenues and prices recorded on a respondents' books are accurate and not arbitrarily set at inflated prices to improperly reduce production costs. Commerce makes this determination by comparing a respondents' affiliated sales prices to its unaffiliated sales prices. If affiliated prices are higher than unaffiliated prices, the affiliated prices are considered inflated and Commerce will re-calculate all affiliated sales transaction revenues at the unaffiliated price.

187. By way of example, for Tembec's sales from its sawmills in British Columbia, the data was as follows. As stated in Question 69, the transfer price for woodchips to affiliated parties was [[ ]]. The sales price to unaffiliated parties was [[ ]]. This means that in Tembec's case, its sales prices to affiliated parties were not at market prices because they were *too low.* The United States asserts that this [[ ]] difference in price was attributable to "profit" (something Commerce never found in the investigation) and that Tembec's affiliated sales were in fact at market value. Woodchips can have no profit since they have no costs. Therefore, the US justification is incorrect. Tembec's recorded revenues should have been recalculated because they could not be used to calculate Tembec's costs for producing and selling lumber.

76. By emphasizing the terms "and any other differences which are also demonstrated to affect price comparability." in para. 271 of its *First Written Submission,* does Canada argue that the requested adjustment should have been granted based on that language in Article 2.4? To what extent did Slocan demonstrate in the course of the investigation that the alleged difference affected comparability? Please provide references to documents on the record (indicate page, paragraph and sentence) where Slocan proved that the alleged difference affected price comparability.

188. Article 2.4 of the *Anti-Dumping Agreement* provides that "[d]ue 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." Slocan's futures hedging activity was a condition of sale unique to the US market that affected prices of all sales in that market. Therefore, the revenues (or losses) earned from that activity constituted a difference between the Canadian and US markets affecting price comparability. Article 2.4 mandates that in such circumstances, an administering authority must make an adjustment. As Commerce itself noted in its final determination, Slocan's futures contracts were related to its core business of selling lumber. In particular, its futures contracts related directly to its export sales of lumber to the US market.

189. As a practical matter, a respondent in a US anti-dumping investigation is not required to separately establish the effect of price comparability for every potential adjustment. Although Article 2.4 requires the United States to adjust for all differences affecting price comparability, Commerce does not normally make a separate finding regarding price comparability for every adjustment. It is not among the criteria that Commerce uses, so one would not expect to find a discussion of the issue on the record of an investigation. For example, it is universally acknowledged that Commerce should, and does, adjust for the cost of freight. Freight costs are usually very different for home market and US sales, and Commerce corrects for that difference by subtracting freight from the price to the customer to obtain comparable ex-factory prices. At no point, however, does Commerce expressly analyze the extent to which freight differences affect price comparability. Neither does it require respondents to prove anew in every investigation that there is an effect on price. Commerce simply makes the adjustment. Its obvious effect on price is accepted by Commerce without individual, independent demonstration. Note that in this investigation, Commerce never stated that futures contract revenues did not affect price comparability between export and domestic sales. Rather, its rationale for refusing the adjustment was that futures contract revenues were not "sales" contemplated by Article 2.4.

190. That said, there is evidence in the record demonstrating that Slocan's hedging activity affected one market and not the other, creating a difference in conditions of sale between the two markets. All *ex pit* settlements appeared on Slocan's database of US sales in the investigation.[186] They were identified as a separate sales channel in the CHANNELU database field. In contrast, there was no *ex pit* settlement channel of sale in the home market database, because Slocan's hedging activity was in the United States only.[187] Commerce verified that the contents of these fields were accurate, and there is no dispute as to the amount of the revenues earned or the market in which they occurred.[188]

191. By proving the existence and amount of the revenues, and by demonstrating that they occurred in one market only, Slocan provided all of the proof necessary, and all that the United States ever requires in an investigation, to show that a difference has affected price comparability.

77. The Panel notes the following statement in para. 273 of Canada's *First Written Submission*:

> **"[i]t was DOC that determined that this difference affected the comparability of the two softwood lumber markets."**

[186] Slocan's Sections B-D Questionnaire Response (24 July 2001), at C-12 to C-13, (Exhibit CDA-154 – Contains Business Confidential Information).

[187] *See Ibid*., at B-14 (CHANNELH field).

[188] DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Slocan Forest Products Ltd. (1 February 2002), at 26 (Exhibit CDA-118).

The Panel also notes the following statement contained in note 313 to the *US First Written Submission*:

> **"Canada is incorrect that the "DOC made the factual determination that futures revenues affected lumber prices. . . ." Canada First Written Submission, para. 274. This is nowhere stated or implied in Commerce's findings. As noted above, Commerce stated that "Slocan's lumber futures hedging activity is related to its core business of selling lumber," but nowhere did Commerce determine that futures revenue affected prices. *Final Determination*, Comment 21 (Exhibit CDA-2)."**

Could Canada please point to the relevant document on the record (indicate page, paragraph and sentence) where that determination is made?

192. In the Issues and Decision Memorandum accompanying its Final Determination, Commerce stated "we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber[.]"[189] The Memorandum was based on Commerce's factual findings at verification, as reported in its verification reports.[190] The record evidence before Commerce was as follows:

- Commerce had before it an explanation of the purpose and effect of hedging contracts.[191]

- At verification, Commerce confirmed that Slocan was a "hedger" rather than a "speculator" in the lumber market. (The CME requires each participant to identify itself as one or the other).[192] Revenue earned by a speculator might or might not affect prices in the market, but futures revenue earned by a hedger affects prices by definition. The sole purpose of a hedging contract is to shield against fluctuations in price. Hedges have a stabilizing effect on the market by bringing a measure of predictability to an otherwise volatile commodity market.

- During the open life of the contract, Slocan monitors US market conditions to determine whether it should settle the contract *ex pit* and thereby ship, or let the contract go to term and then ship, or liquidate (sell) the contract and not ship.[193] The contracts that happen to be sold rather than fulfilled by delivery of physical goods are not a separate activity at all, but are an integral part of Slocan's selling activities. The decision to sell the contract or deliver the goods depends on the current price trends in the market. The hedging company has greater flexibility to respond to changes in price trends because it knows that a certain percentage of its sales (those through the CME) will achieve a certain minimum income (either by completing delivery at the agreed price or by liquidating the contract for an agreed price). The prices that it offers on other sales are thus different than they would have been absent the safety net that hedging contracts provide, Thus, hedging activity, by definition, affects prices for all sales in the market, not only those made through the CME.

193. Given the purpose and definition of hedging activity, a factual determination that "Slocan's lumber futures hedging activity is related to its core business of selling lumber" *is* a determination that

[189] IDM, Comment 21, at 94. (Exhibit CDA-2)

[190] Cost Verification Report at 15, Exhibit CDA-155; Memorandum from David Layton et al. to Gary Taverman, at 15 (28 Jan. 2002), (Sales Verification Report) (Exhibit CDA- 117).

[191] Slocan Sales Verification Exhibit 21 *Random Length--An Introductory Hedge Guide,* at VE02362 to VE02380 (Exhibit CDA-119 – Contains Business Confidential Information).

[192] *Ibid.*, at VE2381 to VE2384 (Exhibit CDA-119 – Contains Business Confidential Information).

[193] Ibid.

"futures revenue affected prices." That was the basis for Canada's statement at para. 273 of its First Written Submission.

78. The Panel notes the following statement in para. 246 of the US *First Written Submission*:

> **"[DOC] found that revenues from futures contracts were recorded in Slocan's books as sales-type revenues, not as production revenues." (footnote excluded)**

In the view of Canada, would not Slocan's own treatment of these revenues contradict its requests that those revenues be treated as "investment revenues"? Please explain.

194. At no point did Slocan suggest that the best way to treat its futures revenues was as "investment revenues." On the contrary, Slocan argued (and continues to argue before the NAFTA dispute settlement panel), that its futures revenues are properly treated as offsets to direct selling expenses. This is consistent with the fact that revenues from futures contracts were recorded in Slocan's books as "sales-type revenues."

195. It was Commerce, and not Slocan, that first suggested that Slocan's futures revenues were more properly treated as "investment revenues" rather than as direct selling expenses. Specifically, in its *Analysis Memorandum for Slocan Forest Products, Ltd.*, Commerce stated that:

> In the field DIRSELU2 in the US sales database, Slocan has reported the profit or loss associated with sales made on the futures market. *We conclude that this is an investment revenue*, and should not be treated as a sales specific deduction/addition. As this is not a direct selling expense, we have disallowed this price adjustment and have not included this field in our calculations.[194] (emphasis added)

196. In response, Slocan argued that *if* Commerce continued to refuse to treat the revenues as part of direct selling expenses, then it should at least follow through on its decision to treat them as "investment revenues" by applying them as an offset to financial expenses.[195] This was an argument "in the alternative" only, and in no way changed Slocan's position that the best way to treat the revenues was as an offset to direct selling expenses.

197. Before this Panel, Canada's position is that while Commerce may have had the discretion to determine whether to treat Slocan's futures revenues as direct selling expenses or as investment revenues, it did not have the discretion to refuse to make any adjustment at all. Furthermore, Slocan did not have to "guess right" about how Commerce wanted to characterize the adjustment, before Slocan could qualify for an adjustment. Slocan met its only responsibility to bring the difference to the attention of Commerce, and to provide it with the relevant data with which to make an adjustment. Once Commerce determined that the futures revenues were unique to the US market and that they were hedging activity, which is designed to affect prices, all of the underlying facts required were established, and Commerce was then bound by Article 2.4 of the *Anti-Dumping Agreement* to make an adjustment.

[194] DOC Analysis Memorandum for Slocan Forest Products Ltd. for the Preliminary Determination in LTFV Investigation on Certain Softwood Lumber Products from Canada (30 October 2001), at para. 8 (Exhibit CDA-116).

[195] Slocan Case Brief, at 10-11, 73 (12 Feb. 2002). (Exhibit CDA-156– Contains Business Confidential Information).

79. Please comment on the findings contained in para. 6.77 of the *US – Stainless Steel* panel report:

> **"[i]n our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4." (footnote omitted)**

198. Commerce recognized that Slocan is an active player in the futures market.[196] As a hedger, Slocan participated in the futures market in order to affect its net realized profits for overall sales activities in the US market. Its hedging activity was a deliberate effort to affect pricing across the entire US market. In its books and records, Slocan treated liquidated hedging contracts as lumber sales, listing the CME as the customer. Hedging contracts that went to term or that were subject to *ex pit* settlements were booked as lumber sales to the person taking delivery of the physical goods. With each contract, Slocan had a choice as to who the customer would be – the CME or another buyer – based on the price it could obtain from each when the contract came to term. When Slocan determined the price to be charged to its US customers, it did so knowing that it had the option of protecting that price by (1) purchasing more or fewer hedging contracts, and (2) liquidating more or fewer contracts rather than making physical delivery of the goods. Slocan did not have these options when determining the prices for its Canadian customers. This was a difference in market conditions that was not merely anticipated, but was expressly designed, to affect pricing decisions in lumber exports to the US market.

80. Please comment on the statements contained in para. 252 of the US *First Written Submission:*

> **"[a] given expense or revenue item cannot be both a selling expense and a cost of production item. It must be one or the other. This distinction is evident in Article 2.2, which identifies as an alternative basis for normal value "cost of production . . *plus* a reasonable amount for administrative, selling and general costs and for profits." The fact that Article 2.2 contemplates *adding* SG&A to cost of production makes it clear that selling expense (part of SG&A) is not an inherent element of cost of production."**

199. Canada is not suggesting that Commerce should have treated Slocan's lumber revenues as an offset to *both* direct selling expenses and financial expenses. Slocan never argued to Commerce that it should adjust twice for futures revenues. That would be double-counting – an error as egregious as Commerce's "zero-counting" of the adjustment, as if it did not exist at all. Rather, as described above, Slocan argued that the revenues should be treated as an offset to direct selling expenses. Only when Commerce determined that they were more properly treated as "investment revenues" did Slocan suggest that, *in the alternative*, Commerce should at least account for the revenues as offsets to financial expenses.[197]

200. The United States is correct that a given expense or revenue item cannot be both a selling expense and a cost of production item. But it is incorrect in its belief that a properly documented and

[196] DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Slocan Forest Products Ltd. (1 February 2002), at 26 (Exhibit CDA-118); DOC Memorandum on Verification of the Sales Response of Slocan Forest Products Ltd (28 January 2002), at 7-8 (Exhibit CDA-117).

[197] Slocan Case Brief, at 67-72 (12 Feb. 2002) (Exhibit CDA-156– Contains Business Confidential Information).

verified expense or revenue item could be *neither* a selling expense *nor* a cost of production item. Once Commerce determined that the futures revenues existed, that they were present in one market only, and that they related to its core business of selling the product under investigation, it was required by Article 2.4 to treat those revenues as either one or the other, and to make an adjustment accordingly. It could not "zero-count" the adjustment, as if it did not exist.

ANNEX I

G.1 Common Questions on Various Company-Specific Issues

To Canada:

37. For each of the company-specific issues examined below, Canada is requested to summarize the arguments raised by the relevant exporter in the context of the investigation. References to documents on the record should be included (exhibit number, page and paragraph of the document). Canada is also requested to summarize the reasons which were given by DOC, if any, when rejecting the exporter's request. To clarify and summarize the issues, Canada may present the above data in tabular form.

1. Abitibi

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Abitibi: Allocation of Financial Expenses	Beginning with its *first* cost questionnaire response, Abitibi argued that Commerce's COGS allocation methodology, required by the questionnaire, would result in an unreasonable allocation of financial expense as between its lumber products, on the one hand, and its newsprint, paper, and pulp products on the other, because "{o}ur different business lines have *vastly different financing requirements, which differences are not captured by an allocation of net financing expenses based on cost of sales*." Abitibi 23 July 2001 Response at D-45 (emphasis supplied) Exhibit CDA-83. *See also* Abitibi 10 Sept. 2001 Response at SD-35-36, Exhibit CDA-84 (arguing for an asset based allocation of financial expenses "due to the highly divergent asset and financing requirements of lumber operations on the one hand and pulp and paper operations on the other."); Abitibi 26 Sept. 2001 Letter at 12 Exhibit CDA-158 ("Where, as here, allocation of financing expenses based on cost of sales is distortive, because different product lines demonstrate different capital requirements, per dollar of sales or per dollar of cost of sales, the Department must depart from its traditional methodology because that allocation	Abitibi provided specific data to support its arguments. With respect to production costs, it noted that, "[f]or calendar year 2000, lumber sales were CN$638 million, requiring assets of CN$ 859 million, meaning that each dollar of assets produced $0.74 in sales. Newsprint and paper each required more than 50 per cent more assets. Newsprint required assets of CN$7,276 million to produce CN$3,438 million in sales, or a ratio of 0.47. Value-added paper and pulp required assets of CN$3,120 million to produce sales of CN$1,601 million, for a ratio of 0.51. The asset and thus financing needs of lumber is significantly less than that of pulp, value-added papers, and newsprint. Abitibi 23 July 2001 Response at D-45 Exhibit CDA-83. With respect to sales, Abitibi noted that its "standard terms of sale for lumber are [[.]] For North American newsprint, paper, and pulp, standard terms of sale are [[.]] In terms of outstanding accounts receivable, the average number of days outstanding for past due receivables in lumber as of March 2001 was [[ ]] days. For pulp the corresponding figure was [[ ]] days. For value added papers and newsprint, [[ ]]	On 10 August 2001, Commerce issued a supplemental cost questionnaire to Abitibi, which did not question Abitibi's analysis, or the evidence it offered with respect to the allocation methodology for financial expenses. Commerce also did not seek additional evidence relating to the issue of the proper allocation of financial expenses. Without explanation, Commerce directed Abitibi to revise its allocation so as to use Commerce's standard methodology. Commerce 10 August 2001 Supplemental Section D Questionnaire to Abitibi, Question 41 Exhibit CDA-92. Commerce used its COGS methodology for Abitibi in its preliminary determination. No reasons were given. *See* Memorandum from LaVonne Jackson to Neal Halper, Director, office of Accounting, Re: Cost of Production and Constructed value Calculation Adjustments for the Preliminary Results (30 Oct. 2001) at 2 and Attachment 2 Exhibit CDA-89. Commerce did not depart from its COGS allocation methodology in the final determination. Commerce effectively acknowledged that its methodology was not selected based on the evidence presented in

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	methodology is unreasonable."); Abitibi 12 Feb. 2002 Case Brief to Commerce, at 50-55, Exhibit CDA-81 ("under any measure, the capital requirements of pulp and paper operations are substantially greater than those of lumber operations. The Department's COGS methodology unfairly assumes that each dollar of cost of these different operations bears the same financial expense, which is demonstrably untrue for Abitibi.")	days. Plainly, by any measure, the financing needs of these different products are not proportionate to cost of sales, and an allocation based on cost of sales is highly distortive." Abitibi 23 July 2001 Response at D-45 Exhibit CDA-83. In its Case Brief, Abitibi provided a table summarizing the record data. *See* Abitibi's 12 Feb. 2002 Case Brief at 54 Exhibit CDA-81.	the case, but rather reflected its "established practice" of applying a uniform, "consistent and predictable" methodology in all cases. Commerce Final Determination, Issues and Decision Memorandum, at Comment 15 Exhibit CDA-2.
	Abitibi proposed an alternative to Commerce's COGS allocation methodology. Using actual business segment data contained in its audited financial statements, Abitibi suggested that Commerce first allocate its total financial expense among its different business segments in proportion to the total assets used by that business segment. *See* Abitibi 23 July 2001 Response at D-44, Exhibit CDA-83. Once a financial expense for lumber was determined in this fashion, Abitibi agreed that it would be appropriate to allocate this expense among the different, individual lumber products it produced and sold in proportion to cost of sales, as different lumber products are produced and sold using basically the same assets. Abitibi also argued that COGS undervalues capital assets. It contended that certain capital assets are non-depreciable, and that, in any event, the depreciation expense does not reflect the value of the asset that must be financed. Abitibi also pointed out that "{u}nder the Department's traditional methodology, roughly 13.6 per cent of total financing costs will be assigned to lumber, notwithstanding the fact that lumber requires only 7.6 per cent of Abitibi's assets, and accounts for only 10.6 per cent of its depreciation expense. {T}he fact that depreciation is included in cost of sales does not remove or materially mitigate the	Abitibi calculated its financial expenses for lumber on this basis, and responded to Commerce's cost questionnaire with full data and supporting worksheets showing its asset-based allocation methodology. *See* Abitibi 23 July 2001 Response at Annex D.6 Exhibit CDA-83. *See* Abitibi's 12 Feb. 2002 Case Brief at 54 (table summarizing the record data) Exhibit CDA-81.	In its Preliminary Determination, Commerce simply ignored Abitibi's submitted methodology and data without comment. *See* Memorandum from LaVonne Jackson to Neal Halper, Director, Office of Accounting, Re: Cost of Production and Constructed value Calculation Adjustments for the Preliminary Results (30 Oct. 2001) at 2 and Attachment 2 Exhibit CDA-89. Rather than responding directly to Abitibi's arguments, Commerce mischaracterized or ignored them in its Final Determination: "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 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. Commerce Final Determination, Issues and Decision Memorandum, at Comment 15 at 77, Exhibit CDA-2.

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	distortion." Abitibi's 12 Feb. 2002 Case Brief at 54-55 Exhibit CDA-81.		

2. Tembec

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Tembec G&A	Tembec stated in its initial questionnaire response that it was reporting its G&A expenses based on the expenses recorded on the books of its Forest Products Group, which Tembec noted is the business unit within which all of the subject merchandise was produced. The response identified the cost categories covered by the G&A data, which include, among many other cost categories, administration fee – Head Office. Tembec's 12 February 2002 case brief argued, based on the US statutory provision that implements Article 2.2.2, that G&A must be based on "actual data pertaining to production and sales of the foreign like product by the exporter in question;" that the company-wide data did not meet this requirement because most of Tembec's sales are in pulp, paper and chemicals; but that the verified data from the Forest Products Group would meet the legal requirements.	Response of Tembec Inc to Section D of the Department of Commerce Antidumping Questionnaire, 23 July 2001 (Exhibit CDA-159) at pages D-28, D-29 and D-32; Case Brief of Tembec Inc., 12 February 2002 (Exhibit CDA-160) at pages 41-42.	"Because there is no definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has developed a consistent and predictable practice for calculating and allocating G&A expenses. This consistent and predictable method is to calculate the rate based on the company-wide G&A costs . . " Issues and Decision Memorandum (Exhibit CDA-2) Comment 33, page 105.
Tembec By-product Revenue Offset	Tembec stated in its initial questionnaire response that [[ ]] Tembec provided a detailed explanation, accompanied by a sworn declaration, worksheets and supporting documentation, of its woodchip purchases and sales, both internal transfers and market transactions, in its 15 November 2001	Response of Tembec Inc to Section D of the Department of Commerce Antidumping Questionnaire, 23 July 2001 (Exhibit CDA-151) at page D-24; Response of Tembec Inc to the Second Section D Supplemental Questionnaire, 15 November 2001 (Exhibit CDA-152) at pages SD-20 to SD-23 and Exhibits SD-42, SD-43, SD-44, SD-46; Rebuttal Brief of Tembec Inc., 19 February 2002 (Exhibit CDA-153) at pages 15-22.	"Based on the comparison of Tembec's B.C. sawmills' internally set transfer prices for wood chips to the B.C. sawmills' chip sales to unaffiliated purchasers, we concluded that the internally set transfer prices are not preferential. . . . For Tembec's Quebec and Ontario wood chip sales . . . since we have determined that its B.C. mills do not sell wood chips to other Tembec divisions at preferential prices, we deem it reasonable to conclude that their Ontario and Quebec saw mills did not receive preferential prices for its internally

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	supplemental questionnaire response. Tembec repeated its argument that the internal transfer prices were set administratively without reference to market prices. Tembec argued in its 19 February 2002 rebuttal brief, in response to the applicant's argument that affiliated party transactions should be used, that DOC should calculate Tembec's by-product revenue offset based on the market prices for woodchips as demonstrated during verification.		transferred wood chips." Issues and Decisions Memorandum (Exhibit CDA-2), Comment 11, page 61.

3. Weyerhaeuser

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Weyerhaeuser G&A	In Weyerhaeuser's Case Brief to the DOC at 63-64, Exhibit CDA-98,Weyerhaeuser stated that: "[the hardboard siding expense] is not general in nature and it does not relate to the operations of the company as a whole. As disclosed in note 14 of Weyerhaeuser [US]'s consolidated financial statement, this cost relates to a proposed class action settlement of the hardboard siding claims. [footnote to Weyerhaeuser's Section A response at Exhibit A-15 omitted]. The settlement class consists of all persons who own or owned structures in the United States on which the [US] company's hardboard siding has been installed. Thus, the facts on the record clearly show that this cost is associated with a specific product line of non-subject merchandise and that the expense does not relate to the operations of the company as a	Weyerhaeuser's Case Brief to the DOC, CDA-98 at 63-64; Weyerhaeuser's Section A response at Exhibit A-15, Exhibit CDA-101; Weyerhaeuser's Ministerial Error Allegation letter dated 8 April 2002, CDA-100 at 6-7.	"while the costs relate to non-subject product . . . the Department typically allocates business charges of this nature over all products because they do not relate to production activity, but to the company as a whole." [IDM, Comment 48(b), CDA-2, page 134.

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	whole. Thus, it should not be included as a component of corporate G&A."[1] In Weyerhaeuser's Ministerial Error Allegation letter dated 8 April 2002, at 6-7, Exhibit CDA-100, Weyerhaeuser stated that: "In revising Weyerhaeuser's G&A ratio, the Department included claims on hardboard siding . . . as a component of parent G&A. The Department has made a ministerial error by including this amount. The Department does not typically include this type of [[ ]] expense as a component of COP because it has no relationship to the production or sale of the subject merchandise. In this instance, Weyerhaeuser [US] agreed to settle a suit by homeowners who claim that the [US] company sold them faulty hardboard siding. . . Clearly this expense does not relate to the production and sale of Canadian softwood lumber. This expense does not relate to the administrative activities of the company or corporation as a whole and is not specific to the manufacture, design or sale of the product under investigation."		

[1] During the investigation, Weyerhaeuser argued that (1) the hardboard siding expense was not a general expense properly attributed to the production and sale of Canadian softwood lumber, and (2) that the expense is properly characterized as a "cost of sale." Either would have sufficed to correct the DOC's classification of the expense as a "general expense." The DOC rejected both claims. In this WTO appeal, Canada has raised an issue with the DOC's reasoning with respect to item (1) only.

4. West Fraser (by-product):

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
West Fraser By-product Revenue Offset	During cost verification, West Fraser explained that Commerce's preliminary decision to compare the average prices of West Fraser's sales to affiliated and unaffiliated parties across all provinces (to determine whether the former had been made at market prices) was unreasonable, since the price difference Commerce observed resulted from timing differences and local supply and demand factors, rather than inflated prices for sales to affiliates. West Fraser therefore discussed pricing for individual mills and, in effect, urged that the "market" for purposes of 19 U.S.C. § 1677b(f)(2) be defined as the geographic area close to individual pulp and lumber mills. To show that its affiliated sales were made at market prices, West Fraser provided Commerce with monthly data for the year 2000 for chip purchases made by one of its affiliated pulp mills, QRP. This data showed that the prices QRP paid to West Fraser (for woodchip sales from "West Fraser Mills" in Quesnel, BC) were consistent with the prices QRP paid to its principal unaffiliated chip supplier, [[ ]]. West Fraser's choice of QRP was appropriate because (a) those sales were West Fraser's highest-priced sales to affiliated purchasers and, therefore, were the most likely to have been above market prices, and (b) the volume of West Fraser's sales to QRP was significant. To determine whether West Fraser's affiliated sales were made at market prices, Commerce officials also requested sample information regarding sales made to affiliated and unaffiliated purchasers by West Fraser's Blue Ridge (AB) mill and by its Pacific Inland (BC) mill, the two West Fraser lumber mills that had sales to both affiliated and	DOC Verification Rept. at 23 (Exhibit CDA-110); West Fraser Cost Verification Exhibit C5, WF-Cost-007520-21 (CDA-150) (showing chip swaps West Fraser engaged in to minimize transportation costs). **Contains Business Confidential Information on both pages.** West Fraser Cost Verification Exhibit C5, WF-Cost-007548 (CDA-107) (providing monthly comparisons); West Fraser's Appendix D-2 – Revised (CDA-106) [[ ]]. West Fraser Cost Verification Exhibit C5, WF-Cost-007589-007593 (CDA-111) (further documentation requested and verified by Commerce) West Fraser's Case Br. of 12 Feb. 2002, at 46-48 (US Exh. 55); West Fraser Rebuttal Br. of 19 Feb. 2002, at 19-21 (US Exh. 54).	While it acknowledged that the documentation West Fraser provided at verification showed that QRP paid similar prices to West Fraser as to an unaffiliated party for purchases of woodchips, Commerce stated that these comparisons "were selectively provided . . . and not based on a sample chosen by the Department." IDM, Comment 11 at 61 (CDA-2). Commerce also stated that "[t]hese comparisons represented only a portion of the total wood chip purchases by . . . West Fraser's pulp mills and there is no record evidence to determine what the results might be if all mills were included." *Id.* Commerce made these findings despite the fact that its verification report for West Fraser did not list woodchip sales to affiliates among the issues that "will require further consideration." DOC Verification Rept. at 2 (Exhibit CDA-110). Commerce's decision memorandum also did not address the further evidence that Commerce specifically requested and verified on woodchip sales made by West Fraser's Blue Ridge and Pacific Inland sawmills. Instead of basing its decision on the mill-specific information reviewed at verification, Commerce adopted a new methodology in which it compared the average prices of West Fraser's affiliated and unaffiliated woodchip sales on a province-by-province basis to determine whether the former had been made at market prices. *See id.* at 60.

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	unaffiliated purchasers. After verifying that additional information, the Commerce officials neither requested any further information on West Fraser's affiliated woodchip sales, nor indicated that the information provided was inadequate. Consistent with these facts, in its briefs before Commerce West Fraser argued that the mill-specific information that had been verified by Commerce showed that West Fraser's woodchip sales to affiliated parties had in fact been made at market prices.		
	Immediately after Commerce issued its Final Determination, in which it adopted a province-by-province methodology for the first time, West Fraser submitted a letter to Commerce arguing that its oversight in using West Fraser's *de minimis* volume of unaffiliated woodchip sales in British Columbia as its exclusive benchmark for BC market prices constituted a ministerial error.	Letter from West Fraser to DOC of 04/09/02 (CDA-161). Contains Business Confidential Information on pages 4-5.	Commerce rejected West Fraser's ministerial error claim, stating that "[t]he adjustment made to West Fraser's by-product revenue is clearly an intentional methodological choice made by the Department" and, thus, not a ministerial error. *See* DOC Memorandum re Ministerial Error Allegations (25 Apr. 2002) at 17 (CDA-162).

5. Slocan

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Slocan futures revenue	Slocan traded lumber futures in the US market. In its books and records Slocan records the profits and losses from futures trading as lumber selling activity, so it reported the net revenue earned in the POI to Commerce as a direct selling expense.	Verification Exhibit 21, Exhibit CDA-119 (public excerpt – explanation of futures trading) Slocan Cost Verification Report at 26, Exhibit 118; Slocan Case Brief at 70 n.24, Exhibit CDA-156 (revenue recorded in books and records)	
	Commerce rejected this approach in its preliminary determination and stated that the futures revenue was "an investment revenue."	Preliminary Determination Analysis Memorandum at 7 at paragraph 8, Exhibit CDA-116 (futures revenue was investment revenue)	"In the field DIRSELU2 in the US sales database, Slocan has reported the profit or loss associated with sales made on the futures market. We conclude that this is an investment revenue, and should not be treated as a sales specific deduction/addition. As this in not a direct selling expense, we have disallowed this price adjustment and have not

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
			included this field in our calculations." *Prelim. Det. Analysis Mem. at 7* at paragraph 8, Exhibit CDA-116..
	In its case brief, Slocan argued that *if* this was Commerce's decision, then it should account for futures profits and losses as a financial expense, as it would for other investment revenues.	Slocan Case Brief at 67-72, Exhibit CDA-156 ("The Department Should Include Slocan's Futures Profits and Losses in Direct Selling Expenses, or, If It Does Not Do That, Include the Profits and Losses in Slocan's Financial Expense.")	"Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan's financial expenses." IDM, Exhibit CDA-2, Comment 21 at 94.
	Commerce rejected this alternative also and did not account for the futures revenue anywhere in its calculations.	IDM, Exhibit CDA-2, (failure to account for revenue as either a selling expense or a financial expense)	"{W}e have not included in our analysis profits on the sale of a futures contracts that did not result in the shipment of subject merchandise. Such profit is realized from Slocan's position on the CME and as a producer of softwood lumber, but not from its actual sale of subject merchandise. We also have not applied these profits as an offset to Slocan's direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs the Department to make circumstance of sales adjustments only for direct selling expenses and assumed expenses. Section 351.410(c) defines direct selling expenses as "expenses . . . that result from and bear a direct relationship to the particular sale in question." Accordingly, where no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct selling expenses. Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan's financial expenses. In support of this argument, Slocan disputes the Department's statement in its preliminary determination calculation memo that these profits are "investment revenues" by stating that Slocan is engaging in hedging rather then speculative activity, and that sales on the futures market are integral parts of the company's normal sales and distribution process. While we agree that Slocan's lumber futures hedging activity is related to its core business of selling

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
			lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity. As such, the futures profits should not be used to offset the company's interest expense." IDM, Exhibit CDA-2, Comment 21 at 94.
	Commerce's failure to make any adjustment at all for Slocan's futures revenue violated GATT arts. VI:1-2 and AD Agreement Arts. 2.4 and 9.3 because it did not make "due allowance… for factors which affect price comparability{.}"		

ANNEX A-2

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(30 June 2003)

Questions to the Parties

1. The following responses of the United States answer the 19 June 2003 questions to the United States and to both parties. In several instances, the United States has also addressed questions posed by the Panel to Canada.

A. GENERAL ISSUES

To the US:

> **5. In para. 36 of its *First Written Submission*, the US identifies one instance where, in the view of that party, Canada requested the Panel to engage in what effectively would be a *de novo* review of DOC's establishment and evaluation of the facts in this matter. In the view of the US, are there any other such instances? If so, please identify in detail.**

2. Paragraph 36 of the US First Written Submission references paragraph 83 of Canada's First Written Submission. In that paragraph, Canada explained, as a general matter, what it believes the Panel must do to determine whether Commerce's evaluation of facts was unbiased and objective. First, since Canada made that statement as a general proposition within its "Standard of Review" discussion, it presumably frames the approach Canada would urge on each of the questions of fact presented in this case. Second, several specific instances in which Canada is asking the Panel to engage in *de novo* review are as follows:

3. Canada's presentation of a new regression analysis (Exhibit CDA-77) to support its contention that Commerce should have made a price adjustment to account for differences in the dimension of lumber in transactions compared amounts to a request for *de novo* fact finding. This exhibit was not before Commerce in the underlying investigation. At the June 17 Panel meeting, Canada stated that it intends to submit an expert's memorandum to explain the exhibit. The introduction of new evidence and a stated intention to introduce an expert's memorandum (which itself would be new evidence) to explain the new evidence demonstrates an improper attempt to have the Panel find facts as if it were the investigating authority.

4. In the case of Commerce's calculation of cost of production for Abitibi, Canada is asking the Panel to determine whether one method for allocating general and administrative ("G&A") costs is more reasonable and accurate than another. At paragraph 203 of its First Written Submission, Canada asserts, without citation, that "DOC failed to evaluate Abitibi's circumstances and evidence before it so as to develop the most accurate and reasonable method for determining the financial expenses

associated with the production and sale of softwood lumber." Inherent in Canada's statement is a plea for the Panel to weigh the evidence and find Abitibi's proposed method more "accurate and reasonable" than Commerce's. That is a request for *de novo* review.

5. Canada's claim regarding West Fraser's wood chip offset is another illustration. Commerce examined West Fraser's wood chip sales to affiliated entities and "tested" revenues from those sales against revenues from the company's own sales to unaffiliated entities. Canada complains about the "weight" Commerce attached to certain facts versus others.[1] Weighing facts is the responsibility of the investigating authority. In asking the Panel to re-weigh the facts, Canada is again asking for a *de novo* review.

6. A fourth example is Canada's claim regarding product under consideration. This is highlighted in paragraph 35 of Canada's Oral Statement at the 17 June Panel meeting. There, Canada states that the product under consideration "should have been limited to commodity dimension lumber." Effectively, Canada is asking the Panel to adopt its view of where the lines should have been drawn with respect to the product under consideration. That is a request for *de novo* review.

7. The foregoing list is illustrative rather than exhaustive. As stated at the beginning of this response, the United States understands Canada's overarching explanation of standard of review as a statement of how Canada would have the Panel look at each of the issues in dispute.

6. In footnote 166 to its *First Written Submission,* the US states:

> **"[t]he footnote attached to this assertion contains factual analysis never presented to Commerce during the administrative proceeding, in clear violation of Article 17.5(ii), and that information should not be considered by this Panel.[166]**

Could the US please clarify its position regarding Exhibit CDA-76 in light of the above statement?

8. Footnote 166 of the US First Written Submission appears in paragraph 137 and refers to the US objection under Article 17.5(ii) to the new information presented by Canada in its Exhibit CDA-77 (the regression analysis). To clarify this point, the footnote makes reference to the charts contained in Canada's Exhibit CDA-76. These charts were also not presented to Commerce during the underlying proceeding, although the data upon which they are based apparently are derived from the respondents' submitted databases and do not involve the kind of manipulation of data presented by the new regression analysis contained in Canada's Exhibit CDA-77. Although the United States did not object to Canada's inclusion of the data and analysis contained in Exhibit CDA-76, the United States nonetheless believes that Canada's submission of these charts demonstrates that Canada is asking this Panel to re-weigh the evidence and conduct a *de novo* review of the facts.

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[166] ***See* Section III, *supra*. *See also, EC-Pipe Fittings Panel Report,* para. 7.33. However, even if this Panel considers this analysis, despite the US contention that to do so would involve *de novo* review of the facts, the United States submits that it is inconclusive on its face. For example, a close examination of Canada's Exhibit CDA-76 reveals that while Weyerhaeuser's [[ ]], Slocan's comparable product (page 7) sold for an average price of [[ ]], a difference of [[ ]] per cent above Slocan's average price. For Slocan, the average POI price for [[ ]]. For Weyerhaeuser, the average POI price for [[ ]]. Both products commanded the same price within each company, yet the difference between companies in both cases was approximately [[ ]]. In addition, [[ ]] From an examination of the charts, it is apparent that there is no consistent pattern of prices that would require concluding that Commerce did not make an objective and unbiased evaluation of the facts."**

[1] *See* Canada's First Written Submission, para. 244.

To both parties:

7. Please comment on the findings contained in para. 7.3 of the *Egypt – Steel Rebar* panel report:

> **"the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-Rolled Steel,* "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

9. The quoted passage involves the *Egypt – Steel Rebar* panel's analysis of the respective responsibilities of the investigating authority and the interested parties in an antidumping investigation. Specifically, it relates to those instances in which the AD Agreement imposes certain procedural obligations on the investigating authority, but "leaves to the discretion of the investigating authority exactly how they will be performed."[2] This discussion is particularly relevant to Commerce's application of certain cost calculation methodologies challenged by Canada, as well as Canada's claim for a price adjustment for differences in the dimension of the softwood lumber products compared. With respect to each of these calculations, the action taken by Commerce falls within the discretion afforded by the AD Agreement, and Canada's claims are without merit.

10. This statement by the *Rebar* panel highlights the responsibility, in the first instance, for an interested party to submit any relevant information on the record to be considered by an investigating authority. With respect to differences in dimension, Article 2.4 states that a due allowance will be provided "in each case, on its merits," and when differences are "demonstrated" to affect price comparability. Whether a factor has been demonstrated to affect price comparability is a matter for "the judgement and discretion of the investigating authority to resolve on the basis of the record before it."[3] In this case, Commerce provided interested parties with ample opportunity to provide relevant information on the record with respect to any claimed price adjustments for differences in dimension. The questionnaire informed the interested parties of the requirements to establish an adjustment for differences in merchandise[4], a 14 September 2001 letter from Commerce informed the

[2] Egypt– Steel Rebar Panel Report, para. 7.2.

[3] *Id.* at para. 7.3.

[4] *See* Letter to Abitibi enclosing Questionnaire (25 May 2001) at B-29 (requesting variable cost of manufacturing information for all sales of similar, rather than identical products, *i.e.*, if there are differences in

parties that Commerce would consider matching similar, not just identical, softwood lumber products[5], both identical and similar softwood lumber products were matched in the 6 November 2001 Preliminary Determination,[6] after which there was still opportunity for comment and the submission of new factual information.[7] In spite of these opportunities, the Canadian respondent companies' requests for a price adjustment remained unsubstantiated. Therefore, Canada's complaint on this issue, particularly its efforts now to submit new evidence in the form of a regression analysis (Exhibit CDA-77), should be rejected. As the *Egypt – Steel Rebar* panel concluded: "[W]here opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel."[8]

11. There are at least two other examples in Canada's claims where the interested party in the underlying investigation failed to make submissions or to present evidence or arguments. First, contrary to Canada's argument here, West Fraser never raised the claim that its unaffiliated sales in British Columbia were "too small" to be a valid basis for assessing the market value of affiliated transactions, nor did it present evidence or argument to that effect.[9] Second, again contrary to Canada's argument here, Slocan never requested that its futures profits be used as an adjustment to anything other than a direct selling expense or an interest expense.[10] In both cases, the Canadian companies failed to meet their obligations to raise any relevant issues and adequately prove their claims.

B. ARTICLES 5.2/5.3

To the US:

> **12. Please indicate whether the relationship between IP and Weldwood was disclosed by the applicants in the Application, and if so, whether this fact was discussed and considered by the DOC in the context of the initiation of the investigation.**

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physical characteristics) and at I-5 (defining and describing the adjustment for differences in physical differences) (Exhibit US-36). The Questionnaire also refers interested parties to Commerce's regulations on this issue, which were also provided in the US First Written Submission in Exhibit US-44.

[5] *See* Letter to Abitibi Consolidated Inc. (14 Sept. 2001) (Exhibit CDA-75).

[6] *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada*, 66 Fed. Reg. 56,062 (6 Nov. 2001) ("*Preliminary Determination*") (Exhibit CDA-11); *see also* Final Determination, Comment 7 (Exhibit CDA-2).

[7] *See* Commerce's regulations, 19 C.F.R. § 301(b)(1)(providing that new information may be submitted in investigation until seven days prior to date of commencement of verification) (Exhibit US-65). Verifications normally take place after the Preliminary Determination in investigations, as they did in the *softwood lumber investigation*.

[8] Panel Report, *Egypt – Steel Rebar*, para. 7.3 (footnote omitted).

[9] Under US procedures, parties are provided a final opportunity to present all relevant issues that remain in dispute. See 19 C.F.R. § 351.309(c)(2) (Exhibit US-69). West Fraser never raised a single point regarding the quantity of these unaffiliated sales in British Columbia. *See* West Fraser's Case Brief of 12 February 2002, at 46-48 (Exhibit US-55); West Fraser's Rebuttal Brief of 19 February 2002, at 19-21 (Exhibit US-54).

[10] Slocan only requested two alternative treatments for the amount corresponding to these profits, and contradictory ones at that. If there was a third way to treat them – as indirect selling expenses – that claim was never made. In its 23 July 2001 Questionnaire Response, Slocan unambiguously stated that the hedging profits should be treated as an offset to direct selling expenses in the US market, as an adjustment for differences in the conditions and terms of sale. Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, 23 July 2001, pp. C35-37 (Exhibit US-71). In the same submission, Slocan unambiguously asserted that it did not incur indirect selling expenses. *Id.* at p. C-37 (Exhibit US-71).

12. The industry support section of the application addressed the question of quantifying the portion of the US industry that chose not to support the application because of their own affiliations with Canadian producers. In Petition Exhibit IB-7, the applicants provided a Canadian newspaper article on this issue in which Weldwood is mentioned as "owned by International Paper."[11] In its initiation decision, however, Commerce did not discuss the Weldwood-IP relationship, because it was not relevant to either the industry support question or the sufficiency of the evidence presented in the application as to prices and costs.

13. Article 5.2 of the AD Agreement requires the application to list known domestic producers of the product under consideration and known exporters or foreign producers. The application included Weldwood in the list of Canadian producers/exporters.[12] Article 5 does not require the investigating authority to discuss and consider relationships between companies whose data are not necessary for a finding of "sufficient evidence to justify the initiation of an investigation."

13. In para. 66 of its *First Written Submission,* the US states:

> **"[t]he product under consideration was a commodity-type product for which industry-wide data were likely to provide a more reliable representation than company-specific data for a single company responsible for only a small fraction of the Canadian exports to the United States."**

Bearing the above statement in mind, did DOC have industry-wide data on cost of production, home market sales and export prices before it at the time of initiation? If not, did DOC gather that information when examining whether the requirements of Article 5.3 were met?

14. The application contained data on cost of production, home market sales, and export price for many companies in the two largest lumber-producing provinces in Canada: British Columbia in western Canada and Quebec in eastern Canada. Thus, the application data were representative of the Canadian industry.[13] Commerce did not gather additional, nationwide data when examining whether the requirements of Article 5.3 were met, because the information provided in the application was sufficient to initiate an antidumping investigation.

14. The Panel notes the following statement made by Canada in para. 17 of its *First Oral Statement:*

> **"[m]embers of the Petitioner buy lumber from Canadian companies to fill out their product lines daily. They do regular business with Canadian companies, which results in thousands of transactions and billions of dollars worth of cross-border trade. All of these facts were known by Commerce. Accordingly, it is inconceivable that the application was accepted without information on a single actual transaction involving a sale of softwood lumber either in Canada or the United States. The application did not contain transaction-specific evidence identifying a single Canadian exporter or providing any specific examples of price or cost. The Petitioner's claim that such information was not "reasonably available" is simply not credible and should never have been accepted by Commerce." (footnotes omitted)**

[11]*See* Exhibit US-62.

[12]*See* Petition Exhibit IB-9 (Exhibit US-63).

[13]*See* US First Written Submission at paras. 52-62 and sources cited therein, which detail the diverse sources of data in each of these three categories.

In light of the substantial cross-border trade in lumber products between Canada and the US (as stated by Canada in the above citation), was not information on export price from Canadian producers and exporters reasonably available to the applicant?

15. Information on export prices was reasonably available to the applicant and was provided in the application.[14] Because the export prices that were provided in the application (including the full period of investigation *Random Lengths* export price information for both Eastern and Western S-P-F, the affidavit on lost sales and the price quotation affidavit) were sufficient for initiation, no further export price information was necessary. Commerce, therefore, made no determination, during the initiation process or the subsequent investigation, as to whether *still more* information on export prices from Canadian producers and exporters was *also* reasonably available to the applicant. The AD Agreement does not require such determinations in these circumstances.

16. Paragraph 17 of Canada's First Oral Statement, moreover, significantly distorts the facts. It is not accurate that "the application was accepted without information on a single actual transaction involving a sale of softwood lumber either in Canada or the United States." As demonstrated by the record and detailed in our First Written Submission at paragraphs 48-64, the application contained extensive evidence on actual sales of softwood lumber in both Canada and the United States from *Random Lengths* and from affidavits. The claim in paragraph 17 of Canada's First Oral Statement that "[t]he application did not contain transaction-specific evidence identifying a single Canadian exporter or providing any specific examples of price or cost" is true only in the sense that the Canadian producers associated with the specific transactions underlying the data in the application were not named; that does not make the evidence any less "transaction-specific."

