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PUBLIC DOCUMENT

BEFORE THE

WORLD TRADE ORGANIZATION

United States - Final Dumping Determination On Softwood Lumber from Canada

WT/DS264

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

May 12, 2003

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I. INTRODUCTION

1. Pursuant to a properly initiated investigation, the United States Department of Commerce ("Commerce") concluded, in a notice of final determination issued April 2, 2002, that softwood lumber from Canada was being sold in the United States for "less than fair value."[1] In its present complaint, Canada states a number of claims based on Commerce's findings of fact that led to the initiation and subsequent conduct of its investigation into dumping of softwood lumber.

2. In general, Canada's claims concern the sort of fact-bound decisions that any investigating authority must make in the course of an antidumping investigation. Among other things, Canada challenges how Commerce defined the scope of the product it investigated, how it determined the sufficiency of the evidence to initiate an investigation, and how it calculated various costs and adjustments. The claims are disparate, but they share a common theme. In much of its argument, Canada is asking the Panel to place itself in the shoes of Commerce and make new determinations, as if it were the investigating authority. Of course, that is not the applicable standard of review.[2]

3. An antidumping proceeding is a complex matter, involving hundreds, if not thousands of individual decisions that come together to yield a final determination. It is not inconceivable that two different investigating authorities would look at the same facts and reach different conclusions.[3] Recognizing that possibility, the Antidumping Agreement provides that an authority's proper establishment of the facts and unbiased and objective evaluation "shall not be overturned" "even though the panel might have reached a different conclusion."[4]

4. Nevertheless, in this dispute, Canada raises a number of claims that effectively ask this Panel to substitute its evaluation of facts for Commerce's evaluation of the facts. For example, Canada claims that Commerce defined the scope of the product that it investigated too broadly.[5] As discussed below, this claim rests on a non-existent obligation.[6] The AD Agreement is silent on the question of how an investigating authority is to define the scope of the investigated product. Indeed, diverse practice among WTO Members bears out the absence of any rule on

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[1] "Fair value" is the U.S. law term corresponding to "normal value," as that term is used in Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement" or "AD Agreement").

[2] *See* Sec. IV, *infra* (discussing standard of review).

[3] *See* n. 95, *infra* (discussing two investigating authorities' divergent articulation of product under investigation).

[4] AD Agreement, Art. 17.6(i).

[5] *See* First Written Submission of Canada, paras. 110-142 ("Canada First Written Submission").

[6] *See* Sec V:B, *infra*.

this matter. Yet, Canada insists that Commerce defined the product in this case too broadly and effectively asks this Panel to draw its own conclusion as to how it would have defined the investigated product.

5. Another example of Canada asking the Panel to perform its own, *de novo* evaluation of the facts concerns cost calculations. Canada identifies several technical calculations that it claims Commerce performed incorrectly. For instance, it claims that in calculating a general and administrative cost allocation for one Canadian respondent, Commerce improperly relied on the company's audited books and records.[7] Canada claims that, instead, Commerce should have relied on divisional records for the company's forest products group and derived reasonable general and administrative costs from those records.[8] As in the case of Canada's claim regarding the scope of the investigated product, this claim too is nothing more than a request that the panel choose among alternative ways of evaluating the evidence.

6. In the discussion set forth below, the United States will demonstrate that the decisions Commerce made both in initiating and in conducting its softwood lumber investigation were based on proper findings of fact and objective and unbiased evaluations, and were consistent in all respects with the obligations of the United States under applicable WTO rules. Accordingly, Canada's claims should be dismissed.

II. STATEMENT OF FACTS

A. Initiation of Investigation

7. On April 2, 2001, Commerce received an antidumping petition filed on behalf of the U.S. softwood lumber industry, which alleged that imports of certain softwood lumber products from Canada were being sold at less than fair value in the United States market and were injuring a U.S. industry.[9] Specifically, the petitioners alleged that there were sales both at less than fair value and below the cost of production.

8. The scope of the investigation was composed of softwood lumber products defined generally as dimensional lumber, flooring and siding and other products covered by the U.S.

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[7] *See* Canada First Written Submission, paras. 205-221.

[8] *Id.* para. 210.

[9] *See Notice of Initiation* (Exhibit CDA-9). The petition was filed on April 2, 2001, by the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union. The petition was amended on April 20, 2001, to include four additional companies as petitioners. *Id.*

Harmonized Tariff Schedule ("HTSUS") under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020.[10]

9. On April 30, 2001, Commerce initiated an investigation to determine whether Canadian producers of certain softwood lumber products were making sales at less than fair value.[11] In advance of issuing antidumping questionnaires, Commerce issued a letter to interested parties, including the petitioners and the 15 largest known producers/exporters for purposes of soliciting comments on issues of respondent selection, fair value comparison methodology, and possible limitation of reporting of sales and cost data.[12]

10. Based on the responses received and the significant number of Canadian lumber producers, Commerce found it necessary to conduct an investigation into the six producers representing the largest amount of production.[13] Commerce selected the following companies as mandatory respondents: (1) Abitibi-Consolidated Inc. ("Abitibi"), (2) Canfor Corporation ("Canfor"), (3) Slocan Forest Products, Ltd. ("Slocan"), (4) Tembec, Inc. ("Tembec"), (5) West Fraser Timber Co. Ltd. ("West Fraser"), and (6) Weyerhaeuser Company ("Weyerhaeuser").

B. Preliminary and Final Determination

11. On November 6, 2001, Commerce published its *Preliminary Determination*, which contained a preliminary affirmative finding of dumping.[14] On February 25, 2002, Commerce held a public hearing on all issues in the investigation, with the exception of scope-related issues. On March 19, 2002, Commerce held a public hearing on scope-related issues that were analyzed during the investigation.

12. On March 21, 2002, Commerce reached its final determination, which was published in the *Federal Register* on April 2, 2002.[15] On May 22, 2002, Commerce amended its final determination to correct certain ministerial errors, and issued an antidumping duty order.[16]

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[10] *See Notice of Initiation* (Exhibit CDA-9).

[11] *Id.* at 21334-35.

[12] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Nov. 6, 2001) ("*Preliminary Determination")* (Exhibit CDA-11).

[13] *See Preliminary Determination* (Exhibit CDA-11).

[14] *See Id.*.

[15] *See Notice of Final Determination* (Exhibit CDA-1).

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

C. WTO Proceeding

13. Canada initiated this proceeding to challenge certain aspects of the *Final Determination*. Canada has provided a brief history of this proceeding in paras. 22-25 of its first written submission.

D. Canada's "History" of the Lumber Subsidy Dispute

14. The United States notes the "history" of the dispute between the United States and Canada concerning subsidies to Canadian lumber producers, as provided in Canada's first submission, is misleading and inaccurate.[17] That entire discussion is irrelevant to whether the United States determination that Canadian lumber producers are selling lumber in the United States for less than normal value (*i.e.,* dumping) is consistent with the AD Agreement.[18] Therefore, the United States respectfully asks that the Panel disregard this inaccurate and irrelevant discussion by Canada.

III. PRELIMINARY OBJECTIONS

A. Canada's New Claims Regarding the "Product Under Consideration" Are Not Within the Panel's Terms of Reference and Should not be Considered by the Panel.

15. In its first written submission, in its argument on the scope of the product under consideration, Canada included claims with respect to several provisions of the AD Agreement that were not included in its Panel Request. These claims fall outside the Panel's terms of reference under Article 7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and should not be considered by the Panel.

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[17] Canada First Written Submission, paras. 26-50.

[18] For example, Canada alleges that the subsidy case shows that Commerce changed methodologies over time to reach desired results. Canada fails to note that those changes in methodology were, in fact, associated with intervening court decisions and changes in the law. Canada also notes that Commerce self-initiated a subsidy investigation when Canada unilaterally withdrew from a Memorandum of Understanding in 1986. Canada failed to note, however, that a GATT Panel subsequently found that self-initiation was proper. *See* GATT Panel Report, *United States–Measures Affecting Import of Softwood Lumber from Canada*, SCM/162, adopted by the Committee on Subsidies and Countervailing Measures Oct. 27, 1993, para. 359 (*"U.S.-Softwood Lumber"*). Canada's claim that the SLA created conditions that were "the exact opposite of dumping" is equally flawed and self-serving. The SLA was a tariff-rate quota that eliminated the injurious effects of subsidies to the Canadian lumber industry. Nothing in the SLA compelled Canadian exporters to sell lumber in Canada at below cost or in the United States at less than normal value. The United States raises these points not because they are relevant to this dispute, but to demonstrate the inaccurate nature of the "history" offered by Canada.

16. In numbered paragraph 2 of its panel request, Canada contended that "Commerce erroneously determined there to be a single like product (under U.S. law, termed 'class or kind' of merchandise) rather than several distinct like products. . . ." Canada claimed that this error violated Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the AD Agreement and Article VI:1 of the GATT 1994.[19]

17. In its first written submission, Canada has re-characterized this complaint as extending beyond "like product" to "like product *and product under consideration.*"[20] In doing so, Canada has added to its list of claims. In addition to the claims referred to in its panel request, Canada now claims that the United States violated all of Article 2 of the AD Agreement (not just Article 2.6), all of Article 4 (not just Article 4.1), all of Article 5 (not just Articles 5.1, 5.2, 5.3, 5.4 and 5.8), as well as Articles 3, 6.10, and 9.[21]

18. Canada is not permitted to expand its claims through its first written submission. Its claims with respect to "product under consideration" must be limited to those expressly set forth in its panel request.

19. Article 6.2 of the DSU states that a request for a panel "shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Numerous previous panels have concluded that claims that are not raised in the complaining Member's panel request fall outside the panel's terms of reference and may therefore not be considered.[22] The Appellate Body has noted that

> identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[23]

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[19] Canada Panel Request, at para. 2.

[20] Canada First Written Submission, paras. 110-142 (emphasis added).

[21] Canada First Written Submission, paras. 111, 115, 118 n.119 and 142.

[22] *See e.g.,* Panel Report, *European Communities–Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil*, WT/DS219/R, circulated Mar. 7, 2003 (notice of appeal filed Apr. 23, 2003) paras. 7.14-7.15 ("*EC-Pipe Fittings*"); Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted Sep. 27, 1997, para. 143 ("*EC-Bananas").*

[23] Appellate Body Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 124 ("*Korea-Diary Safeguards"*); *see also* Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted Mar. 12, 2001, para 6.17 (*"EC-Bed Linens"*).

20. Similarly, the Appellate Body has stated,

> If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.[24]

21. In its first written submission, Canada attempts to do precisely what the Appellate Body has said is not permitted. The Panel should reject this attempt and rule that Canada's claims of violations of provisions other than those set forth in its panel request are beyond the Panel's terms of reference.

B. Exhibit CDA-77 Should Not Be Considered Under Article 17.5(ii) of the Anti-Dumping Agreement.

22. In its first written submission, Canada included Exhibit CDA-77 in support of its claim that certain dimensional differences in softwood lumber affect price comparability, requiring an adjustment under Article 2.4 of the AD Agreement.[25] This exhibit did not form part of the record of the underlying investigation. Accordingly, as a preliminary matter, the United States respectfully requests that the Panel decline to consider it as relevant evidence.

23. Article 17.5(ii) of the AD Agreement provides:

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

24. As the panel in *EC-Pipe Fittings* has explained, a panel "may consider only facts or evidence going to the substance of the determination that had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation."[26]

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[24] *See EC-Bananas*, para. 143.

[25] *See* First Written Submission of Canada, para. 148, n. 139.

[26] *EC-Pipe Fittings*, para. 733 (interpreting Article 17.5(ii)); *see also* Panel Report, *United States-Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted Aug. 23, 2001, para. 7.6 ("*US - Hot-Rolled Panel Report*") (stating that "[i]t seems clear to us that, under this provision [AD Agreement, art. 17.5(ii)], a panel may not, when examining a claim of violation of the AD Agreement in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were

25. Moreover, as discussed in section IV below, the question before a panel when it examines an investigating authority's findings of fact is whether the authority properly established the facts and whether its evaluation of the facts was unbiased and objective. By introducing new evidence that was not on the record before the investigating authority, Canada is improperly asking this Panel to step into the shoes of Commerce and to engage in a *de novo* review of the record in light of the new evidence.

26. Exhibit CDA-77 contains a "Lumber Regression Analysis" produced by Canadian respondent, Tembec, which is a statistical regression that was not made available to the U.S. investigating authority during the investigation. Indeed, it was created more than six months after the investigation was completed.[27] The analysis is allegedly a manipulation of the underlying data used for Commerce's normal value and net realizable value calculations for Tembec.

27. Exhibit CDA-77 presents newly derived data calculated and reorganized in a different manner than was available for the U.S. investigating authority in the original investigation.

28. Because the information, as contained in this exhibit, was not made available to Commerce in conformity with the appropriate domestic procedures during the investigation, it is not properly before the Panel under Article 17.5(ii). In putting this exhibit before the Panel, Canada necessarily is asking this Panel to undertake its own investigation and make its own findings of fact. Article 17.6(i) expressly prohibits this. Accordingly, the United States urges the Panel to rule that it will decline to consider Exhibit CDA-77.

IV. STANDARD OF REVIEW

29. The AD Agreement sets forth a unique standard of review applicable to disputes arising under that Agreement. That standard of review is contained in Article 17.6, and, as Canada acknowledges, it is applicable to the present dispute.[28]

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investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation."). Although the panel in *US-Hot-Rolled Panel Report* did not exclude the evidence that was challenged (noting the possibility that the exhibits might support a claim outside the AD Agreement), the panel did provide the following instructive *caveat*: "To the extent that these exhibits purport to present facts related to the USDOC or USITC determinations different from or additional to those that were made available to those authorities in conformity with appropriate domestic procedures during the course of the investigation, we have not taken such facts into account in our review of those determinations." *Id.* para. 7.11.

[27] *See* Exhibit CDA-77 (dated 4 October 2002).

[28] *See* Canada First Written Submission, para. 72.

A. Findings of Fact: The Applicable Standard of Review is Whether the Authority's Establishment of Facts was Proper and Whether its Evaluation of Those Facts was Objective and Unbiased, *Not* Whether the Panel Would Have Made the Same Establishment and Evaluation.

30. With respect to an investigating authority's establishment and evaluation of facts, the standard of review, as stated in Article 17.6(i), is as follows:

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

31. In its first written submission, Canada acknowledges that the applicable standard of review is as stated in Article 17.6(i). However, Canada overlooks that provision's distinction between the functions of a panel and the functions of an investigating authority. For example, Canada relies on the statement of the panel in *Egypt – Rebar* that *in that case* it was necessary to undertake "a *detailed review* of the evidence" submitted to the investigating authority.[29] Canada ignores the panel's qualification that such a review was necessary "*in the light of the facts of [that] case,*"[30] incorrectly suggesting the existence of a rule of general applicability.

32. Article 17.6(i) does not contain a "detailed review" requirement for determining whether an investigating authority's establishment of facts was unbiased and objective. Article 17.6(i) quite clearly instructs panels not to substitute their evaluation of facts for the investigating authority's evaluation.

33. In *United States–Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body explained:

> In considering Article 17.6(i) of the [AD Agreement], it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the [AD Agreement], with making factual determinations relevant to their overall determination of dumping and injury.

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[29] Canada First Written Submission, para. 80, quoting Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted Oct. 1, 2002, para. 7.14 ("*Egypt--Rebar*").

[30] "*Egypt--Rebar*" para. 7.14 (emphasis added).

> Under Article 17.6(i), the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts.[31]

34. Similarly, in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland* ("*Thailand–Steel Beams*"), the Appellate Body observed that Article 17.6 places "limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority."[32] The Appellate Body went on to explain that "[t]he aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[33]

35. Several panels have summed up the role of a panel under Article 17.6(i) as the panel did in *United States–Anti-Dumping and Countervailing Measures on Steel Plate From India* ("*India–Steel Plate*"):

> The standard requires us to assess the facts to determine whether the investigating authorities' *own* establishment of facts was proper, and to assess the investigating authorities' *own* evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review.[34]

36. Notwithstanding the foregoing well-established propositions, Canada improperly urges the Panel to engage in what effectively would be a *de novo* review of Commerce's establishment and evaluation of the facts in this matter. For example, in summing up how Article 17.6(i) should be applied in the present case, Canada urges the Panel to examine, among other factors,

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[31] Appellate Body Report, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted Aug. 23, 2001, para. 55 ("*US-Hot-Rolled AB Report"*).

[32] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/AB/R, adopted Apr. 5, 2001, para. 114 ("*Thailand–Steel Beams AB Report*").

[33] *Id.* para. 117.

[34] Panel Report, *United States–Anti-Dumping and Countervailing Measures on Steel Plate From India*, WT/DS206/R, adopted Jul. 29, 2002, para. 7.6 (emphases added) (*"India--Steel Plate*"); *see also* Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry From Brazil*, WT/DS241/R, circulated Apr. 22, 2003, para. 7.45 ("*Argentina–Poultry*") (Under Article 17.6(i), panels "may not engage in *de novo* review"); *Egypt-Rebar*, paras. 7.8 and 7.14 (acknowledging that Article 17.6(i) precludes *de novo* review); Panel Report, *Guatemala–Definitive Anti-Dumping Measures on Grey Portland Cement From Mexico*, WT/DS156/R, adopted 17 November 2000, para. 8.19 ("*Guatemala–Cement II Report*") ("We consider that is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case.").

"whether the authority has given proper weight to the facts."[35] Yet, such an examination is not within the purview of Article 17.6(i). In fact, in an earlier lumber dispute not operating under the explicit limitation found in Article 17.6(i), a GATT panel nevertheless expressly found that its role "was *not* to weigh the relative value of certain evidence in relation to other evidence."[36] The Panel is not permitted to engage in *de novo* review.

37. Applied to the present case, the question before the Panel under Article 17.6(i) is not what it would have done had it stood in Commerce's shoes. Rather, the question is whether Commerce's actual establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. The discussion below will demonstrate that Commerce's establishment of the facts was indeed proper, and that its evaluation of those facts was unbiased and objective.

B. Conclusions of Law: The Applicable Standard of Review is Whether the Authority's Measure Rested on a Permissible Interpretation of the AD Agreement.

38. With respect to an investigating authority's interpretation of provisions in the AD Agreement, the standard of review, as stated in Article 17.6(ii), is as follows:

> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

39. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) acknowledges that there may be provisions of the Agreement that "admit[] of more than one permissible interpretation."

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[35] Canada First Written Submission, para. 83.

[36] *U.S.-Softwood Lumber*, para. 359. The explanation by the *Softwood Lumber* GATT panel of the role of a panel versus the role of an investigating authority has been relied upon by WTO panels in subsequent disputes. *See*, *e.g.*, Panel Report, *Guatemala–Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, adopted Nov. 25, 1998, para. 7.57 (*"Guatemala Cement I"*) ("We believe that the approach taken by the panel in the *Softwood Lumber* dispute is a sensible one and is consistent with the standard of review under Article 17.6(i) of the [AD Agreement]. Thus, we agree with the panel in *Softwood Lumber* that our role is not to evaluate anew the evidence and information before the Ministry at the time it decided to initiate.").

Where that is the case, and where the investigating authority has adopted one such interpretation, the panel is to find that interpretation to be in conformity with the Agreement.[37]

40. The negotiators of the AD Agreement, uniquely among negotiators of the WTO Agreements, saw fit to make specific provision for the possibility that customary rules of interpretation would not always yield definitive meanings of particular provisions of the Agreement. That very fact provides context for the interpretation of that Agreement. It reflects the negotiators' understanding that they had left a number of issues ambiguous, and that customary rules of interpretation would not always yield unequivocal results.

41. Thus, for example, in one recent case, where Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be less than 50 percent, the panel upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation.[38]

42. The drafters of the AD Agreement recognized that they could not possibly foresee every interpretive question in the conduct of highly technical and complex anti-dumping proceedings. They understood that, with regard to many of these complex issues, the established practices of national authorities at the time of the AD Agreement's conclusion differed, and that the AD Agreement should allow sufficient flexibility for authorities to continue their different practices.

43. In applying Article 17.6(ii) to the present case, the Panel should recall that there may be multiple permissible interpretations of particular provisions in the AD Agreement and uphold Commerce's determination where it is the result of one such interpretation.

V. ARGUMENT

A. Commerce Initiated–and Later Declined to Terminate–the Softwood Lumber Investigation Consistent with Articles 5.2, 5.3, and 5.8 of the AD Agreement.

1. Commerce properly determined that there was sufficient evidence to justify initiation of an investigation, based on an unbiased and objective evaluation of the accuracy and adequacy of the information in that petition.

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[37] *See Argentina–Poultry Report*, para. 7.341 and n. 223 ("We recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it.").

[38] *Id.*

44. Petitioners submitted a valid petition under Article 5.2 of the AD Agreement,[39] and, under Article 5.3 of that Agreement, Commerce properly initiated an investigation, based on an unbiased and objective evaluation of the adequacy and accuracy of the evidence in the petition.

45. Canada argues that the petitioners failed to include price and cost data alleged to have been reasonably available to them, and that this tainted the petition under Article 5.2 of the AD Agreement, and in turn tainted Commerce's decision to initiate and later not to terminate the investigation.[40] In fact, the absence of the data at issue did not taint the petition, Commerce's decision to initiate, nor its decision not to terminate.

46. As will be demonstrated below, the information that petitioners put in their petition was sufficient to support a decision to initiate. Further, as will also be demonstrated, the Weldwood cost and price data to which Canada refers could not have detracted from the sufficiency of the evidence in the petition. Thus, the question is whether Article 5.2 obligates an authority to require a petitioner to put information into its petition, even if other information in its petition is sufficient to support initiation of its investigation, and even if the additional information could not detract from the sufficiency of the included information. The answer is that Article 5.2 of the AD Agreement contains no such requirement. It follows that there is no obligation on an investigating authority to decline to initiate (Article 5.3) or to terminate (Article 5.8) due to the absence of such information.

47. In its initiation arguments, Canada focuses exclusively on evidence regarding dumping, as opposed to industry support, injury or causal link. Thus, the present discussion addresses only evidence regarding dumping.

a. The petition contained sufficient evidence of dumping to support initiation of an investigation.

48. Article 5.2(iii) of the AD Agreement provides that a petition "shall contain such information as is reasonably available to the applicant on the following . . .

