

## ANNEX A

### PARTIES' AND THIRD PARTIES' RESPONSES TO QUESTIONS FROM THE FIRST MEETING

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## ANNEX A-1

### RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(30 June 2003)

#### GENERAL ISSUES

##### To Canada:

**1. Could Canada please set out in summary format its legal arguments in support of each of its claims, i.e., listing the respective provisions of the Anti-Dumping Agreement and the GATT 1994, and explaining briefly in the light of the Vienna Convention on the Law of Treaties how the cited factual circumstances constitute violations of the specific language in those provisions cited as allegedly being violated.**

1. Canada claims that Commerce committed a number of fundamental errors that render the imposition of anti-dumping duties inconsistent with US obligations under both GATT 1994 and the *Anti-Dumping Agreement*. Canada's specific claims are set out below.

(i) Initiation of the Investigation: Canada's claims are that the United States acted inconsistently with Articles 5.2 and 5.3.

Article 5.2 provides that an "application *shall* contain such information as is *reasonably available* to the applicant" on a variety of issues including "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country...of origin or export ...and information on export prices". (emphasis added) Article 5.2 requires that information on home market or export prices that is "reasonably available" must be provided in the application. The investigating authority is obligated to examine whether the application conforms to the requirements of Article 5.2. If the applicant fails to provide information that is reasonably available, the investigating authority must reject the proposed application. The ordinary meaning of Article 5.2, together with its object and purpose, make it clear that there is an obligation on the investigating authority to ensure the requirements of Article 5.2 have been met.

The facts of this case demonstrate that actual transaction information was available to the applicant and, therefore, should have been provided. This information was not in the application. Given the magnitude of Canada-US trade in softwood lumber, including the regular purchases by members of the Petitioner of softwood lumber from Canada, an objective investigating authority would have known that the Petitioner in this case had reasonably available information which was not provided. In the facts of this case, Commerce's failure to reject the application was inconsistent with Article 5.2.

Article 5.3 provides that "authorities *shall examine* the accuracy and adequacy of the evidence provided in the application *to determine* whether there is sufficient evidence to justify the initiation of an investigation."(emphasis added) The plain meaning of the text of Article 5.3 demonstrates that an investigating authority must further examine the information in the application to

determine its adequacy and accuracy and, therefore, the sufficiency of evidence. The facts of this case demonstrate that an objective investigating authority conducting a further examination of the evidence would have discovered that the information in the application – consisting of no actual transaction information or Canadian cost data and relying on unrepresentative surrogate and aggregate cost information – was not adequate or accurate, and, therefore, not sufficient to initiate the investigation. Commerce's initiation of the investigation was, therefore, inconsistent with Article 5.3.

(ii) Termination of the Investigation: Article 5.8 provides that “an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.” The ordinary meaning of Article 5.8 is unambiguous. It imposes a continuous obligation on an investigating authority to re-assess the evidence of dumping. Under Article 5.8, Commerce had an obligation to consider the information regarding the relationship between Weldwood and International Paper and the actual cost and price data of Weldwood to determine whether there was sufficient evidence of dumping to justify proceeding with the case. Failure by Commerce to consider the above-noted information rendered it impossible for it to comply with this obligation. Therefore, the United States acted inconsistently with Article 5.8.

(iii) “Like Product” and “Product Under Consideration”: Canada's claim is that Commerce erroneously determined there to be a single “like product”. This claim is grounded in Article 2.6, in particular, the ordinary meaning of the words “characteristics closely resembling”. Canada's position is that the group of products within the “like product” as defined by Commerce did not have “characteristics closely resembling” those of the group of products in the “product under consideration”. The facts of the case before Commerce demonstrated that bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar did not have characteristics closely resembling those of the product under consideration and, therefore, should have been dealt with separately. Non-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *Anti-Dumping Agreement*, e.g., Articles 5.1, 5.2, and 5.4.

(iv) Differences in Dimensions: Article 2.4 requires that the investigating authority *shall* make “due allowance” for differences affecting “price comparability”. Commerce erred by failing, in comparing non-identical products, to make due allowance in normal values for physical differences in softwood lumber products to maintain price comparability and to ensure a fair comparison between normal value and export price. The evidence before Commerce showed that the value of softwood lumber varies depending on the size of the product (including differences in thickness, width and length), and Commerce itself acknowledged this to be the case. There was, therefore, no justification for ignoring these differences, and comparing prices for different-sized products without adjusting for such product differences. An objective investigating authority evaluating the evidence could not have determined that size differences in softwood lumber did not affect price comparability and that adjustments were, therefore, not necessary. The United States therefore contravened Article 2.4 of the *Anti-Dumping Agreement*.

(v) “Zeroing”: Commerce's “zeroing” of negative margins of dumping is inconsistent with the ordinary meaning of the words in Articles 2.4 and 2.4.2 because it fails to take into account a weighted average of all comparable export transactions in determining margins of dumping and fails to produce a “fair comparison”. Zeroing fails to take into account “all comparable export transactions”, as explained by the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*<sup>1</sup>, and results in a dumping margin that does not reflect an “average” of all comparable export transactions. In addition, it fails to produce a “fair

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<sup>1</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted 12 March 2001, at para. 55. [hereinafter “EC – Bed Linen”]

comparison” as required by Article 2.4. Thus the United States contravened Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

(v) Company-Specific Issues: Article 2.2.1.1 requires that an investigating authority normally calculate costs (direct and indirect) on the basis of, “records kept by the exporter or producer under investigation” where these records are in accordance with GAAP and “reasonably reflect costs associated with the production and sale” of the product at issue. Therefore, the plain language of this provision requires that the costs an investigating authority determines must reasonably reflect the costs associated with the production and sale of the investigated product.

Article 2.2.2 requires that the investigating authority calculate an amount for general, selling and administrative costs based on actual data “pertaining to” the production and sale of the investigated product. Together, these provisions impose a “relationship test”, *i.e.*, the calculated cost must relate to the production and sale of the investigated product.<sup>2</sup> Each of the claims below involves a violation of one or both of Articles 2.2.1.1 and 2.2.2. Further, an incorrect calculation of costs impacts the determination of which sales are useable in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed normal value, contrary to Article 2.2.

Article 2.4 provides an overarching obligation on the investigating authority to ensure a fair comparison between export price and normal value. Where the calculation of costs results in an improper normal value, a fair comparison will not be possible. In this situation, Article 2.4 will be violated. The errors described below resulted in violations of Article 2.4. A distinct violation of Article 2.4 in respect of Slocan is described below.

Abitibi: Commerce allocated Abitibi’s financial expenses to its different product lines in proportion to the cost of goods sold (COGS) for each product line. In light of the factual evidence presented by Abitibi, Commerce’s selection and application of this methodology to Abitibi contravened Article 2.2.1.1 and 2.2.2. First, in selecting its allocation methodology, Commerce failed to “consider all available evidence on the proper allocation of costs”. Commerce applied a standard methodology from which it does not depart. Second, in failing to rely upon audited financial statement data concerning the assets actually used by each product line and ignoring the evidence that financial expenses were incurred in relation to assets, Commerce failed to base its calculation of financial expenses “on actual data pertaining to production and sales . . . of the like product by the exporter or producer under investigation”. Third, the use of the COGS methodology failed to result in an allocation that “reasonably reflects the costs associated with the production and sale of the product under consideration.”

Tembec: Commerce calculated Tembec’s general and administrative costs based on all of the products produced worldwide by Tembec, the major proportion of which consisted of pulp, paper and chemicals. These products incurred significantly different general and administrative expenses than the production and sale of softwood lumber in Canada. In so doing, Commerce ignored the general and administrative costs recorded on the books of Tembec’s Forest Products Group, which related primarily to softwood lumber. Commerce thereby contravened Articles 2.2.1.1 and 2.2.2 of the *Anti-Dumping Agreement* by calculating a general and administrative expense cost for Tembec that did not “reasonably reflect” Tembec’s costs “associated with” the production of lumber and included data that did not “pertain to” the production and sale of softwood lumber.

Weyerhaeuser: Commerce allocated a portion of certain charges associated with the settlement of legal claims of Weyerhaeuser US’s (Weyerhaeuser’s parent company) sales of hardboard siding (not a softwood lumber product) in the United States, as part of Weyerhaeuser Canada’s general and administrative costs. As the record demonstrates, the litigation settlement

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<sup>2</sup> *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R, adopted 1 October 2002, at para. 7.393. [hereinafter “*Egypt – Steel Rebar*”]

expenses were not a company-wide expense that related even in part to Weyerhaeuser Canada's production and sale of softwood lumber; rather they were related exclusively to its parent company's production and sale of an unrelated product, hardboard siding. Commerce thereby contravened Articles 2.2.1.1 and 2.2.2 of the *Anti-Dumping Agreement* by calculating a general and administrative expense for Weyerhaeuser that did not "reasonably reflect" the costs associated with the production and sale of softwood lumber and included costs that did not "pertain to" Weyerhaeuser's costs for producing and selling softwood lumber.

West Fraser and Tembec: Where the production of the investigated product results in the generation of a by-product, any revenues arising from the sale of such by-product must be offset against the cost of the investigated product in order to arrive at a cost which reasonably reflects the cost of production and sale of the investigated product. If an investigating authority improperly determines the amount of an offset (e.g., wood chips), it will necessarily result in a cost for the investigated product (e.g., softwood lumber) which does not properly account for the value of the offset and consequently does not reasonably reflect the costs associated with the production and sale of the investigated product. In relation to West Fraser, Commerce failed to calculate revenues from wood chip sales to affiliated parties on the basis of records kept by the company, as required by Article 2.2.1.1. For Tembec, Commerce rejected fully documented actual market prices from arm's length transactions entered into by Tembec with third parties, and instead used internal transfer prices that were set well below market prices. Commerce thereby contravened Article 2.2.1.1 of the *Anti-Dumping Agreement*.

Slocan: Slocan generated revenues from certain futures contracts for the sale of softwood lumber. Although Commerce accepted that the revenues related to Slocan's core business of selling softwood lumber, Commerce refused to account for these revenues, as an offset to financial or selling expenses, or through some other reasonable method. Commerce thereby contravened Article 2.4 in failing to make an adjustment for futures revenues in the export price, or in the alternative, acted inconsistently with Article 2.2.1.1 of the *Anti-Dumping Agreement* in failing to apply those revenues as an offset to financial expenses in determining the normal value.

(vii) Canada alleges that the above specific claims also result in consequential violations of Articles VI:1 and VI:2 of GATT 1994 and Articles 1, 9.3 and 18.1 of the *Anti-Dumping Agreement*. Article 1 requires that an anti-dumping measure be applied only under the circumstances provided for under Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the *Anti-Dumping Agreement*. Article 18.1 requires that no specific action may be taken against dumping except in accordance with Article VI of the GATT 1994.<sup>3</sup> Article VI provides that a Member may only apply an anti-dumping duty in order to offset dumping in an amount that is not greater than the margin of dumping. Similarly, Article 9.3 requires that the amount of any anti-dumping duty shall not exceed the margin of dumping as established under Article 2 of the Agreement. By improperly initiating and continuing the investigation, failing to properly determine the "like product", failing to make an adjustment for physical differences which affected price comparability, zeroing negative margins and improperly calculating each respondent's costs, the United States applied inflated margins of dumping to Canadian softwood lumber products and applied a measure against dumping that was contrary to Articles 1, 9.3 and 18.1 and Article VI of GATT 1994.

**2. With regard to Question 1 above, please explain with reference, where in the Request for Establishment of a Panel these claims have been made. The Panel notes that there are differences, over and above those raised by the US in its *First Written Submission*, between the Articles cited in the Request for Establishment of a Panel and the Articles cited in Canada's *First Written Submission*. Could Canada please clarify?**

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<sup>3</sup> *United States – Anti-Dumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, at para. 81. [hereinafter "*US – Anti-Dumping Act of 1916*"]

2. Canada's claims are stated in the Panel Request as follows:

- Canada's claims regarding initiation and termination of the investigation under Article 5 are stated in Section 1(a), (b) and (d).
- Canada's claim regarding the erroneous determination of "like product" is found in Section 2.
- Canada's claim relating to Articles 2.4 and 2.4.2 for the failure to make adjustments for physical differences is stated in Section 3(b).
- Canada's claim relating to Articles 2.4 and 2.4.2 for "zeroing" is stated in Section 3(a).
- Canada's claims regarding Commerce's improper costs calculations for individual respondents that were contrary to Article 2 are stated in Section 3(c) - (e).
- Canada's claims under Article 1, 9.3 and 18.1 of the *Anti-Dumping Agreement* and GATT Article VI are stated in Section 3(f) and in the paragraph following Section 3.

**3. Please provide the Panel with copies of the complete version of Exhibit CDA-4 and CDA-11.**

3. A complete copy of Exhibit CDA-11 is provided with the exhibits to these responses. A complete copy of the 3-volume transcript of the hearing of the NAFTA Chapter 19 binational panel reviewing the final anti-dumping determination containing approximately 1,000 pages, from which Exhibit CDA-4 is taken, is being provided in .pdf format on CD-ROM (Exhibit CDA-128). If requested, Canada will file hard copies with the Panel.

**4. In para. 26 of its *First Written Submission*, the US makes the following statement:**

**"Exhibit CDA-77 contains a 'Lumber Regression Analysis' produced by the Canadian respondent, Tembec, which is a statistical regression that was not made available to the US investigating authority during the investigation. Indeed, it was created more than six months after the investigation was completed."**

**Could Canada comment on this statement? Please explain in detail how the regression analysis was developed, that is, which methodologies and assumptions were used? In this context, please also comment on the argument put forward by the US that the regression analysis includes new elements which were not presented to DOC. To the extent that Canada's position is that the various components of the regression analysis were presented to DOC, please show this to the Panel by reference to the record of the investigation.**

4. As set forth more fully below in response to Questions 21 and 22, the Department of Commerce, from the very beginning of the investigation, agreed with both the respondents and the petitioner that dimension affects price and therefore was an essential criterion to use in Commerce's model matching. (*See*: Response to Question 22). Commerce used dimension for model matching in both the preliminary determination and in the final determination. In Comment 7 of the *Issues and Decision Memorandum*, Commerce set out its position detailing how it was responding to various

respondent's views in organizing different sizes for its product matching.<sup>4</sup> No one reasonably doubted that the inclusion of dimension for model matching would not mean its inclusion in adjustments for physical differences, and Commerce never gave any reason to expect that it would exclude dimension from its adjustments in the final determination. Commerce could have accounted so meticulously for dimension in model matching only because it recognized the importance of dimension for price. Yet, dimension was used throughout for model matching, but not for a price adjustment for price differences in physical characteristics.

5. The United States had an affirmative duty under Article 6 to notify Canadian parties that it did not intend to use dimension for price because it had put the Canadian parties on notice to the contrary in the questionnaires and in every other aspect of the investigation. All requisite data for the analysis were on the record. The Canadian parties had no reason to submit analyses of the data to prove a point on which Commerce and all parties seemed to have agreed. Had Commerce put the parties on notice about this issue, as required under Article 6.1, the respondents would have prepared and filed with Commerce analyses similar to the Tembec Regression Analysis, which in any event is derived entirely from record evidence and could have as easily been performed by Commerce itself if it had doubts about the importance of dimension.

6. In October 2002, Capital Trade, Inc., a Washington consulting firm with extensive experience in statistical analyses, performed the regression analyses with Tembec data (the regressions could have been performed with the data from any one of the companies, all of whom had the requisite data on the record of the investigation) and advised Tembec's counsel in writing and in detail of the methodology it used. Canada provides here a short summary, and offers the panel the Memorandum of October 2002.<sup>5</sup>

7. Capital Trade used the same US and Canadian sales databases that Commerce used in calculating its final determination dumping margins for Tembec. Thus, all of the underlying data used in these analyses were on the record below and actually used by Commerce in its final determination. Capital Trade used a procedure called "Ordinary Least Squared" or "OLS" to conduct four multiple regression analyses. The first analysis was of Tembec's entire home market sales database as used by Commerce in its final determination. Capital Trade found a 99.99 per cent probability that dimension affects price. In Capital Trade's second regression, using the entire US sales database, it found again a 99.99 per cent probability that dimension affects price. Capital Trade's last two analyses were conducted on portions of the first two databases, using the lumber grades that accounted for the largest and second largest, respectively, volume of sales. Again the results showed a 99.99 per cent probability that dimension affects grade. Finally, as an additional check on its model, Capital Trade compared its regression estimates to published data on lumber prices from *Random Lengths*. The published data showed differences in prices that were extremely close to the pricing differences found in the regression analyses, and confirmed that the market recognizes that differences in dimension affect price. Those data showed significant differences in price between otherwise identical products that varied only by length or width.

**To both parties:**

**7. Please comment on the findings contained in para. 7.3 of the *Egypt – Steel Rebar* panel report:**

**"the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-***

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<sup>4</sup> Issues and Decision Memorandum for the Anti-Dumping Duty Investigation of *Certain Softwood Lumber Products from Canada*, dated 21 March 2002, Comment 7, at 39. [hereinafter "IDM"] (Exhibit CDA-2)

<sup>5</sup> Capital Trade Incorporated, *Certain Softwood Lumber Products from Canada – Regression Analysis*, 7 October 2002. (Exhibit CDA-129 – Contains Business Confidential Information)

***Rolled Steel*, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

8. In *Egypt – Steel Rebar*, the panel found itself repeatedly confronted with the relationship between: (1) the requirements on an investigating authority during an investigation under the *Anti-Dumping Agreement*; and (2) what evidence and argumentation interested parties should contribute during the process of the investigation.<sup>6</sup> Accordingly, in the introduction to its findings the panel considered the broad principles that relate to this relationship. The above excerpt is drawn from this introduction.

