Business Confidential Information Removed from Attachment at p. 15.

UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

WT/DS264

Answers of the United States to the Panel's 13 August 2003 Questions

August 26, 2003

1. The following responses of the United States answer the 13 August 2003 questions to the United States and to both parties. In several instances, the United States has also addressed questions posed by the Panel to Canada.

A. GENERAL QUESTIONS

To the US:

> **86. The Panel refers to paras. 2 and 3 of the US Second Oral Statement. The Panel requests the US to note all the "misstatements" that it has identified in Canada's submissions, in addition to those mentioned in the Second Oral Statement. Further, in its replies to the questions posed by the Panel, Canada's Second Written Submission and Second Oral Statement, Canada made detailed factual presentations relevant to its claims. The US is requested to identify and substantiate all factual aspects with which it disagrees with Canada.**

2. In response, the United States refers the panel to the chart at the Attachment hereto.

3. The United States has diligently reviewed each of Canada's submissions and statements to respond to the Panel's question. In that process, the United States identified numerous misstatements and factual aspects of Canada's argument with which it disagrees. Each of these is catalogued in the Attachment. However, the absence of a particular statement by Canada from the Attachment should not be construed as a concession or as agreement with the substance of that statement.

4. Canada's statements that the United States would describe as "misstatements" or with which the United States disagrees are too numerous to be comprehensively catalogued. For example, inasmuch as the United States disagrees with Canada's interpretations of AD Agreement articles, the United States would describe Canada's statements concerning those articles as "misstatements." The United States has addressed those arguments in its prior submissions and statements and does not separately identify them in the Attachment.

B. ARTICLE 5.2:

To Canada:

> **87. The Panel notes that Canada has made a number of allegations on shortcomings of the data in the application in Section II of its Second Oral Statement. In Canada's view, does the examination it claims should have been done by the DOC, require a pre-initiation investigation?**

5. The United States has argued that Canada's interpretation of Article 5.2 effectively would require an investigating authority to undertake a pre-initiation inquiry. Under Canada's theory, an authority would have to satisfy itself that an application contained *all* information reasonably available to the petitioner on the subjects specified in Article 5.2. Put another way, the authority would have to determine what information was reasonably available to the petitioner (potentially, a very broad universe of information) and whether any of that information had been excluded from the application. The only way to make such a determination would be to conduct an investigation. The United States has observed, in general, the impracticality of requiring such an investigation, as well as the absence of any such requirement in the AD Agreement.[1] The United States would only add that, under Canada's theory, this requirement would not be limited to information on dumping. It presumably would extend to each of the other categories of information specified in Article 5.2. This would include, for example, information on impact of the imports on the domestic industry. A petitioner's information on that particular issue is likely to be very expansive. It is inconceivable and illogical that Article 5.2 would require a petitioner to provide *all* information reasonably available to it on that topic.

C. ARTICLE 5.3:

To Canada:

> **88. In paras. 34 to 43 of Canada's reply to Question 8, Canada has made certain allegations regarding the information contained in the application as submitted by the US domestic industry, and which formed the basis for the initiation of the investigation. In its Second Oral Statement, Canada has also alluded to some of these issues. Could the US please comment in detail on these allegations?**

6. Canada's June 30, 2003, response to Question 8 included claims regarding the alleged failure of the application "to have costs of significant or representative producers" (paras. 34-35); "to provide costs for a period of time sufficient to objectively assess the reasonableness of the data submitted" (para. 36), and to include "evidence of the method used to calculate manufacturing costs for the SPF species" and evidence of "how company costs were allocated to the specific 2.4 kiln-dried dimension or stud lumber" (paras. 37-38). The same response also included claims related to the alleged failure of the application to "contain adequate information regarding freight costs" (paras. 39-43).

7. The United States addressed each of these issues in its July 9, 2003, Second Written Submission, at paras. 23-32, and refers to those detailed answers and the supporting evidence cited therein. Because Canada's response to Question 8 contained numerous factual misstatements, the United States also refers to the U.S. response to Question 86, set forth as an

[1] U.S. First Written Submission, paras. 70-76; U.S. Opening Statement at First Panel Meeting, para. 22; U.S. Second Written Submission, paras. 10-13; U.S. Opening Statement at Second Panel Meeting, paras. 11-21.

Attachment to this submission. In brief, the United States addressed the cost and price issues that Canada raised as follows.

8. In response to Canada's claims regarding costs from significant or representative producers:

- The vast majority of the "costs" used in the application were derived from sources Canada has not challenged (including a significant amount of cost data from Canadian government sources). The data from U.S. mills were used primarily to identify production factors, rather than costs.[2]

- To the extent that Canada is criticizing the sources as a basis for identifying production factor data, the United States explained that what Canada referred to as "the Canadian producers being modeled" included the entire Canadian softwood lumber industry (not merely the very largest producers that were subsequently selected as respondents). The lumber industry is disaggregated and diverse, and the mills whose production factors were included in the application were among those listed in a U.S. Department of Agriculture publication focusing on "large, permanent operations that make up the bulk of the industry."[3]

9. In response to Canada's claims regarding costs for a period of time sufficient to objectively assess the reasonableness of the data submitted:

- As reflected in the exhibits it references, Canada's argument regarding what it broadly terms "cost" data applies, in fact, only to the U.S. mill data on factor usage. Furthermore, taken as a whole, these data, when combined, not only cover the full calendar year 2000 on a country-wide basis, but also include data on both the British Columbia and Quebec markets. The confidential affidavits, furthermore, explain why data for particular months are provided for particular mills, including when particular mills close their financial statements.[4]

10. In response to Canada's claims regarding a lack of explanation of how manufacturing costs were calculated and allocated:

- The United States has pointed out that the application followed the normal industry practice (as reflected in industry patterns of data collection and cost breakouts) of allocating costs, for the most part, on a per-MBF, species-specific basis. The United

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[2] *See* U.S. Second Written Submission, para. 24.

[3] *See id.*, para. 25.

[4] *See id.*, para. 26.

States also explained that when a broader species average was used (*i.e.*, for stumpage costs in Quebec), this actually favored respondents by resulting in lower costs, and, thus, lower margins.[5] Although the cost allocation methodology used in the application may not have been as refined as that developed in the course of the investigation, it permitted Commerce to reasonably ascertain product costs for purposes of initiation. This can be seen from the fact that the evidence of below-cost sales was corroborated both by the press articles in the application and by the extensive below-cost sales found in the investigation using the respondents' own cost data and more detailed cost allocation methodologies.

11. In response to Canada's allegations regarding freight data:

- The United States clarified that, as Quebec producers ship lumber both by truck and by rail, it was appropriate to use a truck shipment rate from a producer that shipped by truck. Commerce also properly relied upon a rail freight rate for "softwood lumber" without seeking out data on the comparative weight of different pine species, especially in view of the fact that the quotation at issue was for transfer over a considerably shorter distance than the delivery distance associated with the export sales for which an estimated freight expense was being calculated. In other words, the quotation likely had the effect of understating the actual cost of transporting lumber for the transactions at issue. Finally, the United States clearly demonstrated from the record that its calculations did not, as Canada claimed, include the cost of freight from the Maritime Provinces in its average cost for freight from Quebec.[6]

12. In its oral statement at the second substantive meeting, Canada addressed almost none of these points or the evidence relied upon by the United States.[7]

89. In its reply to Question 8, Canada submits that using the Applicant's Random Lengths price data for Quebec, a comparison of all of the Quebec ex-factory price data for ESPF (2x4, Studs&Btr, KD, RL and 2x4-8', PET, KD) products sold in Quebec and in the US, shows that the US price was consistently higher during the period and that there was therefore no price-to-price dumping demonstrated by the evidence in the Application. It further provides a calculation

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[5] *See id.*, paras. 27-28.

[6] *See id.*, paras. 29-32.

[7] In its discussion of these issues in Canada's Second Oral Statement, the only explicit reference to the U.S. Second Written Submission argues that the U.S. never made a "finding" that the allocation by MBF and species was consistent with "normal industry practice." Here, also, Canada offers no evidence to contradict this practice (which is clearly reflected, for example, in the pricing patterns found in the *Random Lengths* materials in the application). *See* Canada Second Oral Statement, paras. 16-20.

in footnote 32 to substantiate the allegation. Could the US please comment on this allegation and on the calculations?

13. Both the allegation and the calculation are irrelevant to the question of whether Commerce properly initiated and continued the investigation, because neither the application nor Commerce's decision to initiate was based on price-to-price dumping. As Commerce explained in its initiation checklist, "Because the Canadian prices, when compared to the COP, were demonstrated to be below the COP, petitioners have based their margin calculations on the comparison of {export price} to {constructed value}."[8] This comparison of export prices to constructed value demonstrated that softwood lumber was sold at prices below the cost of production, *i.e.*, dumped.

90. Please comment on Canada's Second Oral Statement, para. 20 which states that:

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

14. As a preliminary matter, the United States finds it hypocritical for Canada to be accusing the United States of "hiding behind the pretense of confidentiality." Canada understands well the sensitivity of business confidential information and the importance of safeguarding it adequately and not disclosing it without the consent of the submitter.[9] It comes as a surprise, therefore, that Canada would dismiss as "hiding behind the pretense of confidentiality," Commerce's legitimate protection of the confidentiality of certain information as required by U.S. statutory law.

15. In any event, Canada ignores both the arguments and the supporting record evidence cited by the United States in its Second Written Submission at paragraph 25 and the footnotes thereto, which demonstrate that the mills in question were within the range of the mills which "make up the bulk of the [U.S. and Canadian softwood lumber] industry."[10]

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[8] *See* Checklist (Exhibit CDA-10) at 7; *see also* Initiation Notice (Exhibit CDA-9), at 66 Fed. Reg. 21330 (margin was based on a comparison of export price to constructed value).

[9] *See* Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/41 at p. 2 (Jan. 24, 2003).

[10] U.S. Second Written Submission, para. 25, note 38.

D. ARTICLE 2.6:

To the US:

91. The Panel notes in para. 36 of the US Second Oral Statement that "Canada misunderstands the analysis that was actually applied." Could the US expand on what it perceives the misunderstanding of Canada is?