> (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export

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[39] The AD Agreement uses the terms "application" and "applicant." Because the comparable terms under U.S. law are "petition" and "petitioner(s)," we have used these terms throughout the submission (except in quotations) for the purposes of clarity.

[40] *See* Canada First Written Submission, paras. 7-8, 85-109.

prices or, where appropriate, on the prices at which the product is first sold to an independent buyer in the territory of the importing Member."

49. Previous panels have appropriately found that the evidence provided in a petition need not be of the same quantity and quality that would be necessary to make a preliminary or final determination of dumping.[41] Nevertheless, the petition in this case contained extensive information on prices of softwood lumber in the country of export (*i.e.*, Canada), costs of production, and export prices.

(i) Information on home market sales and cost of production

50. The basic question in determining whether a product is being dumped is whether the product's export price is less than "normal value."[42] The AD Agreement contemplates alternative methods for determining normal value, depending on circumstances in the domestic market of the exporting country. Ordinarily, normal value is determined based on sales in the domestic market of the exporting country. However, where sales in that market are below cost of production, relying on such data to determine normal value is inappropriate.[43] In that case, the AD Agreement permits alternative bases for determining normal value. One such basis is "constructed value" — *i.e.*, "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[44]

51. To determine whether home market sales are an appropriate basis for determining normal value, home market sales are compared to costs of production of the product under investigation. In this case, petitioners provided information to support such a comparison.

52. With respect to home market sales, petitioners provided information from respected industry sources on representative prevailing prices for common lumber products in two of the most important lumbering areas of Canada. This information consisted of:

- Average MBF prices for western spruce-pine-fir ("WSPF") sold within the interior of British Columbia during the last three quarters of 2000, from the British Columbia Ministry of Forest's published market pricing system lumber values.[45]

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[41] *See, e.g., Guatemala–Cement I*, para. 764.

[42] Article 2.1, AD Agreement.

[43] Article 2.2.1, AD Agreement.

[44] Article 2.2., AD Agreement.

[45] *See* Exhibit CDA-10, at 7-8 and Petition for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930: Certain Softwood Lumber Products from Canada (Apr. 2, 2001) ("Petition") Vol. VI, Exh. D-11 (Exhibit CDA-46). "MBF prices" are prices per thousand board feet. A "board foot" is a three dimensional unit described as the quantity of lumber contained in a piece of lumber 1 inch thick, twelve inches wide,

- MBF prices, as published in the lumber industry publication *Random Lengths,* for the year immediately preceding the petition for eastern spruce-pine-fir ("ESPF") kiln dried 2x4s, in various lengths, delivered to Toronto.[46]

53. With respect to costs of production, petitioners first identified factors involved in the production of softwood lumber. This identification of factors was based on petitioners' direct knowledge of the manufacture of softwood lumber.[47] The identified factors included: raw materials — *i.e.*, standing timber ("stumpage"), costs incurred in harvesting the timber, hours of sawmill labor, kilowatt hours of electricity to run the mill, and the levels of selling, general and administrative costs associated with lumber production.[48]

54. Next, petitioners provided information to support a determination of the value in Canada of the identified production factors, including:

- Provincial stumpage charges in British Columbia and Quebec in 2000;[49]

- Data on harvesting costs in British Columbia from a 1999 independent study by PriceWaterhouseCoopers of B.C. sawmills;[50]

- Data on harvesting costs for Quebec during the last quarter of 2000, from a market research report;[51]

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and 1 foot long, or the equivalent in other dimensions. Petition at Vol. III, at 9 (Exhibit CDA-37).

[46] Because the *Random Lengths* prices are delivered prices, inland freight was deducted from these prices, based on the distance between Quebec and Toronto, to obtain the ex-factory prices that are used in calculating dumping margins. *See* (Exhibit CDA-10) at 7-8 and Petition, Vol. VI, Exhs. C-9, C-10 (Exhibits CDA-41 and CDA-42). Although Canada has claimed that these prices "commingle" U.S. and Canadian data, the publishers of *Random Lengths* have expressly stated that prices in the "Toronto delivery" column are based *exclusively* on production from mills in Canada. *See* Apr. 19, 2001, letter from *Random Lengths*, placed on the record of the case by the petitioners in a public submission of Apr. 20, 2001 (Exhibit US-1).

[47] *See* Petition narrative at Vol. III-15 (Exhibit CDA-37) and Petition Exhibits VI.C-1 (public version) (Exhibit US-2) and VI.D-1 (public version) (Exhibit US-3). This is a very common approach to quantifying costs in the exporting country at the petition stage.

[48] Specifically, and corresponding to the prices used for Canadian and U.S. transactions, the petition modeled costs for producing kiln dried 2x4s in various lengths for both WSPF in British Columbia and ESPF in Quebec.

[49] *See* Petition, Vol. VI, Exh. C-2 (Quebec) (Exhibit US-4); Vol. VI, Exh. D-2 (British Columbia) (Exhibit US-59).

[50] *See* Petition, Vol. VI, Exh. D-4, D-5 (public version) (Exhibits US-5, US-6).

[51] *See* Petition, Vol. VI, Exh. C-4 (Exhibit US-7).

- Data on direct labor costs for British Columbia and Quebec, from surveys of sawmills by the B.C. government and Canadian Federal government, respectively;[52]

- Data on electricity costs from a Canadian Federal Government survey of electrical suppliers;[53] and

- Data on per unit financial expenses from the public 2000 financial statements for Canadian lumber producer Tembec.[54]

55. A comparison between petitioners' information on sales of the subject product in Canada and petitioners' information on costs of production supported the conclusion that sales of softwood lumber were being made in Canada within an extended period of time, in substantial quantities, and at prices which did not provide for the recovery of all costs within a reasonable period of time.[55] This conclusion was corroborated by articles from daily newspapers in various Canadian cities describing widespread below-cost sales of softwood lumber in Canada.[56]

56. Having presented information demonstrating that it would be inappropriate to base normal value on sales of softwood lumber in Canada, petitioners then presented evidence substantiating a determination of normal value based on constructed value. This evidence consisted of the cost of production factors and valuation data described above. An amount for profit, the only element of constructed value not included when determining cost for purposes of comparison to home market prices, was substantiated by the public financial statements of Tembec–the same financial statements used when calculating the cost of production.[57]

(ii) Information on export prices

57. The petition's multiple, independently valid sources of information on normal value were matched by multiple, independently valid sources of information on export prices for models and

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[52] *See* Petition, Vol. VI, Exh. C-5 (Quebec) (Exhibit US-8); D-6 (British Columbia) (Exhibit US-9).

[53] *See* Petition, Vol. VI, Exh. C-6 (Quebec) (Exhibit US-10); D-7 (British Columbia) (Exhibit US-11).

[54] *See* Petition, Vol. VI, Exhs. B-1 (Exhibit US-12) and B-2 (Exhibit US-13); *see also* Exhibit CDA-40, Attachment 11 (revised Tembec financial calculations from Exhibit VI.B).

[55] Under Article 2.2.1 of the AD Agreement, these are the criteria for determining whether below-cost home market sales may be disregarded in determining normal value.

[56] *See* Petition narrative, Vol. III-15, n. 18 (Exhibit CDA-37) and articles cited therein and attached as Exhibit III.14 (Exhibit US-14); *see also* Exhibit CDA-40, Attachment 9 (article in the Montreal *Gazette* in which the international trade director of the Quebec Lumber Manufacturers' Association states that the current market price is "well below operating costs").

[57] *See* Petition, Vol. VI, Exhibits B-1 (Exhibit US-12) and B-2 (Exhibit US-13); *see also* Exhibit CDA-40, Attachment 11 (revised Tembec financial calculations from Petition Exhibit VI.B).

sizes of softwood lumber commonly exported to the United States from two different regions of Canada.

58. First, the petition contained *Random Lengths* data on multiple sales of WSPF for delivery to U.S. cities.[58] Specifically, petitioners provided: 1) an overall average of weekly prices reported throughout the period of investigation ("POI"), which ran from April 1, 2000 through March 31, 2001, for a representative softwood lumber product: kiln-dried WSPF 2x4s "standard and better" in random lengths delivered to two major markets, Chicago and Atlanta, respectively; and 2) an average transaction price for kiln-dried WSPF 2x4 "standard and better" in random lengths delivered to Chicago during the week ending January 19, 2001.[59]

59. Second, the petition contained a price quotation affidavit from a knowledgeable industry source testifying to an offer from a U.S. trading company for Canadian WSPF kiln-dried random length 2x4s from the interior of British Columbia for sale in March, 2001, at a delivered price to a specified destination in the U.S. market.[60] The affidavit contained information on the historical

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[58] *See* Checklist at 6-7 (Exhibit CDA-10); Petition, Vol. III, at 13 (Exhibit CDA-37); Petition, Exh. VI.D-13 (as originally filed) (Exhibit US-15), revisions of April 10, 2001 to Exh. VI.D-13 (Exhibit CDA-40, at Attachment 10); Petition, Exh. VI.D-14 (public version, as originally filed) (Exhibit US-16), and revisions of April 10, 2001 to Exh. VI.D-14 (Exhibit CDA-40). *Random Lengths* defines "Western S-P-F" as "Lumber of the Spruce-Pine-Fir group produced in British Columbia or Alberta." Petition, Exh. III-9 (Exhibit US-17).

[59] *See* Checklist at 6-7 (Exhibit CDA-10); *see also* Petition, Vol. III, at 13 (Exhibit CDA-37); Exh. VI.D-13 (as originally filed) (Exhibit US-15), revisions of April 10, 2001 to Exh. VI.D-13 (Exhibit CDA-40, at Attachment 10); Petition, Exh. VI.D-14 (public version, as originally filed) (Exhibit US-16-R, and revisions of Apr. 10, 2001 to Exh. VI.D-14 (Exhibit CDA-40) at Attachment 10. As with the Eastern SPF export price data, Commerce did not rely upon the one-week-specific *Random Lengths* prices for initiation purposes, but only upon the period-wide data. *See* Checklist at 6-7 (Exhibit CDA-10). Petitioners originally based the WSPF freight adjustment on the same freight expense they had used for the much shorter distance between Quebec and Boston for the ESPF adjustment. *See* affidavit at Exh. VI.C-9 (public version) (Exhibit CDA-41). In the petition amendments of Apr. 10, 2001, petitioners submitted a more accurate, but still very conservative, rate for freight between British Columbia and U.S. destinations. *See* pages 2-3 and Attachments 1-3 (Exhibit CDA-40). The rate is conservative because it is calculated based on a shorter distance than distances from any British Columbia point of origin to the markets to which the WSPF products were delivered. The revised British Columbia calculations reflecting the more accurate freight rate are at Exhibit CDA-40, Attachment 10.

[60] *See* Checklist at 7-8 (Exhibit CDA-10) and Petition, Exh. VI.D-14 (public version, as originally filed, including affidavit) (Exhibit US-16), and partial revisions of Apr. 10, 2001 to Exh. VI.D-14 (Exhibit CDA-40, Attachment 10, which does not include the unchanged affidavit). Affidavits from persons in the industry are frequently used in petitions to present company or industry information. The reliability of the information derives not only from the fact that it is sworn testimony, but also, in a different sense, from the fact that an affiant's professional position and expertise in the industry gives that person access to such information and permits that person to speak credibly to general industry practices. As is generally the case, to avoid retaliation, the name, affiliation, location and other potential identifying characteristics of the affiant, as well as proprietary details with respect to the transactions at issue are given only in the Business Confidential versions of the exhibits. The United States has provided only the public versions of such documents, as they are sufficient to demonstrate the nature of the evidence contained in the Business Confidential versions, and because Canada has never contested the *bona fides*

mark-up received by lumber wholesalers (five percent), and on the likely means of shipment. This data enabled the petitioners (and Commerce) to back out the U.S. middleman's mark-up and the freight costs to estimate the ex-factory price charged by the British Columbia producer to the trading company.[61]

60. Third, the petition contained a "lost sales" affidavit from a U.S. lumber producer reporting four separate episodes in which the affiant lost sales on December 15, 2000, to U.S. potential customers (the buyers) because those buyers reported that "Quebec producers" (the sellers) offered ESPF kiln-dried 2x4s (the product) in "mid-December 2000" (the date range for the four episodes) at the board foot price given in the affidavit, which was lower than the affiant's offering price, such that he could not meet the same terms.[62] The terms were the same (FOB Boston) for both the Canadian and the U.S. product.[63]

61. The fourth source of petition data on export prices was *Random Lengths* data on multiple sales of ESPF across the period of investigation for delivery to two different U.S. locales: Boston and the Great Lakes area.[64] Specifically, petitioners provided: 1) a POI average of weekly reported prices for kiln-dried ESPF 2x4s in random lengths delivered to Boston and the Great Lakes region, respectively; 2) a POI average of weekly reported prices for kiln-dried ESPF 2x4

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of the confidential affiant

[61] In calculating that ex-factory price, the petitioners made a conservative adjustment by backing out the freight between less-distant locations. Thus, they removed *less* than the actual freight charge would likely have been, resulting in a higher export price, and, hence a lower margin when compared to normal value.

Canada has objected to this information on the grounds that the affidavit was "not accompanied by evidence indicating that the offer came from a Canadian company, let alone a Canadian respondent." Canada First Written Submission, paras. 91, 104. However, it does provide information regarding the level at which the Canadian producer would have made the product available for sale to the United States. Because the freight adjustment was conservative, Canada's concern regarding this price would appear to rest on the accuracy of the five percent mark-up, despite the affiant's expertise in this area. As shown by the public information on the chart on the last page of the Checklist, however, the margin associated with this price quotation is over 30 percent. Thus, even had Commerce assumed that the trading company took no mark-up at all from the sale to it by the Canadian producer, this price would still provide evidence supporting a substantial dumping margin. *See* Checklist at 6, and at calculation attachment following page 19 (Exhibit CDA-10); *see also* Attachment 10 (Exhibit CDA-40).

[62] "Lost sales" affidavits are another common way of establishing prices of merchandise imported into the United States. One way in which a producer may learn of non-published prices being quoted by foreign competitors in the U.S. market is when habitual customers advise that the same goods are available at a given lower price from the foreign competitor. Such communications may permit the domestic producer to try to match that price, but if it is unable to sell that low, this can also become evidence of both export prices and injury.

[63] *See* Checklist at 7-8 (Exhibit CDA-10) and Petition, Exh. VI.C-14 (public version)(Exhibit CDA-45).

[64] *See* Checklist at 6-7 (Exhibit CDA-10); Petition, Vol. III, at 10-12 (Exhibit CDA-37); Petition at Exh. VI.C-13 (Exhibit CDA-44) and Petition at Exh. VI.C-14 at 4, n. 5 to "Kiln Dried Studs" category (Exhibit CDA-45) (*Random Lengths* defines the "Great Lakes" area as "Northern Ohio, Western Pennsylvania").

8-foot studs delivered to Boston and the Great Lakes region, respectively; and 3) an average transaction price for kiln-dried ESPF 2x4 8-foot PET studs delivered to Boston during the week of January 19, 2001 "in order to demonstrate how low prices fell during the POI.[65] (Commerce did not rely on the week-specific *Random Lengths* prices for initiation purposes, finding the POI average prices "sufficient.")[66] Because the *Random Lengths* prices are delivered prices, an amount for inland freight was deducted from these prices for purposes of determining an export price appropriate for comparison to normal value.[67]

62. These data constitute evidence of a pattern of Canadian prices of representative softwood lumber products sold from major Canadian lumber-producing regions to major markets in the United States throughout the period of review. Comparison of the petition's export price data to the constructed normal value data demonstrated the existence of dumping with respect to every sale, thus providing more than sufficient evidence to support initiation of an investigation.

b. Consistent with AD Agreement Article 5.3, Commerce examined the accuracy and adequacy of the evidence in the petition to determine whether there was sufficient evidence to initiate an investigation.

63. Commerce examined the petition closely for purposes of evaluating the accuracy and adequacy of the information presented. Commerce staff compared the petition's assertions to the evidence submitted in support of those assertions, and analyzed the petition step by step to ascertain whether there was sufficient evidence to initiate an investigation. As a result of questions that arose during this process, Commerce required the petitioners to provide additional data and clarifications.[68]

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[65] *See* Checklist at 6-7 (Exhibit CDA-10); Petition at Vol. III, at 10-12 (Exhibit CDA-37); Petition at Exh. VI.C-13 (Exhibit CDA-44); and Petition at Exh. VI.C-14 (Exhibit CDA-45).

[66] *See* Checklist at 6-7 (Exhibit CDA-10).

[67] *See* Checklist at 6-7 (Exhibit CDA-10); Petition at Vol. III, at 12 (Exhibit CDA-37); Petition at Exh. VI.C-13 (Exhibit CDA-44); and Petition at Exh. VI.C-14 (Exhibit CDA-45). The inland freight value for Quebec-Boston was supported by the public version of the affidavit at Petition Exh. VI.C-9 (Exhibit CDA-41).

Canada has argued that the *Random Lengths* ESPF data are "inadequate and inaccurate" because, it claims, these data "commingled both Canadian and non-Canadian producer prices" *See* Canada First Written Submission, paras. 91, 104. Canada's claim lacks merit, because a reasonable reading of *Random Lengths'* statement on the record shows that the focus of that publication is to report lumber prices for lumber from Canadian mills. *See* Apr. 19, 2001, letter from *Random Lengths*, placed on the record of the case by the petitioning Coalition in a public submission of Apr. 20, 2001 (Exhibit US-1).

[68] *See* Commerce Deficiency Questions of Apr. 5, 2001 (Exhibit CDA-86); *see also* the Apr. 10, 2001 response to these questions (Exhibit CDA-40).

64. Commerce then summarized its analysis of the petition, as amended, in a nineteen-page analysis memorandum (called "the Checklist" because of its systematic approach to documenting each aspect of the evidence necessary for initiation).[69] That conclusion was based on the petition. However, contrary to Canada's suggestion,[70] it did not amount to a rubber stamp of the petition. Commerce subjected the petition to its own independent analysis. It requested supplemental information. It made adjustments to petitioners' calculation based on information in its possession. In light of this review, Commerce satisfied itself as to the accuracy and adequacy of evidence of dumping and, accordingly, decided to initiate an investigation.

c. The Weldwood cost and price data did not render the evidence in the petition inaccurate or inadequate, and thus did not negate the sufficiency of the evidence to initiate an investigation.

65. Canada asserts that the petition was deficient, and hence the decision to initiate an investigation was deficient, due to the absence of reasonably available cost and price data from Weldwood, a wholly owned subsidiary of petitioner International Paper. However, Commerce properly initiated absent the Weldwood data. As discussed above, the evidence on which Commerce relied was sufficient in and of itself to support initiation, and, for the reasons set forth in this section, the Weldwood data in no way negated that sufficiency.

66. At most, Canada asserts that the Weldwood data would have been more reliable than the data actually included in the petition.[71] The validity of this assertion is questionable. The product under consideration was a commodity-type product for which industry-wide data were likely to provide a more reliable representation than company-specific data for a single company responsible for only a small fraction of the Canadian exports to the United States.[72] In any event, Commerce's determination of the reliability of the data actually presented was one it was entitled to make based on its objective, unbiased evaluation of that data.

67. Moreover, even assuming, *arguendo*, the truth of Canada's assertion regarding the reliability of the Weldwood data, that still would not negate the sufficiency of the data actually presented. By its very nature, the Weldwood data could not have contradicted the country-wide price and cost information contained in the petition. These company-specific data could only have told Commerce what *Weldwood's* costs and prices were.

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[69] *See generally* Exhibit CDA-10.

[70] Canada First Written Submission, para. 103.

[71] *See* Canada First Written Submission, para. 104.

[72] Weldwood was responsible for only about 3 percent of Canadian lumber exports to the United States. Petition, Vol. I-B, at Exh. I-B-9 (Exhibit CDA-39).

68. Even if Weldwood had not been dumping (and Canada has not even asserted, much less demonstrated, this), that "fact" could not have invalidated petitioners' demonstration of widespread dumping elsewhere in Canada, justifying initiation of an investigation.

69. Furthermore, despite Canada's insistent references to the Weldwood data as the only actual price and cost data that Commerce could consider,[73] the nationwide and period-wide data from respected government and industry sources were, as explained above, sufficient for determining whether to initiate a nationwide investigation of dumping of a commodity-type product, such as softwood lumber.[74]

d. Petitioners were not required to include in their petition information over and above what was sufficient to support initiation, where such information would not have lessened the adequacy or accuracy of the included information.

70. As discussed above, the information in the petition was sufficient to support initiation, and the Weldwood information would not have negated that sufficiency. Thus, for Canada to prevail on its initiation claim, there must be an obligation on the part of an investigating authority to reject a petition that excludes some reasonably available information on matters in Article 5.2(iii) of the AD Agreement, even where the included information is sufficient to support initiation, and even where the excluded information could not lessen the adequacy or accuracy of the included information. There is no such obligation.

71. The obligations of an investigating authority with regard to initiation are set forth in Articles 5.3, 5.6 and 5.8. In each case, the obligation hinges on a determination regarding the sufficiency of the evidence.[75] Under Article 5.3 of the AD Agreement, the investigating authority's obligation is to "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is *sufficient evidence* to justify initiation of an

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[73] *See e.g.*, Canada First Written Submission, paras. 95, 98, 104.

[74] *Cf. Argentina–Poultry*, para. 7.80 (disagreeing with Argentina's argument, which the panel understood to be that, "in order to initiate, an investigating authority need only satisfy itself that there has been some dumping, in the sense that certain transactions were dumped"). In that case, the panel determined that Argentina had violated Article 5.3 by initiating its investigation without a proper basis to conclude that there was sufficient evidence of dumping to justify initiation. *Argentina–Poultry*, para. 7.81. Argentina initiated that investigation based on a single dumping margin, which the panel determined had "entirely disregard[ed] the elements that configure the existence of [dumping] outlined in Article 2." *Argentina–Poultry*, para 7.80, citing Panel Report, *Guatemala– Cement II*, n. 48, para. 8.35. In contrast, the methodologies used in the softwood lumber petition are all well-established antidumping methodologies, consistent with the AD Agreement, and the evidence supporting the petition is more than adequate.