15. Please comment on the statement contained in para. 23 of Canada's *First Oral Statement*:

> **"it was demonstrated that the Random Lengths data contained in the application commingled Canadian and US producer prices, and, thus, were not representative of Canadian sale prices."**

17. This statement is incorrect. Canada's First Oral Statement, at paragraph 23, refers, in turn, to Canada's First Written Submission. The only "demonstration" to be found in that submission regarding the alleged commingling of *Random Lengths* data are statements in paragraphs 91 and 104. At paragraph 91, Canada misleadingly suggests that the *applicant* (the Coalition for Fair Lumber Imports Executive Committee) characterized the *Random Lengths* data as commingled: "According to the Executive Committee, the following information [was] relied upon by DOC to initiate the investigation . . . (1) *Random Lengths* pricing data for Eastern Spruce-Pine-Fir that commingled both Canadian and non-Canadian producer prices . . . ." This and other misleading statements in paragraph 91 are indiscriminately "supported" by a lengthy citation in footnote 87 of various exhibits in the application, most of which have no bearing on the "commingled data" allegation. Canada repeats the claim, absent even the limitation to Eastern S-P-F, at paragraph 104 of its First Written Submission: "The *Random Lengths* pricing data commingled both Canadian and non-Canadian producer prices." Once again, that claim and others are "supported" only by an indiscriminate citation of exhibits, none of which "demonstrates" that the *Random Lengths* data relied upon in the application "commingles" Canadian and US sales.

18. The United States, in its own First Written Submission, and in response to the Panel's questions during the first Panel meeting, clarified the facts. As an initial matter, the "*Random Lengths* pricing data" contained in the application comprises three different groups of data used to demonstrate the existence of dumping of softwood lumber by Canadian exporters and producers.

[14] *See* exhibits cited at paras. 57-61 of the US First Written Submission.

19. First, at paragraph 52 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Eastern* S-P-F "delivered to Toronto" as a source of Canadian home market softwood lumber prices used to demonstrate the existence of below-cost sales in the Canadian market. In footnote 46, the United States explained that "[a]lthough Canada has claimed that these prices, 'commingle', US and Canadian data, the publishers of *Random Lengths* have expressly stated that the prices in the "Toronto delivery" column are based *exclusively* on production from mills in Canada." As authority for this, the United States referenced an 19 April 2001 letter from *Random Lengths* to this effect, which was placed on the record in an applicant's submission of 20 April 2001.[15]

20. Second, at paragraph 58 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Western* S-P-F delivered to the Chicago and Atlanta markets as a source of export prices used to demonstrate below-cost (*i.e.*, "dumped") sales to the US market. In footnote 58, the United States noted that "*Random Lengths* defines '*Western* S-P-F' as 'Lumber of the Spruce-Pine-Fir group produced in British Columbia or Alberta.'"[16]

21. Third, at paragraph 61 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Eastern* S-P-F delivered to Boston and the Great Lakes region as an additional source of export prices used to demonstrate below-cost (*i.e.*, "dumped") sales to the US market. Canada's "commingling" claim with respect to this data group is based on the "Terms of the Trade" definition of "Eastern S-P-F": "Lumber of the Spruce-Pine Fir group produced in the eastern provinces of Canada, including Saskatchewan and Manitoba. Also used in reference to some lumber produced in the northeastern United States."[17]

22. This definition itself reflects the fact that the *primary* meaning of this term is limited to certain Canadian-produced lumber. Its use as a "term of the trade" in connection with US-produced lumber is not only secondary, but also separate. In footnote 67 of its First Written Submission, the United States explained that a reasonable reading of statements by *Random Lengths*' publisher on the record demonstrated that Canada's claim lacked merit. As authority for this, the United States referenced an 19 April 2001 letter from *Random Lengths* which had been placed on the record of the case in a submission made by the applicant on 20 April 2001.[18] That letter states, among other things, that the Eastern S-P-F prices reported in *Random Lengths* "are representative of lumber produced in the Eastern Canadian provinces." With respect to this species group, the publisher of *Random Lengths* states that, although his publication "receives" information on S-P-F from mills in New England, "current grading rules" require the New England product to be designated as S-P-F-S (for "south"), whereas "we focus our information gathering and price reporting on Eastern S-P-F coming out of Eastern Canada."

23. This combination of evidence shows that *Random Lengths* recognizes a market distinction between Canadian-produced and US-produced S-P-F and does not commingle data on the Canadian-produced "Eastern S-P-F" with data on US-produced (Eastern) "S-P-F-south" lumber.

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[15] We note that Exhibit US-1 mistakenly included a different submission made by the applicant on that same date. The *Random Lengths* letter regarding Toronto delivery was submitted on the public record of the investigation and is attached as a new exhibit to these responses to the Panel's questions. *See* Fiche 22, Frame 80 (Exhibit US-60).

[16] The cited authority for this is Petition Exhibit III.9 (relevant excerpts from the *Random Lengths* publication "Terms of the Trade") (previously submitted in this dispute as Exhibit US-17). The relevant page from "Terms of the Trade" was inadvertently omitted from Exhibit US-17. A complete version of Petition Exhibit III.9 is attached as Exhibit US-61; the definition of Western S-P-F is at page 370 of that publication.

[17] *See* Petition Exhibit III-9, at p. 114 (Exhibit US-1; Exhibit US-61).

[18] As explained above, Exhibit US-1 mistakenly included a different submission made by the applicant on the same date, and the United States is now providing the correct record document to the Panel as Exhibit US-60. The *Random Lengths* letter in question is at Fiche 22, Frame 79.

24. Further, other export price data in the application, such as the *Random Lengths* Western S-P-F data discussed at paragraph 58 of the US First Written Submission, would have been independently sufficient to justify initiation.

To both parties:

16. In the view of Canada/the US, which obligation(s) are imposed by Article 5.2? Which entity or entities is/are the addressee(s) of the obligation(s)?

25. Article 5.2 does not impose an obligation on investigating authorities. It describes the contents of an application.

26. Canada's argument regarding Article 5.2 rests on the flawed premise that Article 5.2 must be read as imposing a stand-alone obligation, independent of the obligation under Article 5.3. This is not what Article 5.2 does at all. Article 5.2 is a description of the contents of an application. It provides context for an investigating authority's obligation under Article 5.3 to determine whether there is sufficient evidence to initiate an investigation.

27. The proposition that Article 5.2 does not impose a stand-alone obligation on investigating authorities is not nearly as unusual as Canada suggests.[19] Elsewhere in the WTO Agreements, one finds provisions that do not themselves impose obligations but that provide context for obligations set forth elsewhere. An example is Article III:1 of the GATT 1994. Article III:1 states that certain laws, regulations and requirements "should not be applied to imported or domestic products so as to afford protection to domestic production." In *Japan–Alcoholic Beverages*, the Appellate Body explained that the Panel in that case had correctly found "a distinction between Article III:1, which 'contains general principles', and Article III:2, which 'provides for specific obligations regarding internal taxes and internal charges.'"[20] A similar relationship exists in this case between AD Agreement Article 5.2 and Article 5.3.

28. Another example of an agreement provision that does not impose an obligation but provides context for obligations found elsewhere is Article 4.1 of the Agreement on Agriculture, which provides

> Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

29. In *EC–Bananas*, the EC argued that Article 4.1 is a substantive provision, which, read in the context of Article 21.1 of the Agreement on Agriculture (providing that the provisions of the GATT 1994 "shall apply subject to the provisions of this Agreement"), demonstrates that Schedules of concessions supercede the requirements of Article XIII of the GATT 1994.[21] Accordingly, the EC contended that the tariff rate quotas provided for in its Schedule would not be subject to Article XIII.[22] The Appellate Body disagreed, concluding that "Article 4.1 does no more than merely indicate where market access concessions and commitments for agricultural products are to be found."[23]

30. The Appellate Body's interpretation of Article 4.1 of the Agreement on Agriculture illustrates the fact that sometimes an agreement provision may serve a limited purpose, and that obligations

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[19] *See* Canada's First Oral Statement, para. 10.

[20] Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, adopted 1 Nov. 1996, pp. 17-18.

[21] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 20.

[22] *Id.*

[23] *Id*. at para. 156.

should not be extracted from a provision unless the language explicitly supports that interpretation. Article 5.2 of the AD Agreement serves just such a limited purpose—describing the contents of an application. Where paragraphs in Article 5 impose obligations on investigating authorities, they refer explicitly to what "the authorities" shall or shall not do. This is the case, for example, in Articles 5.3, 5.4, 5.5, 5.6, and 5.8. There is no such reference in Article 5.2. The Panel should reject Canada's attempt to read an obligation into Article 5.2 that is not there.

17. In the view of the Parties, is there a hierarchy in which the applicant should endeavour to submit the information, as is reasonably available to it, required under Article 5.2(iii)? Please motivate your response fully.

31. Article 5.2(iii) gives three alternative bases for identifying normal value: (1) information on home market prices, or "where appropriate," (2) information on prices for sales to a third country or countries, or (3) information on the constructed value of the product. Article 5.2 (iii) also gives two alternative bases for identifying export price: (1) information on export prices, or "where appropriate," (2) information on "the prices at which the product is first resold to an independent buyer in the territory of the importing Member" (*i.e.*, "constructed export prices").

32. The alternatives described in Article 5.2(iii) are not interchangeable. With respect to identifying normal value, for example, home market prices in the ordinary course of trade are normally preferable to the other two categories. However, if there are not sufficient sales in the home market for the home market to provide a viable basis of comparison, or if the home market sales database does not offer, because of significant volumes of below-cost sales, a reliable indication of sales made in the ordinary course of trade, it is "appropriate" to use sales in third country markets or constructed value, respectively, even if there are some home market prices on the record. In other words, the "appropriateness" of using the later-listed alternatives depends not upon the absence of data corresponding to the first-listed alternative, but upon other circumstances. The application in this case, for example, began the process of identifying normal value by looking to Canadian home market prices. Because the applicants demonstrated widespread sales below cost in the Canadian market, however, they properly relied upon constructed value as the basis for comparison to export price for purposes of providing evidence of dumping sufficient for initiation of the investigation.

33. It may be that the Panel's question has to do with another sort of "hierarchy on which the applicant should endeavor to submit information." Canada claims that if company-specific sales and cost data for Weldwood were reasonably available to the applicants, then the applicants were required to base their application on these data. But this claim implies that Article 5.2 imposes a data hierarchy, in which data specific to a named company are deemed superior to other types of data, and that, if data in this allegedly higher category are available, alternative types of data may not be used to demonstrate dumping in an application. Article 5.2 contains no such obligation. There is no hierarchy of the types of information an applicant should endeavor to submit to show dumping sufficient to initiate an investigation. As explained at the first Panel meeting, in this case, because of the large number of softwood lumber producers in Canada, the United States believes that the aggregate data submitted in the application provided a relevant, broad picture of pricing practices of the industry.

E. ALLOWANCE FOR DIFFERENCES IN DIMENSIONS

To the US:

25. Please explain in detail how DOC carried out the product comparison in case of non-identical CONNUMs. Of the total number of comparisons made, how many were based on identical CONNUMs?

34. To carry out the product comparison, Commerce first identified the matching characteristics in order of importance, as suggested by the interested parties.[24] These characteristics, from most to least important were: (1) product category (*e.g.*, dimensional lumber, timbers, boards); (2) species (*e.g.*, SPF, Western Red Cedar), (3) grade group, (4) grade, (5) moisture content, (6) thickness, (7) width, (8) length, (9) surface finish, (10) end trimming, and (11) further processing (*e.g.*, edged, drilled, notched).[25] With the exception of grade group, these characteristics were included in the questionnaire. Grade group was added for the Final Determination based on suggestions received from the parties in response to Commerce's 9 August 2001 request for suggestions regarding a model matching hierarchy.[26]

35. At the suggestion of the parties, Commerce did not match across product category, species or grade group. Therefore, all matches are identical with respect to those characteristics. Commerce first compared the control numbers of the US products to those of the home market products to determine if an identical match was available. If an identical match for all characteristics was not available, Commerce's matching methodology found the *most similar* match. Commerce's computer programme accomplished this by finding the most similar match for each characteristic based on its order of importance. For example, it tried to find a product of the identical grade regardless of the less important characteristics. If there were multiple sales of the identical grade, it tried to find a product where grade and moisture content were identical and so on, keeping as many of the characteristics identical to the US sale product as possible, until it found the most similar match. If there were no sales of the identical grade, it found the product with the most similar grade. If there were multiple sales of the most similar grade, it tried to find a sale with the identical moisture content, and continued in this fashion along the hierarchy of characteristics until it found the most similar match.

36. To achieve the most appropriate similar match, each identified trait *within* each model characteristic was assigned a numeric value.[27] For example, with regard to moisture content, dry lumber was assigned a value of one, kiln-wet lumber was assigned a value of three and green lumber was assigned a value of four. When determining a proper similar match, the programme looked at the difference between the number assigned for each characteristic of the US product and those of the possible matches. In the case of moisture content, if no product with the identical moisture content was available, the computer would have chosen to match US sales of green lumber to sales of kiln-wet lumber (4-3 = 1), the most similar comparison available. Only if no possible match to kiln-wet lumber was available, would it have matched to sales of dry lumber (4-1 = 3).[28]

37. Commerce took additional steps to further refine its matching methodology by using available cost data. When matching similar, rather than identical, grade or further processing characteristics, if two equally similar matches were available, the computer chose the match with the smallest variable cost difference. With regard to all three dimensional characteristics, because there was no cost difference, when two equally similar matches were available, both matches were selected and their normal values averaged. For example, the US price of an 8' board would be compared to the weighted average normal value of a 6' and a 10' board, which were identical in every other respect.[29]

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[24] While Commerce accepted the suggestions of the parties in this regard, this acceptance was not dependent upon a demonstration of effect on price comparability.

[25] *See, e.g.,* 25 April 2002 Amended Final Margin computer programme for Weyerhaeuser Corporation at line 2808-2809 (Exhibit US-66).

[26] Final Determination, Comment 7 (Exhibit CDA-2).

[27] *See* the 25 April 2002 Amended Final computer programme for Weyerhaeuser Corporation, at lines 3220-3362, assigning numeric values to each trait within each characteristic (Exhibit US-66).

[28] *See id.* at lines 3306-3308.

[29] Final Determination, Comment 7 (Exhibit CDA-2).

38. At a further suggestion of the Canadian parties, length was classified into the following length bands: less than 16'; 16' - less than 22'; 22' and above.[30] Commerce first attempted to match within each length band, and matched across length bands only when a similar match was not available within the band. In order to accomplish this, Commerce assigned lengths in the less than 16' category numerical values ranging from 100-105, the 16' - 22' category was assigned numbers ranging from 200-202 and the over 22' category was assigned numbers over 300. Sales composed of various lengths (random lengths) where the respondent was unable to separate the sale into its component lengths, were assigned a code of 999.[31] Therefore, if no identical length piece was available, a 14' piece of softwood lumber would match to a 10' piece of lumber before matching to a 16' piece of lumber.

39. Width and thickness were assigned sequential numbers based on ascending size. The computer matched to the product with the smallest difference in numeric value (*i.e.*, the closest number) first. One company, Weyerhaeuser, made sales of random widths and thicknesses and these were assigned a numeric value of 999.[32]

40. Identical matches account for **[[ ]]** per cent of all matches of export sales by volume. Similar matches account for **[[ ]]** per cent and constructed value accounts for **[[ ]]** per cent.[33]

> **26. In the view of the Parties, does Article 2.4 impose (or disallow) the use of any specific methodology in order to determine the amount of an allowance for differences in physical characteristics?**

41. Article 2.4 does not impose or disallow any specific methodology regarding the determination of the amount for a due allowance for differences in physical characteristics. It requires a showing or demonstration, "in each case, on its merits," that there is an effect on price comparability of the difference in physical characteristics before a due allowance is made. However, the provision does not address: (a) how an investigating authority will *identify whether* there is an effect on price comparability, nor (b) how to *measure* the allowance due once that identification has been made.

> **27. Article 2.4 provides that: "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in (...) physical characteristics." Could the text be interpreted to suggest that once differences in physical characteristics have been found, price comparability is automatically affected, or is there still a requirement that the effect on price comparability must be shown in addition?**

42. The text of Article 2.4 does not require an automatic adjustment based on the mere existence of physical differences. Such an interpretation would render the terms "in each case, on its merits" and "demonstrate" meaningless. These terms plainly require a case-by-case analysis to determine whether the facts support any allowance for differences in physical characteristics due to an effect on price comparability.

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[30] *Id.*

[31] See Exhibit US-66 at lines 3310-3321.

[32] *See id.* at lines 3323-3336 (thickness) and 3338-3351 (width).

[33] *See* Exhibit US-68 (which summarizes the data) and Exhibit US-67 (which provides the computer output from the record for each company from which the data was obtained). Commerce has used volume (thousand board feet) in response to the Panel's question because the dumping margins were weighted by volume of export sales. Accordingly, only volume provides a meaningful indication of the relative "number of comparisons" based on identical matches. Based on number of comparisons, the identical matches accounted for **[[ ]]** per cent of all export sales, similar matches accounted for **[[ ]]** per cent, and constructed value for **[[ ]]** per cent. *See* Exhibit US-70.

43. Differences in physical characteristics are not necessarily reflected in differences in the expenses or costs of the producer, nor are they necessarily reflected in the price to the customer. For example, a toy manufacturer may sell a series of toy trucks. Each toy truck may have different working parts, and differ significantly in physical appearance and even toy function - one is a fire truck, the other a dump truck, another a garbage collection truck. Yet all of these toys may have the same costs of production, and may normally be sold for the same price. Therefore, a due allowance, or appropriate adjustment, for differences in physical characteristics would not be warranted *per se*, on the basis of physical differences. Additional evidence would have to be presented to substantiate the due allowance or appropriate adjustment. In order to give the relevant terms of Article 2.4, particularly "in each case, on it merits" and "demonstrate," their ordinary meaning, the investigating authority must first determine, based on record information, that differences in physical characteristics affect price comparability, before making an adjustment.

44. The sentence from Article 2.4 quoted in the Panel's question concludes with the phrase "and any other differences which are also demonstrated to affect price comparability." The use of the term "also demonstrated" confirms the need for a demonstration that the physical differences at issue affect price comparability. We note the panel's statement in *Egypt – Steel Rebar,* in considering a due allowance for imputed credit expenses (which results from a condition or term of sale) that "[i]n short, *where it is demonstrated* by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made."[34] The Canadian respondents in this case did not demonstrate the effect on price comparability of differences in dimension.

F. ZEROING

To the US:

32. Could the US indicate which methodology was used by DOC when comparing normal value to export price in the investigation at issue?

45. In this investigation, the United States made comparisons between normal value and export price using the weighted average to weighted average comparison methodology consistent with Article 2.4.2 of the AD Agreement. We note that in certain cases normal value was based on constructed value.

33. In para. 31 of the EC' *Third Party Submission*, it is stated that:

> **"[t]he European Communities considers that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology already found to be incompatible with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* in *European Communities – Bedlinen*."**

Does the US agree with the above proposition?

46. The United States does not have access to the computer programme and detailed calculation methodologies utilized by the EC in the *EC–Bed Linen* case. Consequently, the United States is not in a position to assess whether the methodology utilized by the United States in this investigation "in no way differs" from that utilized by the EC.

34. Please comment on paras. 8-10 of Japan's *First Oral Statement.*

[34] Panel Report, *Egypt – Steel Rebar*, para. 7.352.

47. To fully address the statements made in these paragraphs, it is necessary to include a discussion of paragraph 7, which sets up the basis for Japan's arguments in the subsequent paragraphs.

48. In paragraph 7 of its First Oral Statement, Japan mis-characterizes the US argument. The United States does not suggest that Article 2.4.2 provides "for calculation of the margin of dumping *only* on a model-specific basis";[35] rather, the United States argues that model-specific, level-of-trade-specific comparisons are permitted under Article 2.4.2. In fact, two of the three methodologies in Article 2.4.2 provide for the calculation of transaction-specific margins of dumping. The third methodology (weighted average to weighted average comparisons) refers to a comparison with "all comparable export transactions." Interpreting this phrase consistently with Article 2.4, an investigating authority may calculate multiple margins of dumping.

49. Also in paragraph 7, Japan mis-quotes Article 2.4.2 of the AD Agreement. The word "margin" – singular – does not appear in Article 2.4.2. Only the plural – "margins" – appears in that provision.

50. In paragraph 8 of Japan's First Oral Statement, Japan essentially makes the same point that the United States made in paragraph 154 of its First Written Submission (albeit relying on a different provision of the AD Agreement): that it is necessary to calculate an overall dumping margin for investigated companies. While Japan referenced Article 6.10 and the United States referenced Article 5.8, in either case, the need for an overall dumping margin is based on obligations separate from those found in Article 2.4.2. Moreover, Article 2.4.2 of the AD Agreement does not specify the methodology to be used to aggregate the "margins of dumping" into an overall dumping margin.

51. In paragraph 9, Japan appears to agree with much of the US position with respect to Article 2.4.2. Although Japan suggests that multiple comparisons may occur under Article 2.4.2 as a matter of "administrative convenience," Japan also recognizes that such multiple comparisons may be appropriate to take into account (among other things) differences in physical characteristics among several models of the product under consideration. Japan recognizes that this step, which occurs pursuant to Article 2.4.2, is "in the middle of the entire process to calculate an individual margin of dumping for an exporter/producer." Moreover, Japan appears to recognize that Article 2.4.2 itself does not establish any obligation as to how the margins of dumping are aggregated. In any event, no additional comparison occurs when an authority aggregates "all of these intermediate margins obtained from multiple comparisons." Therefore, Article 2.4.2, which addresses comparisons only, does not speak to this process of aggregating margins.

52. In paragraph 9, Japan suggests that the legal basis for offsetting dumping margins with non-dumping amounts is the principle of good faith. Pursuant to this Panel's terms of reference and Articles 3.2, 7, and 19.2 of the DSU, this Panel's task is to review the consistency of the US antidumping duty determination with the Antidumping Agreement. Any review of the United States' so-called "good faith" beyond the relevant provisions of the Antidumping Agreement is outside the scope of WTO dispute settlement.

53. Also in paragraph 9, Japan uses the term "negative margins." Article 2.1 of the AD Agreement provides that dumping occurs when a product is sold at less than its normal value. When a proper comparison is made pursuant to the terms of Article 2.4.2 and the weighted average export price is greater than the weighted average normal value, the transactions in question were not dumped. The AD Agreement does not recognize "negative margins," and Japan cites no authority for this concept.

[35]Japan First Oral Statement, para. 7 (emphasis added).

54. In paragraph 10, Japan mis-characterizes the position of the United States with respect to the issue of comparability. The determination of the scope of the product under consideration is distinct from the determination of price comparability between weighted-average export transactions and weighted-average normal values under Article 2.4.2. Japan incorrectly suggests that the United States argued that not all softwood lumber was comparable for purposes of Article 2.4.2. As the United States discussed in paragraphs 162 and 163 of its First Written Submission, sales of all models at all levels of trade are not *equally* comparable. For example, if there is a home market sale of an identical model at the same level of trade, the United States would use that as the comparison (comparing the weighed average normal value to the weighted average of all comparable (in this case, identical, same level of trade) export transactions). Identical models sold at different levels of trade and non-identical models are nonetheless still "able to be compared." However, their differences in physical characteristics and level of trade would make them less comparable and, when those differences affected price comparability, it would be appropriate to make due allowance for the differences, pursuant to Article 2.4. Distinguishing among models and levels of trade is permissible under Article 2.4.2 (as Japan seems to recognize in paragraph 9 of its First Oral Statement), but does not require that the United States consider each model and level of trade to constitute a distinct "product under consideration" for purposes of the AD Agreement.

35. Please comment on para. 20 of EC's *First Oral Statement.*

55. Much of what the EC states in this paragraph re-asserts the conclusion drawn in the *EC – Bed Linen* case, and is premised on the reasoning of the Appellate Body in that case. In its First Written Submission[36] and in its Opening and Closing Statements at the first Panel meeting,[37] the United States explained why the *EC – Bed Linen* report is not binding on this Panel and why it should not be followed in this case. The United States has nothing to add on this question at this time.

56. In the first sentence of paragraph 20, the EC appears to suggest that the issue of multiple comparisons is only relevant to "a broad determination of the product under consideration and the like domestic product." The United States disagrees. Article 2.4 of the AD Agreement requires that other differences that affect price comparability, beyond differences in physical characteristics, also be taken into account when making comparisons. For example, differences in level of trade are among the differences that may affect price comparisons. Thus, even when there is only one "model" of the "product under consideration," it may still be appropriate to have multiple comparisons if there are sales at multiple levels of trade in the markets being examined. In order to capture level of trade distinctions, or model distinctions, if any, multiple comparisons may be necessary and appropriate under the weighted average to weighted average comparison methodology of Article 2.4.2 for calculating margins of dumping on "comparable" export transactions.

57. We note that, like Japan, the EC relies upon the term "negative dumping margins." As discussed in response to Question 34, above, the AD Agreement does not recognize "negative dumping margins" and the EC cites no authority for this concept.

[36]*See* US First Written Submission, paras. 173-78.

[37]*See* Opening Statement of the United States at the first meeting of the Panel, para. 38; *see also* Closing Statement of the United States at the first meeting of the Panel, para. 6.

G. COMPANY-SPECIFIC ISSUES

G.1 Common Questions on Various Company-Specific Issues

To the US:

> **41. With regard to each of the company-specific issues in its *First Oral Statement*, please address the comments made by Canada that the investigation was not conducted in an unbiased and objective manner. Those comments should address, *inter alia*,**
>
> - **Canada's allegations in various paras. of its *First Oral Statement* that statements containing factual data presented by the US in its *First Written Submission* were incorrect (see for instance para. 94 of Canada's *First Oral Statement*) and**
>
> - **Canada's contention that DOC "did not consider the merits of the record evidence" submitted by certain exporters concerning the company-specific issues before the Panel (see for instance para. 79 of Canada's *First Oral Statement*).**

58. The United States will first address Canada's contention that Commerce did not conduct the investigation in an unbiased and objective manner.

59. During the course of the lumber investigation, Commerce calculated costs for purposes of determining whether sales were made below the cost of production and, where necessary, for constructing normal value. Canada argues that, in calculating these costs, Commerce ignored evidence and automatically applied its standard cost methodologies without regard for the factual circumstances of individual producers. However, as is clear from its Final Determination, Commerce fully considered the lumber producers' evidence and arguments and diligently followed the preference in Article 2.2.1.1 for relying on a company's own records where appropriate.

Abitibi G&A

60. In determining cost of production for a product under investigation, it is necessary to attribute to the product some part of the producer's general and administrative (G&A) costs, including financial costs. While the AD Agreement does not prescribe a particular method for allocating these costs, we have provided background on Commerce's practice in response to Question 43. In the case of respondent Abitibi, Commerce applied a "cost of goods sold" methodology in allocating the company's financial costs. While not objecting to the "cost of goods sold" methodology *per se*, Canada contends that Commerce should have applied a different methodology, one based on the value of assets in each of Abitibi's divisions, in allocating financial cost.

61. Canada's claim – that Commerce failed to consider all relevant evidence before selecting an allocation method – is incorrect. As discussed fully in Comment 15 of the Final Determination, Commerce declined to employ Abitibi's suggested methodology after considering the facts and arguments for and against it in an unbiased and objective manner. Commerce reasoned that money is fungible, and interest costs, by definition, relate to the overall borrowing needs of a company. Borrowed money may be used for a full range of purposes, including financing fixed assets or ongoing operations. There is no basis for allocating borrowed money to only one activity. In light of this fact, the "cost of goods sold" methodology was a reasonable basis for allocating interest costs.

62. Moreover, contrary to Canada's contention, the "cost of goods sold" methodology does not ignore asset values. Those values are reflected in the depreciation costs included in the cost of goods

sold and the cost of manufacturing the like product to which the financial expense ratio is applied. That is, greater depreciation costs will be allocated to more asset-heavy divisions of a company.

Tembec G&A

63. As discussed in the Final Determination, Commerce rejected Tembec's division-specific methodology, because G&A costs, by definition, relate to the company as a whole.[38] Canada argues that Commerce should have calculated G&A costs on Tembec's division-specific basis, rather than a company-wide basis. However, Tembec's proposed G&A methodology contradicts the general nature of this cost. It is based on the unsubstantiated premise that general costs are incurred on a divisional rather than a company-wide basis. Moreover, Tembec's methodology is based on unaudited amounts of G&A costs. In sharp contrast, Commerce's methodology is based on the G&A reported in Tembec's audited financial statement, and is therefore consistent with Article 2.2.1.1.

Weyerhaeuser G&A

64. With respect to Weyerhaeuser, Commerce included an allocated portion of certain litigation settlement costs in Weyerhaeuser's general and administrative (G&A) costs. A parent company will frequently incur general costs, such as these litigation settlement costs, that are costs of doing business for all of the operations of the parent company. Where a subsidiary is a respondent producer/exporter in an antidumping investigation, Commerce's ordinary practice is to apportion the parent's G&A costs over sales of all merchandise produced by the entire company, provided the costs are general to the operations of the entire company. This practice comports with Articles 2.2.1.1 and 2.2.2, and is not disputed by Canada. Nor was it disputed by Weyerhaeuser during the investigation.

65. What is in dispute is Commerce's decision to include in Weyerhaeuser's G&A an apportioned amount of the litigation settlement charges at issue. Commerce did so based on its reasoning that business charges of this nature should be allocated "over all products because they do not relate to an [sic] production activity, but to the company as a whole."[39] Information submitted by Weyerhaeuser did not support a deviation from this practice. Weyerhaeuser's own financial statement did not classify the litigation expenses as part of the cost of products sold.[40] Instead, Weyerhaeuser recorded the litigation settlement costs among its general costs, albeit in a separate line item. The general nature of these litigation settlement costs is revealed by explanatory note 14 to the financial statement, which states that such legal proceedings are "generally incidental to its business."[41]

[38]Final Determination, Comment 33 (Exhibit CDA-2).

[39]Final Determination, Comment 48b, p. 134 (Exhibit CDA-2).

[40]Weyerhaeuser 2000 Annual Report, p. 53 (Exhibit CDA-101).

[41]*Id*. at p.75, n. 14 (Exhibit CDA-101). Because Canada suggested orally at the first Panel meeting that this reference was not describing the litigation settlement claims at issue, it may be useful to review the statement in full:

> The company is a party to legal proceedings and environmental matters generally incidental to its business. Although the final outcome of any legal proceeding or environmental matter is subject to a great many variables and cannot be predicted with any degree of certainty, the company presently believes that the ultimate outcome resulting from these proceedings and matters, including those described in this note, would not have a material effect on the company's current financial position, liquidity or results of operation; however, in any given future reporting period, such proceedings or matters could have a material effect on results of such operations.

Id. Thus, Weyerhaeuser's own books and records support the conclusion that these litigation settlement claims related to the operations of the company as a whole.

66. Canada makes two arguments on this issue. First, Canada states that the litigation settlement costs were not included in the "G&A" line item on Weyerhaeuser's books and records.[42] But this is semantics. Simply because Weyerhaeuser broke this litigation cost out of G&A and reported it as a separate line item does not justify excluding it from the company's general costs. As described above, note 14 to the firm's own consolidated financial statement supported accounting for the costs as general costs.

67. Second, Canada claims that the litigation settlement costs pertained to the production and sale of hardboard siding.[43] However, simply because the settlement arose from claims relating to hardboard siding does not make these costs of producing hardboard siding. In fact, these claims arose years after the hardboard siding involved in the litigation was produced. Moreover, Canada has failed to provide any recognized alternative accounting category for this cost that is consistent with Weyerhaeuser's own treatment of it in its audited financial statement. For these reasons, Commerce properly included the litigation settlement costs in its calculation of total G&A, in accordance with Articles 2.2.1.1 and 2.2.2.

By-Product Offset for Wood Chips

68. Canada's next set of arguments concerns Commerce's calculation of offsets to certain respondents' costs of production. Production of softwood lumber yields wood chips as a by-product. Producers are able to sell the wood chips to pulp mills. In calculating companies' costs of producing softwood lumber, Commerce took wood chip sales into account as an offset. That is, Commerce reduced a company's cost of softwood lumber production by an amount determined to be the cost of producing wood chips.

69. Canada challenges the methodologies Commerce used in valuing wood chip offsets. In evaluating that claim, the appropriate starting point is Article 2.2.1.1 of the AD Agreement. As we noted in discussing allocation of G&A expense, that provision does not prescribe particular methodologies for calculating cost of production. However, Article 2.2.1.1 does state that investigating authorities shall normally rely on a producer's records, provided that they are kept in accordance with generally accepted accounting principles and reasonably reflect costs associated with production and sale of the product under consideration. For both of the companies at issue, that is precisely what Commerce did.

West Fraser Wood Chips

70. Wood chips have no independent cost associated with their production, because they are a by-product of lumber production. The task for Commerce was to identify a reasonable value for this by-product. In determining a wood chip offset for respondent West Fraser, Commerce reviewed West Fraser's sales to affiliated entities and compared that information to data on West Fraser's sales to unaffiliated parties, as a benchmark. The benchmark was used to determine whether sales to affiliated entities were at market prices and to make adjustments as appropriate.

71. Arguing that this valuation method was in violation of the AD Agreement, Canada claims that West Fraser's sales volumes to unaffiliated entities were "tiny."[44] On the contrary, the amounts of chips sold by the McBride and Pacific Island Mills were significant in terms of tonnage and value.[45] West Fraser never argued that the quantity of wood chips sold cast doubt on the reasonableness of the value of those sales as a benchmark during the investigation. So long as the wood chip transactions

[42]*See* Canada's First Oral Statement, para. 94.
[43]*See id.* at para. 93.
[44]Canada's First Oral Statement, para. 109.
[45]*See* US First Written Submission, para. 219, n. 251; West Fraser Cost Verification Exhibit C5, WF-Cost-007503 (Exhibit CDA-106).

were commercial in nature, the actual volume of those transactions is irrelevant. As the United States explained in its First Written Submission, Canfor argued that some of its transactions were not commercial in nature, and Commerce agreed with that assessment of those transaction and did not use values derived from those transactions in its calculations. West Fraser, on the other hand, never made such an argument.[46]

72. Canada's arguments ignore the preference in Article 2.2.1.1 for basing cost calculations on a company's own records. If West Fraser's records were somehow not representative of its sales, then West Fraser had an obligation to demonstrate that fact. It did not do so.

Tembec Wood Chips

73. Tembec, unlike West Fraser, had no sales of wood chips to affiliated parties. Instead, it had inter-divisional sales, which Commerce determined to be a reasonable basis for determining the value that Tembec attributed to wood chips. Article 2.2.1.1 obligates investigating authorities to use the books and records of an investigated party in calculating costs if the value on the books and records reasonably reflects a cost of production. The same obligation holds true for the valuation of a by-product for purposes of an offset. Canada challenges Commerce's use of Tembec's actual valuation of wood chips, and states a preference for using another value. However, the fact that Tembec's market transactions were valued higher than Tembec's interdivisional transfers does not undermine the reasonableness of the value Tembec itself assigned to the by-products. Commerce reviewed these amounts, and consistent with its obligations under Article 2.2.1.1 of the AD Agreement, it used these figures.

74. Canada argues that Commerce should not have relied on Tembec's records, because those records showed that inter-divisional transaction values were arbitrary.[47] However, contrary to Canada's assertion, Commerce made no such determination, and the evidence does not support that claim. In the end, Canada asks this Panel to determine, in effect, that Tembec's own valuation data were arbitrary, and that Commerce's rationale for using these data violated the AD Agreement. The facts of the record do not support such a finding.

Slocan's Profits from Futures Trading Contracts

75. Canada argues that Commerce failed to properly account for profits from respondent Slocan's sales of lumber futures contracts. But, as the United States said in paragraph 247 of its First Written Submission, Slocan only requested two alternative treatments for these profits: (1) adjustment to direct selling expense and (2) offset to financial costs. If there was a third way to treat them – as indirect selling expenses – that claim was never made.

76. Slocan unambiguously stated that the hedging profits should be treated as an adjustment to direct selling expenses in the US market for differences in the conditions and terms of sale.[48] However, the facts demonstrated that these profits were not direct selling expenses. They were not directly related to particular softwood lumber sales.[49]

77. We disagree with Canada's suggestion (First Oral Statement, paragraph 121) that Article 2.4 does not require a price adjustment to be directly related to the actual sales transaction being compared. An adjustment cannot be demonstrated to affect price comparability, as required under

[46]*See* US First Written Submission, para. 225, n. 268.

[47]Canada's First Written Submission, para. 260.

[48]*See* Slocan 23 July 2001 Section B, C, & D Questionnaire Response, C35-37; in the same submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.

[49]*See* Slocan Cost Verification Report at 26 (CDA-118); *see* Final Determination, Comment 21 (CDA 2).

Article 2.4, if it is not related to an actual transaction. If Slocan's futures contracts were indirect selling expenses, Slocan had an obligation to make that claim, which it did not.

78. Slocan also asked that its hedging profits be treated as an offset to financing costs. However, as an accounting matter, Slocan's own books and records treated the profits at issue as a type of lumber revenue, albeit revenue that was not generated by actual sales of softwood lumber. Therefore, it would have been inappropriate for Commerce to disregard Slocan's own treatment of the profits as linked somehow to lumber sales and instead treat them as offsets to cost of production.

79. Next, the United States addresses certain specific and incorrect allegations made by Canada in its Oral Statement.

- **First Oral Statement, paragraph 18**

80. Canada's claim in paragraph 17 of its First Oral Statement that the application did not contain "actual transaction information" is incorrect. For elaboration on this issue, see US Response to Question 14. Canada's suggestion that acceptance of the application was not something "an objective investigating authority assessing the evidence" would have done is also incorrect. The AD Agreement does not require that the application contain information beyond what is sufficient to support initiation.

- **First Oral Statement, paragraph 20**

81. Canada's claim that the United States "cannot credibly argue . . . that Commerce conducted an objective further examination of the information provided in the application" ignores the record evidence regarding Commerce's "further examination" of the application.[50] Instead, Canada bases this charge on the premise that, had Commerce conducted an "objective further examination, it would have discovered that the Petitioner was holding back extremely important and relevant evidence." As explained in the US First Written Submission, because the experience of one company could not have negated evidence of dumping by other companies, the Weldwood data could not have had the significance Canada attaches to it.[51]

- **First Oral Statement, paragraph 29**

82. Weldwood placed certain sales data on the record when seeking to be considered a voluntary respondent in the investigation. The fact that the United States did not analyze this data cannot justify Canada's suggestion that Commerce remained "willfully blind to evidence which would throw the applicant's application into doubt." The United States demonstrated, at paragraphs 65-69 of its *First Written Submission*, that the Weldwood data could have shown, *at most*, that Weldwood was not dumping. It could not have negated the evidence of dumping in both eastern and western Canada contained in the application. As such, the Weldwood data could not reasonably be described as "evidence which would throw the applicant's application into doubt." Commerce did, in fact, decline to analyze the data submitted by Weldwood after initiation. As a practical matter, Commerce could only analyze data from six out of the hundreds of Canadian softwood lumber producers. It chose which companies' data to analyze according to the value of exports to the United States. Documentation regarding Commerce's handling of the Weldwood data remained part of the case record throughout the investigation.[52]

[50]*See* US First Written Submission, paras. 63-64 and the documents cited therein.
[51]*See* US First Written Submission, paras. 70-76.
[52]*See* Exhibit US-64.

- **First Oral Statement, paragraph 79**

83. Canada continues to claim that the United States failed to consider Abitibi's evidence relating to financial costs and asset values. This is incorrect. Commerce explains why it rejected Abitibi's argument in the Final Determination, Comment 15. Specifically, Commerce explained that it did not accept Abitibi's basic premise that interest costs could be tied to particular expenditures. In addition, Commerce explained that the methodology actually used accounted for the varying asset levels through depreciation costs.[53]

- **First Oral Statement, paragraph 89**

84. Canada argues that the United States was factually incorrect when it stated that Tembec's "divisional G&A" had to be supplemented with "headquarter G&A." Canada is incorrect. Canada stipulated in its First Written Submission that Tembec's suggested G&A methodology required the allocation of some portion of "headquarter G&A" to Tembec's softwood lumber division.[54] Thus, Tembec's methodology was not only based on the unaudited amount of G&A that Tembec claims was specific to the softwood lumber division, it also included an unaudited amount for "headquarter G&A."

- **First Oral Statement, paragraph 90**

85. Canada claims that Tembec's "division specific" G&A was in accordance with Canadian GAAP. This is an unsubstantiated claim. Moreover, the only evidence on the record indicates that this "division specific" G&A was *not* audited.[55] Commerce's methodology, in contrast, is based on an allocated portion of the G&A found in Tembec's audited financial statement. Thus, Commerce's methodology is in accordance with Article 2.2.1.1. Moreover, Tembec's methodology contradicts the most basic definition of general costs, which are costs incurred on behalf of an entire company, rather than a particular product.[56]

- **First Oral Statement, paragraph 94**

86. Canada claims that Weyerhaeuser did not report its litigation cost as a general cost to the company. Canada is incorrect. The US discussion of Weyerhaeuser at paragraphs 64-67 explains Commerce's basis for finding that Weyerhaeuser reported the litigation cost as a general cost.

- **First Oral Statement, paragraph 95**

87. Canada incorrectly asserts an absence of factual information that Weyerhaeuser's litigation costs were properly allocable to softwood lumber. The US discussion of Weyerhaeuser at paragraphs 64-67 explains Commerce's basis for finding that the litigation cost was a general cost.

- **First Oral Statement, paragraph 105**

88. Canada claims that Commerce "ignored the record evidence of prices at which Tembec's pulp mills in Ontario and Quebec purchased wood chips from affiliated suppliers." In fact, in the Final Determination, Commerce specifically addressed those transactions, explaining that "the documentation presented at verification" that contained these prices was "selectively provided by

[53]*See also* US First Written Submission, para. 194.
[54]*See* Canada's First Written Submission, para. 209.
[55]*See Tembec's Annual Report, "Auditors Report,"* p. 34 (Exhibit US-12 at 3).
[56]Joel G. Siegel and Jae K. Shim, *Dictionary of Accounting Terms* (Barron's Educational Services, Inc. 2nd ed. 1995) (Exhibit US-47).

companies and not based on a sample chosen by the Department."[57] Commerce added that "these comparisons represented only a portion of the total wood chip purchases by [Tembec]'s pulp mills and there is no record evidence to determine what the results might be if all mills were included."[58]

- **First Oral Statement, paragraph 116**

89. Canada claims that Commerce "unreasonably disregarded certain sales by West Fraser as 'inflated' even though it verified that those sales reflected market prices." Commerce never verified that those sales reflected market prices. In fact, it affirmatively determined that those affiliated sales did *not* reflect market prices.[59]

- **First Oral Statement, paragraph 120**

90. Canada argues that Commerce rejected the Slocan futures profit data despite evidence that the data related to lumber. See the US answer to Question 82 for a discussion of Commerce's thorough evaluation of the facts.

42. Please explain the methodology used with respect to treatment of by-product revenue offsets, and the manner in which by-product revenues were offset in the case before the Panel.

91. In the process of manufacturing softwood lumber, wood chips are produced. These wood chips are minor in value when compared to lumber or joint products from the lumber production process, and they have no independent cost associated with their production. Therefore, by definition, they are by-products. These wood chips are subsequently sold by lumber sawmills to pulp mills through different types of transactions. Tembec's sawmills sold wood chips to Tembec's pulp mills through interdivisional transactions – sales within the same company. West Fraser, on the other hand, sold wood chips to affiliated pulp mills. Finally, both Tembec and West Fraser sold wood chips to mills with which they had no corporate relationship whatsoever.

92. In calculating a company's cost of production of softwood lumber, Commerce will offset the total pool of joint lumber production costs by revenue from wood chip sales. Article 2.2.1.1 of the AD Agreement states that investigating authorities have an obligation to use a company's books and records in its cost calculations if those books and records reasonably reflect the cost of production. This also applies to the valuation of an offset to the cost of production calculation. For purposes of the by-product offset, Commerce will use the actual valuation of a by-product from a company's books and records, unless it believes that amount does not reflect a reasonable valuation of that by-product. In the case of the six respondents in the investigation, Commerce used the valuation for wood chips recorded by all of the companies except West Fraser.

93. West Fraser had sales to affiliated pulp mills and unaffiliated pulp mills. Unlike Tembec, it had no interdivisional transfers of wood chips. In evaluating sales to affiliated entities, Commerce applies as a benchmark sales to unaffiliated entities. In this way, Commerce determines whether an amount reported for an affiliated sale is a reasonable reflection of the actual cost of production (or actual value of a by-product in the case of a by-product offset). In the case of West Fraser's Alberta transactions, because these sales of wood chips involved affiliated parties, Commerce compared them to West Fraser's unaffiliated sales in Alberta and determined that the prices of wood chips in affiliated sales were appropriate to use in its calculations. With respect to the British Colombia transactions, Commerce reviewed West Fraser's unaffiliated transactions within British Colombia and found them to be commercial transactions that reflected a market value. It then reviewed West Fraser's affiliated

[57]Final Determination, Comment 11 (Exhibit CDA-2).
[58]Final Determination, Comment 11 (Exhibit CDA-2).
[59]US First Written Submission, para. 220 and exhibit cited therein.

transactions and determined that the prices for wood chips paid by the affiliated parties did not reasonably reflect a market value for wood chips. Thus, Commerce removed the affiliated valuations in its calculations for West Fraser's sales in British Columbia and valued them with the price of wood chips in West Fraser's unaffiliated transactions.

94. Canada now argues that Commerce should have used the prices for West Fraser's affiliated transactions, because most of the transactions in British Columbia were with affiliated parties. Canada also argues that some of the unaffiliated transactions (from the McBride mill) were subject to a contract that kept prices constant. However, Canada does not discuss the commercial validity of the rest of the transactions (from the Pacific Island Resources mill).