16. The most important point related to Canada's claim under Article 2.6 is that this provision contains no obligation concerning an investigating authority's definition of the product under consideration.[11] In various submissions and statements in this dispute, the United States has endeavored to explain Commerce's administrative practice in defining the product under consideration. It has done so not to defend Commerce's practice in light of Article 2.6 – which contains no obligation on this issue – but instead to demonstrate that Canada's argument fails even on its own terms.

17. The misunderstanding referred to in the U.S. Second Oral Statement is Canada's characterization of the analysis applied in the lumber investigation as different from Commerce's *Diversified Products* analysis. Canada has focused on two sentences taken out of context and leveraged these sentences into an assertion that there are two distinct, alternative tests that Commerce may apply in identifying the scope of the product under consideration. The first such test, Canada asserts, is the familiar *Diversified Products* analysis, with which Canada has no complaint. The second test, according to Canada, is a "no clear dividing line"/"continuum" test. Canada alleges that in the lumber investigation, Commerce applied the latter test in lieu of the *Diversified Products* test.

18. Canada's contention that there are two alternative tests and that Commerce applied something other than its familiar *Diversified Products* analysis in this case is incorrect. Simply put, Commerce applied its *Diversified Products* analysis. In applying that analysis, a question that Commerce considered was whether there were clear dividing lines that distinguished some elements of the putative "product under consideration" from other elements. Canada incorrectly suggests that Commerce thereby "subordinated" the *Diversified Products* analysis to a "no clear dividing line" analysis.[12] In fact, it did nothing of the sort.

19. Similarly, Canada improperly asserts that a passing observation by Commerce about the diversity of softwood lumber products must mean that Commerce abandoned the *Diversified Products* analysis in this investigation.[13] Yet, in context, it is clear that, notwithstanding this

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[11] *See* U.S. First Written Submission, paras. 85-99; U.S. Opening Statement at First Panel Meeting, paras. 24-28; U.S. Second Written Submission, paras. 33-41.

[12] Canada Second Written Submission, paras. 70, 87.

[13] *Id.*, paras. 71, 87.

"general observation," Commerce did apply its *Diversified Products* analysis.[14] It did so for each softwood lumber product alleged to be outside the scope of a properly defined product under consideration (*i.e.*, Western red cedar, Eastern white pine, softwood lumber boards used as bed frame components, and softwood lumber boards used as finger-jointed flangestock).[15]

20. Canada's erroneous contention that in this investigation Commerce abandoned its usual practice and applied an unfamiliar analysis appears to be an attempt to compensate for Canada's inability to identify an applicable obligation under Article 2.6. As Article 2.6 is silent on the question of how an investigating authority identifies the product under consideration, Canada has resorted to the suggestion that, whether or not there is an express obligation in this area, Commerce acted unreasonably by deviating from its normal practice. However, the isolated statements on which Canada relies do not support that contention. In identifying the product under consideration in this investigation, Commerce applied its normal *Diversified Products* analysis.

E. PHYSICAL CHARACTERISTICS:

To the US:

94. We refer to the following statement in para. 50 of the US Second Oral Statement:

> **"for all physical characteristics, except dimension, Commerce had cost data to connect the physical differences to the impact on price, pursuant to its normal methodology."**

Could the US confirm that it normally bases adjustments on differences in variable costs and that in this instance DOC could determine adjustments on such a basis for all differences except for dimension?

21. The United States confirms that Commerce normally bases a price adjustment for differences in physical characteristics in the product under consideration on reported differences in the variable cost of manufacturing. This can be seen in Commerce's questionnaire, relevant

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

[15] *See*, *e.g.,* application of *Diversified Products* analysis to Western red cedar (*Scope Memorandum*, at 24-28 (Exhibit CDA-12); *Final Determination*, Comment 52A (Exhibit CDA-2); application of *Diversified Products* analysis to Eastern white pine (*Scope Memorandum*, at 29-31 (Exhibit CDA-12); *Final Determination*, Comment 52C (Exhibit CDA-2); application of *Diversified Products* analysis to bed-frame components (*Scope Memorandum*, at 32 (Exhibit CDA-12); *Final Determination*, Comment 52E (Exhibit CDA-2); application of *Diversified Products* analysis to finger-jointed flangestock (*Scope Memorandum*, at 31-32 (Exhibit CDA-12); *Final Determination*, Comment 52F (Exhibit CDA-2);

portions of which were provided in Exhibit US-36, requesting this information from respondents and explaining the basis for the adjustment in the questionnaire's glossary of terms (also provided in Exhibit US-36). The questionnaire's glossary refers respondents to Commerce's regulations regarding this specific price adjustment (Exhibit US-44). Commerce also has a decade-old policy bulletin explaining the basis for the adjustment, available on its website at <http://ia.ita.doc.gov/policy/>, and provided in Exhibit US-77.

22. With respect to the eleven physical characteristics distinguished for purposes of the model match methodology, Commerce never compared different softwood lumber product categories, species or grade groups.[16] Thus, there were never any comparisons for which a price adjustment would be warranted with respect to these three physical characteristics. The respondents reported variable cost of manufacturing data for moisture content, surface finish, end trim and further processing in their questionnaire responses, and Commerce was able to determine adjustments pursuant to its normal methodology for these four characteristics.[17] In Commerce's *Preliminary Determination*, Commerce relied on the respondents' normal books and records, which reported no difference in variable cost between products of differing grades and dimension. Therefore, Commerce was not able to make an adjustment for grade and dimension pursuant to its normal methodology.[18]

23. In response to specific comments on the *Preliminary Determination* from the Canadian respondents (addressed in more detail below), Commerce further evaluated price and cost data with respect to grade and dimension and determined to allocate certain costs of manufacturing to grade, but not to dimension, using value-based data.[19] Consequently, for the *Final Determination*, Commerce calculated grade-specific variable costs, making a cost-based price adjustment possible when comparing products of different grade. Therefore, dimension remained the only physical characteristic for which an adjustment could not be made pursuant to Commerce's normal methodology.[20]

95. Could the US explain in detail how the issue of dimension was addressed in the lead-up to the Preliminary Determination and from the Preliminary Determination to the Final Determination, including after the DOC found that there were no differences in variable costs? Was DOC's statement in the Preliminary Determination that dimension has an effect on price comparability made before

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[16] *See* U.S. First Written Submission, paras. 124-125.

[17] *Id.*, para. 126; Dept. of Commerce, *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada,*66 Fed. Reg. 56062, 56066 (Nov. 6, 2001) ("*Preliminary Determination*") (Exhibit CDA-11).

[18] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11).

[19] *Final Determination,* Comment 4 (Exhibit CDA-2).

[20] *Id.*, Comment 8 (Exhibit CDA-2).

DOC knew that there was no difference in variable costs? Indicate what made DOC change its position with respect to the effect of dimension on price comparability between the Preliminary Determination and the Final Determination.

24. Commerce did not state that "**dimension** has an effect on price comparability" in its *Preliminary Determination*. The Panel's misapprehension presumably derives from Canada's distortion of a statement in Commerce's *Preliminary Determination* concerning "several" physical characteristics "which affect price." Canada quoted that statement out of context.

25. As indicated in the United States' First Written Submission, paras. 124-125, and in response to Question 95, above, the dimensional characteristics of width, thickness and length comprised three of eleven physical characteristics that Commerce accepted for purposes of distinguishing between models of softwood lumber in this investigation. Commerce's questionnaire identified the specific product characteristics that Commerce determined, based on the interested parties' comments, should be distinguished in its model match methodology. (Grade was later separated into grade and grade group.)

26. As indicated above, the respondents' questionnaire responses reported the same variable cost of manufacturing for all dimensions. However, Commerce, did not match nonidentical dimensions (or grades) in the *Preliminary Determination*. This was consistent with its practice in many agricultural cases, where Commerce did not match across certain characteristics if there were no cost differences associated with differences in physical characteristics.[21] This obviated any need for the requested price adjustment. Commerce's explanation concerning its preliminary treatment of the physical characteristics, particularly dimension and grade, is set forth below. Although Commerce acknowledges an impact of physical differences on price, it does so in the context of distinguishing the complex and diverse factors determining price in this case versus another much simpler case, in which Commerce determined that a value-based price adjustment for a single physical difference was warranted:

> [F]or this preliminary determination, we have concluded that it is not appropriate to match products that do not have the following identical physical characteristics: grade, thickness, width and length. These are significant physical characteristics that cannot be accounted for by means of a cost-based difference-in-merchandise adjustment. The respondents in this investigation have reported that their methods of tracking costs and the nature of producing lumber do not allow them to distinguish costs by grade or size. Specifically, the respondents have reported that they cannot report costs that distinguish between factors other than moisture,

[21] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11) (discussing cases involving tomatoes and salmon, respectively).

> surface finish, end trim and further manufacturing. Our analysis confirms that most lumber produced within a given species has the same production cost.
>
> The respondents have cited to UHFC Company v. United States, 916 F.2d 689 (Fed. Cir. 1990), where the Court of Appeals for the Federal Circuit (CAFC), in that specific case, instructed the Department on remand to match across different strengths/grades, despite the fact that differences in costs could not be calculated. In that case, the product involved was animal glue, where different strength/grades were produced at the same time, using the same production process. The respondents claim that in accordance with the Court's decision in that case, "the Department must calculate a value-based difference-in-merchandise in this case in those instances where similar products are compared and there is no variable cost data available to permit the calculation of a cost-based difmer." Among the suggested bases for a value-based difmer adjustment were data published in Random Lengths, respondents' own reported sales data covering the POI, or historical pricing data.
>
> We disagree that the UHFC decision requires the calculation of a value-based difmer adjustment in this case. First, this investigation is distinguishable from the circumstances in the UHFC case, where there was only a single difference, i.e. glue strength, between the products***. In the instant investigation, there are several significant differences in physical characteristics which affect price.*** As a result, we have determined that we have no comparable basis on which to adjust for physical differences between similar products based upon market value, as has been suggested by the respondents. By Abitibi's own admission, Random Lengths data are not comprehensive enough to identify all of the differences among the entire range of products.[22]

27. As is clear from the above discussion, Commerce *did not make any determination* with respect to the impact, if any, that dimension alone had on price, nor did it focus on *measuring* any appropriate adjustment. Commerce then noted that its decision to match similar products only where it was able to calculate a cost-based price adjustment, and to limit its matches for grade and dimension to identical comparisons, was consistent with agricultural cases.[23] (Moreover, as is apparent from the full discussion of the issue in the *Preliminary Determination*, Commerce did consider making an adjustment pursuant to its normal methodology and did consider the arguments raised by the parties as to other means.)