[75] *Cf. Guatemala – Cement I*, para. 7.50 ("the decision to initiate is made by the objective sufficiency of the evidence in the application, *and not by reference to whether the information provided in the application is all that is reasonably available to the applicant*") (emphasis added).

investigation." Under Article 5.6 of the AD Agreement, in special circumstances, investigating authorities may self-initiate investigations, but only if they have "sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation." Under Article 5.8 of the AD Agreement, a petition must be rejected "as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case."

72. In each of the above-referenced provisions, the operative standard is sufficient evidence. In no case is an investigating authority obligated to not initiate an investigation due to lack of evidence beyond sufficient evidence. As demonstrated above, the evidence on which Commerce relied was sufficient evidence. The Weldwood data did not render it insufficient. Thus, to hold that Commerce violated Article 5.3 of the AD Agreement by initiating an investigation based on a petition that lacked the Weldwood data would impose an obligation on Commerce beyond any contained in Article 5.3 of the AD Agreement (an imposition clearly prohibited under DSU Article 3.2).

73. Notwithstanding the fact that the standard set forth in Articles 5.3 and 5.8 is "sufficient evidence," Canada appears to suggest that Article 5.2 imposes an independent obligation on investigating authorities to reject petitions that contain evidence sufficient to initiate but that lack some evidence alleged to be available to petitioners, even where such evidence would not negate the sufficiency of the included evidence.

74. However, Article 5.2 of the AD Agreement does not impose such an obligation on investigating authorities. The obligation of an investigating authority regarding initiation is set forth in Article 5.3. Article 5.2 simply describes what information a petition shall contain.[76]

75. Further, under ordinary rules of treaty interpretation, Article 5.2 must not be read in isolation. It must be read in light of its context.[77] Article 5.3 describes what an investigating authority is to look for upon receiving a petition – *i.e.*, sufficient evidence. Article 5.8 also provides context, stating that, if there is not sufficient evidence, the investigating authority must reject the petition. Thus, the context of Article 5.2 supports the conclusion that a petition is not required to contain more evidence than is sufficient to support initiation.

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[76] The consequence of a failure to include in a petition the information described in Article 5.2 is that a petitioner risks an investigating authority not finding sufficient evidence to initiate an investigation under Article 5.3. That was not the case here.

[77] *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (Jul. 1969) ("VCLT"), Article 31(1). *See Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico–HFCS*"), WT/DS132/R, adopted Feb. 24, 2000, para. 7.56 ("In order to address [questions related to initiation], we must interpret the relevant provisions of the AD Agreement, and their relationship to one another, in order to arrive at a coherent understanding of the obligations pertaining to the initiation of an anti-dumping investigation").

76. In sum, there is no obligation under Article 5.2 for an investigating authority to reject a petition that includes sufficient evidence to support initiation but excludes particular evidence that would not diminish the adequacy or accuracy of the included evidence. In this case, Commerce properly established the facts supporting initiation and evaluated the adequacy and accuracy of those facts in an objective, unbiased manner. For these reasons, Commerce's determination to initiate was not inconsistent with Article 5.2.

2. Commerce Properly Did Not Terminate the Investigation.

77. Because data with respect to Weldwood prices and costs were not necessary to support either Commerce's initiation, or its continuation, of the softwood lumber investigation, Canada's argument that Commerce was required to terminate the investigation once data on IP's affiliation with Weldwood was added to the record[78] has no support in Article 5.8.

78. As demonstrated above, the petition data were more than sufficient to justify initiation; nothing that occurred subsequent to initiation changed this fact. In other words, the Weldwood information did not, and could not, "render[..] inadequate the information initially provided to Commerce by the Petitioner."[79]

79. In addition to not relying on Weldwood data in making its initiation decision, Commerce did not, in its initiation memorandum, rely upon petitioner's statement that it was unable to obtain company-specific cost and pricing data.[80] In short, Commerce initiated based on the objective adequacy of the data showing dumping, rather than upon the theory that this evidence was acceptable only in the absence of allegedly "better" or "more probative" data. Thus, there was no reason for Commerce to address – before or after initiation – the question of whether petitioners "could have" provided Weldwood data, and the Panel should also decline to address this question. This is *not* a case in which information presented later invalidated the information Commerce had relied upon to initiate.

80. Similarly, Article 5.8 does not impose an obligation on an authority to terminate an investigation based on the absence of evidence beyond what is sufficient to proceed. As the panel in *Mexico – HFCS* recognized, the reverse is also true: "if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application."[81] In arguing to the contrary, Canada seeks impermissibly to impose an obligation

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[78] *See* Canada First Written Submission, paras. 106-109.

[79] Canada First Written Submission, para. 108.

[80] *See generally* Exhibit CDA-10.

[81] *See Mexico–HFCS*, para. 7.99.

beyond what is set forth in Article 5.8 of the AD Agreement. Canada's theory is both contrary to the plain language of the AD Agreement and inimical to effective administration by investigating authorities of the antidumping remedy. It cannot have been the intention of the WTO Members to subject themselves to an impossible requirement to ensure that *all* industry data of the types mentioned in the AD Agreement is included in a petition.

81. Because the cost and price data regarding Weldwood could not detract from the sufficiency of the data upon which it had based its initiation, Commerce's determination not to terminate was consistent with Article 5.8.

82. For the foregoing reasons, the United States requests that the Panel reject Canada's arguments and conclude that the United States' initiation, and continuation, of the softwood lumber antidumping duty investigation were not inconsistent with its obligations under Articles 5.2, 5.3, and 5.8 of the AD Agreement.

B. Canada Fails to Make a Prima Facie Case of a Violation of an Obligation of the AD Agreement Relating to the Product Under Consideration.

83. Canada argues that Commerce has an affirmative obligation under the AD Agreement to narrowly define the "product under consideration"[82] in an antidumping investigation (Canada's "scope" claim).[83] As the complainant, Canada bears the burden of establishing with evidence and argumentation a *prima facie* case of the existence of an obligation under the AD Agreement and a violation of that obligation.[84] If the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.[85]

84. Neither Article 2.6 of the AD Agreement, nor any of the other provisions of the AD Agreement cited by Canada in its panel request, or in its first written submission, requires

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[82] "Product under consideration" is the term used by Canada in its first written submission. This term appears in Article 2.6 of the AD Agreement, a provision that interprets the term "like product." Article 2.6 does not define the term "product under consideration," and Canada is in error in presuming that this term refers to the product under investigation throughout the entire AD Agreement. There are analyses an investigating authority may do in the course of an investigation in which the product being considered is a subset of the product under investigation. For example, under Article 2, in the context of a sales analysis, an investigating authority might find that there are multiple "like products," but not equate each "like product" with the entire scope of the investigation. The United States will therefore use the term "product under consideration" to respond to Canada's arguments in its first written submission, but will do so without conceding Canada's incorrect assumption that the term is synonymous with the product under investigation.

[83] Canada First Written Submission, paras. 110-142.

[84] *See Egypt-Rebar*, para. 7.5.

[85] *See, e.g.,* Appellate Body Report, *EC-Measures Concerning Meat and Meat Products* (*Hormones*), WT/DS26/AB/R, WT/DS48/AB/R, adopted Feb. 13, 1998, para. 109 ("*EC – Hormones*").

Members to "narrowly" define the product under consideration. Indeed, the practice of Members, including Canada, indicates that such an obligation is not recognized. As its arguments are addressed to a non-existent obligation, Canada necessarily fails to make a *prima facie* case of a violation, and the Panel should therefore reject Canada's scope claim.

1. Article 2.6, a Definitional Provision, Does not Establish an Obligation for Members to Define the Scope of An Investigation in the Limited Fashion Proposed by Canada.

85. At its core, Canada's first written submission argues that Commerce had an affirmative obligation under Article 2.6 of the AD Agreement to divide the product under consideration, softwood lumber from Canada, into multiple products subject to multiple investigations.[86]

86. Canada bases its argument on Article 2.6 itself.[87] Article 2.6 provides:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

87. Canada asserts that an investigating authority's identification of the "product under consideration" in a given case is constrained by certain rules. Without citation, Canada states that an authority must explain how the distinct products within the investigation "closely resemble each other."[88] Elsewhere, Canada suggests – again, without citation – an obligation in this case to distinguish among products based on factors such as the type of manufacturing facility where they were produced or specific inputs used.[89] Other than Article 2.6, which defines the term "like product" in relation to the "product under consideration" but does not in turn define the phrase "product under consideration," Canada cites to no provision of the AD Agreement or GATT 1994 for support of the existence of such an obligation.

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[86] Canada First Written Submission, paras. 141-142.

[87] Canada First Written Submission, paras. 112-125. In its scope argument, Canada claims violations of a number of other AD Agreement articles, many of which are not referenced in Canada's panel request and are not properly before this Panel. *See Preliminary Objections,* Section III, above. Moreover, Canada fails to explain how the asserted deficiency in Commerce's scope determination violated any of these articles. Thus, there are passing references to, but no explanation of, violations of the Articles 2, 3 and 5, among others. *See* Canada First Written Submission, paras. 115, 142.

[88] Canada First Written Submission, para. 125.

[89] Canada First Written Submission, para. 115.

88. The ordinary meaning of the term "product" is something "produced by an action, operation, or natural process; a result, a consequence; *spec.* that which is produced commercially for sale."[90] This definition hardly yields the constraints that Canada would impose.

89. Although Canada seeks to support its claim by reference to provisions other than Article 2.6,[91] those provisions generally pertain to the term "like product" and shed no additional light on the phrase "product under consideration."

90. Nor do other provisions cited by Canada in the terms of reference in its panel request support the existence of the asserted obligation:

(A) Article 4.1 of the AD Agreement defines "domestic industry" and the "domestic producers as a whole of like products." It states nothing regarding the "product" covered by an antidumping investigation.

(B) Article 5.1 speaks to the initiation of an investigation. It provides that the "domestic industry" that produces a like product must request the initiation of an investigation, but again gives no guidance on the means by which the scope of the investigation is to be defined.

(C) Article 5.2 addresses the contents of a petition and requires a petitioner to provide a "complete description of the allegedly dumped product," but provides no restrictions as to how that product is described, and certainly does not include the obligations asserted by Canada in its first written submission.

(D) Articles 5.3, 5.4, and 5.8 focus on initiation requirements, but provide no explanation pertaining to the scope of an investigation.

91. In sum, there is no provision in the AD Agreement supporting the limited definition of "product under consideration" urged by Canada. The Panel should not accept Canada's invitation to read into the AD Agreement obligations that are not there.

92. In addition to lacking support in the text of the AD Agreement, Canada's asserted definition of the product under consideration would inherently be difficult to apply. Every investigation is initiated based upon a different set of facts and circumstances, and where some

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[90] *The New Shorter Oxford English Dictionary*, p. 2367 (1993).

[91] Canada First Written Submission, para. 142 (citing generally to Articles 2 and 3, both of which contain several paragraphs that refer to a "like product"). *See* Preliminary Objections, Section III, *supra.*

investigations have covered a very narrow, limited set of products,[92] others have covered a wide variety of types of products.

93. By way of illustration, taking the category "bicycles," the domestic industry in Country "A" might only produce mountain bicycles and file an antidumping petition alleging harm by sales at less than normal value of "mountain bicycles." In Country "B," on the other hand, the domestic industry might allege that the harm is caused by dumping of "mountain bicycles, road bicycles and children's bicycles," while in Country "C" a third domestic industry might allege injury from dumping of bicycles of all types.[93] Under Canada's proposed rule, which of the above cases would pass the "close resemblance" test? Or would even the narrowest category be too broad, as it would group "mountain bicycles with fenders" with "mountain bicycles without fenders"? A generic rule constraining the scope of an investigation is simply impractical and unworkable.

94. Additionally, underlying Canada's argument is an assumption that the phrase "product under consideration" must be defined narrowly.[94] Its desire for such a rule appears to be driven by the facts of this case. Yet, one easily can imagine a case in which an exporting Member complains that the investigating authority of an importing Member has defined the product under consideration *too* narrowly, in a way that guarantees sufficient industry support where such support might not have existed under a broader definition.[95]

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[92] *See, e.g., Antidumping Duty Order; Certain In-shell Pistachios from Iran,* 51 Fed. Reg. 25922 (July 17, 1986) (specifically covering only raw pistachios and not roasted pistachios) (Exhibit US-18).

[93] In fact, the European Communities has an antidumping duty order in place covering a wide range of bicycles produced in and exported from the Peoples Republic of China. *See European Communities: Council Regulations* 1524/2000, O.J. L175/39 (July 10, 2000) ("*Bicycles from Chin*a") (Exhibit US-19).

[94] Canada First Written Submission, paras. 115-116.

[95] A real world example of the disparate ways in which investigating authorities may look at a common product is as follows: Both the United States and the European Communities have, in the past, conducted antidumping investigations concerning the product polyester staple fibers ("PSF"). Yet, their investigating authorities have defined the product under consideration somewhat differently. In 1999, the EC Council held that "[a]ll types" of PSF "were considered one single product" for the purpose of an investigation. Accordingly, it rejected a Taiwanese producer's request that low-melt fiber PSF be considered as a product different from the product under investigation. Council Regulation No. 1728/99, O.J. L/204/3 at 4-5 (1999) (definitive antidumping duty order on PSF from Taiwan). (Exhibit US-20.) In contrast, the United States excluded low-melt PSF (along with PSF used in carpet manufacturing and PSF of less than 3.3 decitex/3 denier) from its antidumping duty investigation and order covering PSF from the same source, Taiwan. *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea and Antidumping Duty Orders: Certain Polyester Staple Fiber From the Republic of Korea and Taiwan*, 65 FR 33807 (May 25, 2000) (Exhibit US-21).

95. In the present case, the investigation covered certain "softwood lumber from Canada."[96] The term "softwood" is a designation for a particular group of species of trees whose wood is "relatively soft, or easily cut."[97] The term "softwood" describes several species of timber, including Eastern White Cedar, Western Red Cedar, Eastern White Pine, Ponderosa Pine, Yellow Pine, Red Pine, Western Hemlock, Eastern Hemlock, Douglas Fir, Larch, and Yukon White Spruce. The term "lumber," covers "timber sawn into rough planks or otherwise partly prepared."[98] Once softwood timber is converted into softwood lumber, it takes many forms and shapes. It may be converted into boards used for manufacturing a wide range of products, including, but certainly not limited to, pallets, trellises, guard rails, fence pickets, and components of bed frames, windows, and doors. It may also be produced into finger jointed I-joist flanges, finger-jointed "studs" or "blocks," log-cabin siding, garage door cores, and many other construction-grade and non-construction grade lumber materials.

96. The particular products for which Canadian respondents sought distinctive treatment (Western Red Cedar, Eastern White Pine, bed frame components, and finger-jointed flangestock) are all types of softwood lumber products, in much the same way that mountain bicycles and children's bicycles are all types of bicycles. However, just as the AD Agreement does not obligate an investigating authority to treat mountain, racing and children's bikes differently for purposes of its analysis, so too does it not obligate an investigating authority to treat Western Red Cedar, for example, differently from Eastern White Cedar.

97. Canada's proffered rule would require the product "softwood lumber" to be divided into dozens, perhaps hundreds of discrete products. There is no basis in the AD Agreement to support the existence of such an obligation.

2. Practices of WTO Members, Including Canada, Refute the Existence of an Obligation to Narrowly Define the Product Under Consideration in an Antidumping Investigation.

98. The absence of any AD Agreement rules on how to define the term "product under consideration" is corroborated by the practice of WTO Members. The wide variety of methods employed by investigating authorities in defining product under consideration demonstrates that the AD Agreement's silence on the matter left the task of defining the product under consideration to Members' discretion. Several examples illustrate the point.

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[96] The scope of the investigation was published in the *Order*, 67 Fed. Reg. 36,068. The scope description, as presented by Canada in its first written submission, footnote 116, is incomplete. The complete scope, which includes further descriptive language and specific exclusions, can be found in Canada Exhibit CDA-3.

[97] *The New Shorter Oxford Dictionary*, p. 2934-2935 (1993) (esp. (a) the timber of coniferous trees; (b) sapwood; ellipt. A tree with such wood) (Exhibit US-22).

[98] *Id.* (Exhibit US-23).

- In 2000, the European Communities issued an antidumping duty order covering bicycles from the People's Republic of China.[99] The EC acknowledged that there were at least four groups of bicycles: mountain bikes; touring, trekking and city bicycles; junior action bicycles; and other sport and racing bicycles. Nevertheless, the EC determined that there was a single product under consideration and calculated a single duty rate for that product.[100]

- In 1998, Canada issued an antidumping finding covering "Certain Baby Food Originating In or Exported From the United States of America."[101] Canada found only one product under consideration and calculated only one margin, even though during the investigation the product had to be divided into four product groups for purposes of its pricing analyses,[102] as the twenty-one Harmonized System ("HS") classification numbers that covered baby food fell under four different HS chapters.[103] By contrast, the softwood lumber order issued in this case was covered by only seven HS classification subheadings, all of which fall under one HS chapter.[104]

- India has conducted several investigations covering a product that, in theory, could be divided into several "products under consideration." For example, it initiated a single antidumping duty investigation of vitamin E from the People's Republic of China, even though that product includes a range of items with different attributes, including "feed grade" and "acetate grade."[105] In another example, India initiated an investigation of the

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[99] *Bicycles from Chin*a (Exhibit US-19).

[100] *See id. at* 40, paras. 17-18 (Exhibit US-19).

[101] *Final Determination – Certain Prepared Baby Foods*, File No. 4237-83, Case No. AD/1180 (Canada Customs and Revenue Agency, March 30, 1998) (*"CCRA-Baby Foods"*) (Exhibit US-24)*; Certain Prepared Baby Foods Originating In or Exported From the United States of America*, Inquiry No. NQ-97-002 (Canadian Int'l Trade Tribunal April 29, 1998) ("*CITT-Baby Foods"*) (Exhibit US-25).

[102] *See CITT-Baby Foods*, 3, Table 1, showing different categories of baby food for purposes of price comparisons (Exhibit US-25).

[103] *See CCRA-Baby Foods*, found at <<http://www.ccra-adrc.gc.ca/cusoms/business/sima/anti-dumping/ad1180f-e.html>> at 3 (Exhibit US-24).

[104] "Certain softwood lumber" in this case is covered by HS chapter 44. *Order*, 67 Fed. Reg. at 36068-69 (Exhibit CDA-3); *see also Final Determination Notice*, 67 Fed. Reg. at 15539 (Exhibit CDA-1). In another case, Canada made an antidumping finding covering "Certain Xanthates Originating In or Exported From the People's Republic of China." Even though there are different uses for xanthates and four generally-recognized types of xanthates, Canada classified xanthates as one product. *Final Determination - Xanthates*, File No. 4240-50, Case No. AD/1282 (Canada Customs and Revenue Agency, Feb. 3, 2003) (Exhibit US-26).

[105] *See Initiation of Anti-Dumping Investigations Concerning Import of Vitamin 'E' originating in or exported from Peoples' Republic of China*, No.14/32/2002-DGAD (Government of India, Department of Commerce, August 27, 2002) (Exhibit US-27).

product "toys" ("including soft toys, mechanical toys, battery operated toys, electronic games/toys etc.").[106]

99. In sum, the practices of WTO Members illustrate the wide variety of methods by which an investigating authority may define a product under consideration. This confirms what is clear from the text of the AD Agreement itself: There simply is no obligation as to how to define a product under consideration.

3. Commerce's Identification of the Product Under Consideration Was Based on Well-Established Criteria Under U.S. Law, Which Are Clearer and More Detailed Than the Vague Test Canada Would Apply.

100. The test that Canada would apply to product-under-consideration determinations not only lacks a foundation in the AD Agreement, but it is far less sophisticated than the test *actually applied* by Commerce to determine the product under consideration in this case.

101. As discussed above, Canada purports to find in the AD Agreement an obligation for an investigating authority to explain "how . . . products closely resemble each other."[107] Canada cites no authority for its "close resemblance" test and, in any event, offers no guidance as to how it should be applied. By contrast, the test that *Commerce* actually applied in determining the product under consideration is well-established in U.S. law and is clearer and more detailed than Canada's vague, "close resemblance" test.

102. Under U.S. law, the product under consideration in an antidumping investigation is referred to as the "class or kind" of merchandise under investigation.[108] During an investigation, Commerce may determine, based upon the facts of the record, that there is more than one product under consideration. If it makes such a determination, it will divide the investigation into multiple investigations, each covering a separate "class or kind of merchandise."[109]

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[106] *See* "Case Profiles," *Directorate General of Anti-Dumping and Allied Duties Annual Report 2001-2002*, at 73 (Government of India, Department of Commerce, April 2, 2002), available at http://commerce.nic.in/gdad/contents.htm (Exhibit US-28).

[107] Canada First Written Submission, para. 125.

[108] 19 U.S.C. §1673(1)(2000) (Exhibit CDA-7).

[109] Commerce has found multiple classes or kinds of merchandise in some antidumping duty investigations. *See, e.g., Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 Fed. Reg. 18992 (May 3, 1989) (five classes or kinds of merchandise) ("*Bearings*") (Exhibit US-29). This decision was affirmed by the United States Court of International Trade in *Torrington Co. v. United States*, 745 F. Supp. 718, 727 (CIT 1990). In each of these cases, once Commerce determined that multiple investigations were warranted, it then analyzed the record and determined if merchandise subject to the scope of each separate investigation was being sold at less than fair value in

103. As part of its "class or kind" analysis, Commerce's practice has been to look to the product as a whole identified in the petition and determine whether "clear dividing lines" exist which run throughout that identified "product" to warrant dividing a single investigation into multiple investigations.[110] As part of its analysis in determining whether "clear dividing lines" exist within the product under consideration identified within the petition, Commerce reviews five factors: 1) the general physical characteristics of the product, 2) the expectations of the ultimate purchaser, 3) the ultimate use of the product, 4) the channels of trade in which the product is sold, and 5) the manner in which the product is advertised and displayed.[111] These are the factors Canada refers to in its first written submission as the "*Diversified Products* factors".[112]

104. Commerce applied these factors in this case, as explained in its *Final Determination*, and found no clear dividing lines warranting division of "softwood lumber" into more than one class or kind of merchandise.[113] Several respondents requested exclusions from the antidumping duty order, and in the alternative, argued that particular types of softwood lumber deserved different "class or kind" treatment.[114] This included Canadian respondents who requested exclusions for the four examples of softwood lumber described by Canada in its first written submission.[115]

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the United States. *Bearings*, 54 Fed Reg. at 18998 (Exhibit US-30).