95. West Fraser's total unaffiliated transactions involved a significant tonnage of wood chips to separate unaffiliated parties, with a significant commercial value.[60] However, it is not the volume of the transaction that makes it a market based transaction, but the commercial setting and the details surrounding the sale. In this case, West Fraser did not argue that its unaffiliated transactions were either too small or not market-based. Thus, Commerce determined that there was no reason to question the representativeness of these transactions, and it used the wood chip prices from these transactions to value West Fraser's by-product offset in its production costs.

96. With respect to Tembec, Canada claims that Commerce should not have used Tembec's interdivisional wood chip valuations, because Commerce (allegedly) verified that these prices were arbitrary and that Tembec's market sales were larger than its interdivisional sales. As Commerce explained in the Final Determination and the US First Written Submission, Commerce never verified that Tembec's interdivisional values were arbitrary,[61] and to the contrary, actually determined that Tembec's interdivisional value for wood chips reasonably reflected a value for that by-product.[62]

97. In determining a "reasonable" amount for valuing the *by-product offset* in interdivisional transactions, Commerce uses the same methodology that it uses for valuing *costs* in interdivisional transactions. As a standard corporate practice, interdivisional transfer values reflect actual costs of production (since the company does not need to include a profit in its price to itself). With respect to by-products, absent any independent costs, Commerce normally takes the internal value assigned by the company to a by-product as a surrogate for an appropriate value for the by-product, and then tests that value for reasonableness, as done here. Because Commerce normally values interdivisional transfers at actual cost, which is less than market value (because of the existence of profit in market value), a value assigned to a by-product is also commonly less than market value.

98. Canada argues that this makes no sense, because if a by-product has no cost, then there can be no "profit." However, even a by-product with no independent cost can be assigned a company's best assessment of a surrogate for cost. This is what Tembec did when it set its internal transfer price.

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[60]West Fraser Cost Verification Exhibit C5, WF-Cost-007503 (Exhibit CDA-106).

[61]When evaluating Tembec's British Columbia sawmills, Commerce stated:

> We compared Tembec's British Columbia ("BC") sawmills' internal transfer prices for wood chips to the BC sawmills' wood chip sales prices to unaffiliated purchasers (i.e., BC market prices). *We found that the company's internal transfer prices did not give preferential treatment to the sawmills. Thus we relied on their normal books and records for the final determination.* (Emphasis added).

DOC Memorandum on Tembec Cost Calculation Adjustments for the Final Determination (21 March 2002), at 2 (Exhibit US-58).

[62]In the Final Determination, Commerce "analyzed the wood chip sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices (were) reasonable." Final Determination, Comment 11 (Exhibit CDA-2). Pursuant to this analysis, it found that the weighted average transfer price between Tembec's own British Colombia sawmills and pulp mills was a reasonable surrogate for the actual cost of wood chips, and it therefore used this number as Tembec's by-product offset. *Id.*

There are no easy methods to assess value under such conditions, but Commerce examined Tembec's assessment and found that it was reasonable. Tembec set an internal surrogate for cost, and it also had an external market price; the difference between the two is the equivalent of "profit" in the normal setting where costs and sales prices are known.

99. Given these inherent difficulties, and contrary to Canada's analysis that there could be no "profit," there also has not been an "arbitrary" valuation, because Commerce used the company's own valuation data to make its determination of a "reasonable" figure for a by-product offset.

> **43. When addressing Canada's company-specific issues relating to the determination of the SG&A expenses of Abitibi, Tembec and Weyerhaeuser, please explain which of the methodologies were applied by DOC to calculate the general and administrative expenses of Abitibi, Tembec and Weyerhaeuser and how they are consistent with the provisions of Article 2.2.2 of the Anti-Dumping Agreement.**

100. In answering this question, the United States will first provide a general description of its SG&A methodology.

101. In order to calculate SG&A, Commerce calculates selling costs, general and administrative costs, and interest costs. Direct selling costs, such as commissions, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question are assigned on a sales-specific basis to the extent possible.

102. Indirect selling costs, which do not result from a particular sale (*e.g.*, salesman's salaries, office supplies) are allocated over all sales made by the sales unit incurring the costs, on the basis of sales value.

103. Other than financial costs, general and administrative (G&A) costs for the like product are allocated to all sales by the producer, through application of a G&A ratio. The producer's total G&A is divided by the producer's total cost of goods sold. If the producer is part of a consolidated entity, Commerce includes in the calculation that portion (ratio) of the parent company's G&A pertaining to the producer under investigation. The resulting quotient is the G&A ratio and represents the amount of G&A incurred for each dollar of production cost. The G&A ratio is applied to the total cost of production of the like product in order to determine the non-financial general and administrative costs pertaining to the production of the like product.

104. Financial costs are also allocated to all sales by the producer (through a financial cost ratio). The producer's total interest cost is divided by the producer's total cost of goods sold. Because money is fungible, a dollar borrowed is not identifiable with any particular product within a company. For example, money borrowed by a company producing several different products may be expended as easily on lumber production as it is on paper production. Accordingly, in calculating the financial cost ratio, Commerce starts at the highest level of corporate consolidation. Thus, if a corporate entity consisted of a parent and several subsidiaries, Commerce would calculate its financial cost ratio based on the total financial cost reported on the parent's consolidated financial statement divided by the parent company's total cost of goods sold. The resulting quotient is the financial cost ratio and represents the financial costs the producer incurs for each dollar of production cost. The financial cost ratio is applied to the total cost of producing the like product in order to determine the financial costs pertaining to the production of the like product.

105. Commerce employed the methodology described above in calculating G&A costs for Abitibi, Weyerhaeuser, and Tembec. As this methodology was based on the actual cost data provided by Abitibi, Weyerhaeuser, and Tembec and was like product specific (*i.e.* the financial cost ratio and the G&A ratio were applied to the cost of producing softwood lumber), this methodology is fully consistent with the chapeau of Article 2.2.2, and with Article 2.2.1.1.

To both parties:

44. What obligations does Article 2.2.1.1 impose: 1) in general on investigating authorities, and 2) with respect to the determination of by-product revenue offsets?

106. Article 2.2.1.1 establishes obligations on investigating authorities with respect to their consideration and use of cost data provided by respondents in an investigation. It states that it is "[f]or the purpose of paragraph 2", which means that, in the context of Article 2.2, it covers "*cost* of production" and also "a reasonable amount for administrative, selling and general *costs*." In particular, investigating authorities are directed by this provision to:

(1) calculate costs normally 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;

(2) consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer. Emphasis should be placed on that evidence which establishes appropriate amortization and depreciation periods and allows for capital expenditures and other development costs; and

(3) adjust appropriately for non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations (unless already reflected in the cost allocations).

107. Article 2.2.1.1 provides no specific guidance on the question of determining the reasonableness of the costs of by-products or by-product offsets.[63] It speaks more generally to the cost of production of the product under investigation. Where an exporter's cost records in accordance with GAAP include a revenue offset, calculating a by-product offset can be a necessary step in calculating the cost of producing the product under consideration. The general guidance in Article 2.2.1.1 applies to each of the particular steps in calculating cost of production, including calculation of a by-product offset.

45. For the terms "actual data pertaining to production and sales (…) of the like product" in Article 2.2.2, please explain the application of this sentence <u>in general</u> and in light of the company-specific issues <u>in this case</u>.

108. The chapeau of Article 2.2.2 expresses a preference for basing the amounts for administrative, selling and general costs and for profits on the actual amounts that pertain to the production and sale in the ordinary course of trade of the like product. If a producer's actual data pertaining to the production of the like product is not available, or if sales of the like product have not been in the ordinary course of trade, Article 2.2.2 provides three alternative methodologies for calculating SG&A and profit.

109. Abitibi, Tembec, and Weyerhaeuser reported actual general and administrative costs that were incurred on behalf of each company. As these general and administrative costs, by definition, were

[63]Indeed, the United States notes that the AD Agreement contains no requirement to make a by-product offset. The only issue is the extent to which an investigating authority has found that the cost records for production of the product under consideration are a reasonable reflection of the costs associated with such production. It becomes an issue, in most cases, where the GAAP of the exporting country allows an exporter's records to use the by-product revenue as an offset.

incurred on behalf of each company, in their entirety, they pertained, in part, to the production and sale of the like product for each company. Therefore, a portion of each producer's actual costs was allocated to the like product by applying the G&A and financial cost ratios to the cost of manufacturing the like product. Because the selling, general, and administrative costs were based on each producer's actual data, sales were in the ordinary course of trade, and the costs pertained to the like product, these costs were calculated consistently with the chapeau of Article 2.2.2.

46. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?

110. Article 2.2.1.1 and Article 2.2.2 relate to the obligations of investigating authorities in calculating a producer's cost, including for purposes of determining whether the producer is selling below the cost of production and also constructing a normal value. Article 2.2.2 addresses administrative, selling and general costs and profit in particular, while Article 2.2.1.1 addresses all cost calculations (including G&A). Article 2.2.2 expresses a preference for basing the calculation of administrative, selling, and general costs and of profits on the actual amounts that pertain to the production and sales in the ordinary course of trade of the like product and the actual profits realized. However, if a producer's actual data pertaining to the production of the like product cannot be determined on this basis, Article 2.2.2 provides alternative methodologies for calculating these costs. Article 2.2.1.1 expresses a preference for basing the calculation of all costs on the books and records of the producer, provided that those books and records are kept in accordance with the GAAP of the country of production and that they reasonably reflect the costs associated with the production and sales of the like product. Thus, while both provisions express a general preference for costs to be calculated on a producer's data pertaining to or associated with the like product, Article 2.2.1.1 clarifies what kind of data an investigating authority is obligated to consider (*i.e.*, books and records kept in accordance with the GAAP of the country of production and that reasonably reflect the cost associated with the production and sales of the like product).

G.2 Calculation Financial Expenses of Abitibi

To Canada:

47. Please comment on the statements contained in p. 77 of DOC's Memorandum of 21 March 2002 (Exhibit CDA-2):

> **"[t]he Department'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."**

111. As the quoted passage indicates, Commerce's methodology reflects asset values, because the cost of goods sold, upon which financial costs are allocated, as well as the cost of manufacturing the like product to which the financial cost ratio is applied, both include depreciation values. Canada argues that because certain types of assets are not depreciated (*e.g.*, land and goodwill), Commerce's methodology is unreasonable.[64] However, the vast majority of Abitibi's assets (approximately C$8 billion out of C$11 billion in total assets) were "capital assets" and were represented in Commerce's financial cost methodology through depreciation costs.[65] Moreover, contrary to

[64]*See* First Oral Statement of Canada, para. 84.
[65]*See Abitibi 2000 Consolidated Financial Statement*, p. 35 (Exhibit CDA-82).

Canada's assertion in its *First Oral Statement* (paragraph 84), Commerce included an amortized portion of goodwill in Abitibi's cost of production.[66]

G.3 alculation of G&A Expenses of Tembec

To the US:

56. In paragraph 200 of its *First Written Submission*, the US states that:

> **"Commerce determined that, because the division-specific amount at issue was unaudited, it was inherently less reliable than audited books and records that had been certified to be consistent with Canadian GAAP. There was greater certainty that audited GAAP-consistent books and records would "reasonably reflect the costs." Second, Commerce determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses." (footnotes excluded)**

Could the US please direct the Panel to where <u>on the record</u> did DOC make such determinations? Please provide <u>detailed</u> references to relevant portions of documents as well as copies thereof.

112. Commerce recognized in its Final Determination that Tembec reported its G&A based on an "internal accounting methodology" rather than on its audited financial statements.[67] Commerce also stated that it was employing its standard G&A methodology in order to avoid "any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionately between divisions."[68] Finally, Commerce noted that its standard G&A methodology "is consistent with Canadian GAAP's treatment of such period costs. . ." Commerce's decision to reject this unaudited G&A amount was reasonable, because an unaudited amount is of questionable reliability. The importance of the reliability of cost data is clearly recognized in Article 2.2.1.1, which states that an investigating authority should normally consider only those books and records that are kept in accordance with the GAAP of the country where the like product is produced and reasonably reflect the cost associated with the production and sale of the like product.

113. Commerce also recognized in its Final Determination that, consistent with the definition of "general costs," G&A relates to the company as a whole rather than a particular product. Commerce stated that its methodology was consistent "with the general nature of [G&A] expenses and the fact that they relate to the activities of the company as a whole rather than a particular production process."[69] Tembec's methodology contradicts this basic definition and is based on the unsubstantiated premise that general and administrative costs are incurred primarily on a divisional level.

[66] Final Determination, Comment 16 (Exhibit CDA-2).

[67] *Id.* at Comment 33; *see also* Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc., p. 26 (29 January 2002) (Exhibit US-73) (stating that Commerce tied Tembec's G&A costs to the audited financial statements).

[68] *See* Final Determination, Comment 33.

[69] *Id.*

57. Could the US please indicate which of the methodologies in Article 2.2.2 did DOC use to determine the SG&A for Tembec?

114. Commerce determined Tembec's SG&A under the chapeau of Article 2.2.2. As discussed in the answer to Question 43, Commerce calculated Tembec's G&A by applying the company-wide G&A ratio to the cost of manufacturing of the like product.[70] The resulting amount represents the G&A cost that pertains to Tembec's production and sale of the like product. As Commerce's methodology relied on Tembec's own data and calculated SG&A specific to the like product under investigation (*i.e.*, the G&A ratio was applied to the cost of manufacturing the like product), it is fully consistent with the chapeau of Article 2.2.2. Given the availability of Tembec's actual data pertaining to the production of the like product, there was no basis for Commerce to use the other methodologies available under Article 2.2.2(i), (ii), and (iii).

G.4 Calculation of G&A (Legal Costs) of Weyerhaeuser

To Canada:

58. Could Canada please direct the Panel to where in the record it can find Weyerhaeuser's arguments on the treatment of certain legal settlement claims incurred by Weyerhaeuser US. Please include references to documents on the record, identifying with precision where on the document Weyerhaeuser's argument are to be found. Also provide a concise summary of Weyerhaeuser's arguments.

115. One place on the record in which the Panel can find Weyerhaeuser's arguments on this legal settlement issue is in the Final Determination, Comment 48b (Exhibit CDA-2), where Weyerhaeuser's arguments, those of the petitioners, and Commerce's decision are fully summarized. This discussion reflects Commerce's consideration of all of the arguments and evidence before reaching its determination.

To the US:

61. In para. 227 of its *First Written Submission*, Canada states that:

> **"[w]ithout providing any citations or evidence to support its conclusion, DOC simply stated that it "typically allocates business charges of this nature over all products because they do not relate to an {sic} production activity, but to the company as a whole."" (footnote omitted)**

Could the US please comment on the above statement. In particular, could the US explain in detail how DOC came to the conclusion that it was justified to reject Weyerhaeuser's request for exclusion of certain legal settlement claims and direct the Panel to where in the record it could find the relevant DOC motivation?

116. In response to this question, the United States refers the Panel to the discussion of "Weyerhaeuser G&A" in the US response to Question 41, paragraphs 65-67.

62. With respect to Weyerhaeuser's arguments relating the treatment of legal settlement costs, it is stated in DOC's Memorandum of 21 March 2002 (Exhibit CDA-2) that:

> **"[w]hile the costs relate to non-subject product, hardboard siding, the Department typically allocates business charges of this nature over all**

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

> **products because they do not relate to an (sic) production activity, but to the company as a whole."**

In para. 211 of the US *First Written Submission*, it is stated that:

> **"[a]s in that case, the nexus here between the litigation costs at issue and production of the product at issue (hardboard siding) was attenuated."**

In light of DOC's finding, could the US explain what the term "was attenuated" means in this context? In replying to this question, could the US please refer to documents/evidence on the record. Please describe and motivate your standard practice.

117. In describing the relationship between the litigation costs and the production of hardboard siding as "attenuated," the United States was stressing that any relationship was weak at best. As explained in the US answer to Question 41, not only were these litigation expenses not of the type that are production costs (*i.e.*, the litigation does not make or help to make a product), but the expense was incurred anywhere from one year to as long as eighteen years after production and sale of the products at issue.

118. Canada's argument confuses a cost being (possibly) associated with a product and a cost being related to the *production* of a product. The mere fact that litigation was about hardboard siding does not mean that the litigation cost was a cost of producing hardboard siding.

119. When the United States used the word "attenuated," it was describing the weak link between the litigation and the cost of producing hardboard siding. The United States was underscoring the point that a long separation between production of a good and the incurring of a litigation expense associated with the good argues strongly against allocating the expense to the current cost of producing that good.

63. In Egypt – Steel Rebar, the panel found that a "relationship test" is articulated in, inter alia, Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement. Could the US please comment on this? Is the US of the view that the fact that certain costs are found to be part of the general and administrative expenses of a company allows an investigating authority to automatically allocate a portion of such costs to the like product, or is the investigating authority obligated to establish a relationship between those costs and the production and sale of the like product?

120. Article 2.2.2 of the AD Agreement requires that amounts for administrative, selling, and general costs be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." Article 2.2.1.1 requires that costs (including G&A costs) normally be calculated on the basis of an exporter or producer's records where, *inter alia*, those records "reasonably reflect the costs associated with the production and sale of the product under consideration." The *Egypt–Steel Rebar* panel characterized these provisions as setting forth a requirement that there be a "relationship" between the interest income at issue (which typically would be considered as part of G&A cost) and the costs of producing and selling the product under consideration.[71]

121. The United States does not disagree with the general proposition that the words "associated with" and "pertaining to" suggest some relationship between G&A costs and costs of producing and selling the product under consideration. Where the United States disagrees with the *Egypt-Steel Rebar* report, as the US understands it, is in the degree of relationship required. The panel in *Egypt-*

[71] *Egypt–Steel Rebar*, para. 7.393.

Steel Rebar appeared to require that a given item of G&A expense – in that case, an offset to short-term interest expense – be related *exclusively* to production and sale of the product under consideration in order for it to be includable in that product's cost of production.

122. It is important to recall the facts in *Egypt-Steel Rebar*. As the panel in that case observed, "[T]he calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation."[72] There, respondents were seeking an offset to cost of production for short-term interest earned during the period of investigation. The investigating authority found that the respondents had not shown a relationship between the interest earned and the costs of selling and producing rebar. The panel agreed, stating that it had not found "evidence of record that would demonstrate any relationship of short-term interest income to the cost of producing rebar."[73]

123. The panel in *Egypt–Steel Rebar* made a point of noting the respondents' failure to respond to the investigating authority's information requests.[74] It is, therefore, unclear what evidence would have satisfied the Panel of the existence of a relationship between short-term interest income and the cost of producing rebar. What is puzzling about the panel's finding is that it seems to require that an element of G&A cost (in this case, a short-term interest offset) be related exclusively to the production and sale of the product under consideration. It was not enough that the element was part of G&A for the company producing the product. This is where the United States disagrees with the panel's reasoning.

124. The degree of relationship between G&A and cost of selling and production apparently required by the *Egypt–Steel Rebar* panel runs contrary to the very concept of G&A. By definition, G&A costs consist of expenses incurred on a company-wide basis for the benefit of the company as a whole. In a company that produces multiple products, G&A costs are not exclusive to any one product. They are related to all of the products and are allocated accordingly.

125. A requirement that any given element of G&A cost be associated exclusively with a single product would lead to the absurd result of G&A cost never being allocable to a product where the producer has several different product lines. Plainly, Articles 2.2.1.1 and 2.2.2 do not require that absurd result.

126. In response to the second part of the Panel's question, the United States is of the view that the fact that certain costs are found to be part of the G&A expenses of a company allows an investigating authority to automatically allocate a portion of such costs to the like product. Because general and administrative expenses are incurred for the benefit of a company as a whole, including all lines of production, they necessarily pertain to each particular line of production.

G.5 Calculation By-Product Revenue Offset – West Fraser

To the US:

> **68. Please comment on the following statements contained in para. 242 of Canada's First Written Submission:**
>
> > **"[f]or DOC to have disregarded the costs set out in West Fraser's records, DOC was required to determine that those records did not reasonably reflect the costs associated with the production and sale of the product under consideration. DOC did not make such a determination."**

[72] *Id.*
[73] *Id.* at para. 7.426.
[74] *Id.*

127. Canada's assertion is incorrect. Commerce did determine that West Fraser's sales to affiliated parties did not reasonably reflect the costs associated with the production and sale of wood chips. Commerce reached this determination by comparing West Fraser's sales to affiliated parties with its sales to unaffiliated parties, as recorded in West Fraser's books. Having determined that West Fraser's sales to affiliates did not reflect market prices, Commerce used the average price for West Fraser's wood chip sales to unaffiliated customers to determine the value of the wood chip offset.[75]

G.6 Calculation of By-Product Revenues – Tembec

To Canada:

> **70. Please explain the statement contained in para. 261 of Canada's First Written Submission that:**
>
> > **"Article 2.2.1.1 of the Anti-Dumping Agreement reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets."**

128. Canada's statement is based on an incomplete reading of Article 2.2.1.1. The AD Agreement expressly provides that an investigating authority must ordinarily base cost calculations on an exporter or producer's books and records. This would include any valuation of the by-product reflected in the books and records of the producer or exporter, "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."

129. It is entirely possible that a given item in a company's books will reasonably reflect costs and still be lower than market price. This is because cost will not include factors such as profit and selling expense, which are elements of market price. Article 2.2.1.1 provides that cost calculations must reasonably reflect the *costs* associated with the production and sale of the product, not the market value of the product.

To the US:

> **74. Explain on which basis the different rules mentioned in para. 216 of the *US First Written Submission* are consistent with Article 2.2.1.1.**

130. In paragraph 216 of its First Written Submission, the United States discusses different methods for valuing a by-product. There are three different scenarios: transactions between unaffiliated parties, transactions between affiliated parties, and transactions between divisions of the same corporate entity. For a detailed explanation of Commerce's practice in each of these scenarios, see the US answer to Question 42, above.

G.7 Futures Contracts

To Canada:

> **79. Please comment on the findings contained in para. 6.77 of the *US – Stainless Steel* panel report:**
>
> > **"[i]n our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralize differences in a**

[75] Final Determination, Comment 11 (Exhibit CDA-2).

> **transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of prices within the meaning of Article 2.4." (footnote omitted)**

131. The passage cited in this question refers to differences between home market sales and export sales that may affect price comparability. It presumes that the seller has identified differences that affect particular sales. In this case, Slocan did not even show that the futures contracts at issue were terms and conditions related to particular sales of lumber in the United States. It did not demonstrate that the futures contracts amounted to a "difference" related to export sales, let alone a difference that affected price comparability.[76]

To the US:

> **81. Please comment on the following statement contained in para. 277 of Canada's First Written Submission:**
>
> > **"DOC could have treated the revenues as an offset to selling expenses, as an offset to financial expenses, or as some other circumstance of sale adjustment. DOC erred, however, when it failed to make any adjustment to account for revenue generated by futures contract revenues."**

132. Slocan requested only two alternative treatments for its futures contract profits. If there was a third way to treat them – as offsets to indirect selling expenses – Slocan did not make that claim.[77]

133. In its 23 July 2001 Questionnaire Response, Slocan unambiguously stated that the hedging profits should be treated as an offset to direct selling expenses in the US market, as an adjustment for differences in the conditions and terms of sale.[78] It stated: "Sometimes Slocan will sell its short positions and take the loss or profit between the sale and strike prices. These expenses or revenues are linked to Slocan's sales in the United States and so are being reported as direct selling expenses."[79] Slocan failed to explain the link between these expenses or revenues and any particular US sales of lumber. It also said nothing about how its contracts might affect prices to US customers. In the same

[76]It is evident from Slocan's financial statements that futures profits are just another source of income to the company. The record shows that, where no physical delivery of subject merchandise occurred, Slocan records the profits or losses from these futures contracts as a sales-type revenue in its books and financial statements. Slocan Case Brief at 70, n. 24 (Exhibit US-72). For all practical purposes in this case, since the revenue was not profit from the sale of lumber, it could just as easily have been revenue from the sale of another product. For example, profits from sales of pulp and paper in the United States are not a difference in conditions and terms of sale for lumber. Similarly, in this case, hedging profits are not tied to any sale of lumber.

[77]First, Slocan claimed that the futures contracts profits should be an offset to direct selling expenses. Commerce found that Slocan's futures contracts profits are not *direct* selling expenses, as they are not directly related to specific sales of softwood lumber. US First Written Submission, para. 250; Final Determination, Comment 21 (Exhibit CDA-2). Second, Slocan alternatively claimed that the futures contracts profits should be an offset to financing costs included in the calculation of Slocan's cost of production. Commerce found that Slocan's alternative argument also failed, because Slocan's own books and records recorded futures profits as sales revenues, not production expenses. US First Written Submission, para. 254; Final Determination, Comment 21 (Exhibit CDA-2).

[78]Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, 23 July 2001, pp. C35-37 (Exhibit US-71).

[79] *Id.* at pp. C-35-36 (Exhibit US-71).

submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.[80] The facts demonstrated that hedging profits were not direct selling expenses, because they were not directly related to particular softwood lumber sales.[81]

134. The United States disagrees with Canada's suggestion (First Oral Statement, paragraph 121), that Article 2.4 does not require a price adjustment to be directly related to the actual sales transaction being compared. An adjustment for alleged differences in conditions and terms of sale cannot be demonstrated to affect price comparability if it is not shown that the claimed difference is related to an actual transaction.[82]

135. In its statements to the Panel, Canada appears to have articulated a claim that is broader than the one Slocan made to Commerce. Slocan urged that its futures contract revenues warranted either an adjustment to "direct selling expense" or an offset to interest expense. Now, Canada argues that the revenues warranted an adjustment to "selling expense," significantly omitting the word "direct."[83]

136. Omission of the word "direct" effectively draws in indirect selling expense. However, Slocan never sought an adjustment to indirect selling expense. In fact, it stated that it had no indirect selling expenses in the United States.[84]

137. Under Article 2.4, Commerce had no obligation to make an adjustment that the respondent did not seek.[85] Article 2.4 requires that "due allowance" be made "in each case, on its merits" where a difference is "demonstrated" to affect price comparability. Since Slocan did not even make the argument for an adjustment to indirect selling expense, there was no basis for Commerce to determine that the merits warranted such an adjustment.

138. Slocan also had asked in the investigation that its hedging profits be treated as an offset to financing costs. However, as an accounting matter, Slocan's own books and records treated the profits at issue as a type of lumber revenue, albeit revenue that was not generated by actual sales of softwood lumber. Therefore, as noted in paragraph 246 of the US First Written Submission, it would have been inappropriate for Commerce to disregard Slocan's own treatment of the profits as linked, albeit indirectly, to lumber sales and instead treat them as offsets to cost of production.

82. Please explain how DOC treated Slocan's futures contracts revenues at issue before the Panel in the various stages of the investigation, including whether or not any form of adjustment was granted in DOC's Final Determination.

139. In its Preliminary Determination, Commerce found Slocan's futures contracts to be a type of investment activity. It did not grant an adjustment for direct selling expenses.[86] In a memorandum issued at the time of its Preliminary Determination, Commerce explained,

[80]*Id.* at pp. C-37 (Exhibit US-71).

[81]*See* Slocan Cost Verification Report at 26 (Exhibit CDA-118); *see* Final Determination, Comment 21 (Exhibit CDA-2).

[82]*See* Panel Report, *Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 Feb. 2001, para. 6.77.

[83]*See* Canada's June 17 First Oral Statement, para. 120; Canada's First Written Submission, para. 277.

[84]*See* Slocan's 23 July 2001 Section B, C, & D Questionnaire Response, p. C-37 (Exhibit US-71).

[85]*See* Panel Report, *Egypt–Steel Rebar*, para. 7.3 ("[W]here opportunities have been provided by the authority for interested parties to submit into the record information and arguments on [a] point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel.").

[86]Preliminary Determination at 56,069 (Exhibit CDA-11).

> In the field DIRSELU2 in the US sales database, Slocan has reported the profit or loss associated with sales made on the futures market. We concluded that this is an investment revenue, and should not be treated as a sales specific deduction/addition.[87]

140. Also, in its Preliminary Determination, Commerce treated the futures trading profits as an offset to financial expenses.[88] Following verification and further argument, Commerce reversed its treatment of the profits as an offset to financial expenses.[89]

141. Slocan disagreed with Commerce's Preliminary Determination regarding direct selling expenses, and argued the issue further in its briefs.[90] Also, Commerce's verifications determined that Slocan used futures contracts to hedge its sales in general, rather than specific transactions.[91]

142. In its case brief in response to the Preliminary Determination, Slocan argued that Commerce disallowed "an integral part of Slocan's US selling activity" by treating profits earned on futures contracts as investment revenue instead of as a selling adjustment.[92] Specifically, Slocan argued that because the company uses the futures market in an effort to protect itself from future downward price trends, Commerce was mistaken in believing that Slocan uses the market for strictly speculative purposes. Slocan stated that "since every futures contract entered into by Slocan with the CME [the Chicago Mercantile Exchange] carries with it the obligation to deliver the actual lumber specified in the contract at the time and place specified, Slocan at all times keeps track of the contracts in relation to its other selling activity, in order to be sure of having the ability to deliver the 'underlying Physical' out of its own inventory." Slocan also cited to Commerce's verification report to support its argument.[93]

143. Slocan argued that "the futures profits are more appropriately treated as short-term investments" and should be treated as an offset to the company's financial expenses. Slocan argued that this situation is "unique from previous situations in which the Department has disallowed investment income on the grounds that the income is not related to the operations of the company," because this income is not generated by investment; rather, this income results from Slocan's "regular lumber sales philosophy."[94]

Commerce concluded:

> **Department's Position**: Slocan's sales on the Chicago Mercantile Exchange (CME) can be divided into two categories: those that result in the shipment of subject merchandise, and those that do not. Any sales of subject merchandise that occurred during the POI as a result of a futures contract have been included in Slocan's reported sales list. However, we have not included in our analysis profits on the sale of futures contracts that did not result in the shipment of subject merchandise. Such profit is realized from Slocan's position on the CME and as a producer of softwood lumber, but not from its actual sale of subject merchandise.
>
> We also have not applied these profits as an offset to Slocan's direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs the Department to make circumstance of sales adjustments only for direct selling expenses and assumed expenses. Section 351.410(c)

[87]DOC Analysis Memorandum for Slocan Forest Products, Ltd. at 7, 30 October 2001 (Exhibit CDA-116).

[88]Preliminary Determination at 56,069 (Exhibit CDA-11).

[89]Final Determination, Comment 21 (Exhibit CDA-2).

[90]Final Determination, Comment 21 (Exhibit CDA-2); Slocan Case Brief at 69-72 (Exhibit US-72).

[91] *See* Cost Verification Report, Memorandum from Michael P. Harrison to Neal M. Halper, 21 February 2002, p. 26 (Exhibit CDA-118).

[92]Slocan Case Brief at 71 (Exhibit US-72).

[93]Final Determination, Comment 21 (Exhibit CDA-2); Slocan Case Brief at 71 (Exhibit US-72).

[94]Final Determination, Comment 21 (Exhibit CDA-2); Slocan Case Brief at 72 (Exhibit US-72).

defines direct selling expenses as "expenses . . . that result from and bear a direct relationship to the particular sale in question." Accordingly, where no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct selling expenses.

Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan's financial expenses. In support of this argument, Slocan disputes the Department's statement in its preliminary determination calculation memo that these profits are "investment revenues" by stating that Slocan is engaging in hedging rather then speculative activity, and that sales on the futures market are integral parts of the company's normal sales and distribution process. While we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity. As such, the futures profits should not be used to offset the company's interest expense.[95]

144. Accordingly, having heard the parties' arguments, verified the evidence, and evaluated the record for the Final Determination, Commerce did not accept either of Slocan's proposed adjustments.

83. The Panel notes the following statement contained in para. 249 of the US First Written Submission:

> **"[t]he adjustment that Canada claims should have been made here is an adjustment for conditions and terms of sale."**

On which basis does the US conclude that the adjustment that Canada claims, "should have been made here", is an adjustment for conditions and terms of sale?

145. The basis for the quoted statement is Slocan's request for an offset to direct selling expenses for sales of US lumber.[96] An adjustment for direct selling expenses, by definition, is a type of adjustment for differences in conditions and terms of sale.[97]

84. Could the US indicate whether DOC examined if the requested adjustment was justified under the following language of Article 2.4: "and any other differences which

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[95]Final Determination, Comment 21 (Exhibit CDA-2).

[96]Final Determination, Comment 21 (Exhibit CDA-2) ("[W]here no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct expenses.").

[97]Differences in circumstances of sale are the US law equivalent to the AD Agreement's reference to differences in conditions and terms of sale. Under US law, an adjustment for direct selling expenses is a sub-category of an adjustment for differences in circumstances of sale. Section 773(a)(6)(C)(iii) of the Tariff Act of 1930 (Exhibit CDA-7) deals with circumstances of sales adjustments:

(6) Adjustments. The price described in paragraph (1)(B) shall be...

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to

... (iii) other *differences in the circumstances of sale*. (Emphasis supplied).

The specific circumstances of sale adjustment that Slocan requested was for profits from futures contracts to be used to offset "direct selling expenses." Commerce's regulations, 19 CFR Section 351.410(c), define "direct selling expenses":

(c) Direct selling expenses. "Direct selling expenses" are expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear *a direct relationship to, the particular sale in question*. (Emphasis supplied).

are also demonstrated to affect price comparability"? If so, what were DOC's conclusions? Please identify the relevant documents on the record.

146. Commerce examined only those bases for adjustment that Slocan requested. The quoted text from Article 2.4 presumes a request for such an adjustment, as well as a demonstration of effect on price comparability. Absent both a request and a demonstration, there is nothing to examine. Article 2.4 does not require an investigating authority, independent of evidence and argument by an interested party, to find bases for a price adjustment. The only attempt Slocan made at a demonstration of effect on price comparability was with respect to direct selling expense. For the reasons described in our response to Question 81, Commerce found no effect on price comparability to have been "demonstrated" in this case.

ANNEX A-3

RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(30 June 2003)

1. Please comment on the findings contained in para. 7.3 of the Egypt – Steel Rebar panel report:

> **"the actions of an interested party during the course of an investigation are critical to <u>its</u> protection of its rights under the AD Agreement. As the Appellate Body observed in US – Hot-Rolled Steel, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "co-operation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

1. The EC notes from the outset that the Panel made its findings unrelated to any specific provision under the *Anti-Dumping Agreement* ("*AD Agreement"*) However, the exact obligations of the investigating authority and interested parties have to be determined on the basis of a relevant particular provision. In this respect overarching principles may have a certain bearing on the interpretation of a given obligation but they do not stand independently thereof.

2. This being said, the EC would recall that the Panel draw a distinction between two different sets of procedural obligations on an investigating authority:

- first, "those that are stated explicitly and in detail, and which have to be performed in a particular way in every investigation".

- second, "those that establish certain due process or procedural principles, but leave to the discretion of the investigating authority exactly how they will be performed."[1]

According to the Panel, the cited conclusions only apply to the second set of obligations.

3. The EC would caution on the accurateness of this distinction, in particular insofar as it would mean that general due process or procedural principles would not have any ramifications on explicit procedural obligations. Indeed, a detailed procedural obligation may be the concrete expression of the due process or good faith requirement and it may also be interpreted in the light thereof.

4. Turning to the specific Panel findings, the EC notes first that the Appellate Body's quotation from *US- Hot-Rolled Steel* was made in the context of Article 6 paragraph 8 in connection with paragraphs 2 to 5 of Annex II of the *AD Agreement* regarding the use of best information available as well as Article 6.13 of the *AD Agreement*. Yet, both provisions are not within the terms of reference of this Panel.

5. Second, the EC would be somewhat concerned by the Panel's statement that in case an interested party did not respond to a procedural obligation on the investigating authorities to "provide opportunities" to present evidence and or arguments, "there may be no factual basis in the record on which a panel could judge whether or not an 'opportunity' either was not 'provided' or was denied". Indeed, the EC would not endorse an interpretation of the Panel's statement according to which "adverse inferences" could be drawn from a "lack of factual basis" in the record concerning the provision or denial of an opportunity to present evidence or arguments. To the contrary, it would appear to the EC that in the case that an interested party did not respond a Member may generally be presumed to have acted in accordance with its treaty obligations and thus as having provided such a respective opportunity.

6. As to the last sentence of the Panel's findings, one has to distinguish two separate issues:

- first, under which conditions the investigating authorities may use best information available and

- second, the consequences of such use for the Panel proceedings.

7. As to the first aspect, Article 6.8 of the *Anti-Dumping Agreement* gives a proper indication on the use of best information available. The first sentence reads as follows:

> In cases in which an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

Thus, a prerequisite for the application of Article 6.8 of the *Anti-Dumping Agreement* is the non-cooperation of the interested party. Thus, an interested party has an interest in cooperating actively with the investigating authority.

8. With regard to the second aspect, the EC would caution that a Panel would be *per se* precluded in reversing an investigating authority's decision if best available information had been used. The standard of review for Panel proceedings under the Anti-Dumping Agreement is set out under Article 17.6(i). Yet, whether an investigating authority came to a conclusion on the basis of a

[1] Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, para. 7.2.

fully co-operative respondent or on the basis of best available information does not affect this standard. Indeed, even if an interested party did not cooperate, an investigating authority might have come to a conclusion on the basis of best information available that were in violation of the Anti-Dumping Agreement.

2. What obligations does Article 2.2.1.1 impose <u>in general</u> on investigating authorities?

9. Article 2.2.1.1 of the *AD Agreement* contains a general obligation on investigating authorities to rely primarily on the operator's record when calculating its costs. However, as evidenced in this article, this does not mean just any information by the operator but only those that meet certain standards, such as for instance the generally accepted accounting principles of the exporting countries. The ultimate purpose of Article 2.2.1.1 of the *AD Agreement* is, therefore, to reach a conclusion on costs that is as objective and reasonable as possible.

3. For the terms "actual data pertaining to production and sales (…) of the like product" in Article 2.2.2, please explain the application of this sentence <u>in general</u>.

10. Article 2.2.2 of the *AD Agreement* provides relevant guidance for the calculation of administrative, selling and general costs and for profits in case of a constructed normal value under Article 2.2 of the *AD Agreement.* The investigating authorities will use the respective data of the like product to the extent that they are available.

4. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?

11. Article 2.2.2 and Article 2.2.1.1 of the *AD Agreement* do both apply within the context of paragraph 2 regarding the calculation of costs. Specifically, Article 2.2.2 deals with costs in relation to SGA and profits in case of the construction of normal value whereas Article 2.2.1.1 of the *AD Agreement* is a sub-paragraph to Article 2.2.1 of the *AD Agreement.* This provision in turn is relevant for the question whether sales in the domestic market and to third countries are made in the ordinary course of trade.

5. Please comment on the statement contained in para. 185 of the US First Written Submission:

> **"[t]his Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as requiring use of particular methodologies."**

12. The EC would in principle agree with the US' statement. In this context, the Panel should also respect the limitations as set out in Article 17.6(i) of the *AD Agreement.* In the absence of specific requirements under the AD Agreement to use certain methodologies it is not for the Panel to make a *de novo* determination. However, this being said, the EC does not take a position for either side in this particular case.

6. Please comment on the statement contained in para. 221 of the US First Written Submission:

> **"[t]he AD Agreement is silent as to how to assess affiliated party transactions relating to costs."**

13. The US made its statement in the context of Article 2.2.1.1 of the *AD Agreement*. The EC would agree with the US that this provision does not provide any special rule for the assessment of costs of affiliated party transactions.

14. The objective of the cost calculation under Article 2.2.1.1 of the *AD Agreement* is to "reasonably reflect the costs associated with the production and sale of the product under consideration". However, it is clear that affiliated party transactions are often made at distorted prices thus not giving a proper guidance on the "real" costs as formulated under Article 2.2.1.1 of the *AD Agreement.* It may, therefore, be more reasonable to disregard them. Yet, the EC does not take a position whether in the present case the US correctly dismissed the information on affiliated sales at hand.

7. Please comment on the statements contained in para. 228 of the US First Written Submission:

> **"Canada asserts that Commerce's calculation of West Fraser's wood chip offset also violated its obligation to make a "fair comparison." This argument confuses obligations regarding determination of normal value with obligations regarding the comparison between normal value and export price. As the panel in Egypt - Rebar confirmed, Article 2.4 is concerned exclusively with the comparison between normal value and export price, not with determination of normal value." (footnote excluded)**

15. Without taking a position in this particular case, the EC considers that the first sentence of Article 2.4 of the *AD Agreement* is unequivocal. It reads:

> A fair comparison shall be made between the export price and the normal value.

Thus, on its face the comparison requirement under Article 2.4 of the *AD Agreement* does not concern the calculation of the normal value. This has also been confirmed in the Panel report *EC - Malleable fittings* where the Panel rejected Brazil' claim of a violation of Article 2.4 on the basis that:

> Brazil's arguments with respect to the calculation of constructed normal value in this case relate to the identification of normal value under Article 2.2 and 2.2.2, rather than to the requirement to ensure a fair comparison with export price under Article 2.4.[2]

[2] Panel Report, *EC-Anti-Dumping Duties On Malleable Fittings Cast iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, not yet adopted, para. 7.140.

ANNEX A-4

RESPONSES OF JAPAN TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. Please comment on the findings contained in para. 7.3 of the *Egypt – Steel Rebar* panel report:

> **"the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-Rolled Steel*, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

Reply

The authorities have general obligations to make efforts to collect from interested parties information that the authorities need for their dumping and injury determinations. For this purpose, the authorities must notify each interested party of information in detail, which the authorities need to receive. Article 6.1 of the AD Agreement provides that "all interested parties in an anti-dumping investigation shall be given notice of the information." Paragraph 1 of Annex II further provides "as soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party." The authorities may use facts available from other sources than the interested party, only where the party, whom the authorities made such request, "refuses access to, or otherwise does not provide, necessary information." *See* Article 6.8 of the AD Agreement. In this context, the Appellate Body stated that "cooperation is indeed a two-way process involving joint efforts," not a one-sided obligation on a responding party.

We would like to note that a Member may present to the panel its claims and arguments that parties in the investigation did not raise during the process of the investigation. Parties argue the

authorities' consistency with their national laws during the process of the investigation, while a Member claims and argues in a WTO dispute settlement consistency of the authorities' practice with the AD Agreement. Thus, claims and arguments in a WTO dispute settlement differ by its nature from arguments in the investigation process. It is particularly the case where the issue before the Panel is related to the administratively long-established and statutorily-approved rules, such as the zeroing, SG&A calculation, and revaluation of affiliated party transaction prices. The Appellate Body has confirmed this in *Thailand – H-Beams*[1], in which it has stated "it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute."[2]

2. What obligations does Article 2.2.1.1 impose <u>in general</u> on investigating authorities?

<u>Reply</u>

Article 2.2.1.1 imposes on the authorities general obligations that the authorities shall normally use a respondent's production costs as maintained in its accounting records for the calculation of costs and sales of the product under consideration. The term "normally" in the first sentence of this Article clarifies that this is the general rule, and there is an exception for this general rule. Article 2.2.1.1 provides the exception that the authorities may deviate their cost calculation from the respondent's recorded costs, if the recorded costs are either not in accordance with the generally accepted accounting principle ("GAAP") of the exporting country, or do not reasonably reflect the costs associated with the production and sale of the product under consideration. In other words, the authorities must find either of these two conditions is not met before the authorities decide to deviate their calculation of costs, or selling, general or administrative expenses from the respondent's accounting records.

The authorities' finding on either of these conditions must be based on all available evidence on the proper allocation of costs, including that that is made available by the exporter or producer.[3] In accordance with Article 17.6(i), such finding must be based on evaluation of facts in an unbiased and objective manner. Thus, in order for the authorities to exercise their discretion to apply an exception to a respondent, the authorities must establish in an unbiased and objective manner that the respondent's recorded costs do not reasonably reflect the production or sales of the product or are not in accordance with the GAAP.

The exercise by the authorities of such discretion is not unfettered. As discussed in our previous statements[4], the general principle of good faith instructs that the authorities must exercise their discretion in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party. The authorities would act inconsistently with the WTO Agreement, if the authorities would calculate costs of production of a respondent's product in a manner that gives disadvantage to the other interested party.

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[1] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams form Poland*, WT/DS122/AB/R, adopted on 12 March 2001.

[2] *Id*., at para. 94.

[3] *See* Article 2.2.1.1. of the AD Agreement ("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.")

[4] *See* Oral Statement of Japan at the First Substantive Meeting, Third Party Session, at paras. 2-4, 16-19. *See also* Third Party Submission of the Government of Japan, 19 May 2003, at paras. 24-27.

3. For the terms "actual data pertaining to production and sales (…) of the like product" in Article 2.2.2, please explain the application of this sentence in general.

Reply

The first sentence of Article 2.2.2 obliges the authorities to base per-unit SG&A on the "actual data" relating to sales by an responding party of like products in the exporting country, if the responding party's normal value is based on sales in the export country. If the normal value is based on sales to the third country, the authorities must base the SG&A on actual data relating to sales of like products to a third country. This sentence also instructs that the SG&A for the constructed value also must be based on the actual data.

"Actual data" under Article 2.2.2 conform to the provisions of Article 2.2.1.1 because such actual data can be found only in the respondent's accounting book.

This sentence, however, does not provide how the authorities shall allocate the "actual data" of SG&A to the product under consideration. The authorities must comply with provisions of Article 2.2.1.1 with respect to the allocation.

4. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?

Reply

The respondent's recorded costs under Article 2.2.1.1, as discussed in our answer to the question 2 above, mean the production costs calculated, and maintained, in the respondent's accounting records in accordance with its ordinary accounting methodologies. These methodologies include valuation, accumulation, and allocation of consumed raw materials, by-product credits, direct labour, and variable and fixed factory overheads, and SG&A. Valuation of by-products and per-unit value of finished product inventory as shown in the respondent's accounting records, for examples, are ones of respondent's recorded costs under Article 2.2.1.1.

