

**BEFORE THE
WORLD TRADE ORGANIZATION**

***United States - Final Dumping Determination
On Softwood Lumber from Canada***

WT/DS264

**EXECUTIVE SUMMARY OF THE
SECOND WRITTEN SUBMISSION OF THE
UNITED STATES**

July 18, 2003

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

Initiation

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

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

4. Under Article 5.3, Canada disputes the sufficiency of the evidence supporting initiation and argues that the Weldwood data would have provided a superior basis for deciding whether to initiate.¹ However, the Weldwood data necessarily would have represented the experience of only a single company, rather than the diverse cost and price data actually set forth in the application. But, even assuming, *arguendo*, that Canada's assessment in this respect is correct, it has no bearing on the question before this Panel.

5. The evidence that Commerce relied upon to initiate included data from the lumber industry publication *Random Lengths*. Canada incorrectly asserts that *Random Lengths* "commingles" Canadian and U.S. data. Its assertion that the *Random Lengths* data are "not actual transaction prices" but "informal estimates" is also incorrect. Moreover, Canada's questioning of the reliability of *Random Lengths* data is contradicted by its own reliance on that very same source.²

6. Canada also argues that the application demonstrated dumping of only a limited number

¹ See, e.g., Canada First Written Submission, paras. 86, 95, 99; Canada's First Responses to Panel Questions, paras. 45-49.

² Canada's First Responses to Panel Questions, paras. 6-7.

of categories of lumber.³ Canada’s argument assumes the correctness of its own claim regarding the product under consideration; that is, it assumes that each “category” of softwood lumber in fact constitutes a separate “product under consideration” and thus requires a separate demonstration of dumping for purposes of initiation. However, Canada’s product-under-consideration argument has no basis in the AD Agreement.

7. Finally, Canada argues that Commerce’s initiation was tainted by a lack of evidence of home market sale prices in British Columbia.⁴ The application contained evidence of home market sales below cost in Quebec. This provided a basis for using constructed value to establish normal value. The AD Agreement does not require investigating authorities to conduct separate cost tests on different markets within “the domestic market of the exporting country.”

8. Commerce’s establishment of the facts with respect to softwood lumber costs was also proper. Canada’s claim that the application “fail[ed] to have costs of significant or representative producers” is incorrect for two reasons.⁵ First, with respect to the vast majority of costs, data from U.S. mills were used only to provide production factors, which were then valued using data Canada does not dispute are representative of Canadian costs of production.⁶ Second, the U.S. mills whose data were used in the cost model were themselves significant and representative producers of softwood lumber.

9. Finally, Canada’s allegation that “Commerce relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces”⁷ is demonstrably false. The cited affidavit provides *separate* per-MBF freight rates for shipment to Boston from four regions, one of which is the Maritime Provinces.⁸

Product Under Consideration

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

11. This is underscored by its June 30 response to a question on this very subject. Canada first attempts to parse the phrase “characteristics closely resembling” in Article 2.6. It concludes that the phrase “must mean that the essential, distinctive traits of one product must be very nearly

³ *Id.*, paras. 28-30.

⁴ *See, e.g., id.*, para. 61.

⁵ *Id.*, paras. 34-35.

⁶ *See* U.S. First Written Submission, paras. 53-54 and exhibits cited therein.

⁷ Canada’s First Responses to Panel Questions, para. 40.

⁸ Petition Exhibit VI.C-9 (Exhibit CDA-41), at para. 4

identical to the essential, distinctive traits of the other product.”⁹ In fact, this conclusion is not borne out by the definitions of key terms Canada cites.

12. Canada then proceeds to posit a problem that might occur if the product under consideration in a given case were defined too broadly, using a hypothetical case comprising automobiles and bicycles.¹⁰ There are several problems with this hypothetical. First, whatever the appropriate analysis of an investigation that might treat automobiles and bicycles as a single product under consideration would be, that is not the case presented here. Second, Canada’s own analysis of its hypothetical begs the question of how Article 2.6 directs an authority to determine the appropriate number of products under consideration in a given case. Third, Canada fails to consider the implications that a narrow definition of product under consideration would have on the very same standing and injury determinations to which it alludes.

