United States - Final Dumping Determination on Softwood Lumber from Canada

WT/DS264

Opening Statement of the United States
Second Meeting of the Panel

August 11, 2003

1. Mr. Chairman and members of the Panel, the United States welcomes this opportunity to meet with the Panel again to discuss the issues raised in this case. Canada has stated a number of claims concerning the initiation and conduct of Commerce's softwood lumber antidumping investigation. The United States has fully addressed each of these claims in its prior submissions. In our presentation today, we will elaborate on our arguments in light of statements Canada has made in its responses to the Panel's questions and in its rebuttal submission.

2. At this stage in the proceeding, we recognize 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 U.S. 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. In our presentation today, we will address Canada's most significant misstatements in an effort to provide the Panel a clear picture of the facts and the issues in this dispute.

3. In the interest of time, we will not address each and every one of Canada's misstatements. However, we wish to register our disagreement, in particular, with statements Canada has made throughout its submissions to the effect that the United States concedes, admits, or acknowledges particular points. We will touch on the most egregious of these. To the extent that we do not address particular misstatements by Canada, we would be pleased to discuss them in response to questions.

Standard of Review

4. First, it is necessary to revisit briefly the issue of the appropriate standard of review. The standard under Article 17.6 of the AD Agreement is clear. However, Canada has misinterpreted that provision in its affirmative arguments and mischaracterized the U.S. interpretation in its rebuttal arguments.

5. Article 17.6(i) instructs panels to determine whether an investigating authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. It also instructs panels not to overturn an investigating authority's evaluation of the facts where the facts were properly established and evaluated in an unbiased and objective manner.

6. In our first submission, we 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.[1] We 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, we pointed to Canada's request that the Panel examine "whether the authority has given proper weight to the facts." We noted that, as one GATT panel put it, weighing "the relative value of certain evidence in relation to other evidence" is a function for an investigating authority, rather than a panel.[2]

7. In our answers to the Panel's questions, we identified other instances in which Canada appears to be asking for *de novo* review of Commerce's findings of fact. We 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 explaining the analysis. As Commerce did not have an opportunity to probe the assumptions behind the analysis and memorandum in the investigation, Canada's presentation of this new evidence to the Panel amounts to a request for *de novo* review.[3] We also cited arguments Canada made in connection with certain company-specific calculation issues.[4]

8. 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."[5] This accusation is patently false. The United States has never urged the standard Canada alleges. Canada's misstatement is nothing more than an attempt to caricature the U.S. argument and to obscure the main point, which is that Article 17.6 defines a clear distinction between the respective roles of panels and investigating authorities.

9. We see no need to dwell on this issue. We simply ask that here, as in other instances we will describe, the Panel rely on arguments the United States actually makes rather than Canada's characterization of those arguments.

Initiation–Article 5.2

10. 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. I will discuss Article 5.2 and then turn to my colleague to discuss Articles 5.3 and 5.8 and the remaining claims.

11. 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

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[1] U.S. First Written Submission, paras. 30-35.

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

[3] U.S. First Answers to Questions, para. 3.

[4] *Id.*, paras. 4-7.

[5] Canada Second Written Submission, para. 6.

applicants.[6] The U.S. 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.

12. 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. As the European Communities explained, "[N]either the wording nor the context does lend support for the idea that Article 5.2 [. . .] imposes a *direct* obligation upon the investigating authority."[7]

13. 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.[8] 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.[9]

14. In its rebuttal submission, Canada made several statements regarding the U.S. 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."[10] The statement from which Canada infers this supposed admission is part of a U.S. response to a question from the Panel. In that response, the United States stated that the softwood lumber application included a newspaper article "in which Weldwood is mentioned as 'owned by International Paper.'"[11] This unremarkable statement is a far cry from the admission Canada asserts that the United States made. It is not an admission of the relevance of the Weldwood data, nor of any obligation on the investigating authority under Article 5.2. Here, as elsewhere, Canada's mischaracterization of U.S. statements serves only to confuse the issue.

15. Second, Canada erroneously characterizes the U.S. argument as rendering Article 5.2 a

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[6] *See* Canada First Written Submission, paras. 89-99.

[7] Oral Statement by the European Communities as a Third Party (June 18, 2003), para. 5; *see also* Third Party Submission by the European Communities (May 19, 2003), paras. 10-13.

[8] *See* Canada First Written Submission, para. 97 (arguing that application did not contain "all of the information that was reasonably available to [the applicant]," and, "therefore, did not contain 'such information as [was] reasonably available to the applicant'").

[9] *See, e.g.*, U.S. First Written Submission, paras. 70-76.

[10] Canada Second Written Submission, para. 10

[11] *Id.*, note 5 (citing U.S. First Answers to Questions, para. 12).

nullity. Canada argues that, unless Article 5.2 imposes a free-standing obligation on investigating authorities it is "reduced to redundancy and inutility."[12] 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.

16. Article 5.3 expressly requires an investigating authority 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." The obligation on the investigating authority pertains to "the evidence provided in the application"— that is, the evidence provided by the applicant as described in Article 5.2. If the evidence provided by the applicant as described in Article 5.2 is not "sufficient evidence to justify the initiation of an investigation," then the authority may not initiate the investigation. 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.

17. 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."[13] This is a variation on Canada's argument that an investigating authority must prove a negative before initiating. As we understand Canada's argument, an authority must affirmatively conclude that there is no relevant information reasonably available to an applicant that was excluded from the putative application. Only then may an authority determine that the putative application is *in fact* an application and proceed to the sufficiency inquiry under Article 5.3. Aside from its impracticability, Canada's suggestion would require a pre-initiation investigation that simply is not contemplated by the AD Agreement.

18. Next, we want to take a moment to respond to Canada's contention that its interpretation of Article 5.2 is supported by the panel report in *United States–Anti-Dumping Act of 1916*.[14] The report in that matter is not relevant to this case and certainly does not support the proposition that Article 5.2 imposes an independent obligation on investigating authorities. In fact, Canada was correct when it acknowledged at the first Panel meeting, in response to an oral question, that no panel has yet found whether there is an obligation on investigating authorities under Article 5.2.