As discussed in our answer to the question 3, the first sentence of Article 2.2.2 instructs that the authorities shall base SG&A on "actual data". Article 2.2.1.1 applies to the allocation methodologies of the SG&A.

5. Please comment on the statement contained in para. 185 of the US *First Written Submission*:

> **"[t]his Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as requiring use of particular methodologies."**

Reply

The authorities are required to accept a respondent's cost calculation methodology unless certain conditions are met, as discussed in our answer to the question 2 above. When such conditions are met, the authorities may exercise their discretion to calculate the per-unit cost of production of the product under consideration. The AD Agreement does not specify any particular methodologies that the authorities should use in such situations. Also as discussed in our answer to the question 2 above, however, the AD Agreement requires that the authorities exercise such discretion in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party.

6. Please comment on the statement contained in para. 221 of the US *First Written Submission*:

"[t]he AD Agreement is silent as to how to assess affiliated party transactions relating to costs."

Reply

Article 2.2.1.1 of the AD Agreement, as informed by Article 17.6(i) thereof and the general principle of good faith under the Vienna Convention of Law of Treaties, provides how the authorities shall assess the cost of production of the product under consideration. Please see our answer to the question 2 above for further discussion on this issue. In order for the authorities to revaluate the respondent's recorded affiliated party transaction value, therefore, the authorities first must find that such recorded value does not "reasonably reflect" the costs. Article 2.2.1.1, in conjunction with Article 17.6 (i) thereof and the general principle of good faith, further dictates that the authorities, upon such finding, must exercise their discretion to assess affiliated party transaction value in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party. The fact that Article 2.2.1.1 does not specify any particular methodologies relating to costs between affiliated parties does not relieve the authorities from these obligations.

As discussed in our previous submissions, the United States failed to exercise its discretion in an unbiased and objective manner in the anti-dumping investigation in question. First, the United States determined, erroneously, that the recorded value is unreasonable based only on the sales prices by respondents to affiliated parties and to unaffiliated party.[5] The United States ignored all other evidence showing other factors affecting sales prices to various purchasers, for example, sales volume, regions, and the terms and dates of the sales. Such determination is inconsistent with Article 2.2.1.1 in conjunction with Article 17.6(i), as the United States failed to evaluate all evidence in an unbiased and objective manner.

Second, the United States' exercise of its discretion to revaluate the affiliated party transaction value is also inconsistent with Article 2.2.1.1 of the AD Agreement in conjunction with Article 17.6(i) thereof and the general principle of good faith. As discussed in our previous submissions, the United States devaluated a respondent's recorded by-product value, when such value was based on sales price to affiliated parties, and was higher than the sales price to unaffiliated parties.[6] The United States did not revaluate the by-product value, which was based on sales prices to affiliated parties, if the value was lower than the sales price to unaffiliated parties.[7] By doing so, the United States exercised its discretion only to decrease the by-product value, accordingly, to increase the production cost of softwood lumber to create and increase the margin of dumping of the respondent. The US's exercise of the discretion in such manner was not even-handed, and did give unfair advantage to parties who have adverse interests to responding parties. If the United States were to exercise its discretion, it should have revaluated in both cases. The manner in which the United States exercised its discretion in connection with valuation of by-product, therefore, is inconsistent with 2.2.1.1. in conjunction with Article 17.6(i) and the general principle of good faith.

[5] US First Written Submission, at para. 219 ("Commerce applied its standard affiliated party transaction methodology to West Fraser, using West Fraser's own sales to unaffiliated parties as a benchmark.")

[6] *See, e.g.*, West Fraser's sales of wood chips to affiliated parties in British Columbia. *Final Determination*, Comment 11 (Exhibit CDA-2), as quoted in US First Written Submission, at para. 221.

[7] *See, e.g.*, West Fraser's sales of wood chips to affiliated parties in Alberta during the POI. *Id*.

7. Please comment on the statements contained in para. 228 of the US *First Written Submission*:

> **"Canada asserts that Commerce's calculation of West Fraser's wood chip offset also violated its obligation to make a "fair comparison." This argument confuses obligations regarding determination of normal value with obligations regarding the comparison between normal value and export price. As the panel in *Egypt - Rebar* confirmed, Article 2.4 is concerned exclusively with the comparison between normal value and export price, not with determination of normal value." (footnote excluded)**

Reply

We agree with previous panels in *Egypt – Rebar*, at para. 7.335, and in *Argentina – Poultry*, at para. 7.265, that Article 2.4 deals with a "fair comparison" between the export price and the normal value. The issue of Article 2.4 in connection with the revaluation by the United States of wood chip value, however, is moot because the establishment by the United States of the normal value is inconsistent with Article 2.2.1.1. The Panel, thus, does not need to reach the question on Article 2.4.

ANNEX B

PARTIES' RESPONSES TO QUESTIONS FROM THE SECOND MEETING

ANNEX B-1

RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(26 August 2003)

A. GENERAL QUESTIONS

To Canada:

> **85. In response to Question 1 of the Panel, Canada restated its claims. The Panel's understanding is that the claims contained in this restatement are the only claims that are before the Panel (Articles 5.2, 5.3, 5.8, 2.6, 2.4, 2.4.2, 2.2.1.1, 2.2.2, 2.2, 1, 9.3, and 18.1 of the *AD Agreement* as well as GATT 1994 Articles VI:1 and VI:2 – sequencing as per Canada's response to Question 1 of the Panel). Could Canada please confirm that the Panel's understanding is correct?**

1. In addition to the provisions of the *Anti-Dumping Agreement* and GATT 1994 cited by the Panel in Question 85, Canada retains its claims based on Article 5.1, Article 5.4 and Article 2.2.1, which were referred to in Canada's written answer to Question 1 from the Panel**.**

B. ARTICLE 5.2

To Canada:

> **87. The Panel notes that Canada has made a number of allegations on shortcomings of the data in the application in Section II of its Second Oral Statement. In Canada's view, does the examination it claims should have been done by the DOC, require a pre-initiation investigation?**

2. Canada's claims, as detailed in Section II of Canada's Second Oral Statement and Canada's previous submissions, do not require that an investigating authority conduct a pre-initiation investigation.

3. Article 5.3 obligates an investigating authority to examine the accuracy and adequacy of the evidence provided in an application and to determine whether there is sufficient evidence to justify initiating an investigation.

4. Commerce did not properly examine the accuracy and adequacy of the information provided in the Application and did not properly determine, based on the facts before it, that there was sufficient evidence to justify initiating this investigation. The *Anti-Dumping Agreement* requires an objective and unbiased examination and determination in accordance with Article 5.3 prior to initiation.

5. There is an additional obligation that arises prior to initiation in the circumstances of this investigation. Article 5.2 instructs that the "application shall contain such information as is

reasonably available to the applicant" on a number of subjects. The Application in this investigation was both insufficient to justify initiation and did not contain the minimum information that was reasonably available to the Applicant, on prices and the constructed value, including costs of production, of the softwood lumber products at issue.[1]

6. There has been a dispute in this proceeding over whether the investigating authority must ensure that the application contains some, any, or all reasonably available information. This issue is hypothetical. In this case, there was material information readily available that the Applicant withheld and that Commerce, based on information in the Application, knew it withheld.

7. The United States has admitted that the Application contained information indicating that the Applicant International Paper owned Weldwood, a major Canadian producer and exporter of softwood lumber.[2] Therefore, there was information in the Application establishing that actual cost and price information from a major Canadian producer was available.[3] Such cost and price information was not provided in the Application.

8. An objective and unbiased investigating authority, as a part of its examination and determination of the sufficiency of the evidence in the Application in this investigation, would have determined that the Applicant had not provided reasonably available information on prices and costs. As part of its examination prior to initiation of the facts before it, Commerce was aware that the Application did not, in spite of the Applicant's repeated statements to the contrary,[4] contain such information as was reasonably available to the Applicant on prices and costs. The United States has admitted that Commerce did not discuss the "Weldwood-IP relationship, because it was not relevant to either the industry support question or the sufficiency of the evidence presented in the application as to prices and costs."[5] Therefore, any suggestion by the United States that some sort of elaborate pre-initiation investigation was required to satisfy Canada's claim under Article 5.2[6] is not credible and is an attempt to distract from the facts before the Panel in this proceeding. Based on the Application, Commerce knew that reasonably available information had not been provided; it chose simply to ignore that fact.

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[1] See Article 5.2(iii) of the *Anti-Dumping Agreement*.

[2] US First Answers to Questions, at paras. 12-13; Petition, Exhibit I.B-7, Article from The Vancouver Sun, 23 March 2001 (Exhibit US-62). See also Petition, Vol. 1B, Exhibit 1B-9, Top Canadian Exporters of Softwood Lumber to the United States 2000 (Exhibit CDA-39).

[3] Further, the availability of Weldwood as a source of data was made clear to Commerce five days before publication of the Notice of Initiation in this investigation. See Quebec Lumber Manufacturers Association Letter to DOC (25 April 2001) (Exhibit CDA-50). The Notice of Initiation was published in the Federal Register on 30 April 2001 (*Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21,328 (Dep't Commerce 30 April 2001) (initiation) [hereinafter "Initiation Notice"] (Exhibit CDA-9)). Canada also notes that Weldwood provided data and information to Commerce in connection with this investigation on at least two occasions and asked to be a voluntary respondent in this investigation. See Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001 (Exhibit CDA-138) and Cover Letter for Weldwood Sections B, C and D Questionnaire Response from Hunton & Williams to DOC, 16 July 2001 (public version) (Exhibt CDA-49). Commerce never considered the data or information. See *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep't Commerce 6 November 2001) (prelim. anti-dumping determination) at 56,064 (Exhibit CDA-11).

[4] See, *e.g.*, *Certain Softwood Lumber Products from Canada*, Petition for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930, As Amended, Vol. I (2 April 2001) at 1 [hereinafter the volumes of the Petition are referred to as "Petition"] (Exhibit CDA-36); Petition, Vol. III (2 April 2001) at p. III-1, III-13 to III-16 (Exhibit CDA-37); and Petitioners' Amendment to Petitions for Imposition of Antidumping and Countervailing Duties on Certain Softwood Lumber Products from Canada (10 April 2001) at 2 (Exhibit CDA-40).

[5] US First Answers to Questions, at para. 12.

[6] Opening Statement of the United States at the Second Meeting of the Panel, 11 August 2003, at para. 17 [hereinafter "US Second Oral Statement"].

9. In any event, Canada's claims under Articles 5.2 and 5.3 are separate. Leaving aside Canada's claim under Article 5.2, the same question before the panel in *Argentina – Poultry* is before this Panel: could an objective and unbiased investigating authority, looking at the facts before it, properly have determined that there was sufficient evidence of dumping to justify initiating an anti-dumping investigation?[7] Based on Canada's submissions and the information before this Panel indicating, *inter alia*, that the Application did not allege dumping by any particular Canadian producer, the answer is no.

C. ARTICLE 5.3

To Canada:

> **88. In paras. 34 to 43 of Canada's reply to Question 8, Canada has made certain allegations regarding the information contained in the application as submitted by the US domestic industry, and which formed the basis for the initiation of the investigation. In its Second Oral Statement, Canada has also alluded to some of these issues. Could the US please comment in detail on these allegations?**

10. Based on Canada's submissions and the information before this Panel, the Panel must conclude that an objective and unbiased investigating authority, looking at the facts before it, could not have properly determined that there was sufficient evidence of dumping to initiate this investigation. Therefore, the United States violated Article 5.3.

11. Canada reserves the right to respond to any new evidence or information, should such evidence or information exist, that the United States may proffer in support of its assertion that Commerce had sufficient evidence before it to justify initiating this investigation.

> **89. In its reply to Question 8, Canada submits that using the Applicants *Random Lengths* price data for Quebec, a comparison of all of the Quebec ex-factory price data for ESPF (2x4, Studs&Btr, KD, RL and 2x4-8', PET, KD) products sold in Quebec and in the US, shows that the US price was consistently higher during the period and that there was therefore no price-to-price dumping demonstrated by the evidence in the Application. It further provides a calculation in footnote 32 to substantiate the allegation. Could the US please comment on this allegation and on the calculations?**

12. Commerce properly rejected the home market price data as supplied in the Application for British Columbia.[8] The Quebec pricing data, as demonstrated in the footnote referenced in the Panel's question, showed no dumping.[9] Therefore, the Application contained no evidence of dumping on a price-to-price basis with respect to any company or even any region of Canada.

13. Canada reserves the right to respond to any new evidence or information, should such evidence or information exist, that the United States may proffer in support of its assertion that Commerce had sufficient evidence before it to justify initiating this investigation.

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[7] *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, Report of the Panel, WT/DS241/R, adopted 19 May 2003, at para. 7.60.

[8] Initiation Notice, 66 Fed. Reg. at 21,330 (Exhibit CDA-9). See also Canada's Second Oral Statement, at para. 13; Canada's Responses to Questions to the Parties from the Panel in Connection with the First Substantive Meeting, 30 June 2003, at para. 33 [hereinafter "Canada's First Responses to Questions"]; and Canada's Second Written Submission, at para. 49.

[9] Canada's First Responses to Questions, at para. 33 and footnote 32.

90. Please comment on Canada's Second Oral Statement, para. 20 which states that:

> **"[t]he United States, hiding behind the pretence of confidentiality, has not provided this Panel with any information that was before Commerce about the two US surrogate mills. These US mills were at the heart of Commerce's decision to initiate. Canada has not seen, and the Panel still does not have before it, basic information in the hands of the United States, such as the names of the US mills and what Commerce knew about those mills. The United States has responded to Canada's claims with nothing but assertions."**

14. Canada emphasizes four points regarding the issues raised by this question.

15. First, the United States has no reasonable basis for refusing to provide whatever information it has as to the identity of the two US surrogate mills used to model the costs of Quebec producers and any information concerning what Commerce knew, if anything, about the mills prior to initiation. There are mechanisms in this proceeding for keeping information confidential. Trusting in those mechanisms, Canada has provided highly confidential information to the Panel and the United States. There is no basis for the United States to claim that any information about these mills is so sensitive that it cannot be shared with the Panel.

16. Second, the two US surrogate mills used to model the costs of Quebec producers were critical to the decision to initiate. All of the price comparisons indicated that there was no dumping; the initiation was based solely on costs.[10] There were no usable home market prices, nor surrogate prices, from British Columbia, and therefore Commerce could not legally initiate the investigation on the basis of any information in the Application pertaining to British Columbia.[11] With respect to Quebec, there was no cost evidence from any Quebec producer.[12] Instead, the Applicant constructed a surrogate cost for Quebec mills using information from US mills regarding overhead, and labour, electricity and fuel usage factors.[13] Therefore, the validity of the decision to initiate turns largely on whether an objective investigating authority, looking at the facts before it, could properly have determined that the US surrogate mills were representative of Canadian mills, and that the costs of the US surrogate mills were reasonably allocated to the products at issue.

17. Third, it is more than a theoretical possibility that the US surrogate mills are not representative and that using their overhead and "usage factors" skewed the costs alleged in the Application. There is a wide range in performance of US mills in areas of the United States that

[10] *Ibid*.

[11] Initiation Notice, 66 Fed. Reg. at 21,330 (Exhibit CDA-9). See also Canada's Second Oral Statement, at para. 13; Canada's First Responses to Questions, at para. 33; and Canada's Second Written Submission, at para. 49.

[12] Petition, Exhibit VI.A, Petitioners' Cost Methodology (public version), at 1-2 (Exhibit CDA-134).

[13] See DOC AD Investigation Initiation Checklist: Certain Softwood Lumber Products from Canada, Inv. No. A-122-838, at 8 (Exhibit CDA-10); and Petition, Exhibit VI.A, Petitioners' Cost Methodology (public version), at 1-4 (Exhibit CDA-134). See also Petition, Exhibit VI.C-1 (public version), (Exhibit CDA-135). Column "C" of each of the "Costs of Manufacturing" calculations charts in Exhibit CDA-135 indicates that the "input units required per MBF of lumber" are taken from the two redacted "Certifications" from employees of two US mills that follow the calculations charts. Therefore, the "input units" or usage factors for the components of the cost model, including the "processing costs" component of the model, are derived from some undisclosed combination of the experience of the two US mills. Neither of the "Certifications" provides cost information for the US mills for a full calendar year. Canada also notes that the United States has admitted that data from US mills were used to provide "production" or usage factors for the Applicant's cost model. See US Second Written Submission, at paras. 24-25.

border Quebec. Some of those mills might be representative of mills in Quebec, but many others were inefficient mills with outdated equipment and substantial operational problems that would have driven up their cost of producing a thousand board feet of lumber.[14] Any constructed normal value based on such mills would be unduly high and would tend to show dumping where there was, in fact, no dumping. Further, the use of such mills to model costs makes it more likely that legitimate home market sales would be improperly rejected as below cost (*i.e.*, not in the ordinary course of trade).

18. The Application itself lists several US mills in Maine that curtailed operations or had layoffs during the relevant time period. For example, Pleasant River Lumber Co. in Dover-Foxcroft, Maine; Moose River Lumber Co. in Jackman, Maine; Georgia Pacific in Woodland, Maine; and J.D. Irving in Ashland, Maine, all experienced curtailments and layoffs.[15] Because of the wide range in the performance of the US mills, it is important to know the identity of the US surrogate mills and additionally, to know what Commerce knew, did not know and failed to ask about the US surrogate mills that formed the basis of its decision to initiate.

19. Finally, there is no evidence on the record that Commerce knew much about the US surrogate mills. For example, there are no annual reports or product lists in the public version of the Application. Nor are there significant areas redacted in the public version of the Application that might discuss the representative nature or the cost allocations of these mills. It appears that Commerce based its initiation on unsubstantiated assertion by the Applicant. The Application was deficient, and the investigating authority has tried from the beginning to avoid the consequences of the deficiency.

20. Canada reserves the right to respond to any new evidence or information, should such evidence or information exist, that the United States may proffer in support of its assertion that Commerce had sufficient evidence before it to justify initiating this investigation.

D. ARTICLE 2.6

To the US:

> **91. The Panel notes in para. 36 of the US Second Oral Statement that "Canada misunderstands the analysis that was actually applied". Could the US expand on what it perceives the misunderstanding of Canada is?**

21. As there is some discrepancy between what the United States actually did, and what it now tells the Panel, Canada would like to summarize its understanding of "the analysis that was actually applied".

22. The United States told the Panel in its first written submission that it reviewed five factors, from *Diversified Products*, "[a]s **part of** its analysis in determining whether 'clear dividing lines' exist within the product under consideration identified within the petition."[16] In paragraph 36 of its opening statement in the Second Panel Meeting, however, the United States told the Panel, "Commerce's assessment of whether there are 'clear dividing lines' between products is **part of** the

[14] As Canada has stated in previous submissions, including Canada's Second Oral Statement at paragraph 17, the Applicant noted that costs vary significantly among producers based on a number of factors including level of efficiency, type of equipment, physical location and wood fibre source material. See Petition, Exhibit VI.A, Petitioners' Cost Methodology (public version), at 4-5 (Exhibit CDA-134).

[15] Petition, Vol. I (2 April 2001) at I-34 (Exhibit CDA-36); and Petition, Vol. IB, Exhibit 1B-33, Mill Closures – August 2000-March 2001 (Exhibit CDA-177).

[16] US First Written Submission, at para. 103 (emphasis added).

Diversified Products analysis, not subordinate to this analysis."[17] Canada submits that the United States has offered a distinction with a material difference.

23. The central question is whether the *Diversified Products* criteria as applied by the United States satisfy the requirements of Article 2.6. In the first formulation, *Diversified Products* is stated to be part of a "clear dividing lines" test. In the second formulation, the relationship is reversed, and the examination of whether there are clear dividing lines is part of the *Diversified Products* analysis.

24. Although the United States most recently has told the Panel that the "clear dividing lines" test was treated as part of *Diversified Products*, the test actually applied in the investigation was consistent with the first formulation: the United States subordinated the *Diversified Products* criteria to a new and different test for "clear dividing lines", which does not exist in *Diversified Products*.

25. The United States reported to the Panel that its assessment referred to "whether 'clear dividing lines' exist within the product under consideration", but the obligation in Article 2.6 is to determine the like product. The United States thus admits that, in looking for "clear dividing lines", it was not determining whether like products were "identical" to the product under consideration or, in the absence of identical, bearing "characteristics closely resembling" the characteristics of the product under consideration.

26. When the Department of Commerce enumerated the *Diversified Products* criteria for bed frame components and finger-jointed flangestock, it admitted that it did not complete the test. In each instance where the Department of Commerce found bed frame components or finger-jointed flangestock to be unique, entirely unlike the product under consideration, it discarded the criterion from the analysis, preferring to conclude that there was no "clear dividing line" between the disputed product and the product under consideration because of some undefined category of "specialty lumber" that, without explanation, supposedly subsumed both bed frame components and finger-jointed flangestock.[18] Thus, *Diversified Products* was subsumed by a test for "clear dividing lines".

27. The comparisons of Western Red Cedar and Eastern White Pine to the product under consideration suffered a similar fate. Unique characteristics were discarded, as with bed frame components and finger-jointed flangestock, but characteristics that were different were judged not to be "so different" as to warrant the finding of a "clear dividing line". An isolated physical characteristic of an appearance grade species, such as Eastern White Cedar, was found to be similar to a physical characteristic of Western Red Cedar, for example, thus placing the two species on a "continuum" not separated by a clear dividing line.[19]

28. The allegedly similar species did not have to be adjacent to one another on Commerce's continuum. They merely had to have a characteristic that could "link" them. The greater the scope of the investigation, the more characteristics were available to select, creating greater assurance that any distinct like product would have some characteristics also found on the so-called continuum. In such a case, there could never be a "clear dividing line".

29. At no point in its analysis did Commerce attempt to determine whether a product at issue actually possessed characteristics closely resembling those of the product under consideration, as required by Article 2.6. Hence, Canada understands that the US statement offered to the Panel in the

[17] US Second Oral Statement, at para. 36 (emphasis in original).

[18] DOC Issues and Decision Memorandum for the Antidumping Duty Investigation of *Certain Softwood Lumber Products from Canada* (21 March 2002), Comment 52, at 163-164 (bed frame stock/square-end bed frame components); and at 165-166 (flangestock) [hereinafter "IDM"] (Exhibit CDA-2).

[19] *Ibid*., at 152-153 (Western Red Cedar) and at 159-160 (Eastern White Pine).

first written submission is an accurate description of the methodology applied, and that the most recent description is not.

E. PHYSICAL CHARACTERISTICS

To Canada:

92. Could Canada explain why in the case of softwood lumber products cost accounting records of companies do not show differences in variable costs according to different dimensions?

30. Softwood lumber producers, whether in Canada or the United States, do not measure cost differences among the various lumber grades and dimensions that are produced in the sawmill, per common unit of measure. The US implication that producers' books and records identified variable costs for every attribute except dimension is factually incorrect and misleading. In the normal course of business, softwood lumber producers calculate an average cost of production, per thousand board feet of lumber, by process for all production from harvest through planing. They do not attempt to assign different costs to different grades of lumber, or to different dimensions of lumber, but instead track a single, average cost for all joint products jointly produced.

31. Canadian and US producers record an average cost per thousand board feet because of the nature of lumber production, which accountants refer to as a joint production process. In a joint process, products with different characteristics are not produced sequentially, as is typical for most products from steel pipe to semiconductors, but simultaneously. In the case of lumber, logs are processed simultaneously into green lumber of different sizes and grades. While the producers can influence the characteristics of the lumber produced, the principal determinates are the characteristics of the log processed, which, among others, include the quality of the fibre, the length and the diameter. Other examples of joint products include all beef products and all pork products. Producers can track the costs of raising a group of hogs or cattle, as well as the costs of processing the animals into different cuts of beef or pork, but one cannot track the unit cost of an individual cut of meat from an individual animal, just as one cannot track the costs of an individual "cut" of lumber from an individual log.

32. In a joint production process, because it is not possible to measure the unit cost of production using typical cost accounting techniques developed for sequential production, producers have two alternatives. The producers can measure the cost on the basis of a simple physical measure such as average cost by weight or volume (in this case, unit cost per thousand board feet); or the producers can assign cost on the basis of the relative value of the goods produced. The latter, value-allocated cost, has the advantage of assigning costs based on the revenue generating potential of the various products produced, thereby assuring that aberrantly large losses or gains are not recorded at the time of sale. On the other hand, value-allocated cost is more burdensome and costly to administer. Since in the lumber industry value-allocated costs are impossible to measure on an ongoing basis (in terms of measuring the operating results of the company), producers have adopted the first alternative, an average cost per thousand board feet. Rather, they assess profitability based on the portfolio of lumber products they produce; that is, lumber producers look to whether the revenue from all the different sizes and grades of products they produce jointly is sufficient to cover the costs of producing those products.

33. In its Final Determination, Commerce recognized that the use of a single average cost in a dumping analysis for a range of joint products with a range of values would distort the margin calculation. Thus, Commerce adopted a hybrid method that allocated fibre costs (that is, the costs of obtaining timber, harvesting and transporting logs) and sawmill costs by value by grade, but used

average costs for thickness, width, and length.[20] That is, while different grades of lumber were allocated different joint costs, based on the relative values of the grades, different dimensions of lumber within a particular grade were allocated the same "average" joint cost. It was only for this reason that Commerce *created* variable cost differences by allocation among products by grade, but not dimension.

34. In any event, whether or not a difference in the variable costs of production for lumber products of different dimensions can be directly ascertained, the obligation pursuant to Article 2.4 remains the same. Nothing in Article 2.4 relieves an investigating authority from its "due allowance" obligation in cases in which it decides not to calculate a variable cost difference between products with differences in physical characteristics that affect price comparability.

35. It is important to note that, in raising the question of variable costs, the United States has attempted to confuse this issue. The issue before the Panel is simple: whether Article 2.4, which requires an allowance for physical characteristics which affect price comparability, obligates the United States to make an adjustment for dimension in the face of unrebutted evidence before Commerce that dimension affects price. As Canada has noted, the Applicant and the respondent companies agreed that dimension affects price comparability. Commerce itself concluded in the Preliminary Determination[21] that dimension had an effect on price comparability. Commerce also concluded that dimension affects price by using thickness, width and length as product characteristics critical to establish when an identical product was matched. The United States is trying to change the focus to convince the Panel to address the question of *how* the allocation would be calculated, rather than whether an allocation is required.

> **93. Please show whether and where on the record the respondents demonstrated that dimension had an effect on price comparability. Please also explain at what stage of the investigation these were demonstrated.**

36. There are two distinct factual issues regarding the impact of dimension on price that the United States is seeking to confound. The first is the general issue of whether dimension has an effect on price comparability. The second issue is the more specific: what differences were shown to exist by the pricing data collected for the actual pairs of non-identical products compared by Commerce?

37. The first issue is the one most relevant to the Panel's question, and, as explained below, the only one Canadian respondents had an opportunity to address. Evidence relevant to this issue includes (1) statements by US and Canadian producers that they differentiate and price their products based on differences in dimension; (2) industry pricing publications, such as Random Lengths, that report product pricing data differentiated by dimension; (3) findings by other US government agencies knowledgeable about the industry that dimension affects product pricing, and (4) examples from the pricing data collected by Commerce that different dimension products sell for different prices. Such evidence was presented by Canadian respondents throughout the proceeding before Commerce, as Canada has detailed in response to Questions 22 and 25. All of the citations to the record before Commerce were provided in Canada's response to Question 22.

38. In addition, a 11 May 2001 letter from counsel for Tembec, consistent with the citations provided in response to Question 22, is attached as an exhibit.[22] As Canada noted, there was agreement among all interested parties that dimension affected price comparability. The evidence that

[20] *Ibid*., Comment 4, at 19-25 (Exhibit CDA-2).

[21] *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep't Commerce 6 November 2001) (prelim. antidumping determination) (Exhibit CDA-11).

[22] Tembec Response to the 3 May 2001 Submission of the Coalition for Fair Lumber Imports Executive Committee concerning Respondent Selection, Product Matching Criteria, and Simplification Issues (11 May 2001) (Contains Business Confidential Information) (Exhibit CDA-178).

dimension affected price comparability was the same as the evidence that grade affected price comparability. Canada also noted that there is *no* evidence in the record to the effect that dimension does *not* affect price comparability. No party, including the Applicant, argued, much less provided evidence, that producers and buyers do not consider dimension in setting prices, or that dimension did not have to be considered in deciding what prices to compare. Nor does the record contain any other alternative explanation or evidence of why price differences exist among products of different dimensions (all other characteristics being equal).

39. Second, Canadian respondents never had the opportunity to provide the product-specific pricing analyses the United States contends is missing. Where normal value and export price of products of identical dimension were compared, there was of course no dimensional "difmer" requirement. This fact had the effect of greatly reducing the number of "difmers" that Commerce had to calculate. Only non-identical comparisons required a "difmer". And only Commerce could know, prior to the Final Determination, which non-identical comparisons would be made and thus, which products would require a "difmer" calculation. That is, respondents had no opportunity to provide analyses to Commerce with respect to the non-identical comparisons used or any allowances that were required to account for physical differences in the products actually compared that affected price comparability, since Commerce never disclosed to the respondents the non-identical product comparisons it would use or the methodology it would use to select those comparisons. As Canada has noted, Commerce, in its Preliminary Determination, did not make any non-identical comparisons, and thus did not develop any model matching methodology that respondents could analyze. Rather, Commerce developed a model matching methodology and utilized non-identical comparisons only in its Final Determination. This methodology, and the resulting non-identical product comparisons, were disclosed to respondents only after the conclusion of the proceeding. Thus, respondents could never have provided the product-specific pricing analysis the United States contends is missing. Only Commerce could have performed such an analysis, because only Commerce knew the identical (no "difmer" required) and non-identical (dimension "difmer" required) product comparisons to be used in the Final Determination. This analysis, if one ever was performed, is also missing from the record.

To the US:

> **95. Could the United States explain in detail how the issue of dimension was addressed in the lead-up to the Preliminary Determination and from the Preliminary Determination to the Final Determination, including after the DOC found that there were no differences in variable costs? Was DOC's statement in the Preliminary Determination that dimension has an effect on price comparability made before DOC knew that there was no difference in variable costs? Indicate what made DOC change its position with respect to the effect of dimension on price comparability between the Preliminary Determination and the Final Determination.**

40. The United States has focussed its response to Canada's Article 2.4 claim on the fact that Commerce did not have information on variable cost differences among different sizes of lumber products. In so doing, the United States attempted to distract the Panel from two critical facts.

41. First, as discussed above, the fact that there were no variable cost differences among different sizes of lumber was simply a necessary consequence of Commerce's decision not to take dimension into account in allocating costs based on value.

42. Second, and more fundamentally, as noted above, the Article 2.4 obligation to give due allowance is not contingent on the existence of differences in variable cost of production. As long as dimension affects price comparability – an issue that was not in dispute until this proceeding – due allowance must be made for dimensional differences when prices of different dimension products are compared. The obligation to make such an adjustment is separate from the issue of *how* the allowance is calculated. Variable cost differences are one way of calculating the allowance, but there

are other ways to do so. For example, when differences in variable costs are not available, US law provides for calculating the required due allowance by using differences in market value.[23] None of the US arguments on the lack of variable cost differences is relevant to the issue before the Panel concerning the obligations imposed by Article 2.4, and none of the arguments contradicts Commerce's earlier finding that dimension affects price.

96. At what stage were the respondents informed of DOC's finding that differences in dimension do not affect price comparability? What opportunities were provided to respondents to comment on that finding?

43. The Canadian respondents were not informed of Commerce's decision not to make allowance for differences in dimension until Commerce's Final Determination, after which comments cannot be filed. Moreover, as the Panel has noted in the preceding question, Commerce found in its Preliminary Determination that dimension affected price comparability and reiterated that finding in its Final Determination.[24] Thus, there was no need for respondents to provide pricing or other analyses on this issue following the Preliminary Determination, during the normal briefing period, since Commerce and the Applicant had agreed with respondents' position on this issue.

99. With respect to the consistency in price patterns, the Panel has the following questions:

(a) Could DOC explain in detail the methodology it used to carry out its consistency test? Illustrate your explanation with an example from the test that was carried out in this case, including any sampling, selection of dates, etc. Did the US consider using other methodologies?

(b) Could the US explain in detail how the results of its test were evaluated? Please explain the evaluation leading up to that conclusion.

44. Canada notes that Commerce performed no "consistency" test on the record, and there is no information on the record concerning what methodology would have been used for such a test. To the extent that the United States provides such an analysis now, after the fact, Canada requests that it be provided with a copy of the computer programme used to generate that analysis and an opportunity to comment. Canada also suggests that the Panel evaluate whether the analysis the United States offers is comprehensive or selective (the Panel has information on the number of non-identical comparisons used for each respondent) and when the analysis was prepared.

45. Canada further notes that a "consistency" of the relationship among prices for products of particular dimensions is not relevant to the question of whether dimension affects price comparability. Even assuming that, for selective product pairs, the difference in price fluctuates, the very fact that the prices are different to begin with, establishes that dimension affects price comparability. Fluctuations in relative prices are no different than fluctuations in absolute prices – neither precludes price-to-price comparisons or adjustments.

46. The United States makes much of the fact that for some undisclosed, selected product pairs, for undisclosed respondents, it observed that sometimes one product price was higher and sometimes the other product price was higher. If it were established, for a specific non-identical product comparison used for a specific respondent, that the relative price difference fluctuated above and below zero such that on average it was zero, then the appropriate adjustment for that specific comparison would be zero, as the average difference in value of the products compared was zero. But this result would be by far the exception rather than the rule, and could not relieve Commerce from its

[23] See 19 C.F.R. 351.411(b) (Exhibit CDA-179).
[24] See IDM, Comment 7, at 42-46 (Exhibit CDA-2).

obligation to make an adjustment for non-identical product comparisons where differences in the home market prices of those products were not on average zero.

To both parties:

103. Could the parties confirm whether the percentages mentioned in para. 40 and footnote 33 of the US reply to Question 25 of the Panel relate to differences in dimension only?

47. Canada confirms its understanding that the US analysis relates to differences in dimension only.

F. ZEROING

To Canada:

104. According to Canada, would zeroing be permissible if the transaction-to-transaction methodology of Article 2.4.2 is used to calculate the margin of dumping? If not, what is the legal basis for its position?

48. The term "zeroing" has of course only been used in the context of a particular application (through "models") of the first method described in Article 2.4.2, *i.e.*, the comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. Regardless, there is no basis in Article 2.4.2's directions with respect to the transaction-to-transaction methodology to overcome the clear mandate that Article 2.4.2 provides with respect to the average-to-average methodology. Article 2.4.2 does not speak in terms of a particular stage of a methodology, it speaks in general terms only. Thus, whatever directions are given in Article 2.4.2 apply generally, to every stage of a methodology if it requires more than one stage to be accomplished. Any ambiguity arising in Article 2.4.2 as to the second methodology must be interpreted in the context of Article 2.4's mandate that a "fair comparison shall be made between the export price and the normal value".

49. As discussed below in response to Question 108, a comparison that involves zeroing cannot be "fair" because it unjustifiably gives less weight to some transactions than to others in the calculation of an overall dumping margin. Were the United States correct, the transaction-to-transaction language in Article 2.4.2 would mean an investigating authority, when calculating an overall dumping margin, could ignore relevant transactions simply because they were not dumped. Such a results-orientated approach cannot comport with the text of Article 2.4, nor with the obligation under Article 2.1 to calculate a dumping margin for the product under investigation (rather than for any portion thereof). Thus, even with the transaction-by-transaction methodology all export price transactions must be included in the calculation; the dumping margin still must be calculated based on an average of all transactions included, and there is no basis for excluding or altering the values of transactions where the price comparisons revealed no dumping.

50. Ultimately, each method stands on its own. Even if it were the case that the second methodology in Article 2.4.2 lacked disciplines on its application, that would not justify reading out or ignoring the disciplines applied to the first methodology. It is agreed by both Parties to the current proceedings that Canada's claim concerns the application by the United States of the first method described in Article 2.4.2 (weighted average to weighted average). It is in the context of the particular application by the United States of the first method described in Article 2.4.2 that Canada's claim with respect to "zeroing" has arisen. What is permitted or not permitted pursuant to the second method described in Article 2.4.2 is not at issue here.

105. Please comment on paras. 53, 54 and 62 of the US Second Oral Statement.

51. The US argument as advanced in paragraphs 53-54 is based on a false premise: that Canada claims that the meaning of "all" and "comparable" change between the first and final stages of the first methodology. The paragraphs of Canada's submission which the United States contests are not intended to provide a definition of the terms "all" and "comparable" in any way other than their ordinary meaning. Rather, the paragraphs describe how those terms must be *applied* by an investigating authority in each of the two stages of a comparison such as that performed by Commerce in this case. The fact that the standard in Article 2.4.2, prescribed by the words "all" and "comparable", applies in the case of both simple and complex transactions does not mean that the meaning of either "all" or "comparable" changes. To the contrary, the ordinary meaning of these words is retained, and only their application changes. Canada's submission demonstrates that both "all" and "comparable" can and must be applied during both stages of the comparison, in keeping with their ordinary meaning, and have operational significance at both stages.

52. More generally, the US attack on *EC – Bed Linen* is ill-founded as it attacks the Appellate Body for failure to discuss the requirements of Article 2.4.2 as they apply to each stage of a methodology. The stage or stages in a methodology are simply way points *en route* to calculating a proper margin of dumping. The disciplines imposed by Article 2.4.2 with respect to the first methodology ensure a certain result at the final stage, based on the rule that must be employed in using that methodology, *i.e.*, to use all comparable export transactions. There was no need for the Appellate Body to proceed stage by stage for each methodology in Article 2.4.2. It is worth noting, however, that the panel decision in *EC – Bed Linen* does discuss the stages of the first methodology, and reaches the same conclusion as the Appellate Body.

53. Claims made by the United States in paragraph 62 of its opening statement are addressed in Canada's response to Question 108, below.

106. Please comment on para. 56 of the US Second Oral Statement that:

> **"[u]nder Canada's argument, the first basis for establishing dumping margins — the weighted-average-to-weighted-average basis — would apply to both stages of the calculation. However, the other two bases for establishing dumping margins plainly apply only to the first stage. Thus, Canada's theory leads to an interpretation of Article 2.4.2 in which the scope of the obligation differs depending on the basis for establishing dumping margins. Yet, the provision itself does not support such differential interpretation."**

54. The US statement assumes what must be proven: that Article 2.4.2 concerns only the first stage of a comparison, and not all stages, even though the language of Article 2.4.2 is general and not limited. The United States seeks to portray it as peculiar that the first methodology should have application in both stages of a comparison using the first methodology, but that is only because it has posited that the rules apply only at the first stage. As noted above, Article 2.4.2 applies generally. The differences among the methodologies are differences in detail, not differences in generality of application. The fact that one methodology lacks the specific disciplines of another does not negate the existence of those disciplines in the latter.

55. The US interpretation of Article 2.4.2 would suggest that Article 2.4.2 does not apply at all in a case in which there is only a single stage involved in computation of the dumping margin. Not only would such a reading not comport with the text, it would presume that no discipline is imposed upon investigating authorities in respect of single-stage calculations. This is simply not credible, given the clear obligations imposed in both Articles 2.4 and 2.4.2.

56. Canada's interpretation leaves WTO Members free to apply the first method (weighted average to weighted average) in one stage or multiple stages. In the case of a two-stage process, the wording of Article 2.4.2 has as a consequence that zeroing is not permitted. Contrary to what the United States has argued, this is not a situation in which Canada argues that treaty terms take on a different meaning at different stages of the calculation of the dumping margin. Rather, the Panel is dealing with a general description of one methodology that is provided for in Article 2.4.2 to establish the margin of dumping and the question of what the legal consequences are of that legal provision when a WTO Member decides to apply that methodology through two stages (separate models and subsequent aggregation). The Appellate Body has already pronounced, in *EC – Bed Linen*, that in such a two-stage process, a WTO Member is not permitted to apply zeroing. Canada urges the Panel to follow the Appellate Body's interpretation.

107. Please comment on the US statement that the *AD Agreement* does not recognise a concept of "negative" dumping.

57. Canada would agree that the *Anti-Dumping Agreement* does not *refer* to "negative" margins of dumping. However, the US claim that this fact permits Commerce to ignore certain transactions when aggregating intermediate comparisons into the overall margin is founded on a fundamentally flawed premise: that the *Anti-Dumping Agreement* recognizes "margins of dumping" at all at the first stage of a dumping calculation. A "determination of dumping" under Article 2 is made for a product, not for a particular model. This is clear from the terms of Article 2.1, which states that the comparison governed by Article 2 establishes whether "a *product* is to be considered as being dumped".[25] Nowhere does the *Anti-Dumping Agreement* recognize the concept of intermediate stage margins of dumping. Nor does it permit the artificial generation of a dumping margin by denying the existence of sales at prices above normal value. Both the panel and the Appellate Body in *EC – Bed Linen* found that the term "negative" in respect of margins of dumping served simply to illustrate the very obligation that the United States attempts to circumvent.

108. Given that Canada bears the burden of proof of presenting a *prima facie* case of violation:

(a) Could Canada indicate why it considers the results of a dumping margin calculation that includes zeroing to be unfair?

58. A dumping margin calculation that includes zeroing cannot be considered to produce a "fair comparison" within the meaning of Article 2.4 because it unjustifiably operates to give greater weight to transactions included in intermediate models for which export price is less than normal value, than to those for which export price is greater than normal value. The ordinary meaning of "fair" is "just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards". [26] A comparison conducted on the basis of zeroing results in unequal treatment of those transactions for which export price is deemed to exceed normal value at the intermediate stage. Zeroing gives these transactions less weight in the calculation of the overall dumping margin, and thus results in a comparison that is biased in favor of those transactions for which export price is less than normal value. It thus does not produce the "equitable, impartial, unbiased" comparison mandated by Article 2.4. Also, when certain export transactions are disregarded, the figure arrived at is no longer a "weighted average".

(b) Could Canada elaborate on the legal basis for its claim that "zeroing" violates the obligation under Article 2.4 to carry out a "fair comparison", other than the mere reference to the *obiter dictum* of the AB in its *EC - Bed Linen* report?

[25] Emphasis added.

[26] *New Shorter Oxford English Dictionary*, 3rd Ed. (Oxford: Clarendon Press, 1993), at 907 (Exhibit CDA-180).

What is the benchmark against which Canada tests whether a comparison is fair or unfair?

59. The legal basis for Canada's claim that zeroing violates Article 2.4, and the benchmark against which the conduct of the investigating authority must be judged, is the ordinary meaning of the terms of Article 2.4, as described above. A "fair comparison" requires equitable, unbiased treatment of all transactions being compared. Zeroing does not produce a fair comparison because it arbitrarily eliminates certain transactions from the calculation, resulting in a margin that does not equally reflect all transactions. The US reading of Article 2.4 in paragraph 62 of its Second Oral Statement as simply setting forth the factors requiring adjustments to ensure price comparability would render inutile the term "fair comparison." Given that Article 2.4 itself deals with subjects other than price adjustments – such as which sales should be compared and at what level of trade – the US reading of this provision is overly narrow on its face.

60. Article 2.4 sets forth several discrete obligations with respect to comparisons of export price and normal value: (1) that it be "fair" (in keeping with the ordinary meaning of that term); (2) that it be made at the same level of trade and in respect of sales made at as nearly as possible the same time; and (3) that due allowance be made for differences which affect price comparability. The "fair comparison" requirement stands alone, and is not dependent on other statements in that provision. Moreover, the "fair comparison" requirement is directly incorporated into Article 2.4.2 by express reference in Article 2.4.2's introductory clause, which states that the provision is "subject to the provisions governing fair comparison in paragraph 4".[27]

61. The fair comparison of Article 2.4 is conducted so as to account for all appropriate factors and thereby reflect accurately the relationship between prices and variables that affect prices. The measure by which authorities gauge dumping is the price differential between export price and normal value. That differential can be calculated in various ways under Article 2.4.2, but the sole objective of the calculation is to establish whether or not dumping has occurred. Anything that would exaggerate or distort that differential, thereby affecting the final determination by an investigating authority of whether or not dumping exists, would by definition be unfair.

G. ABITIBI

To Canada:

110. Based on information on record, how does Abitibi allocate financial expenses to various products in its normal cost accounting? Was this methodology "historically utilized"?

62. Under generally accepted accounting principles (GAAP) in both Canada and the United States, for financial and thus cost accounting purposes, financial expenses are regarded to be "period" expenses and not "product" expenses. A period expense is one that must be reported in full as belonging to the reporting period at issue, for example, the fiscal year in the current context. Thus, for financial and cost accounting purposes, Abitibi does not allocate financial expenses to its products on its books and records, and is not permitted to do so.

63. Financial expenses are simply reported as an independent line item on the income statement, below operating results. Even though GAAP does not permit financial expenses to be allocated to

[27] Indeed, this is in contrast to the provision at issue in the recent panel decision in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, where the panel found that the absence of an express reference to 2.4 in Article 11.3 precluded a claim of violation of the "fair comparison" requirement in the application of Article 11.3. (WT/DS244/R, 14 August 2003 (not yet adopted), at para. 7.166.)

specific products sold or produced during a period, Commerce does so in computing its costs of production.

64. The rules for financial accounting are driven by the goal of portraying accurately the financial position of the company. Because financial expenses such as interest expenses are recurring and not dependent upon what is produced or sold in a period, financial accounting rules generally require that they be treated as an expense in the period as incurred, in effect matched to the revenues of the same period for purposes of determining the company's profitability.

65. Significantly, financial accounting does not permit financial expenses to be reported as a cost of sales, because financial accounting recognizes that financial expenses bear no direct relationship to cost of sales.

111. In para. 71 of its Second Oral Statement, Canada alleges that DOC "allocated twice the interest expense actually incurred by relying on an unreasonable and unsupportable methodology". Could Canada please elaborate?