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[22] *Preliminary Determination*, 66 Fed. Reg. at 56066 (Exhibit CDA-11) (emphasis added).

[23] *Id.*, (discussing cases involving tomatoes and salmon, respectively).

28. The Canadian respondent companies, in response to Commerce's *Preliminary Determination*, requested that Commerce allocate certain costs, using value data, to grade and dimension, so that a cost-based adjustment for differences in dimension and grade could be made. Alternatively, they requested, once again, that Commerce grant a value-based adjustment for differences in dimension (and grade), rather than limit its comparisons to identical dimension and grade products.[24] Indeed, two of the six respondent companies indicated that the result Commerce reached in the *Final Determination* (what they termed a "zero" adjustment) would be an acceptable result.[25]

29. The Canadian respondent companies requested that Commerce reevaluate its decision to match only identical dimensions and grades based on the available data on the record. Commerce examined the data in the questionnaire responses to determine whether or not it would be appropriate to allocate certain costs to grade and dimension using value data. As Commerce explained in its *Final Determination*, based on the fact that grade is a quality inherent in the wood, Commerce determined that certain costs could be allocated to grade using value data.[26] Unlike grade, Commerce specifically concluded that the facts did not warrant allocating costs to dimension,[27] a conclusion that Canada has not challenged as inconsistent with the AD Agreement.

30. Using the respondents' home market sales data, which was also used to evaluate whether or not it was appropriate to allocate costs to dimension based on value data, Commerce then examined a) whether or not it should compare similar dimensions (rather than just identical dimensions) and b) whether or not, if it compared similar dimensions, it should make a price adjustment for differences in the nonidentical dimensions compared. As indicated above, this analysis was conducted at the behest of the Canadian respondents in light of the results of Commerce's *Preliminary Determination*. Commerce concluded, based on its examination of the data on the record, that it should not be limited to only identical dimensional matches, but that a price adjustment for nonidentical comparisons was not warranted.[28] For a more detailed explanation of Commerce's methodology, please see response to Question 99 below.

96. At what stage were the respondents informed of DOC's finding that differences in dimension do not affect price comparability? What opportunities were provided to respondents to comment on that finding?

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[24] *See, e.g.*, Case Brief of Abitibi, Feb. 12, 2002, 26-29 (Exhibit CDA-142, pp. 93-96); Case Brief of West Fraser, Feb. 12, 2002, 17-19 (Exhibit CDA-142, pp. 140-142).

[25] *See, e.g.*, Case Brief of Slocan, Feb. 12, 2002, 24-32 (Exhibit US-74); Case Brief of West Fraser, Feb. 12, 2002, 26-29 (Exhibit US-75).

[26] *Final Determination*, Comment 4 (Exhibit CDA-2).

[27] *Id.*, Comment 4, note 60 (Exhibit CDA-2).

[28] *Id.*, Comments 7 and 8, respectively (Exhibit CDA-2).

31. As indicated above, Commerce found no cost differences attributable to dimensional differences and no basis for making price-based adjustments for different dimensions. Given these preliminary findings, it was clear that if Commerce matched different dimensions, as requested by the respondents, the obvious questions were: would an adjustment be warranted and, if so, what should it be? Consequently, it was in the *Final Determination* that Commerce concluded, and the respondents were thereby informed, that differences in prices were not attributable to differences in dimension and that a price adjustment for differences in the dimensions of the products compared was not warranted. Although this was Commerce's *final* conclusion, the parties were given ample opportunity to comment on the issue of price adjustments generally throughout the proceeding, as indicated already in Commerce's *Preliminary Determination*.

32. In its explanation in the *Final Determination*, Commerce responded to the specific requests and comments of both the Canadian and domestic interested parties on this issue.[29] The respondents' requests in their case briefs that Commerce match similar dimensions, and grant either a cost- or value-based price adjustment, required Commerce to evaluate the pricing data on the record both for purposes of Commerce's cost methodology and for purposes of a price adjustment. Clearly, it would have been impossible for Commerce to consider the respondents' suggestions without carefully reviewing the effect of dimension on price, as any calculation of a value-based cost or price-based adjustment for dimension would have been necessarily dependent on the relative prices between dimensions.

33. It would be a misreading of the AD Agreement to find that at every decision point in an investigation, an investigating authority must announce each intermediate decision and provide further opportunity for comment. Under such an interpretation, investigating authorities would be effectively prevented from completing investigations within any realistic time period and manageable comment schedule. This interpretation would place a significant obstacle in the way of the rule that investigations be concluded within one year and in no case more than 18 months.[30]

97. Please comment on Canada's response to Question 22, with reference to the respondents' demonstrating a need for a price adjustment:

> **"at the beginning, of the period, in April 2000, Abitibi's average net price for No. 2 grade 2x4x8 was around [[ ]] whereas the No. 2 2x6x16 price was [[ ]]. The comparable figures for economy grade were [[ ]] for the smaller size and [[ ]] for the larger."**

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[29] *Id.*, Comment 8 (Exhibit CDA-2).

[30] AD Agreement, art. 5.10.

34. The above example does not demonstrate a need for a price adjustment. This specific example, provided to Commerce in Abitibi's case brief during the investigation, is flawed because it relies on average prices for only one month. The example says very little about the effect of different dimensions on prices, as it only represents a limited amount of price data (average prices in a single month) and it is not clear what other factors might account for the price differences. Anecdotal price differences such as these may be part of a discernible pattern indicating price differences attributable to dimensional differences, or they may merely reflect coincidental pricing differences unrelated to differences in dimensions.

35. Attached to this submission, at Exhibit US-81, is a chart plotting the actual net sales prices of Abitibi's 2x4x8 No. 2 grade and economy grade softwood lumber and 2x6x16 No. 2 grade and economy grade softwood lumber over the course of the period of investigation. These are the same products as in the example from Abitibi's case brief.

36. What the exhibit strikingly demonstrates is that a price adjustment for dimension is *not* warranted, because no pattern of consistent price differences based on dimension is discernible. The prices, within each grade, for the two different dimensions converge, diverge and overlap during the period of investigation. In stark contrast, prices of the No. 2 grade and the economy grade remain consistently distinct. This example of the distinction between the relative behavior of grade and dimension supports Commerce's differing treatment of grade and dimension (using value data to allocate certain costs to grade) in the cost methodology for the *Final Determination*.

98. The Panel notes the following statement contained in Canada's response to Question 22:

> **"Tembec suggested several alternative data sets and methodologies for computing such an adjustment (DIFMER)."**

Was the proposed methodology evaluated? What was the result of this evaluation? Please indicate where such a result can be found on the record.

37. The quoted sentence is another example of Canada's mischaracterization of the record. In fact, Tembec's "suggestions" amounted to no more than brief requests to use pricing data on the record, requests that had already been made to and rejected by Commerce in the *Preliminary Determination*. The full quote from Tembec's case brief reads as follows:

> The record is sufficient to calculate a value-based Difmer. The Department could use the relative values of the respective CONNUMs as reported in the respondents sales databases, the Publicly Available Published Information from sources such as Random Lengths, or historical value data as submitted by several respondents.

> Were the Department to think that other data were required, the Department should have requested such data.[31]

38. Commerce addressed these suggestions in the *Final Determination*.[32] With respect to the use of the respondents' own sales pricing data as a basis for calculating a price adjustment, Commerce again noted the large number of sales made outside the ordinary course of trade, as it had in the *Preliminary Determination*: To use respondents' prices "would adjust normal values back to prices already determined to be outside the ordinary course of trade, the whole reason why we would be disregarding such prices and comparing to a similar product."[33] With respect to the use of *Random Lengths* data, Commerce reiterated that the data were not complete.[34] In the *Preliminary Determination*, Commerce stated its reservations concerning the use of historical price data, indicating that it had no basis on which to determine whether or not those sales had been made in the ordinary course of trade.[35] Commerce concluded that a price adjustment was not warranted based on its evaluation of all the data on the record.[36]

99. With respect to the consistency in price patterns, the Panel has the following questions:

(a) Could DOC explain in detail the methodology it used to carry out its consistency test? Illustrate your explanation with an example from the test that was carried out in this case, including any sampling, selection of dates, etc. Did the US consider using other methodologies?

39. In deciding how to address dimensional differences in this case, Commerce had four options: 1) calculate a value-based cost across dimension, which would allow the calculation of a cost-based price adjustment for dimensional differences pursuant to Commerce's normal methodology; 2) calculate a value (price)-based adjustment for dimensional differences; 3) calculate no price adjustment; or 4) continue to use the same methodology as in the *Preliminary Determination*, and not match products across dimension.

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[31] Feb. 12, 2002, Tembec Case Brief, 37-38 (Exhibit CDA-142, pp. 163-164). The United States notes Tembec's first sentence from the quote above: "The record is sufficient to calculate a value-based Difmer." Apparently, Tembec and Canada now disagree, since Canada has attempted to submit a regression analysis of Tembec's data (Exhibit CDA-77 and Exhibit CDA-129) for the first time in this dispute. The United States continues to object to the submission of that data as a violation of Article 17.5(ii) of the AD Agreement.

[32] *Final Determination*, Comment 8 (Exhibit CDA-2).

[33] *Id.*

[34] *Id.*

[35] *Preliminary Determination,* 66 Fed. Reg. at 56066 (Exhibit CDA-11).

[36] *Final Determination*, Comment 8 (Exhibit CDA-2).

