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PUBLIC VERSION

BEFORE THE

WORLD TRADE ORGANIZATION

United States - Final Dumping Determination On Softwood Lumber from Canada

WT/DS264

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

July 9, 2003

TABLE OF CONTENTS

I. INTRODUCTION

1. In this dispute, to date, the United States has established certain essential points, which we recapitulate briefly before elaborating on particular arguments that call for rebuttal.

2. It has now been demonstrated that Commerce's initiation, and continuation, of the softwood lumber antidumping investigation was consistent with its obligations under Articles 5.2, 5.3, and 5.8 of the AD Agreement.[1] Canada has failed to show otherwise.

3. It has also been demonstrated that Canada has failed to make a *prima facie* case of any violation of an obligation under Article 2.6 of the AD Agreement relating to the product under consideration.[2] That is, Canada has not identified an obligation limiting the scope of the product under consideration.

4. The United States has shown that, having taken dimensional differences into account in its matching criteria, Commerce was not required to make an allowance for the remaining differences in the dimensions of softwood lumber in the products compared for determining dumping margins, given that those remaining differences were not demonstrated to affect price comparability.[3] Canada improperly relies on new data, not presented in the underlying investigation, to support its claim to this Panel.

5. The United States has also shown that Articles 2.4 and 2.4.2 of the AD Agreement contain no obligation concerning the determination of an overall dumping margin from model-specific and level-of-trade specific margins.[4] In particular, these provisions do not obligate Members to offset margins of dumping with any non-dumping amounts that may be found on distinct comparisons. Canada has provided no legal basis for its claim; it relies not on the text, nor even the negotiating history, of the AD Agreement but instead relies solely on the flawed reasoning found in the *EC–Bed Linen* report.

6. Finally, with respect to each of the six company-specific, fact-intensive issues raised by Canada, it has been demonstrated that each determination was based on a proper establishment of the facts and an evaluation of those facts that was unbiased and objective.[5] In each case, Canada

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[1] *See* U.S. First Written Submission, paras. 44-82; U.S. First Opening Statement, paras. 13, 20-23; U.S. First Closing Statement, paras. 8-10; U.S. First Answers to Panel Questions, paras. 12-33.

[2] *See* U.S. First Written Submission, paras. 83-113; U.S. First Opening Statement, paras. 14, 24-28; U.S. First Closing Statement, paras. 11-13.

[3] *See* U.S. First Written Submission, paras. 114-141; U.S. First Opening Statement, paras. 18, 29-32; U.S. First Closing Statement, paras. 14-17; U.S. First Answers to Panel Questions, paras. 34-44.

[4] *See* U.S. First Written Submission, paras. 142-178; U.S. First Opening Statement, paras. 15, 33-38; U.S. First Closing Statement, paras. 5-6; U.S. First Answers to Panel Questions, paras. 45-57.

[5] For Abitibi G&A, *see* U.S. First Written Submission, paras. 179-195; U.S. First Answers to Panel Questions, paras. 60-62, 100-105, 111. For Tembec G&A, *see* U.S. First Written Submission, paras. 179-185, 196-204; U.S. First Answers to Panel Questions, paras. 63, 112-114. For Weyerhaeuser G&A, *see* U.S. First Written Submission, paras. 179-185, 205-212; U.S. First Answers to Panel Questions, paras. 64-67, 115-119. For West Fraser by-product offset, *see* U.S. First Written Submission, paras. 214-229; U.S. Answers to Panel Questions, paras. 70-72, 127. For Tembec by-product offset, *see* U.S. First Written Submission, paras. 214-217, 230-244; U.S. First

argues that Commerce should have used a methodology different from the one actually used. None of the operative AD Agreement provisions require a particular methodology to calculate a company's cost of production. In urging one methodology over another, Canada is improperly asking this Panel to state what it would have done had it been the investigating authority.

7. In this submission, the United States will address points raised by Canada at the first substantive meeting and in Canada's June 30 responses to the Panel's questions. The United States will demonstrate that these statements do nothing to change the conclusion the Panel should reach. With respect to each claim, 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.

II. ARGUMENT

A. Commerce Based its Decision to Initiate the Investigation on Sufficient Price and Cost Evidence that Canadian Softwood Lumber was Being Dumped.

8. On the question of Commerce's initiation of the softwood lumber investigation, Canada argues that Commerce breached an obligation under Article 5.2 of the AD Agreement to ensure that the petitioners had put in their application "all" reasonably available information concerning the matters listed in that article.[6] Canada also argues that information that was included in the application was not sufficient to warrant initiation of the investigation under Article 5.3.[7]

9. In previous submissions, the United States refuted Canada's arguments by demonstrating that (1) Article 5.2 does not impose an independent obligation on investigating authorities, but rather, provides context for their obligation under Article 5.3;[8] (2) Article 5.2 does not require an application to contain "all" information reasonably available to a petitioner;[9] (3) the evidence actually included in the softwood lumber petition provided ample support for initiation;[10] and (4)

Answers to Panel Questions, paras. 73-74, 128-130. For Slocan hedging contract profits, *see* U.S. First Written Submission, paras. 245-253; U.S. First Answers to Panel Questions, paras. 75-78, 131-146.

[6] *See* Canada First Written Submission, paras. 6, 88; Canada's First Responses to Panel Questions, paras. 13, 15, 44(d), 51, 55.

[7] *See* Canada First Written Submission, paras. 6-7, 92, 94-95, 97-100 ; Canada's First Responses to Panel Questions, paras. 12-44, 58-61.

[8] *See* U.S. First Written Submission, paras. 45-46, 70-76; U.S. First Answers to Panel Questions, paras. 25-33.

[9] *See* U.S. First Written Submission, paras. 46, 70-76; U.S. First Opening Statement, paras. 20-23; U.S. First Answers to Panel Questions, paras. 14, 15, 25-30.

[10] *See* U.S. First Written Submission, paras. 52-62 and sources cited therein; U.S. First Answers to Panel Questions, para. 14.

the Weldwood data that Canada alleges to have been reasonably available to petitioners could not have negated the sufficiency of the data included in the application.[11] In this rebuttal submission, we elaborate on these arguments in light of statements made by Canada at the first substantive meeting and in its June 30 responses to the Panel's questions.

1. Canada Misinterprets Article 5.2 of the AD Agreement.

10. Canada's argument regarding Article 5.2 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. For example, Article 5.3 states what "authorities shall examine" to determine whether to initiate. Article 5.5 states that "authorities shall avoid" publicizing an application in advance of initiation and that, upon initiation, "the authorities shall notify the government of the exporting Member concerned." Article 5.6 sets forth the conditions under which "the authorities . . . shall proceed" to initiate an investigation in the absence of an application. By contrast, Article 5.2 makes no reference at all to the authorities. It simply describes the contents of an application.

11. The fact that Article 5.2 simply describes the contents of an application is not inconsequential. Article 5.2 must be read in its context, which includes Article 5.3.[12] Under Article 5.3, investigating authorities have an obligation 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 the investigation." The description of the application's contents in Article 5.2 necessarily informs the inquiry into accuracy and adequacy and sufficiency under Article 5.3. A petitioner that fails to include in its application the information set forth in Article 5.2 risks an investigating authority not being able to verify accuracy, adequacy, and sufficiency under Article 5.3.

12. The second flaw in Canada's argument on Article 5.2 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. However, the phrase that Canada cites does not contain the critical word, "all." Moreover, Canada's argument implies that before initiating, an investigating authority must determine what information is reasonably available to a

[11] *See* U.S. First Written Submission, paras. 65-69; U.S. First Answers to Panel Questions, paras. 33, 82.

[12] *See* U.S. First Written Submission, paras. 46, 70-76; U.S. First Answers to Panel Questions, paras. 25-30.

petitioner and verify that such information has been included in the application. A requirement for such an impractical pre-initiation inquiry has no basis in the AD Agreement.

13. It bears recalling with respect to Canada's arguments under both Articles 5.2 and 5.3 that several panels have noted the difference between evidence required to initiate an antidumping investigation and evidence required to make an affirmative determination of dumping, injury, or causal link. For example, in *Guatemala–Cement II*, the panel stated:

> We 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.[13]

2. Commerce Properly Determined That There was Sufficient Evidence of Dumping to Initiate the Softwood Lumber Investigation.

14. 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. As discussed in previous submissions and elaborated below, the Weldwood data necessarily would have represented the experience of only a single company. They 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 constituted evidence of dumping.

15. Canada suggests that the quality of the Weldwood data was better than the quality of the data actually included in the application.[14] The United States questions that comparison, in light of the limited experience reflected in the Weldwood data. But, even assuming, *arguendo*, that Canada's assessment in this respect is correct, it has no bearing on the question before this Panel.

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[13] Panel Report, *Guatemala–Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted Nov. 17, 2000, para. 8.35; *see also* Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, circulated Apr. 22, 2003, para. 7.67 (finding evidence sales in a major market of exporting country, though not the entire country, sufficient for initiation); Panel Report, *Guatemala–Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, adopted Nov. 25, 1998, para. 7.64 (*"Guatemala Cement I"*) (evidence at initiation need not be of same quantity or quality as would be necessary to support preliminary or final determination).

[14] *See, e.g.*, Canada First Written Submission, paras. 86, 95, 99; Canada's First Responses to Panel Questions, paras. 45-49.

Article 5.3 does not speak to the quality of the data that form the basis for initiation other than requiring that the data constitute sufficient evidence of dumping.

a. Commerce properly established the facts underlying initiation with respect to *prices*.