9. This excerpt accentuates two important principles relating to evidence provided by interested parties to investigating authorities: communication and co-operation. An investigating authority is required to "provide opportunities" to interested parties to present evidence on given issues. It follows that the investigating authority must communicate with the interested parties to inform them of the issues and how to provide the required evidence. At the same time, interested parties must cooperate with the investigating authorities in making an effort to present this evidence. If interested parties do not present evidence it will not be possible to review whether the investigating authority met the requirements of or properly exercised its discretion under the *Anti-Dumping Agreement*.

10. In this respect, Article 6 and Annex II of the *Anti-Dumping Agreement* provide important context for these principles. Article 6.1, for example, requires that an investigating authority provide interested parties with notice of the information it requires. This requirement is reiterated in paragraph 1 of Annex II, which is incorporated into the *Anti-Dumping Agreement* through Article 6.8. This provision provides that: "As soon as possible after the initiation of the investigation, the investigating authorities should *specify in detail the information required* from any interested party, and the manner in which that information should be structured ... ." An investigating authority is also not permitted to consider other available information where a party does not provide certain information because the authorities have failed to specify in detail the information that was required.<sup>7</sup> Moreover, Annex II paragraph 6 provides that an interested party must be immediately informed and afforded an opportunity to provide further explanation when an investigating authority does not accept its information. These provisions demonstrate that there is a strong requirement on the investigating

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<sup>6</sup> Egypt – Steel Rebar, at para. 7.1.

<sup>7</sup> In Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, the panel found that:

[W]e conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided *unless the investigating authority has clearly requested that the party provide such supporting documentation*. (emphasis added)

authority to communicate with interested parties to inform them of required evidence and *whether the evidence they have provided is adequate*.

11. In relation to co-operation, Annex II also specifies that investigating authorities should ensure that an interested party is aware that if it does not provide information that the authority will be free to make a determination on the basis of other evidence.<sup>8</sup> Again, if interested parties do not co-operate with an investigating authority this will detract from their position in both the underlying investigation and any subsequent WTO action.

## **B. ARTICLES 5.2/5.3**

### **To Canada:**

**8. If it is, *arguendo*, assumed that there was no relationship between Weldwood and International Paper, would Canada consider that the evidence before the US authorities at the time of initiation was sufficient to justify the initiation of the AD investigation against softwood lumber? Could Canada please explain its position in detail?**

12. Assuming that Weldwood was not a wholly-owned subsidiary of International Paper, one of the leading members of the Coalition for Fair Lumber Imports Executive Committee (the Applicant), the information before the US authorities at the time of initiation was not sufficient to justify the initiation of the investigation against Canadian softwood lumber.

13. As discussed below, even though the Application addresses a product that is the subject of billions of dollars of cross-border trade including purchases of imported lumber by several companies that make up the Applicant, the Application provides no information on transaction prices and grossly inadequate information on costs to support its allegations. Even without knowledge of the Weldwood and International Paper relationship, it would be obvious to any reasonable investigating authority that the data provided with the Application was insufficient to justify an investigation and was not all that was reasonably available to the Applicant. Hence Commerce's initiation violated Articles 5.2 and 5.3 of the *Anti-Dumping Agreement*.

14. In its Notice of Initiation, Commerce concluded that “[b]ased on the data provided by the petitioners, there is reason to believe that certain imports of softwood lumber products from Canada are being, or are likely to be, sold at less than fair value.”<sup>9</sup> The information provided by the Applicant and which was relied on by Commerce to initiate the investigation was so inaccurate and inadequate that it was insufficient to justify the initiation of the investigation within the meaning of Article 5.3. Commerce's determination that the evidence was sufficient was not one that an objective investigating authority could properly have made.

15. As will be demonstrated below, there were material deficiencies in the data provided by the Applicant and upon which Commerce relied to reach its decision that there was sufficient evidence to initiate the investigation. It is also readily apparent that Commerce did not sufficiently scrutinize the accuracy or adequacy of the **price** and **cost** information in the Application. In the context of the market for softwood lumber it would have been obvious to any investigating authority acting objectively that additional data on actual transactions had to be available to the Applicant and these

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<sup>8</sup> Annex II paragraph 1 provides, in part, that:

... The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

<sup>9</sup> *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21,328, at 21,331 (Dep't Commerce 30 April 2001) (Initiation). [hereinafter “Initiation Notice”] (Exhibit CDA-9)

data might very well have contradicted and nullified the information provided by the Applicant. Further, it would have been obvious that the US mills chosen as surrogates for the cost calculation were unrepresentative and that use of certain cost information was objectively unreasonable.

16. Relying on the Applicant's representation that better data on Canadian producer prices and costs were not reasonably available to it, Commerce *nonetheless* initiated its investigation based on insufficient information contained in the Application which omitted actual transaction prices; provided limited and, at best, imprecise information on prices at which Canadian lumber was exported to the United States; and relied on a hybrid cost model built, in significant part, on aggregate information and non-Canadian cost data from small, unrepresentative surrogate mills.

A. COMMERCE FAILED TO HAVE ACCURATE AND ADEQUATE PRICE INFORMATION BEFORE IT SUFFICIENT TO JUSTIFY THE INITIATION OF THE INVESTIGATION

17. The Application contained no evidence of any actual sales transactions involving identified Canadian companies, despite the fact that five applicant companies (i.e., members of the Coalition for Fair Lumber Imports Executive Committee)<sup>10</sup> themselves purchased from three of the six largest Canadian producers<sup>11</sup> and that there were billions of dollars of cross-border trade in softwood lumber. Instead, the Application relied almost exclusively on information from *Random Lengths*, an industry publication that provides only price estimates - not prices - for various types of lumber supplemented by a few alleged "price quotes" contained in two affidavits that amounted to mere assertions, unsupported by material facts such as the identity of the purchaser or the circumstances of sale. Finally, although the Application described seven major categories of softwood lumber, it provided no evidence of pricing, of any kind, on five of the seven self-described categories.

(i) *Reliance on information contained in Random Lengths*

18. Commerce relied on insufficient information represented as US "market prices" reported in *Random Lengths*. First, with respect to the alleged "price quotes", even the Applicant characterized the *Random Lengths* prices as a "derivation of US market prices"<sup>12</sup> or "as a basis for estimating prices in the United States".<sup>13</sup> Thus, even the Applicant concedes that what is provided by *Random Lengths* are neither actual prices nor an average compiled from actual prices.

19. *Random Lengths* itself acknowledges that the prices it publishes are not actual transaction prices or averages of transaction prices. As explained by *Random Lengths* in information included with the Application, its "reported prices are not averages, nor are they determined by a formula or model":<sup>14</sup>

A reported price is **not** an arithmetic average of the prices reported to the Random Lengths staff. It is **not** the price for the item for the week following publication (that

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<sup>10</sup> *Ibid.*, at 21,329 fn 1, and *Petition for the Imposition of Anti-dumping and Countervailing Duties: Certain Softwood Lumber Products from Canada*, Vol. I (2 April 2001), Exhibit 1B-1 [hereinafter "Petition"] (Exhibit CDA-38), Information About Petitioners, for the list of companies that are members of the Coalition for Fair Lumber Imports Executive Committee. The list includes [[ ]]

<sup>11</sup> The record is clear that [[ ]] members of the Coalition for Fair Lumber Imports Executive Committee (the Applicant), purchased Canadian softwood lumber from [[ ]] during the period of investigation and therefore had access to US transaction price data. [[ ]] All exhibits contain Business Confidential Information.

<sup>12</sup> Petition, Vol. VI, Exhibit VI.C-13, "Derivation of US Market Price" (Exhibit CDA-44)

<sup>13</sup> Petition, Vol. III, at III-12 (Exhibit CDA-37).

<sup>14</sup> Petition, Vol. III, Exhibit III.12, "Random Lengths - How Reported Prices Are Determined" and "Random Lengths - Answers to Questions About the Prices Published In Random Lengths", at 1. (Exhibit CDA-133)

is, it is not a projected price for future transactions). It is **not** the only price at which transactions took place during the week of publication.<sup>15</sup> (emphasis in original)

20. In short, the *Random Lengths* reported prices are estimates or judgments based on informal enquiries conducted by *Random Lengths* personnel. Informal estimates of this sort are not actual transaction prices or price quotations. Such estimates did not amount to sufficient evidence to support the initiation of the investigation especially in a market with billions of dollars of cross-border trade and due to the fact that some of the Applicants are also purchasers of imported Canadian lumber.

21. The eastern spruce-pine-fir (SPF) US “price” data from *Random Lengths* (delivered to Boston and the Great Lakes)<sup>16</sup> that was relied upon by Commerce to initiate the investigation<sup>17</sup>, may have suffered from the additional flaw that the data commingled Canadian and US producer data. *Random Lengths* defines eastern SPF as follows:

Lumber of the Spruce-Pine-Fir group produced in the eastern provinces of Canada, including Saskatchewan and Manitoba. Also used in reference to some lumber produced in the northeastern United States.<sup>18</sup>

22. In addition, and with respect to normal values, Commerce quite rightly concluded that the Application contained no evidence of home market prices for producers located in British Columbia.<sup>19</sup> Commerce was wrong however to conclude that the Application contained home market price information for producers in Quebec sufficient to support the Applicant’s allegation of sales below cost.<sup>20</sup> For this determination, Commerce once again relied on monthly average “prices” reported by *Random Lengths* for the six-month period (October 2000 to March 2001) for two eastern SPF 2x4 products.<sup>21</sup> As discussed above with respect to US price information, *Random Lengths* does not provide evidence of actual transaction prices that is sufficient to justify an investigation.

(ii) *The alleged US Price Quotes contained in the Application*

23. The Notice of Initiation and Initiation Checklist confirm that Commerce, for the purposes of calculating export price for initiation purposes, relied on “POI-average *Random Lengths* prices and actual price quotes from Canadian producers”.<sup>22</sup> This information was insufficient as a basis for initiation. There are material deficiencies in the two price quotes, the only other export price

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<sup>15</sup> *Ibid.*, at 5 (Page one of the section entitled “Random Lengths – Answers to Questions About the Prices Published In Random Lengths”).

<sup>16</sup> Petition, Vol. VI, Exhibit VI.C-13, “Derivation of US Market Price” (Exhibit CDA-44) and Petition, Vol. VI, Exhibit VI.C-11, “*Yardstick and Random Lengths*” (various issues) (Exhibit CDA-43). The price data at issue related to ESPF, 2x4, Std&Btr, Kiln Dried, random lengths, delivered to Boston and the Great Lakes respectively.

<sup>17</sup> COMMERCEAD Investigation Initiation Checklist: *Certain Softwood Lumber Products from Canada*, Inv. No. A-122-838, at 6-7 [hereinafter “Initiation Checklist”] (Exhibit CDA-10). and Initiation Notice, at 21,330 (Exhibit CDA-9).

<sup>18</sup> Petition, Vol. III, Exhibit III.9, *Random Lengths – Terms of the Trade*, 4<sup>th</sup> ed., at 114. (Exhibit CDA-147)

<sup>19</sup> The Applicant provided data from the British Columbia Ministry of Forests that Commerce rejected because the Application did not indicate that the data were restricted to Canadian sales prices. *See* Initiation Notice, at 21,330 (Exhibit CDA-9). Because there were no prices given for sales in British Columbia at the time of initiation, there is no indication that Commerce even evaluated whether the sales in British Columbia were below cost before calculating normal value based on constructed value.

<sup>20</sup> Initiation Notice, at 21,330 (Exhibit CDA-9) and Initiation Checklist, at 7-9 (Exhibit CDA-10).

<sup>21</sup> Initiation Checklist, at 79 (Exhibit CDA-10). On page 8 of the Initiation Checklist, Commerce found that the Application contained “[c]urrent price data” in “Exhibit C-10, (Volume IV)”. Petition, Vol. VI, Exhibit VI.C - 10, “Foreign Market Price” (Exhibit CDA-42).

<sup>22</sup> Initiation Notice, at 21,330 (Exhibit CDA-9) and Initiation Checklist, at 6-7 (Exhibit CDA-10).

information outside of the *Random Lengths* data, relied on by Commerce to initiate the investigation.<sup>23</sup>

#### First US “Price Quote”

24. The first US “price quote” (Quebec Price Quote #1), is supported by an affidavit containing a general allegation of lost sales.<sup>24</sup> The Applicant identifies it as a “transaction price” for eastern SPF<sup>25</sup>, but in fact it is not. The price quote in the affidavit does not identify a Canadian producer or producers as the seller of the merchandise, nor is there any information verifying that the purchaser was honestly quoting the Quebec offer (rather than using a phantom quote for negotiation purposes).<sup>26</sup> In particular, there is no evidence as to (i) the name of the producer or exporter providing the quotation; (ii) the names of the customers receiving the quotation; (iii) whether these customers were affiliated or unaffiliated with the producers; and iv) any other relevant information regarding the circumstances of the “alleged” sale, including the volume of the sale, or the circumstances under which the price quote was obtained by the party providing the information.

25. The Application contains nothing more than a simple assertion about a price allegedly offered by what the Applicant claims were Quebec producers. Such assertion does not constitute adequate and accurate evidence sufficient to justify the initiation of the investigation.

#### Second US “Price Quote”

26. The second US “price quote” (B.C. Price Quote # 1) contained in the Application and upon which Commerce relied, also is supported by an affidavit.<sup>27</sup> The affidavit refers to a price quote for western SPF from a trading company and does not identify any individual Canadian producer or exporter as the supplier of the product. In fact, this price quote was not one offered by a Canadian producer or exporter, or a US company affiliated with a Canadian producer or exporter. Such pricing information cannot justify the initiation of an investigation as it does not reflect the selling practices of Canadian producers or exporters.<sup>28</sup>

27. From such information no investigating authority evaluating the Application objectively could have concluded that the information provided in the Application was sufficient to initiate the investigation.

(iii) *The Application provides no pricing data to support initiation on five of the seven softwood lumber categories or for any species other than Eastern SPF and Western SPF*

28. At the time of initiation, Commerce did not have before it pricing evidence for five of the Applicant’s self-identified seven categories of softwood lumber.

29. While the Application contained pricing information and purported dumping calculations of only two narrowly defined products ((i) SPF 2x4 kiln-dried dimension lumber and (ii) SPF 2x4 kiln-

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<sup>23</sup> Ibid.

<sup>24</sup> Petition, Vol. VI, Exhibit VI.C-14, “US Price Quote” (Exhibit CDA-45).

<sup>25</sup> Petition, Vol. III, at III-10 (Exhibit CDA-37).

<sup>26</sup> We note that the International Trade Commission, the US authority which investigates the issue of material injury, routinely deals with lost sales allegations and often finds that the allegation cannot be confirmed.

<sup>27</sup> Petition, Vol. VI, Exhibit VI.D-14 (public version, as originally filed) (Exhibit US-16).

<sup>28</sup> In addition, the affiant assumed that “the mark-up received by lumber wholesalers in the United States has historically been five (5) per cent of the purchase price”. See *Ibid.* The Application provided no evidence in support of this assumption.

dried stud lumber)<sup>29</sup>, the Application nonetheless requested that Commerce undertake an investigation of virtually all “softwood lumber” which it classified into 7 major categories: (1) studs; (2) boards; (3) dimension lumber; (4) timbers; (5) stress grades; (6) selects and (7) shop.<sup>30</sup>

30. The Application, however, upon which Commerce relied at the time of initiation, contained no evidence of dumping of products falling within five of the Applicant's self-described seven product categories. Specifically, there was no evidence of the dumping of (1) boards; (2) timbers; (3) stress grades; (4) selects; or (5) shop lumber. The limited evidence offered in the Application on two products alone applied solely to “dimension” and “stud” lumber.<sup>31</sup>

31. Commerce relied, without further enquiry, on an Application that contained insufficient information to justify initiation of an investigation with the scope of merchandise proposed by the Applicant.

**B. COMMERCE FAILED TO HAVE ACCURATE AND ADEQUATE COST INFORMATION BEFORE IT SUFFICIENT TO JUSTIFY THE INITIATION OF THE INVESTIGATION**

32. The cost data – which formed the sole basis for the initiation – were developed from unrepresentative surrogate companies, employed certain costs for less than the full operating cycle, involved aggregate data with no explanation regarding cost allocations, and failed to adequately deal with the freight calculation, among other defects.

33. Cost data were critical to Commerce’s initiation findings regarding both Quebec and British Columbia. First, even assuming *arguendo* that the prices cited for Quebec were usable, Commerce would have had to find that there was no dumping unless it also determined Canadian domestic sales were below cost. A price-to-price comparison for the same product in the same month shows that the US price was consistently above the Canadian price.<sup>32</sup> Indeed, the only instance in which Commerce was able to find dumping was when it used the aggregate costs and compared these costs to an

<sup>29</sup> Petition, Vol. III, at III-16 (Exhibit CDA-37). The alleged dumping margins were subsequently revised: Petition, Vol. VI, Exhibits VI.D-15, VI.D-16, VI. C-15, VI.C-16 (Exhibit CDA-40).

<sup>30</sup> Petition, Vol. I, at I-5 - I-6 (Exhibit CDA-36).

<sup>31</sup> Petition, Vol. III, at III-10 – III-16 (Exhibit CDA-37).

<sup>32</sup> A comparison of all of the Quebec ex-factory pricing data for Canadian products sold in Quebec and in the United States consistently shows that the US price was higher, *i.e.*, that there was no price-to-price dumping. In fact, none of the Quebec Derivation of Foreign Market Price data for any of the months Petition, Vol. VI, Exhibit VI.C-10, “Foreign Market Price” (Exhibit CDA-42), when compared to the same product in the same month is higher than the US price data. Petition, Vol. VI, Exhibit VI.C-13, “Derivation of US Market Price” (Exhibit CDA-44).