40. In order to consider the first three options, all of which were suggested by various respondents, it was necessary to examine the relative prices of the various dimensions. As indicated above, Commerce examined relative prices initially in the context of determining whether or not to calculate a value-based cost. Because Commerce was deciding which cost methodology to use, Commerce examined all prices for selected dimensions in its relative price test, even those which would eventually be found to be below cost. Commerce concluded that the random nature of the movement in relative prices between the various dimensions precluded dimension-specific prices from providing a sound basis for a value-based cost allocation.[37]

41. Using the same relative price tests, Commerce next considered the issue of whether, if it compared products across dimension, it was more appropriate to calculate a price-based adjustment for differences in dimension, or to make the comparisons with no such adjustment. Commerce examined random sales of commonly sold softwood lumber products, comparing products with relatively small dimensional differences. Commerce chose products with small dimensional differences, because its computer program was designed to match U.S. sales to the above-cost home-market sales with the smallest possible dimensional differences.

42. Examples of the tests Commerce carried out can be found in Exhibit US-76 (replacement), involving two West Fraser products, and in Exhibits US-42 and US-43, involving two Slocan products. Commerce compared the actual home market sales prices for each of the Canadian respondent companies, plotting sales over the entire period of investigation. The sales included both above- and below-cost sales, as the point of the tests was to determine whether a pattern of consistent price differences which could be linked to dimension existed.

(b) Could the US explain in detail how the results of its test were evaluated? Please explain the evaluation leading up to that conclusion.

43. As a result of the above analysis, it was apparent that no reasonable adjustment could be measured or quantified. The prices of the sampled products fluctuated relative to each other over the period of investigation, such that no adjustment could reliably account for the difference in price at any given time. The sample comparisons demonstrated that the price *differences* between the comparable products varied to a significant degree. For example, the price differences between two products were both negative and positive in varying amounts over the course of the period of investigation. The sample West Fraser comparison provided in Exhibit US-76 (replacement) illustrates such fluctuations. In looking at these comparisons, Commerce found that not only would it be unable to quantify any price adjustment, but that given the relative fluctuations, an adjustment was not warranted. For example, if the price differences between two products were negative at some points during the period and positive at others, there was no meaningful way to determine whether an adjustment between those two products should

[37] *See id.*, Comment 4, fn. 60.

be positive or negative, and therefore, there was no rational basis to conclude that an adjustment was appropriate. Ultimately Commerce concluded, after looking at all of the sample comparisons and seeing the degree of relative price fluctuations between the products most likely to be compared, that price differences could not be attributed solely to differences in dimension, particularly where those differences were minor.

44. Had respondents had other means to demonstrate a more consistent pattern of price differences, Commerce would have considered such data. The respondents had raised the issue themselves and had opportunities to present data in support of their claims.

100. The Panel notes that in Exhibit CDA-2, p. 51 it is stated that:

> **"as we stated in the Preliminary Determination, we do not believe it would be appropriate to use the respondents' prices as a basis for calculating a difmer adjustment where there were home market sales outside the ordinary course of trade during the POI for certain products involved here. To do so would adjust normal values back to prices already determined to be outside the ordinary course of trade, the whole reason why we would be disregarding such prices and comparing to a similar product."**

In response to an oral question by the Panel on 11th August, the US indicated that all the price data – including those prices which had previously found not to be cost-covering – were used for the consistency test. How does this statement reconcile with the above-quoted excerpt from the IDM?

45. The above quote refers specifically to the problem inherent in calculating a price-based adjustment in the face of a large number of sales made outside the ordinary course of trade. Under the limited-reporting criteria agreed to by all the parties, each sale in the U.S. database had an identical match in the home market database. The only time, therefore, that a U.S. sale matched to a home market sale of a similar, rather than identical product, was when 100 percent of the sales of the identical product were determined to be outside the ordinary course of trade. Therefore, Commerce was concerned that including sales outside the ordinary course of trade in the calculation of a price-based adjustment would result in establishing normal values that reflected prices of sales outside the ordinary course of trade.

46. This observation did not, however, affect the relative price test that Commerce carried out. (See Response to Question 99 above.) In looking at the movement in relative prices between dimensions, Commerce concluded that "there appears to be little, if any, difference in

home market prices that is attributable to differences in dimensions of the products compared, especially where those dimensional differences were minor."[38]

101. Please comment on Canada's Second Oral Statement, para. 56 which states that:

> **"[t]he US International Trade Commission, in the injury inquiry, determined that "lumber prices generally differ substantially depending on grades and dimensions"."**

47. The full statement of the U.S. International Trade Commission (ITC),[39] in context, shows the ITC's recognition of general conditions of competition in the market, with regard to variations in prices among types of softwood lumber. The ITC did not conduct any specific analysis with respect to the impact of dimension on price, nor did it quantify such relationship. The ITC's statement appears to be an observation about the market and not a finding of fact fundamental to its own determination of whether the U.S. industry was materially injured or threatened with material injury by reason of dumped imports.

102. In paras. 58-60 of Canada's Second Oral Statement, Canada alleged that the average dumping margin for the non-identical comparisons was 2 to 7 times higher than the average margins of dumping for identical comparisons as DOC made numerous comparisons of smaller, low-value lumber sold in the US to larger dimension, high-value lumber sold in Canada, without any adjustment for dimension. Could the US comment on this allegation that this establishes a prima facie breach of the requirement of Article 2.4?

48. Canada erroneously suggests that dimensional differences explain the differences in margins in the comparisons at issue. Canada admits, however, that the non-identical comparisons with high margins included "numerous comparisons of smaller low-value lumber."[40] However, as is clear from Exhibit US-76 (replacement) (first four pages), many of these low-value products sold in the United States could only generate high margins if they were sold for prices in the United States that were well below their cost of production.[41] The lowest price for a product that Commerce could ever use in making a fair comparison is one that is at

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[38] *Final Determination*, Comment 8 (Exhibit CDA-2).

[39] The ITC observed, in considering conditions of competition pertinent to the softwood lumber industry, that: "Softwood lumber prices generally differ substantially depending on grades and dimensions, and may differ by species and applications involved, with better grades and wider dimensions usually carrying higher prices than lower grades and narrower dimensions." U.S. International Trade Commission, Pub. No. 3426, *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928 (Preliminary) (May 2001) at 16 (Exhibit CDA-31).

[40] Canada Second Oral Statement, para. 59.

[41] The United States notes that Canada is not challenging Commerce's cost methodology here.

least equal to the cost of production, since Commerce discarded all below-cost sales prior to making price comparisons. The comparison that Commerce actually made was to the most similar product which had any sales which passed the cost test. As Exhibit US-76 shows, the prices of the most similar products were often only marginally above the cost of production. Therefore, it appears that the low-value products which generated high margins were, in fact, the most dumped products. It is for that reason, rather than the dimension of the compared product, that these low-value, low-priced U.S. sales generated high margins.

49. In addition, Canada distorts the effect of these sales on the final margin by emphasizing the number of comparisons, rather than the quantity of lumber involved in the comparisons. Taking quantity of lumber into account, even the fact that the products at issue were heavily dumped (that is, that the margins on those particular sales were high) still had a limited effect on the final margin.

50. Canada has not established a *prima facie* breach of Article 2.4 (paragraph 60 of its Second Oral Statement), simply by claiming that the margins of the nonidentical comparisons were 2 to 7 times higher than the margins of the identical comparisons. Canada's argument rests principally on its claim that all parties acknowledged that dimension affects price. However, the evidence from the record Canada has cited[42] did not prove that any amount of differences in prices were specifically attributable to differences in dimension. Commerce found that relative prices of otherwise identical products of different dimensions appeared to fluctuate randomly, making it impossible to attribute any differences in price to the dimension of lumber. Therefore, because dimension was not demonstrated to affect price comparability, Commerce was not required to make any allowance for differences in dimension under Article 2.4.

To both parties:

103. Could the parties confirm whether the percentages mentioned in para. 40 and footnote 33 of the US reply to Question 25 of the Panel relate to differences in dimension only?

51. The percentages referred to in paragraph 40 and footnote 33 of the United States First Answers to the Panel's questions relate to all differences in physical characteristics, not just dimension. However, the United States notes that the majority of the "similar" (*i.e.*, non-identical) comparisons will include different dimensions as a result of the model match methodology. Therefore, the United States does not believe that similar matches as a percentage of total comparisons (either weighted by quantity or stated as a raw number) would be significantly different if limited to dimension only.

[42] *See, e.g.,* Exhibit CDA-76; Canada's First Responses To Panel Questions, para. 87; Exhibit CDA-142.

F. ZEROING:

To the US:

109. Could the US explain how it normally calculates the dumping margin at the two stages and how it afterwards establishes the duty liability, and how this compares to the duties collected definitively.

52. In an antidumping investigation, the United States normally calculates a company's overall dumping margin using price-to-price comparisons through the following two stage process.

Stage 1

a. Relevant physical and other (*e.g.*, level of trade) characteristics are identified for sales matching purposes.

b. For each combination of relevant physical and other characteristics of products sold in the United States during the period of investigation, the identical or most comparable combination of physical and other characteristics of products sold in the home market is identified.

c. Where the combination of characteristics is not identical between the two markets and the differences have been demonstrated to affect price comparability, price adjustments are made.

d. For all sales of each combination of relevant physical and other characteristics of products sold in the United States during the period of investigation, and for each most comparable combination of characteristics of products sold in the home market, the weighted-average price per unit (including any adjustments identified in (c) above) is calculated.

e. For each set of comparable characteristics, the weighted-average normal value per unit is compared to the weighted-average export price (or constructed export price) per unit. When the weighted-average normal value exceeds the weighted-average export price, the difference is the per unit dumping margin for that comparison. When the weighted-average normal value is equal to or less than the weighted-average export price, there is no dumping margin for that comparison.

Stage 2

f. Each per unit dumping margin found in step (e) is multiplied by the volume of the export transactions used in the comparison that resulted in that dumping margin.

g. The results of step (f) are summed to create the numerator for the overall dumping margin calculation.

h. The result of step (g) is divided by the aggregate value of all export transactions utilized in step (e).

53. The result of step (h) is the overall dumping margin for a given respondent. This overall dumping margin is the provisional measures rate in a preliminary determination and the cash deposit rate (estimated dumping duty) in a final determination.

54. In the absence of an administrative review, the estimated dumping duty is definitively collected. However, if a review is requested, Commerce performs a similar calculation to that identified above in order to calculate an appropriate assessment rate for the importer and a new cash deposit rate for the producer.