19. In the *1916 Act* case, Japan challenged U.S. legislation authorizing U.S. courts to impose

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[12] *See id.*, para. 23 ("If verification of sufficiency of evidence were the only obligation imposed on investigating authorities prior to initiation, Article 5.2, in the light of Article 5.3, would be reduced to redundancy and inutility.").

[13] *Id.*, para. 21.

[14] *Id.*, paras. 16, 24.

criminal and civil penalties based on certain specified conduct by "persons importing or assisting in importing any articles from any foreign country into the United States." Japan claimed that the 1916 Act provided a remedy for dumping that is inconsistent with Article VI of the GATT 1994 and various provisions of the AD Agreement. Japan argued, among other things, that the rules governing the initiation of complaints in U.S. courts did not require a plaintiff to provide evidence of the elements described in Article 5.2. The panel found that the 1916 Act "does not require the establishment of injury within the meaning of Article VI of the GATT 1994."[15] Accordingly, it went on to find that "there is no obligation for a complainant under the 1916 Act to respect the obligations of Article 5.2 of the Anti-Dumping Agreement in terms of the type of evidence to be included in an application."[16]

20. The panel in the *1916 Act* case said nothing about obligations of investigating authorities under Article 5.2. It spoke of a *complainant* respecting obligations under that provision. That is, the applicable rules did not require a plaintiff to file a complaint meeting the requirements of Article 5.2. Perhaps this could be read to support the EC's position as third party in this case, that Article 5.2 "is solely addressed to the petitioner."[17] In any event, it has absolutely no bearing on the issue at hand, which is the obligation of an investigating authority in deciding whether to initiate. That obligation is contained in Article 5.3.

21. As a final note on this provision, we 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.[18] It bases this assertion entirely on the word "such" in the phrase "such information as is reasonably available to the applicant." In its oral presentation at the first Panel meeting, Canada cited the following dictionary definition of the word "such": "Of the kind, degree, category being or about to be specified."[19] Nothing in that definition even suggests the word "all." Applying that definition to the phrase at hand, an application must contain information "of the kind, degree, [or] category" as is reasonably available to the applicant. Information may be "of the kind, degree, or category" that is reasonably available without being *all* information that is reasonably available. Thus, even if the Panel were to find an obligation on investigating authorities under Article 5.2, that obligation would not be violated by initiation of an investigation based on an application that did not contain *all* information reasonably available to the applicant.

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[15] Panel Report, *United States–Anti-Dumping Act of 1916*, WT/DS162/R, adopted Sep. 26, 2000, para. 6.258.

[16] *Id.*

[17] EC Third Party Submission, para. 11.

[18] *See, e.g.*, Canada Second Written Submission, para. 25; Oral Statement of Canada at the First Substantive Meeting of the Panel (June 17, 2003), para. 14.

[19] Oral Statement of Canada at First Substantive Meeting of the Panel, para. 14 (citing *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993) at 3129 (Exhibit CDA-126)).

22. I will turn now to my colleague, who will elaborate on the U.S. response to Canada's Article 5.3 and 5.8 arguments, as well as Canada's arguments on Commerce's conduct of the lumber investigation.

Initiation–Article 5.3

23. Canada has also argued that Commerce initiated the softwood lumber investigation based on insufficient evidence of dumping, in violation of Article 5.3.[20] The United States responded by detailing the evidence on home market sales, costs of production, and export sales that was provided in the application, information that was more than sufficient to justify initiation.[21] Canada has tried to discredit this evidence, often with illogical results. For example, Canada has derided the use of price information from the lumber industry publication *Random Lengths*, even while it relies on the very same source to support its argument on an adjustment for dimensional differences.[22]

24. 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 U.S. mills. However, all significant *production costs* were valued on the basis of actual cost data from Canadian sources.[23] For example, Canadian national or provincial government data were used to value the cost of stumpage (standing timber), labor, and electricity.[24] Other data on Canadian companies were used to value harvesting costs and financial expenses.[25]

25. Canada's claim that the usage factor data in the petition were "not representative" is equally misleading.[26] 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.[27]

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[20] *See*, *e.g.*, Canada First Written Submission, paras. 100-105.

[21] *See* U.S. First Written Submission, paras. 48-62.

[22] *Compare* Canada First Written Submission, para. 17 ("[T]he Application relied almost exclusively on information from *Random Lengths*, an industry publication that provides only price estimates - not prices - for various types of lumber . . ."), *with* Canada First Responses to Questions, paras. 6-7 (explaining regression analysis used to support claim, including reliance on *Random Lengths* data).

[23] *See* Initiation Checklist, at 8-9 (Exhibit CDA-10); *see also* First Written Submission of the United States, para. 54.

[24] *Id.*

[25] *Id.*

[26] Canada Second Written Submission, para. 42.

[27] *See* U.S. Second Written Submission, paras. 24-25.

26. Canada also continues to assert that the application contained insufficient evidence on prices to justify initiation. Here again, Canada dismisses applicants' use of *Random Lengths* data, questioning whether they represent actual transactions.[28] The United States has responded to this allegation in prior submissions, demonstrating that *Random Lengths* data do, in fact, represent actual transactions.[29] That Canada acknowledges the reliability of this source is demonstrated by its own reliance on *Random Lengths* in making its argument on due allowance.[30]

27. Also in rebuttal, Canada attempts to make an issue of the fact that Commerce ultimately did not rely upon the application's prices for western spruce-pine-fir ("WSPF") sold in British Columbia in reaching its decision to initiate.[31] This is yet another example of Canada attributing undue significance to an unremarkable fact. All this fact really shows is that Commerce did not rubber stamp the application; in an abundance of caution, Commerce elected not to rely on the B.C. prices. While the prices were obtained by the B.C. Ministry of Forests from Canadian lumber producers, it could not be confirmed that these prices were restricted to sales in Canada.[32] Canada neglects to mention that Commerce did not consider the WSPF prices because they were "unnecessary, as the petitioners were able to demonstrate sales below cost using other domestic prices contained in the petition."[33] As Commerce properly assessed the adequacy and accuracy of the information contained in the application, and found more than sufficient information to justify initiation in accordance with its obligation under Article 5.3.