Product	Date	Quebec Price	US Price
ESPF, 2x4, Std&Btr, KD, RL	October 2000	\$199.85	\$247.00 \$241.09
“	November 2000	\$210.20	\$263.00 \$257.09
“	December 2000	\$203.01	\$237.00 \$232.09
“	January 2001	\$199.30	\$230.00 \$221.09
“	February 2001	212.91	\$247.00 \$242.09
“	March 2001	\$215.19	\$257.00 \$253.09

A comparison of all reported ex-factory price data for ESPF studs (ESPF, 2x4-8’, PET, KD) from the same sources also shows that there was no price-to-price dumping. Petition, Vol. VI, Exhibit VI.C-10, “Foreign Market Price” (Exhibit CDA-42) compared with Petition, Vol. VI, Exhibit VI.C-13, “Quebec Derivation of US Market Price #2” (Exhibit CDA-44).

individual product. Second, there were no Canadian home market prices used to calculate normal value for British Columbia. After Commerce rejected the Applicant's proffered price data from the B.C. Ministry of Forests (on the basis that the Application did not indicate that the prices were restricted to sales in Canada)<sup>33</sup> there were no other British Columbia prices offered or requested. Because there were no prices given for sales in British Columbia, there is no indication that Commerce even evaluated whether the sales in British Columbia were below cost (as Commerce normally does and is anticipated by Article 2.2.1 of the *Anti-Dumping Agreement*) before calculating normal value based on constructed value.

(i) *Failure to have costs of significant or representative producers*

34. Claiming no better information was available, the Applicant based its estimation of British Columbia and Quebec producers' costs on manufacturing costs of members of the US Coalition. The Applicant asserted and Commerce accepted with no apparent effort at verification that the members of the Coalition whose costs were used were "significant producers" in the United States that were representative of the "Canadian producers being modelled".<sup>34</sup>

35. There is no evidence in the record that Commerce made further enquiries to ascertain the accuracy of these claims prior to initiation. To the contrary, Commerce appears to have assumed the accuracy of the Applicant's claim that no information was available to the Applicant on Canadian costs<sup>35</sup> and that the US companies whose costs were used as surrogates were significant producers of the products for which the cost models were being constructed. A review of the evidence reveals that, in fact, the US mills relied upon by the Applicant were not significant producers of softwood lumber and were not representative of the Canadian mills for which their costs were used as a surrogate.<sup>36</sup> For example, the US mills used as a surrogate were significantly smaller than the Canadian mills and therefore the US mills did not have any of the efficiencies of scale that the Canadian mills have and consequently the cost model from the surrogate mills would have had higher costs. The US surrogate mills used for British Columbia costs were only approximately one-third the size of the Tembec mills in British Columbia used for the calculation, and the US mills used as a surrogate for the Quebec costs were less than one-tenth the size of each of the six largest Canadian mills and smaller than over 75 per cent of all Canadian mills that export to the United States.<sup>37</sup>

(ii) *The failure to provide costs for a period of time sufficient to objectively assess the reasonableness of the data submitted*

36. Both the cost models constructed for Quebec and British Columbia relied on certain manufacturing and cost data for less than a full year (2000).<sup>38</sup> The failure to capture costs associated with a full operating cycle for the purposes of initiation is clearly insufficient. Home construction, and thus dimensional and stud lumber sales, is a seasonal business. Such reliance on a period less than one fiscal year is misleading and provides a distorted view of unit production costs. There is no

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<sup>33</sup> Initiation Notice, at 21,330 (Exhibit CDA-9).

<sup>34</sup> Petition, Exhibit VI.A (public version), at 2 (Exhibit CDA-134); Initiation Checklist, at 8 (Exhibit CDA-10) and Initiation Notice, at 21,330 (Exhibit CDA-9).

<sup>35</sup> Petitioners' April 10 Amendment Letter, at 2 (Exhibit CDA-40).

<sup>36</sup> Request for Termination and Rescission of Investigation, Letter from Weil Gotshal & Manges to COMMERCE(19 July 2001), at 23 - 28 [hereinafter "Request for Termination"] (Exhibit CDA-51). The Government of Canada does not have access to the proprietary information in this document as it is confidential information belonging to the Applicant.

<sup>37</sup> Smaller mills generally have higher costs as they cannot benefit from the efficiencies available to larger mills.

<sup>38</sup> Petition, Exhibit VI.C-1 (public version), at para. 4 (Exhibit CDA-135), of each "Certification"; and Petition, Exhibit VI.D-1 (public version), at para. 4 (Exhibit CDA-136) of the second "Certification". The first "Certification" at para. 4 of Exhibit VI.D-1 is the only one of the cost affidavits relied on that purports to describe costs for a full calendar year.

evidence on the record of any analysis by Commerce of the adequacy of these “abbreviated” cost reporting periods.

(iii) *No evidence of the method used to calculate manufacturing costs for the SPF species or of how company costs were allocated to the specific 2x4 kiln-dried dimension or stud lumber*

37. There was inadequate and insufficient information before Commerce concerning product-specific costs. Commerce made its initiation decision without any evidence before it of how the Applicant calculated manufacturing costs for the SPF species or of how company costs were allocated to the specific 2x4 kiln-dried dimension or stud lumber.<sup>39</sup> For example, the stumpage costs were based on costs for all species, including the higher valued Douglas fir and cedar timber.<sup>40</sup>

38. The Applicant claimed that it “provided manufacturing costs on a product-specific basis for representative Canadian products”, that it provided costs for certain eastern and western SPF products, and that it even “modelled costs for 2x4s that have been kiln-dried.”<sup>41</sup> However, there was, in fact, no evidence on the description of the species produced by companies supplying the cost information or of how their manufacturing costs were calculated or allocated to the specific products for which the cost models were constructed. Commerce did not have any information on how the costs for multiple products and species were allocated or whether it was appropriate to take these average aggregate costs to compare to the costs for a single SPF 2x4 product.

(iv) *The Application did not contain adequate information regarding freight costs*

39. Although freight is a significant component of the price for lumber, the Application lacked reasonably obtainable Canadian freight information from either of the two Canadian national railways and instead relied on freight information that was not even for Canadian rail or international freight.

40. For example, in the case of Quebec, Commerce relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces. In doing so it included freight costs unrelated to transport between Quebec and the United States.<sup>42</sup> There was also no evidence to support the Applicant’s allegation that truck rather than rail is used by Quebec producers to ship lumber.

41. In the case of British Columbia, Commerce relied on an affidavit indicating that rail freight charges incurred for what appears to be a Southern-Yellow-Pine shipment which weighs considerably more than the western SPF for which the Applicant purported to be creating a cost model.<sup>43</sup>

42. There are many other examples of inaccuracies and inadequacies in the freight rate calculations provided to and relied upon by Commerce to initiate the investigation.<sup>44</sup>

43. In short, relying on the claim that no better information was reasonably available, Commerce relied on data based on the costs of four unrepresentative US mills and other unrepresentative and unallocated cost information, even though the market situation and purchases by the Applicant

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<sup>39</sup> Petition, Vol. III, at III-4 (Exhibit CDA-37); Petition, Vol VI, Exhibits VI.C-12 and VI.D-12 (Exhibit CDA-40). Initiation Checklist, at 8-9 (Exhibit CDA-10); and Initiation Notice, at 21,330-21,331 (Exhibit CDA-9).

<sup>40</sup> Petition, Vol. VI, Exhibits VI.C-2 and VI.D-2 (Exhibit CDA-137).

<sup>41</sup> Petition, Exhibit VI.A, at 4 (Exhibit CDA-134).

<sup>42</sup> Petition, Vol. VI, Exhibit VI. C-9, Freight Affidavit (public version) (Exhibit CDA-41).

<sup>43</sup> Petition, Attachment 1 “Average MBF per rail car is 92,160 MBF. Average weight is approximately 195,000 lbs.” (Exhibit CDA-40); Petition, Vol. VI, Exhibit VI.D-13 (revised) (Exhibit CDA-40); and Request for Termination, at 29-30 and Enclosure 7 (Exhibit CDA-51).

<sup>44</sup> Request for Termination, at 28-32 (Exhibit CDA-51).

companies the extensive cross-border trade and cross-border ownership suggested more reliable and more specific information was reasonably available to the Applicant.

44. In summary:

- (a) The price information in the Application consisted principally of estimates from an industry publication and unsubstantiated anecdotal reports in two affidavits. In short, there was no information on actual prices.
- (b) The cost information in the Application was based on the surrogate costs of four US mills that were unrepresentative of the Canadian mills. Further, there was no explanation for how certain aggregate cost elements were allocated.
- (c) This price and cost information was accepted as all that was reasonably available to the Applicant by Commerce in the context of a market Commerce had previously investigated on three occasions<sup>45</sup> which involved billions of dollars in cross-border trade.
- (d) The information contained in the Application was inadequate to justify initiation of an investigation. It did not provide evidence that would lead an unbiased and objective investigating authority to determine there was sufficient evidence of dumping within the meaning of Article 2. Moreover, in this context of the market in question, the information provided was obviously not all the information that was reasonably available to the Applicant.
- (e) Finally, the data provided were so inadequate that an objective investigating authority would recognize that the Application's information could easily be contradicted and nullified by actual price and cost data that were almost certainly available to the Applicant.

**9. In which way was the data from Weldwood more representative of the Canadian exports of the relevant softwood lumber products than the information contained in the application?**

45. In a submission to Commerce in connection with this investigation, Weldwood described itself in the following terms:

Weldwood is the largest producer of softwood lumber in Alberta and one of the largest producers in British Columbia. In addition, Weldwood is one of the largest exporters of subject merchandise to the United States. Weldwood sells a broad range of products throughout the United States and Canada.<sup>46</sup>

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<sup>45</sup> First Written Submission of Canada, at 9-11, fn 21, fn, 22, fn 33. In particular, the footnotes refer to previous determinations relating to softwood lumber: *Certain Softwood Products from Canada*, 48 Fed. Reg. 24,159 (Dep't Commerce May 31, 1983) (final determination) ("*Lumber I*"); *Certain Softwood Products from Canada*, 51 Fed. Reg. 37,453 (Dep't Commerce Oct. 22, 1986) (prelim. determination) ("*Lumber II*"); and *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570 (Dep't Commerce 28 May 1992) (final determination) ("*Lumber III*").

<sup>46</sup> Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001, at 3 of the Mini-Questionnaire Response (Exhibit CDA-138 – Contains Business Confidential Information). Weldwood was one of the 15 largest producers and exporters of softwood lumber that received a mini-questionnaire from Commerce on 25 April 2001. *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep't Commerce 6 November 2001) (prelim. anti-dumping determination) (Exhibit CDA-11). Weldwood's response filed with Commerce on 3 May 2001 indicates that Weldwood produces and exports lumber to the US from nine different mills with seven located in British Columbia and two in Alberta (p. 1 of the Mini-Questionnaire response).

46. Similarly, the Applicant itself identified Weldwood as one of the “Top Canadian Exporters of Softwood Lumber” in the Application.<sup>47</sup>

47. As described in Question 8, the export and home market price data submitted by the Applicant and relied on by Commerce to initiate the investigation were not actual transaction prices and were severely flawed. In fact, Commerce apparently initiated the investigation without any home market prices or price information from British Columbia, the province that accounts for well over half of Canadian softwood lumber production and exports to the United States.<sup>48</sup> As for the cost data submitted by the Applicant and relied on by Commerce, among other flaws, they were based on four small US mills that are unrepresentative of the typical Canadian mill. (This flaw and others are described more fully above in response to Question 8).

48. The Weldwood data were actual costs, and actual export and home market transaction prices for softwood lumber, including home market prices from British Columbia. This is not only better and more representative data, it was, as established in Canada’s First Written Submission, readily available to the Applicant given Weldwood’s status as a wholly-owned subsidiary of International Paper.<sup>49</sup> Further, the availability of Weldwood as a source of data was made clear to Commerce five days before publication of the Notice of Initiation in this investigation.<sup>50</sup>

49. No investigating authority acting objectively could have initiated this investigation on the basis of the data in the Application, particularly in the light of the existence of the better and more representative data that were available in this case – the Weldwood data being only an example of such data.

**10. Please comment on the statements contained in para. 70 of the US *First Written Submission*:**

**"[t]hus, 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."**

50. The United States fails to differentiate between the obligations of the investigating authority under Articles 5.2 and 5.3.

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<sup>47</sup> Petition, Vol. 1B, Exhibit 1B-9, Top Canadian Exporters of Softwood Lumber to the United States 2000 (Exhibit CDA-39).

<sup>48</sup> The Applicant provided data from the British Columbia Ministry of Forests that Commerce rejected because the Application did not indicate that the data were restricted to Canadian sales prices. *See* Initiation Notice, at 21,330 (Exhibit CDA-9). Because there were no prices given for sales in British Columbia at the time of initiation, there is no indication that Commerce even evaluated whether the sales in British Columbia were below cost before calculating normal value based on constructed value.

<sup>49</sup> First Written Submission of Canada, at paras. 90,94-95.

<sup>50</sup> Quebec Lumber Manufacturers Association Letter to DOC, 25 April 2001 (Exhibit CDA-50). The Notice of Initiation was published in the Federal Register on 30 April 2001 (Initiation Notice, at 21,328, Exhibit CDA-9). Canada also notes that Weldwood provided data and information to Commerce in connection with this investigation on at least two occasions. *See* Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001 (Exhibit CDA-138 – Contains Business Confidential Information) and Cover Letter for Weldwood Sections B, C and D Questionnaire Response from Hunton & Williams to DOC, 16 July 2001 (public version) (Exhibit CDA-49). Commerce never considered the data or information. *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep’t Commerce 6 November 2001) (prelim. anti-dumping determination) at 56,064 (Exhibit CDA-11).

51. The obligation on the investigating authority under Article 5.2 is clear. The application must contain all the information that is “reasonably available” to the applicant on the factors set forth in Article 5.2(i) –(iv).

52. The obligation under Article 5.3 is equally clear and distinct from the obligation of the investigating authority under Article 5.2. Article 5.3 imposes an independent obligation on the investigating authority to assess, once it has determined that the requirements of Article 5.2 are met, whether sufficient evidence exists to initiate an investigation.<sup>51</sup> The authority must examine the accuracy and adequacy of the evidence in the application “to determine whether there is sufficient evidence to justify initiation of an investigation”.

**11. Please comment on the statements contained in paras. 73-74 of the US *First Written Submission*:**

**"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.**

**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."**

53. The position of the United States in these paragraphs is incorrect for the same reasons mentioned in response to Question 10. It is true that Article 5.2 describes what information an application shall contain and that there is a requirement on the applicant to provide that information. However, the investigating authority can only accept the application if it determines that that requirement has been met. Moreover, the US reading of Article 5.2 would render the provision inoperative. Even an application that does not conform to Article 5.2, would, under the US interpretation, be capable of supporting initiation meaning that a breach of Article 5.2 would have absolutely no consequences. Article 5.2 would be rendered meaningless. This is an invalid interpretation under the well-established requirement of effectiveness in treaty interpretation. It is also implausible that the negotiators would have drafted such a detailed list of informational requirements for the application in Article 5.2 if they did not intend for authorities to be required to reject applications that did not meet the requirements.

**To both parties:**

**16. In the view of Canada/the US, which obligation(s) are imposed by Article 5.2? Which entity or entities is/are the addressee(s) of the obligation(s)?**

54. The obligation under Article 5.2 is on the investigating authority to determine whether the application contains “such information as is reasonably available to the applicant” on the factors set out in Article 5.2(i) to (iv) including on “prices” as required by Article 5.2(iii).<sup>52</sup> The *WTO*

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<sup>51</sup> *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/R, adopted as modified 28 November 1998 (WT/DS60/AB/R), at para. 7.50 [hereinafter *Guatemala-Cement I*]. The Appellate Body did not consider the Panel’s interpretation of Article 5 of the *Anti-Dumping Agreement*.

<sup>52</sup> Canada notes that in *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, the panel asked both parties, the complainant Brazil and the respondent Argentina, for their views as to the “extent – if any – to which Article 5.2 [of the *Anti-Dumping Agreement*] imposes obligations on Members, as opposed to applicants.” Both parties agreed that Article 5.2 imposes obligations on Members. See *Argentina – Definitive*

*Agreement*, including the *Anti-Dumping Agreement*, sets out the obligations of WTO Members, not private parties.<sup>53</sup>

**17. In the view of the Parties, is there a hierarchy in which the applicant should endeavour to submit the information, as is reasonably available to it, required under Article 5.2(iii)? Please motivate your response fully.**

55. No. The ordinary meaning of Article 5.2 requires that if the applicant has information on prices that is reasonably available to it, then it must provide it to the investigating authority. Whether the applicant has provided all “reasonably available” information must be determined based on an objective evaluation of the evidence before the investigating authority at the time initiation of an investigation is requested.

C. ARTICLE 5.8

**To Canada:**

**18. Please comment on the statement contained in para. 79 of the US *First Written Submission*:**

**"[t]his is not a case in which information presented later invalidated the information Commerce had relied upon to initiate."**

56. The US statement is premised on its assertion that Commerce initiated “based on the objective adequacy of the data showing dumping”.<sup>54</sup> As discussed in the response to Question 8, an “objective” review demonstrates that the data upon which Commerce relied were inadequate and therefore insufficient to justify initiation. The United States also maintains that, in initiating the investigation, Commerce did not rely on the Applicant’s statement that it was unable to obtain company-specific cost and price data.<sup>55</sup> However, this is simply a self-serving *post hoc* rationalization. Surely, if Commerce had been aware at the time of initiation of price and cost information in the Applicant’s possession that could show there was no dumping, it would not have initiated. Hence at least implicitly Commerce was relying on the Applicant’s representation.