[110] *Bearings*, 54 Fed. Reg. at 18998 (Exhibit US-29).

[111] *Id.* (Exhibit US-29).

[112] Canada First Written Submission, para. 128. "*Diversified Products*" refers to a case that did not even involve an investigation determination of class or kind. In *Diversified Products v. United States*, 572 F. Supp. 883 (CIT 1983) ("*Diversified Products*"), the U.S. Court of International Trade articulated five factors that Commerce should examine to determine if a new product imported after an antidumping duty was imposed was intended to be included in the scope of the order (Exhibit CDA-57). Commerce has determined that these factors are appropriate factors to examine in determining "class or kind" as well.

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

[114] *Final Determination,* at Comment 52 (identifying which parties specifically requested separate "class or kind" treatment) (Exhibit CDA-2). Commerce specifically explained that, even for some of the parties which did not expressly make such a claim, it nonetheless applied the *Diversified Products* factors as part of its analysis if some factors might arguably make that individual product unique.

[115] Letter from Miller & Chevalier to Commerce, dated May 21, 2001, at 1-2 (acknowledging that Western Red Cedar is a softwood lumber and requesting exclusion from the order); Letter from Baker & Hostetler to Commerce, dated May 21, 2001, at 2-4 (acknowledging that finger jointed flangestock is softwood lumber and requesting exclusion from the order); Letter from Wilmer, Cutler & Pickering to Commerce, dated May 21, 2001, at 2, 8 (acknowledging that squared ended bed frame components are softwood lumber and requesting exclusion from the order); Letter from Wilmer, Cutler & Pickering to Commerce, dated May 21, 2001 at 20 (acknowledging that Eastern White Pine is softwood lumber and requesting exclusion from the order) (Exhibit US-31).

However, when Commerce applied the *Diversified Products* factors to each of the individual products for which distinctive treatment was requested, it found that although each softwood lumber product had qualities unique to its species or product-type, there were other types of softwood lumber that shared similar traits.[116] In other words, Commerce found that none of these products were so essentially different from other products covered by the investigation as to warrant drawing "clear dividing lines" between those products.[117]

105. Canada alleges that Commerce erred in declining to exclude from the product under consideration four examples of softwood lumber.[118] These claims of error amount to improper requests for this Panel to find and evaluate the facts *de novo*. For the reasons set forth below, Commerce's decisions regarding these four lumber products were based on consistent application of the *Diversified Products* factors.

106. With respect to Western Red Cedar ("WRC"), the facts on the record before Commerce demonstrated that WRC shares similar physical characteristics with many other examples softwood lumber.[119] For example, although WRC is attractive, Eastern White Cedar, Eastern White Pine and other softwood lumber products are also valued for their appearance.[120] Furthermore, WRC is extremely durable, but so is old growth wood cut from trees such as Douglas Fir and Eastern White Cedar.[121] WRC is light in weight and has low structural strength, but Eastern White Pine and Eastern White Cedar share these features as well.[122]

107. As for the other four *Diversified Products* factors, evidence before Commerce demonstrated that customers purchased Western Red Cedar most commonly for use in "high end" applications, such as use in decks, siding, flooring, fencing, and shingles.[123] Other record

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

[117] *Id.*

[118] Canada First Written Submission, paras. 120-123, 130, 141-142.

[119] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated Mar. 18, 2002, at 23-25 (discussing WRC physical characteristics) and Exhibit 1 ("Uses of Various Softwood Lumber"); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 9-13 (discussing WRC physical characteristics) and Attachments 1, 4 and 5. The Coalition provided several websites, publications, and resources on the record to explain the physical similarities between Western Red Cedar and other softwood lumber products (Exhibits US-32 and US-33).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated March 18, 2002, at 25-26 (discussing WRC uses and customer expectations) and Exhibit 1 ("Uses of Various Softwood Lumber"); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re:

evidence showed that Eastern White Cedar, as well as other species within the product under consideration, are purchased for the same uses.[124] Customers for many of these "high end" softwood lumber products share similar expectations for the use and appearance of this softwood lumber. Furthermore, the record showed that Western Red Cedar was advertised, displayed and sold in the same channels of trade as other "high-end appearance" softwood lumber products.[125]

108. The second species that Canada argues ought to have been treated differently from the product under consideration is Eastern White Pine.[126] However, the record evidence showed that this species shares many physical characteristics with other pine species, including the "Western Pines," such as Ponderosa Pine, Sugar Pine, and Idaho Pine.[127] Furthermore, evidence showed consumers' expectations of Eastern White Pine are similar to their expectations of other appearance-grade softwood lumber.[128] Eastern White Pine is generally traded in the same distribution channel as other softwood lumber in the product under consideration, and it is marketed for its particular strengths to secondary manufacturers in a manner similar to that of

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Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 13-16 (discussing WRC uses and customer expectations) and Attachments 1 and 3. The record contains numerous other submissions which support the fact that WRC shares similar end uses and customer expectations with other softwood lumber products (Exhibits US-32 and US-33).

[124] *Id.*

[125] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated Mar. 18, 2002, at 26-28 (discussing WRC channels of trade and the manner in which it is advertised and displayed); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 16-18 (discussing WRC channels of trade and the manner in which it is advertised and displayed). The record contains numerous other submissions which support this analysis (Exhibits US-32 and US-33).

[126] Canada First Written Submission, para. 134.

[127] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated Mar. 18, 2002, at 29-30 (discussing EWP physical characteristics) and Exhibit 1 ("Uses of Various Softwood Lumber"); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 18-21 (discussing EWP physical characteristics) and Attachments 1, 3, 14 and 15. The record contains numerous other submissions which supported the fact that EWP shares physical characteristics with other softwood lumber products (Exhibits US-32 and US-33).

[128] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated Mar. 18, 2002, at 30-31 (discussing EWP uses and customer expectations) and Exhibit 1 ("Uses of Various Softwood Lumber"); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 21-23 (discussing EWP uses and customer expectations) and Attachments 1 and 3. The record contains numerous other submissions which support the fact that EWP shares common uses and customer expectations with other softwood lumber products (Exhibits US-32 and US-33).

other species in the product under consideration.[129] Although this species is most commonly used in the manufacture of paneling, siding, coffins, boats and other such products, the record indicated that it has also been used for construction purposes.[130]

109. The third lumber product that Canada claims ought to have been investigated as a separate product under consideration is softwood lumber boards exported for ultimate use in the United States in the manufacture of bed frames.[131] The evidence before Commerce demonstrated little distinction between these boards and other softwood lumber boards within the product under consideration. Canada calls these boards "further manufactured, downstream products" because they are measured to particular lengths and dimensions that are used in the manufacture of box spring frames.[132] In fact, softwood lumber boards used in the manufacturing of many items – from garage doors to pallets – come within the product under consideration.[133] All of these various types of softwood lumber are cut to particular sizes, sold through particular channels, and used for particular end-purposes.[134] Thus, the evidence before Commerce showed that, for purposes of the *Diversified Products* factors, bed frame components did not differ from the wide array of other specialty softwood lumber product components subject to the investigation.

110. Finally, Canada argues that softwood lumber boards cut and glued into finger-jointed flangestock should have been treated as an entirely different class or kind of merchandise from

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[129] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated Mar. 18, 2002, at 31-32 (discussing EWP channels of trade and the manner in which it is advertised and displayed); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 23-24 (discussing EWP channels of trade and the manner in which it is advertised and displayed). The record contains numerous other submissions which support this analysis (Exhibits US-32 and US-33).

[130] *See, e.g.,* Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 22 and attachment 16 (Exhibit US-33). There was further evidence on the record which supported this contention.

[131] Canada First Written Submission , paras. 131-132, 135.

[132] Canada First Written Submission, para. 131.

[133] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 40-46 (discussing bed frame components in light of the *Diversified Products* analysis) and applying the EWP uses and customer expectations) and Attachment 15 (containing U.S. Customs Ruling HQ 960768 (Oct. 23, 1997) which determined that bed frame components are designated as boards of wood, and not as part of a bed frame "kit"); *see also* Commerce Memorandum from Maria MacKay to Bernard Carreau re: Scope Clarification, dated October 30, 2001 at 8 (discussing Customs treatment of bed frame components) (Exhibit US-33 and US-34).

[134] *Id.* There was further evidence on the record which addressed the similarities between bed frame components and other softwood lumber products.

all other merchandise composing the product under consideration.[135] The record evidence before Commerce did not support such a determination. Although flangestock is manufactured to strength specifications, the same is true of other types of lumber, such as machine stress rated ("MSR") lumber, that are included in the product under consideration.[136] Flangestock is also produced from the same input material used to make finger-jointed studs, (which are included within the product under consideration) and is produced in the same mills where finger-jointed studs are produced.[137] Commerce noted that Flangestock is produced in especially long lengths, but explained in its *Final Determination* that length, alone, is not enough of a distinguishing feature to warrant treatment as a separate product under consideration.[138] As for the other *Diversified Products* factors, many other softwood lumber products, such as square ended bed frame components, or window or door components, are also "specialty products," which are manufactured for specific purposes, are sold in a specific channel of trade, and are advertised for particular usage.[139] Thus, Commerce found that finger-jointed flangestock was not so essentially different from other examples of softwood lumber contained within the product under consideration to warrant separate "class or kind" treatment.

111. With respect to none of these examples of softwood lumber to which Canada refers did the evidence support distinctions from other types of softwood lumber clear enough to require separate "class or kind" treatment. Canada argues that Commerce should have initially determined a neutral "general category of softwood lumber" and then compared all other softwood lumber species and lumber to that unnamed "general category."[140] As discussed above, the AD Agreement contains no such obligation.

112. Canada's argument regarding the four types of softwood lumber amounts to a request for this Panel to decide for itself whether it would have grouped these types within the product under consideration. Twenty-eight of the exhibits attached to Canada's first written submission provide the Panel with all of the facts, figures and information that Canadian respondents

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[135] Canada First Written Submission para. 130.

[136] *See*, *e.g.*, Coalition for Fair Lumber Imports Executive Committee Reply Brief on Scope and Class or Kind Issues, dated March 18, 2002, at 12-14 (discussing flangestock under the *Diversified Products* analysis); Coalition for Fair Lumber Imports Executive Committee Letter to Commerce re: Antidumping and Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, dated June 18, 2001, at 47-52 (discussing flangestock under the *Diversified Products* analysis) and Attachments 15 (containing Customs Ruling NY E88881 discussing I-joist flange components). The record contains numerous other submissions which supported the fact that finger-jointed flangestock shares similar characteristics with other softwood lumber products, as analyzed under the *Diversified Products* factors (Exhibits US-32 and US-33).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Canada First Written Submission para. 139.

provided to Commerce during the investigation.[141] Canada, however, does not provide the Panel with the hundreds of pages of information that were submitted on the record by other interested parties, which often clarified and, at times, refuted the information supplied by the Canadian respondents. Canada, therefore, would have the Panel review all of the information on the record that it finds favorable and make a determination based solely on that information. The Panel should not assume this task.

113. Because the violations that Canada alleges in its scope claim are based on a non-existent obligation, this Panel should reject Canada's scope claim.

C. The United States Was Not Required to Make an Allowance for Differences in the Dimension of Softwood Lumber under Article 2.4 of the AD Agreement.

114. The United States determined, in accordance with Article 2.4 of the AD Agreement, that Canada failed to demonstrate that differences in the dimensions of softwood lumber affected price comparability in this case. Canada either ignores or confuses the plain fact that any differences in prices for softwood lumber in the comparisons made were not shown to be attributable to differences in dimension (width, thickness and length). Article 2.4 provides for an adjustment to normal value for differences in physical characteristics that are shown, "in each case, on its merits" to affect price comparability. Commerce not only requested and evaluated information it normally relies upon to determine whether any adjustment was appropriate, it analyzed additional data provided by the parties as well. Pursuant to Article 2.4, the burden rested squarely on the Canadian respondents to substantiate their claim for an adjustment to normal value for differences in the three dimensional characteristics. Canada's attempt at burden-shifting notwithstanding, respondents failed to substantiate their claim before the agency, and Canada has not provided a basis under the AD Agreement for this Panel to overturn the United States' determination.

1. Article 2.4 of the AD Agreement Only Requires an Adjustment for Physical Differences That Are Shown To Affect Price Comparability

115. The Canadian companies failed to demonstrate that differences in the dimension of softwood lumber had an effect on price comparability in this case. While Article 2.4 requires that a due allowance shall be made for certain differences that affect price comparability, it also unambiguously provides that due allowance will be made in "each case, on its merits" for differences that are "demonstrated" to affect price comparability. Without adequate factual support on the record under Article 2.4, the United States was not required to make an adjustment to normal value for differences in the dimension of softwood lumber.

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[141] *See* (Exhibits CDA-53 through CDA-79).

116. The relevant provision of Article 2.4 states:

> Due allowance shall be made *in each case, on its merits*, for differences which *affect* price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which *are also demonstrated* to affect price comparability.[142]

117. According to these explicit terms, the mere existence of differences in physical characteristics does not automatically require a price adjustment. The language of Article 2.4 is qualified in certain critical respects. First, the physical difference at issue must affect price comparability. Second, that effect must be "demonstrated" or shown "in each case, on its merits."[143] The Canadian companies seeking a price adjustment for differences in dimension failed to make the requisite demonstration that dimensional differences affected price comparability.

118. Panel reports interpreting Article 2.4 with respect to a variety of price adjustments have recognized that an allowance is not automatic. For instance, in a recent report, the panel explained:

> Thus, while it is incumbent upon the investigating authorities to ensure a fair comparison, so also is it incumbent upon interested parties to substantiate their assertions concerning adjustments as constructively as possible. The duty of an investigating authority to ensure a fair comparison *cannot, in our view, signify that an investigating authority must accept any claimed adjustment*. Rather, the investigating authority must take steps to achieve clarity as to the adjustment claimed and then *determine whether and to what extent that adjustment is merited*.[144]

119. Similarly, another panel "read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability."[145]

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[142] Article 2.4, AD Agreement (footnote omitted, emphasis added).

[143] The Appellate Body has cautioned that "an interpreter is not free to adopt a reading that would result in reducing whole clauses and paragraphs of a treaty to redundancy or inutility." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996, para. 23 ("*U.S .– Reformulated Gasoline AB Report*").

[144] *EC - Pipe Fittings Panel Report*, para. 7.158.

[145] *Egypt - Rebar*, para. 7.352.

120. What these panel reports make clear is that claims for price adjustments must be substantiated. For example, in *EC - Pipe Fittings*, the panel concluded that the European Communities ("EC") did not violate Article 2.4 in denying a claimed adjustment for differences in taxation that were not adequately substantiated. The panel stated:

> It may be, for example, that this legal right [to a tax credit] had not been exercised in a given period by [the party]. In any event, it would be necessary to resort to [the party's] records to discern what had actually occurred. In this respect, moreover, the EC authorities examined the factual basis for [the party's] claim and their evaluation was that they considered, *inter alia*, that "the real value of this tax credit [is] doubtful"; it was not consistently booked and was wrongly calculated.[146]

121. Differences in physical characteristics, as well as differences in taxation, "are explicitly listed as a factor that must be taken into account under Article 2.4 *to the extent* they may affect price comparability, and for which due allowance shall be made, in each case, on its merits."[147] The case-by-case nature of the inquiry under Article 2.4 means that the United States, like the EC authority in *EC - Pipe Fittings*, was required to evaluate the identified differences in dimension "with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and then to make an adjustment where it determines this to be necessary on the basis of this evaluation."[148]

122. The United States, like the EC in *EC - Pipe Fittings*, fulfilled its obligation to seek the relevant information and thoroughly evaluate the claimed adjustment. Ultimately, this Panel should conclude that a "reasonable and objective investigating authority could have made an examination of this evidence and taken this decision on the basis of the record of this investigation."[149]

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[146] *EC - Pipe Fittings Panel Report*, para 7.164.

[147] *Id.*

[148] *Id.*, para. 7.157. The panel went on to state:

> The last part of the last sentence of Article 2.4, that the authorities "shall not impose an unreasonable burden of proof" on interested parties, does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments. In a similar vein, an investigating authority in possession of the requisite information substantiating a claimed adjustment would not be justified in rejecting outright that claimed adjustment.
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> *Id.*

[149] *Id.* para. 7.166.

2. Differences in the Dimension of Softwood Lumber Were Not Shown to Affect Price Comparability in This Case.

a. The United States ensured a fair comparison.

123. The softwood lumber antidumping investigation involved one of the most complex product comparisons conducted by the United States. Commerce's product matching mechanism was established by agreement with all the parties in the case and has not been challenged by Canada. Under the product matching mechanism, only softwood lumber products that were either identical or the most similar available (and in fact identical for a number of significant characteristics), were compared. Canada, and the individual respondent companies, were well aware of the efforts the United States made throughout the investigation to ensure the comparability of *each* transaction. Nonetheless, Canada now claims that it was entitled to a price adjustment to normal value on the comparisons made in this case involving minor dimensional differences. Canada fails to demonstrate, however, that the adjustment was warranted on the record.

124. At the outset of this investigation, Commerce sought to establish the distinguishing physical characteristics of softwood lumber in order to best match home market and U.S. products.[150] With the agreement of the parties, Commerce established the following matching criteria hierarchy:

(1) product category (*e.g.*, dimensional lumber, timbers, boards);
(2) species (*e.g.*, SPF, Western Red Cedar);
(3) grade group;
(4) grade;
(5) moisture content;
(6) thickness;
(7) width;
(8) length;
(9) surface finish;
(10) end trimming; and
(11) further processing (*e.g.*, edged, drilled, notched).[151]

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[150] *See, e.g.*, Commerce Request Re: Comparison Methodology (April 25, 2001) (Exhibit US-35).

[151] *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, 56065 (Dep't Commerce Nov. 6, 2001) (*Preliminary Determination*) (Exhibit CDA-11); *see also* Letter to Abitibi Consolidated, Inc. enclosing Questionnaire (May 25, 2001) at B-7 - B-10 (Exhibit US-36); Weyerhaeuser Calculation Memorandum at 4-5 (Exhibit US-37).

125. With regard to the first three characteristics (including the grade group), the United States *never* matched U.S. sales of softwood lumber products to Canadian transactions that did not contain the identical physical characteristics. With respect to the remaining physical characteristics (including the dimensions at issue here) Commerce's methodology, undisputed by Canada, was to search first for the transactions with the identical product characteristics in order to make a price comparison. If no identical match was found, Commerce's methodology was to search for the transaction containing the next *most* similar product characteristics available.

126. For the *Final Determination*, Commerce analyzed extensive cost and pricing data relevant to both its cost methodology and adjustments for differences in physical characteristics. Commerce thoroughly evaluated the applicable comments from the parties. At the insistence of some of the Canadian parties, and over the objections of the petitioners, the United States adopted a value-based cost allocation methodology.[152] As a result, Commerce was able to calculate an adjustment for any differences in grade, moisture content, differences in surface finishing, end trim and further processing characteristics.[153] Thus, the only physical differences remaining for which an adjustment was ever potentially necessary were differences in dimension. These adjustments, even if appropriate, would only be made in those instances where identical matches had not been found. Moreover, Commerce found that any such differences in dimension were generally small because Commerce's practice was to search for the most similar transaction available for a price comparison.[154]

127. Canada oversimplifies an extremely complex process that Commerce undertook to achieve fair price comparisons. Dimension involved only three out of 11 physical characteristics relevant to the price comparisons. Identical dimensional matches were made whenever possible. When identical matches were unavailable (always because the sales of identical product had been found to be outside the ordinary course of trade), the most similar dimensional matches were made. The record supported nothing further, and the AD Agreement requires nothing further.

b. Differences in dimension were not shown to affect price comparability.

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

[153] *Id.*, Comment 8. Canada does not challenge Commerce's value-based cost allocation methodology. Nonetheless, Canada complains in its first written submission that if Commerce "had followed through in its value-based cost analysis and properly allocated individual costs to the different sizes of lumber, there would be an appropriate cost-based adjustments [sic] for all products." Canada First Written Submission n. 145; *see also id.* at para.153. To the extent Canada is attempting to raise an indirect challenge to any aspect of the United States' cost methodology, this effort should be rejected.

[154] Commerce concluded in its *Final Determination* that "in this case, to the extent that we compared products having different dimensions, those differences were generally small." *Final Determination*, Comment 8 (Exhibit CDA-2).

128. Canada, like the respondents below, fails to demonstrate that the record evidence establishes that differences in the dimensional characteristics of softwood lumber affected price comparability in any of the comparisons made in this case. As Commerce explained,

> [I]n this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as [one respondent] argued, the record shows that *lumber prices for different products fluctuated in relation to each other over the course of the [period of investigation]*. Consequently, *there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared*, especially where those dimensional differences were minor.[155]

129. The record supports Commerce's conclusion. A sample of weighted average prices for several companies makes clear that Canada's assertion that large softwood lumber products have higher prices than smaller softwood lumber products is not supported by the record.[156] The relative prices for lumber of different dimensions varied over time; they were not stable or predictable.[157] Commerce thus noted that "the record shows that lumber prices for different products fluctuated in relation to each other over the course of the [investigation]."[158] Faced with this inconclusive evidence, Commerce reasonably 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."[159]

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[155] *Final Determination*, Comment 8 (Exhibit CDA-2) (emphasis added). United States law requires that an adjustment to the home market price for differences between the export price (or constructed export price) and normal value "that is established to the satisfaction of the administering authority [Commerce] to be wholly or partly due to" differences in merchandise. 19 U.S.C. § 1677b(a)(6)(C) (Exhibit CDA-7). The United States law is consistent with the standard set forth in Article 2.4.

[156] *See* "Sample of Weighted Average HM Net Prices" output, in the Weyerhaeuser Calculation Memorandum (observations 11-20) (Exhibit US-38); "Sample of Weighted Average HM Net Prices" output, in the Abitibi Calculation Memorandum (observations 3-7 and 8-12) (Exhibit US-39); "Sample of Weighted Average HM Net Prices" output, in the Tembec Calculation Memorandum (observations 10-16) (Exhibit US-40); "Sample of Weighted Average HM Net Prices" output, in the West Fraser Calculation Memorandum (observations 40-44 and 45-49) (Exhibit US-41). An examination of the gross unit prices column in each of these exhibits (HMGUPCAN) reveals little variation in prices as the lengths sold increases, other factors remaining constant (columns CONNUMH and LENGTHH2).