Initiation–Article 5.8

28. 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."[34] This argument is flawed for several reasons. First, it is predicated on a mischaracterization of the U.S. argument concerning the Weldwood data. Canada incorrectly characterizes the United States as positing that the data "*would* not have 'invalidated' the information on which Commerce did rely."[35] What the United States actually argues is that these data *could* not have negated the sufficiency of the data on which Commerce relied at the time of initiation.[36] That is because they reflect the experience of a single company,

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[28] *See* Canada Second Written Submission, para. 52.

[29] *See* U.S. First Answers to Questions, paras. 17-24; U.S. Second Submission, paras. 16-17.

[30] *See* Canada First Responses to Questions, para. 7.

[31] Canada Second Written Submission, para. 49.

[32] *Notice of Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21328, 21330 (April 30, 2001) (Exhibit CDA-9).

[33] *Id.*

[34] Canada Second Written Submission, para. 63.

[35] *Id.*, para. 62 (emphasis added).

[36] *See, e.g.*, U.S. Second Written Submission, para. 14.

whereas the data actually relied upon for initiation reflected the experience of a broad cross-section of Canada's lumber producing and exporting industry.

29. Second, Canada ignores the fact that Weldwood's data were submitted two months after the initiation of the investigation, as a "voluntary" response to be examined and verified only if one of the selected respondents dropped out of the investigation. The data were received concurrently with the submissions of the six examined Canadian respondents, each of whose data demonstrated dumping.

30. In light of the evidence of dumping obtained during the investigation, it is not at all clear how Canada believes Commerce 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.

31. 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.[37] But, Article 5.8 contains no such look-back requirement. Article 5.8 concerns whether there *is* sufficient evidence to proceed at a given point in an investigation, not whether there *would have been* sufficient evidence to initiate at an earlier point. As Canada has not shown that the data accumulated during the investigation demonstrated a lack of sufficient evidence of dumping to proceed, the Panel should reject its Article 5.8 claim.

Product Under Consideration

32. We turn now 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 of the Antidumping Agreement.[38] 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 antidumping investigation.[39] This point is underscored by the fact that in pending negotiations, certain WTO Members have proposed that there should be such an obligation.[40] Such a proposal would be superfluous if the obligation already existed.

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[37] *See, e.g.*, Canada Second Written Submission, para. 62 ("Commerce violated Article 5.8 in failing to assess the sufficiency of what the Applicant submitted at initiation in light of more probative information.").

[38] *See, e.g.*, Canada Response to Preliminary Objections (June 10, 2003), para. 11. ("Accordingly, Canada challenges Commerce's definition of 'product under consideration' in relation to its definition of 'like product' as inconsistent with Article 2.6.").

[39] *See, e.g.*, U.S. Second Written Submission, paras. 33-41; U.S. First Written Submission, paras. 83-99.

[40] *See* U.S. Second Written Submission, para. 35 & note 66.

33. What Article 2.6 does contain is a definition of the term "like product." It provides that the "like product" is to be defined vis-a-vis the "product under consideration," a term that is *not* defined in Article 2.6 or anywhere else in the AD Agreement. Under Article 2.6, "like product" is defined as "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." Canada purports to apply this definition as among the different elements of the product under consideration. However, Article 2.6 does not support such a requirement. Indeed, even Canada acknowledges that the support for its theory is mere inference, rather than any express rule.[41]

34. In addition to demonstrating the absence of the rule Canada purports to find in Article 2.6, prior U.S. submissions explained the analysis Commerce undertook in identifying the product under consideration. Specifically, we explained Commerce's application of its *Diversified Products* test. We demonstrated that this test is clearer and more detailed than any test Canada claims to infer from Article 2.6.[42]

35. In its rebuttal submission, Canada focuses on two U.S. 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.

36. First, Canada focuses on the U.S. 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."[43] Canada asserts that this means that Commerce "subordinated its use of the *Diversified Products* criteria to a 'no clear dividing line'/'continuum' test."[44] 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.[45] It was through the application of each of these criteria that Commerce determined whether the evidence supported treating products as separate products under consideration. For example, in addressing the physical characteristics factor for Western red cedar, Commerce found that Western red cedar shared similar physical characteristics with other softwood lumber species. It concluded that no

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[41] *See* Canada Second Written Submission, para. 70 (stating that "Article 2.6 *infers*" a requirement to determine whether certain products "have characteristics closely resembling 'those of the product under consideration'"(emphasis added)).

[42] U.S. First Written Submission, paras. 100-113.

[43] Canada Second Written Submission, para. 70 & note 66 (citing U.S. First Written Submission, para. 103).

[44] *Id.*, paras. 70, 87.

[45] *See Scope Memorandum*, at 23-32 (Exhibit CDA-12); *Final Determination*, Comment 52 (Exhibit CDA-2).

dividing line could be identified on the basis of physical characteristics.[46] 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.

37. The second statement on which Canada focuses in its rebuttal is Commerce's statement, in its Issues and Decision Memorandum, 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."[47] Canada erroneously takes a passing observation by Commerce and 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. Just a few sentences after the sentence to which Canada attaches so much importance, Commerce stated:

> Having made these general observations on the difficulty of separating individual lumber products out of the spectrum as separate classes or kinds of merchandise, we nevertheless had to validate our general conclusion with product-specific *Diversified Products* analysis of the softwood lumber products for which separate class or kind treatment was specifically requested.[48]

38. In other words, contrary to Canada's mischaracterization, Commerce expressly acknowledged that it could not base its class or kind determination on the diversity of characteristics among lumber products. Rather, it recognized an obligation under its own practice to apply the *Diversified Products* factors.[49] In light of this recognition, the significance Canada attributes to Commerce's passing reference to diversity plainly is misplaced.