Due Allowance for Dimensional Characteristics

13. Commerce acted consistently with Article 2.4 of the AD Agreement in its consideration of the dimensional characteristics of softwood lumber. Canada contends that the respondent companies had no notice of Commerce’s intent to consider whether or not a price adjustment should be granted for dimensional differences.¹¹ Its claim of procedural unfairness – specifically, that the United States violated Article 6 of the AD Agreement – is a new claim that falls outside the Panel’s terms of reference.

14. In its response to the Panel’s questions, Canada provided a seven-page consultant’s report (contained in Exhibit CDA-129) to explain the regression analysis contained in Exhibit CDA-77. Canada’s reason for presenting the regression analysis (and the consultant’s background report) for the first time in this dispute, instead of during the investigation, is that “no one reasonably doubted that the inclusion of dimension for model matching would not mean its inclusion in adjustments for physical differences.”¹² Canada’s position is belied by the record. The parties’ submissions during the investigation evidence their awareness that whether or not an adjustment would be made for differences in dimension was an open question.

15. Canada misinterprets Commerce’s inclusion of physical characteristics in the product matching methodology as an acknowledgment that dimensional differences had an effect on price comparability, requiring “due allowance” under Article 2.4.¹³ However, Commerce cannot be deemed to have concluded that dimension affected price comparability simply by having made a product matching determination. Commerce accepted that dimensional characteristics were

⁹ Canada’s First Responses to Panel Questions, para. 64.

¹⁰ *Id.*, para. 65.

¹¹ *Id.*, paras. 4, 5.

¹² *Id.*, para. 4.

¹³ *Id.*, para. 86.

significant for product matching purposes, at the behest of the parties, but without scrutiny of the price or cost data specifically relevant to dimension. Even assuming *arguendo*, that Commerce implicitly acknowledged that dimension affects price comparability, it made the due allowances that Article 2.4 requires by comparing products on the basis of criteria that included dimension. In contrast to the Argentina authority in *Argentina–Floor Tiles*, by conducting a model-by-model comparison, and matching not only identical softwood lumber dimensions, but also, where identical dimensions were not available for matching, the most similar dimensions possible, Commerce *fully* accounted for dimensional differences.

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

17. This is not a case in which Commerce either failed to ask for data, or asked for data the respondents never provided, and therefore record evidence does not exist. Commerce reached its conclusion based on a review of the information contained in the respondents’ cost and sales databases conducted in the normal course of the investigation.¹⁴

18. In response to the Panel’s request to the United States for the “number of comparisons” of softwood lumber made involving different dimensions, Canada provided its own distorted response. First, Canada presented only the number of comparisons made, without weighting the results by volume.¹⁵ Because the dumping margins are calculated according to the volume of U.S. sales, a simple number of comparisons does not reflect the relative significance of the identical, similar, and constructed value comparisons in the margin.

19. Canada also provided several charts showing price differences in the Canadian market for several softwood lumber products. However, the price differences reflected in those charts may not be attributable to differences in dimension, but to the fact that the sales were made outside the ordinary course of trade.¹⁶ Other comparisons on the record show no discernible pattern between dimension and price. They show minimal price differences for differences in dimension, significant fluctuations, and smaller lumber pieces selling for higher prices than large lumber pieces. This other record evidence demonstrates the selective nature of Canada’s charts.

¹⁴ See *Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber from Canada*, 67 Fed. Reg. 15,539 (April 2, 2002), Comment 4, n. 60 (Exhibit CDA-2).

¹⁵ Canada’s First Responses to Panel Questions, para. 97.

¹⁶ See Exhibit US-76 at pp.1-4 illustrating this point.