57. Viewed in this light it is clear this is a case in which information presented after the decision to initiate could have invalidated the deficient information on which Commerce relied in its initiation. Moreover, it is telling that Commerce was advised of the existence of significant and extensive actual price and cost information readily available to the Applicants five days before the notice initiating the investigation was published<sup>56</sup> and 30 days before the respondents were selected and anti-dumping questionnaires were issued. It is apparent Commerce would have had ample time to collect and analyze the price and cost information possessed by Weldwood, for example, and to re-evaluate its decision to initiate. It chose to take no action and now seeks to defend its inaction by asserting that demonstrably inadequate information with no actual Canadian price or cost data was in fact adequate.

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*Anti-Dumping Duties on Poultry from Brazil*, Report of the Panel, WT/DS241/R, adopted 19 May 2003, at paras. 7.96-7.98.

<sup>53</sup> While WTO Members are free to give the *WTO Agreement* direct effect in their domestic law, and thus to apply Article 5.2, for instance, directly to private parties, this is a consequence of their national laws rather than the *WTO Agreement* itself.

<sup>54</sup> First Written Submission of the United States, at para. 80.

<sup>55</sup> *Ibid.*

<sup>56</sup> Quebec Lumber Manufacturers Association Letter to DOC, 25 April 2001 (Exhibit CDA-50). The Notice of Initiation was published in the Federal Register on 30 April 2001 (Initiation Notice, at 21,328, Exhibit CDA-9).

**19. Does Canada agree with the statement by the US in para. 81 of the US *First Written Submission* that "the cost and price data regarding Weldwood could not detract from the sufficiency of the data upon which [the IA] had based its initiation"?**

58. Canada does not agree with the statement for many of the reasons set out in the response to Questions 8 and 9. As discussed at length above, the information provided with the Application did not satisfy the requirements of Articles 5.2 or 5.3. However, even if the information had been marginally sufficient to justify initiation in a situation where no actual price and cost data were reasonably available to the Applicant, it is apparent that actual sales and cost data information available to the Applicant could have invalidated the information upon which Commerce relied.

59. The United States suggests that the Weldwood cost and price data would not have been significant because it was company-specific data that "could not have contradicted the country-wide price and cost information contained in the petition."<sup>57</sup> This is simply a *post hoc* rationalization for Commerce's inaction. Weldwood is one of Canada's largest producers of softwood lumber with production operations in British Columbia and Alberta.<sup>58</sup> In its 3 May 2001, submission responding to Commerce's mini-questionnaire and as noted in the response to Question 9 above, Weldwood described its operations as follows:

Weldwood is the largest producer of softwood lumber in Alberta and one of the largest producers in British Columbia. In addition, Weldwood is one of the largest exporters of subject merchandise to the United States. Weldwood sells a broad range of subject products throughout the United States and Canada.<sup>59</sup>

60. In that same submission Weldwood requested that it be selected as a mandatory respondent in the anti-dumping investigation.

61. The United States is arguing that transaction-specific information on Canadian and US sales and on the costs of producing softwood lumber from one of the largest Canadian producers would have been irrelevant to its evaluation of whether to initiate the investigation. In view of the fact that the data on which Commerce did rely contained **no** actual sales data and **no** actual Canadian cost data, the US position is untenable. This is especially true in the light of the fact that Commerce apparently initiated the case without any home market sale prices from British Columbia, by far the largest lumber-producing province in Canada.<sup>60</sup>

D. ARTICLE 2.6

**To Canada:**

**20. Please explain the legal basis for Canada's legal claim in the present case that the US action violation Article 2.6 (following the US argument in para. 26 of its *First Oral Statement* that the product under consideration is the starting point for determining the "like product").**

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<sup>57</sup> First Written Submission of the United States, at para. 68.

<sup>58</sup> Weldwood was one of the 15 largest producers and exporters of softwood lumber that received a mini-questionnaire from Commerce on 25 April 2001. See Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001 (Exhibit CDA-138 – Contains Business Confidential Information). Weldwood's response filed with the Department on 3 May 2001 indicates that Weldwood produces and exports lumber to the US from nine different mills with seven located in British Columbia and two in Alberta (p. 1 of the Mini-Questionnaire response).

<sup>59</sup> *Ibid.*, at 3 of the Mini-Questionnaire.

<sup>60</sup> See Canada's response to Question 9 above.

62. Canada does not dispute that “the product under consideration is the starting point for determining the ‘like product.’<sup>61</sup> Of necessity, an investigating authority begins with the proposed scope of investigation that an applicant presents to the authority. Although that is the starting point, that is not the end of the authority’s responsibilities, however. The authority must proceed to find a like product that conforms to the requirements of Article 2.6.

63. Article 2.6 expressly requires an investigating authority to define the “like product” as “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.”

64. The ordinary meaning of Article 2.6 and the terms “characteristics closely resembling” support this interpretation. The *New Shorter Oxford English Dictionary* (1993) defines “characteristic” as “[a] distinctive mark; a distinguishing trait, peculiarity or quality.” It defines “close” as “[v]ery near in position, relation or connection”, and “resemble” as “[b]e like, have a likeness or similarity to, have a feature or property in common with”. When these three words are taken together, as they are in Article 2.6, they must mean that the essential, distinctive traits of one product must be very nearly identical to the essential, distinctive traits of the other product.<sup>62</sup>

65. Thus, if a product under consideration has been proposed that is too broad, it will not be possible to define a single like product that meets the criteria set forth in Article 2.6. A simple example, used in Canada’s First Oral Statement, will illustrate this problem. If an applicant proposes that the product under consideration is to consist of “certain vehicles”, comprising automobiles and bicycles, then it will not be possible to define a single like product that meets the requirements of Article 2.6. The “like product” cannot be “automobiles and bicycles,” because then only some of the items in this proposed “like product” will be identical with or have characteristics that closely resemble the set of items in the proposed “product under consideration.” That is, the automobiles will be identical with or have essential, distinctive traits that closely resemble the automobiles, but they will definitely not be identical with or have essential, distinctive traits that closely resemble the bicycles. Each item in the like product class must, however, be identical with or have essential, distinctive traits that closely resemble *all* items in the product under consideration. If this matching were not the case, then a “like product” could consist of any disjointed agglomeration of products whatsoever, as long as it was a “mirror image” of the disjointed agglomeration of products in the proposed product under consideration. That cannot be a correct interpretation of “like product,” because it would deprive “like product” of any meaning or coherence whatsoever.

66. It should be recalled that, according to Article 2.6, “like product” has the same meaning throughout the Agreement. As a result, in order to proceed at all, the authority must determine that the applicant represents the majority of producers of the product that is “like” the “product under consideration.” See Article 5.4. The applicant must also present evidence that the domestic like product is injured by the product under consideration. See Article 5.2. Adequate evidence of injury in the application depends upon defining an industry that makes the relevant like product.

67. A like product that consists of a disjointed agglomeration of products would lead to irrational results under Articles 5.4 and 5.2. Using the example from above, were bicycle makers to represent more than half of both bicycle and automobile manufacturers, automobile manufacturers would not have to be represented at all among the applicants to satisfy Article 5.4. In such a scenario, an investigation could be initiated and pursued against both bicycle and automobile imports notwithstanding the absence of standing or evidence of injury and causation against automobiles.

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<sup>61</sup> First Oral Statement of the United States, at para. 26.

<sup>62</sup> L. Brown, ed., *The New Shorter Oxford English Dictionary*, 3<sup>rd</sup> Ed. (Oxford: The Clarendon Press, 1993), at 374, [“characteristic”] (Exhibit CDA-139); 421 [“close”] (Exhibit CDA-140); and 2558 [“resemble”] (Exhibit CDA-141).

This results directly from the collapse of two products that do not have closely resembling characteristics into a single like product.

68. An investigating authority that has received a proposed product under consideration that comprises products that do not all share identical or closely resembling characteristics must therefore define multiple like products that will correspond to subsets of the application's product under consideration. Standing, industry support, and other necessary elements of the application must then be evaluated with respect to each of these distinct like products.

69. In the above example, having properly concluded that two like products existed, the authority need also determine that there are two distinct products under consideration, such that separate margins of dumping must be calculated for each: one being bicycles, corresponding to the like product, bicycles; and the other being automobiles, corresponding to the like product, automobiles. In this case, each member of a like product set will be identical with or closely resemble all of the articles in the relevant product under consideration. The bicycles in the "bicycles" like product will, for example, be identical with or closely resemble all of the articles in the product under consideration, thereby satisfying the requirement of Article 2.6 for a properly-defined like product.

70. As a consequence of a separate "like product" determination, the investigating authority would be required to make separate findings, for bicycles and automobiles, of standing under Article 5.1, and industry support under Article 5.2, and the application would have to contain separate evidence under Article 5.3. In addition, because Articles 2.1 and 2.2.2 expressly require comparisons using data only for "the like product", automobile pricing, costs, or profits could play no role in determining the dumping margin for bicycles, and *vice versa*. Thus, dumping could be found to exist for one product and not the other. In these circumstances, it would make no sense to allow for the calculation of a single average margin of dumping, applied equally to bicycles and automobiles.

71. The United States did not even attempt to define a like product or like products that conformed to the requirements of Article 2.6, that each item in the like product be identical with or have essential, distinctive traits that closely resemble the essential, distinctive traits of the product under consideration. In this case, the product under consideration was defined as "certain softwood lumber," and therefore, the like product also was defined as "certain softwood lumber." The like product in this case includes products not identical, not the same, not similar, and not having characteristics closely resembling the essential traits of other products included in the like product. The absence of essential traits in one product closely resembling the essential traits of another is fatal to a definition of like product that comports with Article 2.6.

72. As a result of this breach of Article 2.6, Commerce permitted the US applicants to file an anti-dumping application for products that, in some instances, its members did not even produce, on behalf of industries they did not represent, and as to which they did not demonstrate industry support, dumping, or injury, notwithstanding that the "like product" determination delimits these obligations under Articles 5.1, 5.2, and 5.4.

73. Instead, Commerce included products and species by identifying isolated characteristics of different products within the "product under consideration," and then determined whether some of the items comprising the proposed "like product" (which was a "mirror image" of the agglomeration of diverse products that comprised the "product under consideration") shared the same isolated characteristics. The United States refers to this test as the "clear dividing line/continuum" test.<sup>63</sup> (It can be disputed that the United States even applied that test, but that issue is beyond the scope of this question.) This mode of analysis violates Article 2.6 because it fails to determine whether any product's essential, distinctive traits are identical or closely resembling to the essential, distinctive traits of the products making up the product under consideration. The United States never tested, as it

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<sup>63</sup> See, e.g.: First Written Submission of the United States, at para. 103.

was required to do under Article 2.6, whether each item comprising its proposed like product was identical with or closely resembled each of the items comprising the proposed product under consideration. If it had done so (which it could have done by properly applying its ‘*Diversified Products*’ criteria), it would have found that the four categories of products at issue here needed to be treated as separate “products under consideration” and have separate, and corresponding, like products defined for each of them, or else needed to be eliminated from the scope of the investigation as not comprising part of the product under consideration that Commerce undertook to investigate.

74. For the investigating authority to recognize and distinguish like products, it must begin with the product under consideration as defined by the applicant, but it must examine all proposed like products to determine whether they are identical to the product under consideration or have traits closely resembling the essential traits of the product under consideration. Commerce failed to make these comparisons, and consequently failed to conform to the plain language of Article 2.6 in ascertaining the product under consideration and corresponding like product.

#### E. ALLOWANCE FOR DIFFERENCES IN DIMENSIONS

##### To Canada:

**21. For ease of reference of the Panel, can Canada please provide in summary form the arguments on differences in dimensions, including the date of the relevant documents and reference where they can be found on the record, put forward by respondents in the context of the investigation.**

75. See response to Question 22 below.

**22. Have exporters demonstrated to DOC that those differences in dimensions affect price comparability? Please refer to relevant documents on the record.**

76. Canada will address these two questions together as both address the nature of argument and information presented by the Canadian and other parties in the underlying proceeding before Commerce. Before detailing all of the argument and information presented to Commerce, which encompassed dozens of individual submissions, it is useful to place the issue in context with several summary observations.

77. *First*, whether differences in dimension affected price comparability was not an issue that was in dispute during the proceeding before Commerce. From the very outset, *all* parties and *all* US investigating agencies involved *agreed* that dimension affected price comparability. The Petitioners so stated in their Petition. The US International Trade Commission, which examines injury issues, so stated in its preliminary determination a few weeks after initiation, which determination then was presented to Commerce as evidence that dimension affects price. *All* parties (including all respondents) submitting comments on the product characteristics that should be taken into account in distinguishing products for price comparison purposes identified thickness, width, and length as characteristics that needed to be accounted for (after characteristics like species and grade but ahead of other characteristics such as surface treatment, end trimming, and further processing). And, finally, respondents all argued that an adjustment for dimension (DIFMER) in determining normal value was required by law. Indeed, no submission could be located in which any party, including the applicant, contended that dimension did *not* affect price comparability.

78. *Second*, throughout the proceeding, Commerce indicated to the parties that it agreed that dimension affected price comparability. As shown below, at the very beginning of its investigation, in April 2001, Commerce solicited comments on the physical characteristics that affected price comparability. When all parties agreed in May 2001 that thickness, width, and length each were characteristics that affected price comparability, Commerce on 25 May 2001 issued a questionnaire

requiring respondents to report sales identifying the thickness, width, and length of each product. Respondents were not asked for further justification or data supporting the inclusion of these characteristics; to the contrary, the questionnaire made it clear that parties had to provide supporting information only if they sought consideration of *other* characteristics that Commerce had not identified.

79. In its October 2001 preliminary determination, Commerce confirmed the importance it attached to dimension. In its preliminary determination, Commerce limited its price-to-price comparisons only to identical merchandise, with identical defined so as to include products that had exactly the same thickness width, and length, among other characteristics. Commerce ruled preliminarily that it *would not even compare prices of products with different dimensions*. Because Commerce *agreed* in its preliminary determination that dimension affected price comparability, there was no need for respondents to submit further argument or analysis to Commerce regarding this issue. Commerce's rules require parties only to submit argument and analysis regarding aspects of the preliminary determination with which they disagree.

80. *Third*, because the issue was not disputed, and because Commerce accepted all three dimensional characteristics, individually, as significant in its questionnaire and in its preliminary determination, Commerce *never* requested any additional supporting analyses or documentation, nor did it perform any analysis of its own upon which respondents could comment. This latter point bears emphasis – nowhere in the record is there any evidence that Commerce analyzed the detailed, dimension-specific, sales data respondents had submitted (which included not only data for the period of investigation, but historical data as well), for purposes of reaching its conclusion that the effect of dimensional differences on price were “minor” or “fluctuating” and thus did not have to be adjusted for.

81. Indeed, respondents' arguments regarding dimension were the same as for all other product characteristics. That is, the companies presented exactly the same argument and evidence regarding dimension and price comparability as they did for all other physical characteristics, including species, grade, moisture content, end trimming, surface treatment, and further processing. Commerce performed no analysis, and made no findings that each of these characteristics affected price comparability; yet Commerce included each in its matching characteristics, and either did not permit non-identical comparisons (such as for species) or else computed and applied an adjustment (DIFMER) whenever the characteristic was not identical (such as for grade, moisture content, end trimming, surface treatment, and further processing).

82. In its final determination, and thus after the fact, Commerce effectively established a different standard, and treated dimension differently than all of the other physical characteristics it did fully take into account (for both matching *and* DIFMER purposes), including species, grade, moisture content, surface treatment, further processing, and end trimming. As to each of these other characteristics, the parties agreed that they affected price comparability, just as they had agreed that dimension affected price comparability. No further showing was required, no further evidence was presented, and no further analysis was performed by Commerce. Yet each of these characteristics was fully taken into account, but dimension was not.

83. Because the applicant and Commerce at every step of the investigation had agreed that dimension affected price, just as they had agreed that species, grade, surface treatment, moisture content, further processing and end trimming affected price, respondents had no notice that additional information would be required to satisfy Commerce that dimension affected price comparability, or what such information could be. Commerce never requested additional information, and thus respondents reasonably understood that the undisputed information they had submitted would be sufficient – just as it was for every single other physical characteristic.

84. *Fourth*, the respondents were concerned that Commerce would fail to compute an adjustment (DIFMER) for dimension and other characteristics for which Commerce decided not to compute a cost difference, and blame such failure on respondents' failure to provide adequate data – just as has occurred here. On multiple occasions, on 16 August 2001, 10 September 2001, and 24 September 2001 – well in advance even of Commerce's preliminary determination – respondents expressly requested specific guidance from Commerce as to what data or analysis they could submit for adjustment (DIFMER) purposes. *Commerce never responded to any of these requests.* Respondents nonetheless submitted data they thought might be useful, including historical pricing data going back several years, as well as data from *Random Lengths* going back several years. Commerce ignored these data as well. Again, the record contains no analyses by Commerce of any of these data.

85. *Fifth*, Commerce's final determination not to consider dimension was internally inconsistent. On the one hand, Commerce continued, as it had throughout its investigation, to use all three dimension characteristics – thickness, width, and length – in deciding the products it would compare, and treating as identical products only those with identical thickness, width and length. (If Commerce had decided that dimension did not affect price comparability, it should have eliminated these three characteristics, and compared prices without regard to dimension.) On the other hand, after having defined these characteristics as critical in matching products so as to achieve price comparability, Commerce inconsistently then compared products that differed in dimension characteristics without any adjustment for the difference in the products compared.

86. There simply is no difference between the characteristics that affect price comparability for matching purposes and those that affect price comparability for DIFMER purposes. They are one and the same. Either the characteristic affects price, or it does not. The only reason a characteristic is included for model matching purpose is because it is known to affect price. By including a characteristic that affects price as a matching characteristic, Commerce ensures that it does not compare prices of products the prices of which cannot be compared without adjusting for the product difference.