16. The evidence that Commerce relied upon to initiate included data from the lumber industry publication *Random Lengths*. In previous submissions, the United States demonstrated that Canada incorrectly asserts that *Random Lengths* "commingles" Canadian and U.S. data.[15] Canada's assertion that the *Random Lengths* data are "not actual transaction prices" but "informal estimates"[16] is also incorrect. This is demonstrated by the very exhibit Canada relies upon. Petition Exhibit III.12 contains two documents from the *Random Lengths* website: "How Reported *Prices* are Determined," and "Answers to Questions About the *Prices* Published in Random Lengths".[17] As described in greater detail in that exhibit, the published prices are "actual sales prices"[18] that "reflect levels at which stock has actually traded between manufacturers and their customers."[19]

17. Moreover, Canada's questioning of the reliability of *Random Lengths* data is contradicted by its own reliance on that very same source. In response to the Panel's question 4, Canada explained how a consulting firm performed the regression analysis that Canada offers in support of its price adjustment claim.[20] Canada explained that its consultant used *Random Lengths* data to check its regression estimates.[21] If those data suffered from the weaknesses Canada has asserted, this certainly would call into doubt the decision of Canada's consultant to use them in verifying the results of its regression analysis.[22]

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[15] *See* U.S. First Written Submission, paras. 52, 58 and accompanying notes; U.S. First Answers to Panel Questions, paras. 17-24 and accompanying notes.

[16] *See*, *e.g.*, Canada's First Responses to Panel Questions, paras. 19, 20.

[17] Exhibit CDA-133 (emphases added).

[18] *Id.,* ("How Prices Determined," page 2, para. 2).

[19] *Id.*, page 1, para 5; *see also id.,* "Questions about Prices," pages 1-2. The staff of *Random Lengths* gathers these actual, historical, prices in "hundreds of telephone interviews with sellers and buyers each week," and then publishes, for each particular wood product tracked, *one* of the multiple actual prices gathered for that time period. The particular price chosen for publication for any given product not only (necessarily) "falls within the range of prices reported by those sources contacted," but is selected for its ability to serve as a benchmark (*i.e.*, to be representative of) the broader group of collected actual sales so as to provide data useful to the readers of this trade publication.

[20] Canada's First Responses to Panel Questions, paras. 6-7.

[21] *Id.*, para. 7.

[22] For reasons described later in this submission, Canada's explanation of how its consultant developed the regression analysis underscores that the analysis is evidence that was not before the investigating authority. Therefore, the Panel should decline to consider it pursuant to Article 17.5(ii) of the AD Agreement. Indeed, the

18. The United States also addressed, in its first submission, Canada's arguments concerning the affidavits from knowledgeable industry participants with respect to the two price quotations used, in addition to the *Random Lengths* prices, to establish U.S. price.[23] In its June 30 responses to the Panel's questions, Canada raises additional arguments regarding the first affidavit. Canada asserts that the quoted price "in fact . . . is not" a transaction price for eastern SPF. This is incorrect. The affidavit clearly indicates that sales were made at the quoted prices, because the affiant "lost the sale" to four particular potential customers to Quebec producers selling eastern SPF at US$225/MBF.[24]

19. Canada argues that the petitioner did not provide the names of the companies involved in the transactions or other related details.[25] It suggests that, in the absence of further identifying details, the "honesty" of the parties involved cannot be relied upon, and thus the affidavit is "nothing more than a simple assertion."[26] However, in the United States, as in the legal systems of other WTO Members, a sworn statement is more than "a simple assertion," and may be accorded the status of evidence. Accordingly, Commerce properly treated the lost sales affidavit as evidence of dumping in deciding whether to initiate.

20. Canada also argues that the application demonstrated dumping of only a limited number of categories of lumber.[27] 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. For reasons explained in previous submissions and elaborated in this submission Canada's product-under-consideration argument has no basis in the AD Agreement. Since Commerce had 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. Just as nothing in the AD Agreement requires that an application demonstrate that dumping is occurring with respect to every company and every product, nothing in the Agreement requires an applicant to demonstrate that dumping is occurring in every "category" of the product it seeks to have investigated.

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explanation of how the analysis was developed, which Canada supplies in connection with its June 30 responses to the Panel's questions, is itself new evidence. The United States refers to this matter here for the exclusive purpose of demonstrating that Canada itself effectively acknowledges the reliability of *Random Lengths* data.

[23] *See* U.S. First Written Submission, paras. 59 and 60, and notes thereto. Canada's arguments in its First Responses to Panel Questions with respect to the second price quote affidavit simply repeat those the United States refuted in that earlier submission.

[24] Petition Exhibit VI.C-14 (Exhibit CDA-45).

[25] Canada's First Responses to Panel Questions, para. 24.

[26] *Id.*, para. 25.

[27] *See* Canada's Responses to Questions, paras. 28-30.

21. Finally, Canada argues that Commerce's initiation was tainted by a lack of evidence of home market sale prices in British Columbia.[28] This argument incorrectly implies that the quality and quantity of evidence at initiation should be the same as at the conclusion of an investigation. In this case, the application contained evidence of home market sales below cost in Quebec. This provided a basis for using constructed value to establish normal value.[29]

22. The AD Agreement does not require investigating authorities to conduct separate cost tests on different markets within "the domestic market of the exporting country." The recent panel report in *Argentina–Poultry* is instructive in this regard. There, the application contained data on home market price in a particular region (São Paulo) of the exporting country (Brazil). Brazil argued that these data should not have been sufficient to support initiation, as they were not necessarily representative of sales in Brazil as a whole. The panel rejected Brazil's argument, stating 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."[30] For similar reasons, this Panel should reject Canada's argument concerning the absence of price data from British Columbia.

b. Commerce properly established the facts underlying initiation with respect to *cost.*

23. Commerce's establishment of the facts with respect to softwood lumber costs was also proper. In its First Written Submission, the United States briefly outlined the cost methodology Commerce used in reaching its decision to initiate the investigation.[31] That explanation addressed the sole cost-related initiation argument made in Canada's First Written Submission.[32]

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[28] *See, e.g.*, Canada's First Responses to Panel Questions, para. 61.

[29] *See* AD Agreement, Art. 2.2.1 (providing that sales of like product in the domestic market of the exporting country may be disregarded in determining normal value where "such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time"); Art. 2.2 (providing that margin of dumping may be determined by comparison with cost of production in country of origin, plus a reasonable amount for administrative, selling and general costs and for profits when sales in the home market of the exporting country do not permit a proper comparison). Commerce provided this rationale in the *Notice of Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products from Canada* ("*Initiation Notice*"), 66 Fed. Reg. 21328, 21130, n. 4 (Exhibit CDA-9).

[30] Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil* ("*Argentina–Poultry*"), WT/DS241/R. circulated Apr. 22, 2003, para. 7.67.

[31] U.S. First Written Submission, paras. 53-56. The entire application submission supporting the cost methodology consisted of hundreds of pages of documentation, much of which is Business Confidential information.

[32] *See* Canada First Written Submission, para. 95 ("the cost information was made up of a hybrid cost model built, in significant part, on non-Canadian cost data").

In this submission, the United States addresses only those new cost-related initiation arguments first set forth in Canada's June 30 responses to the Panel's questions.

i. Representativeness of producers used in the application cost model

24. Canada's claim that the application "fail[ed] to have costs of significant or representative producers" is incorrect for two reasons.[33] First, as the United States has already demonstrated, with respect to the vast majority of costs, data from U.S. 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.[34]

25. Second, the U.S. mills whose data were used in the cost model were themselves significant and representative producers of softwood lumber. The application provided data on cost of production for undisputedly representative products from four U.S. mills - two in a major lumbering area in the eastern United States, and two in a major lumbering area in the western United States.[35] Canada's argument is based on its understanding that the western U.S. mills were smaller than the Tembec mills in British Columbia, and the eastern U.S. mills were smaller than most Canadian mills that export to the United States.[36] Given the great disparity in size of lumber mills in both Canada and the United States, a particular U.S. mill need not be among the largest to be both a "significant" and "representative" producer of softwood lumber for purposes of a cost model that serves as a proxy for an equally broad range of Canadian mills.[37] Canada cites no authority for the size comparisons it claims apply to the U.S. surrogate mills.[38]

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[33] *See* Canada's First Responses to Panel Questions, paras. 34-35.

[34] *See* U.S. First Written Submission, paras. 53-54 and exhibits cited therein.

[35] Petition Exhibit VI.A, 1-2 (Exhibit CDA-134). Because the identity of these mills is confidential information, we will refer to them as East-1, East-2, West-1, and West-2.

[36] *See* Canada's First Responses to Panel Questions, paras. 35, 47.

[37] The United States recalls that, for purposes of the cost test, the data from the eastern mills cost model were compared to *Random Lengths* data for sales from Quebec to Toronto. For purposes of constructed value, the cost model results were compared to the sales data from the two affidavits and to *Random Lengths* data on sales to the United States from both eastern and western Canada. *Random Lengths*, in gathering data which it deems representative of the industry, does not limit its inquiry to only the largest companies; instead, it draws from "hundreds" of buyers and sellers, "a wide range of sources, from the largest producers to single mill operators." Petition Exhibit III-12, at 1 (Exhibit CDA-133).

[38] *See* Canada's First Responses to Panel Questions, para. 35. In Commerce's investigation, the Canadian parties based their post-initiation allegation that the U.S. surrogate mills were not "significant producers" largely on production data in the U.S. Department of Agriculture Publication *Profile 2001: Softwood Sawmills in the United States and Canada*. Exhibit CDA-51, at Enclosure 3. Although the specific portions of the mill production lists in that publication included in the exhibit have been treated as confidential information so as not to reveal the identity of the U.S. mills at issue, the public introductory section states that:

ii. Cost data submission periods

26. Canada's argument that the application cost model did not "provide costs for a period of time sufficient to assess the reasonableness of the data"[39] is incorrect. As explained above, the application contained cost data from four U.S. mills. Taken as a whole, the data from these four mills cover the entire calendar year 2000.[40] The data are also representative of both the eastern region and the western region for each quarter of the year. Canada's suggestion that the data are tainted by a seasonal bias has no basis. The confidential versions of the certifications provided by each of the four companies explained why each had provided data for particular months.[41] For the most part, the explanations had to do with the basis on which each company keeps its books and prepares financial statements as this related to the month in which the petition was filed.[42]

iii. Calculation of costs for SPF species and specific products

27. Canada's argument that, in deciding to initiate, Commerce had insufficient information of product-specific costs[43] is also incorrect. In calculating most costs on a per-species, per-MBF (*i.e.*, per thousand board feet) basis, the petitioners in this case followed normal industry practice.[44] The question of precisely how to allocate costs to products was the subject of much

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> Among the major industrial groups, the softwood lumber industry is one of the most disaggregated. As of January 2001, more than 1,200 sawmills in the United States and Canada concentrate exclusively, or at least in large part, on producing softwood lumber. . . . [T]his report focuses on *large permanent operations* that make up the bulk of the industry.