[157] For example, a sampling of Slocan's home market sales database shows prices for **[[ ]]** fluctuating and overlapping during the period of investigation. The data further indicates that the **[[ ]]** (Exhibits US-42 and US-43).

[158] *Final Determination*, Comment 8 (Exhibit CDA-2); *see also id*. at Comment 4 (Exhibit CDA-2) ("the company notes that softwood lumber prices fluctuate greatly").

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

130. Price comparability in this case was driven by a number of physical characteristics, including dimension, all of which were taken into account by Commerce in its model matching program. The record evidence did not reveal a consistent pattern of price movement that was attributable to the small differences in the non-identical products compared. Commerce's establishment of the facts was proper and its evaluation of the facts was unbiased and objective. Accordingly, this Panel should reject Canada's request to overturn this decision.

3. Canada Has Failed to Satisfy its Burden of Proof.

131. The complaining Member in a WTO dispute bears the burden of proof. This means, as an initial matter, that Canada, as the complaining Member, bears the burden of coming forward with evidence and argument that establish a *prima facie* case of a violation.[160] It also means that, if the balance of the evidence is inconclusive with respect to its claim for price adjustments based on differences in dimension, Canada must be found to have failed to establish its claim.[161]

a. Under Article 2.4, the Burden Was on the Canadian Interested Parties to Substantiate Their Claim for an Adjustment.

132. The Canadian parties failed to satisfy their burden to substantiate entitlement to an adjustment for differences in dimension in this case. Article 2.4 states:

> The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

133. Implicit in this sentence, and repeatedly confirmed by dispute settlement panels, is the principle that the burden is on the party seeking an adjustment to prove its entitlement thereto.[162] The obligation of Commerce to indicate what information was necessary, and not to impose an unreasonable burden of proof was amply satisfied. Commerce sought the data necessary to determine whether or not dimensional differences in lumber affected price comparability in the questionnaires issued to the companies early in the investigation: The prices and dimensional characteristics, as well as cost data for the sales and products at issue, were contained in each of

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[160] *See, e.g.*, Appellate Body Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted May 23, 1997, p. 14 ("*U.S .- Wool Shirts AB Report*"); *EC-Hormones* para. 117.

[161] *See, e.g.*, Panel Report, *India-Quantitative Restrictions on Imports of Agricultural Textile and Industrial Products*, WT/DS90/R, adopted September 22, 1999, para. 5.120.

[162] *See, e.g.*, *EC-Pipe Fittings* paras. 7.167, 7.192 (claims for adjustment for tax credit and packing cost not substantiated); *Egypt-Rebar*, para. 7.381, 7.387 (claim for adjustment for credit cost not properly raised at agency level).

the respondents' databases submitted to the United States during the investigation.[163] Thus, Canada and each of the respondent companies had ample opportunity to develop and analyze that data to demonstrate to Commerce how dimensional differences affected price comparability.[164] Canada erroneously attempts to place on Commerce the burden of substantiating and quantifying an adjustment for differences in the dimension of softwood lumber. Canada's attempt at burden-shifting is plainly at odds with the AD Agreement.

134. Canada's first written submission demonstrates the factual complexity Commerce faced in this case, as well as Canada's failure to provide proof. In its introductory statement, at paragraph 59, Canada explains:

> In the case of lumber, no company can produce only Select Grade lumber, 10-inch widths, or 16-foot lengths. Rather, the production of these high value products necessarily is accompanied by the production of *smaller size, lower grade, lower value products as well.*

135. However, at paragraph 56, Canada also explains that:

> [I]f a quality defect exists at one or both ends, like wane or large knots, the grader can cut off the defect, and shorten the lumber, because *the shorter, higher-grade lumber is of higher value*. Once again, the relative values of different grade and length lumber affect the products produced, and the quality of the wood affects not only the grade of lumber produced but also the size.

136. In the latter quote, Canada emphasizes length and grade together, without distinguishing between the two factors, and without any reference to width or thickness. Canada simply could not prove that the minor differences in the size of the products compared in this case had an effect on price comparability.

137. Canada's argument regarding dimensional differences is without foundation in the record evidence. Canada makes the bald assertion that "[t]he fact that physical differences in softwood

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[163] The United States questionnaire issued to the parties early in the investigation informs the parties of the information normally required to establish an adjustment for differences in merchandise compared. *See, e.g.*, Letter to Abitibi Consolidated, Inc. enclosing Questionnaire (May 25, 2001) at Appendix I-5, B-29 (Exhibit US-36); *see also* Commerce Regulations at 19 C.F.R § 351.411 (Exhibit US-44).

[164] Commerce accepted and reviewed all of the parties' information and comments presented on this issue. *See Final Determination*, Comment 8 (Exhibit CDA-2). Thus, not only did Commerce examine the question of what variable cost information was available on the record (the type of information Commerce prefers to demonstrate an allowance for this adjustment), but also examined each of the Canadian parties' alternative claimed bases for an adjustment for the remaining physical differences in dimension. Commerce found each of the party's arguments to be flawed in a significant respect. *Id.*

lumber affect price comparability was confirmed by the pricing data submitted by the Canadian exporters."[165] This statement is simply inaccurate. The footnote attached to this assertion contains factual analysis never presented to Commerce during the administrative proceeding, in clear violation of Article 17.5(ii), and that information should not be considered by this Panel.[166] Canada's examples of price variability, allegedly based on size, are without any citation to specific pieces of record evidence presented to Commerce.[167] To the extent that these claims are based on analyses not presented to Commerce during the investigation, they cannot provide a basis for review of Commerce's conclusion on the record before it.

138. Canada has presented this Panel with numerous arguments, including new charts and a regression analysis not before Commerce at the time it made its administrative determination, in clear violation of Article 17.5(ii) of the AD Agreement, and thus improperly inviting *de novo* review. Commerce thoroughly evaluated relevant price and cost data and the dimensional characteristics of softwood lumber on the record, including the arguments and data presented by the parties during the investigation. Even if this Panel were to consider Canada's new analyses, or determine that it might have reached a different conclusion on the facts, it should uphold Commerce's determination in light of its basis on a proper establishment of the facts and an objective and unbiased evaluation of the facts.

b. Canada's reliance on *Argentina - Floor Tiles* is misplaced.

139. Canada erroneously claims that "[i]n essence, Commerce did exactly what the investigating authority did in *Argentina – Floor Tiles* . . . ."[168] Canada has misread the panel's

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[165] Canada First Written Submission, para. 148.

[166] *See* Section III, *supra*. *See also, EC-Pipe Fittings Panel Report*, para. 7.33. However, even if this Panel considers this analysis, despite the United States' contention that to do so would involve *de novo* review of the facts, the United States submits that it is inconclusive on its face. For example, a close examination of Canada's Exhibit CDA-76 reveals that while Weyerhaeuser's **[[ ]],** Slocan's comparable product (page 7) sold for an average price of **[[ ]]**, a difference of **[[ ]]** percent above Slocan's average price. For Slocan, the average POI price for **[[ ]]**. For Weyerhaeuser, the average POI price for **[[ ]]**. Both products commanded the same price within each company, yet the difference between companies in both cases was approximately **[[ ]]**. In addition, **[[ ]]** From an examination of the charts, it is apparent that there is no consistent pattern of prices that would require concluding that Commerce did not make an objective and unbiased evaluation of the facts.

[167] Canada First Written Submission, para. 148.

[168] Canada First Written Submission, para 150.

report, and the facts, in *Argentina–Floor Tiles*.[169] First, the panel in that proceeding did *not* conclude that all differences in physical characteristics must automatically result in an adjustment in the margin calculation, irrespective of the evidence presented or regardless of their impact on price.[170] Its decision rested on the conclusion that the facts of record showed "other factors significantly affecting price comparability."[171]

140. Second, the panel faulted the Argentine administering authority for ignoring physical differences altogether and failing to gather or evaluate relevant data.[172] Indeed, in that case, the Argentine authority specifically rejected relevant data presented by the Italian respondents.[173] In addition, the Argentine authority "chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability."[174]

141. In stark contrast to that case, Commerce sought and evaluated extensive data regarding many physical characteristics, including dimensional differences. All of the relevant data are on the record in this case. Dimensional characteristics were considered and taken into account, along with other physical characteristics in Commerce's product matching mechanism.[175] Transactions with identical dimensional characteristics were compared whenever possible. Accordingly, the burden was squarely on the Canadian interested parties to substantiate the claimed adjustment for the minor differences in dimension remaining in the price comparisons.[176] However, the parties failed to demonstrate that the differences in dimension affected price

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

[170] *Argentina–Floor Tiles Panel Report*, para. 6.117.

[171] *Id.*

[172] *Id.* para. 6.115 (the Argentine authority "acknowledged that there existed a large variety of types and models of ceramic tiles with significant price differences between them"). *See also, id.*, para. 6.116 ("other important differences remained, as the [Argentine authority] acknowledged in its final determination").

[173] *Id.* para. 6.112 ("We recall our findings on claims 1 and 2 that the [Argentine authority] was not justified in disregarding a large part of the exporters' information and erred in failing to determine an exporter-specific margin of dumping").

[174] *Id.*, para. 6.116.

[175] By contrast, in *Argentina–Floor Tiles* the European Communities complained that the Argentine authority "without any justification, rejected the exporters' request for a model-to-model comparison and failed to apply any alternative method for making a due allowance for differences in physical characteristics affecting price comparability." *Argentina–Floor Tiles Panel Report*, para. 6.106.

[176] Canada's reference to *Atlantic Salmon* is also inapposite. Commerce did not conclude in that case that differences in prices were not attributable to the weight differences at issue there, a conclusion specifically reached in this case concerning the dimensional differences at issue here. *See* GATT Panel Report, *United States–Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway*, ADP/87, 41S/229, adopted by Committee on Antidumping Practices, Apr. 27, 1994, paras. 471-72 ("*Atlantic Salmon"*).

comparability.[177] Indeed, Commerce reached a reasoned conclusion that the connection had not been made between prices and differences in dimension, "especially where those dimensional differences were minor."[178] Even if the Panel might have reached a different conclusion on these particular facts, it should not overturn Commerce's determination, under the standard under Article 17.6(i).

D. The United States' Margin Calculation Methodology Is Consistent with the AD Agreement.

142. In its first written submission, Canada argues that the United States calculated dumping margins on Canadian softwood lumber in a manner inconsistent with the AD Agreement. Relying exclusively on the Appellate Body's report in *EC–Bed Linen*,[179] Canada asserts that the United States' methodology for calculating the overall weighted average dumping margin was inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement.[180]

143. As the United States describes below, the methodology used in this case is not inconsistent with Articles 2.4 or 2.4.2, because neither of those articles establishes obligations as to the calculation of the overall dumping margin. The *EC–Bed Linen* report, which Canada relies on, is not binding on this Panel, and the Panel should not follow its reasoning. Moreover, in urging this Panel to follow the *EC–Bed Linen* findings, Canada asks the Panel to rely on an incorrect reading of the contextual significance of Article 2.1 in the interpretation of Article 2.4.2, a reading that cannot be reconciled with the ordinary meaning of the text of Article 2.4.2, read in the context of Article 2.4, to which it explicitly refers. The relevance of Article 2.4 of the AD Agreement to the proper interpretation of Article 2.4.2 is confirmed by the negotiating history of Articles 2.4 and 2.4.2.

1. Articles 2.4 and 2.4.2 of the AD Agreement Do Not Address the Methodology About Which Canada Complains.

144. Canada alleges that the United States used a methodology inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement when calculating the overall weighted average dumping margins

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[177] Canada's quotation of Commerce's statement "we recognize that these physical differences *could* result in differences in market value" (Canada First Written Submission, para. 149, quoting *Final Determination*, Comment 8 at 51(Exhibit CDA-2), does not contradict the United States' position. The use of the word "could" is clear. The United States acknowledged the differences in dimension and acknowledged only the *possibility* of the effect on price comparability.

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

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

[180] Canada First Written Submission, paras. 165-73.

for Canadian softwood lumber producers. An analysis of these claims necessarily begins with the text of the cited articles.[181]

145. Article 2.4 of the AD Agreement provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.
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> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

146. Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. In particular, Article 2.4 provides that comparisons are to be made at the same level of trade and in respect of sales made as nearly as possible at the same time. This provision also provides that due allowance is to be made for certain articulated differences, including physical differences, conditions and terms of sale, etc., when those differences affect price comparability.

147. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities. In light of these possible distinctions, Article 2.4 provides that, in order to ensure a fair comparison, export transactions are to be compared to normal values established at the same level of trade. Similarly, due allowance is to be made for other differences affecting price comparability,

[181] Appellate Body Report, *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, adopted Dec. 19, 2002 para. 62."*U.S.–German CVDs*").

including physical characteristics, conditions and terms of sale, taxation, quantities, and any other differences (including level of trade, when comparisons are not made at the same level of trade) which are also demonstrated to affect price comparability.

148. In order to provide for the most fair comparison in any particular case, it is often necessary and appropriate to distinguish among distinct models of the like product and to distinguish among sales of each of these models at each level of trade and to make model-specific, level-of-trade-specific comparisons between normal value and export price.[182]

149. Once the comparisons have been identified pursuant to Article 2.4 of the AD Agreement, Article 2.4.2 establishes the permissible methods for comparing normal value to export price. Article 2.4.2 of the AD Agreement provides, in full:

> Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods and if an explanation is provided why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

150. Article 2.4.2 provides three methods for determining the existence of margins of dumping in an investigation: (1) comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions; (2) comparison of normal value and export prices on a transaction to transaction basis; or (3) when certain conditions are met, comparison of normal value established on a weighted average basis with individual export transactions. Notably, at least the first two methods are made explicitly subject to the provisions governing fair comparison in Article 2.4 of the AD Agreement.[183]

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[182] *See* Panel Report, *United States–Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*, WT/DS179/R, adopted Feb. 1, 2001, para. 6.120, and n.121 ("*U.S.–Steel Sheet/Strip*"), noting that the parties to the dispute agreed that multiple averages were justified pursuant to Articles 2.4.2 and 2.4 of the AD Agreement based on differences in level of trade and differences in physical characteristics. Indeed, elsewhere in its submission, Canada rests its argument on the need for a price adjustment for physical differences in part on the model-by-model nature of the price comparison, thereby recognizing Article 2.4's model-specific requirements. Canada First Written Submission, paras. 143-164.

[183] Whether the cross-reference to Article 2.4 at the beginning of Article 2.4.2 is applicable to the third methodology is not relevant to this dispute and need not be addressed by this Panel.

151. Regardless of which method is selected in a given investigation, the investigating authorities will normally have to make multiple comparisons between normal value and export price. With respect to the second and third methodologies, because comparisons are being made to transaction-specific export prices, in any investigation in which there is more than one export transaction, multiple comparisons will be necessary. Multiple comparisons will also be necessary pursuant to the first methodology whenever there are export transactions at multiple levels of trade or involving products with different physical characteristics.[184]

152. This commonly accepted practice of multiple comparisons, even under the first methodology, is consistent with the definition of "like product" in Article 2.6 of the AD Agreement, which defines the like product relative to the "product under consideration." Thus, for example, where the "product under consideration" includes multiple, distinct models of a product and there are sales of the same, multiple models in the home market, Article 2.4 of the AD Agreement requires Members to calculate multiple averages based on each export model and its particular like product (the identical model sold in the exporting country).

153. Additionally, this calculation of multiple averages for comparison is consistent with the ordinary meaning of Article 2.4.2 of the AD Agreement which provides for the calculation of *"margins*" – plural – of dumping regardless of whether the comparisons are being conducted on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis.

154. While Article 2.4.2 provides for the calculation of multiple margins of dumping in an investigation under all three methodologies, it is nevertheless necessary to determine a single, overall dumping margin for each exporter or producer. At a minimum, calculation of such a single, overall dumping margin is necessary to comply with Article 5.8 of the AD Agreement, which requires termination of an investigation when it is determined that "the margin" – singular – of dumping is *de minimis*. In addition, as a matter of administrative practicality, many authorities utilize this single, overall dumping margin as the basis for collecting antidumping duties or cash deposits, pursuant to Article 9 of the AD Agreement; otherwise, their authorities would be faced with maintaining potentially thousands of distinct, producer-specific, model-specific, and level-of-trade-specific dumping margins and associating each entry with one of those margins. Nevertheless, neither Article 2.4, nor Article 2.4.2 contains obligations as to how the single, overall dumping margin is to be calculated and, consequently, the United States' methodology cannot be found to be inconsistent with a non-existent obligation.

155. In seeking to have this Panel establish obligations where none exist, Canada would have this Panel create obligations to which the Members have not agreed. The Panel may not interpret the AD Agreement in such a manner that adds to or diminishes the rights and obligations

[184] *See U.S.–Steel Plate/Sheet*, para 6.120 and n. 121, discussed above.

provided in that Agreement.[185] It is not the role of panels to make new commitments, but to clarify existing provisions in accordance with customary rules of interpretation of public international law.[186]

156. In applying the customary rules of interpretation of public international law, the Panel should be mindful of the corollary to the general rule that an interpretation "must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundance or inutility."[187] Canada's interpretation of Article 2.4.2 would render the term "comparable" without meaning, inconsistent with this corollary. By arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation,"[188] Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all" which immediately precedes it.[189]

157. The importance of the word "comparable" is particularly clear when Article 2.4.2 is examined in full. As discussed above, Article 2.4.2 provides three methodologies for establishing the existence of margins of dumping: weighted-average-to-weighted-average comparisons; transaction-specific-to-transaction-specific comparisons; and weighted-average-to-transaction-specific comparisons.

158. The entire basis of Canada's argument is founded on the particular language of the first of these three methodologies. Nevertheless, it is clear that both the second and third methodologies provided for in Article 2.4.2 will result in the calculation of multiple margins of dumping, which would have to be combined to establish an overall margin of dumping. It is also clear that Article 2.4.2 does not establish any obligations with respect to how those multiple margins of dumping are to be combined.

159. Thus, interpreting the language of the first methodology as requiring authorities to offset dumping margins implies that the negotiators addressed the offset issue with respect to that methodology, but not the other two, leaving the issue to the Members' discretion when utilizing

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[185] DSU, Articles 3.2 and 19.2.

[186] DSU, Article 3.2.

[187] Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996, at 23 (footnote omitted).

[188] Canada First Written Submission, para. 171.

[189] As described below, the negotiating history confirms that the addition of the term "comparable" reflected the careful consideration of the negotiators. Moreover, the cross-reference from Article 2.4.2 to Article 2.4 emphasizes the significance of the term "comparable" within Article 2.4.2 and, through its use of a variant of "comparable" – "comparability" – confirms that not all sales of the like product are equally comparable, in contrast to Canada's suggested reading of Article 2.4.2.

either of the other two methodologies. Canada offers no interpretation of Article 2.4.2 that justifies such an anomalous result, nor does it offer any explanation as to why the negotiators might have intended to create such an anomaly.

160. Finally, in relying on the *EC-Bed Linen AB Report*, Canada rests its interpretation of Article 2.4.2 on the faulty premise that the reference to "a product" in the definition of dumping in Article 2.1 constrains the term "margins of dumping" in Article 2.4.2.[190] Thus, following the *EC-Bed Linen AB Report* line of reasoning, Canada contends that, under Article 2.4.2, margins of dumping can be established only for "a product," not for individual models of a product.[191]

161. The line of reasoning that Canada endorses ascribes a significance to Article 2.1 of the AD Agreement that cannot be reconciled either with the text of Article 2.4.2 or the immediate and expressly referenced context of Article 2.4. As discussed above, Article 2.4.2 explains how to establish "margins" – plural – of dumping, making clear that the methodologies described may yield multiple margins. Article 2.4.2 also uses the term "all comparable export transactions" in describing the weighted-average-to-weighted-average methodology, making plain that not all export transactions are "comparable."

162. The possibility that not all export transactions will be equally comparable with all normal value transactions is further supported by Article 2.4 — the provision to which Article 2.4.2 is made "subject." As explained above, Article 2.4 catalogues a variety of features that may distinguish individual transactions within the product under consideration. Article 2.4 anticipates that such differences may "affect price comparability," and that, as a consequence, multiple margins of dumping may have to be calculated.

163. Article 2.4 thus informs the concept of comparability in Article 2.4.2. Under the instruction in Article 2.4.2 to compare "weighted average normal value with a weighted average of prices of all comparable export transactions," it would be improper to compare a weighted average normal value with respect to one model or one level of trade to a weighted average of prices for a different model or different level of trade. Such factors are elements of comparability as explained in Article 2.4.

164. Thus, Canada's reasoning starts from the premise that Article 2.1 defines dumping with respect to "a product"– in the singular– and concludes that, therefore, margins of dumping under Article 2.4.2 may not be established with respect to particular models of a product. This reasoning improperly overlooks the more detailed text of Articles 2.4 and 2.4.2 in favor of the

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[190] *See EC-Bed Linen AB Report*, paras. 51-53.

[191] Canada First Written Submission, para. 171.

more general text of Article 2.1.[192] It deprives the term "comparable" of any meaning and, accordingly, ought to be rejected in favor of the more natural interpretation of the operative terms.

2. The Negotiating History of the AD Agreement Confirms That the United States' Dumping Margin Calculation Is Consistent with Articles 2.4 and 2.4.2 of the AD Agreement.

165. As demonstrated above, neither Article 2.4 nor 2.4.2 provides obligations as to how multiple margins of dumping are to be combined to calculate a single, overall dumping margin. Moreover, Canada's interpretation to the contrary would read the term "comparable" out of Article 2.4.2. The fact that neither Article 2.4, nor 2.4.2 addresses this issue is confirmed by examination of the negotiating history of the AD Agreement. Recourse may be had to supplementary means of interpretation such as negotiating history in order to confirm the meaning resulting from an analysis of the text, context and object and purpose.[193]

166. Individual contracting Parties to the GATT and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Antidumping Code") already had in place their own methodologies for calculating dumping margins and the negotiators of the AD Agreement were well aware of these methodologies. In the case of a number of major users of the antidumping provisions, including the United States and the European Communities, the investigating authority made comparisons between individual export transactions and weighted average normal values. This was referred to during the Uruguay Round negotiations as an "asymmetrical" comparison or "the asymmetry issue."[194] This methodology was examined by a

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[192] In light of the text of Article 2.4.2 and the immediate context of Article 2.4, the reference to "product" in Article 2.1 cannot possibly have the significance that Canada implicitly would ascribe to it in its reliance on the *EC-Bed Linen AB Report*. In fact, Article 2.1 is no more and no less than what it appears to be – a general definition of dumping meant to frame the scope of the AD Agreement. The significance of the term "a product" in that context should not be broadened in the manner Canada urges on this Panel.