87. Following, in chronological order, are the detailed references in the record responding to the Panel's requests and supporting the observations above:

**1. 2 April 2001: US Industry Petition**

- The Petition itself acknowledged that dimension affects the price of lumber. It noted that “a very precise comparison of products is necessary if the Commission hopes to develop useful price information.”(emphasis in original).<sup>64</sup> The Petition suggested three product comparisons, all of which specified dimension. For example, the proposed Product 1 comparison was of 2x4x8 Engleman spruce and lodgepole pine, kiln dried, PET stud (US) to 2x4x8 western SPF kiln dried, PET stud (Canada).<sup>65</sup> (“2x4x8” means lumber 2 inches thick, by 4 inches wide, by 8 feet long; “stud” is a grade.) Obviously, if dimension did not affect price, the Petitioner would have no reason to differentiate products, for price comparison purposes, by thickness, width, **and** length.

**2. May 2001: ITC Preliminary Injury Determination**

- For purposes of its preliminary injury analysis and determination, the ITC concluded that “[s]oftwood lumber prices generally differ **substantially** depending on grades

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<sup>64</sup> DIFMER Exhibit, at 2 (Exhibit CDA-142 – Contains Business Confidential Information) [Petition, Vol. I, at I-29 (Exhibit CDA-37)].

<sup>65</sup> *Ibid.*

**and dimensions** and may differ by the species and applications involved, with better grades and wider dimensions carrying higher prices than lower grades and narrower dimensions.”<sup>66</sup> (emphasis added). The Canadian companies subsequently provided to Commerce this finding by the ITC such that it was made part of the record evidence before Commerce (see below).

3. 3 and 4 May 2001: **Party Comments on Characteristics Affecting Price Comparability Submitted at Beginning of Investigation**

- Commerce, on 24 April 2001, invited comments on the characteristics affecting price comparability that Commerce should include in its questionnaire. By 4 May all interested parties submitted comments. Both the Petitioner and *all* respondents agreed that dimension is a characteristic that must be considered. The *only* differences reflected *how* to take dimension into consideration, not *whether* to do so. For example, while respondents proposed reporting studs in length groupings of either six-inch or 12-inch increments,<sup>67</sup> Petitioner proposed reporting them in one-inch increments.<sup>68</sup> The fact that Petitioner requested that length be reported in one-inch increments reflects its understanding that even very small differences in length can affect price comparability.
- In response to Commerce’s questionnaire of 24 April 2001, the Petitioner proposes a list of model matching characteristics, which address “fundamental product characteristics, customer expectations, and production processes that distinguish products within the scope from one another.”<sup>69</sup> (In order of importance, these characteristics are: (1) treatment, (2) category, (3) species, (4) grade, (5) moisture content, (6) finger jointed, (7) *width*, (8) *thickness*, (9) *length*, and (10) surface finish.<sup>70</sup> (emphasis added). In the alternative, Petitioner proposes a “condensed” model matching hierarchy for use if Commerce adopts Petitioner’s suggestions regarding limited reporting. The condensed model matching hierarchy contains eight characteristics – three of which are related to dimension (width, thickness, and length).
- Respondents all joined in comments provided by the British Columbia Lumber Trade Council (“BCLTC”). The BCLTC identified 10 characteristics affecting price comparability, in order of importance: (1) species, (2) lumber type, (3) treatment (e.g., pressure treated), (4) moisture content (e.g., dried or green), (5) *grade*, (6) *dimension (i.e., thickness and width)*, (7) *length*, (8) surface trimming (number of

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<sup>66</sup> *Ibid.*, at 4 [US International Trade Commission, Pub. No. 3426, *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928 (Preliminary)(May 2001) at 16. (Exhibit CDA-31)]

<sup>67</sup> *Ibid.*, at 7 [Steptoe & Johnson Letter to the Department of Commerce, “Certain Softwood Lumber from Canada: British Columbia Lumber Trade Council Comments on Procedural and Technical Issues” (3 May 2001), at Enclosure I, 9].

<sup>68</sup> A stud is grade of lumber that requires the product to be precision end trimmed to an exact length. It is used primarily in framing walls, where the builder needs a precise length vertical piece to fit between horizontal supports. *Ibid.*, at 10 (fn 3), 14-15 [Dewey Ballantine Letter to the Department of Commerce, “Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada” (3 May 2001), at Attachment 1, (fn 3), VII, VIII, IX. B].

<sup>69</sup> *Ibid.*, at 9 [Dewey Ballantine Letter to the Department of Commerce, “Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada” (3 May 2001), at 3].

<sup>70</sup> *Ibid.*, at 10-15 [Dewey Ballantine Letter to the Department of Commerce, “Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada” (3 May 2001), Attachment 1]

sides planed), (9) edge trimming (eased or square edges), and end trimming (precision end trimmed or not).<sup>71</sup> (emphasis added)

- Abitibi, in its submission, stated expressly that size affects price. With respect to the “dimension” characteristic, it stated: “Dimension (thickness, and width) is an important physical difference among most softwood lumber product types, with larger products generally commanding higher prices.”<sup>72</sup> It then stated that “Length too affects value, with longer length products generally commanding higher prices per foot than shorter length products.”<sup>73</sup>

4. 11 May 2001: **Rebuttal Comments on Characteristics Affecting Price Comparability**

- BCLTC responds to the applicant’s proposal, and other respondents all adopt the BCLTC response. It notes that both the applicant and respondents have identified thickness, width and length as relevant and important characteristics.
- Respondent’s position on the relative importance of characteristics affecting price comparability is as follows: “In sum, the product matching criteria and hierarchy for the products under investigation should be: 1) species; 2) lumber type; 3) treatment; 4) moisture content; 5) grade; 6) *thickness and width*; 7) *length*; 8) surface treatment; and 9) end trim.”<sup>74</sup> (emphasis added).
- Weyerhaeuser specifically identified dimension as a physical product characteristic that affects price comparisons, stating: “Petitioners also propose to rank width and thickness separately and apparently propose to rank width first. This does not follow industry practice, nor market valuation. Different size products are generally not substituted for each other and are not directly comparable, and thickness is the more important factor. (For example, a 2x4 is even less similar to a 4x4 than it is to a 2x6.)”<sup>75</sup>:
- The applicant expressly recognizes the link between dimension and price. It addresses so-called “random-length” transactions, circumstances in which a customer purchases, at a single average price, lumber of a specified thickness and width, but with a range of lengths, since it wants to offer a range of lengths to its customer. It contends that “comparisons of transactions sold on a R/L [random length] basis is not appropriate if those comparisons do not take into account the *length* composition of the transaction (number of pieces of each length), and *the different market value for pieces of different lengths . . .*”<sup>76</sup> (emphasis added). Moreover, with respect to

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<sup>71</sup> *Ibid.*, at 6-7 [Steptoe & Johnson Letter to the Department of Commerce, “Certain Softwood Lumber from Canada: British Columbia Lumber Trade Council Comments on Procedural and Technical Issues” (3 May 2001), at Enclosure I, 8-9].

<sup>72</sup> *Ibid.*, at 17 [Arnold & Porter Letter to the Department of Commerce, “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (3 May 2001), at 16].

<sup>73</sup> *Ibid.*, at 18 [Arnold & Porter Letter to the Department of Commerce, “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (3 May 2001), at 17].

<sup>74</sup> *Ibid.*, at 6 [Steptoe & Johnson Letter to the Department of Commerce, “Certain Softwood Lumber from Canada: British Columbia Lumber Trade Council Comments on Procedural and Technical Issues” (3 May 2001), at Enclosure I, 8].

<sup>75</sup> *Ibid.*, at 166 [Rebuttal of Weyerhaeuser Company to Petitioners’ Comments in Response to the Request for Information of the Department of Commerce dated 24 April 2001 (11 May 2001), at 2].

<sup>76</sup> *Ibid.*, at 25 [Dewey Ballantine Letter to the Department of Commerce, “Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada” (11 May 2001), at 12].

precision end trimmed (“PET”) lumber, the applicant notes that “PET lumber should be separately identified in the model match because the length is specified within narrow tolerance and that distinction *is an important determinant of the customer’s choice of product.*”<sup>77</sup> (emphasis added)

5. 25 May 2001: **Commerce's Initial Questionnaire**

- This questionnaire identified the product characteristics Commerce had determined to be relevant in matching/distinguishing products for price comparison purposes. All respondents were *required* to use these characteristics, and code each of their products and sales accordingly. Thickness, width, and length each were *individually* listed as required product characteristics. [Exact specifications were required for thickness and width (*e.g.*, 2 inches, 3 inches, etc.), but length was required to be reported in two foot increments (*e.g.*, 6 feet to less than 8 feet, 8 feet to less than 10 feet, etc.)]<sup>78</sup>
- The questionnaire instructed that respondents could add additional characteristics, “However, if you add characteristics not specified in the questionnaire, describe in the narrative response why you believe the Department should use this information to define **identical** and **similar merchandise.**”<sup>79</sup> (emphasis in original). In other words, Commerce told the companies additional factual information was required to justify *only additional* product characteristics, not those Commerce had already selected, which, as noted, included each of the three dimensional characteristics.

6. 8 June 2001: **Comments on Initial Questionnaire**

- Canfor requests that Commerce modify the length break-outs in the Questionnaire for stud lumber because the existing categories fail to comport with the manner in which stud lumber is priced and sold in the North American market and, unless modified, would result in inappropriate product comparisons.<sup>80</sup>

7. 15 June 2001: **Applicant Comments on Respondents’ Product Reporting**

- The applicant objects to the reporting used by Weyerhaeuser which, for certain limited sales, stated it could not specify length. Petitioner objects, “given the market reality that different lengths command different prices and the National Lumber Grades Authority of Canada mandates that invoices for lumber measured in MBF [thousand board feet] show the number of pieces of each nominal size and length.”<sup>81</sup> (footnote omitted) The applicant emphasizes that “the price of most (if not all) products per MBF varies by length.”<sup>82</sup> (emphasis in original).

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<sup>77</sup> *Ibid.*, at 26 [Dewey Ballantine Letter to the Department of Commerce, “Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada” (11 May 2001), at 12].

<sup>78</sup> *Ibid.*, at 28-29, 31-32 [United States Department of Commerce, Request for Information Abitibi Consolidated, Inc. (25 May 2001), at B-9 – B-10, C-9 – C-10, Sections: B – 3.5, 3.6 and 3.7; and C – 3.5, 3.6 and 3.7].

<sup>79</sup> *Ibid.*, at 30 [United States Department of Commerce, Request for Information Abitibi Consolidated, Inc. (25 May 2001), at C-5].

<sup>80</sup> *Ibid.*, at 34 [Kaye Scholer LLP Letter to the Department of Commerce, “Softwood Lumber Products from Canada: Anti-Dumping Investigation” (8 June 2001), at 5].

<sup>81</sup> *Ibid.*, at 36-37 [Dewey Ballantine Letter to the Department of Commerce, “Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada” (15 June 2001), at 3-4].

<sup>82</sup> *Ibid.*, at 37-38, fn 10 [Dewey Ballantine Letter to the Department of Commerce, “Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada” (15 June 2001), at 4-5, fn 10].

8. 9 August 2001: **Letter from Commerce**

- In early August 2001, Commerce solicited comments on whether and how it should compare prices of non-identical products. As if to highlight how well-established it already was that dimension affected price, Commerce asked parties to “explain whether, in your view, the thickness and width criteria should be combined into a single criterion, rather than considered separately”.<sup>83</sup> There was no dispute that both thickness and width had to be considered; the only issue Commerce framed was whether to consider them together or separately.

9. 16 August 2001: **Respondents Comments on Physical Characteristics that Should be considered in Comparing Prices of Non-Identical Products**

- Abitibi reiterated that thickness, width and length each should be taken into account, in that order (and after considering grade and moisture content, but before surface finish, end trimming, and further processing). For width, Abitibi noted that value differences were important, but differed. It noted for example that “the value difference between a 2x6 and a 2x8 is less than the between a 2x6 and a 2x4.”<sup>84</sup> For length, Abitibi noted that length affected commercial value, but that there certain break points: “There tend to be significant breaks in the commercial value of softwood lumber products of different lengths at two points: 16-foot lengths and 22-foot lengths. Abitibi suggests, therefore, that the Department divide the length criterion into three groups: less than 16 feet, 16 feet to less than 22 feet, and 22 feet plus.”<sup>85</sup>
- As to the calculation of an adjustment (DIFMER) when non-identical products are compared, Abitibi affirmed “its willingness to provide such data as it may have available that the Department might require, but expressly seeks the Department’s guidance as to what additional data Abitibi should submit to permit the calculation of the appropriate value-based difmers. We could locate no published decision indicating how the Department calculates value-based difmers, much less what data it requires to do so, and thus need guidance on this issue.”<sup>86</sup> Commerce did not respond to this express request for guidance.
- Canfor reiterated that thickness, width and length (family code and length) should be taken into account, in that order (and after considering grade and moisture content, but before surface finish, end trimming, and further processing). Canfor further noted that “[g]iven the significant differences in application, cost and value, among the

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<sup>83</sup> *Ibid.*, at 40 [Department of Commerce Letter to Abitibi Consolidated, Inc. “Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada” (9 August 2001), at 2].

<sup>84</sup> *Ibid.*, at 43-44 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada; Antidumping Duty Investigation Comments on Use of Similar Merchandise Comparisons and Information Pertaining to Scieres Saguenay Limitee” (16 August 2001), at 19-20].

<sup>85</sup> *Ibid.*, at 44 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada; Anti-Dumping Duty Investigation Comments on Use of Similar Merchandise Comparisons and Information Pertaining to Scieres Saguenay Limitee” (16 August 2001), at 20].

<sup>86</sup> *Ibid.*, at 42 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada; Anti-Dumping Duty Investigation Comments on Use of Similar Merchandise Comparisons and Information Pertaining to Scieres Saguenay Limitee” (16 August 2001), at 9].

different lengths of lumber sold, Canfor believes it is appropriate to establish groups, or families, of lengths for product matching purposes.”<sup>87</sup>

- Slocan noted that thickness and width should be treated as separate characteristics, and also argued for grouping lengths into families: “in general Slocan believes that the 2-foot increments defined by the Department can be compared to their neighbors. However, there is a clear price break between 14’ and the highly desirable 16’ lengths, and between 16’ – 20’ lengths and 22’ and above. There are consistent price gaps between 14’ and under and 16’ and higher, and between 16’ –20’, and 22’ and above. Therefore Slocan proposes that the weighting be set up to make allowance for this commercial fact . . . .”<sup>88</sup>
- Tembec pointed to Commerce’s legal authority to make allowances for differences in physical characteristics based on market values, and stated that “many of the physical differences between similar lumber products are not reflected in production costs, but result in significant differences in market valuation.”<sup>89</sup> Tembec also contended that “when identical matches are not available the Department should base Normal Value on similar matches with DIFMERs calculated based on difference in variable cost supplemented with value-based DIFMERs as needed. Should the Department determine that it needs additional information . . . it should request that information in a supplemental questionnaire . . . .”<sup>90</sup>
- Weyerhaeuser reiterated that width, thickness, and length are physical differences that create differences in realizable value and urged that those characteristics be included in the product characteristics hierarchy. Weyerhaeuser noted again, as it had in its earlier submission, that: “Commercially, thickness is generally more important than width. Products of different thickness are often used for fundamentally different applications and thus are sold under different market conditions.”<sup>91</sup>

10. 21 August 2001: **Petitioner Comments on Using Non-Identical Product Comparisons**

- The applicant did not argue that Commerce should compare prices of non-identical products differing in dimension without any DIFMER. To the contrary, the applicant recognized the distortions this would create, and instead argued that if no identical product comparison should be made, US Export Price should be compared to a constructed normal value.<sup>92</sup>

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<sup>87</sup> *Ibid.*, at 48 [Kaye Scholer LLP Letter to the Department of Commerce “Softwood Lumber Products from Canada: Anti-Dumping Investigation” (16 August 2001), at 5.]

<sup>88</sup> *Ibid.*, at 50 [Baker & McKenzie Letter to the Department of Commerce “Certain Softwood Lumber Products from Canada” (17 Aug. 2001), at 7].

<sup>89</sup> *Ibid.*, at 52 [Baker & Hostetler, LLP Letter to the Department of Commerce “Certain Softwood Lumber Products from Canada” (16 August 2001), at 7] (Contains Business Confidential Information).

<sup>90</sup> *Ibid.*, at 54-55 [Baker & Hostetler, LLP Letter to the Department of Commerce “Certain Softwood Lumber Products from Canada” (16 August 2001), at 14-15] (Contains Business Confidential Information).

<sup>91</sup> *Ibid.*, at 60 [Miller & Chevalier Letter to the Department of Commerce “Softwood Lumber Products from Canada: Anti-Dumping Investigation” (16 August 2001), at 9]. The letter responded to the Commerce’s letter of 9 August 2001, requesting comments on the matching of similar comparison merchandise in the captioned investigation.

<sup>92</sup> *Ibid.*, at 62-64 [Dewey Ballantine Letter to the Department of Commerce “Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada” (21 August 2001), at 3-5].

- The applicant itself presented public data showing significant price differences by length. The applicant argued, however, against the length groupings advocated by respondents, contending, for example, that it was not always the case that 16 foot length was more valuable than 14 foot length lumber.<sup>93</sup> The applicant itself presented the following data from *Random Lengths*<sup>94</sup>:

Species	thickness/width	12 foot long	14 foot long	16 foot long
WSPF	2x8	\$244	\$198	\$227
WSPF	2x10	\$228	\$340	\$291

11. 21 August 2001: **Respondents' Rebuttal Comments on Physical Characteristics that Should be Considered in Comparing Prices of Non-Identical Products**

- Canfor rebuts the applicant's claim that all of the products covered in the investigation are substitutable and reiterates its position (stated in its 16 August Letter to Commerce) that Commerce should establish groups, or families, of lengths for product-matching purposes.<sup>95</sup>

12. 10 September 2001: **Submission of Historical Sales Data**

- Following up on 16 August request for guidance from Commerce regarding the data Commerce would require to compute a DIFMER, Abitibi reiterates its request for guidance. It then provides additional data: "Because the Department has not yet provided such guidance, and because the issue is of such critical importance to Abitibi, we are providing additional data that the Department may find useful in computing value-based difmers. We are providing, both electronically, and in Annex SBC.22, historical, pre-POI pricing data, separately for the years 1999, 1998, and 1997."<sup>96</sup> In other words, when it could not obtain guidance from Commerce, Abitibi proactively submitted three years worth of average sales price data, by product characteristics, that Commerce could use to compute DIFMERs or to analyze, over time, the effect of different characteristics on price.
- Commerce *never* responded to Abitibi's request for guidance, and *never* analyzed Abitibi's pricing data of previous years in examining whether dimension affects price or to compute a value-based DIFMER.