Id., page 1 (emphasis added). Finally, the size differential between the western U.S. surrogate mills and the British Columbia mills of Tembec did not prejudice the Canadian parties with respect to the initiation decision, because the cost model did not *compare* the costs of the U.S. mills to those of Tembec. Given that Canada is arguing that larger mills have lower costs, it cannot complain about the application's use of certain data from the public financial statements of Tembec, one of the largest softwood lumber producers in Canada, to calculate certain financial costs for purposes of the model.

[39] *See* Canada's First Responses to Panel Questions, para. 36.

[40] 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. *See* Petition Exhibits VI.C-1 (East) (Exhibit CDA-135) and VI.D-1 (West) (Exhibit CDA-136).

[41] *See* Petition Exhibits VI.C-1 (East) (Exhibit CDA-135) and VI.D-1 (West) (Exhibit CDA-136).

[42] For example, mill East-2, before providing a confidential elaboration, states that "[t]he first nine months of 2000 represents the most recent period for which finalized cost information is readily available." Petition Exhibit VI.C-1 (Exhibit CDA-135).

[43] Canada's First Responses to Panel Questions, para. 37.

[44] *See, e.g.*, *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, 56059 (Nov. 6, 2001) ("*Preliminary Determination*") (Exhibit CDA-11) (describing industry practice to calculate costs on MBF basis; logs are sorted by species (or species group) before being brought to the mill for processing; most respondents have

discussion during the investigation.[45] However, it was not an issue that needed to be definitively resolved prior to initiation.[46]

28. Although Canada cites both the Quebec and the British Columbia stumpage exhibits in support of its statement that "the stumpage costs were based on costs for all species, including the higher valued Douglas fir and cedar timber,"[47] it is evident from those exhibits that this was the case only with respect to the stumpage calculation for British Columbia. The Quebec stumpage rates are based solely on the "fir/spruce/jackpine/larch" category (*i.e.*, the "SPF" group used by the Quebec Ministry of Natural Resources), and do not include the remaining ten species categories Quebec uses for stumpage-billing purposes.[48] Canada is correct that the average stumpage cost used for British Columbia was based on all species; SPF, however, was the predominant species group in that average (far outweighing all other species combined). Furthermore, although Canada suggests that the non-SPF lumber in the British Columbia average increased the average cost, the SPF-only cost was, in fact, higher.[49] Thus, the stumpage value used in the application was, in fact, conservative.

iv. Freight calculation issues

29. The claim that Commerce should have rejected the application due to alleged "inaccuracies and inadequacies" with respect to the information it offered on freight costs[50] also is incorrect.

- Truck freight or rail freight (Quebec)

30. Canada complains that there was "no evidence to support Applicant's allegation that truck rather than rail is used by Quebec producers to ship lumber."[51] The application, however, made no such sweeping allegation. The relevant exhibit simply provided a rate for truck freight, based on the affiant's experience in using truck freight for softwood lumber in this region.[52]

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broken-out costs for species).

[45] *See, e.g.*, *Final Determination*, at Comment 4 (Exhibit CDA-2).

[46] As discussed above, the evidence to support initiation need not be of the same quantity or quality as the evidence to support a preliminary or final determination. *See* para. 12 above.

[47] Canada's First Responses to Panel Questions, para. 37.

[48] *See* Petition Exhibit VI.C-2, at 1, 8-11 (Exhibit CDA-137).

[49] The average stumpage cost for the SPF categories (*i.e.*, based on balsam fir, lodgepole pine and spruce) only would have been C$32.25/$m^3$ in comparison to the average of C$30.72/$m^3$ used in the application. *See* Petition Exhibit VI.D-2, at 1-5 (Exhibit CDA-137).

[50] *See* Canada's First Responses to Panel Questions, paras. 39-43.

[51] Canada's First Responses to Panel Questions, para. 40.

[52] Petition Exhibit VI.C-9 (Exhibit CDA-41).

There was no evidence before Commerce that Quebec producers ship lumber only, or even predominantly, by rail. Given that the application was based primarily on prices and costs that are derived from a wide range of mills, information on either truck freight or rail freight was adequate for purposes of initiation.

- Rail freight rate for sales from British Columbia to the United States

31. Canada argues that, for initiation, Commerce improperly relied on rail freight charges incurred for shipment of what "appears to be" heavier Southern Yellow Pine, rather than lumber of the Western Spruce-Pine-Fir group.[53] This is another example of Canada improperly asking the Panel to weigh the evidence as if it were the investigating authority. The affidavit included in the April 10 amendment to the application provided a rail freight rate for "softwood lumber." For purposes of initiation, Article 5.3 did not require Commerce to search out information on the relative weights of different groups of pines, all of which are "softwood lumber." This was not necessary to establish the sufficiency of the evidence justifying initiation. This is especially true, inasmuch as the freight calculation was conservatively based on costs for transport over significantly shorter distances than those for delivery of the U.S. sales in the application (including from the interior of British Columbia to Chicago (at least 1800 miles) and to Atlanta (at least 2444 miles)).[54]

- Freight from the Maritimes

32. 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"[55] is demonstrably false. 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.[56] The average per-MBF freight cost Commerce relied upon for sales from Quebec to the United States was $29, the average of the cost for shipment from Northern Quebec, Southern Quebec, and the Gaspe Peninsula (which is also part of Quebec).[57] Had the cost for the Maritime Provinces been included, the average would have been $30.50 per MBF.

B. Commerce Properly Defined the Product Under Consideration in the Softwood Lumber Investigation.

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[53] Canada's First Responses to Panel Questions, para. 41.

[54] *See* April 10, 2001 Petition Amendment, at 2-3 (Exhibit CDA-40); the exact distances are confidential information.

[55] Canada's First Responses to Panel Questions, para. 40.

[56] Petition Exhibit VI.C-9 (Exhibit CDA-41), at para. 4

[57] *Compare id., with* Petition Exhibit VI.C-13 ("U.S. market price") (Exhibit CDA-44), including footnote 2 (source for $29 figure is the "average of freight charges from Boston to Quebec" in Exhibit VI.C-9).

33. Commerce defined the product under consideration in this investigation to cover "certain softwood lumber," providing a detailed description of the product under consideration (and of merchandise excluded from the product under consideration) in the *Final Determination*.[58] Commerce's definition of the product under consideration was based on a thorough, reasoned analysis[59] of the record and is in conformity with the United States' obligations under the AD Agreement.

34. Canada has not identified an obligation arising out of Article 2.6 of the AD Agreement that the United States violated in this case. Since the beginning of this dispute, Canada's claim has shifted and evolved.[60] Initially, in its request for the establishment of a panel, Canada claimed that "Commerce erroneously determined there to be a single like product (under U.S. law, termed 'class or kind' of merchandise) rather than several distinct like products. . ." and alleged 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 the GATT 1994.[61] Then, in its first written submission, Canada switched its focus to the term "product under consideration" in Article 2.6 of the AD Agreement, while at the same time improperly expanding its complaint to include previously unidentified claims under all of Article 2, all of Article 3, all of Article 5, Article 6.10 and all of Article 9 of the AD Agreement.[62] The United States sought a preliminary ruling rejecting Canada's expansion of its complaint.[63] In response, Canada clarified that "[t]he legal basis for the claim remains Article 2.6."[64]

35. Canada's shift from one theory to another reflects its inability to identify any violation of an AD Agreement obligation in Commerce's definition of the product under consideration. As the United States has explained in previous submissions, the AD Agreement does not contain

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[58] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber from Canada*, 67 Fed. Reg. 36,068 (May 22, 2002) (the "Order") (defining the scope of the investigation, including excluded products) (Exhibit CDA-3).

[59] *Final Determination*, Comment 52 (Exhibit CDA-2). *See also* Commerce Memorandum from David Layton, Case Analyst, to Bernard T. Carreau, Deputy Assistant Secretary, re: Class or Kind Determinations and Consideration of Certain Scope Exclusion Requests, dated March 12, 2002 (which preliminarily addressed Commerce's "class or kind" analysis) (Exhibit CDA-12). The *Final Determination* occasionally referred to this Memorandum rather than repeat a factual analysis it had already conducted earlier in the proceeding.

[60] *See* U.S. First Written Submission, Preliminary Objections at paras. 15-21 (noting the first change in argument from Canada's Panel Request to Canada's First Written Submission).

[61] Canada's Panel Request, para. 2.

[62] *See* Canada's First Written Submission, paras. 110-142.

[63] *See* U.S. First Written Submission, Preliminary Objections, paras. 15-21.

[64] Canada's Response to Preliminary Objections, para. 16 (June 10, 2003).

rules on how an investigating authority defines the product under consideration.[65] This fact was acknowledged in a recent Rules Negotiation paper filed by several WTO Members.[66]

36. Canada's inability to identify any obligation that has been violated is underscored by its June 30 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."[67] In fact, this conclusion is not borne out by the definitions of key terms Canada cites. In particular, as Canada acknowledges, the term "resemble" means "'[b]e like, have a likeness or similarity to, have a feature or property in common with.'"[68] Yet, Canada inexplicably paraphrases in a way that causes "resembling" to become "identical," even though the concept of "identical" is nowhere in the definition Canada cites.

37. Canada then proceeds to posit a problem that might occur if the product under consideration in a given case were defined too broadly. In Canada's hypothetical, the product under consideration is defined as comprising automobiles and bicycles.[69] There are several problems with this hypothetical. 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. The question here is whether Commerce's identification of the product under consideration in this case violated any obligation under the AD Agreement, not whether a measure not before this Panel would be considered to violate an obligation under the AD Agreement.