55. The differences between a review and an investigation are generally found in stage 1. In a review, rather than compare period-wide weighted averages, Commerce normally compares individual export transactions to a monthly weighted average of the most comparable home market sale. The results of these comparisons are combined in the same manner as described in the stage 2 discussion above to establish a new cash deposit rate.

56. A separate stage 2 calculation is performed to establish importer-specific rates for purposes of assessing definitive duties. For these purposes, the results of the comparisons between export transactions and monthly weighted average normal values are segregated based on the importer involved in the export transaction. The stage 2 calculation is then performed on an importer-specific basis, using the importer's entered value as the denominator.

G. ABITIBI:

To the US:

113. Please comment on Exhibit CDA-176.

57. Exhibit CDA-176 provides in chart form many of Canada's unsubstantiated claims related to Commerce's COGS-based methodology for the allocation of financial costs. Specifically, Canada highlights different kinds of assets that it believes are ignored through the

COGS-based methodology. The vast majority of Abitibi's assets are considered through the COGS methodology.[43]

58. The argument for which Canada relies on in Exhibit CDA-176 is based on at least two false premises. The first false premise is that the costs of producing goods are fully reflected in accounts receivable. Financial costs relate to all the costs a company incurs in relation to the production of goods. As fully discussed in answer to question 115 below, Canada's argument falsely presumes that the only COGS that should be considered in the allocation of financial costs are those COGS captured in inventory. However, there is no evidence that Abitibi only incurs financial costs on inventory. Financial costs relate to all the costs a company incurs, including the costs incurred on producing sold goods as well as the costs incurred on producing goods in inventory. Commerce's COGS-based methodology considers both of these costs, while Canada's methodology considers only the latter. Canada's argument is also based on the false premise that Abitibi finances the full value of its assets in each year of production.[44] This extraordinary claim is contrary to normal business practices and entirely unsubstantiated. Depreciation expenses included in the COGS-based methodology which represent the cost incurred in using an asset in a given year are a reasonable, and, in fact, a more appropriate basis upon which to consider assets in the allocation of financial costs.

114. Please comment on Canada's Second Oral Statement, para. 72 which states that:

> **"Commerce: asserted in the Final Determination that it used COGS, not because it was the proper methodology for Abitibi's facts, but because it was Commerce's "established practice" and was "consistent and predictable".**"

59. Canada's statement misconstrues Commerce's determination. In fact what Commerce stated was:

> "Finally, we disagree with Abitibi that the Department should depart from its established practice of calculating financial expense ratios based on the financial expenses and cost of goods sold. . . (i.e. because of the fungibility of money). Because there is no bright-line definition in the Act of what a financial expense is or how the financial expense rate should be calculated, the Department has developed a consistent and predictable practice for calculating and allocating financial expenses."[45]

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[43] At least C$8 billion dollars of Abitibi's C$11 billion total assets were capital assets for which depreciation expenses were realized. *See* Abitibi Consolidated Financial Statement, p. 35 (Exhibit CDA-82).

[44] *See* Canada's Second Oral Statement, para. 77.

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

While predictability and consistency are important goals to which any investigating authority aspires, these were by no means the only bases for Commerce's determination. Commerce considered Abitibi's argument relating to an asset-based allocation for financial costs and rejected it. Specifically, after finding that Abitibi's argument was improperly premised on the debt of the company relating to only non-lumber producing divisions Commerce stated:

> "[T]he Department's method addresses Abitibi's concern that those activities [*i.e.*, non-lumber production] are more capital intensive. Specifically, those activities would have a higher depreciation expense on their equipment and assets. Thus, when the consolidated financial expense rate is applied to the cost of manufacturing lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense."[46]

Thus, rather than ignoring Abitibi's arguments, Commerce expressly considered them and rejected them.

To both parties:

> **115. The Panel understands Canada to argue in para. 80 of its Second Oral Statement that an asset-based methodology can capture the flow elements through inventory. Please comment.**

60. Canada's assertion in paragraph 80 of its Second Oral Statement is simply wrong. Abitibi's suggested asset-based allocation methodology does not "capture the flow elements through inventory." A company's inventory balance represents the inventory on-hand at any given point in time (generally, at the end of the year). The value of products that passed through the inventory account on the way to being sold during the year are not included in the ending inventory account – which necessarily means the inventory account does not capture the flow elements. That is, the inventory account does not capture the (usually much greater) value of products that have previously passed through inventory accounts during the year.

61. Canada's assertion also incorrectly assumes that only those costs incurred on products in inventory require financing, because sold products have produced revenues that are in turn used to pay for the cost of producing those sold goods.[47] However, similar to proceeds from a loan, proceeds from sales are entirely fungible and may be used to pay for any of the costs a company incurs (*e.g.* the purchase of fixed assets). Thus, financial costs relate to all the costs a company incurs, including the costs incurred on producing sold goods as well as the costs incurred on

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

[47] *See* Second Written Submission of Canada, para. 205 (arguing that cost of producing goods need only be financed until payment is received).

goods in inventory. Commerce's COGS-based methodology considers both of these costs, while Canada's methodology considers only the latter.

62. The balance sheet is not the correct place to look for cash flows. The correct place is the cash flows statement from Abitbi's financial statement.[48] This cash flow statement illustrates the numerous sources of cash, most significantly the net cash from operating activities, as well as the numerous uses of cash. This cash flow statement fully supports the concept of fungibility of money and that financing costs cannot be traced to one particular activity of the company, such as the acquisition of assets.

116. Please indicate the advantages/disadvantages in this context, of the two approaches (COGS; asset-based) for allocating interest expenses.

63. Allocation of financial costs based on cost of goods sold results in a reasonable allocation of financial costs to softwood lumber, consistent with Article 2 of the AD Agreement. COGS is a broad category that includes the costs associated with the production of goods in a given year, including assets through the inclusion of depreciation expenses. Because COGS is specific to a given year, it is a reasonable basis upon which to allocate financial costs specific to the same period. Total asset values, on the other hand, relate to assets that exist over multiple years and are, thus, a less appropriate basis upon which to allocate current financial costs. In addition, an allocation of a financial costs based on asset-values falsely assumes that financial costs are a function of the value of assets at a particular point in time. There is no basis for such an assumption that could grossly distort the allocation of financial expenses. Finally, financial costs relate to all the costs a company incurs, including the costs incurred on producing sold goods as well as the costs incurred on goods in inventory. Commerce's COGS-based methodology considers both of these costs, while Canada's methodology considers only the latter.

64. For the reasons set forth here and in its prior submissions, the United States believes that the COGS methodology was the more reasonable of the two methods in this case. However, the question before the Panel is not whether one methodology was more reasonable than the other. Under the Article 17.6 standard of review, the only question is whether Commerce properly established the facts and evaluated the facts in an objective and unbiased manner. The United States has demonstrated that Commerce did so and, accordingly, its application of the COGS methodology conformed with the applicable WTO obligations.

H. TEMBEC (G&A):

To the US:

[48] *See* Abitbi's Financial Statement p. 34, "Consolidated Statement of Cash Flows" (Exhibit CDA-82).

119. In its reply to question 56, the US refers to the "reliability of cost data". Based on the record, did DOC find in the context of the investigation that data submitted by Tembec for the Forest Products Group was not reliable? If so, please point to relevant documents submitted to the Panel – including cost verification reports – or provide them.

65. Commerce found that the use of Tembec's internal, division-specific books and records could have resulted in distortions.[49] Thus, reliability was a principal basis for Commerce's determination. Consistent with Article 2.2.1.1 of the AD Agreement, Commerce determined that cost data kept in accordance with GAAP were more reliable than cost data not kept in accordance with GAAP. No evidence was presented that Tembec's divisional data were kept in accordance with GAAP.[50] Moreover, the United States has provided evidence that Tembec's divisional data were not required to be kept in accordance with GAAP nor were they required to be an objective measures of costs.[51]

120. Please comment on paras. 84-88 of Canada's Second Oral Statement, specially on the last sentence of para. 85.

A. No factual basis for assertion that Tembec's lumber producing division incurred less G&A:

66. Canada has failed to provide any reasonable factual basis for its assertion that Tembec's lumber producing division incurred less G&A than its non-lumber producing divisions. For instance, in its Second Written Submission, Canada asserts that, "Tembec submitted documented evidence that its pulp and paper operations incurred significantly higher G&A expenses than its lumber operations."[52] However, Canada's basis for this assertion makes no sense. Canada's claim rests only on the fact that its Forest Products Group requires a smaller amount of Tembec's total assets while accounting for relatively more of Tembec's total sales.[53] There is no logical nexus between the productivity of assets and G&A. Moreover, the fact that Tembec internally assigned costs to various divisions in a certain manner for its own purposes does not mean that such expenses were in fact incurred by those divisions in those amounts. Therefore, there is no basis upon which to find that Tembec's lumber producing division incurred less G&A than Tembec's non-lumber producing divisions.

B. Commerce rejected Tembec's divisional data for multiple reasons:

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[49] *Final Determination*, Comment 33 (Exhibit CDA-2).

[50] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[51] *See* Exhibit US-80, p. 2.

[52] Canada Second Written Submission, para. 223.

[53] *Id.*

67. Contrary to Canada's assertion, Commerce did not reject Tembec's data simply because Commerce's standard practice was to rely on company-wide data for G&A calculations. In fact, as discussed in response to Question 119, Commerce rejected the data because they were less reliable and could have led to distortions. Moreover, basing G&A on company-wide data is consistent with the definition of general costs (*i.e.,* cost that relate to a company as a whole) while basing G&A on divisional data is not.

C. Commerce used Tembec's divisional data in the dumping calculation for an extremely limited purpose:

68. Article 2 of the AD Agreement requires an investigating authority to consider only books and records kept in accordance with GAAP. No evidence was presented that Tembec's divisional data were kept in accordance with GAAP.[54] Moreover, the United States has provided evidence that Tembec's divisional data were not required to be kept in accordance with GAAP.[55] Thus, Commerce was under no obligation to consider them.

69. In fact, whenever possible Commerce relied on audited amounts for the dumping calculation. To the extent that Tembec's divisional data were used for an extremely limited purpose (*i.e.*, establishing packaging costs to be removed from the G&A ratio), Commerce relied on this data because audited, GAAP consistent data were not available.