13. September 2001: **Comments in Advance of Preliminary Determination**

- Abitibi remained concerned that Commerce would fail to compute an adjustment (DIFMER), and blame respondents for failing to provide adequate data. It submitted a letter to Commerce, contending, among other things, as follows:

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<sup>93</sup> *Ibid.*, at 65-66 [Dewey Ballantine Letter to the Department of Commerce "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (21 August 2001), at 25-26].

<sup>94</sup> *Ibid.*, at 66 [Dewey Ballantine Letter to the Department of Commerce "Anti-Dumping Duty Investigation of Certain Softwood Lumber Products from Canada" (21 August 2001), at 26].

<sup>95</sup> *Ibid.*, at 68-69 [Kaye Scholer LLP Letter to the Department of Commerce "Softwood Lumber Products from Canada: Antidumping Investigation" (21 August 2001), at 4-5].

<sup>96</sup> *Ibid.*, at 71 [Arnold & Porter Letter to the Department of Commerce "Softwood Lumber from Canada: Anti-Dumping Investigation" (10 September 2001), at SBC-56].

In the circumstances of this case, and to the extent the Department relies upon average production costs by mill, the Department should compute difmers based upon differences in market value. *See* 19 C.F.R. § 351.411(b); *U.H.F.C. Co. v. United States*, 916 F.2d 689, 699 (Fed. Cir. 1990). Abitibi reiterates its request, first made on 16 August for guidance from the Department on the data it should submit to enable the Department to compute value-based difmers. Abitibi submitted historical sales data, for 1999, 1998, and 1997, by CONNUM, in its submission of 10 September 2001, that can be used to calculate value-based difmers, but as there is no available precedent as to how the Department computes value-based difmers, Abitibi has no means of identifying what, if any, other data to provide. We do not want to be in the position of having our request for a value based difmer denied based on the inadequacy or incompleteness of the factual record, so, one month after our first request, we again ask the Department to identify any data it would need from Abitibi to calculate and apply value-based difmers so that Abitibi can supply such data.<sup>1</sup>

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<sup>1</sup> *See, e.g., Creswell Trading Company, Inc. v. United States*, 15 F.3d 1054, 1062 (Fed. Cir. 1994) (“Commerce is presumably in the best position to know . . . its own requirements and what evidence will satisfy these requirements, and therefore . . . Commerce at a minimum bore a burden of requesting any additional information that it required when it came to its conclusion . . . that the information of record was insufficient.”); *NSK Ltd. v. United States*, 910 F.Supp. 663, 671 (Ct. Int’l Trade 1995) (“Respondents should not be required to guess the parameters of Commerce’s interpretation of a phrase in the statute”);<sup>97</sup>

- Tembec argued that “[s]hould the Department fail to ask for relevant information to aid its decision-making on whether to calculate a value-based DIFMER, it may not avoid a value-based DIFMER calculation based on lack of information or inadequacy of the record.”<sup>98</sup>

**14. 30 October 2001: Commerce’s Preliminary Determination**

- Commerce explicitly recognizes that grade, thickness, width and length “are significant physical characteristics”, for which it should calculate a DIFMER.<sup>99</sup> However, Commerce states that it is unable to calculate a cost-based DIFMER for these “significant differences in physical characteristics *which affect price*.”<sup>100</sup>(emphasis added) It therefore limits its price-to-price comparisons to products identical in thickness, width, and length, among other characteristics, and resorts to constructed value where it cannot match a US product to a Canadian product identical in thickness, width, and length.

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<sup>97</sup> *Ibid.*, at 76-77 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation: Abitibi Pre-Preliminary Determination Comments (26 September 2001), at 2-3].

<sup>98</sup> *Ibid.*, at 79 [Baker & Hostetler, LLP Letter to the Department of Commerce “Certain Softwood Lumber Products from Canada” (28 September 2001), at 2]. This letter cited *NSK Ltd. v. United States*, 910 F. Supp. 663, 671 (Ct. Int’l Trade 1995) in support of this request.

<sup>99</sup> *Ibid.*, at 82 [Department of Commerce, Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada (Preliminary Determination) (30 October 2001), at 18].

<sup>100</sup> *Ibid.*, at 83 [Department of Commerce, Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada (Preliminary Determination) (30 October 2001), at 19].

15. 12 February 2002: Case Briefs to Commerce

- Under Commerce regulations, all legal arguments must be made at the time of filing of the so-called “Case Briefs”. Legal arguments regarding price comparability, DIFMERS, etc., are not required to have been made earlier.<sup>101</sup>
- Abitibi began its brief as follows: “Three indisputable facts regarding softwood lumber must be taken into account in developing the methodology used to measure dumping in this industry. *First*, softwood lumber is produced and sold in a wide range of grades, dimensions, lengths, and other characteristics, with individual products having widely divergent values due to differences in these product characteristics.”<sup>102</sup> As an illustration, it included two charts of monthly prices over the POI – one for 2x3x8 lumber, by grade, and one of 2x6x16 lumber by grade. Although each chart showed price differences by grade, the two charts combined show differences by dimension as well. For example, at the beginning, of the period, in April 2000, Abitibi’s average net price for No. 2 grade 2x4x8 was around [[     ]] whereas the No. 2 2x6x16 price was [[     ]]. The comparable figures for economy grade were [[     ]] for the smaller size and [[     ]] for the larger.<sup>103</sup>
- Abitibi also demonstrated that log size affects log value, because larger logs yield more valuable, larger lumber: “Low diameter, shorter trees will produce lower value, smaller lumber products. Large diameter tall trees will produce higher value, bigger lumber products. In addition, small diameter trees will tend to produce lumber with more wane, thereby of lower grade. Trees with decay or rot or other quality defects will also produce lower grade lumber than trees without quality defects. For these reasons, where well-developed log markets exist, logs of the same species sell for different prices per cubic meter depending upon quality and size characteristics.”<sup>104</sup> And, timber quality and size do affect the stumpage price companies must pay to harvest.<sup>105</sup>

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<sup>101</sup> 19 C.F.R. § 351.309 (Exhibit CDA-143).

<sup>102</sup> DIFMER Exhibit, at 86 (Exhibit CDA-142 – Contains Business Confidential Information) [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (12 February 2002) enclosing: Case Brief of Abitibi Consolidated Inc. and Affiliates (12 February 2002), at 2 (citing ITC preliminary determination)].

<sup>103</sup> *Ibid.*, at 87-88 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (12 February 2002) enclosing: Case Brief of Abitibi Consolidated Inc. and Affiliates (12 February 2002), at 3-4] (Contains Business Confidential Information).

<sup>104</sup> *Ibid.*, at 91 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (12 February 2002) enclosing: Case Brief of Abitibi Consolidated Inc. and Affiliates (12 February 2002), at 19] (Contains Business Confidential Information). *See Ibid.*, at 107 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (23 July 2001), enclosing: Response of Abitibi Consolidated, Inc. to the Department’s 25 May 2001 Questionnaire (23 July 2001), at D-6 (“logs vary in length, diameter, and quality, and thus in value”)]. *Also See Ibid.*, at 110-124 [Response of Government of British Columbia to the Department’s 1 May 2001 Questionnaire (29 June 2001), Vol. 16, Exh. BC-LER-20, Case No. C-122-839]. Containing publicly available pricing data from Vancouver log market, and showing different prices for different grade logs of the same species.

<sup>105</sup> *Ibid.*, at 91 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (12 February 2002) enclosing: Case Brief of Abitibi Consolidated Inc. and Affiliates (12 February 2002), at 19] (Contains Business Confidential Information). Abitibi’s Case Brief also cites an excerpt from the Questionnaire Response of the Government of Québec in the countervailing duty investigation which stated that:

For example, Quebec charges different stumpage prices in each of its 161 different tariffing zones. One of the key variables in the stumpage equation is relative operating costs, and tree size in cubic meters is one of the key variables in determining relative operating costs between zones. Moreover, Quebec also makes a

- Based on these facts, Abitibi explicitly contended that (1) Commerce cannot limit its price-to-price comparisons to identical merchandise, but must instead use non-identical comparisons when identical comparisons are not possible, and (2) that an adjustment (DIFMER) must be applied to all non-identical comparisons, and that Commerce had the data to do so.<sup>106</sup> Abitibi suggested several alternative data sets and methodologies for computing such an adjustment (DIFMER).<sup>107</sup>
- Canfor noted that “there is no question that these distinct lumber products vary dramatically in their revenue generating capability. Lumber prices vary substantially depending upon the lumber type . . . , grade, dimension, and length of lumber. For example, the average market price for kiln-dried, Western SPF dimension lumber as reported by Random Lengths, recently varied from a high of \$485 per MBF for 2x10, 24-foot No.2 & Better grade dimension lumber, to a low of \$147 per MBF for 2x6 random length No.3 grade.”<sup>108</sup>
- Tembec stated that “the Department may not compare products of different dimensions or grades without adjusting for the substantial difference in the value resulting from those differences in physical characteristics. . . . similar product matches cannot satisfy the statutory and WTO requirements for a fair comparison unless an appropriate Difmer adjustment is made.”<sup>109</sup> (footnotes omitted) Tembec also stated that “[t]here are no reported cost differences for characteristics such as length, width, thickness or grade for softwood lumber, all characteristics affecting the market value of distinct products. Should the Department compare products that differ with respect to these characteristics in the final determination, it must calculate a value-based Difmer.”<sup>110</sup> (footnote omitted) Tembec suggested several alternative data sets and methodologies for computing such an adjustment (DIFMER).<sup>111</sup>
- West Fraser argued that Commerce must make “similar comparisons in a manner that is in keeping with its statutory obligation.”<sup>112</sup> West Fraser then went on to explain what information was on the record and how the adjustment (DIFMER) could be calculated, including properly applying the cost test or using information from *Random Lengths*. West Fraser further pointed out that it had sought guidance from Commerce as to whether Commerce needed additional data and because it received no such guidance, suggests that Commerce was satisfied with the data submitted.<sup>113</sup> Weyerhaeuser pointed out that softwood products “vary by grade, thickness, width, and length” and that these are “all characteristics the Department has identified as

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“quality adjustment” that takes into account the impact on timber value of average diameter, rot percentages, and log taper.

<sup>106</sup> *Ibid.*, at 93-101 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (12 February 2002) enclosing: Case Brief of Abitibi Consolidated Inc. and Affiliates (12 February 2002), at 26-34] (Contains Business Confidential Information).

<sup>107</sup> *Ibid.*, at 101-105 [Arnold & Porter Letter to the Department of Commerce “Softwood Lumber from Canada: Anti-Dumping Duty Investigation” (12 February 2002) enclosing: Case Brief of Abitibi Consolidated Inc. and Affiliates (12 February 2002), at 34-38] (Contains Business Confidential Information). *Ibid.*, at 127-130 [Case Brief of Weyerhaeuser Company (13 February 2002), at 48-51].

<sup>108</sup> *Ibid.*, at 138 [Case Brief of Canfor Corporation (12 February 2002), at 13].

<sup>109</sup> *Ibid.*, at 161-162 [Case Brief of Tembec Inc. (12 February 2002), at 35-36].

<sup>110</sup> *Ibid.*, at 163 [Case Brief of Tembec Inc. (12 February 2002), at 37].

<sup>111</sup> *Ibid.*, at 163-164 [Case Brief of Tembec Inc. (12 February 2002), at 37-38].

<sup>112</sup> *Ibid.*, at 140 [Case Brief of West Fraser Mills, Ltd. (12 February 2002), at 17] (Contains Business Confidential Information).

<sup>113</sup> *Ibid.*, at 140-152 [Case Brief of West Fraser Mills, Ltd. (12 February 2002), at 17-29] (Contains Business Confidential Information).

affecting value,” citing the Department’s finding in its Preliminary Determination that thickness, width and length are “significant physical characteristics” affecting value. Weyerhaeuser specifically went on to explain that: “In this case, the Department can and should calculate difmer adjustments based on market value. As was the case in *Nepheline Svnite*, the parties to this proceeding, and the Department itself, agree that physical differences (such as grade, width, length and thickness) exist and affect market value. Further, evidence of the relationship between these factors and market value is apparent from the sales data provided to the Department in the course of this proceeding, as well as from industry pricing indices such as Random Lengths.”<sup>114</sup> (footnote omitted)

- Even the applicant acknowledged that when making similar comparisons, Commerce would have to determine “whether a longer or shorter product or a wider or narrower product would be most appropriate to match when the identical product was not available.”<sup>115</sup>

**16. 19 February 2002: Rebuttal Briefs**

- In its rebuttal brief to Commerce, Tembec noted that “[w]henver there is a physical difference between products, such as moisture content, grade, dimension or planing, the Department must calculate the appropriate difference in merchandise adjustment (“Difmer”) to reflect the difference in value attributable to that difference in physical characteristics.”<sup>116</sup>

**17. 21 March 2002: Commerce’s Final Determination**

- In the final determination, Commerce, “based upon [the] submissions, as well as the Department’s analysis, width and thickness were numbered sequentially and matched to similar products.”<sup>117</sup>
- With respect to length, Commerce accepted respondents’ arguments, and grouped products into length bands for matching purposes. Specifically, Commerce established three length bands: (1) less than 16 feet, (2) 16 feet to less than 22 feet, and (3) 22 feet and above.<sup>118</sup> For matching purposes, Commerce would first match within a band before matching to a different band. This recognizes that not all lengths are of equal value or are equally comparable. To the contrary, the band approach recognizes the higher value of 16 foot and 22 foot lumber relative to lower length lumber. Thus, 16 foot lumber could not be matched equally to 14 foot and 18 foot lengths – it would be matched to 18 foot only.
- Commerce explicitly recognized that “in this case . . . differences in dimension (*i.e.*, length, width or thickness) . . . could result in differences in market value.”<sup>119</sup>
- Inconsistently with its foregoing findings and conclusions, Commerce elected not to calculate a DIFMER for differences in dimension. Although Commerce stated that “there is no information on the record by which we can calculate a difmer adjustment

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<sup>114</sup> *Ibid.*, at 127 [Case Brief of Weyerhaeuser Company (12 February 2002), at 48].

<sup>115</sup> *Ibid.*, at 133 [Case Brief on Behalf of the Petitioner with Respect to Abitibi Consolidated Inc. (12 February 2002), at 14].

<sup>116</sup> *Ibid.*, at 136 [Rebuttal Brief of Tembec Inc. (20 February 2002), at 12].

<sup>117</sup> *Ibid.*, at 155-156 [IDM, at 45-46 (Exhibit CDA-2)].

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, at 158 [IDM, at 51 (Exhibit CDA-2)].

to account for differences in dimension based either on cost or value.”<sup>120</sup> it 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 . . . .”<sup>121</sup> Yet the record contains no evidence of any analysis by Commerce of any pricing data to support this conclusion, and it is inconsistent with Commerce’s use of thickness, width, and length as matching characteristics, not to mention its adoption of length bands.

**23. Please comment on the statements contained in para. 136 of the US *First Written Submission*:**

**"[i]n 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."**

88. US paragraph 136 quotes from Canada’s paragraph 59. It is true in that quote that Canada mentioned length and grade together. The context of that discussion was a description of the softwood lumber production process, to make the point that different lumber products resulting from the production process are joint products with joint costs. In the very next paragraph, Canada stated “this joint production process simultaneously yields numerous lumber products that, for any given species, vary in a number of respects, the most significant of which are grade and size. Each of these characteristics affect value.”

89. While the United States focussed on paragraph 56, paragraphs 143 through 164 of Canada’s First Written Submission explain specifically how dimension affects price. Of course, in addition, when the United States in its paragraph 136 asserts that Canada could not “prove” that dimension affects price, it would only accept as proof in that regard a “consistent pattern of price movement” and no fluctuation in relative prices of lumber of different dimension. Since prices through the year-long POI did indeed fluctuate, as is normal in any commodity market, it was impossible for Canada to meet the burden of proof that the United States has now articulated after-the-fact. The *Anti-Dumping Agreement* does not impose such a burden on entitlement to an adjustment for differences in the physical characteristics of the products being compared. It directs that adjustment be made for all physical differences that affect price comparability -- without regard to whether prices are fixed or fluctuate, or whether the difference between any two products is replicated in consistent patterns across all products. As demonstrated in response to Questions 21 and 22 above, the respondents made such a showing, *i.e.*, that differences affect price comparability, with the full agreement of the Petitioner.

90. After substantial submissions by respondents on this issue, Commerce agreed, first in its questionnaire, then in its Preliminary Determination, and again at least in principle in its Final Determination when it stated “specifically in this case, where products have differences in dimension (*i.e.*, length, width, thickness) we recognize that these physical differences could result in differences in market value.”<sup>122</sup> The reason therefore that Commerce refused to apply a dimension adjustment was not, as the United States now argues, because the need was not demonstrated but rather because of Commerce’s assertion that an adjustment could not be calculated. But this assertion simply is incorrect. Commerce could have made an adjustment based on the value difference between non-identical products, and it had a variety of different data sources available for such a calculation. Alternatively, it could have computed a cost difference, if it had simply extended its cost calculations so as to take dimension into account.