38. Second, Canada's own analysis of its hypothetical underscores the absence of the obligation Canada claims to have identified. Canada suggests that, faced with an application concerning automobiles and bicycles, an investigating authority could "properly conclude[]" that there are in fact two like products and two distinct products under consideration.[70] Yet, Canada cites no basis for concluding that two would be the right number in this case. It does not explain why the obligation it purports to find in Article 2.6 would not require further sub-divisions to isolate mountain bicycles and road bicycles, or racing cars and station wagons, for example.

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[65] U.S. First Written Submission at paras. 83-99, United States First Opening Statement at paras. 24-28.

[66] Paper filed by Permanent Missions of Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Separate Customs Territory of Taiwan; Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand, TN/RL/W/10 (June 28, 2002).

[67] Canada's First Responses to Panel Questions, para. 64.

[68] *Id.* (quoting *New Shorter Oxford English Dictionary* at 2558).

[69] *Id.*, para. 65.

[70] *Id.*, para. 69.

39. Third, Canada focuses exclusively on what it views as the problem of an overly broad definition of the product under consideration. It suggests that an investigating authority has an obligation to define a product under consideration narrowly, but it fails to consider the implications that a narrow definition would have on the very same standing and injury determinations to which it alludes. In short, while the circumstances of this case may cause Canada to advocate for a narrow definition of product under consideration, other circumstances might cause a complainant to advocate for a broad definition.

40. Article 2.6 is silent on the broad-versus-narrow question. It takes as the starting point in an investigation a product under consideration as defined by the investigating authority. It does not, as Canada suggests, require an investigating authority to redefine the product under consideration in light of the definition of the like product.[71]

41. The complaining Member in a WTO dispute bears the burden of proving a violation of a WTO agreement.[72] Canada has failed to satisfy this burden, having failed to demonstrate an obligation under Article 2.6 of the AD Agreement to define the product under consideration in the manner it has proposed. Accordingly, its claim regarding the definition of the product under consideration should be rejected.

C. Commerce Complied With Article 2.4 of the AD Agreement in its Treatment of the Three Dimensional Characteristics of Softwood Lumber.

42. Commerce acted consistently with Article 2.4 in its consideration of the dimensional characteristics of softwood lumber. Commerce took width, thickness and length into account in its product comparisons, matching softwood lumber products with the identical dimensional characteristics where identical matches were available, and where they were not available, matching softwood lumber products with the most similar dimensional characteristics available. Because the Canadian respondents failed to show that any differences in the dimension of the softwood lumber products compared in this case affected price comparability, Commerce was not required by Article 2.4 to grant a price adjustment to normal value.

43. In its First Written Submission, Canada argued that during the investigation, the parties agreed that lumber size affects the price for softwood lumber and that Commerce did not deny that the physical differences in size could affect market value. Furthermore, Canada argued that the record contained the necessary information to make an appropriate price adjustment. Given this information, Canada argued, a price adjustment was required under Article 2.4 of the AD

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[71] *Id.*, para. 68.

[72] *See, e.g.,* Appellate Body Report, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted May 23, 1997, pp. 13-14 (*"U.S.–Wool Shirts AB Report"*).

Agreement.[73] Among other information, Canada submitted a newly-created regression analysis, Exhibit CDA-77, to demonstrate a connection between the price and the length and width of softwood lumber for the sales of one respondent during the period of investigation.[74]

44. In response, the United States argued in its First Written Submission that the regression analysis was improperly submitted to the Panel as new evidence, that neither Commerce nor interested parties had considered the analysis during the investigation, and that it should not be considered by the Panel in light of Article 17.5(ii). The United States also argued that under Article 2.4, a due allowance for differences in physical characteristics is not automatic, but rather requires a showing of an effect on price comparability. Because the differences in dimension of the softwood lumber compared were not shown to affect price comparability, Article 2.4 did not require that a due allowance be made. The United States demonstrated that dimensional characteristics were indeed accounted for in Commerce's model matching methodology in which identical and most similar dimensional softwood lumber products were compared. Commerce concluded that the record did not support any adjustment for the remaining differences in dimension, quoting its statement in the *Final Determination* 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."[75]

45. Based on Canada's statements at the first substantive meeting and in its First Responses to Panel Questions, the United States understands Canada's dimensional differences claim to rest on three arguments: (1) an entirely new argument of procedural unfairness under Article 6 – that respondents could not anticipate that Commerce would not grant a price adjustment, and therefore had no opportunity to substantiate their claim for a due allowance;[76] (2) that Commerce must be deemed to have concluded that dimensional differences affected price comparability because of its use of dimension in the model match methodology;[77] and (3) that the facts of record do not support Commerce's conclusion.[78] Each of these arguments is without merit.

1. The Parties Had Notice That An Adjustment For Dimensional Characteristics Remained an Issue Even After Development of the Model Match Criteria. Therefore, Canada's Newly Introduced Regression Analysis and Consultant's Report Should Not Be Considered by the Panel.

[73] Canada First Written Submission, paras. 143-164.

[74] Canada's First Written Submission, para. 148, n. 139.

[75] U.S. First Written Submission, paras. 114-141.

[76] Canada's First Responses to Panel Questions, paras. 4-7, 83.

[77] Canada's First Responses to Panel Questions, paras. 77-80, 87, 91.

[78] Canada's First Responses to Panel Questions, paras. 96-100.

46. Canada raises a new argument in response to the Panel's questions, claiming 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. As a consequence, Canada argues that it is entitled to submit new evidence to the Panel that was never submitted to the investigating authority, in order to substantiate the claimed price adjustment.[79] There is no basis in the record for Canada's argument.

47. As an initial matter, Canada's claim of procedural unfairness – specifically, that the United States violated Article 6 of the AD Agreement, is a new claim not contained in Canada's panel request. Accordingly, it falls outside the Panel's terms of reference under Article 7 of the DSU and should not be considered.[80]

48. 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."[81] Canada's position is belied by the record. The parties' submissions regarding dimension during the course of the investigation evidences their awareness that whether or not an adjustment would be made for differences in dimension was an open question.[82] The interested parties' case briefs included arguments on this very issue.[83]

49. Some of the Canadian respondents were disappointed with the conclusion reached by Commerce. However, they cannot reasonably claim to have been surprised by the fact that a question under consideration was whether or not a price adjustment would be granted for

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[79] Canada's First Responses to Panel Questions, paras. 4, 5.

[80] *See, e.g.*, Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted Sep 27, 1997, para. 143 ("*EC–Bananas*") (all claims by a complaining party must be specified in the request for establishment of the panel, in order to allow the defending party and any third parties to know the legal basis of the complaint).

[81] Canada's First Responses to Panel Questions, para. 4.

[82] *See, e.g.*, Abitibi Case Brief, Feb. 12, 2002, at 26-40 (Exhibit CDA-78). *See also* Canada's First Responses to Panel Questions at para. 87 (summarizing submissions by Canadian respondents on the "dimensional differences" issue) and Exhibit CDA-142.

[83] *See Final Determination*, Comment 8 (Exhibit CDA-2) (summarizing respondents' comments requesting an adjustment for differences in dimension); *see also* Case Brief of Abitibi, Feb. 12, 2002 at 29-40 (Exhibit CDA-78); Case Brief of Tembec, Feb. 12, 2002 at 35-38 (Exhibit CDA-129). In fact, two of the six Canadian respondents argued for the outcome reached by Commerce that Canada challenges before this Panel. *Final Determination*, Comment 8 (Exhibit CDA-2) (comments of West Fraser and Slocan) (articulating argument for "zero" as the adjustment for differences in dimension, particularly if the dimensional matches were "fine-tuned," which Commerce did); *see also* Slocan Case Brief at 24-32 (Exhibit US-74); West Fraser Case Brief at 26-29 (Exhibit US-75) (these respondents supported this outcome as an alternative to another preferred outcome).

dimensional differences. Under Article 17.5(ii) of the AD Agreement, the Panel should not consider Canada's newly proffered evidence – either the regression analysis or the accompanying expert's memorandum, prepared on behalf of one of the respondents only after the investigation was completed.[84]

2. An Investigating Authority's Decision To Match Products Based on Certain Physical Characteristics Does Not Mean That a Price Adjustment Is Always Warranted For Remaining Differences in the Products Compared.

50. Canada misinterprets Commerce's inclusion of physical characteristics in the product matching methodology as an acknowledgment that dimensional differences had an effect on price comparability, requiring "due allowance" under Article 2.4.[85] Canada offers an extensive review of the various submissions of the parties regarding Commerce's model matching methodology in an attempt to demonstrate that Commerce agreed that width, thickness, and length affected price comparability.[86] Canada's argument fails for two reasons.

51. First, assuming *arguendo*, that Commerce implicitly acknowledged that dimension affects price comparability, it made the due allowances that Article 2.4 requires by comparing products on the basis of criteria that included dimension. The report of the panel in *Argentina–Floor Tiles*[87] supports this conclusion. There, the panel noted that the Argentine authority "chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability."[88] The logical implication of that

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[84] The consultant's report that purports to explain the regression analysis is also new evidence. As it was not submitted during the investigation, neither the interested parties nor Commerce had an opportunity to test its relevance and/or validity. Certain aspects of the report suggest lines of inquiry that interested parties or Commerce could have pursued had the report been introduced during the investigation. For example, the analysis appears to include home market sales that were **[[ ]]** (*i.e.*, outside the ordinary course of trade) as a basis for its conclusions. *See* Capital Trade Inc. Memorandum at 1 (Exhibit CDA-129). Commerce's concerns about the use of **[[ ]]** in determining an adjustment for differences in dimension, are described at Comment 8 of its Final Determination (Exhibit CDA-2). An examination of just one Tembec sale illustrates this concern. *See* Exhibit US -76 at pp. 1, 3 (showing numerous **[[ ]]** for one comparison for non-identical products). Moreover, had the new evidence been submitted during the investigation, Commerce could have examined the data contained in the regression analysis and the explanations in the consultant's report to assess whether the parameters used were identical to those used in Commerce's margin program. It is Commerce's normal practice in the course of this kind of examination to issue questions to consultants concerning their proposed "studies."