66. Canada's statement was based on the difference for Abitibi between the amount of interest expense allocated to lumber employing Abitibi's total asset-based methodology and the amount allocated to lumber by Commerce employing its cost-of-goods-sold (COGS) methodology. Exhibit CDA-91 compares Commerce's calculation to Abitibi's calculation for interest expense.

67. Under Commerce's methodology, 13.6% of Abitibi's total financial expenses were allocated to lumber compared to the 7.6% that would be allocated under the asset-based allocation methodology. This means that almost twice the expense was attributed to lumber by Commerce than actually incurred, as demonstrated in Abitibi's calculation based on the financial requirements of its different product lines.[28]

112. In paras. 76-79 of its Second Oral Statement, Canada makes a number of allegations in support of its statement in para. 75 that DOC's "methodology is unreasonable because it considers the first only in part and does not consider the second at all." Please explain in detail why Canada would regard the asset-based methodology as being the only methodology that should be applied.

68. At paragraph 75 of Canada's Second Oral Statement, Canada notes that the COGS allocation methodology only considers "the amount of money needed to produce and sell a product" in part and does not consider "the amount of time for which that money is needed" at all. Therefore, it could not accurately or adequately capture the amount of Abitibi's total financial expenses associated with the production and sale of softwood lumber as opposed to Abitibi's other products.

69. As financial and cost accounting do not address how financial expense should be allocated to products, it is useful to return to basic principles to understand what financial expenses relate to. For example, suppose a person wanted to start a company to produce lumber and newsprint. Investors provide some capital, and the remaining money needed for this company is borrowed. Capital outlays would come first. For lumber, the company would need to buy land, construct a sawmill, and install all the necessary equipment and infrastructure. For newsprint, the company would need to buy land, construct a paper mill, and install all the necessary equipment. The funds needed for each of the two distinct product lines are directly proportional to the relative assets employed for each distinct business segment. Because money is fungible, the debt is not regarded to be tied to particular assets, but instead is regarded as relating to all assets equally. The financial expenses resulting from that debt thus are directly proportionate to asset values, not depreciation expenses, and not cost of sales.

[28] See Canada's Second Written Submission, at paras. 195-196.

Therefore, only the asset-based methodology reflects the financial expenses "associated with" or "pertaining to" each product line.

70. Next, operations begin. Raw materials for production are purchased, workers are hired, and energy and other expenses are incurred, as products are produced and sold. But the amount of funds required for such ongoing operations are not proportionate to the *total* current expenses for any given period of time. As lumber and newsprint are sold, customers pay for it. Thus, the funds needed for each of the two product lines depend on the expenses "outstanding" at any given point in time. As illustrated and explained in the flowchart provided in response to Question 115 below, these amounts consist of the actual expenses incurred for the raw material inventory that must be maintained, the actual expenses incurred for the work-in-process and finished good inventory that must be maintained to fill orders, and the value of the accounts receivables outstanding for sales of each product. These asset values alone reflect the cash needed to operate the two product lines on an ongoing basis. Again, the amount of money needed to establish and operate the two business segments – and thus the financing expenses incurred – is proportionate to asset values. In no way are financing expenses incurred in proportion to cost of sales. Again, only the asset-based methodology reflects the financial expenses "associated with" or "pertaining to" each product line.

71. Canada's argument here is based on how companies actually utilize money. The US' COGS methodology is not based on financial or cost accounting, and is not based on how companies utilize money. Indeed, the United States has not articulated any principled basis at all for allocating interest expenses in proportion to cost of goods sold.

72. In short, in light of Abitibi's factual circumstances – the fact that it produces multiple, varied product lines, which lines have dramatically different asset requirements, and that its total asset needs far outstrip its annual cost of sales – the asset-based methodology is the only methodology that reasonably reflects how Abitibi actually utilizes its capital and money. Only the asset methodology fully considers:

- the complete range of activities for which companies expend funds,
- the amount of funds required for such activities, and
- the amount of time such funds are required.

73. Because the amount of a company's interest expense is a function of all three of these elements, any methodology that fails to consider all such elements may not, depending on the particular circumstances, properly reflect the amount of interest expense "associated with" or "pertaining to" the production and sale of subject merchandise as required by Articles 2.2.1.1 and 2.2.2. of the *Anti-Dumping Agreement.*

74. In light of the factual evidence submitted by Abitibi to Commerce, the Panel is not presented with a choice between two "reasonable" allocation methodologies.[29] The COGS methodology, as applied to Abitibi, was unreasonable because it failed to meet the requirements of Articles 2.2.1.1 and 2.2.2, in multiple, independent respects that Canada has discussed in its prior submissions.[30] We highlight two examples here.

[29] Canada's First Written Submission, at paras. 191-196; Canada's First Responses to Questions, Annex 1, Abitibi Response; Canada's Second Written Submission, at paras. 193-198.

[30] Canada's First Written Submission, at paras. 190-199; Canada's First Oral Statement, at paras. 80-85; Canada's Second Written Submission, at paras. 200-208; Canada's First Responses to Questions, at paras. 130-138; Canada's Second Oral Statement, at paras. 74-78.

75. First, the plain language of both Articles 2.2.1.1 and 2.2.2 requires use of an allocation methodology that considers expenses associated not only with the *production* but also with the *sale* of the product under investigation. Commerce's COGS methodology, however, considers only production expenses (and even then, only current expenses without regard to the value of assets required for such production). Yet, because Abitibi is not paid immediately upon making a sale, Abitibi necessarily finances *sales* to its customers by the extension of credit until the customer pays.

76. The record evidence showed that this was an important consideration in regard to Abitibi's financing needs. Abitibi demonstrated to Commerce that it offered far more generous credit terms to its newsprint, pulp and paper customers than to its lumber customers, and that its lumber customers paid much more quickly.[31] The shorter time period for payment meant lumber sales generated less financing needs. Commerce's COGS methodology utterly ignores the different financing expenses associated with the *sale* of lumber as opposed to pulp, paper, and newsprint, in violation of the plain language of Articles 2.2.1.1 and 2.2.2. The asset-based methodology, on the other hand, fully captures the different financial expenses associated with the *sale* of different products, because the value of accounts receivable for different products reflects differences in credit provided for different products, and accounts receivable are an asset included in the asset-based allocation. Commerce's methodology ignores the financing costs of accounts receivable entirely.

77. Second, and relatedly, is the distortion referenced in the question itself. The United States conceded in its First Written Submission that financial expense related both to cash outlays needed to acquire assets and to cash outlays needed to fund current expenses. But COGS only considers the latter – and considers even that incorrectly, as it simply totals the expenses without examining the actual amounts required to support such recurring expenses that are outstanding only until payment is received for the merchandise sold. Abitibi's evidence showed that in its case, the first use – assets – was far more significant than the second – current expenses – and, more importantly, that the relative asset needs of its different product lines differed dramatically. Therefore, assets could not simply be ignored. [32]

78. During the period of investigation that Commerce examined, Abitibi had $11 billion in assets but only $4 billion in COGS. Yet, after acknowledging that Commerce had to consider both assets and current expenses, the United States is left to defend Commerce's COGS methodology which

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[31] See Canada's First Written Submission, at para. 195; Canada's First Responses to Questions, Annex 1, Abitibi Response; Canada's Second Written Submission, at paras. 205-206; Abitibi's 23 July 2001, Section D Response, at D-45 (Exhibit CDA-83 - Contains Business Confidential Information).

[32] In *Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of one Megabit and Above from the Republic of Korea,* Commerce's provides reasons for applying, in that case, an interest allocation in proportion to the fixed asset requirements of different product lines. These reasons are equally applicable here:

> The Department generally accepts interest expense allocated by the cost of sales because that methodology often approximates the interest expense related to the production of the investigated merchandise. However, the Department has used other allocation methodologies when the facts of particular cases have required a change. After reviewing the facts in this case, we have found that for Samsung and Hyundai, a larger proportion of total fixed assets are related to the semiconductor line of business than to other lines of business. While the Department acknowledges that not all assets are financed through borrowings, it also recognizes that funds obtained from debt and equity are fungible and that the method used to finance the purchase of an asset is not relevant to the appropriate allocation basis. For these companies, because of this disproportional amount of fixed assets related to semiconductors, allocation of interest expense based on cost of sales would not appropriately recognize the expense related to the capital investment necessary for semiconductors compared to the other lines of business. Thus, the Department reallocated interest expense on the basis of proportional fixed assets to account for these facts.
>
> 58 Fed. Reg. 15,467 (Dep't of Commerce 23 March 1993), at 15,471-15,472 [hereinafter *DRAMS from Korea]* (Exhibit CDA-145).

considers only the less significant current expenses and ignores the more significant $11 billion in assets. Absent some explanation of why it was necessary or appropriate to ignore $11 billion in assets, it cannot be reasonable both to acknowledge that assets are financed and then ignore asset values in allocating financial expenses.

79. Moreover, the US argument that depreciation expense accounts for the differences in financing requirements generated by the different asset needs of different products, is completely incorrect. As Canada has demonstrated, when Abitibi purchases an asset it must pay for and finance the full value of that asset, not just its depreciation expense.[33] This means that by valuing financing requirements at the amount of a products' depreciation expense, the COGS methodology fails to consider the full amount that a company must finance to acquire an asset. Indeed, the distribution of Abitibi's depreciation expenses, by product line, is not even proportionate to the distribution of its asset values, by product line.[34] In no way can depreciation expenses serve even as a surrogate for asset values.

To the US:

114. Please comment on Canada's Second Oral Statement, para. 72 which states that:

> **"Commerce: asserted in the Final Determination that it used COGS, not because it was the proper methodology for Abitibi's facts, but because it was Commerce's "established practice" and was "consistent and predictable"."**

80. Canada notes that the Final Determination contains no reference to any of the factual evidence submitted by Abitibi concerning the proper allocation of financial expenses, and that Commerce made no factual findings at all based on such evidence.[35]

To both parties:

115. The Panel understands Canada to argue in para. 80 of its Second Oral Statement that an asset-based methodology can capture the flow elements through inventory. Please comment.

81. The Panel is correct in its understanding.

82. Throughout this proceeding, the United States has presented the Panel with a false argument: that assets are but one type of "activity" or "investment," and that Abitibi's asset-based methodology is flawed because it is a "limited basis," that fails to consider other, unidentified investments or activities and thus does not reflect Abitibi's "overall borrowing needs."[36] On the other hand, the United States has characterized Commerce's COGS methodology as "covering a wide range of costs,"[37] implying that it somehow is a broader basis than assets thereby justifying the COGS methodology.

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[33] Canada's First Responses to Questions, at paras. 130-138, Annex 1 - Abitibi Response; Canada's Second Written Submission, at paras. 201-206.

[34] See Canada's Second Written Submission, at para. 195 (table showing lumber business segment required 7.6 per cent of Abitibi's total, company-wide assets but accounted for 10.6 per cent of company-wide depreciation expenses).

[35] IDM, Comment 15 (Exhibit CDA-2).

[36] See US Second Oral Statement, at para. 67; US Second Written Submission, at para. 74; US First Responses to Questions, at para. 61.

[37] US Second Written Submission, at para. 74.

83. Exhibit CDA-176 and paragraph 80 of Canada' Second Oral Statement demonstrate the falsity of that argument by showing (1) that "assets" is not simply one activity or type of investment, but rather comprehensively reflects all activities and expenditures in which a company engages, and (2) as an illustration, that *every single type of expense included in COGS also is included in the asset-based methodology*. Thus, applying the United States' own suggestion that limited allocation bases for financial expenses should be rejected in favour of broadly based allocations, the COGS methodology fails.

84. Exhibit CDA-181 explains further how every single item of expense in COGS is captured using an asset-based allocation.[38] This is a flowchart showing how all current production expenses flow through and thus are captured in asset values, at the same value as they are in COGS, for the precise amount of time in which the expense is outstanding and thus is financed, *i.e.*, before the lumber, newsprint, pulp, or paper that is sold is paid for by the customer. The flowchart uses lumber production as an illustration; similar charts could be created for Abitibi's other products showing their raw material inputs and production processes also flowing into asset values.

85. At the bottom of the chart, are listed all ongoing production expenses that are included in COGS and thus in Commerce's COGS allocation. The flowchart reflects the accrual accounting for lumber production and sale.

- The first step in the production process is the acquisition of raw materials – in the case of lumber, logs. As Abitibi harvests or purchases logs, and transports them to its sawmill, all of the actual expenses incurred – including labour, stumpage, fuel, and depreciation on logging equipment – are cumulated and booked to an asset account for raw materials/log inventory. They are NOT treated as an expense when incurred; as explained below, an expense is recognized only after the logs are used in production and the final product has been sold. As long as the logs remain in inventory, their cost remains in the value of raw materials/logs inventory.

- As logs are brought into the sawmill for manufacturing into lumber, the costs for those logs are subtracted from the raw materials inventory asset account, and other expenses are incurred for all the processing operations necessary to manufacture finished lumber. *All* of these additional expenses – for labour, plant and machinery depreciation, energy, overhead, etc. – are cumulated, added to the log costs, and booked to another asset account – finished goods inventory/lumber. Again, none of these costs are treated as an expense at the time they are actually incurred. Again, all of the actual costs remain in the value of finished goods inventory.

- When the lumber is sold, all of its costs of production, which have been held in the finished goods/lumber asset account, are transferred in Abitibi's records from that asset account to cost of goods sold, and recognized as an expense at that time. It is only at this time that all of these costs – which required cash at the time they were generated – are treated as an expense. The sales price of the lumber is recognized as revenue at the same time, and the difference between the sales value and the cost of goods sold is the operating profit.

- Importantly, the amount of the expense booked to cost of goods sold is *exactly the same* as the cost captured in finished goods inventory. That is, the COGS method and the asset-based method are using the same ongoing production costs.

[38] Flowchart Showing How All Expenses Flowing to COGS Also Flow to Assets at Equal Value, (Exhibit CDA-181).

- Also at the time of sale, the sale price of the lumber is booked to another asset account, the purchasing customer's accounts receivable for lumber. When Abitibi receives payment from the customer, the accounts receivable asset account is reduced by the amount of the payment, and the cash account is increased by the amount that Abitibi has received.

86. Thus, every single expense considered by Commerce in its COGS methodology is considered, at the same value, in the asset-based methodology.

87. In addition, the asset-based methodology – which the United States argues is less comprehensive than the COGS methodology – considers additional assets that Commerce's methodology considers either fractionally or not at all. These are all the asset categories identified in the top row of the flowchart. The flowchart thus demonstrates that the asset methodology, and not the COGS methodology, is comprehensive, and that the COGS methodology unjustifiably fails to consider entire categories of cash expenditures to which financial expenses need to be allocated. These are identified not only on the flowchart but also in Exhibit CDA-176.

88. Finally, as the above explanation makes clear, the US argument that COGS reflects all of the ongoing production expenses incurred during the year, simply is not true. COGS does not reflect the current expenses, or even expenses for products produced in the period. COGS instead reflects only the production expenses for products sold in the period. This creates yet another distortion, since Commerce's cost of production calculation is for products produced during the period.

116. Please indicate the advantages/disadvantages in this context, of the two approaches (COGS; asset-based) for allocating interest expenses.

89. The fact that Commerce did not even purport to answer this question in its Final Determination establishes Canada's claim that Commerce failed to consider all available evidence on the proper allocation of Abitibi's interest expense, contrary to Article 2.2.1.1. Canada submits that Commerce could not have "consider[ed] all available evidence on the proper allocation of costs" without assessing the advantages and disadvantages of the COGS and asset-based allocation methodologies in light of that evidence. Indeed, Commerce in its Final Determination nowhere identified any specific disadvantages of the asset-based methodology.[39] The only "advantage" it identified for the COGS methodology was that it was "consistent and predictable."

90. The starting point for answering this question must be to define a reference standard, or the objective of the interest expense allocation. An allocation methodology cannot possess advantages/disadvantages, or be considered to be "reasonable", in the abstract.

91. Canada has suggested several such reference standards. It has contended that a financial expense allocation methodology can be reasonable only if it achieves the objectives of Articles 2.2.1.1 and 2.2.2; that is, that it results in an allocation of interest expense to lumber that reasonably reflects the financial expenses with the production and sale of lumber. Relatedly, Canada has suggested as a reference whether or not the allocation methodology reflects the basis on which the expense to be allocated is incurred. For financial expenses, that basis would include consideration of (1) the full amount of the expenditure regarded as having been financed, and (2) the period of time for which it must be financed.

92. Tellingly, the United States, in contrast, offers the Panel no coherent reference standard, contending in its Second Written Submission only that Commerce's COGS methodology is reasonable because it "allocated interest costs across a wide range of costs."[40] There is no explanation

[39] IDM, Comment 15 (Exhibit CDA-2).
[40] US Second Written Submission, at para. 74.

as to why that should be the standard, nor is there even an argument that the COGS methodology uses the widest range of costs possible.

93. In light of the reference standards suggested above, Canada offers the following list of advantages and disadvantages based on its earlier submissions:

	ADVANTAGES	**DISADVANTAGES**
ASSET-BASED	1. comprehensively considers all categories of company-wide expenditures, including all expenses included in COGS, and numerous expenditures not included in COGS 2. considers financial expenses associated both with the *production* and *sale* of the product under consideration 3. fully values all assets 4. considers time period for which expenditure is outstanding, consistent with how financing expenses are incurred 5. consistent with basis on which financial expenses are incurred 6. broadest allocation basis possible 7. accurately reflects the relative borrowing needs for different product lines, and thus results in an allocation to lumber of the financial expenses associated with and pertaining to the production and sale of lumber	1. can be used only for companies such as Abitibi that segregate assets by business line
COGS	1. very simple to apply, and can be applied in every case because all financial statements state cost of good sold	1. considers current production expenses only 2. fails to consider financial expenses associates with the *sale* of the product under consideration 3. ignores entirely, for no stated reason, non-depreciable assets, like accounts receivable, land, investments in other companies, and, also with no stated justification, considers depreciable assets fractionally, at their depreciation expense rather than the full value that must be financed 4. fails to take into account the time period for which the expenditure is outstanding, and thus overstates financing requirements of current production expenses for products sold and paid for

	ADVANTAGES	DISADVANTAGES
		5. results in a cost mismatch, in that an allocation based on products *sold* during the period is applied to the costs of products *produced* during the period 6. bears no rational relationship to the basis on which financial expenses are incurred, and thus cannot determine the financial expenses associated with the production and sale of the product under consideration

94. Canada also wishes to address two supposed disadvantages to the asset-based approach that have been suggested during the course of this proceeding, neither of which are correct. First, the United States has suggested that the asset-based methodology is inappropriate because it looks at values at one time only. This is an *ex post facto* argument not suggested by Commerce anywhere in its Final Determination. Indeed, if Commerce had actually raised this issue during the investigation, Abitibi could have provided quarterly or monthly data from which Commerce could have computed average asset values for the period of investigation.[41]

95. More importantly, the proportion of Abitibi's company-wide total assets devoted to Abitibi's different product lines does not change significantly over time. This can be confirmed with reference to data on the record before Commerce. For example, as we have noted, Abitibi's audited financial statement for 2000 evidences that Abitibi's lumber production and sales utilized 7.6 per cent of company-wide total assets.[42] Abitibi also submitted to Commerce its financial statement for the First Quarter of 2001, which shows that lumber production and sales accounted for 7.4 per cent of company-wide total assets as of 30 April 2001 – the close of Commerce's period of investigation.[43] Thus, the US argument regarding "snapshots" is faulty.[44] Whether annual financial statements are used, or quarterly statements from the entire period of review are averaged, the results are not materially different – and are far from the 13.6 per cent COGS-based share of financial expense allocated by Commerce.[45]

[41] If Abitibi had done so itself, then the United States no doubt would now be arguing against such an approach (incorrectly, in Canada's view) because Abitibi's published quarterly financial statements, and its internal financial statements, are unaudited.

[42] Abitibi Section A Questionnaire Response (22 June 2001), at 252 (Exhibit CDA-82). See also Canada's Second Written Submission, at para. 195.

[43] Abitibi's First Quarter Report, 2001, at 7, submitted to Commerce as Abitibi Section A Questionnaire Response (22 June 2001), Annex 12, at 302 (Exhibit CDA-182).

[44] US First Written Submission, at footnotes 220 and 223.

[45] Moreover, Abitibi's suggested approach was consistent with the approach Commerce itself has used previously. In *DRAMS from Korea* – the one case in which Commerce used an asset allocation methodology for financial expenses – Commerce calculated the percentage of assets devoted to the subject merchandise by averaging asset distributions measured on two days. Commerce looked to the company's audited financial statement alone and averaged the asset distribution on the close of that fiscal year and the close of the prior fiscal year. *DRAMS from Korea* (Exhibit CDA-145). Abitibi could not reasonably average its 31 December 2000 and 31 December 1999 data as the United States had suggested in its First Written Submission at footnote 223, however, because the 1999 data bore no relationship to the company that existed during the 1 April 2000 to 31 March 2001 period of investigation. In April 2000, Abitibi acquired a larger company, Donohue Inc., thereby almost tripling its assets. Commerce included both Abitibi and Donohue costs for the entire period of investigation, and therefore 1999 data were unrepresentative of the merged company for

96. Second, during the Second Substantive Meeting, the Chairman queried whether the asset-based methodology might be flawed because an asset could be fully depreciated yet still be incurring a financing expense. As an initial matter, Canada notes that this is not an issue that distinguishes the two allocation approaches. Under either methodology, no financial expense would be allocated to the business line utilizing that asset because the asset had no value (asset-based approach) and, because it had been fully depreciated, it would have no depreciation expense (COGS approach). More importantly, however, the scenario posed rests upon a faulty premise. Both Canada and the United States agree that money and debt are fungible. As a consequence, both Parties agree that financial expenses should not be tied directly to specific assets or activities, but instead must be allocated to the company's assets and activities as a whole. Moreover, nothing in Abitibi's financial statements or elsewhere on the record indicates that any of its debt is tied to specific assets.

97. In sum, although COGS may in some situations be acceptable, an asset-based allocation was the only reasonable methodology applicable in Abitibi's circumstances. Abitibi's different product lines had significantly different asset requirements, significantly different accounts receivable turnover, and therefore significantly different financing requirements. In these circumstances, the COGS-methodology did not result in an allocation of financial expenses that reasonably reflected the cost of production and sale of softwood lumber.

H. TEMBEC (G&A)

To Canada:

> **117. Based on information on record, how did Tembec allocate G&A expenses to the Forest Products Group? Was this methodology "historically utilized"? Please point to relevant documents submitted to the Panel or provide them.**

98. Except for the cost category "administration fee – Head Office," all expenses falling within each of the cost categories comprising the Forest Products Group general and administrative expense (G&A) amount were, in fact, incurred at the divisional level.[46] For example, there is a human resources department within the Group whose salaries relate solely to the Forest Products Group and comprise a part of the G&A for the Group.

99. The cost category "administration fee – Head Office" represents the Forest Products Group's share of head office G&A, which in Tembec's normal books and records is allocated among its business segments according to the sales revenues of each business segment. This cost category represents a relatively small proportion of the total G&A of the Forest Products Group. Thus, G&A expenses are recorded for the Forest Products Group as part of Tembec's normal accounting procedures and there was no need to "allocate G&A expenses to the Forest Products Group" for purposes of the anti-dumping investigation.

100. The methodology Tembec used to report its G&A expenses for the Forest Products Group is the methodology that it uses in its normal books and records consistent with the accounting practice that Tembec has followed for many years. The accounting policies used in the business units are the same as those described in the summary of significant accounting policies for the entire company in Tembec's Annual Reports.[47] Tembec's Annual Report from 1994 describes the same accounting

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which Commerce was computing costs of production. See Abitibi Section A Questionnaire Response (22 June 2001), at 252 (Exhibit CDA-82).

[46] The following cost categories comprise the submitted G&A costs: [[
]]. Tembec's Section D Questionnaire Response (23 July 2001), at D-28-29 (Exhibit CDA-183 – Contains Business Confidential Information).

[47] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 44 (Exhibit CDA-94).

methodology for business segments as the one described in Tembec's Annual Report from 2000.[48] Tembec has followed this same approach for more than ten years. Through the years, Tembec's internal accounting methodology has been consistent and reliable in calculating G&A expenses specific for each of its five business units.

101. Tembec provided detailed information to Commerce on the makeup of its Forest Products Group G&A in its first questionnaire response.[49] The financial statements of the Forest Products Group did contain complete G&A information, which Tembec provided to Commerce, including its fully allocated share of the head office G&A. Commerce officials, during verification, traced Tembec's G&A calculation to Tembec's Annual Report for 2000 as well as Tembec's detailed statement of costs through the company's consolidation software (*i.e.*, Hyperion).[50]

118. Please comment on para. 70 of the US Second Oral Statement:

> **"unlike audited financial statements, internal, division-specific records are not intended as objective measures of a company's performance. Instead, the function of division-specific records is to "enable financial statement users to see the business through the eyes of the management.""**

102. It is not obvious what distinction the United States is attempting to make in the above-quoted paragraph. Canada assumes the distinction is between audited accounting records and separate non-audited reports that management frequently creates for managerial as opposed to financial accounting purposes.

103. This distinction is not relevant to the G&A issue currently before the Panel. The statements from which Tembec derived its Forest Products Group G&A data are not managerial reports. They are part of Tembec's financial accounting records. As noted on page 44 of Tembec's Annual Report, the same accounting policies were used in preparing the Forest Products Group's statements as were used in preparing the consolidated company-wide financial statements.[51] The Forest Products Group's accounting records tie directly into the consolidated company-wide financial statements and were reviewed by Tembec's auditors as part of the audit of the consolidated financial statements.[52] As such they are an objective measure of the Forest Products Group's performance.

104. Commerce has relied upon these data in every other calculation methodology and Commerce officials personally verified their accuracy at Tembec. There is nothing in Article 2.2.1.1 or 2.2.2 that expresses a requirement or preference for audited records or consolidated statements. Further, nowhere in the Final Determination does Commerce state that its decision to reject the Forest Products Group data was based on the fact that the segmented statements were not audited or that

[48] Tembec Inc. 1994 Annual Report, at 20-22 and 38-39 (Exhibit CDA-184); Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 44 - 45 (Exhibit CDA-94).

[49] Tembec's Section D Questionnaire Response (23 July 2001), at D-28-29 (Exhibit CDA-183 – Contains Business Confidential Information).

[50] Tembec Cost Verification Exhibit 10 (Exhibit CDA-96) contains a consolidation worksheet from Hyperion which shows the aggregation of each of the function groups in addition to the aggregation of individual entities within the Forest Products Group. See DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (29 January 2002) at 8 (Contains Business Confidential Information) (Exhibit CDA-112). Tembec Cost Verification Exhibit 20 (Exhibit CDA-95) details the calculation of Tembec's G&A. The Commerce verifiers made handwritten notes on the exhibit stating the values used to derive the G&A expense ratio were traced to Tembec's FY 2000 Annual Report as well as the Hyperion Consolidated software.

[51] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 44 (Exhibit CDA-94).

[52] Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 29 (Exhibit CDA-173).

segmented statements are, supposedly, only for managerial purposes. The attempt by the United States to do so now is simply an *ex post facto* rationalization.

To both parties:

> **121. Was the "internal accounting methodology" referred to in Comment 33, p. 105, of the Memorandum of 21 March 2002 an allocation methodology "historically utilized by the exporter"? Please refer to the record.**

105. What Commerce referred to as Tembec's "internal accounting methodology" is the accounting methodology that Tembec has used historically. Tembec has calculated its G&A expenses consistent with that methodology for at least the past 10 years. Canada refers the Panel to Canada's answer to Question 117 for a more detailed description of Tembec's historical utilization of its accounting methodology.

I. WEYERHAEUSER

To Canada:

> **122. On page 51 of the year 2000 annual report of Weyerhaeuser Company, it is stated under the heading "Contingencies" that "[t]he company is a party to legal proceedings and environmental matters generally incidental to its business. (…) (See Note 14 of Notes to Financial Statements)". On page 53 of that document, note 14 appears immediately after the words "Charges for settlement of hardboard siding claims". On page 74 of the same document, the title reads "Note 14. Legal proceedings, commitments and contingencies". A statement to the same effect as that contained on the above-cited page 51 appears on page 74 of Weyerhaeuser's annual report. Bearing this in mind, does not note 14 – and the comments contained therein – refer to <u>all</u> legal proceedings in which Weyerhaeuser Company was involved during year 2000? Does the amount of USD130 million reported on page 53, after the words "Charges for settlement of hardboard siding claims", include the charge for settlement of hardboard siding claims only? Or, does it also include charges for legal proceedings, commitments and contingencies detailed in note 14?**

106. As the Panel has noted, Note 14 on page 74 of Weyerhaeuser's financial statement refers to all legal proceedings in which Weyerhaeuser Company was involved during 2000.[53] In discussing the hardboard siding expense, the Note states specifically that the hardboard siding expense amounted to an $82 million after-tax charge. As stated on page 51 of Weyerhaeuser's financial statement, the $82 million after-tax charge is equivalent to a $130 million pre-tax charge.[54] The $130 million figure traces directly to page 53 of Weyerhaeuser's consolidated statement of earnings, which includes a $130 million charge related solely to the estimated cost of the hardboard siding settlement and related costs;[55] the $130 million figure does not include charges for any other legal proceedings, commitments or contingencies.

107. The relationship between the $130 million charge and the hardboard siding settlement expense is unambiguous. Commerce never expressed any doubt that the $130 million charge related to the hardboard siding charge alone.

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[53] Weyerhaeuser Section A Questionnaire Response (25 June 2002), Exhibit A-15 (Audited Financials), at 74 (Exhibit CDA-101).

[54] Weyerhaeuser Section A Questionnaire Response (25 June 2002), Exhibit A-15 (Audited Financials), at 51 (Exhibit CDA-166).

[55] Weyerhaeuser Section A Questionnaire Response (25 June 2002), Exhibit A-15 (Audited Financials), at 53 (Exhibit CDA-101).

108. The United States in its Second Oral Statement expressly stated that Commerce, as a matter of practice, does not allocate any parent company G&A to a subsidiary where the parent performs no functions on behalf of the subsidiary.[56] In other words, the allocation of parent G&A to the subsidiary is not automatic, but rather depends on the extent to which the G&A relates to activities of the parent performed on behalf of the subsidiary. Indeed, Commerce at Comment 48(a) of its Issues and Decisions Memorandum – in respect of certain Weyerhaeuser US G&A expenses related to real estate – stated that it was proper to allocate only those headquarters G&A incurred on behalf of its subsidiaries.[57]

109. The hardboard siding expense was not a general expense for Weyerhaeuser Canada and was not an expense incurred by Weyerhaeuser US on behalf of Weyerhaeuser Canada. The expense does not even relate to softwood lumber. Yet despite this Commerce included the hardboard expense as a cost attributable to softwood lumber production. Commerce's inclusion of a charge related to hardboard siding – a non-like product that was outside the scope of its investigation – in its G&A expense calculation clearly violated Articles 2.2.1.1 and 2.2.2 of the *Anti-Dumping Agreement*.

J. TEMBEC (BY-PRODUCT REVENUE)

To the US:

129. Canada draws an analogy between the present case and the finding in para. 148 of the AB in *US - Hot-Rolled Steel* that "discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation." Please comment.

110. In *United States – Hot Rolled Steel*, the Appellate Body considered Commerce's test for reviewing affiliated transactions for purposes of calculating Normal Value.[58] It concluded that the discretion afforded to investigating authorities must be exercised in an even-handed manner. It found that Commerce's test was not even-handed because it "operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales".[59]

111. Commerce applied a *nearly identical* test, but in reverse, to assess whether to use Tembec's internal transfer prices.[60] This test also suffers from the same lack of even-handedness. In relation to West Fraser, Commerce rejected affiliated transactions as preferential after concluding that these transactions were slightly above the unaffiliated benchmark. In contrast, Commerce found that Tembec's internal transfer prices were non-preferential even though they were significantly below the unaffiliated benchmark. This inconsistent approach was not even-handed and served only to prejudice these exporters by raising their dumping margins.

130. Please comment on para. 107 of Canada's Second Oral Statement.

112. Canada would like to comment briefly on paragraph 107 and Exhibit CDA-175. Canada reviewed a considerable amount of accounting literature, none of which supported the distinction that the United States attempts to draw between internal transfers and affiliated transfers for by-product

[56] US Second Oral Statement, at para. 73.
[57] IDM, Comment 48(a), at 133 (Exhibit CDA-2).
[58] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, adopted 24 July 2001 [hereinafter *US – Hot Rolled Steel*].
[59] *Ibid*, at paras. 148 and 155.
[60] *Ibid*, at paras. 154-158.

revenue offsets.[61] Canada provided Exhibit CDA-175 as an example of the accounting literature discussing the proper treatment of this type of revenue offset *within a corporation*. The exhibit draws no distinction between internal transfers and affiliated transfers.

113. In the Second Substantive Meeting, the United States attempted to assert that this exhibit supported its position that there is a cost of production for a by-product. It referred to the use of the word "cost" in the exhibit in support of its position. A careful review of the exhibit, however, demonstrates that it undermines, rather than supports the US position.

114. This text discusses the miscellaneous income approach and the net realizable value method for accounting for the value of waste, scrap and by-products. The first method is only appropriate as an accounting "short-cut" when the value of the by-products or scrap is uncertain or very small.[62]

115. The second method was selected by Commerce in the underlying investigation. In this method, the *net realizable value* of the by-product (wood chips) is offset against the cost of production of the major product (softwood lumber). The net realizable value method is used to measure the value of: (1) by-products; and (2) waste or scrap that is processed subsequently into a saleable product.

116. The net realizable value method values by-products at their "selling price" or market value. After the "split off" from the major product some forms of waste may be further processed into by-products. In this situation, the net realizable value method values the by-product produced from the waste at market value less the cost of any further processing that was required after the "split off" from the major product.[63] Applied to the present situation, wood chips are by-products that do not require further processing to become a saleable product. Accordingly, wood chips must be valued at market value.

117. Canada reserves its right to comment on any explanation the United States provides concerning its internal transfer methodology.

K. WEST FRASER

To Canada:

> **131. Based on information on the record at the time of the investigation, please provide the total volume (in ODTs) of wood chips sold by West Fraser in British Columbia. Please provide separately for the same market, the volume (in ODTs) of wood chips sold to affiliated and unaffiliated parties.**

118. The total quantity of wood chips sold by West Fraser in British Columbia during the period of investigation amounted to [[ ]].[64] Of this total quantity, [[ ]] (which accounted for 99.7 per cent of West Fraser's total wood chip sales) were sold in affiliated transactions.[65] In contrast, only [[ ]] were sold in unaffiliated transactions (an amount that a large pulp mill would consume in less than one day).[66] As outlined in Canada's previous submissions, these unaffiliated

[61] The US methodology would even distinguish between internal transfers and transfers between a parent corporation and a wholly owned subsidiary.

[62] W.J. Morse and H.P. Roth, *Cost Accounting: Processing, Evaluating, and Using Cost Data*, 3rd ed. (Reading, Mass.: Addison-Wesley, 1986), at 158 (Exhibit CDA-175).

[63] *Ibid*. (Example 5-7).

[64] West Fraser Cost Verification Exhibit C5, WF-Cost-007503, Appendix D-2 Revised, "Residual Chip Sales" (Exhibit CDA-106).

[65] *Ibid*.

[66] *Ibid.*

transactions only amounted to less than 0.3 per cent of record evidence concerning B.C. market prices during the period of investigation.

132. Canada has stated in the Second Substantive Meeting that prices concerning the long-term contract of the McBride mill fluctuate. Could you please confirm that?

119. As a threshold matter, Canada would like to observe that the record evidence is limited concerning the exact details of the McBride wood chip contract. Commerce's Cost Verification Report shows that West Fraser officials discussed the wood chip issue with Commerce's verification team and made those officials aware that a long-term contract (entered into before West Fraser purchased the mill) obligated McBride to sell wood chips at a lower contracted price when market prices began to increase in May 2000.[67]

120. In the interest of responding to the Panel's question, however, Canada can confirm that prices under the long-term contract of the McBride mill did in fact fluctuate. The McBride contract set prices at the beginning of each calendar quarter based on market conditions in the previous quarter. As wood chip prices had already been set for the second quarter of 2000, McBride was unable to increase its prices when the market value of wood chips increased in May 2000[68], as reflected in Commerce's cost verification report. It is important to note that all wood chip sales from McBride during the period of investigation occurred in the first two months (*i.e.*, April and May 2000).

L. SLOCAN

To Canada:

134. Based on information on record, where in Slocan's books is the revenue generated by, and cost associated with, the sale of a futures contract accounted for? Please explain it in detail.

121. As explained in Canada's response to the first questions, Slocan treated liquidated hedging contracts as US lumber sales and listed the Chicago Mercantile Exchange (CME) as the customer.[69] In Commerce's sales verification report the verifiers misstate that these futures revenues were recorded as a form of investment profit.[70] Afterwards, Slocan clarified its treatment of futures revenues explaining that:

> The Sales Verification Report is somewhat unclear in its statement on page 8 that Slocan records the profits or losses realized from futures contracts as investment income. *In all cases, including where no physical delivery is made, Slocan records the profits or losses as a credit or debit to lumber sales revenue. These profits or*

[67] DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by West Fraser Mills Ltd. (4 February 2002) at 23 (Contains Business Confidential Information) (Exhibit CDA-110).

[68] See 2000 Chip Prices for Purchases by Quesnel River Pulp (Contains Business Confidential Information) (Exhibit CDA-174). This exhibit reflects the increase in wood chip prices in April and May of 2000.

[69] Canada's First Responses to Questions, Question 79, at para. 198.

[70] DOC Memorandum on Verification of the Sales Response of Slocan Forest Products Ltd (28 January 2002), at 8 [hereinafter "Slocan Sales Verification Memorandum"] (Exhibit CDA-117). The verifiers may have been attempting to reconcile Slocan's records with Commerce's Preliminary Determination Analysis Memorandum, which had concluded that Slocan's futures activities were a form of investment revenue. See DOC Analysis Memorandum for Slocan Forest Products Ltd. for the Preliminary Determination in LTFV Investigation on Certain Softwood Lumber Products from Canada (30 October 2001), at 7 (Exhibit CDA-116).

> *losses are not recorded in an investment account in Slocan's books and financial statements.*[71]

122. Slocan treated futures revenues as an integral portion of lumber selling activities. As Commerce concluded in the Final Determination "Slocan's lumber futures hedging activity is related to its core business of selling lumber".[72]

> **135. Did Slocan argue and demonstrate in the context of the investigation that, because of its engagement in futures trading activities, price comparability was affected? If so, please provide relevant document/s substantiating it.**

123. Slocan argued and demonstrated that its futures activities affected price comparability in the underlying investigation. In its questionnaire response Slocan requested an adjustment for its futures revenues, which by definition meant that Slocan was taking the position that price comparability was affected by its futures hedging activities.[73] Slocan also undertook to explain the significance of its futures hedging activities to both Commerce's sales verification and cost verification teams. It is for this reason that these activities are described in both reports, and why both reports contain materials explaining the purpose and significance of hedging, as well as detailed data concerning Slocan's actual futures activities.[74] Slocan also argued that futures hedging affects price comparability in its Case Brief:

> Slocan relies on futures sales as part of its sales profile to *hedge against price movements*. Slocan locks in a certain portion of its sales at a guaranteed price through futures contracts with the Chicago Mercantile Exchange (CME), and Slocan thereby forgoes possible increased profits in order protect (*i.e.*, hedge) *against possible future price declines*. … While futures contracts can be used for speculation, Slocan uses the CME for exactly the opposite reason, *as price protection* to reduce its risk by locking in a certain portion of its sales.[75]

124. This hedging occurred, of course, only with respect to the US market, price protection being unavailable in the Canadian market.

125. Slocan also provided the following evidence to demonstrate the effect of futures hedging:

- Evidence concerning the existence and amount of the futures revenues;[76]

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[71] Slocan Case Brief (12 February 2002), at 70 footnote 24 (Contains Business Confidential Information) (Exhibit CDA-156) (emphasis added).

[72] IDM, Comment 21, at 94 (Exhibit CDA-2).

[73] Slocan Section C Questionnaire Response (23 July 2001), at C-35 - C-36 (Exhibit US-71). Commerce questionnaires require that respondents report adjustments that should be made. Commerce chose, however, not to make this adjustment, despite evidence that Slocan placed on the record concerning its futures trading activities, and Commerce's conclusion that these revenues constitute an offset to indirect selling expense under US law.

[74] Slocan Sales Verification Memorandum, at 7-8 (Exhibit CDA-117); and DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Slocan Forest Products Ltd. (1 February 2002), at 26 [hereinafter "Slocan Cost Verification Report"] and Slocan Sales Verification Exhibit 21 (Exhibit CDA-118 and 119). Sales Verification Exhibit 21 provides a explanation of the purpose and effect of lumber futures contract. It also contained much of the standard documentation for lumber futures activities.

[75] Slocan Case Brief (12 February 2002), at 67-68 (Exhibit CDA-156) (emphasis added).

[76] Slocan Section C Questionnaire Response (23 July 2001), at C-35 - C-36 (Exhibit US-71). This futures revenue was reported in a US sales database field labelled DIRSELU2. Commerce also verified that Slocan had accurately reported this data. See Slocan Cost Verification Report, at 26 (Exhibit CDA-118). There was never any dispute concerning the existence or amount of the futures revenues.

- Evidence that these futures revenues only relate to the US market;[77]
- Slocan's treatment of futures revenue in its books and records as lumber sales revenue;[78]
- An explanation of the purpose and effect of futures hedging contracts for lumber prepared by the CME;[79]
- Slocan's hedge approval for the CME (demonstrating that Slocan was a hedger rather than a speculator);[80]
- Slocan's standard futures hedging contract;[81] and
- Slocan's hedging account designation agreement with its broker.[82]

126. Most tellingly, as the United States conceded in the Second Substantive Meeting, Commerce has concluded that these futures revenues constitute an offset to indirect selling expenses. This concession is itself an admission that Commerce in fact concluded that Slocan had *demonstrated an effect on price comparability.* Consequently, Commerce was required to make an adjustment of some kind to ensure a fair comparison.

127. The United States repeatedly refers to irrelevant aspects of its own domestic law to argue that Commerce was not required to provide an adjustment. In effect, the United States claims that Slocan was required to "guess" the right type of US domestic law adjustment, before Commerce would provide this adjustment. This is not, however, a prerequisite to a proper adjustment for a difference affecting price comparability under Article 2.4 of the *Anti-Dumping Agreement*.

128. In *United States – Hot Rolled Steel*, the Appellate Body found that Article 2.4 requires that appropriate "allowances" must be made to ensure a "fair comparison".[83] The Appellate Body also explained that "under Article 2.4, the obligation to ensure a 'fair comparison' lies on the *investigating authorities*, and not the exporters."[84] As the panel in *Egypt – Steel Rebar* concluded, this type of explicit obligation must be "performed by the investigating authority on its own initiative, and exactly as specified in the *Anti-Dumping Agreement*".[85] Finally, Article 2.4 also places the obligation on the investigating authority to "indicate to the parties in question what information is necessary to ensure a fair comparison" if the requisite information has not been provided. At no point in time did Commerce request additional evidence from Slocan to demonstrate an effect on price comparability.

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[77] *Ibid*. The database field DIRSEL2 was only found in the database relating to US sales. There is no futures market that is comparable to the CME in Canada.

[78] Slocan Case Brief (12 February 2002), at 70 fn 24 (Exhibit CDA-156). Also see US First Written Submission, at para. 246; US First Answers to Questions, at fn 77 and para. 138; and IDM, Comment 21, at 94 (Exhibit CDA-2).

[79] Chicago Mercantile Exchange, "An Introductory Hedge Guide - Random Lengths" (Chicago: Chicago Mercantile Exchange, 2000), Slocan Sales Verification Exhibit 21, at VE02362 - VE02380 (Exhibit CDA-119).

[80] Chicago Mercantile Exchange, "Year 2001 Hedge Approval" (29 December 2000), *ibid*., at VE 02428 – VE02429.

[81] Merchants Trading Company, "Customer Information Sheet – Customer Agreement", *ibid*., at VE0281 – VE02382.

[82] Merchants Trading Company, "Hedging Account Designation", *ibid*., at VE 02386.

[83] *US – Hot Rolled Steel*, at para. 176.

[84] *Ibid*., at para. 178 (emphasis in original).

[85] *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R, adopted 1 October 2002, at para. 7.2.

129. As outlined above, Commerce has determined that these futures revenues were an offset to "indirect selling expenses" that affect price comparability. As there was an effect on price comparability, Article 2.4 required Commerce to provide an adjustment of *some kind*. Further, Commerce was required to provide this adjustment even if it determined that "direct selling expenses" were not the proper form of adjustment under US domestic law. Commerce was not free, however, to ignore the effect on price comparability altogether, and to make no adjustment whatsoever.

130. Finally, the United States attempts to argue that "direct selling expenses …[are] a type of adjustment for differences in conditions and terms of sale."[86] Although "direct selling expenses" might often constitute "conditions and terms of sale" these expenses will sometimes more properly relate to other listed differences in Article 2.4. A simple example is illustrative. In the underlying investigation, Softwood Lumber Agreement (SLA) taxes were deducted as "direct selling expenses".[87] Article 2.4 requires that due allowance is made for differences relating to "taxation". As an export tax these SLA tax revenues more properly relate to "taxation" rather than "conditions and terms of sale". Moreover, Commerce's treatment of these revenues confirms that the SLA taxes are a difference in "taxation". Commerce deducted SLA taxes as "direct selling expenses" from all sales, including sales for which there were *no SLA taxes applied*. As a result, these SLA taxes could not constitute a "condition or a term of sale" in any ordinary understanding of this term.[88] In a similar manner, "direct selling expenses" that do not constitute "conditions and terms of sale" might also fall under the ambit of "other" differences affecting price comparability.