[193] Article 32 of the *VCLT* provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 ... ." *See also, United States–German Steel CVDs* para. 90 (negotiating history confirming view as to meaning of Article 31 under the WTO Subsidies Agreement).

[194] *See, e.g., Submission of Japan on the Amendments to the Anti-Dumping Code*, MTN.GNG/NG8/W/48, at item IV (August 3, 1989) (arguing that a justification must be provided for comparing weighted average normal values to individual export prices); *Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55, at item II.E, Comment 16 (October 13, 1989)(*"Singapore Communication"*). Note that there was a second and distinct "asymmetry" argument raised during the negotiations, relating to the fact that certain adjustments might only be made to normal value or to export price, but not both, depending on the circumstances of the case. The resolution of that issue is not relevant to this issue before the Panel.

GATT panel during the Uruguay Round negotiations and found to be consistent with the Antidumping Code.[195]

167. Separately, a number of the Parties to the Antidumping Code, including the United States, the European Communities, and Canada, utilized a methodology whereby they calculated the overall margin of dumping by aggregating the dumping amounts for all comparisons where normal value exceeded export price and dividing that number by the aggregate of all export prices. Some negotiators argued that this methodology did not properly account for comparisons where export price exceeded normal value and they referred to this as the "zeroing" issue.[196] Concurrent with the negotiations, this methodology was reviewed by an Antidumping Code dispute settlement panel and found to be consistent with the Antidumping Code.[197]

168. Uruguay Round negotiators were faced with a clearly defined issue. Both methodologies at issue, the comparison of weighted average normal values to individual export transactions ("zeroing") and not offsetting dumping margins with non-dumped transactions ("asymmetry"), were methodologies that panels had found to be consistent with the Antidumping Code. Thus, absent modified text, it was reasonable for negotiators to expect that these practices would continue to be found GATT consistent.[198]

169. Among the issues before this Panel is the question whether the Uruguay Round negotiators agreed to change the then-existing status quo, to require that dumping margins be offset by non-dumped sales. The answer is clearly "no." The negotiators did not agree to modify the text of the AD Agreement so as to prohibit this. While agreement was reached to address the asymmetry issue through and to the extent provided for in the language of Article 2.4.2 of the AD

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[195] *Atlantic Salmon,* paras. 474-86.

[196] *See, e.g., Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins "'negative' dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value"); *Communication from the Delegation of Hong Kong,* MTN.GNG/NG8/W46 (July 3, 1989), at 7.

[197] Panel Report, *EC–Imposition of Anti-dumping Duties on Imports of Cotton Yarn From Brazil*, ADP/137, adopted by the ADP Committee October 30, 1995, paras. 500-501 (finding the practice of "zeroing" not to be inconsistent with the Antidumping Code).

[198] Although GATT Panel Reports were not binding on future panels, the fact that when they were adopted, it was through consensus, suggests a reasonable likelihood that a legal interpretation, once adopted would be followed in future disputes.

Agreement, nothing was provided for in the agreement to require offsetting dumping margins by non-dumped sales.[199]

170. As described above, the ordinary meaning of Article 2.4.2 of the AD Agreement, when read in the context of Article 2.4 of the AD Agreement, which is explicitly referenced in Article 2.4.2, makes it clear that this provision requires a symmetrical comparison (unless the exception provided therein applies), but does not address how the results of those multiple, symmetrical, comparisons are to be combined. The negotiating history of the AD Agreement confirms this interpretation. The word "all" in the first sentence of Article 2.4.2 first appeared in the Dunkel Draft issued in December 1991, as follows:

> [T]he existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* export transactions or be a comparison of normal value and export prices on a transaction to transaction basis.[200]

171. The word "all," as modifying "export transactions," was viewed by participants, including the United States, as a drafting error, not an intentional substantive obligation in the text of Article 2.4.2. Accordingly, in November 1993, the United States proposed to delete the word "all":

> Price Averaging
>
> Article 2.4 of the antidumping text properly requires that a fair comparison be made between the export price and the normal value, at the same level of trade and using sales made at as nearly as possible the same time. [...]

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[199] To be clear, there is a limited degree of overlap between the asymmetry issue and the offsetting of dumping margins. That overlap occurs to the extent that there are comparisons between a weighted average normal value and the weighted average of multiple comparable export sales of the same model at the same level of trade. If some of those export sales were dumped, while other export sales of the same model at the same level of trade were sold above the average normal value, the weighted-average to weighted-average comparison provision of Article 2.4.2 of the AD Agreement would lower (or, perhaps, eliminate) the dumping margin for those sales of that particular product. In other words, the pricing above normal value on the higher priced export sales of the model would offset dumping margins on the lower priced export sales of the same model at the same level of trade. However, this offsetting occurs only within comparisons of comparable merchandise. By specifying that the comparison was to be made to "all *comparable* export transactions," the negotiators indicated that such offsetting was appropriate only for comparison of the same model at the same level of trade – i.e., across all comparable export transactions being compared to the same weighted average normal value.

[200] *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA, at Article 2.4.2 (Dec. 20, 1991)("*Dunkel Draft"*)(emphasis added).

> Unfortunately, the clear direction which article 2.4 provides is clouded later in article 2.4.2. In describing the normal basis of comparison, article 2.4.2 states that "the existence of margins ... shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* export transactions ..." (emphasis added). Even though the introductory clause to this subparagraph indicates that the comparison is to be made "subject to the provisions governing fair comparison in paragraph 4 of this Article," the United States is concerned that the use of the term "all" may imply that average export price is to be established on the basis of sales both within and outside of the category of comparison. To clarify this, we propose that the word "all" simply be deleted.[201]

172. Subsequently, the phrase in question was modified by the addition of the word "comparable," which satisfied the concerns expressed by the United States.[202]

3. The Panel Should not Rely on *EC–Bed-Linen*

173. Canada justifies its position by relying on the reasoning in the *EC–Bed Linen AB Report*. That reliance is misplaced however.

174. First, the United States was not a party to the *EC–Bed Linen* case, and the concept of *stare decisis* is not applicable to WTO disputes. Article IX:2 of the *WTO Agreement* provides the only explicit basis for establishing authoritative interpretations of the Agreements: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." By contrast, the Appellate Body has found that dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute."[203]

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[201] *See* also Explanation *of U.S. Proposals to Amend The Draft Antidumping Agreement*, at p. 7-8 (Nov. 26, 1993).

[202] As the Panel noted in *U.S.–Steel Plate/Sheet*, para. 6.111 and n. 114, "[I]nsertion of the word 'comparable' into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. [...] This suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters."

[203] Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, at 14, adopted Nov. 1, 1996 ("*Japan–Alcoholic Beverages")* (footnote omitted); *see also,* Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, adopted Nov. 21, 2001 para. 107-09 (extending the reasoning of *Japan–Alcoholic Beverages* to Appellate Body reports); *Argentina-Poultry*, para. 7.41(not bound by rulings contained in adopted WTO panel reports).

175. While the Appellate Body also said that adopted reports "should be taken into account where they are relevant to any dispute,"[204] the relevance of *EC–Bed Linen* to this dispute is limited to the extent that the Appellate Body was not asked to, and therefore did not, address a number of the textual arguments advanced above and, in so doing, erroneously concluded that the methodology adopted by the EC in that case did not constitute a permissible interpretation of Article 2.4 and 2.4.2 of the AD Agreement within the meaning of Article 17.6(ii) of the AD Agreement.

176. Indeed, non-parties cannot expect their interests to be fully protected by parties to a dispute, and must have the opportunity to defend their interests through independent evaluation of their arguments.

177. As discussed above, the AD Agreement does not require Members to offset dumping amounts with the amount by which sales of non-comparable models were not dumped. In *EC–Bed Linen AB Report*, the Appellate Body came to a different conclusion based on its reliance on Article 2.1 of the AD Agreement for context and its finding that all export transactions within a like product should be treated as comparable for purposes of Article 2.4.2.[205] When considered within the context of the remainder of Article 2.4.2 and in conjunction with Article 2.4 (which is explicitly cross-referenced in Article 2.4.2 and which addresses the comparability of normal value and export price), as discussed above, there is clear justification for not further extending the reasoning of the *EC–Bed Linen* report to the present dispute.

178. For these reasons, the Panel should find that the United States' dumping margin calculation methodology was consistent with the obligations found in Articles 2.4 and 2.4.2 of the AD Agreement.

E. Company-Specific Issues

1. Commerce Calculated Reasonable Amounts of Administrative, Selling, and General Costs in Calculating Costs of Production.

179. Canada makes a number of claims based on the way Commerce performed various calculations during the softwood lumber investigation. As discussed in this section, the claims amount to alternative interpretations of the evidence rather than demonstrations that Commerce improperly found facts, or evaluated facts in a biased, non-objective manner.

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[204] *Japan–Alcoholic Beverages*, at 14.

[205] *EC–Bed Linen*, paras. 51 and 58.

180. In brief, Canada contends that it would have made various calculations differently, and it asks this Panel to revise Commerce's calculations. This is simply a request for *de novo* fact-finding and should be rejected under Article 17.6(i) of the AD Agreement.

181. Under Article 2.2 of the AD Agreement,[206] when normal value cannot be determined based on sales in the domestic market of the exporting country or in a third country, the investigating authority may construct a normal value. Article 2.2 states:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country. . . the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to a third country. . . or *with the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits*." (emphasis added)

182. The AD Agreement provides only general guidance as to the determination of constructed normal value and does not address the variety of fact-specific issues that can arise in such a calculation. For instance, Article 2.2.1.1 does not prescribe a particular methodology for calculating a producer's cost of production, or a producer's general and administrative costs ("G&A costs"). It provides simply that the investigating authority shall calculate these costs:

> on the basis of records kept by the exporter or producer under investigation, provided such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

183. Article 2.2.2 states that G&A costs ordinarily shall be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." However, in the absence of such data, it permits an investigating authority to calculate G&A costs according to two defined methods or "any other reasonable method."[207]

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[206] U.S. law largely mirrors the language of the AD Agreement. *See*, 19 U.S.C. § 1677b(e) and 1677b(f), (Exhibit CDA-7).

[207] Canada relies on the *EC - Bed Linens AB Report* to argue that any improper calculation of constructed value would necessarily result in an unfair comparison between normal value and export price in violation of Article 2.4 of the *Antidumping Agreement. See, e.g.,* Canada First Written Submission, para. 183. However, Articles 2.2, 2.2.1.1, and 2.2.2 relate to the determination of normal value, as such, while Article 2.4 relates to a fair comparison once normal value has been properly determined. Thus, a claim that a constructed normal value was improperly calculated does not state a claim under Article 2.4. *See EC-Pipe Fitting*, para. 7.140 ("Brazil's arguments with respect to the calculation of constructed normal value in this case relate to the identification of normal value under Article 2.2 and 2.2.2, rather than to the requirement subsequently to ensure a fair comparison with export price under

184. Those dispute settlement panels that have considered calculation of costs under Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 have recognized the fact-specific nature of the underlying determinations and the discretion that may be exercised by an investigating authority in calculating costs. For instance, in *EC-Pipe Fittings*, in upholding an investigating authority's calculation of costs, the panel rejected as overly restrictive Brazil's interpretation of the AD Agreement, which would have limited the data from which the EC investigating authority could select a profit rate when actual data were not available.[208] In rejecting Brazil's claim, the panel explained that under Article 2.2.2, the investigating authority has discretion in selecting a profit rate for constructed value when actual data are not available, including profit rates derived from sales that were in sufficiently low volumes that they could not themselves serve as a basis for normal value.[209]

185. As other panels have done in similar cases, this Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as requiring use of particular methodologies. Reading such an obligation into these general provisions would create new obligations under the Antidumping Agreement, in contravention of the requirement that ". . . rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[210]

a. Abitibi

186. In order to calculate a dumping margin for Canadian respondent Abitibi, Commerce calculated Abitibi's costs of production. Consistent with the AD Agreement, Commerce included a reasonable amount for G&A costs. Among the G&A costs was an amount for financial (*i.e.*, interest) costs. Consistent with Commerce's normal practice, financial costs attributable to softwood lumber production were derived through a proportionate allocation among all goods, based on cost of goods sold ("COGS") (or "cost of sales"). This resulted in

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Article 2.4. For this reason, we decline to consider Brazil's allegation under Article 2.4 in this context."); *see also Egypt - Definitive Antidumping Measures on Steel Rebar From Turkey*, WT/DS211/R, adopted October 1, 2002, paras. 7.333-335 (finding that Article 2.4 does not apply to establishment of normal value "as such"). The Appellate Body in *EC - Bed Linen* (para. 59), was not considering a claim that normal value had been improperly identified (*i.e.*, it was not considering the calculation of a constructed normal value or cost of production) but instead was considering a claim related to the comparison of normal value to export price. It is telling that in a subsequent portion of the same report (paras. 67-85) the Appellate Body considered claims under Article 2.2.2 without considering these claims also as violations of Article 2.4. Thus, *EC - Bed Linen* does not support Canada's argument.

[208] *EC-Pipe Fittings*, paras. 7.137 - 139.

[209] *Id.*, paras. 7.137 - 139.

[210] DSU Article 3.2.

[[ ]][211] of financial costs being attributed to merchandise other than softwood lumber, with only the balance allocated to softwood lumber.

187. Canada argues that allocation of interest expense, based on COGS, violated the United States' obligations under Articles 2.2, 2.2.1.1, 2.2.2, and 2.4 of the AD Agreement as applied to Abitibi, by over-allocating financial costs to the division within Abitibi producing softwood lumber by **[[ ]]**.[212] Canada claims that interest should have been allocated according to asset value rather than COGS.[213] In essence, Canada is arguing that Commerce's method of allocating interest expense is distortive. However, the COGS method is a reasonable method, as required by Article 2.2.

188. Under the COGS method of allocating financial costs, Commerce first determines a company's total financial cost.[214] Second, Commerce takes total financial cost and compares it, as a ratio, to the company's total COGS. The resulting quotient is the company-wide financial cost ratio and represents the overall borrowing needs of the company. Third, this ratio is applied to the total cost of manufacturing for the product under investigation in order to calculate a financial cost specific to that product. Thus, total financial costs are attributed proportionately to the subject product.

189. COGS represents all the manufacturing costs associated with producing merchandise sold during the year. That is, COGS reflects the cost of input raw materials, energy, labor, depreciation, and so on. The theory underlying the use of COGS is that financial costs should be allocated based on the overall expenses incurred by a company to produce products, because financial costs are directly related to a company's working capital requirements.[215]

190. Commerce examined the cost data submitted by Abitibi and preliminarily determined, consistent with its standard methodology and its treatment of all other respondents in the

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[211] Abitibi's financial cost ratio was **[[ ]]**, and total financial costs were **[[ ]]**. *See*, *Final Calculation Memorandum*, Attachment 2 (Exhibit CDA-90); Abitibi's total reported cost of manufacturing was **[[ ]]**. *See*, Cost Verification Exhibit 5, p. 71 (Exhibit US-45).

[212] Canada First Written Submission, para. 199, 204. Based on Abitibi's asset based methodology **[[ ]]** of total interest cost would have been allocated to non-subject merchandise. *See* Abitibi 2000 Annual Report, p. 36 for asset values (Exhibit CDA-82); *see* note, 207, *supra* (for a discussion of why Article 2.4 does not apply here).

[213] Canada First Written Submission, para. 198.

[214] *See Section D Questionnaire - Cost of Production and Constructed Value*, D-13 (Exhibit US-46).

[215] *See Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Sweden*, 63 Fed. Reg. 40,449, 40459 (July 29, 1998) at Comment 12 ("The [COGS] approach is intended to recognize the general nature of these [interest costs] and the fact that many of these [costs] are incurred in supporting a range of the company's overall operations. This approach is consistent with [generally accepted accounting principle]'s treatment of such costs as period expenses") (Exhibit US-48).

investigation,[216] to allocate Abitibi's financial costs based on COGS. Subsequently, Abitibi argued before Commerce[217] (and Canada argues before this Panel[218]) that this allocation was unreasonable, because its financial costs related more directly to overall assets than to production of merchandise sold during the year.

191. Commerce considered Abitibi's argument, but ultimately disagreed with it, and in its Final Determination continued to allocate Abitibi's financial costs based on COGS.[219]

192. Abitibi's theory (now Canada's theory) incorrectly assumed that fixed-asset purchases are the principal activities of a company requiring working capital. The argument ignored a company's cash requirements to support current production activities (*e.g.,* raw material purchases, paying workers, paying energy bills, etc.).[220] Financial costs are reflective of a company's *overall* cash needs not just fixed-asset needs. Cash is needed to fund current operations as well as capital acquisitions. If Commerce had apportioned financial costs based solely on the narrower category of asset values, it would have ignored the cash needs for ongoing production activities. Using the broader category of COGS as the basis for apportionment is reasonable, indeed preferable, because it takes into account the cash needs for both ongoing production *and* capital investments.

193. In other words, as Commerce noted in its Final Determination, because money is fungible, a company can use the proceeds from loans for a variety of corporate purposes.[221] Since money is fungible, it is irrelevant which cash outlay came from a specific loan or instead a specific sales transaction. What is relevant is the company's overall need to borrow money to fund its overall production operations (*i.e.*, equipment purchases as well as the cost of production inputs.).

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[216] Many of the Canadian respondents, like Abitibi, also were integrated lumber producers and produced multiple products, including paper and pulp, yet none of the other respondents argued that financing costs should be allocated based on the proposed asset value method, rather than COGS.

[217] Abitibi Case Brief, pp. 50-55 (Feb. 2, 2002) (Exhibit CDA-81).

[218] Canada First Written Submission, para. 196.

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

[220] Abitibi's argument is also wrong because it allocates financial costs based on asset values on December 31, 2000, which results in **[[ ]]** of financial costs being allocated to non-subject merchandise. However, if one were to allocate financial costs on the first day of calendar year 2000 (a date more closely aligned with the beginning of the POI and therefore more contemporaneous) the result would be **[[ ]]**of the company's financial costs being allocated to non-subject merchandise. Abitibi's 2000 Annual Report, p. 36 (Exhibit CDA-82).

[221] *Final Determination,* Comment 15 (Exhibit CDA-2). For example, a company may decide to pay its workers or its electric bill using capital from its current sales transactions while using the proceeds from loans to purchase a piece of machinery or equipment, or it may do the opposite.

194. In addition, and contrary to Canada's arguments that Commerce ignored the asset-laden nature of Abitibi's non-lumber producing divisions,[222] Commerce found in the Final Determination that:

> Commerce's [COGS-based] method addresses Abitibi's concern that those activities are more [asset] intensive. Specifically, those activities would have a higher depreciation expense on their equipment and assets. Thus, when the consolidated financial expense rate is applied to the cost of manufacturing of lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense.[223]

195. For the foregoing reasons, the method applied by Commerce to allocate financial costs to Abitibi's softwood lumber production was based on a proper establishment of the facts and on an unbiased and objective evaluation of the facts, and accordingly should be upheld by this Panel.

b. Tembec

196. As part of the process of determining the existence of dumping for Canadian respondent Tembec, Commerce calculated Tembec's cost of production. Consistent with the AD Agreement, Commerce included a reasonable amount for G&A costs. Also consistent with the AD Agreement, Commerce's normal practice, and Commerce's treatment of all other respondents in the investigation, Commerce based Tembec's G&A cost on Tembec's company-wide audited financial statement.[224]

197. Canada argues that derivation of a G&A cost for subject merchandise from an audited financial statement, as applied to Tembec, was contrary to the United States' obligations under Article 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the AD Agreement, because in relying upon it, Commerce over-allocated G&A costs to softwood lumber.[225] Instead, Canada argues that

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[222] Canada First Written Submission, para. 199.

[223] *Final Determination,* Comment 15 (Exhibit CDA-2). Using annual COGS as the basis for allocating annual financial costs recognizes that the funding of operations includes all operating costs incurred to produce products, as well as an allocated portion related to the current use of capital assets. By contrast, use of an asset value that is based on one day in the year does not account for the significant costs incurred to produce the product sold. Moreover, Abitibi's asset value allocation factor included a significant amount of current assets (*e.g.,* cash inventory, accounts receivable) whose values fluctuate significantly depending on the particular day in the year on which their value is determined. Use of asset values as of a particular day in the year, therefore, unreasonably fails to account for significant fluctuations in the value of current assets.

[224] *Id.,* Comment 33 (Exhibit CDA-2).

[225] Canada First Written Submission, para. 207.

Commerce should have based Tembec's G&A cost on an unaudited number, even though it had not been substantiated that the number was established in accordance with Canadian GAAP.[226]

198. Article 2.2.1.1 of the AD Agreement states that

> costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles [GAAP] of the exporting country and reasonably reflect the cost associate with the production and sale of the product under consideration.

199. Consistent with Article 2.2.1.1, it is Commerce's practice to allocate G&A costs to a product based on the company-wide G&A cost reported on a company's audited financial statement.[227] Similar to financial costs, G&A costs are allocated based on cost of goods sold. That is, company-wide G&A costs are divided by total cost of goods sold, yielding the "G&A cost ratio." The G&A cost ratio is then applied to the total cost of manufacturing for these goods, and the resulting amount represents the G&A cost allocated to production of those goods.[228] That is what Commerce did in Tembec's case.[229]

200. Tembec disagreed with this approach and urged Commerce to base its allocation of G&A cost on an unaudited amount that was claimed to be specific to a division within Tembec (the Forest Products Group).[230] Commerce declined to do so for two reasons. First, Commerce determined that, because the division-specific amount at issue was unaudited, it was inherently

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[226] Canada First Written Submission, paras. 209 - 210.