[85] Canada's First Responses to Panel Questions, para. 86.

[86] Canada's First Responses to Panel Questions, para. 87, and Exhibit CDA-142.

[87] Panel Report, *Argentina–Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles From Italy*, WT/DS189/R, adopted Nov. 5, 2001 ("*Argentina–Floor Tiles*")

[88] Panel Report, *Argentina–Floor Tiles*, para. 6.116.

statement is that, had the authority conducted a model-by-model comparison (as Commerce in fact did in the case at hand), it would *not* have been necessary to find other means to account for the physical differences at issue. In contrast to the authority in *Argentina–Floor 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. Article 2.4 calls for "due allowance," and Commerce made just such an allowance.

52. If, as Canada argues, Commerce's inclusion of dimension in its matching criteria leads to the necessary conclusion that dimension affects price comparability, then the matching of all of the respondents' products to identical dimensions (which accounted for the vast majority of comparisons by volume) or the most similar dimensions, satisfies the fair comparison requirements of Article 2.4. In order to qualify for any *further* allowance under Article 2.4, the data submitted by the respondents needed to demonstrate that the *remaining* differences in dimension in the products compared had an affect on price comparability.

53. Second, 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.[89] Canada cites, *inter alia*, to Commerce's *Preliminary Determination*[90] as evidence of Commerce's recognition of the impact of dimension on price.[91] However, in the *Preliminary Determination*, Commerce matched U.S. softwood lumber products to Canadian products with only *identical* dimensions (and grade).[92] The Canadian respondents asked

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[89] In the typical case, this connection is easily drawn. It is Commerce's long-standing practice (of which the respondents were aware) to assume that significant physical differences in a product will be reflected in the product's variable cost of manufacturing, and in turn in the product's sales price. *See, e.g.*, Letter to Abitibi enclosing Questionnaire (May 25, 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 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 United States' First Written Submission in Exhibit US-44. *See also* the United States' decade-old policy bulletin on this issue, *Differences in Merchandise; 20% Rule,* Import Administration Policy Bulletin 92.2 (Jul. 29, 1992) (Exhibit US-77), also available on Commerce's website <http://ia.ita.doc.gov/policy/>. In this case, however, the Canadian respondent's own books and records showed that there was no difference in variable cost related to dimensional differences.

[90] *Preliminary Determination*, 66 Fed. Reg. 56,062 (Nov. 6, 2001) (Exhibit CDA-11, as resubmitted June 30, 2003).

[91] Canada's First Responses to Panel Questions, para. 87 (subpara. 14).

[92] It is common practice in cases involving commodities such as softwood lumber (or, for example, salmon or tomatoes), for Commerce to match only products with identical characteristics when available, and otherwise to resort to constructed value comparisons. In the softwood lumber investigation, because of the

Commerce to change this practice for the *Final Determination,* in favor of including similar dimensional (and grade) matches before resorting to constructed value comparisons.[93] By specifically requesting that Commerce match similar softwood lumber products (products having non-identical physical characteristics), in addition to identical products, the parties were necessarily asking Commerce to examine the correlation between price and dimension.

54. 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.[94] The connection between physical differences and price had to be established in some other fashion in order to justify an adjustment.

55. The data on the record simply did not support the conclusion certain of the Canadian respondents wished Commerce to reach. 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. The respondents' sales and cost databases were on the record and contained the information needed to assess the effect on price comparability of differences in dimension.[95] Contrary to Canada's assertion that Commerce conducted no analysis,[96] 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.[97]

3. The Panel Should Not Re-Weigh the Evidence.

56. Lastly, Canada has tried to refute Commerce's conclusion in its *Final Determination* by selectively pointing to certain record data, and providing the Panel with misleading information. In response to the Panel's request to the United States for the "number of comparisons" of

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particularly detailed product characteristics, and the myriad product permutations in the sales databases that could result in very similar matches, Commerce ultimately determined that it was more appropriate to attempt to complete more price-to-price matches, by matching products with very similar as well as identical characteristics.

[93] *Final Determination*, Comment 8, Exhibit CDA-11.

[94] With respect to dimension, there were no differences in variable costs of manufacturing associated with dimension that were reported to Commerce. There are no measurable differences in the inputs used or the processing required, to produce lumber of differing dimensions within each grade category. *Final Determination*, Comment 4, n. 60 (Exhibit CDA-2); *see also Preliminary Determination*, 66 Fed. Reg. 56,069 (Exhibit CDA-11).

[95] *See* Canada's First Responses to Panel Questions, para. 92.

[96] Canada's First Responses to Panel Questions, paras. 87, 92.

[97] *See Final Determination*, Comment 4, n. 60 (distinguishing use of value-based cost allocation methodology for grade and dimension, determining methodology not appropriate for dimension based on record data). Canada has not challenged Commerce's cost allocation methodology.

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.[98] Because the dumping margins are calculated according to the volume of U.S. sales, a simple number of comparisons does not reflect the relative significance of the identical, similar, and constructed value comparisons in the margin. When viewed according to their relative weight in the actual margins calculated, it is apparent that the vast majority of comparisons made were of identical products.[99]

57. Canada also provided several charts showing significant price differences in the Canadian market for several softwood lumber products that were sold **[[ ]]** and *for that reason* were not available for comparison with a product sold in the United States. At the beginning of the investigation, at the request of the parties, Commerce limited the reporting of U.S. sales to those with identical matches in Canada.[100] If a U.S. sale was not matched to an identical product, it was only because 100% of the sales of that product were **[[ ]]** in the Canadian market. What Canada has provided to the Panel are several examples of softwood lumber products sold in the United States for which there were no identical Canadian products sold in the ordinary course of trade, thus necessitating a similar, rather than an identical, match. The problem with Canada's charts is that the *identical* Canadian products **[[ ]]**, outside the ordinary course of trade, and thus could not be considered by Commerce in determining normal value. Therefore, the price differences reflected may not be attributable to differences in dimension, but to the fact that the sales were made outside the ordinary course of trade.[101]

58. Other comparisons on the record show no discernible pattern between dimension and price. They show minimal price differences for differences in dimension,[102] significant fluctuations, and smaller lumber pieces selling for higher prices than large lumber pieces.[103] This

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[98] Canada's First Responses to Panel Questions, para. 97.

[99] U.S. Answers to Panel Questions, para. 40, and Exhibit US-68 list the proper percentage based on volume of sales. Similarly, Canada provides a misleading list of margins associated with each of the identical and similar comparisons for each company. Again, because the similar comparisons only represent a small portion of the total margin calculated by Commerce according to volume, they in fact have a much smaller impact on the actual margin than Canada suggests.

[100] *See, e.g.*, Letter to Abitibi Consolidated, Inc., Sept. 14, 2001, referring to Commerce's initial request for identical sales only. Exhibit CDA-75.

[101] *See* Exhibit US-76 at pp.1-4 illustrating this point.

[102] *See* Exhibits US-38, US-39, US-40, and US-41 revealing little variation in the weighted average prices based on dimension.

[103] *See, e.g.*, Exhibit US-76, at pp. 5-6 (this exhibit demonstrates fluctuating and overlapping prices for two products sold by West Fraser during three months of the period of investigation. These sales are taken from West Fraser's home market sales database and do not distinguish between **[[ ]]**. This chart simply illustrates, for one potential product comparison, the lack of a pattern of price differences attributable to

other record evidence demonstrates the selective nature of Canada's charts. Accordingly, Commerce'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. No evidence cited by Canada supports a conclusion other than that Commerce's establishment of the facts was proper and its evaluation was unbiased and objective.

D. Canada's Claim Regarding the Calculation of the Overall Dumping Margin Lacks a Basis in Articles 2.4 and 2.4.2.

59. On the issue of Commerce's calculation of the overall dumping margin, Canada's responses to the Panel's first set of questions has created more confusion than clarity. The issue before this Panel 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.

60. 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. Despite Canada's reluctance to answer the Panel's question regarding its own practice in this area,[104] Canadian administrative practice is clear and speaks for itself. It shows that Canada's interpretation of Articles 2.4 and 2.4.2 is similar to the United States' interpretation. Specifically, Canada engages in a two-stage antidumping analysis and does not offset margins of dumping with non-dumping amounts based on distinct comparisons.

61. Canada's practice in this respect was described in its dumping determination regarding "Fresh Tomatoes from USA."[105] There, Canada described its margin calculation methodology as follows:

> In calculating the margin of dumping for a normal value grouping, negative margins of dumping offset positive margins of dumping. In calculating the margins of dumping of each cooperative exporter, a negative margin at the grouping level was set at zero. In calculating the weighted average margin of

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dimension); *id.* at pp. 1-2 (plotting sales prices for two Abitibi products, from the examples provided by Canada in its charts found at para. 100 of Canada's First Responses to Panel Questions, showing the prices fluctuating relative to each other, and without a discernible pattern).

[104] *See* Canada's First Response to Panel Questions, paras. 112-13.

[105] *See* "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," June 24, 2002, Exhibit US-78 (this document is also available at http://www.ccra-adrc.gc.ca/customs/business/sima/anti-dumping/ad1274f-e.html).

> dumping of all respondents with complete submissions, that is, the country weighted average margin of dumping, negative margins were set at zero at the exporter level.[106]

62. For these purposes, it appears that a "normal value grouping" is equivalent to a model or type of the product under consideration, sold at a particular level of trade, perhaps with additional common sales characteristics within the meaning of Article 2.4 of the AD Agreement. Within such a grouping, Canada permits what it calls "negative margins of dumping" to offset positive margins. Presumably, this is intended to serve as the functional equivalent of comparing weighted average normal values to weighted averages of all comparable export transactions.[107]

63. However, Canada limits the effect of any "negative margins" to within the normal value grouping, *i.e.*, the model/type and level of trade being compared. As Canada stated, "a negative margin at the grouping level was set at zero."[108] In light of this practice, 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.