131. Which particular adjustment should have been made under US domestic law is a matter that this Panel need not decide, and it is not a matter that Canada has asked this Panel to decide. What *is* a matter for this Panel to decide is whether Commerce was free to make no "due allowance" whatsoever for a difference that, the United States now acknowledges, affected price comparability.

136. Please comment on para. 138 of the US reply to Question 83 of the Panel:

> **"as noted in paragraph 246 of the US First Written Submission, it would have been inappropriate for Commerce to disregard Slocan's own treatment of the profits as linked, albeit indirectly, to lumber sales and instead treat them as offsets to cost of production."**

132. Although Slocan's treatment of futures revenues in its records is persuasive as to the proper treatment of these revenues, it is not conclusive.

133. Commerce's reliance on these records was not consistent. As outlined above, Slocan treated liquidated hedging contracts in its records as a form of lumber sales revenue. If Slocan's records were determinative of the treatment for futures revenues then Commerce should have provided a "direct selling expense" adjustment. Instead, Commerce ignored these records and refused a "direct selling

[86] US First Answers to Questions, Question 83, at para. 145.

[87] SLA taxes were an export tax collected by the Canadian government on lumber exports in excess of predetermined quota limits.

[88] "[T]he phrase 'conditions and terms of sale' refers to the *bundle of rights and obligations created by the sales agreement*, and 'differences in conditions and terms of sale' refers to differences in that bundle of contractual rights and obligations." (emphasis added) *United States – Anti-Dumping Measures on Stainless Steel Plate from Korea*, Report of the Panel, WT/DS179/R, adopted 1 February 2001, at para. 6.75. In this proceeding, the United States took the position that "conditions and terms of sale" has a much broader significance. If that was the US position under its domestic law during the investigation, then the futures revenue should have been considered a condition and term of sale and the revenue treated as a "direct selling expense."

expense" adjustment.[89] It then used the same records to support its determination that futures revenues were not a form of investment income.[90] This selective reliance on Slocan's records is neither even-handed nor objective.

To both parties:

> **140. Please provide in diagram format the company structure of Weyerhaeuser International Inc., showing the relationship between Weyerhaeuser Canada, Weyerhaeuser US and Weyerhaeuser International Inc. In addition, could Canada provide the structure of the financial records of the different entities, that is, at which level are they audited/consolidated.**

Corporate Structure

134. The respondent in the softwood lumber investigation was Weyerhaeuser Company, a US company based in Washington State.[91] Weyerhaeuser Company owns [[ ]] of Weyerhaeuser International Inc., which is also a US company. Weyerhaeuser International Inc. owns [[ ]] of Weyerhaeuser Canada Limited, which produced and exported the Canadian softwood lumber that was subject to the investigation.[92] The remaining [[ ]] of Weyerhaeuser Canada Limited is owned by Weyerhaeuser Holdings Limited, a British Columbia (Canada) company that is [[ ]] owned by Weyerhaeuser International Inc. This relationship is depicted in the attached Exhibits.

135. Attached as Exhibit CDA-189 is a set of four diagrams of Weyerhaeuser's corporate structure. The first three documents are linked.

- The first page includes all of Weyerhaeuser Company's US organization. Weyerhaeuser International Inc. is listed on this page.

- The second page is a breakdown of Weyerhaeuser International. Weyerhaeuser Canada is on this page, as is a breakdown of Weyerhaeuser Canada.

- The third page is simply an enlarged version of the Weyerhaeuser Canada Limited section of the chart shown on page 2.

- The fourth page is a simplified version of the overall corporate structure involving these companies.

Financial Records

136. Weyerhaeuser Company, the overall US parent company, prepared consolidated financial statements. Since Weyerhaeuser Company is both an operating unit (managing the company's US operations) and corporate headquarters for the company's global operations, operating expenses and corporate expenses appear on Weyerhaeuser Company's financial statements. Commerce's task

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[89] IDM, Comment 21, at 94 (Exhibit CDA-2).

[90] US First Written Submission, at 246; US First Answers to Questions, at fn 77 and para. 138; and IDM, Comment 21, at 94 (Exhibit CDA-2). The IDM states that "While we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity."

91 This company was referred to as Weyerhaeuser US for the purposes of the submissions filed in this dispute.

92 Weyerhaeuser Canada Limited was referred to as Weyerhaeuser Canada for the purposes of the submissions filed in this dispute.

during the investigation was to isolate those corporate expenses that were attributable to the production and sale of softwood lumber by Weyerhaeuser Canada Limited, its Canadian business.

137. Weyerhaeuser International did not prepare consolidated financial statements.

138. Weyerhaeuser Canada Limited prepared financial statements for its own operations, in accordance with US Generally Accepted Accounting Principles, that Commerce relied on during the investigation.[93] All G&A expenses associated with the production and sale of Canadian softwood lumber appeared on Weyerhaeuser Canada's financial statements. The hardboard siding expense did not appear on Weyerhaeuser Canada's financial statement because it was an expense related solely to Weyerhaeuser Company's US operations.

139. Commerce committed an error when it attributed the hardboard siding expense to the production and sale of softwood lumber because the hardboard siding expense related to Weyerhaeuser Company's US operations; it was not a Company-wide headquarter expense incurred on behalf of Weyerhaeuser Company's global business.

140. Attached as Exhibit CDA-190 is a narrative portion from Weyerhaeuser's Section A Response to Commerce[94], discussing the financial statements produced by Weyerhaeuser Company.

93 Weyerhaeuser Section A Questionnaire Response (22 June 2001) at A-52 **(Contains Business Confidential Information on page A-52)** (Exhibit CDA-190).

94 Ibid., at A-52 – A-54.

ANNEX B-2

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(26 August 2003)

1. The following responses of the United States answer the 13 August 2003 questions to the United States and to both parties. In several instances, the United States has also addressed questions posed by the Panel to Canada.

A. GENERAL QUESTIONS

To the US:

> **86. The Panel refers to paras. 2 and 3 of the US Second Oral Statement. The Panel requests the US to note all the "misstatements" that it has identified in Canada's submissions, in addition to those mentioned in the Second Oral Statement. Further, in its replies to the questions posed by the Panel, Canada's Second Written Submission and Second Oral Statement, Canada made detailed factual presentations relevant to its claims. The US is requested to identify and substantiate all factual aspects with which it disagrees with Canada.**

2. In response, the United States refers the panel to the chart at the Attachment hereto.

3. The United States has diligently reviewed each of Canada's submissions and statements to respond to the Panel's question. In that process, the United States identified numerous misstatements and factual aspects of Canada's argument with which it disagrees. Each of these is catalogued in the Attachment. However, the absence of a particular statement by Canada from the Attachment should not be construed as a concession or as agreement with the substance of that statement.

4. Canada's statements that the United States would describe as "misstatements" or with which the United States disagrees are too numerous to be comprehensively catalogued. For example, inasmuch as the United States disagrees with Canada's interpretations of AD Agreement articles, the United States would describe Canada's statements concerning those articles as "misstatements." The United States has addressed those arguments in its prior submissions and statements and does not separately identify them in the Attachment.

B. ARTICLE 5.2:

To Canada:

> **87. The Panel notes that Canada has made a number of allegations on shortcomings of the data in the application in Section II of its Second Oral Statement. In Canada's view, does the examination it claims should have been done by the DOC, require a pre-initiation investigation?**

5. The United States has argued that Canada's interpretation of Article 5.2 effectively would require an investigating authority to undertake a pre-initiation inquiry. Under Canada's theory, an authority would have to satisfy itself that an application contained *all* information reasonably available to the petitioner on the subjects specified in Article 5.2. Put another way, the authority would have to determine what information was reasonably available to the petitioner (potentially, a very broad universe of information) and whether any of that information had been excluded from the application. The only way to make such a determination would be to conduct an investigation. The United States has observed, in general, the impracticality of requiring such an investigation, as well as the absence of any such requirement in the AD Agreement.[1] The United States would only add that, under Canada's theory, this requirement would not be limited to information on dumping. It presumably would extend to each of the other categories of information specified in Article 5.2. This would include, for example, information on impact of the imports on the domestic industry. A petitioner's information on that particular issue is likely to be very expansive. It is inconceivable and illogical that Article 5.2 would require a petitioner to provide *all* information reasonably available to it on that topic.

C. ARTICLE 5.3:

To Canada:

> **88. In paras. 34 to 43 of Canada's reply to Question 8, Canada has made certain allegations regarding the information contained in the application as submitted by the US domestic industry, and which formed the basis for the initiation of the investigation. In its Second Oral Statement, Canada has also alluded to some of these issues. Could the US please comment in detail on these allegations?**

6. Canada's 30 June 2003, response to Question 8 included claims regarding the alleged failure of the application "to have costs of significant or representative producers" (paras. 34-35); "to provide costs for a period of time sufficient to objectively assess the reasonableness of the data submitted" (para. 36), and to include "evidence of the method used to calculate manufacturing costs for the SPF species" and evidence of "how company costs were allocated to the specific 2.4 kiln-dried dimension or stud lumber" (paras. 37-38). The same response also included claims related to the alleged failure of the application to "contain adequate information regarding freight costs" (paras. 39-43).

7. The United States addressed each of these issues in its 9 July 2003, Second Written Submission, at paras. 23-32, and refers to those detailed answers and the supporting evidence cited therein. Because Canada's response to Question 8 contained numerous factual misstatements, the United States also refers to the US response to Question 86, set forth as an Attachment to this submission. In brief, the United States addressed the cost and price issues that Canada raised as follows.

8. In response to Canada's claims regarding costs from significant or representative producers:

- The vast majority of the "costs" used in the application were derived from sources Canada has not challenged (including a significant amount of cost data from Canadian government sources). The data from US mills were used primarily to identify production factors, rather than costs.[2]

- To the extent that Canada is criticizing the sources as a basis for identifying production factor data, the United States explained that what Canada referred to as "the Canadian producers

[1] US First Written Submission, paras. 70-76; US Opening Statement at First Panel Meeting, para. 22; US Second Written Submission, paras. 10-13; US Opening Statement at Second Panel Meeting, paras. 11-21.

[2] *See* US Second Written Submission, para. 24.

being modelled" included the entire Canadian softwood lumber industry (not merely the very largest producers that were subsequently selected as respondents). The lumber industry is disaggregated and diverse, and the mills whose production factors were included in the application were among those listed in a US Department of Agriculture publication focusing on "large, permanent operations that make up the bulk of the industry.[3]33

9. In response to Canada's claims regarding costs for a period of time sufficient to objectively assess the reasonableness of the data submitted:

- As reflected in the exhibits it references, Canada's argument regarding what it broadly terms "cost" data applies, in fact, only to the US mill data on factor usage. Furthermore, taken as a whole, these data, when combined, not only cover the full calendar year 2000 on a country-wide basis, but also include data on both the British Columbia and Quebec markets. The confidential affidavits, furthermore, explain why data for particular months are provided for particular mills, including when particular mills close their financial statements.[4]

10. In response to Canada's claims regarding a lack of explanation of how manufacturing costs were calculated and allocated:

- The United States has pointed out that the application followed the normal industry practice (as reflected in industry patterns of data collection and cost breakouts) of allocating costs, for the most part, on a per-MBF, species-specific basis. The United States also explained that when a broader species average was used (*i.e.*, for stumpage costs in Quebec), this actually favoured respondents by resulting in lower costs, and, thus, lower margins.[5] Although the cost allocation methodology used in the application may not have been as refined as that developed in the course of the investigation, it permitted Commerce to reasonably ascertain product costs for purposes of initiation. This can be seen from the fact that the evidence of below-cost sales was corroborated both by the press articles in the application and by the extensive below-cost sales found in the investigation using the respondents' own cost data and more detailed cost allocation methodologies.

11. In response to Canada's allegations regarding freight data:

- The United States clarified that, as Quebec producers ship lumber both by truck and by rail, it was appropriate to use a truck shipment rate from a producer that shipped by truck. Commerce also properly relied upon a rail freight rate for "softwood lumber" without seeking out data on the comparative weight of different pine species, especially in view of the fact that the quotation at issue was for transfer over a considerably shorter distance than the delivery distance associated with the export sales for which an estimated freight expense was being calculated. In other words, the quotation likely had the effect of understating the actual cost of transporting lumber for the transactions at issue. Finally, the United States clearly demonstrated from the record that its calculations did not, as Canada claimed, include the cost of freight from the Maritime Provinces in its average cost for freight from Quebec.[6]

12. In its oral statement at the second substantive meeting, Canada addressed almost none of these points or the evidence relied upon by the United States.[7]

[3] *See id.*, para. 25.
[4] *See id.*, para. 26.
[5] *See id.*, paras. 27-28.
[6] *See id.*, paras. 29-32.
[7] In its discussion of these issues in Canada's Second Oral Statement, the only explicit reference to the US Second Written Submission argues that the US never made a "finding" that the allocation by MBF and species was consistent with "normal industry practice." Here, also, Canada offers no evidence to contradict this

89. In its reply to Question 8, Canada submits that using the Applicant's Random Lengths price data for Quebec, a comparison of all of the Quebec ex-factory price data for ESPF (2x4, Studs&Btr, KD, RL and 2x4-8', PET, KD) products sold in Quebec and in the US, shows that the US price was consistently higher during the period and that there was therefore no price-to-price dumping demonstrated by the evidence in the Application. It further provides a calculation in footnote 32 to substantiate the allegation. Could the US please comment on this allegation and on the calculations?

13. Both the allegation and the calculation are irrelevant to the question of whether Commerce properly initiated and continued the investigation, because neither the application nor Commerce's decision to initiate was based on price-to-price dumping. As Commerce explained in its initiation checklist, "Because the Canadian prices, when compared to the COP, were demonstrated to be below the COP, petitioners have based their margin calculations on the comparison of {export price} to {constructed value}."[8] This comparison of export prices to constructed value demonstrated that softwood lumber was sold at prices below the cost of production, *i.e.*, dumped.

90. Please comment on Canada's Second Oral Statement, para. 20 which states that:

> **"[t]he United States, hiding behind the pretence of confidentiality, has not provided this Panel with any information that was before Commerce about the two US surrogate mills. These US mills were at the heart of Commerce's decision to initiate. Canada has not seen, and the Panel still does not have before it, basic information in the hands of the United States, such as the names of the US mills and what Commerce knew about those mills. The United States has responded to Canada's claims with nothing but assertions."**

14. As a preliminary matter, the United States finds it hypocritical for Canada to be accusing the United States of "hiding behind the pretence of confidentiality." Canada understands well the sensitivity of business confidential information and the importance of safeguarding it adequately and not disclosing it without the consent of the submitter.[9] It comes as a surprise, therefore, that Canada would dismiss as "hiding behind the pretence of confidentiality," Commerce's legitimate protection of the confidentiality of certain information as required by US statutory law.

15. In any event, Canada ignores both the arguments and the supporting record evidence cited by the United States in its Second Written Submission at paragraph 25 and the footnotes thereto, which demonstrate that the mills in question were within the range of the mills which "make up the bulk of the [US and Canadian softwood lumber] industry."[10]

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practice (which is clearly reflected, for example, in the pricing patterns found in the *Random Lengths* materials in the application). *See* Canada Second Oral Statement, paras. 16-20.

[8] *See* Checklist (Exhibit CDA-10) at 7; *see also* Initiation Notice (Exhibit CDA-9), at 66 Fed. Reg. 21330 (margin was based on a comparison of export price to constructed value).

[9] *See* Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/41 at p. 2 (24 Jan. 2003).

[10] US Second Written Submission, para. 25, note 38.

D. ARTICLE 2.6:

To the US:

91. The Panel notes in para. 36 of the US Second Oral Statement that "Canada misunderstands the analysis that was actually applied." Could the US expand on what it perceives the misunderstanding of Canada is?

16. The most important point related to Canada's claim under Article 2.6 is that this provision contains no obligation concerning an investigating authority 's definition of the product under consideration.[11] In various submissions and statements in this dispute, the United States has endeavoured to explain Commerce's administrative practice in defining the product under consideration. It has done so not to defend Commerce's practice in light of Article 2.6 – which contains no obligation on this issue – but instead to demonstrate that Canada's argument fails even on its own terms.

17. The misunderstanding referred to in the US Second Oral Statement is Canada's characterization of the analysis applied in the lumber investigation as different from Commerce 's *Diversified Products* analysis. Canada has focused on two sentences taken out of context and leveraged these sentences into an assertion that there are two distinct, alternative tests that Commerce may apply in identifying the scope of the product under consideration. The first such test, Canada asserts, is the familiar *Diversified Products* analysis, with which Canada has no complaint. The second test, according to Canada, is a "no clear dividing line"/"continuum" test. Canada alleges that in the lumber investigation, Commerce applied the latter test in lieu of the *Diversified Products* test.

18. Canada's contention that there are two alternative tests and that Commerce applied something other than its familiar *Diversified Products* analysis in this case is incorrect. Simply put, Commerce applied its *Diversified Products* analysis. In applying that analysis, a question that Commerce considered was whether there were clear dividing lines that distinguished some elements of the putative "product under consideration" from other elements. Canada incorrectly suggests that Commerce thereby "subordinated" the *Diversified Products* analysis to a "no clear dividing line" analysis.[12] In fact, it did nothing of the sort.

19. Similarly, Canada improperly asserts that a passing observation by Commerce about the diversity of softwood lumber products must mean that Commerce abandoned the *Diversified Products* analysis in this investigation.[13] Yet, in context, it is clear that, notwithstanding this "general observation," Commerce did apply its *Diversified Products* analysis.[14] It did so for each softwood lumber product alleged to be outside the scope of a properly defined product under consideration (*i.e.*, Western red cedar, Eastern white pine, softwood lumber boards used as bed frame components, and softwood lumber boards used as finger-jointed flangestock).[15]

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[11] *See* US First Written Submission, paras. 85-99; US Opening Statement at First Panel Meeting, paras. 24-28; US Second Written Submission, paras. 33-41.

[12] Canada Second Written Submission, paras. 70, 87.

[13] *Id.*, paras. 71, 87.

[14] *Final Determination*, Comment 52, at 154 (Exhibit CDA-2).

[15] *See* , *e.g.*, application of *Diversified Products* analysis to Western red cedar (*Scope Memorandum*, at 24-28 (Exhibit CDA-12); *Final Determination*, Comment 52A (Exhibit CDA-2); application of *Diversified Products* analysis to Eastern white pine (*Scope Memorandum*, at 29-31 (Exhibit CDA-12); *Final Determination*, Comment 52C (Exhibit CDA-2); application of *Diversified Products* analysis to bed-frame components (*Scope Memorandum*, at 32 (Exhibit CDA-12); *Final Determination*, Comment 52E (Exhibit CDA-2); application of *Diversified Products* analysis to finger-jointed flangestock (*Scope Memorandum*, at 31-32 (Exhibit CDA-12); *Final Determination*, Comment 52F (Exhibit CDA-2);

20. Canada's erroneous contention that in this investigation Commerce abandoned its usual practice and applied an unfamiliar analysis appears to be an attempt to compensate for Canada's inability to identify an applicable obligation under Article 2.6. As Article 2.6 is silent on the question of how an investigating authority identifies the product under consideration, Canada has resorted to the suggestion that, whether or not there is an express obligation in this area, Commerce acted unreasonably by deviating from its normal practice. However, the isolated statements on which Canada relies do not support that contention. In identifying the product under consideration in this investigation, Commerce applied its normal *Diversified Products* analysis.

E. PHYSICAL CHARACTERISTICS:

To the US:

94. We refer to the following statement in para. 50 of the US Second Oral Statement:

> **"for all physical characteristics, except dimension, Commerce had cost data to connect the physical differences to the impact on price, pursuant to its normal methodology."**

Could the US confirm that it normally bases adjustments on differences in variable costs and that in this instance DOC could determine adjustments on such a basis for all differences except for dimension?

21. The United States confirms that Commerce normally bases a price adjustment for differences in physical characteristics in the product under consideration on reported differences in the variable cost of manufacturing. This can be seen in Commerce's questionnaire, relevant portions of which were provided in Exhibit US-36, requesting this information from respondents and explaining the basis for the adjustment in the questionnaire's glossary of terms (also provided in Exhibit US-36). The questionnaire's glossary refers respondents to Commerce's regulations regarding this specific price adjustment (Exhibit US-44). Commerce also has a decade-old policy bulletin explaining the basis for the adjustment, available on its website at <http://ia.ita.doc.gov/policy/>, and provided in Exhibit US-77.

22. With respect to the eleven physical characteristics distinguished for purposes of the model match methodology, Commerce never compared different softwood lumber product categories, species or grade groups.[16] Thus, there were never any comparisons for which a price adjustment would be warranted with respect to these three physical characteristics. The respondents reported variable cost of manufacturing data for moisture content, surface finish, end trim and further processing in their questionnaire responses, and Commerce was able to determine adjustments pursuant to its normal methodology for these four characteristics.[17] In Commerce's *Preliminary Determination*, Commerce relied on the respondents' normal books and records, which reported no difference in variable cost between products of differing grades and dimension. Therefore, Commerce was not able to make an adjustment for grade and dimension pursuant to its normal methodology.[18]

23. In response to specific comments on the *Preliminary Determination* from the Canadian respondents (addressed in more detail below), Commerce further evaluated price and cost data with

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[16] *See* US First Written Submission, paras. 124-125.

[17] *Id.*, para. 126; Dept. of Commerce, *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada*,66 Fed. Reg. 56062, 56066 (6 Nov. 2001) ("*Preliminary Determination*") (Exhibit CDA-11).

[18] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11).

respect to grade and dimension and determined to allocate certain costs of manufacturing to grade, but not to dimension, using value-based data.[19] Consequently, for the *Final Determination* , Commerce calculated grade-specific variable costs, making a cost-based price adjustment possible when comparing products of different grade. Therefore, dimension remained the only physical characteristic for which an adjustment could not be made pursuant to Commerce's normal methodology.[20]

> **95. Could the US explain in detail how the issue of dimension was addressed in the lead-up to the Preliminary Determination and from the Preliminary Determination to the Final Determination, including after the DOC found that there were no differences in variable costs? Was DOC's statement in the Preliminary Determination that dimension has an effect on price comparability made before DOC knew that there was no difference in variable costs? Indicate what made DOC change its position with respect to the effect of dimension on price comparability between the Preliminary Determination and the Final Determination.**

24. Commerce did not state that "**dimension** has an effect on price comparability" in its *Preliminary Determination*. The Panel's misapprehension presumably derives from Canada's distortion of a statement in Commerce's *Preliminary Determination* concerning "several" physical characteristics "which affect price." Canada quoted that statement out of context.

25. As indicated in the United States' First Written Submission, paras. 124-125, and in response to Question 95, above, the dimensional characteristics of width, thickness and length comprised three of eleven physical characteristics that Commerce accepted for purposes of distinguishing between models of softwood lumber in this investigation. Commerce's questionnaire identified the specific product characteristics that Commerce determined, based on the interested parties' comments, should be distinguished in its model match methodology. (Grade was later separated into grade and grade group.)

26. As indicated above, the respondents' questionnaire responses reported the same variable cost of manufacturing for all dimensions. However, Commerce, did not match nonidentical dimensions (or grades) in the *Preliminary Determination*. This was consistent with its practice in many agricultural cases, where Commerce did not match across certain characteristics if there were no cost differences associated with differences in physical characteristics.[21] This obviated any need for the requested price adjustment. Commerce's explanation concerning its preliminary treatment of the physical characteristics, particularly dimension and grade, is set forth below. Although Commerce acknowledges an impact of physical differences on price, it does so in the context of distinguishing the complex and diverse factors determining price in this case versus another much simpler case, in which Commerce determined that a value-based price adjustment for a single physical difference was warranted:

> [F]or this preliminary determination, we have concluded that it is not appropriate to match products that do not have the following identical physical characteristics: grade, thickness, width and length. These are significant physical characteristics that cannot be accounted for by means of a cost-based difference-in-merchandise adjustment. The respondents in this investigation have reported that their methods of tracking costs and the nature of producing lumber do not allow them to distinguish costs by grade or size. Specifically, the respondents have reported that they cannot report costs that distinguish between factors other than moisture, surface finish, end

[19] *Final Determination*, Comment 4 (Exhibit CDA-2).
[20] *Id*., Comment 8 (Exhibit CDA-2).
[21] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11) (discussing cases involving tomatoes and salmon, respectively).

> trim and further manufacturing. Our analysis confirms that most lumber produced within a given species has the same production cost.
>
> The respondents have cited to UHFC Company v. United States, 916 F.2d 689 (Fed. Cir. 1990), where the Court of Appeals for the Federal Circuit (CAFC), in that specific case, instructed the Department on remand to match across different strengths/grades, despite the fact that differences in costs could not be calculated. In that case, the product involved was animal glue, where different strength/grades were produced at the same time, using the same production process. The respondents claim that in accordance with the Court's decision in that case, "the Department must calculate a value-based difference-in-merchandise in this case in those instances where similar products are compared and there is no variable cost data available to permit the calculation of a cost-based difmer." Among the suggested bases for a value-based difmer adjustment were data published in Random Lengths, respondents' own reported sales data covering the POI, or historical pricing data.
>
> We disagree that the UHFC decision requires the calculation of a value-based difmer adjustment in this case. First, this investigation is distinguishable from the circumstances in the UHFC case, where there was only a single difference, i.e. glue strength, between the products**.** ***In the instant investigation, there are several significant differences in physical characteristics which affect price.*** As a result, we have determined that we have no comparable basis on which to adjust for physical differences between similar products based upon market value, as has been suggested by the respondents. By Abitibi's own admission, Random Lengths data are not comprehensive enough to identify all of the differences among the entire range of products.[22]

27. As is clear from the above discussion, Commerce *did not make any determination* with respect to the impact, if any, that dimension alone had on price, nor did it focus on *measuring* any appropriate adjustment. Commerce then noted that its decision to match similar products only where it was able to calculate a cost-based price adjustment, and to limit its matches for grade and dimension to identical comparisons, was consistent with agricultural cases.[23] (Moreover, as is apparent from the full discussion of the issue in the *Preliminary Determination*, Commerce did consider making an adjustment pursuant to its normal methodology and did consider the arguments raised by the parties as to other means.)

28. The Canadian respondent companies, in response to Commerce's *Preliminary Determination*, requested that Commerce allocate certain costs, using value data, to grade and dimension, so that a cost-based adjustment for differences in dimension and grade could be made. Alternatively, they requested, once again, that Commerce grant a value-based adjustment for differences in dimension (and grade), rather than limit its comparisons to identical dimension and grade products.[24] Indeed, two of the six respondent companies indicated that the result Commerce reached in the *Final Determination* (what they termed a "zero" adjustment) would be an acceptable result.[25]

29. The Canadian respondent companies requested that Commerce reevaluate its decision to match only identical dimensions and grades based on the available data on the record. Commerce examined the data in the questionnaire responses to determine whether or not it would be appropriate

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[22] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11) (emphasis added).

[23] *Id.*, (discussing cases involving tomatoes and salmon, respectively).

[24] *See, e.g.*, Case Brief of Abitibi, 12 Feb. 2002, 26-29 (Exhibit CDA-142, pp. 93-96); Case Brief of West Fraser, 12 Feb. 2002, 17-19 (Exhibit CDA-142, pp. 140-142).

[25] *See, e.g.*, Case Brief of Slocan, 12 Feb. 2002, 24-32 (Exhibit US-74); Case Brief of West Fraser, 12 Feb. 2002, 26-29 (Exhibit US-75).

to allocate certain costs to grade and dimension using value data. As Commerce explained in its *Final Determination*, based on the fact that grade is a quality inherent in the wood, Commerce determined that certain costs could be allocated to grade using value data.[26] Unlike grade, Commerce specifically concluded that the facts did not warrant allocating costs to dimension[27], a conclusion that Canada has not challenged as inconsistent with the AD Agreement.

30. Using the respondents' home market sales data, which was also used to evaluate whether or not it was appropriate to allocate costs to dimension based on value data, Commerce then examined (a) whether or not it should compare similar dimensions (rather than just identical dimensions) and (b) whether or not, if it compared similar dimensions, it should make a price adjustment for differences in the nonidentical dimensions compared. As indicated above, this analysis was conducted at the behest of the Canadian respondents in light of the results of Commerce's *Preliminary Determination*. Commerce concluded, based on its examination of the data on the record, that it should not be limited to only identical dimensional matches, but that a price adjustment for nonidentical comparisons was not warranted.[28] For a more detailed explanation of Commerce's methodology, please see response to Question 99 below.

96. At what stage were the respondents informed of DOC's finding that differences in dimension do not affect price comparability? What opportunities were provided to respondents to comment on that finding?

31. As indicated above, Commerce found no cost differences attributable to dimensional differences and no basis for making price-based adjustments for different dimensions. Given these preliminary findings, it was clear that if Commerce matched different dimensions, as requested by the respondents, the obvious questions were: would an adjustment be warranted and, if so, what should it be? Consequently, it was in the *Final Determination* that Commerce concluded, and the respondents were thereby informed, that differences in prices were not attributable to differences in dimension and that a price adjustment for differences in the dimensions of the products compared was not warranted. Although this was Commerce's *final* conclusion, the parties were given ample opportunity to comment on the issue of price adjustments generally throughout the proceeding, as indicated already in Commerce's *Preliminary Determination*.

32. In its explanation in the *Final Determination*, Commerce responded to the specific requests and comments of both the Canadian and domestic interested parties on this issue.[29] The respondents' requests in their case briefs that Commerce match similar dimensions, and grant either a cost- or value-based price adjustment, required Commerce to evaluate the pricing data on the record both for purposes of Commerce's cost methodology and for purposes of a price adjustment. Clearly, it would have been impossible for Commerce to consider the respondents' suggestions without carefully reviewing the effect of dimension on price, as any calculation of a value-based cost or price-based adjustment for dimension would have been necessarily dependent on the relative prices between dimensions.

33. It would be a misreading of the AD Agreement to find that at every decision point in an investigation, an investigating authority must announce each intermediate decision and provide further opportunity for comment. Under such an interpretation, investigating authorities would be effectively prevented from completing investigations within any realistic time period and manageable comment schedule. This interpretation would place a significant obstacle in the way of the rule that investigations be concluded within one year and in no case more than 18 months.[30]

[26] *Final Determination*, Comment 4 (Exhibit CDA-2).
[27] *Id.*, Comment 4, note 60 (Exhibit CDA-2).
[28] *Id.*, Comments 7 and 8, respectively (Exhibit CDA-2).
[29] *Id.*, Comment 8 (Exhibit CDA-2).
[30] AD Agreement, art. 5.10.

97. Please comment on Canada's response to Question 22, with reference to the respondents' demonstrating a need for a price adjustment:

> **"at the beginning, of the period, in April 2000, Abitibi's average net price for No. 2 grade 2x4x8 was around [[ ]] whereas the No. 2 2x6x16 price was [[ ]]. The comparable figures for economy grade were [[ ]] for the smaller size and [[ ]] for the larger."**

34. The above example does not demonstrate a need for a price adjustment. This specific example, provided to Commerce in Abitibi's case brief during the investigation, is flawed because it relies on average prices for only one month. The example says very little about the effect of different dimensions on prices, as it only represents a limited amount of price data (average prices in a single month) and it is not clear what other factors might account for the price differences. Anecdotal price differences such as these may be part of a discernible pattern indicating price differences attributable to dimensional differences, or they may merely reflect coincidental pricing differences unrelated to differences in dimensions.

35. Attached to this submission, at Exhibit US-81, is a chart plotting the actual net sales prices of Abitibi's 2x4x8 No. 2 grade and economy grade softwood lumber and 2x6x16 No. 2 grade and economy grade softwood lumber over the course of the period of investigation. These are the same products as in the example from Abitibi's case brief.

36. What the exhibit strikingly demonstrates is that a price adjustment for dimension is *not* warranted, because no pattern of consistent price differences based on dimension is discernible. The prices, within each grade, for the two different dimensions converge, diverge and overlap during the period of investigation. In stark contrast, prices of the No. 2 grade and the economy grade remain consistently distinct. This example of the distinction between the relative behaviour of grade and dimension supports Commerce's differing treatment of grade and dimension (using value data to allocate certain costs to grade) in the cost methodology for the *Final Determination*.

98. The Panel notes the following statement contained in Canada's response to Question 22:

> **"Tembec suggested several alternative data sets and methodologies for computing such an adjustment (DIFMER)."**

Was the proposed methodology evaluated? What was the result of this evaluation? Please indicate where such a result can be found on the record.

37. The quoted sentence is another example of Canada's mischaracterization of the record. In fact, Tembec's "suggestions" amounted to no more than brief requests to use pricing data on the record, requests that had already been made to and rejected by Commerce in the *Preliminary Determination* . The full quote from Tembec's case brief reads as follows:

> The record is sufficient to calculate a value-based Difmer. The Department could use the relative values of the respective CONNUMs as reported in the respondents sales databases, the Publicly Available Published Information from sources such as Random Lengths, or historical value data as submitted by several respondents. Were

the Department to think that other data were required, the Department should have requested such data.[31]

38. Commerce addressed these suggestions in the *Final Determination.*[32] With respect to the use of the respondents' own sales pricing data as a basis for calculating a price adjustment, Commerce again noted the large number of sales made outside the ordinary course of trade, as it had in the *Preliminary Determination*: To use respondents' prices "would adjust normal values back to prices already determined to be outside the ordinary course of trade, the whole reason why we would be disregarding such prices and comparing to a similar product."[33] With respect to the use of *Random Lengths* data, Commerce reiterated that the data were not complete.[34] In the *Preliminary Determination*, Commerce stated its reservations concerning the use of historical price data, indicating that it had no basis on which to determine whether or not those sales had been made in the ordinary course of trade.[35] Commerce concluded that a price adjustment was not warranted based on its evaluation of all the data on the record.[36]

99. With respect to the consistency in price patterns, the Panel has the following questions:

(a) Could DOC explain in detail the methodology it used to carry out its consistency test? Illustrate your explanation with an example from the test that was carried out in this case, including any sampling, selection of dates, etc. Did the US consider using other methodologies?

39. In deciding how to address dimensional differences in this case, Commerce had four options: (1) calculate a value-based cost across dimension, which would allow the calculation of a cost-based price adjustment for dimensional differences pursuant to Commerce's normal methodology; (2) calculate a value (price)-based adjustment for dimensional differences; (3) calculate no price adjustment; or (4) continue to use the same methodology as in the *Preliminary Determination*, and not match products across dimension.

40. In order to consider the first three options, all of which were suggested by various respondents, it was necessary to examine the relative prices of the various dimensions. As indicated above, Commerce examined relative prices initially in the context of determining whether or not to calculate a value-based cost. Because Commerce was deciding which cost methodology to use, Commerce examined all prices for selected dimensions in its relative price test, even those which would eventually be found to be below cost. Commerce concluded that the random nature of the movement in relative prices between the various dimensions precluded dimension-specific prices from providing a sound basis for a value-based cost allocation.[37]

41. Using the same relative price tests, Commerce next considered the issue of whether, if it compared products across dimension, it was more appropriate to calculate a price-based adjustment for differences in dimension, or to make the comparisons with no such adjustment. Commerce examined random sales of commonly sold softwood lumber products, comparing products with

[31] 12 Feb. 2002, Tembec Case Brief, 37-38 (Exhibit CDA-142, pp. 163-164). The United States notes Tembec's first sentence from the quote above: "The record is sufficient to calculate a value-based Difmer." Apparently, Tembec and Canada now disagree, since Canada has attempted to submit a regression analysis of Tembec's data (Exhibit CDA-77 and Exhibit CDA-129) for the first time in this dispute. The United States continues to object to the submission of that data as a violation of Article 17.5(ii) of the AD Agreement.

[32] *Final Determination*, Comment 8 (Exhibit CDA-2).

[33] *Id.*

[34] *Id.*

[35] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11).

[36] *Final Determination*, Comment 8 (Exhibit CDA-2).

[37] *See id.*, Comment 4, fn. 60.

relatively small dimensional differences. Commerce chose products with small dimensional differences, because its computer programme was designed to match US sales to the above-cost home-market sales with the smallest possible dimensional differences.

42. Examples of the tests Commerce carried out can be found in Exhibit US-76 (replacement), involving two West Fraser products, and in Exhibits US-42 and US-43, involving two Slocan products. Commerce compared the actual home market sales prices for each of the Canadian respondent companies, plotting sales over the entire period of investigation. The sales included both above- and below-cost sales, as the point of the tests was to determine whether a pattern of consistent price differences which could be linked to dimension existed.

(b) Could the US explain in detail how the results of its test were evaluated? Please explain the evaluation leading up to that conclusion.

43. As a result of the above analysis, it was apparent that no reasonable adjustment could be measured or quantified. The prices of the sampled products fluctuated relative to each other over the period of investigation, such that no adjustment could reliably account for the difference in price at any given time. The sample comparisons demonstrated that the price *differences* between the comparable products varied to a significant degree. For example, the price differences between two products were both negative and positive in varying amounts over the course of the period of investigation. The sample West Fraser comparison provided in Exhibit US-76 (replacement) illustrates such fluctuations. In looking at these comparisons, Commerce found that not only would it be unable to quantify any price adjustment, but that given the relative fluctuations, an adjustment was not warranted. For example, if the price differences between two products were negative at some points during the period and positive at others, there was no meaningful way to determine whether an adjustment between those two products should be positive or negative, and therefore, there was no rational basis to conclude that an adjustment was appropriate. Ultimately Commerce concluded, after looking at all of the sample comparisons and seeing the degree of relative price fluctuations between the products most likely to be compared, that price differences could not be attributed solely to differences in dimension, particularly where those differences were minor.

44. Had respondents had other means to demonstrate a more consistent pattern of price differences, Commerce would have considered such data. The respondents had raised the issue themselves and had opportunities to present data in support of their claims.

100. The Panel notes that in Exhibit CDA-2, p. 51 it is stated that:

> **"as we stated in the Preliminary Determination, we do not believe it would be appropriate to use the respondents' prices as a basis for calculating a difmer adjustment where there were home market sales outside the ordinary course of trade during the POI for certain products involved here. To do so would adjust normal values back to prices already determined to be outside the ordinary course of trade, the whole reason why we would be disregarding such prices and comparing to a similar product."**

In response to an oral question by the Panel on 11th August, the US indicated that all the price data – including those prices which had previously found not to be cost-covering – were used for the consistency test. How does this statement reconcile with the above-quoted excerpt from the IDM?

45. The above quote refers specifically to the problem inherent in calculating a price-based adjustment in the face of a large number of sales made outside the ordinary course of trade. Under the

limited-reporting criteria agreed to by all the parties, each sale in the US database had an identical match in the home market database. The only time, therefore, that a US sale matched to a home market sale of a similar, rather than identical product, was when 100 per cent of the sales of the identical product were determined to be outside the ordinary course of trade. Therefore, Commerce was concerned that including sales outside the ordinary course of trade in the calculation of a price-based adjustment would result in establishing normal values that reflected prices of sales outside the ordinary course of trade.

46. This observation did not, however, affect the relative price test that Commerce carried out. (See Response to Question 99 above.) In looking at the movement in relative prices between dimensions, Commerce concluded that "there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared, especially where those dimensional differences were minor."[38]

101. Please comment on Canada's Second Oral Statement, para. 56 which states that:

> **"[t]he US International Trade Commission, in the injury inquiry, determined that "lumber prices generally differ substantially depending on grades and dimensions"."**

47. The full statement of the US International Trade Commission (ITC)[39], in context, shows the ITC's recognition of general conditions of competition in the market, with regard to variations in prices among types of softwood lumber. The ITC did not conduct any specific analysis with respect to the impact of dimension on price, nor did it quantify such relationship. The ITC's statement appears to be an observation about the market and not a finding of fact fundamental to its own determination of whether the US industry was materially injured or threatened with material injury by reason of dumped imports.

102. In paras. 58-60 of Canada's Second Oral Statement, Canada alleged that the average dumping margin for the non-identical comparisons was 2 to 7 times higher than the average margins of dumping for identical comparisons as DOC made numerous comparisons of smaller, low-value lumber sold in the US to larger dimension, high-value lumber sold in Canada, without any adjustment for dimension. Could the US comment on this allegation that this establishes a prima facie breach of the requirement of Article 2.4?

48. Canada erroneously suggests that dimensional differences explain the differences in margins in the comparisons at issue. Canada admits, however, that the non-identical comparisons with high margins included "numerous comparisons of smaller low-value lumber."[40] However, as is clear from Exhibit US-76 (replacement) (first four pages), many of these low-value products sold in the United States could only generate high margins if they were sold for prices in the United States that were well below their cost of production.[41] The lowest price for a product that Commerce could ever use in making a fair comparison is one that is at least equal to the cost of production, since Commerce

[38] *Final Determination*, Comment 8 (Exhibit CDA-2).

[39] The ITC observed, in considering conditions of competition pertinent to the softwood lumber industry, that: "Softwood lumber prices generally differ substantially depending on grades and dimensions, and may differ by species and applications involved, with better grades and wider dimensions usually carrying higher prices than lower grades and narrower dimensions." US International Trade Commission, Pub. No. 3426, *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928 (Preliminary) (May 2001) at 16 (Exhibit CDA-31).

[40] Canada Second Oral Statement, para. 59.

[41] The United States notes that Canada is not challenging Commerce 's cost methodology here.

discarded all below-cost sales prior to making price comparisons. The comparison that Commerce actually made was to the most similar product which had any sales which passed the cost test. As Exhibit US-76 shows, the prices of the most similar products were often only marginally above the cost of production. Therefore, it appears that the low-value products which generated high margins were, in fact, the most dumped products. It is for that reason, rather than the dimension of the compared product, that these low-value, low-priced US sales generated high margins.

49. In addition, Canada distorts the effect of these sales on the final margin by emphasizing the number of comparisons, rather than the quantity of lumber involved in the comparisons. Taking quantity of lumber into account, even the fact that the products at issue were heavily dumped (that is, that the margins on those particular sales were high) still had a limited effect on the final margin.

50. Canada has not established a *prima facie* breach of Article 2.4 (paragraph 60 of its Second Oral Statement), simply by claiming that the margins of the nonidentical comparisons were 2 to 7 times higher than the margins of the identical comparisons. Canada's argument rests principally on its claim that all parties acknowledged that dimension affects price. However, the evidence from the record Canada has cited[42] did not prove that any amount of differences in prices were specifically attributable to differences in dimension. Commerce found that relative prices of otherwise identical products of different dimensions appeared to fluctuate randomly, making it impossible to attribute any differences in price to the dimension of lumber. Therefore, because dimension was not demonstrated to affect price comparability, Commerce was not required to make any allowance for differences in dimension under Article 2.4.

To both parties:

> **103. Could the parties confirm whether the percentages mentioned in para. 40 and footnote 33 of the US reply to Question 25 of the Panel relate to differences in dimension only?**

51. The percentages referred to in paragraph 40 and footnote 33 of the United States First Answers to the Panel's questions relate to all differences in physical characteristics, not just dimension. However, the United States notes that the majority of the "similar" (*i.e.*, non-identical) comparisons will include different dimensions as a result of the model match methodology. Therefore, the United States does not believe that similar matches as a percentage of total comparisons (either weighted by quantity or stated as a raw number) would be significantly different if limited to dimension only.

F. ZEROING:

To the US:

> **109. Could the US explain how it normally calculates the dumping margin at the two stages and how it afterwards establishes the duty liability, and how this compares to the duties collected definitively.**

52. In an antidumping investigation, the United States normally calculates a company's overall dumping margin using price-to-price comparisons through the following two stage process.

[42] *See, e.g.*, Exhibit CDA-76; Canada's First Responses To Panel Questions, para. 87; Exhibit CDA-142.

Stage 1

(a) Relevant physical and other (*e.g.*, level of trade) characteristics are identified for sales matching purposes.

(b) For each combination of relevant physical and other characteristics of products sold in the United States during the period of investigation, the identical or most comparable combination of physical and other characteristics of products sold in the home market is identified.

(c) Where the combination of characteristics is not identical between the two markets and the differences have been demonstrated to affect price comparability, price adjustments are made.

(d) For all sales of each combination of relevant physical and other characteristics of products sold in the United States during the period of investigation, and for each most comparable combination of characteristics of products sold in the home market, the weighted-average price per unit (including any adjustments identified in (c) above) is calculated.

(e) For each set of comparable characteristics, the weighted-average normal value per unit is compared to the weighted-average export price (or constructed export price) per unit. When the weighted-average normal value exceeds the weighted-average export price, the difference is the per unit dumping margin for that comparison. When the weighted-average normal value is equal to or less than the weighted-average export price, there is no dumping margin for that comparison.

Stage 2

(f) Each per unit dumping margin found in step (e) is multiplied by the volume of the export transactions used in the comparison that resulted in that dumping margin.

(g) The results of step (f) are summed to create the numerator for the overall dumping margin calculation.

(h) The result of step (g) is divided by the aggregate value of all export transactions utilized in step (e).

53. The result of step (h) is the overall dumping margin for a given respondent. This overall dumping margin is the provisional measures rate in a preliminary determination and the cash deposit rate (estimated dumping duty) in a final determination.

54. In the absence of an administrative review, the estimated dumping duty is definitively collected. However, if a review is requested, Commerce performs a similar calculation to that identified above in order to calculate an appropriate assessment rate for the importer and a new cash deposit rate for the producer.

55. The differences between a review and an investigation are generally found in stage 1. In a review, rather than compare period-wide weighted averages, Commerce normally compares individual export transactions to a monthly weighted average of the most comparable home market sale. The results of these comparisons are combined in the same manner as described in the stage 2 discussion above to establish a new cash deposit rate.

56. A separate stage 2 calculation is performed to establish importer-specific rates for purposes of assessing definitive duties. For these purposes, the results of the comparisons between export transactions and monthly weighted average normal values are segregated based on the importer involved in the export transaction. The stage 2 calculation is then performed on an importer-specific basis, using the importer's entered value as the denominator.