D. Specialized accounting standards are irrelevant to the Panel's inquiry:

70. Canada argues that based on the Federal Acquisition Regulation ("FAR"), Commerce's determination that G&A relates to a company as a whole is unreasonable.[56] However, the FAR standards are specialized accounting rules that relate to government procurement and are not equivalent to generally accepted accounting principles. Commerce's determination that general costs relate to a company as a whole is a reasonable interpretation of the term "general costs" found in Article 2 of the AD Agreement.[57] Moreover, as discussed above, Tembec has failed to provide any credible evidence that its lumber division incurred less G&A than its other divisions.[58]

E. Tembec's divisional statements are not audited and have not been shown to be in accordance with GAAP:

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[54] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[55] *See* Exhibit US-80, p. 2.

[56] *See, e.g.* Canada Second Oral Statement, para. 86.

[57] *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).

[58] *See supra* answer to question 120(A).

71. Canada argues that the divisional data are audited and reliable. However, the Auditor's Statement clearly indicates that the portion of Tembec's consolidated balance sheet that was audited does not include the divisional information.[59] Moreover, the United States has shown that under Canadian accounting practices, divisional data are not meant to be an objective measure of costs. Rather, they are meant to enable financial statement users to see the business through the eyes of the management.[60] Finally, the United States has shown that divisional data in Canada do not have to be kept in accordance with Canadian GAAP.[61]

To both parties:

121. Was the "internal accounting methodology" referred to in Comment 33, p. 105, of the Memorandum of 21 March 2002 an allocation methodology "historically utilized by the exporter"? Please refer to the record.

72. Tembec presented no evidence of its historical allocation. In any event, under Article 2.2.1.1 an investigating authority is obligated to consider historical allocations only when such historical allocations are shown to be in accordance with GAAP and to be not distortive. No evidence was presented that Tembec's divisional data were kept in accordance with GAAP.[62] Moreover, the United States has provided evidence that Tembec's divisional data were not required to be kept in accordance with GAAP nor were they required to be objective measure of costs.[63] Thus, even assuming, *arguendo*, that Tembec has historically allocated costs between divisions in the same manner, Commerce was under no obligation to consider Tembec's division-specific G&A data. While historical use may indicate some consistency of compilation or presentation of information over time, historical use alone cannot impart reliability or consistency with GAAP.

I. WEYERHAEUSER:

To the US:

123. It is stated in para. 84 of the US Second Written Submission that:

"[g]eneral expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole. They are not specific to one or another product

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[59] *See* Tembec's Annual Report, "Auditor's Report,"p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[60] *See* Exhibit US-80, p. 2.

[61] *See id.*

[62] *See* Tembec's Annual Report, "Auditor's Report," p. 34 (Exhibit US-12) (stating that only the company-wide statements were audited).

[63] *See* Exhibit US-80, p. 2.

line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable. This would render meaningless the requirement of Article 2.2 that "a reasonable amount for administrative, selling and general costs" be included in a company's cost calculation."

In its practice, how does DOC treat G&A costs which have been demonstrated to it not to "pertain[] to production and sales (…) of the like product" in accordance to the chapeau of Article 2.2.2? Please provide a recent example of that practice.

73. As an initial matter, the United States disagrees with the proposition that G&A costs may pertain more or less to a product. G&A, by definition, relates to a company as whole.[64] In its Second Written Submission Canada agrees that G&A does not pertain to products.[65]

74. Commerce does have, however, a practice whereby it excludes G&A that does not pertain to a company from that company's G&A calculation. More specifically and as discussed in the United States' Second Oral Statement,[66] Commerce's administrative practice is to include a portion of a parent company's G&A costs in a producer's G&A.[67] However, if it is shown that the parent company does not perform any functions on behalf of the subsidiary, Commerce considers that parent company's G&A to not pertain to the subsidiary company and does not allocate any of the parent company's G&A to the subsidiary. An example of this practice is the *Brass Sheet and Strip* determination cited by Canada.[68] In fact, Canada has not challenged Commerce's practice and agrees that a portion of the parent company's G&A, including G&A listed separately on the parent company's financial statement, should be included in Weyerhaeuser Canada's G&A.[69]

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[64] *See* Joel G. Siegel, Jae K. Shim, *Dictionary of Accounting Terms* (Barrons Educational Services, Inc. 2nd ed. 1995) (Exhibit US-47).

[65] *See* Canada Second Written Submission, para. 166. ("'Administrative, selling and general costs' . . are costs that are not directly attributable to the product under investigation or any particular product.")

[66] United States Second Oral Statement, para. 73.

[67] *See Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 49,622 and accompanying Issue and Decision Memorandum at Comment 7 (Sept. 28, 2001) (stating Commerce's practice is to "calculate G&A expenses based on the company-specific unconsolidated financial statements of the producing entity ...we also include in the company's G&A an amount for administrative services performed on the company's behalf by it parent.") (Exhibit US-82).

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

[69] *See* Canada Second Written Submission, para. 230, where Canada concedes that other separately listed items on the parent company's financial statement constituted general costs and were properly included in Weyerhaeuser Canada's G&A ratio. *See also* United States Second Written Submission, para. 89 footnote 149.

124. It is stated on page 51 of the year 2000 annual report of Weyerhaeuser Company (Exhibit CDA-166) that:

> **"[t]his is a claims-based settlement, which means that the claims will be paid as submitted over a nine-year period with no maximum or minimum amount."**

In determining the amount attributable to the period of investigation [POI], did DOC take into account that the claims would be paid as submitted over a nine-year period with no maximum or minimum amount? Or, did DOC allocate the whole amount booked by the company to the POI? Please explain.

75. Consistent with Weyerhaeuser's treatment of the entire litigation cost as a period expense for fiscal year 2000 in its own books and records, Commerce included the entire litigation cost in its G&A ratio. In other words, Weyerhaeuser recognized the entire litigation cost in the year in which it was incurred (*i.e.*, the POI). Weyerhaeuser never argued before Commerce that this litigation cost should be treated as anything other than a period cost. (*E.g.*, Weyerhaeuser never argued that the settlement cost should be amortized over several years.) Instead, it argued only that the entire cost should be excluded from the allocation of G&A to softwood lumber production.

125. Please comment on the following portion of para. 229 of Canada's Second Written Statement:

> **"Commerce agreed that it was proper to exclude the expense from parent company G&A in its preliminary determination".**

76. Commerce permitted the exclusion of the settlement cost for the *Preliminary Determination* because it was only at verification that Commerce became cognizant of the fact that Weyerhaeuser had excluded the settlement cost from the parent company's reported G&A. In an antidumping investigation verification occurs after the preliminary determination. As discussed in the *Final Determination*, once Commerce considered the settlement cost it determined that the settlement cost was properly considered part of the parent company's G&A and allocated a portion of it to softwood lumber.[70]

126. Please comment on the following portion of para. 93 of Canada's Second Oral Statement:

> **"the United States never responds in any of its submissions to the fact that Commerce's traditional practice has been to exclude unrelated parent**

[70] *See Final Determination*, Comment 48b (Exhibit CDA-2).

company G&A, finding on numerous occasions that not all G&A is fungible."

77. It is Commerce's standard practice to exclude a parent company's G&A if evidence is presented that the parent company did not perform any functions on behalf of the subsidiary,[71] as was the case in the *Brass Sheet and Strip* determination cited by Canada.[72] However, this case and Commerce's practice when a parent company performs no functions on behalf of a subsidiary are irrelevant to Weyerhaeuser Canada's G&A calculation, because it is uncontested that the parent company performed functions on behalf of Weyerhaeuser Canada. In any event, Canada has not objected to the inclusion of a portion of the parent company's G&A in Weyerhaeuser Canada's G&A.[73] Thus, Canada has not challenged the fungibility of the parent company's G&A in relation to Weyerhaeuser Canada. Instead Canada has challenged only the inclusion of a portion of the litigation cost in Weyerhaeuser Canada's G&A.

127. Please comment on the following extract of para. 90 of Canada's Second Oral Statement:

"Cost Verification Exhibit 26 breaks down the elements of Weyerhaeuser US G&A expense, including a line item for Law of [[ ]]. This represented the company's general legal expenses. The [[ ]] hardboard siding expense is not listed." [footnote excluded]

78. The proper characterization of the hardboard siding litigation expense does not depend on the break-out of that expense by Weyerhaeuser US in its books and records. What is relevant is the inherent nature of the expense. A company usually breaks out particular costs because they are significant and require further explanation,[74] as was the case with the litigation cost on Weyerhaeuser's consolidated financial statement. However, if a cost item is general in nature, listing it separately from the generic G&A line item does not change its general nature. In point of fact, Weyerhaeuser listed another category of general costs, "integration and closure costs," separately on its financial statement. Canada does not challenge the inclusion of these "integration and closure costs" in the G&A ratio for Weyerhaeuser Canada. Similarly,

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[71] *See supra* answer to question 123.

[72] *See Brass Sheet and Strip from Canada; Final Results of Antidumping Duty and Administrative Review*, 61 Fed. Reg. 46618, 46619 (September 4, 1996). (Exhibit CDA-104); *see also* Canada Second Written Submission, para. 230, where Canada concedes that other separately listed items on the parent company's financial statement constituted general costs are were properly included in Weyerhaeuser Canada's G&A ratio; *see also* United States Second Written Submission, para. 89 footnote 149.

[73] *See* Canada's Second Written Submission, para. 230 explaining which portion of the parent company's G&A it did not object to Commerce including in Weyerhaeuser Canada's G&A calculation.

[74] *See* Susan Weiss Budak, Patrick R. Delaney, Barry J. Epstein, and Ralph Nach, Wiley GAAP 2002: Interpretation and Application of Generally Accepted Accounting Principles 2000, p. 76 (John Wiley & Sons 2001). (Exhibit US-83).

Commerce's inclusion of a portion of the litigation costs in Weyerhaeuser Canada's G&A was reasonable.