Calculation of Overall Dumping Margin

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

21. While it is clear that Canada disagrees with the United States on the existence of such an obligation (for purposes of this dispute), it is not clear that the disagreement extends beyond this dispute. Canadian administrative practice shows that Canada's interpretation of Articles 2.4 and 2.4.2 is similar to the United States' interpretation.¹⁷ It is not clear how Canada reconciles its interpretation of Articles 2.4 and 2.4.2 for purposes of its own investigations with its interpretation of those provisions in the present case.

22. Further, Canada has stated positions that are: (a) inconsistent with the *EC–Bed Linen* report and (b) internally inconsistent. First, after relying heavily on the Appellate Body report in *EC–Bed Linen*, Canada is now espousing positions at odds with that report. Canada now agrees with the United States that a two-stage process for determining whether a producer or exporter has engaged in dumping is appropriate under Articles 2.4 and 2.4.2 of the AD Agreement.¹⁸ However, the Appellate Body, in arriving at its finding in *EC–Bed Linen* found “nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished [...], nor to justify the distinctions [...] among *types or models* of the same product on the basis of these ‘two stages’.”¹⁹ Thus, Canada now appears to agree with the United States that the reasoning in *EC–Bed Linen* does not account for the need to make multiple comparisons in order to comport with Articles 2.4 and 2.4.2 of the AD Agreement.

23. Second, Canada is not completely consistent in its position regarding a two-stage dumping analysis. In particular, at paragraph 109 of its First Responses to Panel Questions, Canada seems to take the position that a two-stage analysis is required by the AD Agreement. Yet, in the same response, and without citation or explanation, Canada claims that “the resulting dumping margin should be the same whether the authority carries out its calculation in one stage or two”²⁰ and that, in this case, the first stage “divided the single like product into multiple

¹⁷ See “Margins of Dumping” section of “Statement of Reasons, Concerning the making of a final determination of dumping with respect to Fresh Tomatoes, Originating in or Exported from the United States of America, Excluding Tomatoes for Processing,” June 24, 2002, Exhibit US-78 (this document is also available at <http://www.ccra-adrc.gc.ca/customs/business/sima/anti-dumping/ad1274f-e.html>).

¹⁸ Canada's First Responses to Panel Questions, paras. 101, 105-7, 109.

¹⁹ Appellate Body Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted March 12, 200, para. 53.

²⁰ Canada's First Responses to Panel Questions, para. 110.

models *as an expedient* that permitted appropriate comparisons between identical or most similar products.”²¹ Nowhere does Canada reconcile these positions.

24. Although Canada took issue with the appropriateness of the United States’ reference to negotiating history of Articles 2.4 and 2.4.2 of the AD Agreement,²² Article 32 of the *Vienna Convention on the Law of Treaties* expressly provides for recourse to the negotiating history in order to confirm the ordinary meaning of treaty terms in their context and in light of the treaty’s object and purpose. Canada does not refute the substance of the relevant negotiating history.

Company-Specific Issues

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

26. Canada raises the issue whether Commerce’s decision to allocate **Abitibi’s financial costs** using a “cost of goods sold” (COGS) methodology was consistent with Articles 2.2.1.1 and 2.2.2. Commerce fully considered Abitibi’s “asset-based” allocation proposal, but disagreed that assets alone should govern how financial costs were allocated.²³ Canada argues that the COGS allocation is unreasonable, not because it fails to include a value for capital assets, but because it fails to consider all assets to a sufficient degree.²⁴ For example, Canada argues that the COGS methodology fails to consider non-depreciable assets. However, the record reflects that the vast majority of Abitibi’s assets – and all of its “capital assets” – were depreciable assets.²⁵

27. Whether or not Abitibi’s asset-based cost allocation methodology was a reasonable alternative to Commerce’s COGS methodology is not the issue before this Panel. However, even on its own terms, Canada’s argument is flawed, because it is based on the unsubstantiated premise that Abitibi’s financial costs relate solely to its assets. Because money is fungible, financial costs cannot be attributed to any one expenditure – whether to asset purchases or to any other particular investment.²⁶ Rather, and consistent with Canadian GAAP’s treatment of financial costs as a general cost, Commerce concluded that financial costs relate to Abitibi as a whole and are reflective of Abitibi’s overall borrowing needs.