39. 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. It bases that inference on the express rule governing the definition of like product. That rule refers to "characteristics closely resembling those of the product under consideration." Canada refers to definitions of each of the key terms in that phrase: "characteristic"; "close"; and "resemble."[50] Although none of those terms refers 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."[51] 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.

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[46] *See Final Determination*, Comment 52, at 152 (Exhibit CDA-12).

[47] Canada Second Written Submission., paras. 71, 87.

[48] Final Determination, Comment 52, at 154 (Exhibit CDA-2).

[49] *See Id.*, at 154-56, 159-60, 163-64, 165-66 (Exhibit CDA-2).

[50] Canada Second Written Submission, para. 76.

[51] *Id.* (emphasis added).

40. Finally, in its rebuttal submission, Canada seeks support for its position from the panel report in *Indonesia–Autos*.[52] Its reliance on that case is misplaced for at least two reasons. First, and most importantly, unlike the present case, the panel in *Indonesia–Autos* was not reviewing an investigating authority's determination under the standard in Article 17.6 of the AD Agreement. It was deciding in the first instance what the "like product" was for purposes of Article 6.3 of the Subsidies Agreement. The panel in that case was the finder of fact in the context of an actionable subsidy dispute. It was not reviewing the action of an investigating authority. By contrast, in the present case, the Panel is reviewing Commerce's findings of fact to determine whether they were properly established and the result of unbiased and objective evaluation. That distinction is critical.

41. Second, unlike the present case, there was no question in *Indonesia–Autos* as to the identity of the product under consideration. The parties to the dispute agreed that the Timor car was the product under consideration.[53] For this reason, too, *Indonesia–Autos* is not relevant to the present case, in which the very question at issue is Commerce's identification of the product under consideration.

Due Allowance for Physical Differences

42. The next issue is Canada's "due allowance" 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. In its responses to the Panel's questions and in its rebuttal submission, Canada flatly asserts that the significance of weight, thickness and length for price comparability was never questioned by Commerce, even in the *Final Determination*. This is demonstrated, Canada alleges, by the submissions of various parties during the investigation urging that dimension be considered as a criterion for model matching purposes, and Commerce's subsequent acceptance of dimension in the model matching methodology.[54] Canada further points to the submissions of certain parties that contained statements alluding to the impact of dimension on price.[55] Canada also places great weight on Commerce's statement in its *Preliminary Determination* that it had compared only identical softwood lumber grades and dimensions, because of their "significant physical characteristics which affect price."[56]

43. Canada omits critical pieces of the puzzle. When these pieces are put in their proper place, they reveal a determination in which width, thickness and length *were* taken into account

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[52] *See id.*, paras. 78-81 (discussing Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, DS55/R, DS59/R, DS64/R, adopted July 23, 1998 ("*Indonesia–Autos*")).

[53] *See* Panel Report, *Indonesia–Autos*, para. 14.164.

[54] Canada Second Written Submission, paras. 116-117; Canada First Responses to Questions, para. 87.

[55] Canada First Responses to Questions, para. 87, subpara. 3 and notes 72, 73.

[56] Canada Second Written Submission, para. 121.

in the product comparisons. The United States has explained in detail Commerce's methodology for matching transactions and making adjustments. In prior submissions, we showed that Commerce matched softwood lumber products with the identical dimensional characteristics where identical matches were available. Where they were not available, Commerce matched softwood lumber products with the most similar dimensional characteristics available.[57] Canada conveys an incomplete picture. In fact, the respondents themselves were dissatisfied that Commerce did not compare products of different dimensions in its *Preliminary Determination.* It was the respondents that argued that Commerce should *not* be limited to only identical dimensional matches.[58] By urging Commerce to reject the approach it took in the *Preliminary Determination*, respondents squarely raised the issue of what impact any dimensional differences in nonidentical comparisons might have on price comparability.

44. Canada's responses to questions and rebuttal submission also contain other significant distortions of fact and mischaracterizations of the U.S. position.

45. First, Canada continues to grossly misrepresent the impact on the margin of the non-identical dimensional comparisons made.[59] The Panel asked the United States how many comparisons were based on identical CONNUMs. The U.S. response was weighted by quantity, which is how the dumping margin is in fact calculated.[60] Canada's presentation of raw, non-weighted numbers of comparisons[61] creates a distorted and unreliable picture. The number of comparisons is only meaningful if it is viewed according to how the margins are in fact determined. Understood correctly, the vast majority of comparisons by weight were of identical softwood lumber products, thereby significantly limiting the impact of these non-identical comparisons.

46. Second, Canada mistakenly claims that the United States has created a new, unattainable standard for the establishment of a price adjustment for physical differences, requiring a showing of stable, non-fluctuating prices.[62] Canada has entirely misread the U.S. 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. Article 2.4 supports no such finding. As the panel in *Egypt–Rebar* explained, under Article 2.4,

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[57] *See* U.S. First Written Submission, paras. 123-130; U.S. First Answers to Questions, paras. 34-40.

[58] *See*, *e.g.*, Case Brief of Abitibi Consolidated Inc., February 12, 2002, at 26-34 (Exhibit CDA-142). *See also Final Determination*, Comment 7 (Exhibit CDA-2).

[59] Canada Second Written Submission, para. 123.

[60] United States First Answers to Questions, para. 40.

[61] Canada First Responses to Questions, para. 97.

[62] Canada Second Written Submission, paras. 113 n. 117, 134.

a due allowance is warranted only if an effect on price comparability is demonstrated.[63]

47. Contrary to Canada's claims,[64] the United States has *not* argued that in order to obtain a price adjustment, a larger softwood lumber product must have a higher price. Nor has the United States argued that prices may never fluctuate, or that they must be stable over time.[65]

48. What the United States has argued, and what Canada simply is unable to refute, is that prices of softwood lumber products of different dimensions *relative to each other* must show *some discernible relationship*. Consider the example used by Canada in its rebuttal submission,[66] the 16-foot and 18-foot 2x4. If the 16-foot 2x4 is *neither* consistently higher-priced *nor* consistently lower-priced than the 18-foot 2x4 over the period examined, it becomes *impossible* to determine that the fluctuation in relative price is attributable to *dimension*. This is the case if the prices continue to fluctuate relative to one another, such that they are the same at a given time, or the 16-foot 2x4 is priced higher than the 18-foot 2x4 some times and lower at other times, (or if the prices diverge and come together and diverge).