[227] *See Section D Questionnaire - Cost of Production and Constructed Value Standard Commerce Questionnaire*, D-13 (Exhibit US-46); *see also*, *Issues and Decision Memorandum for the 1998-1999 Administrative Review of Oil Country Tubular Goods From Mexico: Final Results of Antidumping Administrative Review*,66 Fed. Reg. 15,832 (Mar. 21, 2001) Comment 5 (Exhibit US-49).

[228] *Section D Questionnaire*, D-13 (Exhibit US-46)).

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

[230] *See* Tembec Annual Report, "Auditors' Report", p. 34 (stating that the only portion of the report that was audited for conformity with Canadian generally accepted accounting principles was the "consolidated balance sheets of Tembec Inc. as of September 29th, 2001 and September 30th 2000, and the consolidated statements of operations, retained earnings and cash flows for the year end."). Thus, the Forest Product Group's G&A cost figure that Tembec relies upon *was not audited.* (Exhibit US-12 at 3)).

Canada cites no evidence on the record that the specific lumber division G&A costs were audited. Canada argues that Commerce rejected the division-specific G&A cost data, although it had been verified. Canada First Written Submission, para. 220. While Commerce conducted an on-site verification for Tembec, Tembec did not provide any evidence at verification that the division-specific data at issue had been audited and/or were in accordance with Canadian generally accepted accounting principles.

less reliable than audited books and records that had been certified to be consistent with Canadian GAAP. There was greater certainty that audited GAAP-consistent books and records would "reasonably reflect the costs."[231] Second, Commerce determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses.[232]

201. In fact, Canada's own statement on this issue makes plain the problems inherent in using unaudited, division-specific data to determine G&A. Canada states that "[t]he G&A factor derived from the Forest Products Group includes a properly allocated portion of corporate G&A. . . ."[233] Implicit in this statement is an acknowledgment that the division-specific data, on their own, were an inaccurate basis for allocating G&A. That number had to be supplemented by a portion of company-wide G&A to come up with a "derived" G&A number for the Forest Products Group.

202. Moreover, the fact that an amount from company-wide G&A would have to be added to the division-specific G&A compounds the unreliability of the underlying unaudited data. Now, not only are the division-specific data unaudited, but the hand-picked allocation of company-wide G&A added to the division-specific G&A also is unaudited. It is difficult to see how this method for allocating G&A would have been more reasonable than Commerce's actual reliance on Tembec's audited books and records.

203. Finally, Canada's reliance on the *Thailand–Steel Panel Report* to make its claim regarding Tembec is misplaced.[234] As cited by Canada, that panel report refers to the requirement to use actual data in calculating G&A costs. Actual data *were used* in this case. What is at issue here is not the use of actual data but, rather, the choice between audited books and records and unaudited data proffered by a company. The question before Commerce was which of these sources reasonably reflects the costs associated with Tembec's production and sale of softwood lumber. Consistent with AD Agreement Article 2.2.1.1, Commerce relied on audited books and records in calculating G&A costs for Tembec. That is in no way inconsistent with the panel's interpretation of Article 2.2.2 in *Thailand-Steel Panel Report.*

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[231] If, in fact, the G&A costs recorded by Tembec at a divisional level related solely to the products produced in that division, that cost would have more appropriately been classified for accounting purposes as "overhead." Those costs would have been allocated to subject merchandise as overhead rather than G&A costs and would have not been included in Tembec's company-wide G&A cost. However, Tembec never presented these divisional costs as overhead and they were, in fact, reported on Tembec's audited financial statement as part Tembec's G&A costs.

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

[233] Canada First Written Submission, para. 220.

[234] *Id.* para. 219 (citing *Thailand- Anti-Dumping Duties on Angles, Shapes and Sectionals of Iron Non-Alloy Steel and H-Beams from Poland,* WT/DS122/R, adopted Apr. 5, 2001, para.7.125).

204. For the reasons set forth in this section, the Panel should uphold Commerce's calculation of G&A costs for Tembec as a reasonable method under Article 2.2.2, based on a proper establishment of facts and an unbiased and objective evaluation of the facts. The Panel should reject Canada's claim, in accordance with the standard of review in Article 17.6(i).

c. Weyerhauser

205. In order to calculate a dumping margin for Weyerhaeuser Canada Ltd. ("Weyerhaeuser Canada"), Commerce calculated costs of production. Consistent with the AD Agreement, Commerce included a reasonable amount for G&A costs. Included in the G&A costs was an apportioned amount of litigation settlement costs incurred by the parent company, Weyerhaeuser Company. The parties agree that apportioning parent company G&A to its producing subsidiary was appropriate. The only issue is inclusion of this particular cost in that G&A calculation. Canada argues that inclusion of this litigation settlement cost was contrary to the United States' obligations under Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and Article 2.4 of AD Agreement, because the litigation from which this cost arose related most directly to hardboard siding and thus could not be properly considered a G&A cost pertaining to softwood lumber production.[235]

206. During the course of the softwood lumber investigation, Weyerhaeuser Company reported a litigation settlement cost on its consolidated financial statements.[236] However, Weyerhaeuser Company did not include this litigation settlement cost within the G&A costs it reported to Commerce. Weyerhaeuser Company argued that this litigation settlement cost was not properly treated as G&A cost, but rather should be considered part of the cost of producing hardboard siding, the particular product that was the subject of the litigation settlement.

207. Commerce disagreed. It found that because this cost was incurred years after the production of the hardboard siding at issue and was not part of the production process for that product, it could not properly be considered a cost uniquely allocable to hardboard siding production.[237] In addition, Weyerhaeuser had treated it as a general cost on its audited financial statement.[238] Commerce explained that it "typically allocates business charges of this nature over all products because they do not relate to [a] production activity, but to the company as a whole."[239]

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[235] Canada First Written Submission, para. 230. Canada's claim regarding Article 2.4 of the AD Agreement is misplaced, for the reasons discussed in note 207, *supra*.

[236] Weyerhaeuser 2000 Annual Report, 53 (Exhibit CDA-101).

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

[238] Weyerhaeuser 2000 Annual Report, 53 (Exhibit CDA-101).

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

208. Commerce's decision on this issue is supported by Weyerhaeuser Company's own books and records,[240] which include these litigation settlement expenses as a general expense, as opposed to a cost of goods sold. More specifically, in a note to its financial statement, Weyerhaeuser Company describes litigation costs as "generally incidental to its business."[241]

209. It was reasonable for Commerce to recognize that litigation costs are ultimately a cost of doing business for the corporate group as a whole, including Weyerhaeuser Canada, and thus part of G&A costs. While the AD Agreement does not define "administrative, selling, and general cost", Commerce's treatment of legal costs as G&A cost comports with the common understanding of these terms. According to an authoritative accounting industry dictionary, G&A costs are defined as "all expenses incurred in connection with performing general and administrative activities. Examples are executives' salaries and *legal expenses*."[242] It has been Commerce's consistent practice to treat legal expenses as a G&A expense.[243]

210. Canada argues that the report of the panel in *Egypt– Rebar* supports an interpretation of the AD Agreement that would require cost of production to include only those costs directly attributable to the production and sale of subject merchandise.[244] However, Canada's argument misrepresents the reasoning of *Egypt– Rebar* and ignores the meaning of G&A cost. In *Egypt– Rebar*, a panel examined an investigating authority's determination of the extent to which interest revenues should offset a cost of production calculation. The panel upheld the authority's determination not to deduct interest revenue, in light of the failure of the producer in that case to show a sufficient nexus between interest revenue and the production of the product at issue.

211. The inclusion of litigation costs reported on a consolidated financial statement in G&A costs does not contradict the reasoning of *Egypt– Rebar*. As in that case, the nexus here between the litigation costs at issue and production of the product at issue (hardboard siding) was attenuated.

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[240] Weyerhaeuser 2000 Annual Report, 53 (Exhibit CDA-101). That the litigation settlement cost at issue was borne by Weyerhaeuser Company on behalf of the entire corporate group is evidenced by its inclusion on its consolidated financial statement.

[241] Weyerhaeuser 2000 Report, 75 & n-14 (Exhibit US-50).

[242] Joel G. Siegel, Jae K. Shim, *Dictionary of Accounting Terms* (Barron's Educational Services, Inc. 2nd ed. 1995) (emphasis added) (Exhibit US-47).

[243] *See e.g.*, *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Final Results of Antidumping Administrative Review*, 62 Fed. Reg. 18448, 18465, Comment 15 (April 15, 1997)(Exhibit US-51); *Silicomanganese From Brazil: Preliminary Results of Antidumping Administrative Review*, 62 Fed. Reg. 1320, 1322 (Jan. 1, 1997) (Exhibit US-52).

[244] Canada First Written Submission, paras. 228-30.

212. The legal costs at issue here, because they are borne by a parent company on behalf of its group companies, are a typical example of a parent company G&A cost. Therefore, consistent with Articles 2.2, 2.2.1 and 2.2.1.1 of the AD Agreement, Commerce properly allocated a portion of the legal costs, reported on the Weyerhaeuser Company's consolidated financial statement as a general cost, to Weyerhaeuser Canada for purpose of calculating cost of production. Commerce's calculation was based on a proper establishment of the facts and an unbiased and objective evaluation of those facts and should be upheld under the standard of Article 17.6(i).

2. Commerce Properly Calculated Reasonable Amounts For By-Product Revenues From the Sale Of Wood Chips As Offsets in Calculating Lumber Costs for West Fraser and Tembec.

213. This section responds to issues raised by Canada relating to West Fraser and Tembec.

214. To determine the cost of production of softwood lumber, Commerce used sales of wood chips (a by-product in the production process) as an offset to the lumber production costs, on the theory that these sales reduce the lumber production cost. It is this "by-product offset" that is the issue in dispute.

215. The basic issue is essentially a factual one: how to measure the amount of this by-product revenue offset. A challenge recognized by all parties to the Commerce proceeding is that, by definition, a by-product has no separate identifiable cost. Thus, to determine the amount of the offset, it is necessary to examine other relevant data of the producer. The two company situations raised by Canada present two different scenarios, with different rules governing each. The first scenario is that of West Fraser, in which case the issue is how to measure the value of the sales of the wood chips by-product from West Fraser to affiliated companies. The second scenario is that of Tembec, in which case the issue is how to measure the value of internal transfer prices of the wood chips by-product between divisions within Tembec.

216. Consistent with Article 2.2.1.1, Commerce applies different rules to these scenarios. 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.

217. Canada's arguments blur these distinctions. In particular, with regard to Tembec, Canada incorrectly characterizes these transactions at issue as being from Tembec to affiliates, as

opposed to transfers between divisions within Tembec.[245] Only West Fraser's sales were between affiliated companies. The specific situations are addressed below.

a. Commerce Properly Calculated West Fraser's Revenue Offset For Wood Chip By-Product Sales To Its Affiliates, Where The Established Facts Confirmed Use Of West Fraser's Own Sales To Unaffiliated Parties As The Appropriate Benchmark.

218. Commerce applied its standard affiliated party transaction methodology to West Fraser, using West Fraser's own sales to unaffiliated parties as a benchmark.[246] Despite the existence of the best evidence to assess the value of West Fraser's wood chips (West Fraser's own sales to unaffiliated parties at arm's length), Canada complains that Commerce should have disregarded those sales.[247] Canada alleges that it is a violation of Article 2.2.1.1 of the AD Agreement to use West Fraser's own sales, which it now contends (for the first time, since West Fraser never raised the argument to Commerce) were in amounts too small to be valid.[248] However, Commerce found that West Fraser's sales to non-affiliates were at market prices, and as such were the best benchmark for evaluating West Fraser's affiliated sales.[249] Commerce's finding was entirely consistent with Article 2.2.1.1, which expresses a preference for use of data from the producer's own records.

219. The record shows that West Fraser made most of its British Columbia ("B.C.") wood chip by-product sales to its affiliated pulp mills.[250] However, in B.C. it also had amounts which were sold to unaffiliated entities from two of its mills. One of these mills made its unaffiliated sales pursuant to a contract negotiated before the period of investigation. West Fraser sold **[[ ]]** Oven-Dried Tonnes (ODTs) of wood chips to unaffiliated parties, with a commercial value of over **[[ ]].**[251] Commerce employed these unaffiliated sales as a benchmark to determine whether the affiliated sales were at market value.[252] Using both B.C. and Alberta sales together in the *Preliminary Determination*, Commerce found West Fraser to be selling nationally to its

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[245] In Canada's First Written Submission, para. 236, Canada introduces its arguments by stating that "West Fraser and Tembec each sold wood chips to both affiliated and unaffiliated purchasers." This assertion may be true, but it confuses the issue. The contested sales involving Tembec were not sales to affiliates, but inter-divisional sales (as later correctly stated, in para. 255).

[246] *Final Determination*, Comment 11, Exhibit CDA-2.

[247] Canada First Written Submission, para. 242.

[248] Canada First Written Submission, para. 242.

[249] *Final Determination*, Comment 11, Exhibit CDA-2.

[250] *See*, West Fraser Cost Verification Exhibit C5, WF-Cost-007503, Exhibit CDA-106.

[251] *See*, West Fraser Cost Verification Exhibit C5, WF-Cost-007503, Exhibit CDA-106.

[252] *Preliminary Determination* at 56070-71, Exhibit CDA-11.

affiliates at prices higher than its prices to unaffiliated entities.[253] Therefore, Commerce adjusted these affiliated sales to market value.[254] The effect of this accounting adjustment was to reduce the value of the offset to West Fraser's cost of lumber production. West Fraser argued that Commerce should not have used West Fraser's own unaffiliated sales as the benchmark for determining the market value of West Fraser's sales to its affiliates.[255] It also argued that a national average of its wood chip sales should not be used as a benchmark; rather, it urged as a benchmark its schedules of sales (to both affiliated and unaffiliated entities) on a regional basis.[256]

220. For the *Final Determination*, Commerce concluded:

> [U]nder section 773(f)(2) of the [Tariff Act of 1930], [Commerce] may disregard transactions between affiliated parties if they do not fairly reflect the amount usually charged in the market under consideration. When a respondent sells the same by-product to affiliated and unaffiliated parties at different prices, *Commerce considers the prices received from unaffiliated parties by the respondent to be at arm's-length and to represent market prices*. See Pure Magnesium from Israel. *** With respect to West Fraser, for purposes of the final determination, we have compared West Fraser's sales of wood chips to affiliated and unaffiliated parties separately for Alberta and British Columbia. Based on this comparison we find that West Fraser's sales of wood chips to affiliated parties in Alberta during the POI were made at arm's-length prices. We also find, however, that West Fraser's sales of wood chips to affiliated parties in British Columbia during the POI were not made at arm's-length prices. Thus, for sales of wood chips in British Columbia, we used the average sales price for wood chips received from unaffiliated parties to value the sales to affiliated parties and adjusted West Fraser's by-product offset for the final determination.[257]

221. The AD Agreement is silent as to how to assess affiliated party transactions relating to costs. Article 2.2.1.1 simply states:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the

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[253] *Preliminary Determination* at 56070-71, Exhibit CDA-11.

[254] *Preliminary Determination* at 56070-71, Exhibit CDA-11.

[255] *Preliminary Determination* at 56071, Exhibit CDA-11; *Final Determination*, Comment 11, Exhibit CDA-2.

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

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

> exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

222. In determining whether a company's records reasonably reflect costs associated with production and sale of a product, Commerce considers whether transactions between affiliated parties occurred at arm's length prices.[258] It did that analysis here and concluded that affiliated sales did not occur at arm's length prices. Accordingly, it relied on unaffiliated sales in valuing the West Fraser's wood chip offset.

223. Canada raises four arguments against Commerce's determinations relating to West Fraser's sales of wood chips to affiliates in B.C. and the amount of the offsets. First, Canada argues that Commerce should not have tested West Fraser's affiliated sales against unaffiliated sales but instead should have used other evidence. Specifically, Canada claims Commerce should have relied upon sales by other respondents to non-affiliates in B.C.[259] Canada's argument that Commerce should have preferred one source of evidence over another effectively is an improper request for this Panel to find facts *de novo*. Moreover, the evidentiary preference expressed directly contravenes Article 2.2.1.1, which instructs investigating authorities to rely on an exporter's or producer's records where they are available. In this case, such records were available. Yet, Canada claims that Commerce nevertheless should have relied on other evidence.[260]

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[258] In making its determination with respect to West Fraser, Commerce applied U.S. law 19 U.S.C. § 1677b (Exhibit CDA-7) which provides:

> (2) Transactions disregarded. A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount *usually reflected in sales of merchandise under consideration in the market under consideration*. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to *what the amount would have been if the transaction had occurred between persons who are not affiliated*. (Emphasis added)

In the 1997 Preamble to its Regulations, Commerce explained that:

> *[t]he appropriate standard for determining whether input prices are at arm's length is its normal practice of comparing actual affiliated party prices with prices to or from unaffiliated parties.* This practice is the most reasonable and objective basis for testing the arm's length nature of input sales between affiliated parties, and is consistent with section 773(f)(2) of the Act.

Antidumping Duties, Countervailing Duties; Final Rule, 62 FR 27,295, 27362 (May 19, 1997) (Exhibit US-53).

[259] Canada First Written Submission, para. 245.

[260] Canada also argues that, under Article 2.2.1.1, in order for Commerce to disregard the costs of production set out in West Fraser's records, Commerce was required to determine that those records did not reasonably reflect the costs associated with the production and sale of the product, and that Commerce did not make such a determination. *Id.*, para. 242. This argument is misleading. First, Canada fails to note that the issue here is not *lumber* but *wood chips*, a by-product having no independent cost of its own (and thus no costs reflected in West

224. Second, Canada raises an argument that was never even made by West Fraser, that Commerce's determination of market prices using West Fraser's own unaffiliated sales was based on sales volumes that were "too low."[261] According to Canada's new theory, because the quantity of sales was low, those sales could not provide reliable evidence to support Commerce's conclusions.[262] It is not surprising that West Fraser never raised this argument in the administrative proceeding, given that the facts do not support it.[263] Moreover, contrary to the arguments made by Canada,[264] West Fraser made no argument that the long-term contract by which one of its mills made sales during the investigation period did not represent valid market prices, nor did it make any argument about the arm's length nature of the sales made from its

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Fraser's records). Second, Commerce used the market value of sales to unaffiliated parties, a record that it *did verify* in West Fraser's books.

[261] Canada First Written Submission, at para. 237 ("small volume of sales"), 241 ("tiny quantity of sales"), 248 ("tiny quantity")("too low").

[262] *Id.*, at para. 248.

[263] West Fraser argued late in the proceeding that Commerce should not make a determination for its affiliated party transactions on a national basis, as was done in the *Preliminary Determination*, but should do so on a regional basis. *See* West Fraser's Rebuttal Brief, Feb. 19, 2002, at 19-20 (Exhibit US-54)). At verification, "Company officials explained that the pricing for chip sales to all mills is based on the prevailing fair market value in a particular area. . . ." *See*, Cost Verification Report, Feb. 4, 2002, at 23 (Exhibit CDA-110). West Fraser also was aware of the standard methodology applied by Commerce in such cases, namely use of unaffiliated sales as the benchmark if such sales exist. This same methodology (using the test with unaffiliated sales) had been used at the *Preliminary Determination*. However, West Fraser raised no issue regarding the quantity of these unaffiliated sales in B.C. *See* West Fraser's Case Brief of Feb. 12, 2002, at 46-48 (Exhibit US-55); West Fraser's Rebuttal Brief, February 19, 2002, at 19-21 (Exhibit US-54).

[264] Canada First Written Submission, para. 249. Contrary to Canada's assertion, the record nowhere states that West Fraser's contract prices from its McBride mill were "not reflective of the market." West Fraser never made such an argument. West Fraser's Cost Verification Report (Exhibit CDA-110) records only that: "the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred in April and May 2000. They explained that the sales value of chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price." These prices represented West Fraser's market experience. Together with the sales from the Pacific Island resources mill - which neither Canada nor West Fraser ever contest were arm's length transactions - these two sets of mill sales were reflective of West Fraser's prices during the POI. Thus, when West Fraser was prepared to sell wood chips (pursuant to this commercial contract, and without it), this was the best evidence of a fair market price for its wood chips, rather than the higher, inflated prices at which it sold to its affiliates.

other mill.[265] Thus, if the unaffiliated sales quantities **[[ ]]** in B.C. were "too low" in the view of West Fraser, it never made that claim to Commerce.

225. Third, despite West Fraser having its own commercial sales to unaffiliated parties, Canada argues that "Commerce applied different benchmarks for two respondents that were similarly situated."[266] In fact, the other respondent at issue – Canfor – was not similarly situated to West Fraser. West Fraser had sales in B.C. to unaffiliated parties. Canfor did not. The sales in B.C. made by West Fraser were of its own product mix, and thus the best evidence of the value of an offset in West Fraser's process. By contrast, Canfor had no B.C. sales, and therefore, the best evidence of the value of an offset for Canfor was other companies' arm's length sales in the market. Thus, Commerce carefully distinguished the market situation of West Fraser,[267] and Canfor.[268]

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[265] West Fraser did not present any evidence that these sales might have been improper. Had it done so, Commerce would have considered such arguments. For example, in the case of Canfor, Canfor submitted evidence that its contract prices were not representative of the market. **[[ ]]** *See* Canfor's Verification Report at 28 (Exhibit US-56). Commerce verified that to be true, and used other methods. West Fraser failed to make any such argument, and there is no evidence on the record that the contract prices used were not valid benchmarks.

[266] Canada First Written Submission, para 250.

[267] Regarding West Fraser, Commerce found the following: "With respect to West Fraser, for purposes of the final determination, we have compared West Fraser's sales of wood chips to affiliated and unaffiliated parties separately for Alberta and British Columbia. Based on this comparison we find that West Fraser's sales of wood chips to affiliated parties in Alberta during the POI were made at arm's-length prices. We also find, however, that West Fraser's sales of wood chips to affiliated parties in British Columbia during the POI were not made at arm's-length prices. Thus, for sales of wood chips in British Columbia, we used the average sales price for wood chips received from unaffiliated parties to value the sales to affiliated parties and adjusted West Fraser's by-product offset for the final determination." *Final Determination*, Comment 11, Exhibit CDA-2.