28. Canada raises the issue whether Commerce’s calculation of **Tembec’s general and**

²¹ *Id.*, para. 111 (emphasis added).

²² Canada’s First Oral Statement, paras. 67-68.

²³ *Final Determination*, Comment 15 (Exhibit CDA-2).

²⁴ *See* Canada First Response to Panel Questions, para. 146.

²⁵ *See* Abitibi Consolidated Financial Statement, p. 35 (Exhibit CDA-82).

²⁶ U.S. First Written Submission, paras. 192-193.

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

29. Canada was unable to provide evidence that Tembec’s “divisional G&A” was in accordance with Canadian GAAP.²⁷ Instead, Canada argues that an assertion in an unaudited portion of Tembec’s financial statement establishes that the “divisional G&A” is in accordance with Canadian GAAP.²⁸ However, this note to the audited financial statements does not address directly Tembec’s treatment of its G&A costs, nor does the record establish that Tembec’s “divisional G&A” was among the items audited.²⁹ Canada argues that because Tembec’s overall G&A cost was audited, the G&A cost that Tembec attributed to various divisions must also have been audited,³⁰ but that conclusion does not logically follow. The fact that an audited financial statement properly records a company’s total G&A costs does not mean that the company’s internal allocation of those costs among divisions has been audited.

30. Regarding **Weyerhaeuser’s G&A costs**, Canada appears to reason that G&A costs that are not related *exclusively* to the production and sale of softwood lumber must not be included in a calculation of those production costs.³¹ This reasoning misapprehends the very nature of G&A cost. General expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole and are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable. This would render meaningless the requirement of Article 2.2 that “a reasonable amount for administrative, selling and general costs” be included in a company’s cost calculation.

31. In previous submissions, the United States has referred the Panel to Note 14 of Weyerhaeuser’s audited financial statement, explaining the general nature of the company’s litigation costs.³² In its most recent submission, Canada replies that the statement in Note 14 “was not made in the context of the hardboard siding claim.”³³ However, Note 14 plainly is attached to the line item in Weyerhaeuser’s financial statement pertaining to the hardboard siding litigation. Canada also adds that Note 14 “neither attributes the expenses to any particular portion of Weyerhaeuser’s business nor the business as a whole. It simply acknowledges that the

²⁷ Canada’s First Response to Panel Questions, paras. 149-154.

²⁸ *Id.*, para. 149.

²⁹ See Tembec Annual Report, “Auditors’ Report,” p. 34 (Exhibit US-12).

³⁰ Canada’s First Response to Panel Questions, para. 150.

³¹ See, e.g., Canada’s First Responses to Panel Questions, paras. 163-64.

³² See U.S. First Answers to Panel Questions, para. 65, n. 41, *citing* Weyerhaeuser 2000 Annual Report, note 14, p. 75, Exhibit CDA-101.

³³ Canada’s First Responses to Panel Questions, para. 164.

company incurred certain costs.”³⁴ But, this is not a basis for excluding the cost from G&A costs. If it were, then litigation expenses and other expenses that are general in nature would avoid inclusion in calculation of a company’s total SG&A cost simply by virtue of their characterization on a company’s books and records.

32. Canada maintains that these costs had a “clear association with the production and sale of non-like product”³⁵ What Canada does not explain is how litigation occurring years after a good’s production can be clearly associated with its production.

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

34. Applying market value as a benchmark, Commerce determined that West Fraser’s British Columbia affiliated transactions did not reasonably reflect the value of the wood chips.³⁶ Thus, Commerce valued the by-product offset for both affiliated and unaffiliated transactions using the “average sales price” for wood chips derived from the unaffiliated British Columbia transactions.³⁷

35. Canada now acknowledges that West Fraser never argued to Commerce that some of its unaffiliated (McBride mill) transactions were unrepresentative of a market value for wood chips.³⁸ It argues that, because West Fraser had a large amount of affiliated transactions during the period of investigation, it is “self-evident” that Commerce should have questioned the use of West Fraser’s unaffiliated transactions for valuing wood chips in British Columbia.³⁹ However, West Fraser’s unaffiliated transactions were significant in number and value. Even if the quantity of transaction had been smaller, this fact, in and of itself, would not have called into question the commercial nature of the unaffiliated transactions.