49. 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 we explained in prior submissions, may not be considered by the Panel in its examination, under Article 17.5(ii).

50. Finally, Canada complains about the difference in treatment between dimension and other physical characteristics.[67] However, 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. Canada specifically mentions Commerce's adjustment for grade. In its Final Determination, Commerce determined to calculate a value-based cost for grade, because it found that different wood grades have significantly different values.[68] Different dimensions, by contrast, were found to have frequent and inconsistent price fluctuations.[69] Therefore, Commerce's treatment of dimension was necessarily distinct from its treatment of grade and other physical characteristics.

51. The Canadian respondents failed to demonstrate that dimensional differences affected

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[63] Panel Report, *Egypt–Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted Oct. 1, 2002, para. 7.352.

[64] Canada Second Written Submission, paras. 131-135.

[65] *Id.*

[66] *Id.*, para. 118 note 111.

[67] *Id.*, paras. 137- 138.

[68] *Final Determination*, Comment 4.

[69] *Id.*, Comment 4, note 60

price comparability. For those limited instances in which a comparison between non-identical matches was necessary, Commerce was not required to make a price adjustment under Article 2.4.

Calculation of the Overall Dumping Margin

52. We turn now to Canada's claim that the United States did not accurately calculate the overall dumping margin. Canada has failed to establish that the AD Agreement affirmatively 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* report[70] is not binding on this Panel, and the Panel should not rely on it; and (3) the negotiating history confirms the U.S. interpretation, that Article 2.4.2 was crafted to address the symmetry of comparisons in dumping calculations, not the offset issue.

53. In our 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.[71]

54. 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. To quote:

> 150. [...] 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. "[A]ll" ensures that all the transactions meeting those requirements of comparability are utilized.
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> 151. 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.[72]

Canada's theory that the same word takes on a different meaning depending on the stage of the

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[70] Appellate Body Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted March 12, 2001 ("*EC–Bed Linen*").

[71] *See* U.S. Second Written Submission, para. 67.

[72] Canada Second Written Submission, paras. 150-51.

dumping calculation at issue finds no support in ordinary rules of treaty interpretation.

55. 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.

56. 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.

57. Canada suggests that the United States has introduced an "artificial distinction between positive and negative intermediate margins."[73] To the contrary, the AD Agreement recognizes the concept of "dumping," which it defines as occurring when export price is less than normal value.[74] When export price exceeds normal value, there is an absence of dumping, not a "negative margin," a concept not recognized by the AD Agreement. It is Canada that seeks to create the artificial construct of a "negative margin," which Canada asserts must be measured and applied as an offset to actual margins of dumping.

58. With respect to the Appellate Body report in *EC–Bed Linen*, we have 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*.[75] Here again, Canada mischaracterizes a statement by the United States. We refer the Panel to our response to the Panel's Question 33, where we explained that, without access to the details of the EC calculation, we could not assess the similarities or differences in the practices.[76]

59. Second, Canada argues that as an adopted Appellate Body report, *EC–Bed Linen* should be taken into account where it is relevant.[77] As discussed in our first written submission, the concept of *stare decisis* does not apply to WTO disputes.[78] This Panel is not bound to follow

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[73] *Id.*, para. 141.

[74] *See* AD Agreement, art. 2.1.

[75] Canada Second Written Submission, para. 140.

[76] U.S. Answers to Panel Questions, para. 46.

[77] Canada Second Written Submission, para. 147.

[78] U.S. First Written Submission, paras. 173-177.

EC–Bed Linen. Like the panel in *Argentina–Peaches*,[79] this Panel should not refrain from reevaluating an adopted report where appropriate. The United States respectfully suggests that, in this case, such reevaluation is appropriate. For the reasons we have detailed in our prior written and oral submissions, the Panel should find that *EC–Bed Linen* is not persuasive.[80]

60. With respect to the negotiating history of Article 2.4.2, we would also like to make two points. 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.

61. 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 Article 2.4.2."[81] To the contrary, the United Sates 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,[82] the U.S. interpretation can hardly be described as "unilateral."

62. Finally, in its rebuttal submission, Canada asserts that offsets are required by the "fair comparison" language in Article 2.4.[83] 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. It 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 further adjustment in the form of an offset of non-dumped amounts against dumping margins.

63. In discussing the issue of offsetting dumping margins by non-dumped amounts, an apt analogy is sometimes made to a motorist who drives within the speed limit on parts of his journey and exceeds the limit on other parts. If the motorist is caught speeding, he is not credited for how much or how long he drove below the speed limit during other parts of his journey.

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[79] Panel Report, *Argentina–Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, adopted April 15, 2003, para. 7.24.

[80] U.S. First Written Submission, para. 143-177; U.S. Opening Statement at First Panel Meeting, paras, 34-38; U.S. Closing Statement at First Panel Meeting, para. 6; U.S. Answers to Panel's June 19, 2003 Questions, paras. 55-57; and U.S. Second Written Submission, paras 64-69.

[81] Canada Second Written Submission, para. 149.

[82] *See* U.S. Second Written Submission, paras. 60-63.

[83] Canada Second Written Submission, para. 153.

Having found an infraction, the authorities will be indifferent to the fact that the motorist may have driven below the speed limit prior to the infraction. Similarly, here, Commerce did not err in declining to offset respondents' dumping by non-dumped amounts.

Company-Specific Issues

64. 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. Once again, Canada distorts the record. Commerce has a set of standard methodologies that are grounded in fundamental accounting principles and based on longstanding analysis in light of the purpose of the antidumping calculation. As discussed in our submissions,[84] Commerce applied its standard methodologies only after careful consideration of the record evidence. However, Commerce did not stop there. Each of the comments raised by the respondents in this case was considered and addressed at length in the Final Determination.