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<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, at 159 [IDM, at 52 (Exhibit CDA-2)].

<sup>122</sup> IDM, Comment 8, at 51 (Exhibit CDA-2).

**24. Please comment on the statements contained in para. 137 of the US *First Written Submission*:**

**"Canada's examples of price variability, allegedly based on size, are without any citation to specific pieces of record evidence presented to Commerce. [footnote excluded] 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."**

91. The evidence and argument before Commerce is reviewed in detail in response to Questions 21 and 22 above. As already noted, the issue was not disputed by any party, and Commerce accepted in its Preliminary Determination and in its Final Determination that dimension affects price comparability.

92. In addition to the evidence reviewed above, Commerce also had before it the complete sales databases for all six respondents. These databases contained pricing data by product, differentiated by thickness, width, and length among other characteristics. Commerce's record reveals that it performed no analyses of these data. The United States refers to CDA-76 that shows that various dimensions had an effect on price. These charts are simply graphical representations of data that were before Commerce -- specifically, the data derived from actual pricing in the final Canadian sales database submitted by individual respondent companies. All of the underlying data were provided to Commerce, including examples provided by both respondents and petitioners.

93. To the extent that the United States is suggesting that respondents did not provide record evidence to Commerce or to this panel showing differences in lumber value based on differences in dimension, the United States is simply in error. Canada cited extensive evidence in its paragraphs 147 and 148 demonstrating that size can and did affect the value of lumber. That evidence was all before Commerce during the investigation.

**25. Please explain in detail how DOC carried out the product comparison in case of non-identical CONNUMs. Of the total number of comparisons made, how many were based on identical CONNUMs?**

94. For each US product that could not be compared to an identical Canadian product, Commerce selected what it regarded to be the most similar Canadian product, with reference to the ten product matching characteristics it had implemented at the outset of the investigation. Specifically, it ordered these product characteristics from most important to least important, as follows: product category (*e.g.*, boards, dimension lumber, timbers), species, grade, moisture content, thickness, width, length, surface finish (the number of sides planed), end trimming (*i.e.*, whether the end were precision trimmed or not), and further processing. Commerce selected the most similar non-identical product by identifying the Canadian product with the fewest, and least important, product differences. Thus, a spruce, pine fir (SPF), No. 2 grade, dried, 2 inch x 4 inch x 8 foot, fully planed, not precision trimmed, and not further processed product would be matched to a spruce, pine fir, No. 2 grade, dried, 2 inch x 4 inch x 10 foot product, ahead of both an SPF No. 1 grade product, and an SPF No. 2, dried, 2 inch x 6 inch x 8 foot product, because length is the least important characteristic among length, width and grade. Commerce applied other matching rules as well. Commerce did not match across categories or species. In addition, it limited comparisons to other products within limited grade groups, where the grade groups were assigned by Commerce based on the commercial applications for the lumber. Finally, as noted in more detail in the response to Questions 21 and 22, Commerce used three length groupings as well for matching purposes, in an effort to match lengths of the closest value, and in recognition of the fact that length affects value.

95. In view of the place in the product matching hierarchy for dimension characteristics, and the fact that virtually all lumber sales reported were lumber without further processing, and with planing,



Analysis Memorandum for Weyerhaeuser Company, Output of Margin Programme (unnumbered page) (25 April 2002).<sup>123</sup>

98. Moreover, contrary to the assertions of the United States, the many non-identical comparisons were not neutral. The non-identical comparisons generally worked against respondents. That is, Commerce tended to compare prices of narrower, shorter, less valuable products sold in the United States with prices of wider, longer, more valuable lumber sold in Canada. (This was a direct result of Commerce's cost allocation methodology which allocated the same costs of production to lumber of different size, with the result that smaller, less valuable lumber tended always to be found to be below cost. Thus, only high value lumber sold in Canada tended to pass the cost test.)

99. To demonstrate this point, we provide below specific examples of non-identical comparisons actually made by Commerce for respondent companies. All products noted are identical in all physical characteristics other than dimension. We show the dimensions of the US product, the dimensions of the Canadian product Commerce used in its price comparison, and the dumping margin that resulted. The Panel should take note of the generally far larger dimensions of the Canadian product. In each case, Commerce compared a US price to a Canadian price of a larger, more valuable product, without adjustment.

100. To illustrate the value difference between the products compared, we have also provided in the table comparable prices for the two products *in the same market*. The prices indicated under the US and Canadian products (reported in Canadian dollars) are the period of investigation weighted average Canadian market price for that product for that company net of all actual billing adjustments, freight expenses, and selling expenses, so as to eliminate all price differences caused by differences in freight and selling expense. The price shown for the US product is *not* the price used in the dumping comparison, as it is the Canadian market price rather than the US market price. The data underlying these charts are the very data respondents submitted to Commerce in their final sales databases – the actual databases used by Commerce in its Final Determination margin calculations. The products were chosen as illustrations from the mandatory respondents.<sup>124</sup> The figures provided show one potential measure of the extent to which the Canadian product used by Commerce in actual dumping comparisons is more valuable than the US product to which it was compared. Because Commerce compared the products without adjustment, it presumed their values to be the same. The tables below show just how far off this presumption was with very concrete examples, instead of the overbroad assertions made by Commerce to the effect that dimension has only a minor impact on price, without reference to any actual product to product comparisons actually made.

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<sup>123</sup> Respondents' Analysis Memoranda, Output of Margin Programme at 1-10. (Exhibit CDA-157 – Contains Business Confidential Information).

<sup>124</sup> There are no examples provided for Slocan because Slocan's consultant currently is out of the country and unable to run the calculations for the Home Market (Canadian) Price of the US Product.

**ABITIBI**

<b>Dumping Margin</b>	<b>Identical Characteristics</b>	<b>Dimension of US Product</b>	<b>Dimension of Non-Identical Canadian Product Compared by Commerce</b>	<b>Home Market (Canadian) Price of U.S. Product</b>	<b>Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce</b>
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]

Code: SPF = spruce, pine, fir = species  
dry = kiln dried = moisture content  
kiln-wet = does not meet drying specification  
PET = precision end trimmed

**CANFOR**

<b>Dumping Margin</b>	<b>Identical Characteristics</b>	<b>Dimension of US Product</b>	<b>Dimension of Non-Identical Canadian Product Compared by Commerce</b>	<b>Home Market (Canadian) Price of U.S. Product</b>	<b>Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce</b>
[[					]]
[[					]]
[[					]]
[[					]]
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[[					]]
[[					]]

Code: fascia is a type of finish

**TEMBEC**

<b>Dumping Margin</b>	<b>Identical Characteristics</b>	<b>Dimension of US Product</b>	<b>Dimension of Non-Identical Canadian Product Compared by Commerce</b>	<b>Home Market (Canadian) Price of US Product</b>	<b>Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce</b>
[[					]]
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**WEST FRASER**

<b>Dumping Margin</b>	<b>Identical Characteristics</b>	<b>Dimension of US Product</b>	<b>Dimension of Non-Identical Canadian Product Compared by Commerce</b>	<b>Home Market (Canadian) Price of US Product</b>	<b>Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce</b>
[[					]]
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Code: S4S = surfaced on four sides  
EE = eased edges

**WEYERHAEUSER**

<b>Dumping Margin</b>	<b>Identical Characteristics</b>	<b>Dimension of US Product</b>	<b>Dimension of Non-Identical Canadian Product Compared by Commerce</b>	<b>Home Market (Canadian) Price of US Product</b>	<b>Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce</b>
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<sup>2</sup> The larger product (timber) can be less valuable than a smaller product – *e.g.*, due to rot in the middle, which while it may not affect structural strength, can limit the ability to make smaller pieces from it.

F. ZEROING

**To Canada:**

**28. Please explain the legal basis for the claim that zeroing is inconsistent with Article 2.4 and 2.4.2, in addition to its citations from the *EC – Bed Linen* AB report.**

101. Under the first methodology specified in Article 2.4.2, investigating authorities must take into consideration “all comparable export transactions” when calculating margins of dumping. The express language of the agreement does not limit this standard to a particular stage of margin analysis, and therefore it must be understood to apply to both intermediate stage margin calculations and any margin calculation made for the product under consideration as a whole. The report of the Appellate Body in *EC – Bed Linen* supports this interpretation of the Agreement: there, the Appellate Body analyzed the terms of the Agreement and concluded that the requirements of Article 2.4.2 are not limited to the intermediate margin calculations, but rather apply to the final overall margin calculation as well.<sup>125</sup> In Canada’s view, this is the best interpretation of Article 2.4.2 because it gives all of the language in that provision operative meaning. When applying this standard to intermediate stage calculations, the term “all” ensures that all relevant transactions are included in the calculations. The term “comparable” is particularly significant because it operates to ensure that model-to-model comparisons include only “comparable” transactions in each given model. In applying this standard to a margin calculation for the product as a whole — such as that at issue in this case — the term

<sup>125</sup> *EC – Bed Linen*, at para. 53.

“comparable” describes the transactions being considered for the product as a whole, and — perhaps most significantly for this case — “all” requires an authority to include every transaction within the terms of that analysis, without qualification or exception. It is Canada’s position that the United States failed to comply with this standard when it calculated the overall margin for softwood lumber, because it improperly reduced to zero any negative margins that resulted from model-to-model comparisons, thus failing to fully account for “all comparable export transactions” in its final margin calculation.

102. It is agreed between Canada and the United States that the margins of dumping were to 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”. Zeroing is also inconsistent with Article 2.4.2 because it does not fully take into account certain transactions in establishing “a weighted average” (of prices of all comparable export transactions). Zeroing is by definition inconsistent with the calculation of a true “weighted average”.

103. In Canada’s view, zeroing does not produce a fair comparison consistent with Article 2.4 because it does not average all model-specific margins equally, and thus the US practice is inconsistent with the obligations of the United States under Article 2.4. Canada notes that the Appellate Body agreed with this position in *EC – Bed Linen*, where it stated it was “of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions - such as the practice of “zeroing” at issue in this dispute - is *not* a “fair comparison” between export price and normal value....”<sup>126</sup>

**29. Please comment on the statement contained in para. 154 of the US *First Written Submission*:**

**"[n]either 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."**

104. This statement by the United States is unsupported by the text of Articles 2.4 and 2.4.2, is inconsistent with the position of the Appellate Body in *EC – Bed Linen*, and would undermine the object and purpose of the *Anti-Dumping Agreement* by effectively allowing investigating authorities limitless discretion in calculating the margin actually applied to a respondent in an investigation. Neither the requirement that “a fair comparison shall be made” contained within Article 2.4 nor the requirement in Article 2.4.2 providing for a comparison using “all comparable export transactions” is limited to those margins an authority may calculate before establishing the final margin. The only permissible reading of Article 2.4.2 is that the “margins” to which it refers are any margins calculated by the investigating authority at any stage in the process of calculating a final antidumping margin, including the final margin itself.

105. The same argument offered here by the United States was considered -- and rejected -- by the Appellate Body in *EC – Bed Linen*. In that case, the EC had claimed, as the United States now does in para. 155 of its First Submission, that Article 2.4.2 provides no guidance to investigating authorities as to how margins of dumping established for particular models should be combined in the second stage to calculate an overall margin of dumping for the product under consideration.<sup>127</sup> The Appellate Body found that the plain meaning of the language of Article 2.4.2, coupled with the reference in Article 2.1 to establishing dumping for “a product” suggested that these provisions were intended to govern any second stage margin determinations, and thus it was “unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an overall margin of

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<sup>126</sup> *Ibid.*, at para. 55.

<sup>127</sup> *Ibid.*, at para. 49.

dumping for the product under investigation.”<sup>128</sup> Based on this reasoning, the Appellate Body concluded that the *Anti-Dumping Agreement* prohibited the practice of zeroing. Given that the Appellate Body’s reasoning in that case was addressed to precisely the same claim raised here, it should be highly relevant to this Panel’s assessment of the US position in this case.

**30. Please comment on the statements contained in para. 156 of the US *First Written Submission*:**

**"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,” 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." (footnotes omitted)**

106. Canada has not claimed that Article 2.4.2 does not cover intermediate-stage comparisons (when such comparisons are required to be made); thus, in making those comparisons, Article 2.4.2 would require that comparable transactions be used. But, more importantly, contrary to the position of the United States, nothing in Article 2.4.2 limits the application of that Article to intermediate-stage comparisons. As a result, the requirements of Article 2.4.2, like the requirements of Article 2.4, apply to the calculation of the margin for the product as a whole and also to the calculation of intermediate-stage margins (where it is necessary to calculate such intermediate-stage margins, which will depend on the facts of a given investigation). Thus, for particular intermediate-stage comparisons, some items falling within the like product may not be capable of comparison with other items within the same like product category – because, for example, they do not meet the contemporaneity requirement set forth in Article 2.4. But this does not mean that the requirement of Article 2.4.2 that “a weighted average normal value be compared with a weighted average of prices of all comparable export transactions” does not apply when it comes to aggregating all those intermediate-stage margins, in order to generate a single margin for the like product as a whole; the “all comparable export transactions” requirement must still be preserved. Article 2.4.2 applies to that step also, because the *Anti-Dumping Agreement* does not contain a provision excluding its applicability.

**31. Please comment on the statements contained in para. 164 of the US *First Written Submission*:**

**"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 more general text of Article 2.1. 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." (footnotes omitted)**

107. The United States incorrectly characterized Canada's argument as based on the reference to “a product” under Article 2.1. In fact, Canada believes that Articles 2.4 and 2.4.2 more squarely address the issue, and therefore has focused upon those provisions in its analysis. In Canada’s view, zeroing is prohibited under Article 2.4.2 itself because it requires that the investigating authority take into consideration “all comparable export transactions” in calculating margins when the first methodology is used. Moreover, Article 2.4 imposes the additional requirement that comparisons between normal values and export prices must be “fair”. Zeroing does not produce a fair comparison under Article 2.4 because it does not average all values, and is thus inconsistent with US obligations under Articles 2.4

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<sup>128</sup> *Ibid.*, at para. 53.

and 2.4.2. Thus, Canada has argued that the requirement contained in Article 2.4.2 that an investigating authority consider “all comparable export transactions” in calculating the dumping margin applies both to intermediate stage and final margin calculations, and therefore it is on this ground that zeroing is prohibited under the Agreement.

108. Canada notes that Article 2.1, however, confirms that the final margin determined pursuant to the requirements of Article 2.4.2 must reflect a determination of dumping for “the product” under consideration. It suggests, as Japan’s submission notes, that second-stage calculations of the margin for “a product” cannot exclude those subcategories of products which result in zero margins. See Third Party Submission of Japan, at para. 9 (“Article 2.1 thus provides that dumping must be determined on the basis of all types of a product under consideration as a whole, not some types of the product.”). This is consistent with and reinforces Canada’s position that the requirements contained in Article 2.4 and 2.4.2 would operate to prohibit zeroing.

109. Contrary to the allegation of the United States, Canada’s interpretation of Article 2.4.2 does not prohibit the establishment of margins of dumping with respect to particular models of a product. Rather, the direction to conduct a “comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions” involving the like product operates to require the authority to compare each weighted average normal value with all export transactions that are fairly comparable with that normal value, and **not to compare** those export transactions to normal values established for different levels of trade, or based on sales made in a different time period, or against normal values not adjusted for other differences that affect price comparability.

110. In Canada's view, the resulting dumping margin should be the same whether the authority carries out its calculation in one stage or two. In this case the United States used a two-stage method. But at the second stage it changed negative dumping margins (*i.e.*, where weighted average normal value was lower than the weighted average of prices of comparable export transactions) to a dumping margin value of zero, effectively deeming, contrary to fact, that the weighted average of prices of comparable export transactions of such a model was equal to (and not higher than) the weighted average normal value. An “average” cannot be computed without the inclusion of all values. By eliminating some values from the computation of averages, the United States failed to establish margins of dumping in accordance with Article 2.4.2, which, to repeat, requires margins of dumping to be “established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions” of the like product. A “comparison” considers the elements to be compared as they were calculated, and cannot “revise” certain of these elements to reflect a fictional value (zero), when the value in issue was in fact computed to be a negative number.

111. In this case, the first (model-to-model comparison) stage divided the single like product into multiple models as an expedient that permitted appropriate comparisons between identical or most similar products. However, the United States went on to calculate a single overall like product margin for each investigated exporter, in the “second stage” of the margin calculation. In arriving at the overall like product margin of an exporter, which could only originate from the comparison of normal values and export prices done at the first stage, the US was required to continue to take into account all margins so obtained, because Article 2.4.2 requires margins to be established by reference to all comparable export transactions as they occurred, not as revised downward by an investigating authority.

**At the first substantive meeting with the Panel, Canada was asked to describe whether it has a multi-stage process and how it arrives at its anti-dumping margins.**

112. Canada respectfully refers to the terms of reference of the Panel and notes that these terms cover the measure of the United States referred by Canada to the DSB in document WT/DS264/2, *i.e.*,

the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada.

113. Canada regrets it cannot be of further assistance on this question.

G. COMPANY-SPECIFIC ISSUES

G.1 Common Questions on Various Company-Specific Issues

To Canada:

**36. Can Canada explain its own practice concerning the calculation of SG&A, with particular emphasis on the company-specific issues which are at issue before the Panel?**

114. Canada respectfully refers to the terms of reference of the Panel and notes that these terms cover the measure of the United States referred by Canada to the DSB in document WT/DS264/2, *i.e.*, the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada.