64. In fact, the legal basis for Canada's present position is anything but clear. In its first written submission and in its statements before the Panel, Canada relied exclusively on the Appellate Body's report in *EC–Bed Linen*.[109] However, in explaining the legal basis for its claim apart from a simple reliance on the *EC–Bed Linen* report, and in responding to other questions, Canada has stated positions that are: (a) inconsistent with the *EC–Bed Linen* report and (b) internally inconsistent.

65. First, after relying heavily on the Appellate Body report in *EC–Bed Linen*, Canada is now espousing positions at odds with that report. Specifically, 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.[110] 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

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[106] *Id.*

[107] *See* U.S. First Written Submission, para. 169, fn. 199 (discussing how the pricing above normal value on higher priced export sales of a model offset dumping margins on the lower priced export sales of the same model at the same level of trade).

[108] Fresh Tomatoes from USA, Exhibit US-78.

[109] *See, e.g.,* Canada's First Written Submission, paras. 165-173, particularly para. 173 ("The practice of zeroing as applied by DOC . . . is inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* for the same reasons that the Appellate Body condemned the practice of the EC in *EC–Bed Linen*."); *see also*, Canada's Oral Statement at the First Substantive Meeting of the Panel, paras. 64-68; and Canada's Closing Statement at the First Substantive Meeting of the Panel, para. 8.

[110] Canada's First Responses to Panel Questions, paras. 101, 105-7, 109.

distinguished [...], nor to justify the distinctions [...] among *types or models* of the same product on the basis of these 'two stages'."[111] 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 the provisions of Articles 2.4 and 2.4.2 of the AD Agreement.

66. Second, Canada is not completely consistent in its position regarding a two-stage dumping analysis. In particular, at paragraph 109 of its First Responses to Panel Questions, Canada seems to take the position that a two-stage analysis is required by the AD Agreement:

> [T]he 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.[112]

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"[113] 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."[114] Nowhere does Canada reconcile these positions.

67. In response to the United States' argument that Canada's interpretation of Articles 2.4 and 2.4.2 of the AD Agreement would deny meaning to the term "comparable," Canada now seems to claim that its interpretation gives meaning to "all comparable export transactions" by calling for the use of "comparable" export transactions in the first stage and "all" export transactions in the second stage.[115] Canada has not explained how these two terms, modifying the same phrase, can be applied without reference to one another and at different stages in the analysis – as its position requires.

68. With respect to the negotiating history relating to Articles 2.4 and 2.4.2 of the AD Agreement, the United States makes the following points: Although Canada took issue with the

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[111] *EC–Bed Linen (AB)*, para. 53.

[112] Canada's First Responses to Panel Questions, para. 109 (first emphasis added, second emphasis original).

[113] *Id.*, para. 110.

[114] *Id.*, para. 111 (emphasis added).

[115] *Id.*, para. 101.

appropriateness of the United States' reference to negotiating history,[116] Article 32 of the *Vienna Convention on the Law of Treaties* 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's assertion that Article 32 of the Vienna Convention is not applicable here is based on nothing more than its unsupported assertion that the ordinary meaning of the relevant terms is different from the meaning propounded by the United States.[117] Significantly, Canada does not refute the substance of the United States' explanation of the relevant negotiating history, *i.e.*, that the negotiators of the AD Agreement understood the so-called asymmetry issue and the offset issue to be distinct from one another and agreed to language intended to deal only with the asymmetry issue.

69. In sum, the United States has offered an interpretation of Articles 2.4 and 2.4.2 that is in accordance with the ordinary meaning of the terms of the AD Agreement, as corroborated by the negotiating history of the AD Agreement and subsequent practice of Members under the AD Agreement. This interpretation also gives meaning to all of the words of these articles. While Canada's interpretation attempts to align itself with a single Appellate Body report, Canada's inability to otherwise reconcile its position with the text, context, and object and purpose of the AD Agreement is telling and should cause the Panel to reject that position.

E. With Respect to Each Company in the Lumber Investigation, Commerce Acted Consistently With Article 2 of the AD Agreement.

70. Canada has contested the methodologies Commerce used in the calculation of costs[118] for several investigated respondents. The AD Agreement provisions relating to the cost calculation are Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2. Canada misconstrues Articles 2.2.1.1 and 2.2.2 as mandating particular methodologies other than the methodologies Commerce actually used.

71. Article 2.2.1.1 and Article 2.2.2 provide investigating authorities with general guidance as to the calculation of production costs and constructed value. Article 2.2.1.1 primarily requires investigating authorities to use the books and records of a respondent, provided that those books and records are consistent with the GAAP of the country in which the respondents are located, and the values reported reasonably reflect the cost of production. Article 2.2.2, provides guidance as to the information investigating authorities must use in calculating amounts for administrative, selling, and general costs and for profits. Neither provision expressly or implicitly prohibits the methodologies used by Commerce and contested by Canada, just as

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[116] Canada's First Oral Statement, paras. 67-68.

[117] *Id.*

[118] For example, the calculation of a constructed normal value and the determination of whether sales were made below the cost of production.

neither provision requires investigating authorities to apply the methodologies advocated by Canada.

72. Canada now asks this Panel to perform its own, *de novo* evaluation of the facts and to find a particular methodology required for each calculation. As the United States has demonstrated in previous submissions and will elaborate below, Commerce's establishment of the facts was proper, and its application of its cost methodologies to the facts on the record was both unbiased and objective.

1. Abitibi

73. The issue here is whether Commerce's decision to allocate Abitibi's financial costs using a "cost of goods sold" (COGS) methodology was consistent with Articles 2.2.1.1 and 2.2.2. Canada acknowledges that Articles 2.2.1.1 and 2.2.2 did not require that Commerce use "particular methodologies" to allocate Abitibi's financial expense.[119] Instead, Canada claims that Commerce's COGS methodology fell "outside the parameters" of those articles, because Commerce "did not consider Abitibi's evidence in determining the allocation methodology."[120] In fact, Commerce fully considered Abitibi's "asset-based" allocation proposal, but disagreed that assets alone should govern how financial costs were allocated.[121] Canada has simply mistaken Commerce's rejection of Abitibi's argument as a failure to consider relevant evidence.

74. In its first submission, Canada argued that Commerce "utterly disregarded" Abitibi's circumstances regarding the proper cost allocation.[122] Specifically, Canada argued that Commerce's methodology failed to consider the varying capital asset requirements of Abitibi's divisions.[123] In response, the United States reiterated, as Commerce had explained in the *Final Determination*, that the higher depreciation costs of the non-lumber producing divisions resulted in a greater allocation of interest costs to the non-lumber producing divisions.[124] Canada now 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.[125] 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

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[119] Canada's First Response to Panel Questions, para. 143.

[120] *Id*.

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

[122] *See, e.g.,* Canada's First Written Submission, para. 200.

[123] *See* Canada's First Written Submission, para. 194.

[124] *See. e.g.,* U.S. First Written Submission, para. 194; *Final Determination*, Comment 15 (Exhibit CDA-2). In fact, Commerce allocated over **[[ ]]** of interest costs to non-lumber products. U.S. First Written Submission, para. 186 and fn. 211.

[125] *See* Canada First Response to Panel Questions, para. 146.

depreciable assets.[126] Thus, Canada's new argument does not change the fact that Commerce's methodology reasonably accounted for Abitibi's total assets.[127]

75. 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 financial costs relate solely to its assets. As the United States has explained in previous submissions, Commerce reasoned that, because money is fungible, financial costs cannot be attributed to any one expenditure – whether to asset purchases or to any other particular investment.[128] 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.[129] Thus, Commerce's allocated interest costs across a wide range of costs including, but not limited to, the depreciation costs associated with capital assets.

76. In sum, Commerce's rejection of Abitibi's proposed cost allocation methodology was not, as Canada suggests, a matter of blind adherence to a different methodology. Rather, it reflected a careful consideration of the company's evidence and argument.

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

[127] The United States would like to clarify a statement made in response to the Panel's questions. *See* U.S. First Answers to Panel Questions, para. 111. While Commerce did amortize a portion of Abitibi's goodwill expense and included this amount in Abitibi's G&A calculation, the amount was not included in the financial cost calculation. However, as goodwill is a general cost, it is not attributable to a particular product, but to the company as a whole. Thus, the inclusion of a goodwill expense in the financial cost calculation would not have meaningfully altered the interest that was allocated to lumber producing divisions, as compared to non-lumber-producing divisions.

[128] U.S. First Written Submission, paras. 192-193.

[129] Canada cites a single example in which Commerce allocated financial costs based on asset values,. *Canada's Response to Questions*, paras. 140-141 (*citing DRAMS from Korea* (1993)) and concedes the subsequent repudiation of that decision. *See Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea* 63 Fed. Reg. 8,934 (February 23,1998), Comment 2:

> In our preliminary determination we allocated interest expense among the various operating units according to the proportional share of fixed assets. We have reconsidered this issue for the final determination and concluded that because COGS includes a proportional amount of the depreciation of the assets used in the production of the merchandise, allocation of financing expenses on the basis of COGS distributes proportionately more interest expense to those products having higher capital investment. Moreover, we note that it has been the Department's longstanding practice to allocate interest expense on the basis of COGS. . . We also note that for the 1995-1996 administrative review of DRAMs we have allocated interest expense based on COGS consistent with the methodology of this case.

See Exhibit US-79.

2. Tembec

77. The issue here is whether Commerce's calculation of Tembec's general and administrative 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. It is not disputed that the source for Commerce's calculation – Tembec's audited financial statements – were part of Tembec's books and records. In previous submissions, the United States has explained that calculating a G&A cost ratio on a company-wide basis is consistent with the very nature of G&A expenses, which are, by definition, company-wide expenses.[130] Therefore, calculating a company-wide G&A cost ratio based on Tembec's audited financial statements "reasonably reflect[s] the costs associated with the production and sale" of Tembec's softwood lumber. Commerce did not violate Articles 2.2.1.1 and 2.2.2 in making that calculation, and Canada has failed to show otherwise.