65. 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. For example, at the request of respondents, Commerce deviated from its standard practice of allocating costs based on the quantity of merchandise produced. Rather, Commerce allocated product-specific costs for species and grade using the relative values of the different products. Another example of deviation from standard methodologies is the valuation of wood chips for the by-product offset. Commerce's standard practice is to measure the value of by-products sold to affiliates using the arms-length price in the country as a whole. In this case, at the request of respondents, Commerce determined the value of wood chips based on provincial markets rather than Canada as a whole. Thus, Canada cannot credibly claim that Commerce automatically applied standard methodologies.

66. For Abitibi, Tembec, and Weyerhaeuser, Canada argues that Commerce over-allocated general and administrative costs to softwood lumber. We will address each company in turn.

Abitibi

67. In its first submission, Canada argued that the cost of goods sold ("COGS") methodology for allocating Abitibi's financial expenses was unreasonable, because it ignored the lower capital asset requirements of its softwood lumber division.[85] 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.[86] However, Canada's argument only has merit if one

[84] *See e.g.,* U.S. First Written Submission, paras. 190-191, 200, 207.

[85] *See* Canada First Written Submission, paras. 193 - 194.

[86] *See* Canada Second Written Submission, para. 211.

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.[87]

68. As the United States has explained, "asset values" is a limited basis upon which to allocate financial costs, because it inadequately considers any of the other costs upon which a company incurs financial costs (*e.g.,* ongoing operations).[88] Moreover, because money is fungible, there is no reason to assume that financial costs are any more related to assets than the costs a company incurs to produce products. 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.[89] Non-depreciable assets, such as land, constitute such a small portion of Abitibi's total assets that Abitibi did not even list land as a separate line item on its financial statement.[90] Commerce's determination to allocate Abitibi's financial costs based on COGS resulted in a reasonable allocation of financial costs to softwood lumber in accordance with the AD Agreement.

Tembec

69. Canada also argues that Commerce over-allocated general costs for another lumber producer, Tembec. Canada rests its argument on the fact that Commerce refused to base Tembec's general and administrative 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.[91]

70. Moreover, even if we 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.[92] The United States has already explained that Canada is incorrect in arguing that Commerce's acceptance of Tembec's divisional specific G&A as a verification exhibit is equivalent to an independent auditor's evaluation of a company's financial statements.[93] Morever, unlike audited financial statements, internal, division-specific records are not intended as objective measures of a company's performance.

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[87] *Id.*, para. 189.

[88] *See* U.S. First Written Submission, para. 192.

[89] *See* Canada Second Written Submission, para. 203.

[90] *See* Abitibi Consolidated Financial Statement, p. 35 (exhibit CDA-82).

[91] *See* Final Determination, Comment 33 (Exhibit CDA-2); U.S. Second Written Submission, para. 77 and note 130.

[92] *See* Tembec's Annual Report, "Auditor's Report", pg. 34 (Exhibit US-12).

[93] *See* U.S. Second Written Submission, note 132.

Instead, the function of division-specific records is to "enable financial statement users to see the business through the eyes of the management."[94] Thus, consistent with Article 2.2.1.1, Commerce based Tembec's general and administrative costs on the amount reported in Tembec's financial statements. This resulted in a reasonable allocation of general and administrative costs to softwood lumber consistent with the AD Agreement.

Weyerhaeuser

71. Canada also argues that Commerce over-allocated general and administrative expenses when it allocated a portion of litigation costs incurred by Weyerhaeuser Canada's parent company to softwood lumber.[95] This apportioned amount of G&A was based on the line item "G&A," as well as the separately listed "charge for settlement costs," and "integration costs."[96] Settlement costs were reasonably considered part of G&A, because they are legal expenses and were included in Weyerhaeuser's financial statement in operating income.[97] Canada now argues that even if these settlement costs were general costs, they did not pertain to softwood lumber.[98] 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.[99]

72. Also contrary to Canada's assertions, Commerce did not reduce the parent company's reported general and administrative costs because these costs were unrelated to softwood lumber. Instead, as the United States has explained, Commerce reduced the consolidated company's reported G&A, because some of the consolidated G&A related to subsidiaries, and had been reported separately by Weyerhaeuser Canada.[100]

73. Commerce's treatment of Weyerhaeuser is consistent with its administrative practice, which is to include a portion of a parent company's G&A costs in a producer's G&A, absent a showing that the parent performed no functions on behalf of the subsidiary. Commerce only considers the parent's G&A and not the consolidated amount including all subsidiary companies' G&A. Commerce assumes that, absent a showing to the contrary, a parent company routinely incurs G&A on behalf of a subsidiary but a subsidiary does not routinely incur G&A on behalf of

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[94] *See* Summary of Canadian Accounting Rules For Segment Information, pg. 2 (Exhibit US-80).

[95] *See e.g.*, Canada Second Written Submission, para. 227.

[96] *See Id.*, para. 230.

[97] *See* U.S. First Written Submission, para. 209 and note 242.

[98] *See* Canada Second Written Submission, para. 247.

[99] *See* Joel G. Siegel, Jae K. Shim, *Dictionary of Accounting Terms* (Barron's Education Services, Inc. 2nd ed. 1995) (Exhibit US-47). *See also*, Canada Second Written Submission, para. 166 (stating "Administrative, selling, and general costs. . . are costs that are not directly attributable to the product under investigation or any particular product").

[100] *See* U.S. Second Written Submission, note 140.

a parent. Only where evidence is presented that the parent company performed no functions on behalf of the subsidiary — as was the case in the *Brass Sheet and Strip* determination cited by Canada — will Commerce decline to allocate a parent company's G&A to that subsidiary.[101] In fact, Canada has not challenged Commerce's practice and agrees that a portion of the parent company's G&A should be included in Weyerhaeuser Canada's G&A.[102]

74. It is uncontested that Weyerhaeuser's parent company performed functions on behalf of Weyerhaeuser Canada. Thus, consistent with this fact, Commerce included an apportioned amount of the parent company's G&A expenses, including a portion of the litigation costs, within Weyerhaeuser Canada's G&A. This resulted in a reasonable allocation of Weyerhaeuser's general costs to softwood lumber consistent with the AD Agreement.