J. TEMBEC (BY-PRODUCT REVENUE):

To the US:

> **128. How was the arm's length test applied? Canada states in para. 235 of its First Written Submission that:**
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> > **"[w]here the average price charged to affiliated purchasers was higher than the average price charged to unaffiliated purchasers, DOC concluded that a respondent had sold chips to its affiliated purchasers at inflated, non-market prices. In these situations, DOC disregarded the revenues in a respondent's books and records for its sales to affiliated purchasers and re-valued those sales based on the lower price that the respondent charged to unaffiliated purchasers."**
>
> **Does Canada's assertion accurately reflect DOC's practice as applied in the softwood lumber anti-dumping investigation? In particular, did DOC disregard West Fraser's British Columbia revenues from sales to affiliated parties on the ground that they were made at "inflated, non-market prices"? Please explain.**

79. This question appears under the heading "Tembec (By-Product Revenue)." However, Commerce did not apply an arm's length analysis with respect to Tembec's by-product revenues. As explained in the *Final Determination*, with respect to Tembec, the wood chip transactions were between divisions of the same legal entity. Commerce's practice with respect to transactions within the same legal entity is to use the actual cost of the input.[75] By-products, by their nature, have no directly attributable costs. Thus, Commerce first looked to Tembec's books and records, as required by the AD Agreement, to determine a reasonable value for wood chips. Commerce then compared Tembec's internal values with Tembec's market-based wood chip sales prices. Just as internal costs are generally lower than market prices, in light of the existence of profit, so, too, are by-product offsets to cost calculations generally lower than the market value for a by-product. Commerce observed that Tembec's transfer prices between divisions were lower than its sales prices to unaffiliated parties. It therefore determined that the use of the lower prices was a reasonable estimate of cost for the by-product.

80. It is important to note that, in the case of Tembec, Commerce examined unaffiliated market prices not for purposes of applying an arm's length analysis but as a starting point in

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[75] *Final Determination*, Comment 11 at 60 (Exhibit CDA-2).

determining the cost of the wood chips. Commerce's approach was consistent with the preference that Article 2.2.1.1 of the AD Agreement expresses for reliance on a producer's own books and records.

81. With regard to West Fraser, Canada's statement in paragraph 235 of its First Written Submission accurately reflects Commerce's general application of the arm's length test. However, it is important to note that Commerce does not apply this test blindly, but will review the prices reported in the books and records of a respondent to determine if there are particular factors which justify the use of higher affiliated transaction values. In this case, Commerce disregarded West Fraser's B.C. revenues from sales to affiliated parties where the average price charged to affiliated purchasers was higher than the average price at which wood chips were sold to unaffiliated purchasers. It is important to note that Commerce's arm's length test – which Canada does not challenge *per se*[76] – is premised on the recognition that affiliated party transactions are inherently unreliable and are, therefore, subject to searching scrutiny. In determining whether transactions between affiliated parties occurred at arm's length prices, Commerce determined that West Fraser's affiliated sales prices were higher than its unaffiliated sales prices.[77] Consistent with this finding, Commerce disregarded the affiliated prices and revalued West Fraser's chip sales based on the unaffiliated sales prices.

82. The AD Agreement expresses a preference for calculating costs based on a party's books and records, unless those data do not reasonably reflect the costs associated with the production and sale of the product under consideration. In applying its arm's length test to West Fraser's affiliated chip sales, Commerce determined that those sales did not reasonably reflect the costs associated with the production and sale of the product under consideration. Therefore, consistent with Article 2.2.1.1, Commerce revalued those chip sales based on unaffiliated sales prices.

129. Canada draws an analogy between the present case and the finding in para. 148 of the AB in US - Hot-Rolled Steel that "discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation." Please comment.

83. Canada's analogy to the Appellate Body's finding in *United States-Hot-Rolled Steel* is inapposite. At issue in *United States-Hot-Rolled Steel* was Commerce's practice for excluding from its calculation of normal value affiliated party sales determined to be outside the ordinary course of trade. Under that practice, Commerce automatically excluded from the normal value calculation sales to affiliated parties at prices that are less than 99.5 percent of a weighted average of sale prices to unaffiliated parties. Japan objected to that practice, in part because no

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[76] *See, e.g.,* Canada's First Written Submission, para. 243.

[77] This analysis is reflected in DOC Memorandum on West Fraser's Cost of Production and Constructed Value Calculation Adjustments for the *Final Determination*, at 2 and attach. 1 (Exhibit CDA-108).

similar, automatic exclusion applied to sales to affiliated parties at prices that were greater than 100.5 percent of a weighted average of sale prices to unaffiliated parties. In other words, Japan objected to the lack of symmetry between the treatment of low-priced sales between affiliates and the treatment of high-priced sales between affiliates.

84. In contrast, the wood chip offset issues in the present dispute do not raise a symmetry question. The proposition that even-handedness requires similar situations to be treated similarly does not mean that Commerce's method for evaluating wood chip sales to affiliated customers must be identical to its method for evaluating wood chip transfers between two divisions of the same company. That is because sales to affiliates and transfers between divisions are not similar transactions. They are fundamentally different types of transactions. Even-handedness does not require that they be evaluated in an identical way.

85. As the United States has explained in prior submissions, sales to affiliates are fundamentally different from transfers between divisions. In the case of sales to affiliated companies, the question is whether those sales reflect a true market price, unaffected by the affiliation between the buyer and seller. In the case of internal transfer prices between divisions, the question is whether the internal transfer price used by the company reasonably reflects the company's cost of producing the by-product being used as an offset. In the softwood lumber investigation, Commerce did calculate wood chip offsets in "an even-handed way that is fair to all parties affected." However, contrary to Canada's suggestion, even-handedness did not require it to apply the same methodology to fundamentally different factual situations.

86. It is also worth noting that, where an arm's length test was applied, as in the case of West Fraser, Canada has not challenged *per se* Commerce's arm's length test, only aspects of its application with respect to the wood chip by-product issues. In its First Written Submission, Canada stated that it:

> does not dispute that a determination of non-arm's length pricing could support a determination that books and records containing such prices might not reasonably reflect the costs associated with the production and sale of the product under consideration. In such an instance, the investigating authority might legitimately resort to alternative data and disregard the books and records.[78]

Indeed, Canada has not objected to the use of the arm's length test as it was applied by Commerce to other respondents. Its objection with respect to West Fraser is simply that "an unbiased and objective investigating authority could not have found that West Fraser's recorded chip sales to affiliated purchasers were made at inflated, non-market prices."[79] Commerce's

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[78] Canada First Written Submission, para. 243.

[79] *Id.* at para. 244.

application of an arm's length analysis in reviewing West Fraser's affiliated wood chip sales was exercised in an even-handed way that was fair to the party affected.

130. Please comment on para. 107 of Canada's Second Oral Statement.

87. The accounting text that Canada cites for the proposition that transactions between affiliated entities should be evaluated in the same manner as transactions between divisions of the same entity does not support its argument. In fact, the text is silent on this issue. Its silence does not amount to a recognition of a prohibition on different methods of evaluating sales to affiliates versus inter-divisional transfers.

88. Moreover, the accounting text cited by Canada at para. 107 of its Second Oral Statement actually supports the U.S. argument that the difference between inter-divisional transfer prices and sales prices to unaffiliated entities is a function of profit, or "gain." The text states that "[a]ny differences between actual selling prices and prices used in by-product costing are treated as a gain or loss."[80] As the United States has explained, the AD Agreement requires that Commerce determine whether reported costs reasonably reflect costs of production. Sales of merchandise in the market typically include not only actual costs of production, but an additional amount for profit. Thus, while a company may assign a value to a by-product, it generally will sell that by-product for a higher amount to unaffiliated purchasers. The accounting literature cited by Canada confirms the very idea that Canada has rejected: that a company may derive a "gain" from the sale of a by-product in the marketplace, much the same way it would derive "profit" for the sale of factors of production in the marketplace.

K. WEST FRASER:

To the US:

133. With respect to West Fraser's McBride mill, the following statement is contained in p. 23 of DOC's verification report (Exhibit CDA-110):

> **"[c]ompany officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April and May 2000. They explained that the sales value of chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price."**

Did DOC consider the above findings in the context of the investigation? If so, how. Please direct the Panel to the record. The Panel notes that in at least two instances

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[80] W.J. Morse and H.P. Roth, *Cost Accounting: Processing, Evaluating, and Using Cost Data*, 3rd ed. (Reading, Mass.: Addison-Wesley, 1986), at 157-158. (Exhibit CDA-175.)

DOC – that is, with respect to Canfor and Tembec – decided not to use certain price data for sales to unaffiliated parties. How did those situations relating to Canfor and Tembec differ, if at all, from that of the McBride mill?

89. Regarding whether Commerce considered the findings of its verification report, three points are worth noting: 1) West Fraser never argued that its unaffiliated McBride mill sales were made under circumstances that caused them not to reasonably reflect the market values for West Fraser's chips, and in fact, Commerce found at verification that the McBride mills sales reasonably reflected a market value for wood chips;[81] 2) even if West Fraser had made this claim in the investigation, there is nothing about the nature of the long-term contract that would cause the transactions to be "noncommercial," given that long-term contracts are common commercial instruments;[82] and 3) Commerce did not rely solely on the McBride mill sales in its analysis; it also considered the Pacific Island Mill transactions, which were market-based transactions.[83]

90. The Panel refers to the treatment of sales to unaffiliated parties by Tembec and Canfor. With respect to Tembec, all related-party sales were between divisions of the same legal entity.[84] Comparing Tembec's internal transfer prices for chips in British Columbia with Tembec's B.C. sales of chips to unaffiliated parties, Commerce determined that the internal transfer prices were reasonable surrogates for wood chip costs.[85] For Tembec's Quebec and Ontario internal chip sales, there was no usable market price data to evaluate whether internal transfer prices were preferential. Thus, Commerce applied the company-specific finding for Tembec's B.C. chip sales, *i.e.*, that the internal transfer prices for chips were not preferential, to the company's Quebec and Ontario chip sales and determined that Tembec's internal transfer prices for chips were not preferential and could be relied upon for the final determination. In other words, the results of the analysis on Tembec's B.C. chip sales were sufficiently reliable that they could be applied to the company's chip sales in other provinces. There was no claim that any contractual arrangements influenced the price of Tembec's chip sales to either affiliated or unaffiliated parties. For these reasons, the facts regarding Tembec are different from those involving West Fraser.