78. Canada argues that, while the G&A costs in Tembec's audited financial statements undoubtedly pertain to the production of Tembec's softwood lumber products, the unaudited "divisional G&A" figure identified by Tembec "more accurately 'pertained to' production and sale of the product at issue."[131] However, Canada cites to no authority for the proposition that, as an accounting matter, a company can incur G&A costs on a divisional basis.

79. In response to the Panel's questions, Canada was unable to provide evidence that Tembec's "divisional G&A" was in accordance with Canadian GAAP.[132] 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.[133] However, this note to the audited financial statements does not address directly Tembec's treatment of its G&A costs. Moreover, the evidence on the record establishes beyond question that the only items audited were Tembec's consolidated balance sheet, consolidated statement of operations, consolidated statement of retained earnings, and consolidated statement of cash flows. Tembec's segment (or divisional) information was not audited.[134]

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[130] *See* U.S. 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).

[131] Canada's First Response to Panel Questions, para. 126.

[132] Canada's First Response to Panel Questions, paras. 149-154. For example, Canada argues that Commerce's acceptance of Tembec's verification exhibits renders the "divisional G&A" reliable. Canada's First Response to Panel Questions, paras. 152-154. The collection of exhibits during an on-site verification, however, cannot be construed as Commerce's acceptance of the reliability of the divisional G&A figure at issue. Equally without merit is Canada's claim that Commerce must use Tembec's "divisional" data to calculate G&A simply because Commerce used this data as a source for packing costs where no alternative audited data were available. *Id*., para. 151. In the case of G&A costs, audited information was available.

[133] *See* Canada's First Responses to Panel Questions, para. 149.

[134] *See* Tembec Annual Report, "Auditors' Report," p. 34 (Exhibit US-12).

80. Canada argues that because Tembec's overall G&A cost was audited, the G&A cost that Tembec attributed to its different divisions must also have been audited.[135] 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. For example, an auditor would test whether a company's financial statements accurately included the President's salary in overall G&A cost, but would not necessarily attest to the accuracy of the allocation of that salary among the company's divisions.

81. Canada's argument begs the ultimate question of whether Tembec's allocation of G&A to its different divisions was reasonable. There is no evidence on the record that Tembec's division-specific methodology was consistent with Canadian GAAP.[136] Nor is there evidence that Tembec's methodology was even reasonable given the fact that G&A is incurred on behalf of an entire company.

82. What was true for Abitibi is also true for Tembec: While Canada argues that one cost allocation methodology is better than another, it fails to demonstrate that the methodology applied by Commerce violates any obligations under the AD Agreement.

3. Weyerhaeuser

83. Here, the issue is whether Commerce's inclusion of corporate litigation settlement costs in its calculation of G&A costs for Weyerhaeuser was based on proper establishment of the facts and an objective and unbiased evaluation of those facts. Given that these litigation costs were treated as *general* costs in Weyerhaeuser's own books and records, their inclusion in the G&A calculation was consistent with Articles 2.2.1.1 and 2.2.2.[137]

84. 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.[138] 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. 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

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[135] Canada's First Response to Panel Questions, para. 150.

[136] It appears that, under Canadian accounting standards, segment information does not have to be reported in accordance with GAAP. *See* Exhibit US-80, p. 2.

[137] *See Final Determination*, Comment 48b, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 207-209.

[138] *See, e.g.,* Canada's First Responses to Panel Questions, paras. 163-64.

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.

85. Moreover, in arguing that Weyerhaeuser's litigation settlement expense should not have been treated as a general cost, Canada essentially is asking the Panel to take a different view of the evidence.[139] Canada has not demonstrated that Commerce's treatment of that cost was improper.[140]

86. In previous submissions, the United States has referred the Panel to Note 14 of Weyerhaeuser's audited financial statement, explaining the general nature of the company's litigation costs.[141] In its most recent submission, Canada replies that the statement in Note 14 "was not made in the context of the hardboard siding claim."[142] However, Note 14 plainly is attached to the line item in Weyerhaeuser's financial statement pertaining to the hardboard siding litigation. While the note discusses litigation generally, this does not change the fact that the hardboard siding case was an example of such litigation.

87. Canada 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."[143] 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

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[139] Canada acknowledges that it has abandoned the claim that this expense should have been treated as a "cost of sale." *See* Canada First Response to the Panel's Questions, at Annex I, section 3, page A-6, fn. 1. Canada's remaining argument is that the litigation expense "was not a general expense properly attributed to the production and sale of Canadian softwood lumber." *Id.* As explained in the U.S. First Written Submission (paras. 207, 252), if a cost is not part of cost of production, under Article 2.2 of the AD Agreement it must, by definition, be part of SG&A. Here, the litigation cost is clearly not a selling cost, and Canada now admits that it is not part of cost of production. Therefore, it must be part of G&A. This was Commerce's conclusion. *See Final Determination*, Comment 48b, Exhibit CDA-2.

[140] In paragraph 161 of Canada's First Response to the Panel's Questions, Canada contends that "Commerce excluded numerous expenses because they did not relate to the production and sale of softwood lumber." While it is true that of the US$1.050 billion in SG&A costs recorded in the parent's consolidated financial statement, **[[ ]]** were excluded by Commerce, this misstates the issue entirely. In this case, to have included the entire US$1.050 billion would have double-counted SG&A reported from various subsidiary operations, including **[[ ]]** G&A reported on Weyerhaeuser Canada's own books and records. *See* March 21, 2002 DOC Cost Memorandum, Attachment 2, Exhibit CDA-105. Instead, from the consolidated Weyerhaeuser Inc. accounts, Commerce properly excluded **[[ ]]** to avoid double-counting G&A costs. *Id.* (citing CVE 26 at 1). Contrary to Canada's claim, costs were not excluded because of their lack of relationship to softwood lumber. Instead, they were excluded either to ensure that only parent company general costs were included in the calculation, or to avoid double-counting.

[141] See U.S. First Answers to Panel Questions, para. 65, n. 41, *citing* Weyerhaeuser 2000 Annual Report, note 14, p. 75, Exhibit CDA-101.

[142] Canada's First Responses to Panel Questions, para. 164.

[143] *Id.*

inclusion in calculation of a company's total SG&A cost simply by virtue of their characterization on a company's books and records. For purposes of the AD Agreement, a cost item either relates to the cost of production or is treated as an SG&A cost.[144] Articles 2.2 and 2.2.1 of the AD Agreement recognize these two basic categories. Yet, it is possible that, as here, a company may group costs into other, additional categories or list individual costs as separate line items. The fact that a general cost is delineated separately and not subsumed in the specific SG&A "line" on a company's financial statement does not affect the general nature of that cost. Weyerhaeuser effectively conceded this point, because in its submissions to Commerce, it included in G&A certain costs other than those included in the SG&A line in its financial statement.[145]

88. Weyerhaeuser's financial statement did not report the company's litigation costs as a cost of goods sold, but as a general period expense, a type of general cost.[146] Canada maintains that, nevertheless, these costs had a "clear association with the production and sale of non-like product . . . ."[147] What Canada does not explain is how litigation occurring years after a good's production can be clearly associated with its production. It can not.[148] For that reason, it would not have been appropriate to allocate the litigation cost, as Canada's argument would seem to suggest, to the cost of *producing* hardboard siding.

89. Finally, it is notable that there were items in addition to litigation costs that Weyerhaeuser added to its own G&A (and that Commerce included in Weyerhaeuser's G&A cost), even though such items did not relate directly to softwood lumber production. A notable example is costs for "integration and closures."[149] Weyerhaeuser's own inclusion of such costs within its reported

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[144] As an accounting matter, there may be rare exceptions to this rule, which are not relevant here, such as extraordinary costs, which are reported separately. However, for purposes of Articles 2.2 and 2.2.1 of the AD Agreement, all costs must be categorized as either costs of production or SG&A.

[145] For example, Weyerhaeuser included "Charges for integration and closure of facilities (Note 15)", an item on its financial statement directly above the litigation expenses and likewise itemized separately as a general expense. *See* Weyerhaeuser Section A Response at 8-9 (June 22, 2001), Exhibit CDA-101.

[146] Weyerhaeuser 2000 Annual Report, p. 53, Exhibit CDA-101.

[147] *See* Canada's First Response to Panel Questions, para. 159.

[148] *See Final Determination*, Comment 48b; Exhibit CDA-2. Canada has not explained how post-production (indeed, post-sale) litigation expenses can relate to actual production costs. The earliest products sold and installed were from 1981. *See* Weyerhaeuser 2000 Annual Report, note 14, pp. 74-75, Exhibit CDA-101.

[149] Note 15 of the consolidated statement for Weyerhaeuser's parent indicates that the US $56 million amount added to Weyerhaeuser G&A included US $8 million for the closure of a Weyerhaeuser container board packaging plant. Container board packaging is separate from the part of Weyerhaeuser that produces softwood lumber. *See* Weyerhaeuser Section A Response at 8-9 (June 22, 2001), Exhibit CDA-101. The consolidated statement also indicates that US $48 million was allocated for "costs incurred throughout the year for the transition and integration of activities" involving acquisitions. As with litigation costs, the US $56 million was reported by the parent company as a separate type of general cost. Weyerhaeuser reported this cost to Commerce as a general expense, and neither Weyerhaeuser nor Canada object to Commerce's allocating a portion of these costs to the cost

G&A costs calls into question Canada's insistence that an item must be excluded from G&A costs for a good if it is not directly related to production of that good.