36. Canada also argues that Commerce should have compared the values of West Fraser’s wood chips to the values of *all* wood chips on the record, including those values reflected in the

³⁴ *Id.*

³⁵ See Canada’s First Response to Panel Questions, para. 159.

³⁶ *Final Determination*, Comment 11, Exhibit CDA-2. See also U.S. First Written Submission, paras. 218-229.

³⁷ *Final Determination*, Comment 11, Exhibit CDA-2. See also U.S. First Written Submission, paras. 218-229.

³⁸ Canada First Responses to Panel Questions, para. 168, n. 168.

³⁹ *Id.*, para. 168, n. 168.

books and records of Tembec, Canfor, Abitibi, and Weyerhaeuser.⁴⁰ Canada cites to no provision of the AD Agreement requiring that analysis.

37. Finally, Canada argues that Commerce “blindly adhered” to its methodology for valuing affiliated transactions.⁴¹ However, Commerce’s methodology in British Columbia (and applied to Alberta transactions as well) was based on an objective review of the firm’s books and records.⁴²

38. In the case of Tembec, the question is Commerce’s valuation of interdivisional transfers of wood chips. A value for an interdivisional transfer of a by-product recorded on a company’s books and records may be a reasonable reflection of the “costs associated with the production and sale” of the byproduct, even if that value is less than market value. In this case, Commerce determined that the price paid by Tembec’s pulp mills to its sawmills was a reasonable amount.⁴³

39. Canada claims that Tembec’s inter-divisional transactions were “arbitrary.”⁴⁴ But, no provision in the AD Agreement requires an investigating authority to replace a company’s own valuation of inter-divisional transfers of a product with the market value for sales of the same product. Costs of production are commonly lower than the market value of a product, due to profit paid by an unaffiliated purchaser to its supplier.

40. With respect to **Slocan**, Canada asserts that Commerce should have made some adjustment for futures contract profits, even though Slocan itself failed to substantiate either of the alternative treatments it sought. As the panel in *Egypt–Rebar* noted, responding parties have an obligation to assert and to justify the information and arguments required to prove their claims.⁴⁵ Slocan requested two alternative and directly contradictory treatments of its hedging profits, but the evidence did not support either claim.⁴⁶

41. Neither Slocan nor Canada has explained how Slocan’s futures contracts could “affect” any specific prices to U.S. customers, given that no sale or shipment of softwood lumber and no payment for lumber actually occurred under the contracts.⁴⁷ Canada has not identified a sale of lumber to a customer in the United States for which Slocan’s futures contracts were a condition

⁴⁰ *Id.*, paras. 170-171.

⁴¹ *Id.*, paras. 170 and 172.

⁴² See *Final Determination*, Comment 11 (Exhibit CDA-2).

⁴³ *Id.* See also U.S. First Written Submission, paras. 230-244.

⁴⁴ Canada’s First Response to Panel Questions, para. 179.

⁴⁵ Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted Oct. 1, 2002., para. 7.3.

⁴⁶ See *Final Determination*, Comment 21, Exhibit CDA-2.

⁴⁷ See U.S. First Written Submission, paras. 249-250.

and term of sale.⁴⁸ Absent such a showing in the investigation, there was no basis for an adjustment for differences in conditions and terms of sale under Article 2.4.

42. Commerce also found, consistent with Article 2.2 of the AD Agreement, that the futures contracts were not linked to production, since the profits amounted to sales revenue (even though they were not tied to any particular sale of lumber in the United States). Thus, Commerce properly declined to use selling revenue to offset finance expenses included in Slocan's production costs.⁴⁹

⁴⁸ *Id.*

⁴⁹ *Id.*, para. 252.