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[81] *See* U.S. First Written Submission, para. 224, and record citations therein. Notably, Canada stresses the importance of the alleged noncommercial nature of West Fraser's McBride Mill contracts in front of the Panel, but during the investigation, West Fraser never even placed the contract on the record. The commercial/noncommercial status of the contract was never called into question by West Fraser, so it was not an issue specifically addressed by Commerce.

[82] U.S. Opening Statement at Second Substantive Meeting, para. 79.

[83] *See, e.g.,* West Fraser Cost Verification Exhibit C5, WF-Cost 007503 (Exhibit CDA-106); U.S. First Written Submission, para. 219; U.S. Answers to Panel's 19 June 2003 Questions, para. 71;

[84] *See* DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (January 29, 2002) (Exhibit CDA-112 - Contains Business Confidential Information).

[85] *Final Determination*, Comment 11 at 61 (Exhibit CDA-2).

91. With respect to Canfor, Commerce determined that its sales of wood chips from Alberta sawmills to unaffiliated purchasers were distorted due to so-called "contractual arrangements" that did not reflect any market price during the relevant period. The exact nature of Canfor's "contractual arrangements" in Alberta is business confidential information that cannot be disclosed in this proceeding, but it is a completely different factual situation from West Fraser's contract between the McBride mill and certain unaffiliated purchasers.[86] Thus, there was no reliable basis upon which to perform the arm's-length test for Canfor's chip sales in Alberta. In British Columbia, Canfor's sawmills made no sales of chips to unaffiliated parties.[87] With no unaffiliated chip sales in British Columbia, and no reliable results from Alberta that could be applied to British Columbia (different from Tembec's situation), Commerce was left with one option – comparing Canfor's chip sales to affiliates in British Columbia with the weighted-average market price of other respondents' unaffiliated chip sales in British Columbia. The result was that Canfor's affiliated chip sales were found to be at arm's-length prices.

92. These wood chips sales situations of Tembec and Canfor were different from the situation of West Fraser. First, West Fraser was the only one of these three respondents that had chip sales to both affiliated parties and unaffiliated parties in all provinces in which it had chip sales. Second, neither Canfor nor Tembec had contractual issues similar to West Fraser's. There were no contractual issues associated with Tembec's chip sales, and the contractual issues raised in connection with Canfor's chip sales were completely different factually from West Fraser's issues. Third, although Canada attempts to characterize West Fraser's unaffiliated B.C. chip sales as *de minimis*, those sales were actually sizable.[88] Accordingly, West Fraser was differently situated than Canfor and Tembec. In light of the differences, it was appropriate for Commerce to apply a different evaluation to West Fraser's wood chip offset than it applied to Canfor or Tembec's offset.

L. SLOCAN:

To the US:

137. It is stated in para. 319 of Canada's Second Written Submission that:

"Commerce did not include Slocan's futures trading profits anywhere in its preliminary determination."

With respect to the Final Determination, it is stated in para. 327 of Canada's Second Written Submission that:

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[86] See U.S. First Written Submission, para. 255, note 268.

[87] *Id*. at 60.

[88] *See* U.S. First Written Submission, para. 219.

"Commerce's Final Determination left Slocan's futures revenue unaccounted-for and excluded from the margin calculation."

Does the US agree with the above statements and other statements to that effect, contained in Canada's Second Written Submission?

93. While the quoted statements from paragraphs 319 and 327 of Canada's Second Written Submission are factually correct, they are incomplete and misleading.

94. Contrary to Canada's suggestion, throughout the course of the investigation, Commerce gave full and fair consideration to the adjustments that Slocan sought for its futures contract revenues. Moreover, contrary to Canada's suggestion, there was no requirement that these amounts be included in the margin calculation absent a demonstration of effect on price comparability, as provided in Article 2.4 of the AD Agreement.

95. As the panel in *Egypt-Rebar* stated, the burden of substantiating a claim for an adjustment rests with the party seeking the adjustment — here, Slocan — not with the investigating authority.[89] The respondent has an affirmative obligation both to assert and to justify the information and arguments required to prove its claims. Not only is this what Article 2.4 provides, it also makes sense, inasmuch as the relevant information will be in the respondent's hands. The investigating authority has no duty to explore or grant adjustments that have neither been requested nor demonstrated by the respondent.

96. Slocan sought two alternative adjustments for its futures contract revenues. First, it asked to have the revenues treated as an offset to direct selling expenses. Alternatively, it asked to have them treated as an offset to financing expenses. Slocan did not request nor did it demonstrate any further alternative basis for an adjustment.

97. Once Commerce evaluated and properly rejected the two bases for adjustment that Slocan requested, Commerce had satisfied its obligation to consider an adjustment. Any other conclusion suggests that respondent companies are free to make general claims of entitlement to adjustment with minimal explanation of the data and that it is the obligation of an investigating authority to find the appropriate basis for adjustment, even though the explanation may be incomplete, unclear, or contradictory. The AD Agreement does not require such an illogical result. The only requirement under Article 2.4 is that due allowance be made, "in each case on its merits," where the difference is "demonstrated" to affect price comparability.[90]

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[89] *Egypt-Rebar*, paras. 7.381, 7.387 (claim for adjustment for credit cost not properly raised at agency level).

[90] *See* U.S. First Answers to Panel Questions, para 137.

138. Please comment on the following statement contained in Exhibit CDA-123, page III.55:

> **"[f]utures hedging contracts are not direct selling expenses/income, as they are not directly related to sales. They are indirect selling expense/income, not a financing expense/income, and as such also are not proper as a set-off for interest expenses included in production costs."**

98. Exhibit CDA-123 is an excerpt from the Response Brief of the Investigating Authority to the NAFTA panel considering Commerce's lumber antidumping investigation. The quoted statement was Commerce's response to Slocan's submission to the NAFTA Panel, in which Slocan stated *for the first time* that the futures profits might be an indirect selling expense/income. Slocan had made a *post hoc* argument to which Commerce responded, as quoted above. Commerce's statement correctly summarizes its post-proceeding understanding of how Slocan could have presented (but did not in fact present) its request for adjustment. However, that observation — made in litigation subsequent to the investigation — has no bearing on the question before this Panel. The sole question before this Panel is whether Commerce's rejection of Slocan's two alternative bases for its requested adjustment was based on a proper establishment of the facts and an unbiased and objective evaluation of those facts. The United States notes, moreover, that Slocan's only submission during the investigation regarding any possible indirect selling expenses was, in fact, its unambiguous assertion in its July 23, 2001, Questionnaire Response that it had incurred *no* indirect selling expenses in the United States.[91]

139. Please comment on para. 192 of Canada's replies to Question 77 of the Panel:

> **"[t]he prices that it offers on other sales are thus different than they would have been absent the safety net that hedging contracts provide, [sic] Thus, hedging activity, by definition, affects prices for all sales in the market, not only those made through the CME."**

99. Canada's argument is *post hoc* rationalizations. Slocan made no such argument during the investigation to support its requested adjustment.

100. As the United States stated in response to oral questions at the Second Panel Meeting, the total evidence on this issue consisted of two general sentences in Slocan's Section C Questionnaire Response, plus a brochure on hedging that was provided at verification. This evidence failed to demonstrate an effect on price comparability necessary to support an

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

adjustment. There is no *per se* rule — such as Canada advocates — that futures trading by definition affects all sales in the market.

101. In its July 23, 2001 Questionnaire Response, Slocan unambiguously stated that the hedging profits should be treated as an offset to direct selling expenses in the U.S. market, as an adjustment for differences in the conditions and terms of sale.[92] It stated:

> Sometimes Slocan will sell its short positions and take the loss or profit between the sale and strike prices. These expenses or revenues are linked to Slocan's sales in the United States and so are being reported as direct selling expenses.[93]

Slocan failed to explain the link between these expenses or revenues and any particular U.S. sales of lumber. It also said nothing about how its contracts might affect prices to U.S. customers. The facts failed to demonstrate that these profits should be considered an offset to direct selling expenses. They were not directly related to particular softwood lumber sales.[94]

102. Canada has engaged in a *post hoc*, theoretical exercise by now asserting: "Once Slocan demonstrated that it engaged in futures trading activity, which necessarily affects price comparability, Article 2.4 required Commerce to make an adjustment."[95] This is a new assertion made by Canada, which has no basis in Article 2.4 or in the investigation record. Slocan introduced no evidence to demonstrate — as Canada now claims — that "hedging through futures trading activity affects all sales in a particular market."[96]

103. The record evidence submitted by Slocan states that: "The purpose of hedging is *to reduce the risk of holding lumber inventory*."[97] The *Random Lengths* brochure on hedging (supplied by Slocan at verification) also states that when a company hedges, it can "*reduce the risk of holding or acquiring inventory* through taking an equal and opposite position in the Random Length Lumber futures market."[98]

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[92] Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, July 23, 2001, page C35-37 (Exhibit US-71). In the same submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.

[93] *Id.*, p. C-35-36 (Exhibit US-71).

[94] *See* Slocan Cost Verification Report at 26 (Exhibit CDA-118); *see also Final Determination*, Comment 21 (Exhibit CDA-2).

[95] Canada Second Written Submission, para. 336; *see also* notes 356 and 363.

[96] Canada Second Written Submission, note 356.

[97] Sales Verification Report of January 28, 2002, Exhibit 21 at VE 02361, Exhibit CDA-119.

[98] Sales Verification Report of January 28, 2002, Exhibit 21, Random Lengths - An Introductory Hedge Guide, at VE 02364, Exhibit CDA-119.

104. A demonstration that hedging is used to reduce the risk of holding inventory is *not* a demonstration of an effect on all prices in the market. Slocan's evidence does not demonstrate the *per se* effect on price comparability asserted by Canada. Nor does it demonstrate that Slocan's futures contracts (which did not result in delivery) affected any lumber prices included in our analysis. Contracts that resulted in actual delivery to Slocan's customers (in fact, the only sales for which prices were affected) were included as sales in the calculation of Slocan's dumping margin. But the profits earned on contracts that were sold and did not result in lumber delivery are not a proper basis for adjustments for terms and conditions of sale. Accordingly, Commerce appropriately rejected Slocan's requested adjustment.