G. ABITIBI:

To the US:

113. Please comment on Exhibit CDA-176.

57. Exhibit CDA-176 provides in chart form many of Canada's unsubstantiated claims related to Commerce's COGS-based methodology for the allocation of financial costs. Specifically, Canada highlights different kinds of assets that it believes are ignored through the COGS-based methodology. The vast majority of Abitibi's assets are considered through the COGS methodology.[43]

58. The argument for which Canada relies on in Exhibit CDA-176 is based on at least two false premises. The first false premise is that the costs of producing goods are fully reflected in accounts receivable. Financial costs relate to all the costs a company incurs in relation to the production of goods. As fully discussed in answer to question 115 below, Canada's argument falsely presumes that the only COGS that should be considered in the allocation of financial costs are those COGS captured in inventory. However, there is no evidence that Abitibi only incurs financial costs on inventory. Financial costs relate to all the costs a company incurs, including the costs incurred on producing sold goods as well as the costs incurred on producing goods in inventory. Commerce's COGS-based methodology considers both of these costs, while Canada's methodology considers only the latter. Canada's argument is also based on the false premise that Abitibi finances the full value of its assets in each year of production.[44] This extraordinary claim is contrary to normal business practices and entirely unsubstantiated. Depreciation expenses included in the COGS-based methodology which represent the cost incurred in using an asset in a given year are a reasonable, and, in fact, a more appropriate basis upon which to consider assets in the allocation of financial costs.

114. Please comment on Canada's Second Oral Statement, para. 72 which states that:

> **"Commerce: asserted in the Final Determination that it used COGS, not because it was the proper methodology for Abitibi's facts, but because it was Commerce's "established practice" and was "consistent and predictable"."**

59. Canada's statement misconstrues Commerce's determination. In fact what Commerce stated was:

> "Finally, we disagree with Abitibi that the Department should depart from its established practice of calculating financial expense ratios based on the financial expenses and cost of goods sold. . . (i.e. because of the fungibility of money). 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

[43] At least C$8 billion dollars of Abitibi's C$11 billion total assets were capital assets for which depreciation expenses were realized. *See* Abitibi Consolidated Financial Statement, p. 35 (Exhibit CDA-82).

[44] *See* Canada's Second Oral Statement, para. 77.

> consistent and predictable practice for calculating and allocating financial expenses."[45]

While predictability and consistency are important goals to which any investigating authority aspires, these were by no means the only bases for Commerce's determination. Commerce considered Abitibi's argument relating to an asset-based allocation for financial costs and rejected it. Specifically, after finding that Abitibi's argument was improperly premised on the debt of the company relating to only non-lumber producing divisions Commerce stated:

> "[T]he Department's method addresses Abitibi's concern that those activities [*i.e.*, non-lumber production] 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 lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense".[46]

Thus, rather than ignoring Abitibi's arguments, Commerce expressly considered them and rejected them.

To both parties:

> **115. The Panel understands Canada to argue in para. 80 of its Second Oral Statement that an asset-based methodology can capture the flow elements through inventory. Please comment.**

60. Canada's assertion in paragraph 80 of its Second Oral Statement is simply wrong. Abitibi's suggested asset-based allocation methodology does not "capture the flow elements through inventory." A company's inventory balance represents the inventory on-hand at any given point in time (generally, at the end of the year). The value of products that passed through the inventory account on the way to being sold during the year are not included in the ending inventory account – which necessarily means the inventory account does not capture the flow elements. That is, the inventory account does not capture the (usually much greater) value of products that have previously passed through inventory accounts during the year.

61. Canada's assertion also incorrectly assumes that only those costs incurred on products in inventory require financing, because sold products have produced revenues that are in turn used to pay for the cost of producing those sold goods.[47] However, similar to proceeds from a loan, proceeds from sales are entirely fungible and may be used to pay for any of the costs a company incurs (*e.g.* the purchase of fixed assets). Thus, financial costs relate to all the costs a company incurs, including the costs incurred on producing sold goods as well as the costs incurred on goods in inventory. Commerce's COGS-based methodology considers both of these costs, while Canada's methodology considers only the latter.

62. The balance sheet is not the correct place to look for cash flows. The correct place is the cash flows statement from Abitbi's financial statement.[48] This cash flow statement illustrates the numerous sources of cash, most significantly the net cash from operating activities, as well as the numerous uses of cash. This cash flow statement fully supports the concept of fungibility of money and that

[45] *Final Determination*, Comment 15 (Exhibit CDA-2).
[46] *Final Determination*, Comment 15 (Exhibit CDA-2).
[47] *See* Second Written Submission of Canada, para. 205 (arguing that cost of producing goods need only be financed until payment is received).
[48] *See* Abitbi's Financial Statement p. 34, "Consolidated Statement of Cash Flows" (Exhibit CDA-82).

financing costs cannot be traced to one particular activity of the company, such as the acquisition of assets.

116. Please indicate the advantages/disadvantages in this context, of the two approaches (COGS; asset-based) for allocating interest expenses.

63. Allocation of financial costs based on cost of goods sold results in a reasonable allocation of financial costs to softwood lumber, consistent with Article 2 of the AD Agreement. COGS is a broad category that includes the costs associated with the production of goods in a given year, including assets through the inclusion of depreciation expenses. Because COGS is specific to a given year, it is a reasonable basis upon which to allocate financial costs specific to the same period. Total asset values, on the other hand, relate to assets that exist over multiple years and are, thus, a less appropriate basis upon which to allocate current financial costs. In addition, an allocation of a financial costs based on asset-values falsely assumes that financial costs are a function of the value of assets at a particular point in time. There is no basis for such an assumption that could grossly distort the allocation of financial expenses. Finally, financial costs relate to all the costs a company incurs, including the costs incurred on producing sold goods as well as the costs incurred on goods in inventory. Commerce's COGS-based methodology considers both of these costs, while Canada's methodology considers only the latter.

64. For the reasons set forth here and in its prior submissions, the United States believes that the COGS methodology was the more reasonable of the two methods in this case. However, the question before the Panel is not whether one methodology was more reasonable than the other. Under the Article 17.6 standard of review, the only question is whether Commerce properly established the facts and evaluated the facts in an objective and unbiased manner. The United States has demonstrated that Commerce did so and, accordingly, its application of the COGS methodology conformed with the applicable WTO obligations.

H. TEMBEC (G&A):

To the US:

119. In its reply to question 56, the US refers to the "reliability of cost data". Based on the record, did DOC find in the context of the investigation that data submitted by Tembec for the Forest Products Group was not reliable? If so, please point to relevant documents submitted to the Panel – including cost verification reports – or provide them.

65. Commerce found that the use of Tembec's internal, division-specific books and records could have resulted in distortions.[49] Thus, reliability was a principal basis for Commerce's determination. Consistent with Article 2.2.1.1 of the AD Agreement, Commerce determined that cost data kept in accordance with GAAP were more reliable than cost data not kept in accordance with GAAP. No evidence was presented that Tembec's divisional data were kept in accordance with GAAP.[50] Moreover, the United States has provided evidence that Tembec's divisional data were not required to be kept in accordance with GAAP nor were they required to be an objective measures of costs.[51]

120. Please comment on paras. 84-88 of Canada's Second Oral Statement, specially on the last sentence of para. 85.

[49] *Final Determination*, Comment 33 (Exhibit CDA-2).

[50] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[51] *See* Exhibit US-80, p. 2.

A. No factual basis for assertion that Tembec's lumber producing division incurred less G&A:

66. Canada has failed to provide any reasonable factual basis for its assertion that Tembec's lumber producing division incurred less G&A than its non-lumber producing divisions. For instance, in its Second Written Submission, Canada asserts that, "Tembec submitted documented evidence that its pulp and paper operations incurred significantly higher G&A expenses than its lumber operations."[52] However, Canada's basis for this assertion makes no sense. Canada's claim rests only on the fact that its Forest Products Group requires a smaller amount of Tembec's total assets while accounting for relatively more of Tembec's total sales.[53] There is no logical nexus between the productivity of assets and G&A. Moreover, the fact that Tembec internally assigned costs to various divisions in a certain manner for its own purposes does not mean that such expenses were in fact incurred by those divisions in those amounts. Therefore, there is no basis upon which to find that Tembec's lumber producing division incurred less G&A than Tembec's non-lumber producing divisions.

B. Commerce rejected Tembec's divisional data for multiple reasons:

67. Contrary to Canada's assertion, Commerce did not reject Tembec's data simply because Commerce's standard practice was to rely on company-wide data for G&A calculations. In fact, as discussed in response to Question 119, Commerce rejected the data because they were less reliable and could have led to distortions. Moreover, basing G&A on company-wide data is consistent with the definition of general costs (*i.e.*, cost that relate to a company as a whole) while basing G&A on divisional data is not.

C. Commerce used Tembec's divisional data in the dumping calculation for an extremely limited purpose:

68. Article 2 of the AD Agreement requires an investigating authority to consider only books and records kept in accordance with GAAP. No evidence was presented that Tembec's divisional data were kept in accordance with GAAP.[54] Moreover, the United States has provided evidence that Tembec's divisional data were not required to be kept in accordance with GAAP.[55] Thus, Commerce was under no obligation to consider them.

69. In fact, whenever possible Commerce relied on audited amounts for the dumping calculation. To the extent that Tembec's divisional data were used for an extremely limited purpose (*i.e.*, establishing packaging costs to be removed from the G&A ratio), Commerce relied on this data because audited, GAAP consistent data were not available.

D. Specialized accounting standards are irrelevant to the Panel's inquiry:

70. Canada argues that based on the Federal Acquisition Regulation ("FAR"), Commerce's determination that G&A relates to a company as a whole is unreasonable.[56] However, the FAR standards are specialized accounting rules that relate to government procurement and are not equivalent to generally accepted accounting principles. Commerce's determination that general costs relate to a company as a whole is a reasonable interpretation of the term "general costs" found in

[52] Canada Second Written Submission, para. 223.
[53] *Id.*
[54] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).
[55] *See* Exhibit US-80, p. 2.
[56] *See, e.g.* Canada Second Oral Statement, para. 86.

Article 2 of the AD Agreement.[57] Moreover, as discussed above, Tembec has failed to provide any credible evidence that its lumber division incurred less G&A than its other divisions.[58]

E. Tembec's divisional statements are not audited and have not been shown to be in accordance with GAAP:

71. Canada argues that the divisional data are audited and reliable. However, the Auditor's Statement clearly indicates that the portion of Tembec' s consolidated balance sheet that was audited does not include the divisional information.[59] Moreover, the United States has shown that under Canadian accounting practices, divisional data are not meant to be an objective measure of costs. Rather, they are meant to enable financial statement users to see the business through the eyes of the management.[60] Finally, the United States has shown that divisional data in Canada do not have to be kept in accordance with Canadian GAAP.[61]

To both parties:

121. Was the "internal accounting methodology" referred to in Comment 33, p. 105, of the Memorandum of 21 March 2002 an allocation methodology "historically utilized by the exporter"? Please refer to the record.

72. Tembec presented no evidence of its historical allocation. In any event, under Article 2.2.1.1 an investigating authority is obligated to consider historical allocations only when such historical allocations are shown to be in accordance with GAAP and to be not distortive. No evidence was presented that Tembec's divisional data were kept in accordance with GAAP.[62] Moreover, the United States has provided evidence that Tembec's divisional data were not required to be kept in accordance with GAAP nor were they required to be objective measure of costs.[63] Thus, even assuming, *arguendo*, that Tembec has historically allocated costs between divisions in the same manner, Commerce was under no obligation to consider Tembec's division-specific G&A data. While historical use may indicate some consistency of compilation or presentation of information over time, historical use alone cannot impart reliability or consistency with GAAP.

I. WEYERHAEUSER:

To the US:

123. It is stated in para. 84 of the US Second Written Submission that:

> **"[g]eneral expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole. They are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never**

[57] *See* US First Written Submission, para. 200; *see also* Joel G. Siegel, Jae K. Shim, *Dictionary of Accounting Terms* (Barrons Educational Services, Inc. 2nd ed. 1995) (Exhibit US-47).

[58] *See supra* answer to question 120(A).

[59] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[60] *See* Exhibit US-80, p. 2.

[61] *See id.*

[62] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[63] *See* Exhibit US-80, p. 2.

> **be identifiable. This would render meaningless the requirement of Article 2.2 that "a reasonable amount for administrative, selling and general costs" be included in a company's cost calculation."**

In its practice, how does DOC treat G&A costs which have been demonstrated to it not to "pertain[] to production and sales (…) of the like product" in accordance to the chapeau of Article 2.2.2? Please provide a recent example of that practice.

73. As an initial matter, the United States disagrees with the proposition that G&A costs may pertain more or less to a product. G&A, by definition, relates to a company as whole.[64] In its Second Written Submission Canada agrees that G&A does not pertain to products.[65]

74. Commerce does have, however, a practice whereby it excludes G&A that does not pertain to a company from that company's G&A calculation. More specifically and as discussed in the United States' Second Oral Statement.[66] Commerce's administrative practice is to include a portion of a parent company's G&A costs in a producer's G&A.[67] However, if it is shown that the parent company does not perform any functions on behalf of the subsidiary, Commerce considers that parent company's G&A to not pertain to the subsidiary company and does not allocate any of the parent company's G&A to the subsidiary. An example of this practice is the *Brass Sheet and Strip* determination cited by Canada.[68] In fact, Canada has not challenged Commerce' s practice and agrees that a portion of the parent company's G&A, including G&A listed separately on the parent company's financial statement, should be included in Weyerhaeuser Canada's G&A.[69]

124. It is stated on page 51 of the year 2000 annual report of Weyerhaeuser Company (Exhibit CDA-166) that:

> **"[t]his is a claims-based settlement, which means that the claims will be paid as submitted over a nine-year period with no maximum or minimum amount."**

In determining the amount attributable to the period of investigation [POI], did DOC take into account that the claims would be paid as submitted over a nine-year period with no maximum or minimum amount? Or, did DOC allocate the whole amount booked by the company to the POI? Please explain.

75. Consistent with Weyerhaeuser's treatment of the entire litigation cost as a period expense for fiscal year 2000 in its own books and records, Commerce included the entire litigation cost in its G&A ratio. In other words, Weyerhaeuser recognized the entire litigation cost in the year in which it

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[64] *See* Joel G. Siegel, Jae K. Shim, *Dictionary of Accounting Terms* (Barrons Educational Services, Inc. 2nd ed. 1995) (Exhibit US-47).

[65] *See* Canada Second Written Submission, para. 166. ("'Administrative, selling and general costs' . . are costs that are not directly attributable to the product under investigation or any particular product.")

[66] United States Second Oral Statement, para. 73.

[67] *See Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 49,622 and accompanying Issue and Decision Memorandum at Comment 7 (28 Sept. 2001) (stating Commerce's practice is to "calculate G&A expenses based on the company-specific unconsolidated financial statements of the producing entity ...we also include in the company's G&A an amount for administrative services performed on the company's behalf by it parent.") (Exhibit US-82).

[68] *See Brass Sheet and Strip from Canada; Final Results of Antidumping Duty and Administrative Review*, 61 Fed. Reg. 46618, 46619 (4 September 1996). (Exhibit CDA-104.)

[69] *See* Canada Second Written Submission, para. 230, where Canada concedes that other separately listed items on the parent company's financial statement constituted general costs and were properly included in Weyerhaeuser Canada's G&A ratio. *See also* United States Second Written Submission, para. 89 footnote 149.

was incurred (*i.e.*, the POI). Weyerhaeuser never argued before Commerce that this litigation cost should be treated as anything other than a period cost. (*E.g.*, Weyerhaeuser never argued that the settlement cost should be amortized over several years.) Instead, it argued only that the entire cost should be excluded from the allocation of G&A to softwood lumber production.

125. Please comment on the following portion of para. 229 of Canada's Second Written Statement:

> **"Commerce agreed that it was proper to exclude the expense from parent company G&A in its preliminary determination".**

76. Commerce permitted the exclusion of the settlement cost for the *Preliminary Determination* because it was only at verification that Commerce became cognizant of the fact that Weyerhaeuser had excluded the settlement cost from the parent company's reported G&A. In an antidumping investigation verification occurs after the preliminary determination. As discussed in the *Final Determination*, once Commerce considered the settlement cost it determined that the settlement cost was properly considered part of the parent company's G&A and allocated a portion of it to softwood lumber.[70]

126. Please comment on the following portion of para. 93 of Canada's Second Oral Statement:

> **"the United States never responds in any of its submissions to the fact that Commerce's traditional practice has been to exclude unrelated parent company G&A, finding on numerous occasions that not all G&A is fungible."**

77. It is Commerce's standard practice to exclude a parent company's G&A if evidence is presented that the parent company did not perform any functions on behalf of the subsidiary.[71] as was the case in the *Brass Sheet and Strip* determination cited by Canada.[72] However, this case and Commerce's practice when a parent company performs no functions on behalf of a subsidiary are irrelevant to Weyerhaeuser Canada's G&A calculation, because it is uncontested that the parent company performed functions on behalf of Weyerhaeuser Canada. In any event, Canada has not objected to the inclusion of a portion of the parent company's G&A in Weyerhaeuser Canada's G&A.[73] Thus, Canada has not challenged the fungibility of the parent company's G&A in relation to Weyerhaeuser Canada. Instead Canada has challenged only the inclusion of a portion of the litigation cost in Weyerhaeuser Canada's G&A.

127. Please comment on the following extract of para. 90 of Canada's Second Oral Statement:

> **"Cost Verification Exhibit 26 breaks down the elements of Weyerhaeuser US G&A expense, including a line item for Law of [[ ]]. This represented the company's general legal**

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[70] *See Final Determination*, Comment 48b (Exhibit CDA-2).

[71] *See supra* answer to question 123.

[72] *See Brass Sheet and Strip from Canada; Final Results of Antidumping Duty and Administrative Review*, 61 Fed. Reg. 46618, 46619 (4 September 1996). (Exhibit CDA-104); *see also* Canada Second Written Submission, para. 230, where Canada concedes that other separately listed items on the parent company's financial statement constituted general costs are were properly included in Weyerhaeuser Canada's G&A ratio; *see also* United States Second Written Submission, para. 89 footnote 149.

[73] *See* Canada's Second Written Submission, para. 230 explaining which portion of the parent company's G&A it did not object to Commerce including in Weyerhaeuser Canada's G&A calculation.

expenses. The [[ ]] hardboard siding expense is not listed." [footnote excluded]

78. The proper characterization of the hardboard siding litigation expense does not depend on the break-out of that expense by Weyerhaeuser US in its books and records. What is relevant is the inherent nature of the expense. A company usually breaks out particular costs because they are significant and require further explanation[74], as was the case with the litigation cost on Weyerhaeuser's consolidated financial statement. However, if a cost item is general in nature, listing it separately from the generic G&A line item does not change its general nature. In point of fact, Weyerhaeuser listed another category of general costs, "integration and closure costs," separately on its financial statement. Canada does not challenge the inclusion of these "integration and closure costs" in the G&A ratio for Weyerhaeuser Canada. Similarly, Commerce's inclusion of a portion of the litigation costs in Weyerhaeuser Canada's G&A was reasonable.

J. TEMBEC (BY-PRODUCT REVENUE):

To the US:

128. How was the arm's length test applied? Canada states in para. 235 of its First Written Submission that:

> **"[w]here the average price charged to affiliated purchasers was higher than the average price charged to unaffiliated purchasers, DOC concluded that a respondent had sold chips to its affiliated purchasers at inflated, non-market prices. In these situations, DOC disregarded the revenues in a respondent's books and records for its sales to affiliated purchasers and re-valued those sales based on the lower price that the respondent charged to unaffiliated purchasers."**

Does Canada's assertion accurately reflect DOC's practice as applied in the softwood lumber anti-dumping investigation? In particular, did DOC disregard West Fraser's British Columbia revenues from sales to affiliated parties on the ground that they were made at "inflated, non-market prices"? Please explain.

79. This question appears under the heading "Tembec (By-Product Revenue)." However, Commerce did not apply an arm's length analysis with respect to Tembec's by-product revenues. As explained in the *Final Determination*, with respect to Tembec, the wood chip transactions were between divisions of the same legal entity. Commerce's practice with respect to transactions within the same legal entity is to use the actual cost of the input.[75] By-products, by their nature, have no directly attributable costs. Thus, Commerce first looked to Tembec's books and records, as required by the AD Agreement, to determine a reasonable value for wood chips. Commerce then compared Tembec's internal values with Tembec's market-based wood chip sales prices. Just as internal costs are generally lower than market prices, in light of the existence of profit, so, too, are by-product offsets to cost calculations generally lower than the market value for a by-product. Commerce observed that Tembec' s transfer prices between divisions were lower than its sales prices to unaffiliated parties. It therefore determined that the use of the lower prices was a reasonable estimate of cost for the by-product.

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[74] *See* Susan Weiss Budak, Patrick R. Delaney, Barry J. Epstein, and Ralph Nach, Wiley GAAP 2002: Interpretation and Application of Generally Accepted Accounting Principles 2000, p. 76 (John Wiley & Sons 2001). (Exhibit US-83).

[75] *Final Determination*, Comment 11 at 60 (Exhibit CDA-2).

80. It is important to note that, in the case of Tembec, Commerce examined unaffiliated market prices not for purposes of applying an arm's length analysis but as a starting point in determining the cost of the wood chips. Commerce's approach was consistent with the preference that Article 2.2.1.1 of the AD Agreement expresses for reliance on a producer's own books and records.

81. With regard to West Fraser, Canada's statement in paragraph 235 of its First Written Submission accurately reflects Commerce's general application of the arm's length test. However, it is important to note that Commerce does not apply this test blindly, but will review the prices reported in the books and records of a respondent to determine if there are particular factors which justify the use of higher affiliated transaction values. In this case, Commerce disregarded West Fraser's B.C. revenues from sales to affiliated parties where the average price charged to affiliated purchasers was higher than the average price at which wood chips were sold to unaffiliated purchasers. It is important to note that Commerce's arm's length test – which Canada does not challenge *per se*[76] – is premised on the recognition that affiliated party transactions are inherently unreliable and are, therefore, subject to searching scrutiny. In determining whether transactions between affiliated parties occurred at arm's length prices, Commerce determined that West Fraser's affiliated sales prices were higher than its unaffiliated sales prices.[77] Consistent with this finding, Commerce disregarded the affiliated prices and revalued West Fraser's chip sales based on the unaffiliated sales prices.

82. The AD Agreement expresses a preference for calculating costs based on a party's books and records, unless those data do not reasonably reflect the costs associated with the production and sale of the product under consideration. In applying its arm's length test to West Fraser's affiliated chip sales, Commerce determined that those sales did not reasonably reflect the costs associated with the production and sale of the product under consideration. Therefore, consistent with Article 2.2.1.1, Commerce revalued those chip sales based on unaffiliated sales prices.

129. Canada draws an analogy between the present case and the finding in para. 148 of the AB in US - Hot-Rolled Steel that "discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation." Please comment.

83. Canada's analogy to the Appellate Body's finding in *United States-Hot-Rolled Steel* is inapposite. At issue in *United States-Hot-Rolled Steel* was Commerce's practice for excluding from its calculation of normal value affiliated party sales determined to be outside the ordinary course of trade. Under that practice, Commerce automatically excluded from the normal value calculation sales to affiliated parties at prices that are less than 99.5 per cent of a weighted average of sale prices to unaffiliated parties. Japan objected to that practice, in part because no similar, automatic exclusion applied to sales to affiliated parties at prices that were greater than 100.5 per cent of a weighted average of sale prices to unaffiliated parties. In other words, Japan objected to the lack of symmetry between the treatment of low-priced sales between affiliates and the treatment of high-priced sales between affiliates.

84. In contrast, the wood chip offset issues in the present dispute do not raise a symmetry question. The proposition that even-handedness requires similar situations to be treated similarly does not mean that Commerce's method for evaluating wood chip sales to affiliated customers must be identical to its method for evaluating wood chip transfers between two divisions of the same company. That is because sales to affiliates and transfers between divisions are not similar transactions. They are fundamentally different types of transactions. Even-handedness does not require that they be evaluated in an identical way.

[76] *See, e.g.*, Canada's First Written Submission, para. 243.

[77] This analysis is reflected in DOC Memorandum on West Fraser's Cost of Production and Constructed Value Calculation Adjustments for the *Final Determination*, at 2 and attach. 1 (Exhibit CDA-108).

85. As the United States has explained in prior submissions, sales to affiliates are fundamentally different from transfers between divisions. 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. In the softwood lumber investigation, Commerce did calculate wood chip offsets in "an even-handed way that is fair to all parties affected." However, contrary to Canada's suggestion, even-handedness did not require it to apply the same methodology to fundamentally different factual situations.

86. It is also worth noting that, where an arm's length test was applied, as in the case of West Fraser, Canada has not challenged *per se* Commerce's arm's length test, only aspects of its application with respect to the wood chip by-product issues. In its First Written Submission, Canada stated that it:

> does not dispute that a determination of non-arm's length pricing could support a determination that books and records containing such prices might not reasonably reflect the costs associated with the production and sale of the product under consideration. In such an instance, the investigating authority might legitimately resort to alternative data and disregard the books and records.[78]

Indeed, Canada has not objected to the use of the arm's length test as it was applied by Commerce to other respondents. Its objection with respect to West Fraser is simply that "an unbiased and objective investigating authority could not have found that West Fraser's recorded chip sales to affiliated purchasers were made at inflated, non-market prices."[79] Commerce's application of an arm's length analysis in reviewing West Fraser' s affiliated wood chip sales was exercised in an even-handed way that was fair to the party affected.

130. Please comment on para. 107 of Canada's Second Oral Statement.

87. The accounting text that Canada cites for the proposition that transactions between affiliated entities should be evaluated in the same manner as transactions between divisions of the same entity does not support its argument. In fact, the text is silent on this issue. Its silence does not amount to a recognition of a prohibition on different methods of evaluating sales to affiliates versus inter-divisional transfers.

88. Moreover, the accounting text cited by Canada at para. 107 of its Second Oral Statement actually supports the US argument that the difference between inter-divisional transfer prices and sales prices to unaffiliated entities is a function of profit, or "gain." The text states that "[a]ny differences between actual selling prices and prices used in by-product costing are treated as a gain or loss."[80] As the United States has explained, the AD Agreement requires that Commerce determine whether reported costs reasonably reflect costs of production. Sales of merchandise in the market typically include not only actual costs of production, but an additional amount for profit. Thus, while a company may assign a value to a by-product, it generally will sell that by-product for a higher amount to unaffiliated purchasers. The accounting literature cited by Canada confirms the very idea that Canada has rejected: that a company may derive a "gain" from the sale of a by-product in the marketplace, much the same way it would derive "profit" for the sale of factors of production in the marketplace.

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[78] Canada First Written Submission, para. 243.

[79] *Id*. at para. 244.

[80] W.J. Morse and H.P. Roth, *Cost Accounting: Processing, Evaluating, and Using Cost Data*, 3rd ed. (Reading, Mass.: Addison-Wesley, 1986), at 157-158. (Exhibit CDA-175.)

K. WEST FRASER:

To the US:

> **133. With respect to West Fraser's McBride mill, the following statement is contained in p. 23 of DOC's verification report (Exhibit CDA-110):**
>
> > **"[c]ompany officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April and May 2000. They explained that the sales value of chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price."**
>
> **Did DOC consider the above findings in the context of the investigation? If so, how. Please direct the Panel to the record. The Panel notes that in at least two instances DOC – that is, with respect to Canfor and Tembec – decided not to use certain price data for sales to unaffiliated parties. How did those situations relating to Canfor and Tembec differ, if at all, from that of the McBride mill?**

89. Regarding whether Commerce considered the findings of its verification report, three points are worth noting: (1) West Fraser never argued that its unaffiliated McBride mill sales were made under circumstances that caused them not to reasonably reflect the market values for West Fraser's chips, and in fact, Commerce found at verification that the McBride mills sales reasonably reflected a market value for wood chips;[81] (2) even if West Fraser had made this claim in the investigation, there is nothing about the nature of the long-term contract that would cause the transactions to be "noncommercial," given that long-term contracts are common commercial instruments;[82] and (3) Commerce did not rely solely on the McBride mill sales in its analysis; it also considered the Pacific Island Mill transactions, which were market-based transactions.[83]

90. The Panel refers to the treatment of sales to unaffiliated parties by Tembec and Canfor. With respect to Tembec, all related-party sales were between divisions of the same legal entity.[84] Comparing Tembec's internal transfer prices for chips in British Columbia with Tembec's B.C. sales of chips to unaffiliated parties, Commerce determined that the internal transfer prices were reasonable surrogates for wood chip costs.[85] For Tembec's Quebec and Ontario internal chip sales, there was no usable market price data to evaluate whether internal transfer prices were preferential. Thus, Commerce applied the company-specific finding for Tembec's B.C. chip sales, *i.e.*, that the internal transfer prices for chips were not preferential, to the company's Quebec and Ontario chip sales and determined that Tembec's internal transfer prices for chips were not preferential and could be relied upon for the final determination. In other words, the results of the analysis on Tembec's B.C. chip sales were sufficiently reliable that they could be applied to the company's chip sales in other provinces. There was no claim that any contractual arrangements influenced the price of Tembec's

[81] *See* US First Written Submission, para. 224, and record citations therein. Notably, Canada stresses the importance of the alleged noncommercial nature of West Fraser's McBride Mill contracts in front of the Panel, but during the investigation, West Fraser never even placed the contract on the record. The commercial/noncommercial status of the contract was never called into question by West Fraser, so it was not an issue specifically addressed by Commerce.

[82] US Opening Statement at Second Substantive Meeting, para. 79.

[83] *See, e.g.*, West Fraser Cost Verification Exhibit C5, WF-Cost 007503 (Exhibit CDA-106); US First Written Submission, para. 219; US Answers to Panel's 19 June 2003 Questions, para. 71;

[84] *See* DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (29 January 2002) (Exhibit CDA-112 - Contains Business Confidential Information).

[85] *Final Determination*, Comment 11 at 61 (Exhibit CDA-2).

chip sales to either affiliated or unaffiliated parties. For these reasons, the facts regarding Tembec are different from those involving West Fraser.

91. With respect to Canfor, Commerce determined that its sales of wood chips from Alberta sawmills to unaffiliated purchasers were distorted due to so-called "contractual arrangements" that did not reflect any market price during the relevant period. The exact nature of Canfor's "contractual arrangements" in Alberta is business confidential information that cannot be disclosed in this proceeding, but it is a completely different factual situation from West Fraser's contract between the McBride mill and certain unaffiliated purchasers.[86] Thus, there was no reliable basis upon which to perform the arm's-length test for Canfor's chip sales in Alberta. In British Columbia, Canfor's sawmills made no sales of chips to unaffiliated parties.[87] With no unaffiliated chip sales in British Columbia, and no reliable results from Alberta that could be applied to British Columbia (different from Tembec's situation), Commerce was left with one option – comparing Canfor's chip sales to affiliates in British Columbia with the weighted-average market price of other respondents' unaffiliated chip sales in British Columbia. The result was that Canfor's affiliated chip sales were found to be at arm's-length prices.

92. These wood chips sales situations of Tembec and Canfor were different from the situation of West Fraser. First, West Fraser was the only one of these three respondents that had chip sales to both affiliated parties and unaffiliated parties in all provinces in which it had chip sales. Second, neither Canfor nor Tembec had contractual issues similar to West Fraser's. There were no contractual issues associated with Tembec 's chip sales, and the contractual issues raised in connection with Canfor's chip sales were completely different factually from West Fraser's issues. Third, although Canada attempts to characterize West Fraser's unaffiliated B.C. chip sales as *de minimis*, those sales were actually sizable.[88] Accordingly, West Fraser was differently situated than Canfor and Tembec. In light of the differences, it was appropriate for Commerce to apply a different evaluation to West Fraser's wood chip offset than it applied to Canfor or Tembec's offset.

L. SLOCAN:

To the US:

> **137. It is stated in para. 319 of Canada's Second Written Submission that:**
>
> > **"Commerce did not include Slocan's futures trading profits anywhere in its preliminary determination."**
>
> **With respect to the Final Determination, it is stated in para. 327 of Canada's Second Written Submission that:**
>
> > **"Commerce's Final Determination left Slocan's futures revenue unaccounted-for and excluded from the margin calculation."**
>
> **Does the US agree with the above statements and other statements to that effect, contained in Canada's Second Written Submission?**

93. While the quoted statements from paragraphs 319 and 327 of Canada's Second Written Submission are factually correct, they are incomplete and misleading.

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[86] See US First Written Submission, para. 255, note 268.
[87] *Id*. at 60.
[88] *See* US First Written Submission, para. 219.

94. Contrary to Canada's suggestion, throughout the course of the investigation, Commerce gave full and fair consideration to the adjustments that Slocan sought for its futures contract revenues. Moreover, contrary to Canada's suggestion, there was no requirement that these amounts be included in the margin calculation absent a demonstration of effect on price comparability, as provided in Article 2.4 of the AD Agreement.

95. As the panel in *Egypt-Rebar* stated, the burden of substantiating a claim for an adjustment rests with the party seeking the adjustment — here, Slocan — not with the investigating authority.[89] The respondent has an affirmative obligation both to assert and to justify the information and arguments required to prove its claims. Not only is this what Article 2.4 provides, it also makes sense, inasmuch as the relevant information will be in the respondent's hands. The investigating authority has no duty to explore or grant adjustments that have neither been requested nor demonstrated by the respondent.

96. Slocan sought two alternative adjustments for its futures contract revenues. First, it asked to have the revenues treated as an offset to direct selling expenses. Alternatively, it asked to have them treated as an offset to financing expenses. Slocan did not request nor did it demonstrate any further alternative basis for an adjustment.

97. Once Commerce evaluated and properly rejected the two bases for adjustment that Slocan requested, Commerce had satisfied its obligation to consider an adjustment. Any other conclusion suggests that respondent companies are free to make general claims of entitlement to adjustment with minimal explanation of the data and that it is the obligation of an investigating authority to find the appropriate basis for adjustment, even though the explanation may be incomplete, unclear, or contradictory. The AD Agreement does not require such an illogical result. The only requirement under Article 2.4 is that due allowance be made, "in each case on its merits," where the difference is "demonstrated" to affect price comparability.[90]

138. Please comment on the following statement contained in Exhibit CDA-123, page III.55:

> **"[f]utures hedging contracts are not direct selling expenses/income, as they are not directly related to sales. They are indirect selling expense/income, not a financing expense/income, and as such also are not proper as a set-off for interest expenses included in production costs."**

98. Exhibit CDA-123 is an excerpt from the Response Brief of the Investigating Authority to the NAFTA panel considering Commerce's lumber antidumping investigation. The quoted statement was Commerce's response to Slocan's submission to the NAFTA Panel, in which Slocan stated *for the first time* that the futures profits might be an indirect selling expense/income. Slocan had made a *post hoc* argument to which Commerce responded, as quoted above. Commerce's statement correctly summarizes its post-proceeding understanding of how Slocan could have presented (but did not in fact present) its request for adjustment. However, that observation — made in litigation subsequent to the investigation — has no bearing on the question before this Panel. The sole question before this Panel is whether Commerce's rejection of Slocan's two alternative bases for its requested adjustment was based on a proper establishment of the facts and an unbiased and objective evaluation of those facts. The United States notes, moreover, that Slocan's only submission during the investigation regarding

[89] *Egypt-Rebar*, paras. 7.381, 7.387 (claim for adjustment for credit cost not properly raised at agency level).

[90] *See* US First Answers to Panel Questions, para 137.

any possible indirect selling expenses was, in fact, its unambiguous assertion in its 23 July 2001, Questionnaire Response that it had incurred *no* indirect selling expenses in the United States.[91]

139. Please comment on para. 192 of Canada's replies to Question 77 of the Panel:

> **"[t]he prices that it offers on other sales are thus different than they would have been absent the safety net that hedging contracts provide, [sic] Thus, hedging activity, by definition, affects prices for all sales in the market, not only those made through the CME."**

99. Canada's argument is *post hoc* rationalizations. Slocan made no such argument during the investigation to support its requested adjustment.

100. As the United States stated in response to oral questions at the Second Panel Meeting, the total evidence on this issue consisted of two general sentences in Slocan's Section C Questionnaire Response, plus a brochure on hedging that was provided at verification. This evidence failed to demonstrate an effect on price comparability necessary to support an adjustment. There is no *per se* rule — such as Canada advocates — that futures trading by definition affects all sales in the market.

101. In its 23 July 2001 Questionnaire Response, Slocan unambiguously stated that the hedging profits should be treated as an offset to direct selling expenses in the US market, as an adjustment for differences in the conditions and terms of sale.[92] It stated:

> Sometimes Slocan will sell its short positions and take the loss or profit between the sale and strike prices. These expenses or revenues are linked to Slocan's sales in the United States and so are being reported as direct selling expenses.[93]

Slocan failed to explain the link between these expenses or revenues and any particular US sales of lumber. It also said nothing about how its contracts might affect prices to US customers. The facts failed to demonstrate that these profits should be considered an offset to direct selling expenses. They were not directly related to particular softwood lumber sales.[94]

102. Canada has engaged in a *post hoc*, theoretical exercise by now asserting: "Once Slocan demonstrated that it engaged in futures trading activity, which necessarily affects price comparability, Article 2.4 required Commerce to make an adjustment."[95] This is a new assertion made by Canada, which has no basis in Article 2.4 or in the investigation record. Slocan introduced no evidence to demonstrate — as Canada now claims — that "hedging through futures trading activity affects all sales in a particular market."[96]

103. The record evidence submitted by Slocan states that: "The purpose of hedging is *to reduce the risk of holding lumber inventory*."[97] The *Random Lengths* brochure on hedging (supplied by Slocan at verification) also states that when a company hedges, it can "*reduce the risk of holding or acquiring*

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[91] Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, 23 July 2001, pages C35-37 (Exhibit US-71).

[92] Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, 23 July 2001, page C35-37 (Exhibit US-71). In the same submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.

[93] *Id.*, p. C-35-36 (Exhibit US-71).

[94] *See* Slocan Cost Verification Report at 26 (Exhibit CDA-118); *see also Final Determination*, Comment 21 (Exhibit CDA-2).

[95] Canada Second Written Submission, para. 336; *see also* notes 356 and 363.

[96] Canada Second Written Submission, note 356.

[97] Sales Verification Report of 28 January 2002, Exhibit 21 at VE 02361, Exhibit CDA-119.

inventory through taking an equal and opposite position in the Random Length Lumber futures market."[98]

104. A demonstration that hedging is used to reduce the risk of holding inventory is *not* a demonstration of an effect on all prices in the market. Slocan's evidence does not demonstrate the *per se* effect on price comparability asserted by Canada. Nor does it demonstrate that Slocan' s futures contracts (which did not result in delivery) affected any lumber prices included in our analysis. Contracts that resulted in actual delivery to Slocan's customers (in fact, the only sales for which prices were affected) were included as sales in the calculation of Slocan's dumping margin. But the profits earned on contracts that were sold and did not result in lumber delivery are not a proper basis for adjustments for terms and conditions of sale. Accordingly, Commerce appropriately rejected Slocan's requested adjustment.

To both parties:

> **140. Please provide in diagram format the company structure of Weyerhaeuser International Inc., showing the relationship between Weyerhaeuser Canada, Weyerhaeuser US and Weyerhaeuser International Inc. In addition, could Canada provide the structure of the financial records of the different entities, that is, at which level are they audited/consolidated.**

105. In the *Softwood Lumber* anti-dumping investigation, the Department of Commerce ("Commerce") received information from Weyerhaeuser Company, located in the United States, and its wholly-owned Canadian subsidiary, Weyerhaeuser Company Ltd. (collectively, "Weyerhaeuser"). The structure of these companies, in diagram format, was submitted in the administrative record of the underlying investigation as part of Weyerhaeuser's response to the Department of Commerce's Section A Questionnaire. (Weyerhaeuser's 22 June 2001, Section A Questionnaire Response at A-7 and Exhibits A-3 and A-5.) Because these diagrams have been designated as containing proprietary information by Weyerhaeuser, the Canadian respondent, it is more appropriate for the Government of Canada to submit them in response to the Panel's request. Explanations of this structure were also provided in Weyerhaeuser's 23 July 2001, Section D Response, at D-24-25, where it was noted that Weyerhaeuser Company prepares consolidated financial statements in accordance with US GAAP and that Weyerhaeuser Company Ltd. prepares a set of financial statements for tax purposes.

[98] Sales Verification Report of 28 January 2002, Exhibit 21, Random Lengths - An Introductory Hedge Guide, at VE 02364, Exhibit CDA- 119.

ANNEX C

PARTIES' COMMENTS ON REPLIES TO QUESTIONS FROM THE SECOND MEETING

ANNEX C-1

COMMENTS OF CANADA ON RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(5 September 2003)

86. The Panel refers to paras. 2 and 3 of the US Second Oral Statement. The Panel requests the US to note all the "misstatement" that it has identified in Canada's submissions, in addition to those mentioned in the Second Oral Statement. Further, in its replies to the questions posed by the Panel, Canada's Second Written Submission and Second Oral Statement, Canada made detailed factual presentations relevant to its claims. The US is requested to identify and substantiate all factual aspects with which it disagrees with Canada.

Canada's comments on the US response to Question 86 are the following:

1. In the Attachment to the Second US Responses to the Panel's Questions, the United States has raised two new arguments regarding initiation.

2. First, the US argument that information on the operations of the US surrogate mills is in the confidential version of the affidavits is not correct. As is obvious from the public version of the affidavits, there is no bracketed discussion of the operations of the companies.[1]

3. Second, the United States argues, for the first time, that the US surrogate mills "… were used only with respect to factory overhead, planer shavings, and sawdust/bark".[2] Canada notes that this statement is in conflict with the statement in the prior paragraph of that attachment that information from the US mills was used to provide factor usage data on stumpage, harvesting costs, labour, electricity, fuel, and wood chips. A lumber mill's costs are determined by multiplying its factor usage by the per unit price for that factor. Factor usage costs are the part of the cost calculation that would vary most from mill to mill, making it critical that the data be derived from mills that are representative.

90. Please comment on Canada's Second Oral Statement, para. 20 which states that:

> **"[t]he United States, hiding behind the pretense of confidentiality, has not provided this Panel with any information that was before Commerce about the two US surrogate mills. These US mills were at the heart of Commerce's decision to initiate. Canada has not seen, and the Panel still does not have before it, basic information in the hands of the United States, such as the names of the US mills and what Commerce knew about those mills. The United States has responded to Canada's claims with nothing but assertions."**

[1] See affidavits at Petition, Exhibit VI.C-1 (Exhibit CDA-135).

[2] See Attachment to the Answers of the United States to the Panel's 13 August 2003 Questions, 26 August 2003, at 2 [hereinafter "US Attachment"].

Canada's comments on the US response to Question 90 are the following:

4. At paragraph 15 of its Answer to Question 90 and page 7 of its Attachment responding to the Panel's Question 86, the United States cites a US Department of Agriculture Publication entitled *Profile 2001: Softwood Sawmills in the United States and Canada*.[3] The United States cites that publication in support of its assertion that the US surrogate mills chosen to model the costs of Canadian producers for purposes of initiation were representative of Canadian producers.

5. The US citation of this report is deceptive for two reasons. First, the study cited by the United States was *not* before Commerce at the time of initiation. The Application only contained the first three pages of *Profile 1999: Softwood Sawmills in the United States and Canada.* It did not contain any listing of any companies, nor does it discuss "large, permanent operations", the phrase Commerce now relies upon to support its claim that at initiation it had evidence that the mills used were representative.[4] The report now relied upon by the United States was not put on the record until respondents filed the document nearly three months *after* Commerce made the decision to initiate. It was put on the record as part of the respondents' submission requesting Commerce to terminate and rescind the investigation because of insufficient evidence.[5]

6. Second, and more important, the information before Commerce at the time of initiation indicates that the two US surrogate mills could *not* be characterized as "large, permanent operations." Counsel for the respondent companies have informed Canada that information designated as confidential confirms that: (1) any implication that the two US surrogate mills were "large, permanent operations" at the time of initiation is false; and (2) Commerce knew this at the time of initiation.

7. Finally, the US refusal to provide the Panel specific information on the US surrogate mills or on their operations on the basis that the information is confidential, claiming "Commerce's legitimate protection of the confidentiality of certain information as required by US statutory law"[6] is inconsistent with the United States' treatment of Canadian respondents' data. Canada notes that the United States has released the confidential information of individual Canadian companies, in bracketed form, in this proceeding. For example, in defending itself against Canada's Article 2.4 claims, the United States has provided this Panel, and the Canadian Government, specific individual prices of Abitibi, Tembec, Slocan, West Fraser and Weyerhaeuser.[7] These prices were given to Commerce by the individual companies pursuant to an administrative protective order. Commerce did not have their consent to reveal those prices to the Government of Canada and to the Panel.

96. At what stage were the respondents informed of DOC's finding that differences in dimension do not affect price comparability? What opportunities were provided to respondents to comment on that finding?

Canada's comments on the US response to Question 96 are the following:

8. Canada agrees with the US statement in response to this question that the evidence submitted and argument made "required Commerce to evaluate the pricing data on the record" for the purpose of

[3] This is the publication cited at para. 25, footnote 38 of the US Second Written Submission.

[4] See Petition, Vol. IB, Exhibit 1B-49, H. Spelter and T. McKeever, *Profile 1999: Softwood Sawmills in the United States and Canada* (Washington: USDA, 1999) at 1-3. (Exhibit CDA-185).

[5] See Certain Softwood Lumber from Canada: Request for Termination and Rescission of Investigation, Letter from Weil Gotshal & Manges to Commerce (19 July 2001), at Enclosure 3 (Exhibit CDA-51). Commerce initiated the investigation on 23 April 2001, and published the notice of initiation in the Federal Register on 30 April 2001. See *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21,328 (Dep't Commerce 30 April 2001) (initiation) at 21,328 and 21,332 (Exhibit CDA-9).