By-Product Offsets for Wood Chips

75. As the Panel is aware, in determining the cost of production of lumber, sales of wood chips (which are a by-product in the production process) are used as an offset to lumber production costs, since the wood chips can be sold to pulp mills. Commerce granted a reduction in the production costs of lumber for all producers, to ensure that the cost of lumber production would not be overstated. However, despite Commerce's reliance on the companies' own books and records, Canada complains that Commerce did not deduct enough from the lumber costs for two companies here. As the United States has explained,[103] the issue here is a factual one: how to measure the amount of this by-product revenue offset given each company's particular factual situation.

West Fraser–Wood Chip Offset

76. During the period of investigation, West Fraser sold wood chips to affiliated companies in British Columbia. As we have explained in our submissions, 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. It did that analysis here and concluded that the 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.

77. Canada's arguments before the Panel vary from those made by West Fraser. For example, West Fraser never argued that the long-term contract by which one of its mills made

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[101] *See Brass Sheet and Strip from Canada; Final Results of Antidumping Duty and Administrative Review*, 61 Fed. Reg. 46618, 46619 (September 4, 1996). (Exhibit CDA-104)

[102] *See* Canada Second Written Submission, para. 180.

[103] U.S. First Answers to Panel Questions, paras. 91-99.

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. Canada's argument on this point[104] is *post hoc* rationalization. Contrary to Canada's assertion, the record nowhere states that West Fraser's contract prices from its McBride mill were "not reflective of the market." West Fraser never made such an argument. West Fraser's Cost Verification Report (Exhibit CDA-110) states only that "the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred in 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." Together with the sales from the Pacific Island Resources mill—which neither Canada nor West Fraser ever contested were arm's length transactions—these two sets of mill sales were reflective of West Fraser's market prices during the period of investigation. West Fraser was prepared to sell wood chips on these two commercial bases, and this was the best evidence of a fair market price for its wood chips, rather than the higher, non-arm's length prices at which it sold chips to affiliates.

78. In its response to the Panel's question, 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.[105] 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 British Columbia.[106] 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.[107]

79. Moreover, the mere existence of a large volume of affiliated transactions in British Columbia 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.[108] The sales occurred during a significant portion of the period of investigation (two of the twelve months). In business, sales typically occur according to pre-existing contracts; this does not change their arms-length commercial nature.

80. Commerce's finding was consistent with Article 2.2.1.1, which expresses a preference for

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[104] Canada First Written Submission, para. 249.

[105] Canada First Responses to Panel Questions, para. 168, note 168.

[106] *Id.*

[107] West Fraser Cost Verification Exhibit C5, WF-Cost-007503, Exhibit CDA-106. *See also* U.S. First Written Submission, para. 219.

[108] Canada Second Written Submission, para. 258.

use of data from the producer's own records. Contrary to Canada's assertions,[109] the United States does not argue that Article 2.2.1.1 sets out an evidentiary preference that is exclusive. The Article does, however, instruct administering authorities to first consider a company's own records. Canada has produced no evidence from the record that West Fraser's own unaffiliated sales were not commercial transactions, even though their quantity was limited.

Tembec–Wood Chip Offset

81. Canada also challenges how Commerce measured the value of transfer prices of wood chips between Tembec 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. In situations involving internal transfers within a company, Commerce looks only for the cost basis, and it eliminates any profit or loss on the transaction.

82. Canada claims that Tembec's inter-divisional transactions were "arbitrary."[110] Canada's sole argument is that Tembec valued wood chips at a higher rate in its transactions with unaffiliated purchasers, which thereby calls its inter-divisional valuation into question. Canada identifies three instances in which Tembec stated on the record that its transfer prices were not market prices.[111] However, the United States has never argued that Tembec's internal transfer prices were market prices, but that they reasonably reflected the value of the by-product offset.[112] Canada reasons that, because by-products have no independent cost of production, Commerce was required to ignore lower-priced inter-divisional transaction values reflected on Tembec's own records, and replace those values with market-based values.[113]

83. However, other than mere assertions, Canada has produced no evidence that Commerce's assessment was unobjective. These wood chip sales to Tembec's pulp mills formed part of the cost of production of Tembec's pulp and paper production (which it states is its main business).[114] If those costs were artificially low, then the segment information (or divisional information) on Tembec's financial statements would also be arbitrary. But there is no such evidence in the financial statements or otherwise on the record. Also, while the difference between Tembec's British Columbia market value and its inter-divisional transactions may seem large at first glance, the difference appears far less significant in light of the prices that other

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[109] *Id.*, para. 274.

[110] Canada First Responses to Panel Questions, para. 179.

[111] *Id.*, para. 177.

[112] U.S. First Written Submission, para. 239.

[113] Canada First Responses to Panel Questions, paras. 166, 178.

[114] Canada Second Written Submission, para. 295.

respondents paid for wood chips during the period of investigation.

84. In fact, Canada's only real argument is to insist that the United States acted in a biased and unobjective manner by not assessing all costs on a market value basis.[115] The AD Agreement contains no requirement to assess costs in that manner. Moreover, just as Canada says that Commerce's use of cost-equivalent valuation discriminates against single companies that make internal transfers, the rule that Canada would propose would discriminate in *other* cost of production settings against all integrated producers, since a market value profit would have to be added to all integrated producer inter-divisional sales. Again, there is no such requirement in the AD Agreement. Canada argues semantics only, when it complains that there are no "profits" in by-product sales, and therefore there should be no difference between a market price and an inter-divisional transfer price. This argument misses the point entirely. If this were not a sale of a by-product, the difference between cost and market value would be easily identifiable. There is no reason to have a different rule for valuation of inter-company sales of by-products as compared to inter-company sales of other products or inputs. The only reason that there is a difference is because it is impossible to identify by-product costs. But that does not mean — nor does the AD Agreement mandate — that a market value must be used in all circumstances.