[268] With respect to Canfor, in B.C. Commerce found that during the period of investigation, Canfor sold its all by-product wood chips produced at its 11 sawmills to its two B.C. affiliated pulp mills, Lakeland and The Pas, so Canfor had no unaffiliated sales in B.C. *See*, Canfor Verification Report on the Cost of Production and Constructed Value, Feb. 4, 2002. (Exhibit US-56).

In Alberta, two of Canfor's sawmills, Grande Prairie and Hines Creek, sold wood chips only to unaffiliated companies. *Id*. The Grande Prairie and Hines Creek transactions in Alberta were complicated agreements; specifically, Canfor's only unaffiliated transactions during the period of investigation fixed the wood chip prices below market levels in exchange for other products and other company's chip products at below market prices. *See* Canfor's Cost Verification Report, at 28, Exhibit US-56; Canfor Second Supplemental Section D Response (Dec. 12, 2001) at Exhibit D-61, Exhibit US-57; Canfor's Cost of Production Memo (Mar. 21, 2001), Exhibit CDA-109. Commerce also found, *inter alia*, in relation to Canfor's unaffiliated sales in Alberta, the following: "Specific to Canfor, the verified information shows that the fair market value that Canfor's mills obtain for sales of wood chips to unaffiliated. purchasers is clearly distorted due to its contractual agreements." (Citing to: Memorandum to Neal M. Halper through Michael P. Martin from Taija Slaughter: Verification Report on the Cost of Production and Constructed Value Data Submitted by Canfor Corporation; (February 4, 2002) at 27-28)(Exhibit US-56)). *Final Determination*, Comment 11, Exhibit CDA-2.

226. Fourth, Canada complains that Commerce failed to consider evidence other than sales to non-affiliates submitted at verification that Canada maintains was more relevant than such sales.[269] The evidence that Canada says was more relevant[270] to West Fraser's sales than West Fraser's own sales to non-affiliates is of two kinds: First, data not from West Fraser but from other affiliated companies (*e.g.*, QRP)[271](in other words, not "records kept by the exporter" as contemplated by Article 2.2.1.1); second, data not from West Fraser but from other producers in B.C. who have different product mixes, locations and commercial considerations than West Fraser.[272] Neither type of data is a better indication of the market value of West Fraser's wood chips than West Fraser's own unaffiliated wood chip sales used by Commerce.

227. Commerce did discuss West Fraser's offered evidence in its *Final Determination*.[273] Commerce found that West Fraser gave Commerce only selective examples of the secondary evidence on which Canada now says Commerce should have relied. West Fraser failed to place the entirety of its affiliated pulp mill purchases on the record.[274] Thus, even assuming that this evidence might have been relevant and more probative than West Fraser's own data, this omission prevented Commerce from assessing any sales other than the self-serving examples

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[269] Canada First Written Submission, para 251.

[270] *Id.*, para 242. Canada makes much of West Fraser's sales to its affiliated pulp mill, QRP. However, the evidence relating to QRP was evidence from QRP's books, not from West Fraser's books, so contrary to Canada's allegation, when not considering QRP's purchases from third parties, Commerce did not disregard data from West Fraser's records. Moreover, aside from QRP's prices being different from (higher than) West Fraser's sales to unaffiliated parties, there is no evidence that QRP's purchases of wood chips from third parties were better evidence of the market value for West Fraser's wood chips.

[271] Canada First Written Submission, para. 251.

[272] *Id*. para. 250.

[273] *Final Determination*, Comment 11, Exhibit CDA-2.

[274] In paragraph 251 of its first written submission, Canada seeks to highlight that Commerce officials at the cost verification accepted the proffered secondary evidence, and after receipt asked for some clarifications. West Fraser already had presented a schedule for wood chips divided between sales in Alberta and sales in British Columbia. *See*, Cost Verification Report of February 4, 2002, page 23 (Exhibit CDA-110). That schedule showed that West Fraser's B.C. sales to affiliates failed the primary test of whether they fairly reflected the amounts usually charged by West Fraser in this market. The additional information provided by West Fraser was superfluous. Moreover, had it been relevant, it was West Fraser's responsibility to submit complete information, which it did not do.

selectively chosen by West Fraser.[275] In light of these facts, there was no violation of Article 2.2.1.1 in Commerce's reliance on West Fraser's own data.

228. As its final point, Canada asserts that Commerce's calculation of West Fraser's wood chip offset also violated its obligation to make a "fair comparison."[276] This argument confuses obligations regarding determination of normal value with obligations regarding the comparison between normal value and export price. As the panel in *Egypt - Rebar* confirmed, Article 2.4 is concerned exclusively with the comparison between normal value and export price, not with determination of normal value.[277]

229. For the foregoing reasons, Commerce's determination of an offset for West Fraser's wood chip sales was based on a proper establishment of the facts and an objective and unbiased evaluation of those facts. Accordingly, it should be upheld under the standard of review in Article 17.6(i).

b. Commerce's Determination That Tembec's Divisional Wood Chip By-Product Prices Reflect a Reasonable Surrogate for the Actual Cost of the Wood Chips For Use As An Offset Was Based on a Proper Establishment of the Facts and an Unbiased and Objective Evaluation Of The Facts.

230. Canada contends that "[t]he internal Tembec transfer prices as contained in its records and relied upon by DOC do not reasonably reflect the market value of wood chip sales."[278] As demonstrated in this section, Commerce relied on Tembec's own data to value its wood chip sales consistently with Article 2.2.1.1.

231. As a preliminary matter in this discussion, it is important to distinguish Tembec's case from West Fraser's. In Tembec's case, there was evidence in the company's own records of cost

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[275] Commerce found:

> For West Fraser and Tembec we also disagree that the documentation presented at verification demonstrated that the prices it received from its affiliates for sales of wood chips reflected market prices. While we acknowledge that the documentation submitted at verification showed that certain affiliated pulp mills selected by these respondents paid similar prices to their sawmills and to unaffiliated parties for purchases of wood chips, *we note that the comparisons provided by each respondent were selectively provided by the companies* and not based on a sample chosen by Commerce. These comparisons represented only a portion of the total wood chip purchases by both Tembec and West Fraser's pulp mills and *there is no record evidence to determine what the results might be if all mills were included.*

Final Determination, Comment 11 (Exhibit CDA-2). (Emphasis supplied).

[276] Canada First Written Submission, para. 254.

[277] *Egypt–Rebar* para. 7.335; *see also*, *Argentina – Poultry* para. 7.265.

[278] Canada First Written Submission, para. 261.

of wood chip production. The evidence consisted of internal information on wood chip sales to intra-company divisions. Commerce relied on evidence of sales to non-affiliated entities to test the validity of that data from Tembec's own books and records.

232. In West Fraser's case, by contrast, there were no data in the company's own books and records to determine cost of wood chip production. Accordingly, Commerce had to look for the most reliable source of evidence to value the amount of the wood chip offset. For reasons discussed in the preceding section, sales to non-affiliated entities were an appropriate proxy.

233. The record shows that Tembec, Inc. is a large corporation, with a corporate structure separated into several divisions. Tembec owns several sawmills, as well as several pulp mills. In the process of manufacturing softwood lumber, Tembec produced a large amount of its chief by-product, wood chips. These wood chips were sold internally for particular prices within the company, from a division operating sawmills to a division operating pulp mills. Some of these wood chips were sold outside of the corporation to unaffiliated pulp mills as well.[279]

234. Consistent with Article 2.2.1.1, Commerce determined that the transfer prices between Tembec's B.C. sawmills to various Tembec-owned pulp mills reasonably reflected Tembec's actual costs associated with wood chip production.[280]

235. Canada argues that Commerce should have valued the cost of wood chips transferred to Tembec's pulp mills using the **[[ ]]** prices for wood chips sold to unaffiliated parties during the period of investigation ("POI").[281] Canada contends that Tembec's inter-divisional wood chip sales were "set arbitrarily to provide an internal preference."[282] However, no evidence in the record before Commerce supports that contention.

236. Commerce conducted a five-day verification of Tembec's cost of production and constructed value data.[283] For Eastern Canada (*i.e.*, Ontario and Quebec), Commerce verified that wood chips produced by Tembec sawmills are either sold to Tembec pulp mills, or **[[ ]]** with unaffiliated parties.[284] Company officials explained to Commerce that wood

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[279] *See Memorandum From Peter S. Scholl to Neal M. Halper re: Cost Verification Report*, dated January 29, 2002 (Exhibit CDA-112) ("Cost Verification Report"), at 25.

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

[281] Canada First Written Submission, para. 255.

[282] Canada First Written Submission, para. 255.

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

[284] *See Id*. at 24. Attached to the Cost Verification Report was a multiple-page exhibit, Exhibit 13 (Exhibit CDA-113), which chronicled the large amount of prices paid during the POI by pulp mills for Tembec's wood chips in Eastern Canada, with varying prices depending on the quality, volume, and type of wood chips. Commerce found

chips were **[[ ]]** in the Eastern Canada markets during the POI.[285]

237. Commerce also verified that the weighted average sales price between Western Canadian (*i.e.*, British Columbia) Tembec sawmills and pulp mills was CN$**[[ ]]** during the POI, while the weighted average sales price to non-affiliates was CN$**[[ ]]** during the same period.[286]

238. In a preparatory Memorandum concluding that there was no preference given in the internal transfers[287] and in the *Final Determination*, Commerce "analyzed the wood chip sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices [were] reasonable."[288] Pursuant to this analysis, it found that the weighted average transfer price between Tembec's own B.C. sawmills and pulp mills, as reflected in Tembec's books and records, was a reasonable surrogate for the actual cost of wood chips, and it therefore used this number as Tembec's by-product offset.[289]

239. As Commerce explained in its *Final Determination*, the problem with by-products - for accounting purposes - is that "there is no separately identifiable cost associated with the wood chips that are transferred between Tembec divisions."[290] Thus, to test whether the weighted average transaction price between Tembec's sawmills and pulp mills of wood chips in this case

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that the average transfer price between four Tembec sawmills and the four selected Tembec pulp mills was CN$**[[ ]]** during the POI, while the weighted average price paid by the same four pulp mills to unaffiliated wood chip suppliers was CN$**[[ ]]** during the POI. *See Id.* at 25.

[285] *Id.*

[286] *Id.* at 25. Attached to the Cost Verification Report was a multiple-page exhibit, Exhibit 14 (Exhibit CDA-114), which chronicled the large amount of prices paid during the POI by pulp mills for Tembec's wood chips in Western Canada, with varying prices, depending on the quality, volume and type of wood chips.

[287] When evaluating Tembec's British Columbia sawmills, Commerce found:

> We compared the Tembec's British Columbia ("BC") sawmills' internal transfer prices for wood chips to the BC sawmills' wood chip sales prices to unaffiliated purchasers (i.e., BC market prices). *We found that the company's internal transfer prices did not give preferential treatment to the sawmills. Thus we relied on their normal books and records for the final determination.* For Ontario and Quebec, Tembec did not have woodchip sales to non-affiliated parties (i.e., no market price benchmark). Since the BC analysis showed that Tembec sawmills did not receive preferential treatment on internal transfers of woodchips, we relied on the Ontario and Quebec internal transfer prices for woodchips for the final determination. (Emphasis added).

Commerce Memorandum on Tembec Cost Calculation Adjustments for the Final Determination (March 21, 2002), at 2, Exhibit US-58).

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

[289] *See id.*

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

reflected a "reasonable" cost associated with the production of such wood chips, (*i.e.*, a value for purposes of offsetting lumber costs which was not over-inflated) Commerce looked to prices of wood chips sold to unaffiliated purchasers.[291] At verification, as explained above, Commerce determined that Tembec's Quebec and Ontario sawmills "did not have usable market price data" for the POI.[292] Therefore, it could not make such a comparison for those divisions. However, it did have a complete record for Tembec's B.C. sawmills and pulp mills. Thus, it compared "Tembec's B.C. sawmills' internally set transfer prices for wood chips to the B.C. sawmills' chip sales to unaffiliated purchasers" and it concluded that the "internally set transfer prices are *not preferential*."[293] Accordingly, Commerce relied upon these internal transfer prices for the final determination.

240. Canada's main argument is that, because Tembec's sawmills transferred wood chips to its pulp division at prices **[[ ]]** the prices at which it sold wood chips to non-affiliates, there must have been preferential treatment between the B.C. sawmills and pulp mills.[294] Canada reasons that Commerce should have used the weighted average sales price received from Tembec's non-affiliates. However, in so arguing, Canada fails to address the relevant issue under Article 2.2.1.1: whether Commerce found that Tembec's books "reasonably reflected the *costs* associated with the production and sale of the product under consideration."

241. Canada maintains that Commerce should have used data other than data from Tembec's own books and records. However, that would have been proper under Article 2.2.1.1 only if Tembec's books and records did not reasonably reflect the costs associated with wood chip production.[295]

242. The simple fact that Tembec sold wood chips to non-affiliates for prices that **[[ ]]** the internal transfer prices for wood chips transferred between Tembec divisions, does not mean that the internal transfer price in this case was unreasonable as a surrogate for Tembec's cost. The question is whether the internal transfer price between divisions reasonably reflected the cost of producing the transferred wood chips, not whether such transactions occurred at market prices.

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[291] *See Id*.

[292] *Id*.

[293] *Id*. (Emphasis added).

[294] Canada First Written Submission, para. 255.

[295] Furthermore, Canada incorrectly asserts that Commerce "verified that Tembec's internal transfer prices for wood chips are set arbitrarily to provide a preference for Tembec's affiliated pulp mills." Canada First Written Submission, para. 260. Commerce made no such determination. This alleged fact was not verified by Commerce, it appears nowhere in the Cost Verification Report, it is directly contrary to the Cost Calculation Memorandum (which concluded that "the company's internal transfer prices did not give preferential treatment to the sawmills"), *see* Commerce Memorandum on Tembec Cost Calculation Adjustments for the Final Determination (March 21, 2002), at 2, Exhibit US-58, and is contrary to Commerce's ultimate conclusion.

243. As the Cost Verification Report explained, Commerce verified that the weighted average sales price between Western Canadian Tembec divisions was CN$**[[ ]]** during the POI, while the weighted average sales price to non-affiliates was CN$**[[ ]]** during the same period.[296] In its analysis, Commerce correctly took into account the fact that the price Tembec paid for wood chips to non-affiliated suppliers included an amount for profit.[297] After taking into consideration the critical factor of the amount of profit, if the divisional transfer prices were extremely low or extremely high in comparison to the prices paid by unaffiliated purchasers, then Commerce might determine that the value assigned to the internally transferred wood chips was unreasonable. In this case, however, an adjustment for profit led to the conclusion that prices for inter-divisional transfers **[[ ]]** from prices to non-affiliates. In fact, once Commerce took into account profit and the varying quality and types of wood chips, it determined "no preferential prices" existed.[298] Accordingly, Commerce concluded that inter-divisional sales as reflected in Tembec's books and records reasonably reflected costs of wood chip production.

244. Because Commerce's determination of a wood chip offset for Tembec was based on a proper establishment of the facts and an objective and unbiased evaluation of the facts, this Panel should uphold that determination under Article 17.6(i).

3. Commerce's treatment of Slocan's profits and losses from lumber futures contracts was consistent with the AD Agreement.

245. Commerce properly accounted for Slocan's lumber futures hedging contracts, finding them to be a separate form of lumber revenues, neither directly related to sales of lumber nor a financing expense.[299] Slocan earned profits in the lumber futures market of the Chicago Mercantile Exchange (CME), an activity that (as relevant to this argument) was not connected to any actual sale of lumber: No sale or shipment of lumber actually occurred, and no payment for lumber occurred.[300]

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[296] Tembec Cost Verification Report at 25, Exhibit CDA-112.

[297] *Id.*

[298] *Id.*

[299] In accordance with U.S. law, 19 U.S.C. § 1677b(b)(3), Commerce calculated a weighted-average COP based on the cost of materials and fabrication, plus amounts for general and administrative (G&A) expenses, selling expenses, packing expenses and interest expenses. *Preliminary Determination* at 56069, Exhibit CDA-11.

[300] *Final Determination*, Comment 21 (Exhibit CDA-2).

246. In the proceedings before Commerce, Slocan admitted that its futures contracts activities were "an integral part of Slocan's U.S. selling activity."[301] In some cases, Slocan used futures contracts to lock in prices and then delivered the lumber under the terms of the futures contracts. These transactions were included in Slocan's reported sales, and they are not in dispute here. In other cases, Slocan used futures contracts to "hedge"–*i.e.,* protect itself from risks associated with price fluctuations in the lumber market. Slocan did this not for specific sales transactions, but for its sales in general.[302] Commerce found that this type of hedging activity is linked to overall selling activities and reduction of Slocan's exposure to price changes.[303] Hedging is only indirectly linked to selling activities, because there is no actual sale and delivery of lumber to a buyer. Commerce found that revenues from futures contracts were recorded in Slocan's books as sales-type revenues, not as production revenues.[304]

247. Canada accuses Commerce of using "two directly contradictory lines of reasoning to disregard the profits."[305] But the fact is that Slocan requested two directly contradictory treatments of these profits, neither of which was appropriate. First, it argued that they should be an offset to direct selling expenses for U.S. sales of lumber.[306] Second, Slocan alternatively claimed that the futures profits should be an offset to financing costs.[307]

248. Regarding the first claim, Commerce found that Slocan's futures hedging contracts are not direct selling expenses, as they are not directly related to sales of softwood lumber.[308]

249. With respect to determination of export prices, Article 2.4 of the AD Agreement provides for adjustments to be made for differences that affect price comparability, including adjustments for different conditions and terms of sales. The adjustment that Canada claims should have been made here is an adjustment for conditions and terms of sale. Logically, a condition and term of sale must relate to a particular sale. Here, however, the income at issue was generated by an

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[301] *Final Determination*, Comment 21 (Exhibit CDA-2). While part of general selling activity, there was no direct link to sales and no link to any lumber customer, which is why it did not qualify as a condition and term of sale. Being a selling expense/income is the reason it is also not an offset to cost of production.

[302] *See* Slocan Cost Verification Report, Memorandum from Michael P. Harrison to Neal M. Halper, February 1, 2002, at 26 (Exhibit CDA-118).

[303] *Id.*

[304] *Final Determination*, Comment 21 (Exhibit CDA-2).

[305] Canada First Written Submission, para. 267.

[306] Slocan requested an adjustment for "direct selling expenses" in its questionnaire response. It made no request relating to indirect selling expenses.

[307] *Final Determination*, Comment 21 (Exhibit CDA-2).

[308] *Id.* ("[W]here no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct expenses.")

activity that did not relate to any sales of lumber that actually occurred, and thus did not affect the conditions and terms of sale for any particular customer.[309]

250. The issue is whether there was a sale of lumber to a customer in the United States for which these futures contracts were a condition and term of such sale. The simple answer is "no," as the record showed no sale linked to any of these futures contracts at issue.

251. Canada incorrectly states that "[i]t was DOC that determined that this difference [in conditions and terms of sale] affected the comparability of the two softwood lumber markets."[310] While Commerce noted that "Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity," Commerce expressly found that "[s]uch profit is realized from Slocan's position on the CME and as a producer of softwood lumber, but not from its actual sale of subject merchandise."[311] Although the futures contracts related *generally* to Slocan's business of selling lumber, they did not relate to any *actual sales* of lumber. Since none of the futures profits at issue related to any actual U.S. sales, they could not affect the terms and conditions of actual U.S. sales.[312] Therefore, Commerce properly concluded that "there can be no circumstance of sale adjustment for direct selling expenses."[313]

252. Canada's alternative argument with respect to Slocan's futures contracts is that Commerce should have supported an offset to finance expenses included in the calculation of Slocan's cost of production. However this argument must fail because Slocan's own books recorded futures profits not as production expenses, but as lumber sales revenues.[314] (As explained above, however, this fact alone does not automatically link futures profits or expenses

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[309] *Id.*

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

[311] *Final Determination*, Comment 21 (Exhibit CDA-2).

[312] While Canada points to Commerce's treatment of warranty expenses as a difference in terms and conditions of sale in support of the argument, Canada First Written Submission, para. 273, warranty expenses as an adjustment are a well-known exception to the rule that differences in conditions and terms of sales must be directly related to sales. Warranty expenses occur after the sale, but nonetheless are part of the terms and conditions of sale, agreed between the parties. That is very different from Slocan's unilateral futures activity, which had no connection at all either with any sale or indeed with any buyer. Canada's argument fails to address these important distinctions.

[313] *Final Determination*, Comment 21 (Exhibit CDA-2). Canada is incorrect that the "DOC made the factual determination that futures revenues affected lumber prices. . . ." Canada First Written Submission, para. 274. This is nowhere stated or implied in Commerce's findings. As noted above, Commerce stated that "Slocan's lumber futures hedging activity is related to its core business of selling lumber," but nowhere did Commerce determine that futures revenue affected prices. *Final Determination*, Comment 21 (Exhibit CDA-2).

[314] Slocan records the profits or losses from these futures contracts for undelivered lumber as a credit or debit to lumber sales revenue, and not in an investment or interest account in Slocan's books and financial statements.

to particular sales. It simply describes the general category in which futures transactions are placed for accounting purposes). A given expense or revenue item cannot be both a selling expense and a cost of production item. It must be one or the other. This distinction is evident in Article 2.2, which identifies as an alternative basis for normal value "cost of production . . *plus* a reasonable amount for administrative, selling and general costs and for profits." The fact that Article 2.2 contemplates *adding* SG&A to cost of production makes it clear that selling expense (part of SG&A) is not an inherent element of cost of production. Because Slocan itself characterizes its futures contracts as selling expenses, it was reasonable for Commerce to follow that lead and decline to treat them differently.[315]

253. Contrary to Canada's claims, Slocan failed to meet its burden to identify and demonstrate either of its adjustment requests. Futures hedging contracts are not *direct* selling expenses/income, as they are not *directly* related to particular sales – they are not a part of any conditions and terms of sale of lumber to customers in the United States. They are also not a financing expense/income, and as such also are not proper as an offset for finance expenses included in production costs. Therefore, consistent with the AD Agreement, Commerce properly did not grant the two offsets requested by Slocan. Its decision should be upheld by this Panel under the standard of review in Article 17.6(i).

VI. CONCLUSION

254. For the reasons set forth above, the United States requests that the Panel reject Canada's claims in their entirety.

[315] *Final Determination*, Comment 21 (Exhibit CDA-2).