4. West Fraser and Tembec's By-Product Offsets

90. Canada disputes the values of wood chip offsets that Commerce applied to respondents West Fraser and Tembec. As the United States has explained previously, the values Commerce determined for these by-products were based on West Fraser and Tembec's own books and records and reasonably reflect their costs associated with producing softwood lumber.[150]

91. It has become evident from Canada's submissions that Canada believes that the valuation of a by-product offset must reflect "market value."[151] The AD Agreement is silent as to how investigating authorities should calculate by-product offsets to production costs. Article 2.2.1.1 states that, in calculating costs, investigating authorities are to rely on the books and records of the producer so long as those books and records "reasonably reflect *the costs associated with the production and sale* of the product under consideration" (emphasis added). In Canada's view, Article 2.2.1.1 required Commerce, in the context of calculating wood chip offsets, to determine whether a company's books and records "reasonably reflect the market values of the by-products so as not to overstate or understate the costs associated with the main product."[152] Canada argues that if the valuation of wood chips in a company's books and records did not equal "market value," Commerce was required to ignore the books and records and substitute the market value of the wood chips in its calculations.[153]

92. 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." 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. Thus, determining the "reasonableness" of the value assigned to a by-

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of producing and selling softwood lumber.

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

[151] Canada's First Response to Panel Questions, paras. 178, 180.

[152] Canada First Response to Panel Questions, para. 166. In para. 178, Canada states again, "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."

[153] Canada First Response to Panel Questions, para. 178.

product will depend heavily upon the books and records of the investigated respondent, the corporate relationship of the parties to the transaction, and the market value being used as a benchmark for determining the "reasonableness" of the value.

93. In calculating West Fraser's cost of production for softwood lumber, Commerce recognized two facts relevant to the valuation of wood chips. First, the value of wood chips differed between the provinces of Alberta and British Columbia. Second, West Fraser had engaged in transactions with affiliated and non-affiliated customers in both provinces.[154] To determine the reasonableness of wood chip sales from West Fraser to affiliated entities, Commerce used as a benchmark market value, as reflected in West Fraser's sales to unaffiliated entities. Commerce conducted this analysis on a province-specific basis. For British Columbia, Commerce first reviewed the sales of wood chips made by West Fraser's McBride and Pacific Island Resources mills to unaffiliated purchasers. It found these sales to be commercial in nature and made at arm's length.[155] It then compared West Fraser's affiliated sales to these unaffiliated sales to determine whether the affiliated transactions reflected a reasonable value for the wood chips.[156] Commerce determined that West Fraser's British Columbia affiliated transactions did not reasonably reflect the value of the wood chips.[157] 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 British Columbia transactions.[158]

94. In its response to the Panel's questions, 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.[159] 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

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[154] *Final Determination*, Comment 11, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 218-229.

[155] West Fraser Cost Verification Exhibit C5, WF-Cost-007503, Exhibit CDA-106. *See also* United States First Written Submission, paras. 218-229.

[156] *Final Determination*, Comment 11, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 218-229. Commerce conducted the same exercise for West Fraser's unaffiliated and affiliated transactions in Alberta as well.

[157] *Final Determination*, Comment 11, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 218-229.

[158] *Final Determination*, Comment 11, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 218-229. On the other hand, in Alberta, Commerce applied the exact same methodology, and determined that West Fraser's affiliated transactions did reflect a reasonable value for wood chips. Accordingly, Commerce used West Fraser's books and records and did not modify the value of the by-product offset as reported by West Fraser in all of its transactions.

[159] Canada First Responses to Panel Questions, para. 168, n. 168.

wood chips in British Columbia.[160] Contrary to Canada's assertions, however, West Fraser's unaffiliated transactions were significant in number and value.[161] Nonetheless, even if the quantity of transactions had been smaller, this fact, in and of itself, would not have called into question the commercial nature of the unaffiliated transactions. Canada does not question that these transactions were arms-length transactions. The mere existence of a large volume of affiliated transactions in British Colombia during the period of investigation does not call into question the market value of wood chips derived from the remaining unaffiliated transactions.

95. Canada also argues in its response to the Panel's questions 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. Only after making such a comparison, according to Canada, could Commerce have concluded that the prices of West Fraser's wood chip sales to unaffiliated parties were an appropriate benchmark for wood chip sales to affiliated parties.[162] Canada cites to no provision of the AD Agreement requiring that analysis. Once Commerce determined that West Fraser's unaffiliated transactions represented a reasonable market value on its own books and records, there was no obligation to compare this number to wood chip values in other respondents' books and records.

96. Finally, Canada argues that Commerce "blindly adhered" to its methodology for valuing affiliated transactions, and that Commerce's valuation methodology as applied to West Fraser's Alberta sales is "irrelevant."[163] Far from being "biased and unobjective"[164] or "blind," Commerce's methodology in British Columbia was based on an objective review of West Fraser's books and records.[165] Commerce applied the same methodology for both Alberta and British Columbia transactions. In the first case, the facts warranted using West Fraser's affiliated transaction by-product valuation figures. In the second case, the facts did not warrant such treatment.

97. Unlike West Fraser, which sold wood chips only to separate affiliated and unaffiliated purchasers, Tembec's sawmills transferred wood chips to Tembec's pulp mills through several

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[160] Canada First Responses to Panel Questions, para. 168, n. 168.

[161] West Fraser sold **[[ ]]** Oven-Dried Tonnes (ODTs) of wood chips to unaffiliated parties, with a commercial value of over **[[ ]]**. West Fraser Cost Verification Exhibit C5, WF-Cost-007503, Exhibit CDA-106. *See also* U.S. First Written Submission, para. 219.

[162] Canada's First Responses to Panel Questions, paras. 170-171.

[163] *Id.,* paras. 170 and 172.

[164] Canada's First Responses to Panel Questions, para. 170.

[165] *See Final Determination*, Comment 11 (Exhibit CDA-2).

interdivisional transactions.[166] Consistent with Article 2.2.1.1, Commerce looked first to the values assigned by Tembec in its books and records for its inter-divisional transfers to determine whether the reported values were reasonable based on a comparison to market value. As noted above, 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 byproduct, even if that value is less than market value. Just as actual costs of production will ordinarily be less than the market value of a product (because market value will include a reasonable amount of selling expenses and profit), so too may the by-product offset valuations be less than the market value of the by-product. In this case, Commerce determined that the price paid by Tembec's pulp mills to its sawmills was a reasonable amount, and valued the wood chips as reported.[167]

98. Canada claims that Tembec's inter-divisional transactions were "arbitrary."[168] Like Tembec during the investigation, Canada's sole argument is that Tembec valued wood chips at a higher rate in its transactions with unaffiliated purchasers, which thereby calls its interdivisional valuation into question.[169] 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 books and records and replace those values with market-based values.[170]

99. 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. Once Commerce determined that the difference between the market value and inter-divisional transfer value of Tembec's wood chips was reasonable, its analysis ended and Article 2.2.1.1 did not require that it do any more.[171]

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[166] *See Memorandum From Peter S. Scholl to Neal M. Halper*, re: Cost Verification Report, dated January 29, 2002 ("Cost Verification Report"), Exhibit CDA-112.

[167] *See Final Determination*, Comment 11, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 230-244.

[168] Canada's First Response to Panel Questions, para. 179.

[169] Canada identifies three instances in which Tembec stated on the record that its transfer prices were not market prices. *See* Canada's First Responses to Panel Questions, para. 177. 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.

[170] Canada's First Response to Panel Questions, paras. 166, 178.

[171] *See* U.S. First Answers to Panel Questions, paras. 97-99 for a more detailed explanation of the reasoning underlying Commerce's methodology for valuing Tembec's wood chip offset.

5. Slocan's Futures Contract Profits

100. The final issue is Commerce's treatment of Slocan's profits from futures hedging contracts. Commerce declined to adjust U.S. selling expenses or to offset interest costs based on these profits. In prior submissions, the United States has explained why this was proper.[172]

101. In reply, Canada asserts that Commerce should have done *something*, even though Slocan itself failed to substantiate either of the alternative treatments it sought. As the panel in *Egypt-Rebar* noted, responding parties have an obligation to assert and to justify the information and arguments required to prove their claims.[173] Slocan requested two alternative and directly contradictory treatments of its hedging profits: first, an adjustment to direct selling expenses (as an adjustment for the conditions and terms of sale); second, an offset to financing costs in the cost of production. The evidence did not support either claim.[174]

102. 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.[175] 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. In its argument to this Panel, 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.[176] 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.

103. 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

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[172] *See Final Determination*, Comment 21, Exhibit CDA-2. *See also* U.S. First Written Submission, paras. 230-244; U.S. First Answers to Panel Questions, paras. 132-138. A contradiction in Canada's claims is worth noting: for Weyerhaeuser, Canada wants general costs included in G&A only if they related exclusively to production of the product under consideration, while for Slocan, Canada seeks an adjustment under Article 2.4 based on an asserted general, but unexplained "affect" on all U.S. prices. *See, e.g.,* Canada's First Response to Panel Questions, para. 190 (hedging activity "affected one market and not the other").

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

[174] *See Final Determination*, Comment 21, Exhibit CDA-2. *See also* U.S. First Answers to Panel Questions, paras. 132-138, and 146 for a full response to Canada's assertions that the United States breached some undefined duty to grant adjustments that have been neither requested nor demonstrated by the respondent.

[175] *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. Canada's assertions have no support on the record. *See e.g.,* Canada's First Response to Panel Questions, para. 188 ("Slocan's futures hedging activity was a condition of sale to the U.S. market that affected prices of all sales in that market."); and para. 198 ("Its hedging activity was a deliberate effort to affect pricing across the entire U.S. market.").

[176] *See* U.S. First Written Submission, paras. 249-250.

properly declined to use selling revenue to offset finance expenses included in Slocan's production costs.[177] Canada has provided no new explanation supporting its contention that Commerce should have done otherwise.

IV. CONCLUSION

104. For the reasons set forth above, as well as in the United States' First Written Submission, oral statements at the first substantive meeting of the Panel, and responses to the Panel's questions, the United States requests that the Panel reject Canada's claims in their entirety.

[177] *See* U.S. First Written Submission, para. 252.