85. Finally, Canada has argued in its second submission that different treatment for inter-divisional transfers and sales to affiliates is a distinction without a difference.[116] This is wrong. Commerce values internal transfers at cost, because the inclusion of internal profit or loss would not result in accurately finding the producer's actual cost of producing the item. When looking at sales to affiliated entities, by contrast, the concern is whether the transaction is at arm's length (i.e., market price) and includes an element of profit.

86. 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.[117]

Slocan's Profits from Futures Trading Contracts

87. Commerce properly accounted for Slocan's lumber futures hedging contracts, finding them not to be a financing expense but rather a separate form of sales revenues not directly

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[115] Canada First Responses to Panel Questions, paras. 178, 180.

[116] Canada Second Written Submission, para. 312.

[117] *See* U.S. First Answers to Panel Questions, paras. 97-99 (explaning the reasoning underlying Commerce's methodology for valuing Tembec's wood chip offset).

related to sales of lumber.

88. Commerce found, consistent with Article 2.4 of the AD Agreement, that these futures hedging contracts are not a part of any conditions and terms of sale of lumber to the United States — indeed, here they had no connection with any sales transaction or any customer. Neither Slocan nor Canada has explained how Slocan's futures contracts could "affect" any specific prices to U.S. customers, given that no sale or shipment of softwood lumber and no payment for lumber actually occurred under the contracts on which Slocan has earned these profits.[118] Similarly, Slocan did not show that the futures contracts at issue were terms and conditions related to particular sales of lumber in the United States.[119] 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.

89. Canada is incorrect that the "DOC made the factual determination that futures revenues affected lumber prices. . . ."[120] This is nowhere stated or implied in Commerce's findings. As noted previously, Commerce stated that "Slocan's lumber futures hedging activity is related to its core business of selling lumber,"[121] but nowhere did Commerce determine that futures revenue affected prices. Canada has further adapted its position 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."[122] These are new assertions made by Canada, and unsupported on the record for Slocan. No proof was submitted by Slocan to demonstrate — as now claimed by Canada — that "hedging through futures trading activity affects all sales in a particular market."[123] This cannot constitute the *per se* effect on price comparability that is asserted by Canada. There was never any demonstration by Slocan that these futures contracts affected its sales or its contract prices with its customers. Given that no delivery of lumber ever took place pursuant to these contracts, such proof would not have been possible.

90. Canada points to Commerce's treatment of warranty expenses as a difference in terms and conditions of sale in support of its argument that no direct relationship to sales is required,[124] and it recently added Softwood Lumber Agreement ("SLA") export fees as another example.[125] Warranty expenses occur after the sale, but are the direct result of an actual sale and are part of

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[118] *See* U.S. First Written Submission, paras. 249-250. *See also* Slocan Case Brief of February 13, 2002, at 69, Exhibit US-72; *Final Determination*, Comment 21, Exhibit CDA-2.

[119] *See* Canada First Written Submission. *See also* U.S. First Written Submission, paras. 249-250.

[120] Canada First Written Submission, para. 274; Canada Second Written Submission, fn 363.

[121] *Final Determination*, Comment 21, Exhibit CDA-2.

[122] Canada Second Written Submission, para. 336, and note 356 and 363.

[123] *Id.*, note 356.

[124] Canada First Written Submission, para. 273.

[125] Canada Second Written Submission, para. 331.

the terms and conditions of sale, agreed between the parties.[126] SLA fees also result from actual sales. So both scenarios are very different from Slocan's unilateral futures activity, which had no connection at all either with any sale or indeed with any buyer. Actually, these profits occurred only in the absence of a sale. Canada's argument fails to address these very important distinctions.

91. 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). Thus, Commerce properly declined to use selling revenue to offset finance expenses included in Slocan's production costs.[127] Canada has provided no new explanation supporting its contention that Commerce should have done otherwise.

92. Canada asserts that Commerce should have done *something*, even though Slocan itself failed to substantiate either of the alternative treatments that it sought.[128] As the panel in *Egypt-Rebar* noted, responding parties have an obligation to assert and to justify the information and the arguments required to prove their claims.[129] Contrary to Canada's assertions, there is no undefined duty to grant adjustments that have been neither requested nor demonstrated by the respondent.[130]

93. Canada states, purporting to rely on Article 2.4, "If Commerce was not satisfied with the evidence and arguments that Slocan provided regarding its futures activity, Commerce has an explicit obligation to indicate what further information was necessary."[131] Canada is taking provisions of Article 2.4 out of their context. Commerce complied with the requirement to specify the necessary information, when it included detailed instructions with its questionnaires.[132] Therefore, consistent with the AD Agreement, Commerce properly did not grant the two offsets requested by Slocan.

Conclusion

94. As we stated at the beginning of our presentation, a number of Canada's arguments rely on mischaracterizations of the U.S. position. They obscure the issues and create a distorted impression of the facts. In our presentation today, we have tried to paint a clear and complete

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[126] *See* U.S. First Written Submission, note 312.

[127] *See Id.*, para. 252.

[128] Canada Second Written Submission, paras. 340-342.

[129] Panel Report, *Egypt–Rebar*, para. 7.3.

[130] *See* U.S. First Answers to Panel Questions., paras. 132-138, and 146.

[131] Canada Second Written Submission, para. 341.

[132] Response of Slocan Forest Products Ltd To Sections B, C, and D of the Department of Commerce Antidumping Questionnaire, July 23. 2001, pages C35-37 (Exhibit US-71).

picture for the Panel. In the interest of time, we have not responded to every single misstatement by Canada. We look forward to the opportunity to bring even greater clarity to the facts and issues during this second substantive meeting, and stand prepared to answer any questions or provide further clarifications to the Panel regarding the explanation we have provided.