[6] Answers of the United States to the Panel's 13 August 2003 Questions, 26 August 2003, at para. 14 [hereinafter "US Second Responses to Questions"].

[7] See, *e.g.*, Exhibits US-42 and US-76.

"carefully reviewing the effect of dimension on price."[8] Yet, as the US response to Question 99 makes clear, Commerce did not do so. It applied no coherent methodology for selecting representative comparisons, in sufficient number to achieve representative results. Also, it performed no coherent analysis with respect to the handful of comparisons it appears to have examined. The best explanation the United States can offer is that Commerce determined not to allow for any adjustment ("difmer") on any of the 2,382 non-identical comparisons it made,[9] on the basis of charts showing individual transaction prices[10] for one pair of West Fraser Products and one pair of Slocan products. These charts were not made part of Commerce's record and thus appear to have been created after the fact. Indeed, Commerce appears to have performed no valid analysis at all. Even after the Final Determination, the United States has only offered a simple plotting of data points on compressed charts that do not provide sufficient information to confirm that the data are appropriate.

97. Please comment on Canada's response to Question 22, with reference to the respondents' demonstrating a need for a price adjustment:

> **"at the beginning, of the period, in April 2000, Abitibi's average net price for No. 2 grade 2x4x8 was around [[ ]] whereas the No. 2 2x6x16 price was [[ ]]. The comparable figures for economy grade were [[ ]] for the smaller size and [[ ]] for the larger."**

Canada's comments on the US response to Question 97 are the following:

9. The graphical representation of data in Exhibit US-81, which was not before Commerce at the time of its Final Determination,[11] is misleading, difficult to follow, and analytically deficient.[12] Although not explained, the graph plots, in a compressed fashion, all of Abitibi's individual home market sales of four products. The Y-axis appears to show the net price in Canadian dollars (after subtracting freight costs and other adjustments),[13] while the X-axis appears to plot the invoice date.[14]

10. Prices for individual sales are rarely set on the invoice date. For example, Abitibi has a wide range of sales arrangements, including spot sales, in which prices are negotiated at the time of order, as well as contract sales with longer-term prices, or with formula prices.

11. In view of the fluctuating nature of lumber prices, there is no reason to expect that sales of even the same product with the same invoice date will show the same price, much less that different products will show "consistent" price differences based on the invoice date. It is for this reason that Canadian respondents, and Canada in this proceeding, have always examined monthly average or annual average prices, as such averages smooth out data fluctuations caused by the different mechanisms and times at which prices are set in relation to invoice date. A scatter diagram of individual transaction prices based on invoice dates is essentially useless in determining whether dimension has an impact on price.

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[8] US Second Answers to Questions, at para. 32.

[9] See Canada's Responses to Questions to the Parties from the Panel in Connection with the First Substantive Meeting, 30 June 2003, at para. 97, for a table showing the number of non-identical comparisons Commerce made for each respondent.

[10] It is not clear whether these are gross or net prices.

[11] The same is true of Exhibits US-76, US-42, and US-43.

[12] Throughout this proceeding, the United States has argued that the Panel should not examine charts or tables not before Commerce, even if the underlying data were before Commerce. In submitting this exhibit, the United States recognizes that which Canada has asserted all along. As long as the underlying data were before the investigating authority, it is perfectly appropriate for parties to present these data to the Panel in a new form, using graphs, charts and tables.

[13] The United States did not state what adjustments were made.

[14] This is not explained either.

12. In this respect, it is instructive to review Abitibi's data for the No. 2 grade products Commerce examined. As Canada noted previously, the United States made a total of 2,382 non-identical product price comparisons, and made *no* adjustment for physical characteristics for *any* of those comparisons. This can only be justified if the record shows that dimension *never* affects price comparability. Canada need only establish that for particular comparisons, dimension does affect price to show that "due allowance" is required for differences in dimension, which allowance, as Canada has acknowledged, may be zero in particular cases.[15]

13. An analysis of the data relied upon by the United States is revealing. First, the weighted average annual net price for each dimension product across the entire period of investigation was computed. This shows, on average, whether different-dimension products sell for the same price or different prices. The use of annual average prices is comprehensive, in that it considers all sales, and also smooths out differences due to the manner and date on which the price for individual sales occurs, as well as other anomalies.[16] The average net price charged by Abitibi for No. 2 2x6x16 was [[ ]] for No. 2 2x4x8. These data show that, for these products, dimension affects price, and significantly so. The average difference in value is some [[ ]], or almost [[ ]] per cent.

14. Next, adopting the US approach of using individual transactions, and of invoice date as relevant for comparison purposes,[17] we tested the US assertion that prices converge, diverge, and overlap, show no "consistent" pattern, and thus cannot establish that dimension affects price. Instead of simply providing a raw scatter diagram, we looked at the number of days on which both products were sold, and calculated the number of times the 2x6x16 product sold for a higher price than the 2x4x8. The data before Commerce show that of the 56 occasions on which both products were invoiced on the same date, the larger product sold for a higher price on 55 of those dates, or over 98 per cent of the time.[18] This would seem to be fairly "consistent."

15. Finally, the data were replotted, using less compressed, more appropriate Y-axis points that allow one better to view the data. Rather than simply testing for patterns using Commerce's "eyeball" test, a regression analysis was done to determine, for each product, the best fitting curve matching each product's prices.[19] This analysis enables one to plot the overall price pattern. The results are presented in attached Exhibit CDA-185. Contrary to Commerce's unsupported assertions, the regression analysis shows pronounced pricing differences between the two products. Indeed, the two curves are almost parallel, demonstrating that the observed pricing differences were, in fact, fairly consistent over the period.

16. In short, once the data are analyzed, rather than simply printed, they establish that, for these products, the dimensional differences create price differences and thus affect price comparability. They also conclusively refute the US suggestion that sometimes one price is higher, sometimes the other is higher, such that on average there is no difference.

99. With respect to the consistency in price patterns, the Panel has the following questions:

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[15] See Canada's Responses to Questions to the Parties from the Panel in Connection with the Second Substantive Meeting, 26 August 2003, at para. 46 [hereinafter "Canada's Second Responses to Questions"].

[16] It is for this reason that Canada's initial presentation to the Panel included graphs showing annual average prices for different dimension products. See POI Average Prices for Different Lengths and Widths: Abitibi, Canfor, Slocan, West Fraser and Weyerhaeuser (Contains Business Confidential Information) (Exhibit CDA-76).

[17] Canada believes this approach to be erroneous for the reasons noted above.

[18] Where there were multiple sales on the same date, we used the weighted average net price.

[19] The regression performed was the ordinary least squares using a quadratic model.

(a) Could DOC explain in detail the methodology it used to carry out its consistency test? Illustrate your explanation with an example from the test that was carried out in this case, including any sampling, selection of dates, etc. Did the US consider using other methodologies?

(b) Could the US explain in detail how the results of its test were evaluated? Please explain the evaluation leading up to that conclusion.

Canada's comments on the US response to Question 99 are the following:

17. In response to this question, the United States claims that Commerce "examined random sales of commonly sold softwood lumber products, comparing products with relatively small dimensional differences"[20] and provided two examples. The United States further claims that Commerce did so for "each of the Canadian respondent companies, plotting sales over the entire period of investigation … includ[ing] both above- and below-cost sales … ."[21]

18. The United States, however, has provided no citation to any record document supporting that this analysis was done. It strains credibility that Commerce was able to "eyeball" all sales of particular product comparisons for the entire Period of Investigation (POI) for each of the respondents, without needing to draft any document in support of this "analysis".[22]

101. Please comment on Canada's Second Oral Statement, para. 56 which states that:

"[t]he US International Trade Commission, in the injury inquiry, determined that "lumber prices generally differ substantially depending on grades and dimensions"."

Canada's comments on the US response to Question 101 are the following:

19. Contrary to the US contention that the US International Trade Commission's (ITC) finding of fact was not material to its injury determination, Canada notes that, as the investigating authority charged with making the injury determination, the ITC, under US law, must specifically examine "the effect of imports of that [investigated] merchandise on prices in the United States of domestic like products."[23] Indeed, price analysis is critical to the ITC analysis. US law expressly requires the ITC to compare prices of imported products with domestic like products for purposes of determining whether imports are underselling domestic like products or causing price depression. [24] The ITC thus examines pricing data of imported products and domestic like products. In selecting and evaluating such comparisons it is critical first to assess all factors affecting price comparability, so as to ensure that its price comparisons are meaningful. It is in this context that the ITC found that lumber prices differ substantially, depending on grade and dimension.

[20] US Second Answers to Questions, at para. 41.
[21] *Ibid*, at para. 42.
[22] In contrast, when Commerce wanted to confirm the appropriateness of the relationship of prices across grades, a Commerce official was tasked with the analysis and a memorandum was placed on the record supporting that analysis. See DOC Issues and Decision Memorandum for the Antidumping Duty Investigation of *Certain Softwood Lumber Products From Canada* (21 March 2002), Comment 33, at 24 and footnote 62 (Exhibit CDA-2) [hereinafter "IDM"].

[23] 19 U.S.C. § 1677(7)(B)(i)(II) (Exhibit CDA-7).
[24] 19 U.S.C. § 1677(7)(C)(ii) (Exhibit CDA-7).

102. In paras. 58-60 of Canada's Second Oral Statement, Canada alleged that the average dumping margin for the non-identical comparisons was 2 to 7 times higher than the average margins of dumping for identical comparisons as DOC made numerous comparisons of smaller, low-value lumber sold in the US to larger dimension, high-value lumber sold in Canada, without any adjustment for dimension. Could the US comment on this allegation that this establishes a prima facie breach of the requirement of Article 2.4?

Canada's comments on the US response to Question 102 are the following:

20. The United States argues for the first time that the reason the margins on non-identical comparisons were two to seven times higher than the margins on identical comparisons was because the non-identical comparisons were on US sales of low-value products, which generated high margins because they were the most dumped products. However, the reason Commerce found these products to be the most dumped was primarily because of Commerce's failure to adjust for differences in physical characteristics when it compared non-identical merchandise.[25] The US argument is an exercise in circular reasoning (*i.e.*, the result is used to justify the failure to comply with the requirements of Article 2.4 that led to those results) that cannot support a conclusion that Commerce's establishment of the facts was proper and its evaluation of those facts was unbiased and objective.

G. ABITIBI:

To the US:

113. Please comment on Exhibit CDA-176.

Canada's comments on the US response to Question 113 are the following:

21. The United States has made several new arguments based on mischaracterizations of Canada's position. Contrary to the arguments now made by the United States, Canada has never asserted that the costs of producing goods are fully reflected in accounts receivable, or that financial costs are only incurred on inventory. Rather, it has been Canada's consistent position that financial costs relate directly to the total debt of a company (only debt generates interest expenses), and that both debt and equity together relate to the total amount of cash invested in the company, or, as the United States has sometimes termed it, the company's total "cash needs." Such total cash needs are reflected in total company assets. The facts establish this to be correct. The basic formula for every balance sheet is that liabilities (cash provided by debt) plus equity (cash provided by investors) equal assets. As money is fungible, and thus specific assets are not associated with specific debt or specific equity, debt relates equally to all assets, and financial expenses relate to total assets. To be precise, in this case, Abitibi's C$11 billion in assets are financed by C$3 billion in shareholder equity and C$5.6 billion in long-term debt, and C$2.4 billion in other liabilities, including accounts payable, etc. Debt is on the balance sheet, and thus interest expense resulting from debt also relates to items on the balance sheet, not the cash flow statement (as the United States erroneously asserts in its Response to Question 115, at para. 62). The US position that Abitibi's debt and interest expense relates exclusively to its cost of sales of C$4 billion, cannot be reconciled with the evidence. Abitibi cannot

[25] Commerce's finding on non-identical comparisons was also due to its cost analysis, an issue not before this Panel. Commerce allocated the exact same costs to dimensions that had a low market value as it allocated to dimensions that had a high market value. Had Commerce used the same value-based cost allocation method for dimensions that it used for grades, then it would have allocated less cost to the low-value products, more of them would have survived the costs test, and there would have been identical matches with much lower dumping margins for more of these low-value products. Commerce then compounded the problem by comparing lower-value products in the US market to higher-value products in the Canadian market without any adjustment for the differences in physical characteristics.

have borrowed C$5.6 billion in long-term debt to finance C$4 billion in short-term expenses. The evidence establishes that it is the US premise that is incorrect.

22. Next, the United States contends that it is a "false premise" that Abitibi finances the full value of its assets in each year of production.[26] But while the United States characterizes this claim as "extraordinary" and "contrary to normal business practices", without explanation, it is, in fact, true, and demonstrably so. Indeed, it is what every balance sheet establishes. As noted above, debt plus equity equals assets, every year. Contrary to the US argument, it is precisely the case that a company must, each year, finance the full value of every asset it requires for its business. Indeed, this is the necessary consequence of the United States' own argument that money is fungible, and thus debt relates to all assets rather than specific assets. A company deploys cash to buy an asset, and the amount of cash required is reflected in its full value, not in its depreciation expense.

23. The United States overlooks the simple fact that the cash spent on an asset remains invested in the asset. The value of the asset *always* reflects the cash deployed in that asset and thus the amount that must be financed, as long as that asset is carried as an asset. Until an asset is sold, or fully depreciated to zero, the amount that must be financed is the remaining value of the asset. It is never the depreciation expense, because depreciation expense never reflects the amount of cash resources the company has "tied up" in the asset.

To both parties:

115. The Panel understands Canada to argue in para. 80 of its Second Oral Statement that an asset-based methodology can capture the flow elements through inventory. Please comment.

Canada's comments on the US response to Question 115 are the following:

24. The US arguments concerning inventory and cash flow again mischaracterize Canada's position. As Canada has repeatedly demonstrated, the amount of money needed over a year to finance production is not the same as the total annual costs of production. Unlike fixed and other assets necessary for producing and selling Abitibi's products (which assets are not sold, and thus must be fully financed each year), once lumber is produced, it is sold and paid for. Abitibi thus only has to finance lumber production from the time it begins to harvest logs until the time it receives payment from its customer. It is only during this period that the company has had to deploy its cash.

25. The annual cash needed to finance the production and sale of lumber for a year thus is not reflected in the production costs incurred in that year, much less in cost of goods sold (COGS), which, as noted, reflects production costs incurred over a different period. Rather, the cash needed to finance the production and sale of lumber in a year is equal to the average costs of the current assets that must be kept on hand to produce and sell lumber – the raw materials inventory, the work-in-process inventory, the finished goods inventory, and the accounts receivable. These costs alone reflect the amount of cash invested in current lumber operations.

26. To illustrate, suppose Abitibi had a line of credit that it used to finance its ongoing lumber operations. As expenses are incurred to harvest logs, process lumber, pay salaries, etc., the negative balance in the account would increase. As payment is received from customers, the balance declines. The key point is that the interest expense incurred over the course of a year will be a function of the average negative balance in the account. The average negative balance, in turn, equals the total value of all the inventory and accounts receivable asset accounts – the costs outstanding for raw materials and goods produced but not yet paid for. Contrary to the US position, the annual interest charge will bear no relationship to the total amount of expenses charged to the account in the year, much less the "flow" through the account for goods produced at other times but sold during the period.

[26] US Second Answers to Questions, at para. 58.

27. The fact that annual financing expenses relate directly to assets and not to current expenses also has nothing to do with how proceeds from sales are spent, as the United States erroneously asserts. As the example above demonstrates, Canada's argument in no way depends on how the proceeds from the sales of lumber are used. The point the United States ignores is that lumber is sold and paid for, and thus does not have to be financed for the entire cost period examined. Fixed and other long-term assets, on the other hand, are not sold, but rather are kept in use for the entire cost period. Thus, they must be financed, at their value, for the entire cost period.

28. Finally, the United States is wrong that the COGS methodology considers both the costs of goods in inventory as well as those sold, while Canada's methodology considers only the costs of goods in inventory. The issue before the Panel is not how to determine production costs, but rather how to allocate interest expenses. Interest expenses are a function of (1) cash needs, and (2) the amount of time for which such cash must be invested. Total COGS for a year reflects neither of these for that year. Canada's methodology is based on both of these functions. The COGS during the year are fully considered, but only for the time the cash invested in producing those goods remains invested, *i.e.*, until they are paid for, and thus only for so long as they remain an asset – either in raw materials inventory, work-in-process-inventory, finished goods inventory, or accounts receivable. Once a good is sold and paid for, no cash remains invested in that good, and it is no longer being financed by the company. The United States has nowhere explained the basis for its position that goods sold and paid for still are being financed by the producer.

119. In its reply to question 56, the US refers to the "reliability of cost data". Based on the record, did DOC find in the context of the investigation that data submitted by Tembec for the Forest Products Group was not reliable? If so, please point to relevant documents submitted to the Panel – including cost verification reports – or provide them.

Canada's comments on the US response to Question 119 are the following:

29. In its answers to Questions 119 and 120, the United States states four times, in paragraphs 65-69 and at pages 16-17 of the Attachment, that no evidence was presented that Tembec's divisional data were kept in accordance with generally accepted accounting principles (GAAP). Those statements are inaccurate. Note 20 to Tembec's Consolidated Financial Statements contained in Tembec Inc.'s 2000 Annual Report explicitly states that "[t]he accounting policies used in these business segments are the same as those described in the summary of significant accounting policies" to the Consolidated Financial Statements.[27]

30. As noted in the Auditors' Report to the Consolidated Financial Statements, an audit includes assessing the accounting policies used in preparing the statements. The auditors found those statements, including the policies used in preparing them, to be in accordance with GAAP in Canada.[28] The United States assertion that Tembec's Forest Products Group records are not maintained in accordance with GAAP is an assertion unsupported by any evidence and contrary to the evidence that is on the record.

120. Please comment on paras. 84-88 of Canada's Second Oral Statement, specially on the last sentence of para. 85.

Canada's comments on the US response to Question 120 are the following:

[27] See Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report) at 44 (Exhibit CDA-94).

[28] *Ibid*., at 29 (Exhibit CDA-173).

31. The United States makes two new arguments in paragraph 66 and on page 17 of its Attachment in response to the Panel's question about the evidence that Tembec's pulp and paper operations incurred significantly higher G&A than its lumber operations. The first new argument is that "the productivity of assets does not determine the amount of G&A used … ."[29] That argument is not relevant. Canada never made arguments concerning assets with respect to Tembec's G&A. The United States is confusing Abitibi and its financing expenses with Tembec's G&A.

32. The second argument is that "no reliable evidence was presented showing that Tembec's lumber division incurred less G&A than its other divisions."[30] This argument is an inaccurate *ex post facto* rationalization. The Hyperion statements included as exhibits to the verification reports show that the pulp and paper groups incurred higher G&A than the Forest Products Group.[31]

33. The United States further claims in paragraphs 65 and 67 that "Commerce rejected the [Forest Products Group G&A] data because they were less reliable and could have led to distortions." This new argument is also an *ex post facto* rationalization that was not part of the agency's explanation for rejecting the Forest Products Group G&A data. Commerce, in its Issues and Decision Memorandum, defended its normal practice of using company-wide data by noting that "[this] methodology also avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionately between divisions."[32] Commerce made no findings that this hypothetical concern was applicable to Tembec. Commerce never made any written findings that Tembec's Forest Products Group G&A data were less reliable or would lead to distortions. The record evidence actually shows that Commerce's use of the company-wide data led to distortions that would have been avoided had Commerce used the Forest Products Group data.

34. Finally, the United States, in paragraph 69 of its answer to Question 102 and at page 17 of its Attachment, claims that Commerce used Tembec's divisional data only for the very narrow purpose of removing certain packaging costs from the denominator in the calculation of the G&A ratio. Commerce, the United States claims, did not use Tembec's divisional data for any other purpose. Actually, Commerce used the Forest Products Group divisional data for every element of the sales databases and its price-to-price comparisons, including not only the sales prices themselves, but also every adjustment.[33] Moreover, Forest Products Group divisional data were used for every element of Commerce's cost calculations except G&A and financing expenses. They were used to determine the costs of all raw materials, labour, energy, depreciation and factory overhead.[34]

123. It is stated in para. 84 of the US Second Written Submission that:

> **"[g]eneral expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole. They are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable. This would render meaningless the requirement of Article 2.2**

[29] US Attachment, at 17.
[30] *Ibid*.
[31] See Tembec Cost Verification Exhibit 10, at 2 (Contains Business Confidential Information) (Exhibit CDA-149).
[32] IDM, Comment 33, at 105 (Exhibit CDA-2).
[33] See DOC Analysis Memorandum For Tembec Inc., at 1 ("This margin is based on sales information supplied by Tembec.") (Tembec Sales Exhibit, at 6 (Contains Business Confidential Information) (Exhibit CDA-187)); see also Verification Report and Accompanying Exhibits providing verified data derived from Tembec's Forest Products Group (*ibid*., at 7-24).
[34] See Cost Verification Report, at 5 (*ibid*., at 8).

> **that "a reasonable amount for administrative, selling and general costs" be included in a company's cost calculation."**

In its practice, how does DOC treat G&A costs which have been demonstrated to it not to "pertain[] to production and sales ( ) of the like product" in accordance to the chapeau of Article 2.2.2? Please provide a recent example of that practice.

Canada's comments on the US response to Question 123 are the following:

35. In its response to Question 123, the United States acknowledges that its policy is to allocate only a portion of parent company G&A to the producer of the like product. The United States misstates its practice. In *Brass Sheet and Strip*, Commerce found that, in calculating G&A:

> [it] includes an amount of G&A from related companies which pertains to the product under investigation. G&A and other non-operating income and expense items are not considered fungible in nature. Thus, non-operating income and expenses realized by a related company does not necessarily affect the general activity of [the respondent].[35]

36. This practice clearly anticipates that non-operating expenses are not fungible and that some such expenses incurred by a parent company may not "affect the general activity of the respondent." Weyerhaeuser's hardboard siding expense is a non-operating expense. The United States concedes that it relates to non-like product. If, as Commerce states, such expenses are not fungible, then there is no basis for attributing the hardboard siding expense to the production and sale of Weyerhaeuser Canada Limited's softwood lumber.

125. Please comment on the following portion of para. 229 of Canada's Second Written Statement:

> **"Commerce agreed that it was proper to exclude the expense from parent company G&A in its preliminary determination".**

Canada's comments on the US response to Question 125 are the following:

37. The United States suggests that it did not know that Weyerhaeuser excluded the hardboard siding expense until verification, after the Preliminary Determination. Canada submits as Exhibit CDA-188 pages from Exhibit D-11 of Weyerhaeuser's Section D response. This response was submitted on 23 July 2001, months before Commerce's Preliminary Determination. The attached pages include Weyerhaeuser's worksheet for calculating parent company G&A and clearly omits the hardboard siding expense, which is a line item that appears in Weyerhaeuser's financial statement (also included in Exhibit D-11). Commerce reviewed Weyerhaeuser's submission and accepted the data. It never objected to Weyerhaeuser's calculation. It reviewed the data at verification and, again,

[35] *Brass Sheet and Strip from Canada*, 61 Fed. Reg. 46,618, at 46,619 (Dep't Commerce 4 September 1996) (Exhibit CDA-104), citing *Certain Hot-Rolled Carbon Steel Flat Products from Japan*, 58 Fed. Reg. 37,154, at 37,166 (Dep't Commerce July 9, 1993).

never mentioned that the exclusion of the hardboard siding expense was an issue to be reviewed. Commerce only addressed this issue in vague terms after the record closed.[36]

[36] See the discussion on pages 85-87 of Canada's Second Written Submission.

ANNEX C-2

COMMENTS OF THE UNITED STATES ON RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(5 September 2003)

1. In this submission, the United States comments on certain statements Canada made in its 26 August 2003 responses to questions from the Panel. The United States is mindful of the narrow scope of the Panel's invitation to comment and, therefore, responds only to new factual data and new arguments raised by Canada. There are many other statements in Canada's 26 August 2003 responses with which the United States disagrees. However, in general, the United States has already addressed the substance of those statements in its prior submissions.

A. Physical Characteristics

2. In its response to Panel Question 92, Canada has significantly oversimplified the softwood lumber production process and the methodologies used by the respondent companies for recording their many production costs. The United States refers the Panel to Comment 4 in the *Final Determination* for a detailed discussion of the issues involved in measuring the cost of producing softwood lumber in this case.[1]

3. In paragraph 33 of its response, Canada states that Commerce "*created*" variable cost differences among product grades.[2] Commerce did not "create" any costs or any cost differences. The costs and cost differences associated with grade are a direct result of the data on the record. At the Canadian companies' urging (and, in fact, contrary to the wishes of the domestic parties), Commerce reallocated certain costs that were recorded and reported by the companies on a volume basis. These costs were reallocated to the various grades produced using pricing data, because grade was determined to result from qualities inherent in the wood.[3] As a result, the variable costs of varying grades of softwood lumber may differ.

4. In paragraph 35 of its response, Canada states that the United States has raised the question of variable costs and is thereby confusing the issue. At no point in this dispute has the United States raised any question with respect to Commerce's calculation of variable costs or any related issue. The United States has simply explained the basis for Commerce's long-standing approach for granting adjustments for differences in physical characteristics, which normally depends on differences in variable costs.[4] Nor has the United States ever attempted to "change the focus" in this case to address "*how* the allocation would be calculated."[5] The United States has consistently directed its arguments

[1] *Final Determination*, Comment 4 (Exhibit CDA-2).
[2] Canada Responses to Second Panel Questions, para. 33.
[3] *See Final Determination*, Comment 4 (Exhibit CDA-2).
[4] *See* US First Written Submission, paras. 126, 133 notes 163, 164; US First Answers to Panel Questions, para. 43; US Second Submission, para. 53, note 89; US Second Answers to Panel Questions, paras. 21-30.
[5] Canada Responses to Second Panel Questions, para. 35.

to the requirements of Article 2.4, unless a specific question from the Panel or argument from Canada has dictated otherwise.

5. In response to Question 93, at paragraph 39, Canada makes yet another attempt to plead surprise with Commerce's Final Determination. This time, however, Canada argues for the first time that respondents did not and could not know what Commerce's model match methodology would be. This contradicts much of Canada's argument, which rests on the parties' comments regarding model matching and the implication of Commerce's alleged acquiescence to those model matching suggestions in the *Preliminary Determination*. Canada argues that respondents could not anticipate what pricing arguments to make unless they could have anticipated (apparently with absolute precision) what non-identical matches Commerce would actually make.

6. Canada's latest claim of surprise makes no sense. Respondents were well aware of Commerce's model match hierarchy, which did not change significantly from the Preliminary Determination to the Final Determination.[6] Thus, they could easily anticipate, generally, what softwood lumber items were likely to be compared as identical and similar. They were familiar with their own databases and their own product mixes. This is the kind of examination that Commerce performed. The softwood lumber databases are enormous (thousands of transactions). As a result, even Commerce could not determine *precisely* what items are similar and what items are matched as identical until the final computer programme generated the final matches, taking into account all variables and adjustments. If Commerce had been required to perform the analysis Canada suggests, and release it to the parties for comment and possible revision, Commerce could not have completed the investigation in a timely manner.

B. Calculation of the Dumping Margin

7. In response to Panel Question 104, Canada argues for the first time that, when using the transaction-to-transaction comparison methodology in Article 2.4.2 of the AD Agreement, an investigating authority must offset dumping margins with the amount by which distinct transactions have not been dumped. Canada's sole basis for this assertion appears to be the " fair comparison" language of Article 2.4.[7] According to Canada, not providing an offset "gives these transactions less weight in the calculation of the overall dumping margin."[8] Canada is simply incorrect. As the United States explained in response to the Panel's Question 109, in calculating the overall dumping margin, Commerce divides the aggregate amount of dumping by the aggregate value of all export transactions that were examined. The aggregate value of all export transactions includes all non-dumped export transactions and no adjustment is made to their value as a result of the fact that they were not dumped. Thus, non-dumped transactions are weighted in the exact same manner as dumped transactions – by their value – and there is no basis for Canada's suggestion that they are given less weight. At the same time, such transactions properly do not affect the numerator in this calculation because, as Canada agrees, "the price comparison revealed no dumping."[9]

C. Abitibi Financial Expenses

8. In response to Panel Question 115, Canada has submitted new factual information in the form of Exhibit CDA-181. Exhibit CDA 181 is misleading and inaccurate for at least two reasons. First, Canada uses this exhibit to imply that all of Abitibi's asset categories are more or less equal. However, as the United States has explained, the vast majority of Abitibi's assets are capital assets for

[6] *Final Determination*, Comment 7 (Exhibit CDA-2) (The basic methodology did not change between the Preliminary and the Final Determination. Commerce did fine-tune the matches, *i.e.*, subdivided length into length bands and added grade groups).

[7] Canada Responses to Second Panel Questions, paras. 48-49.

[8] *Id*., para. 58.

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

which depreciation expenses were realized.[10] (The chart labels these assets as "Building" and "Machinery and Equipment.") The chart is misleading, because it suggests that the asset category "Land," which was so insignificant that Abitibi did not list it separately on its financial statement, is roughly equal to these other asset categories.

9. The relative size of "Building" and "Machinery and Equipment" as compared to "Land" is important and illustrates the shifting nature of Canada's argument before this Panel. Initially, Canada argued that the COGS-based methodology was inappropriate as applied to Abitibi because it ignored the fact that Abitbi's non-lumber producing divisions required more capital assets than the lumber division.[11] The United States explained that because the COGS methodology included depreciation expenses, which are realized on the vast majority of Abitibi's capital assets, the COGS methodology adequately considered the varying capital asset requirements in allocating financial expenses.[12]

10. In response, Canada's argument changed, and started to focus on the only example of capital assets for which depreciation expenses are not realized, *to wit*, land. Canada argued that because depreciation expenses were not realized on land, the COGS methodology must be unreasonable.[13] By creating a chart that suggests that Abitibi owned significant amounts of land during the POI, Canada seeks to strengthen its argument. However, this Panel should look beyond the misleading nature of Exhibit CDA-181. Abitibi did not own significant amounts of land during the POI, as evidenced by the fact that it did not included it as a separate line item on its financial statement.[14]

11. Exhibit CDA-181 is also misleading because it explicitly states that all production (or "sawmill") costs are captured in inventory.[15] Normally, a company produces a large amount of inventory that is sold throughout the year. None of the production costs for these sold goods is included in inventory at the end of the year. Thus, inventory in no manner includes all the production costs incurred throughout the year.

12. In allocating financial expenses, it is important to consider all production costs, because a company may incur financial expenses on any of its costs, including any of its production costs throughout the year. In response to Panel Question 115, Canada argues that a company would not incur financial costs on sold goods, because the proceeds from sales are used to pay for the production of those sold goods.[16] However, this argument disregards the fungible nature of money, a concept with which Canada ostensibly agrees.[17] Because of the fungible nature of money, proceeds from sales, just like proceeds from a loan, may be used to pay for assets as easily as production costs. Thus, all production costs, and not just those in inventory, are properly considered when allocating financial costs.

D. Tembec By-Product Revenue

13. In response to Panel Question 130, Canada incorrectly characterizes a point made by the United States at the Second Substantive Meeting. The United States did not assert that Exhibit CDA-175 demonstrates that there is an actual "cost of production for a by-product." As the United States has explained throughout this proceeding, by-products do not have an actual cost of production. Nonetheless, just as transfer costs are generally less in value than unaffiliated party transactions, because of the existence of profit, so too are offsets to the cost calculation, in this case

[10] *See, e.g.* US Second Written Submission, para. 74.
[11] *See, e.g.* Canada First Written Submission, paras. 191-194.
[12] *See, e.g.* US Second Written Submission, para. 74.
[13] *See, e.g.* Canada Responses to First Panel Questions, para. 136.
[14] *See*, Abitibi Financial Statement, p. 35 and p. 49 note 9 (exhibit CDA-82).
[15] *See also,* Canada Responses to Second Panel Questions, paras. 83-86.
[16] *See, e.g.* Canada Responses to Second Panel Questions, para. 85.
[17] *See, e.g.* Canada Second Written Submission, para. 189.

by-products, generally less in value than the sale price of by-products to unaffiliated purchasers. As Commerce explained in paragraph 88 of its Answer's to the Panel's 13 August 2003 Questions, Exhibit CDA-175 supports this proposition. The exhibit provides, as a general proposition, that at some point, a company will assign a value to a by-product. Once this value has been assigned, future sales of that by-product to unaffiliated parties may result in a "gain," for accounting purposes, to the company. Nothing Canada has offered in drawing distinctions between accounting methods for valuing by-products refutes this proposition, and in fact, Canada's new explanations ignore the United States' central argument: Commerce used Tembec's own books and records to value wood chips in this investigation, as required by Article 2.2.1.1. of the AD Agreement. In doing so, it determined that the difference between Tembec's interdivisional transfer prices and its sales to unaffiliated purchasers could be explained by this reasonable, anticipated "gain". Canada's Exhibit CDA-175 supports Commerce's accounting methodology, which recognizes the existence of such a "gain", and Canada's new arguments have failed to show otherwise.

E. Slocan

6. In response to Panel Question 135, Canada makes a new assertion that the United States "conceded" during the Second Substantive Meeting that Commerce concluded that Slocan's futures profits constituted an offset to indirect selling expenses.[18] Commerce certainly made no such conclusion, and the only point the United States made during the Second Substantive Meeting was that these expenses might properly be indirect expenses, despite Slocan's own claim during the investigation that it had no indirect selling expenses in the United States. Thus, the United States notes that (1) this supposed "concession" is nowhere on the record of the investigation, (2) is a post hoc argument raised by Canada (but never raised by Slocan), and (3) indirect selling expenses still would not affect price comparability in the context of Slocan's requested adjustment, because they are not terms and conditions of sale to a US customer.[19]

[18] Canada Responses to Second Panel Questions, para. 126.
[19] *See* US First Written Submission, para. 249-250.

ANNEX C-3

LETTER OF THE UNITED STATES EXPRESSING OBJECTIONS TO THE COMMENTS OF CANADA ON RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(9 September 2003)

Dear Mr. Chairman,

My authorities have instructed me to express objections regarding Canada's 5 September 2003, Comments on US Responses to Questions from the Panel in Connection with the Second Panel Meeting ("Canada's Comments"). On 28 August 2003, the Panel permitted a limited opportunity for the Parties to comment on each other's replies to questions posed by the Panel following the second substantive meeting. The Panel instructed the Parties "not to comment on any factual issues or arguments which have already been subject to discussion during the procedure, but to restrict their comments to any **new** factual data or any **new** arguments raised by the other Party."

Material in Canada's Comments exceeds the scope of the Panel's instructions. In particular, Canada has submitted yet another "regression" analysis (Exhibit CDA-186), this time for certain Abitibi transactions. This exhibit is not addressed to "new factual data" or "new arguments." Instead, it is addressed to factual issues and arguments that had been introduced prior to the 26 August 2003 submission of responses to questions. Canada's assertions regarding Abitibi's sales were included in Canada's 30 June 2003, Responses to Panel Question from the First Substantive Meeting, para. 87. At the Second Substantive Meeting, the Panel asked the United States to comment on Canada's assertions, which the United States did in its Response to Panel Question 97, at paras. 34-36 and Exhibit US-81. Canada improperly has submitted new evidence to the Panel under the guise of responding to "new" data and arguments. Therefore, not only is the submission of this exhibit contrary to the Panel's explicit instructions of 28 August 2003, it is contrary to para. 14 of the Panel's working procedures.

Contrary to Canada's suggestion, (*see* Canada's Comments at note 12), the United States has not objected to the submission of charts, such as CDA-Exhibit 76, that simply reflect the data that were before the investigating authority. The United States did not object to the submission of the presentation of that data, notwithstanding that such charts and analysis had not been presented to Commerce during the underlying investigation. The United States continues to object, however, to eleventh-hour *manipulations* of the underlying data. This is the case for Exhibit CDA-77 and, now, Exhibit CDA-186. Under Article 17.5(ii), such submissions cannot serve as a basis for establishing a violation of obligations under the AD Agreement.

The United States is providing a copy of this letter directly to Canada.

ANNEX C-4

LETTER OF CANADA REPLYING TO THE OBJECTIONS OF THE UNITED STATES REGARDING THE COMMENTS OF CANADA ON RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(15 September 2003)

Dear Mr. Chairman,

In its letter of 9 September 2003, the United States objects to the submission of Exhibit CDA-186 as part of Canada's comments on the US responses to the Panel's questions from the second substantive meeting.

As stated in Canada's comment on the response of the United States to Question 97 of the Panel, Exhibit CDA-186 was part of Canada's comments on Exhibit US-81. In Exhibit US-81, the United States for the first time presented an analysis of the daily net prices for certain Abitibi products. This analysis was not before Commerce during the underlying investigation. Moreover, these net prices were not on the record before Commerce, but rather had to be calculated for the Panel by subtracting certain adjustments from gross prices. At the Panel's invitation, Canada commented on Exhibit US-81 because it contained new factual data. Canada also commented on new arguments made by the United States based on Exhibit US-81 that are misleading, difficult to follow, and analytically deficient.

As to the more general objection by the United States that the acceptance by the Panel of regression analyses would contravene paragraph 14 of the Panel's Working Procedures, Canada refers to its reply of June 10, 2003, to the preliminary objections filed by the United States to Canada's First Written Submission. As stated there, it is Canada's view that regression analyses are admissible, provided that the underlying data were before the investigating authority; otherwise, the Parties would be barred from assisting the Panel by explaining the relevance of such data in relation to the obligations of the investigating authority pursuant to the *Anti-Dumping Agreement*.

Indeed, Canada sees no distinction between the use of record data in Exhibit US-81 and Exhibit CDA-186. Both require calculations using record data, and both plot the same data points. These exhibits both equally reflect the record data that were before Commerce.

Thank you for considering these comments.

ANNEX D

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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REQUEST FOR THE ESTABLISHMENT
OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS264/2
9 December 2002

(02-6815)

Original: English

UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

Request for the Establishment of a Panel by Canada

The following communication, dated 6 December 2002, from the Permanent Mission of Canada to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The United States initiated anti-dumping proceedings against imports of softwood lumber from Canada on 23 April 2001. The Notice of Initiation was published on 30 April 2001 in the US Federal Register, Volume 66, pages 21328 *et seq.* The investigation was conducted under the US anti-dumping statute (the *Tariff Act of 1930*, as amended: 19 U.S.C. section 1763 *et seq*.) and the related regulations of the United States Department of Commerce (Commerce) (19 Code of Federal Regulations 351–357). On 21 March 2002, Commerce announced its Final Determination, which was published on 2 April 2002, in the US Federal Register, Volume 67, pages 15,539 *et seq*. Following a final affirmative injury determination by the US International Trade Commission, Commerce published in the Federal Register on 22 May 2002 an amended Final Determination and an Anti-dumping Order on softwood lumber products from Canada (Volume 67, pages 36,067 *et seq*.). Commerce's methodologies and determinations that form the bases of its Final Determination are set out in more detail in its underlying decision memoranda, including but not limited to its Issues and Decision Memorandum dated 21 March 2002 and its Scope Memorandum dated 12 March 2002. As a result of violations of the World Trade Organization (WTO) agreements described below, Commerce determined margins of dumping for imports of softwood lumber from Canada.

On 13 September 2002, the Government of Canada requested consultations with the Government of the United States, concerning the final affirmative determination of sales at less than fair value with respect to certain softwood lumber products from Canada (Inv. No. A-122-838) announced by Commerce on 21 March 2002 pursuant to section 735 of the *Tariff Act of 1930*, as amended on 22 May 2002 (Final Determination) and concerning Commerce's initiation of the

investigation and its conduct of the investigation. This request (WT/DS264/1) was made pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Article 17 of the *Agreement on Implementation of Article VI of GATT 1994* (*Anti-Dumping Agreement*).

Canada and the United States held consultations on 11 October 2002 covering the initiation of the investigation, the conduct of the investigation and the Final Determination. These consultations failed to settle the dispute.

Canada therefore requests, pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 17 of the *Anti-Dumping Agreement*, that a panel be established at the next meeting of the Dispute Settlement Body, to be held on 19 December 2002. Canada further requests that the panel have the standard terms of reference as set out in Article 7 of the DSU.

The measures at issue include the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada. The Government of Canada considers these measures and, in particular, the determinations made and methodologies adopted therein by the United States Department of Commerce under authority of the United States *Tariff Act of 1930*, including section 732(c)(4)(E), to violate the *Anti-Dumping Agreement* and the GATT 1994 for, among others, the following reasons:

1. The application filed by the US domestic industry and the subsequent initiation of the investigation by Commerce did not comply with Article 5 of the *Anti-Dumping Agreement*, including Articles 5.1, 5.2, 5.3, 5.4 and 5.8. Specifically:

   (a) The application submitted by the US domestic industry did not include evidence reasonably available to it, including pricing of Canadian exports to the United States, pricing of the like products sold in Canada by Canadian producers, and Canadian cost data in respect of the production in Canada of the like products. By Commerce's failure to determine whether the application contained all information reasonably available to the applicant, and by Commerce initiating the investigation where the application failed to contain evidence reasonably available to the applicant, and by Commerce's failure to terminate the investigation when Commerce became aware that the application failed to contain evidence reasonably available to the applicant, the United States violated Articles 5.2, 5.3 and 5.8 of the *Anti-Dumping Agreement*.

   (b) The application submitted by the US domestic industry did not include sufficient evidence of dumping to justify initiation of the investigation. Commerce failed to examine the accuracy and adequacy of the evidence provided in the application and failed to reject the application in view of the lack of sufficient evidence of dumping required to justify the initiation of an investigation, and failed to terminate the investigation when it became evident that the application did not contain sufficient evidence, thereby resulting in violations by the United States of Articles 5.1, 5.2, 5.3 and 5.8.

   (c) The *Continued Dumping and Subsidy Offset Act of 2000* (CDSOA), by requiring that a member of the US industry support the application as a condition of receiving payments under the CDSOA, made an objective and meaningful examination of industry support for the application impossible. The United States violated Articles 5.4 and 5.8 in that Commerce's initiation of the investigation was not based on an objective and meaningful examination and determination of the degree of support for the application by the domestic industry.

(d) The initiation by Commerce was made without a proper establishment of the facts, was based on an evaluation of the facts that was neither unbiased nor objective and does not rest on a permissible interpretation of the *Anti-dumping Agreement*. Accordingly, the initiation by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6.

2. Commerce erroneously determined there to be a single like product (under US law, termed "class or kind" of merchandise) rather than several distinct like products, thereby failing to assess domestic industry support in respect of each distinct like product and failing to assess the sufficiency of evidence of dumping in respect of each distinct like product, thereby resulting in violations by the United States of Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994. The like product and industry support determinations by Commerce were made without a proper establishment of the facts, were based on an evaluation of the facts that was neither unbiased nor objective and do not rest on a permissible interpretation of the *Anti-dumping Agreement*. Accordingly, the like product and industry support determinations by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6.

3. In making the final determination, the United States acted inconsistently with Article VI of the GATT 1994 and Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4, 2.4.1, 2.4.2, 2.6, and 9.3 of the *Anti-Dumping Agreement.* Specifically, Commerce improperly applied a number of methodologies based on improper and unfair comparisons between the export price and the normal value, resulting in artificial and/or inflated margins of dumping:

(a) The United States violated Article 2 of the *Anti-Dumping Agreement*, including Articles 2.4 and 2.4.2, and Article VI:1 of the GATT 1994 by Commerce's application of the practice of "zeroing" negative dumping margins, the effect of which was to inflate margins of dumping and which, in the recommendations and rulings of the Dispute Settlement Body in an earlier dispute, was found to be inconsistent with the *Anti-Dumping Agreement*. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement.*

(b) The United States violated Article 2 of the *Anti-dumping Agreement*, including Article 2.4, and Article VI:1 of the GATT 1994 by Commerce's failure, when conducting comparisons between prices of products sold in the United States and prices of products with different physical characteristics sold in the Canadian market, to make due allowance for differences that affect price comparability, including differences in physical characteristics. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement.*

(c) The United States violated Article 2 of the *Anti-Dumping Agreement* including Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2, and Article VI:1 of the GATT 1994 by Commerce's failure to apply a reasonable method in calculating amounts for administrative, selling and general expenses for specific exporters, including an improper allocation of general and administrative expenses including financial expenses. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement.*

(d) The United States violated Article 2 of the *Anti-Dumping Agreement*, including Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and paragraph 7 of Annex I, and Article VI:1 of the GATT 1994 by Commerce's failure to apply a reasonable method to account for revenues, including by-product and futures contract revenues, as offsets in calculating costs and export price for specific exporters. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement.*

(e) The methodologies, calculations, comparisons and determinations by Commerce were made without a proper establishment of the facts, was based on an evaluation of the facts that was neither unbiased nor objective and does not rest on a permissible interpretation of the *Anti-dumping Agreement*. Accordingly, the methodologies, calculations, comparisons and determinations by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6.

(f) The methodologies, calculations, comparisons and determinations by Commerce violated Articles VI:1 and VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by levying an anti-dumping duty on softwood lumber from Canada in an amount greater than the margin of any dumping.

In view of the claims set forth above, Canada considers that the United States has acted inconsistently with Article VI of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*, which only permit anti-dumping measures to be applied under the circumstances provided for in Article VI and pursuant to investigations initiated and conducted in accordance with the *Anti-Dumping Agreement*. Because the claims set forth above indicate the violations of various provisions under the *Anti-Dumping Agreement*, Article VI of the GATT 1994 and Articles 1 and 18.1 of the *Anti-Dumping Agreement* are consequently violated.

Canada requests that the Panel consider and find that the US anti-dumping measures concerning imports of softwood lumber from Canada, including the initiation, conduct of the investigation, and Final Determination and resulting Anti-dumping Order are inconsistent with the provisions of the WTO agreements, nullify or impair benefits accruing directly or indirectly to Canada under the WTO agreements, and impede the achievement of the objectives of the WTO agreements.

Canada further requests that the Panel recommend that the United States revoke the anti-dumping order in respect of softwood lumber from Canada.