115. Canada regrets it cannot be of further assistance on this question.

**37. For each of the company-specific issues examined below, Canada is requested to summarize the arguments raised by the relevant exporter in the context of the investigation. References to documents on the record should be included (exhibit number, page and paragraph of the document). Canada is also requested to summarize the reasons which were given by DOC, if any, when rejecting the exporter's request. To clarify and summarize the issues, Canada may present the above data in tabular form.**

116. Please see attached Annex I.

**38. Please comment on the statement contained in para. 185 of the US *First Written Submission*:**

**"[t]his 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."**

117. Articles 2.2.1.1 and 2.2.2 do not specify particular cost calculation methodologies, but instead impose parameters governing the selection of allocation and other calculation methodologies. First, these provisions impose a general preference for the actual data recorded in a respondent's books and records for the amounts actually incurred in producing and selling the product under consideration. This is reflected in Article 2.2.1.1's general requirement that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation . . ." as well as the requirement of Article 2.2.2 that, where possible, that amounts used for general and administrative expenses "shall be based on actual data pertaining to production and sales. . . of the like product by the exporter or producer under investigation." Thus, for example, where a company maintains administrative, selling and general cost data pertaining to the specific product under consideration, an investigating authority should not disregard such data in favour of more general data that it must then allocate. Second, Article 2.2.1.1 imposes a general requirement that an investigating authority's cost calculation "reasonably reflect the costs associated with the production and sale of the product under consideration." With respect to by-product sales, for example, this means that the revenues recorded in a respondent's books and records must not overstate or understate the actual revenues obtainable through by-product sales, since to do so would lead to an overstatement or understatement of the costs associated with the production and sale of softwood lumber. Third, Article 2.2.1.1 requires that

authorities “consider all available evidence on the proper allocation of costs”. This requirement, in combination with the requirement that investigating authorities properly establish the facts and evaluate those facts in an “unbiased and objective” manner, prohibits the use of standard cost calculation methodologies in all cases, without regard to the particular facts of each case. This was confirmed by the panel in *Egypt – Steel Rebar*.<sup>129</sup>

118. Canada’s position is that the various methodologies used by Commerce for the company-specific determinations at issue fell outside these express parameters and thus violated explicit obligations in the *Anti-Dumping Agreement*. Canada does not argue that the general language of these articles requires the use of particular methodologies.

**39. Please comment on the statement contained in para. 221 of the US *First Written Submission*:**

**“[t]he AD Agreement is silent as to how to assess affiliated party transactions relating to costs.”**

119. Canada agrees that Article 2.2.1.1 does not set out a specific test or methodology for determining whether transactions between affiliated parties can reasonably be used in determining a respondent’s costs for producing and selling the product under consideration. Article 2.2.1.1 does, however, express a clear preference for the use of actual transaction data from records kept by an exporter. An investigating authority may only disregard such data where the transactions do not accord with GAAP and do not reasonably reflect costs associated with the production and sale of the product at issue. Canada believes that transactions between affiliated parties are subject to the general requirements of Article 2.2.1.1 of the *Anti-Dumping Agreement* and, as such, must be disregarded by an administering authority where a respondent’s records for those sales would lead to a calculation of costs that do not “reasonably reflect the costs associated with the production and sale of the product under consideration.” Otherwise, such recorded data should be used in the determination of costs of production.

120. By statute the United States has adopted a general rule that transactions between affiliated parties may be disregarded when calculating costs, if those transactions do not fairly reflect market prices. In this case market pricing represents an objective standard against which the investigating authority can assess whether the records reasonably reflect the costs associated with the production and sale of softwood lumber. For the reasons discussed in Canada’s *First Written Submission* and elaborated upon below, Canada does not believe that Commerce satisfied this standard with respect to affiliated chip sales made by West Fraser and Tembec.

**40. Please comment on the statements contained in para. 228 of the US *First Written Submission*:**

**“Canada asserts that Commerce’s calculation of West Fraser’s wood chip offset also violated its obligation to make a “fair comparison.” 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.” (footnote excluded)**

121. Canada’s claim under Article 2.4 is addressed in the response to Question 51.

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<sup>129</sup> *Egypt – Steel Rebar*, at para. 7.393

**To both parties:**

**44. What obligations does Article 2.2.1.1 impose: 1) in general on investigating authorities, and 2) with respect to the determination of by-product revenue offsets?**

122. Article 2.2.1.1 obligates investigating authorities to examine the books and records of a respondent to determine whether those books and records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. If those two requirements are met, the investigating authority shall normally calculate the cost of the product under consideration on the basis of those books and records. The investigating authority must also consider all available evidence on the proper allocation of costs to the production of the product at issue. The requirements of Article 2.2.1.1 must also be considered in conjunction with Article 6.1, which requires the investigating authority to inform respondents of all information that the investigating authority requires, and provide respondents with a reasonable opportunity to present evidence.

123. By-product revenue offsets are an essential part of the calculation of the costs of the main product, in this case lumber. As noted above, the United States has adopted a general rule that transactions between affiliated parties may be disregarded when calculating costs, if those transactions do not fairly reflect market prices. To ensure that the requirements of Article 2.2.1.1 are met it is necessary for the by-product revenue offset to reflect the market value of those by-products. Indeed, unless the by-product offset reasonably reflects the market value for the by-products at issue, the calculation of the cost of the main product (in this case, softwood lumber) would be either overstated or understated. Thus, when the market value of by-product sales is not reflected in a company's own books and records, as was the case for Tembec, Article 2.2.1.1 requires an alternative valuation. In contrast, where the market value of by-product sales is reasonably reflected in a company's own books and records, as was the case for West Fraser, Article 2.2.1.1 requires Commerce to use the company's own recorded figures.

**45. For the terms "actual data pertaining to production and sales (...) of the like product" in Article 2.2.2, please explain the application of this sentence in general and in light of the company-specific issues in this case.**

124. This provision in Article 2.2.2 requires an investigating authority to base its cost calculations for administrative, general and selling expenses, on actual data maintained by the producer, specific to (*i.e.*, "pertaining to") the production and sale of the product under investigation, wherever such specific, actual data are available. Expenses will "pertain" to the production and sale of a product where they "belong or be attached to, spec. (a) as a part, (b) as an appendage or accessory . . ." <sup>130</sup> If "actual data" are not available, the remainder of the Article permits the investigating authority to rely on more aggregate data, including data relating to "the same general category of products" of that producer (Article 2.2.2(i)), other producers data (Article 2.2.2(ii)), or "any other reasonable method" (Article 2.2.2 (iii)).

Abitibi:

125. As Canada has explained, Abitibi's audited financial statements contain detailed data on the value of assets required for the production and sale of merchandise in each of its business segments (its three business segments comprise lumber, newsprint, and pulp and paper). <sup>131</sup> In calculating the amount of financial expenses properly allocable to softwood lumber, Commerce used a COGS methodology that relied on Abitibi's "actual data" but over-allocated non-lumber expense data to the

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<sup>130</sup> L. Brown, ed., *The New Shorter Oxford English Dictionary*, 3<sup>rd</sup> ed. (Oxford: The Clarendon Press, 1993), at 2173 ["pertain"]. (Exhibit CDA-144)

<sup>131</sup> Abitibi Section A Questionnaire Response (22 June 2001), Annex 12, at 252 (Exhibit CDA-82).

cost of producing lumber. Commerce therefore calculated Abitibi's financial expenses by including actual cost data that did not "pertain to" the production and sale of lumber contrary to Article 2.2.2.

Tembec:

126. With respect to Tembec's G&A issue, the phrase "actual data" is not relevant because both the company-wide G&A calculation and the Forest Products Group G&A calculation are based on actual data. The key portion of Article 2.2.2 is the phrase "pertaining to production and sales . . . of the like product." The majority of the sales of the Forest Products Group are of products that are identical to the product under consideration and, thus, are the "like product." The Forest Products Group data therefore more accurately "pertained to" the production and sale of the product at issue. By contrast, the Tembec company-wide data cannot be said to "pertain to" the production and sale of the like product in Canada, or even any product in the same general category of products, because those figures represent the company's worldwide production, 70 per cent of which is made up of paper, pulp and chemicals.<sup>132</sup> By using the company-wide data to determine G&A, Commerce over-allocated costs based on data that related to the production of non-lumber goods to softwood lumber and therefore calculated Tembec's G&A for softwood lumber based on data that did not "pertain to" the production and sale of softwood lumber.

Weyerhaeuser Company:

127. Weyerhaeuser Canada Limited, the producer and exporter of Canadian softwood lumber in Commerce's investigation, is a Canadian subsidiary of Weyerhaeuser Company ("Weyerhaeuser US"). Article 2.2.2 requires Commerce to consider only "actual data pertaining to production and sales . . . of the like product by the *exporter or producer under investigation*." In accordance with its normal practice, Commerce included a part of the parent-company G&A in the subsidiary's G&A calculation. This is reasonable to the extent that the parent company incurs expenses that would ordinarily fall on Weyerhaeuser Canada if Weyerhaeuser US did not exist (*e.g.*, Director salaries). However, Canada takes issue with the way Commerce classified certain expenses incurred by Weyerhaeuser US as G&A – contrary to Weyerhaeuser US's books and records – that Commerce ultimately attributed to Weyerhaeuser Canada's production and sale of softwood lumber.<sup>133</sup>

128. In particular, Commerce included in its G&A calculation a \$130 million charge incurred by Weyerhaeuser US for legal settlement expenses related to hardboard siding, a product produced by the parent company in the *United States*, for claims arising for the period 1981 to 1999 (*i.e.*, years prior to the period of investigation in this case).<sup>134</sup> Weyerhaeuser US's hardboard siding expense does not "pertain to", or "attach" to Weyerhaeuser Canada's production and sale of Canadian softwood lumber; nor is it "a part" of the Canadian softwood lumber production process. By including these expenses in the production of softwood lumber, Commerce included actual data that did not pertain to

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<sup>132</sup> Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report) at 45 (Exhibit CDA-94).

<sup>133</sup> During the investigation, Weyerhaeuser argued that (1) the hardboard siding expense was not a general expense properly attributed to the production and sale of Canadian softwood lumber, and (2) that the expense is properly characterized as a "cost of sale." Either would have sufficed to reclassify the expense as a "general expense". The DOC rejected both claims. See Weyerhaeuser Case Brief (13 February 2002) at 64 (Exhibit CDA-98 – Contains Business Confidential Information). In this WTO appeal, Canada has raised an issue with the DOC's reasoning with respect to item (1) only.

<sup>134</sup> See DOC Verification Report on the Cost of Product and Constructed Value Data Submitted by Weyerhaeuser Company Ltd. (22 January 2002) at 4, para. 3(2) (Exhibit CDA-97 – Contains Business Confidential Information); Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15 at 53, 74 (Exhibit CDA-101); DOC "Issues and Decision Memorandum for the Antidumping Duty Investigation of *Certain Softwood Lumber Products from Canada*," dated 21 March 2002, Comment 48b, at 136 (Exhibit CDA-2).

the production and sale of softwood lumber and thereby calculated an inflated amount for Weyerhaeuser's G&A costs contrary to Article 2.2.2.

**46. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?**

129. Both Article 2.2.1.1 and 2.2.2 apply for the "purposes of paragraph 2" of Article 2 (*i.e.*, constructing costs). Article 2.2.1.1 is generally applicable to all cost calculations and determinations, including both costs of production and general selling and administrative costs. Article 2.2.2 only addresses the determination of general, selling and administrative costs. Accordingly, where an authority establishes GS&A costs it must meet the requirements of both Articles 2.2.1.1 and 2.2.2. These provisions together establish certain specific rules for the construction of costs and normal value.

**G.2 Calculation Financial Expenses of Abitibi**

**To Canada:**

**47. Please comment on the statements contained in p. 77 of DOC's Memorandum of 21 March 2002 (Exhibit CDA-2):**

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

130. These assertions are misleading and demonstrably incorrect, as pointed out below. The problem with Commerce's COGS methodology is that it considers only current expenses, and effectively ignores the true, full costs of long-term capital assets. After all, COGS includes *only* current expenses. It does not include the full value of long-term capital assets, nor does it include the value of any non-depreciable capital assets at all. Therefore, for companies such as Abitibi, whose long-term capital assets are far greater than current assets and expenses, a COGS allocation does not reflect a company's "overall cash needs" as the United States repeatedly asserts.

131. To understand this point, and Commerce's misleading response that it considered capital assets by virtue of considering depreciation expense, the Panel need not delve into esoteric accounting concepts. It need only focus on one's own experience in purchasing and financing long-term assets, such as an automobile.

132. When a buyer purchases an automobile, he is required to pay the dealer the full value of the car. Thus, if he buys a \$25,000 automobile, he must finance, through borrowing or equity, the full \$25,000 purchase price of the car. In Commerce's terminology, the "cash need" is \$25,000. Because the automobile can be used for many years, it is a long-term capital asset, and its initial value is \$25,000.

133. Assuming that the automobile has a useful life of five years, the depreciation expense associated with that automobile will be one-fifth of the total or \$5,000 per year for each of five years. So, when Commerce contends that it considered the automobile purchase through its depreciation expense, the example demonstrates how Commerce *undervalued* long-term capital assets. Commerce valued the automobile for interest expense allocation purposes at \$5,000 instead of \$25,000, even though it cannot be disputed that the amount that had to be financed – the "cash need" – is \$25,000.

134. In the corporate context, distortions arise from considering only depreciation expense because different assets used by different divisions have different useful life periods. For example, a company may purchase a \$25,000 five-year asset for one product division, and a \$50,000 ten-year asset for a different product division. Both assets have the same annual depreciation expense of \$5,000, but the \$50,000 asset requires double the cash outlay and thus should bear double the financial expense. The COGS methodology, however, assigns the two divisions the same financial expense for these two assets. This is how the COGS methodology distorts the allocation of interest expense between divisions with respect to capital assets.

135. The question thus is not whether Commerce considered the depreciation expense associated with long-term capital assets in allocating interest expenses. Canada acknowledges that it did. The question is why it considered *only* the depreciation expense, and not the full value of all depreciable assets. Just like an individual must finance the full value of an automobile purchase, so too must a company finance the full value of all its depreciable long-term assets. They cannot pay, and cannot just finance, the depreciation expense.

136. The second problem with Commerce's approach of valuing capital assets for interest allocation purposes only by the depreciation expense is that not all capital assets are depreciable. Commerce's method ignores completely all capital assets that are not depreciated, including land and goodwill. Abitibi has purchased land for its various plants, and has goodwill assets that it acquired for over a billion dollars. The purchase of these assets had to be financed. Yet because these assets are not depreciated, they do not affect COGS at all. These significant assets are not considered at all by Commerce in allocating interest expenses.

137. Now consider the other current expenses included in COGS, like the ongoing labour and materials costs of felling logs and sawing them into lumber. Unlike the capital assets like automobiles and sawmills that Abitibi will use for many years, Abitibi will sell the lumber soon after it is produced and then get paid. Thus, unlike capital assets which need to be financed for the full year and longer, current production expenses *do not need to be financed for the full one-year period* Commerce considered. They only need to be financed until payment is received. Thus, the "cash needs" or capital needed to finance current expense is an amount much *less* than the annual total of those expenses. For example, if on average it takes Abitibi 36.5 days to harvest logs, produce lumber, and receive payment, its inventory will turnover on average 10 times per year. This means that to finance \$10,000 in annual current expenses, Abitibi's "cash need" will be only one-tenth of its annual expenses, or \$1,000. The same \$1,000 in cash will finance ten separate cycles of production and sales within that one year.

138. In sum, while Commerce contends that money is fungible, and that interest expense must be allocated equally among all expenses and capital assets in proportion to all "cash needs" of the company, its COGS allocation methodology does not do so in a case such as Abitibi's where its long-term capital assets are far greater than its current assets needed to finance current production activities. (These include, for example, cash, raw materials inventory, finished goods inventory, and accounts receivable.)<sup>135</sup> As demonstrated, certain capital assets are not considered at all, whereas those capital assets that are considered are grossly under-weighted, as Commerce does not take into account the "cash need" to acquire the asset. Correspondingly, Commerce grossly over-weighted current expenses in its allocation, since the "cash needed" to finance current expenses over one year is not the total of such expenses, but rather the total divided by the inventory turnover time.

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<sup>135</sup> As Canada noted in its First Oral Statement at paragraph 83, over 85 per cent of Abitibi's assets are long-term assets, with less than 15 per cent comprising current assets. Also Abitibi Case Brief (12 February 2002) at 54 (Exhibit CDA-81 – Contains Business Confidential Information); Abitibi Section A Questionnaire Response (22 June 2001), Annex 12, at 235, 249, 251 and 252 (Exhibit CDA-82).

**48. It is stated in para. 201 of Canada's *First Written Submission* that:**

**"DOC expressly conceded that it did not consider any of the evidence presented by Abitibi or otherwise developed in the case."**

**Could Canada please direct the Panel to the basis for this statement, that is, where in the record can the Panel find the document (indicate page, paragraph and sentence) in which DOC made the above-quoted finding? If this document has not been included in the list of exhibits submitted by the Parties so far, could Canada please submit a copy of the document.**

139. Canada's argument was tied to the next sentence in paragraph 201 of its First Submission: "COMMERCE stated that its goal was to use a methodology that was consistent and predictable." This statement by Commerce is found in the IDM at Comment 15, page 77, in Exhibit CDA-2. In the same paragraph, Commerce also referred to its COGS allocation methodology as "its established practice". A methodology that is an "established practice" and that is "consistent and predictable" is one that is always followed, and is not one that is selected based on the particular factual circumstances of an individual case. Nor does Commerce ever reference any consideration of Abitibi's evidence in its findings or adequately explain its reasons for rejecting that evidence.

140. Over at least the past fifteen years, Commerce has used its COGS methodology for allocating financial expenses in every single investigation and administrative review, with one lone exception. In *DRAMS from Korea*,<sup>136</sup> Commerce departed from its cost of sales approach and allocated financial expenses to different product divisions based on assets – the methodology advocated by Abitibi. Commerce expressly noted that a disproportionate amount of the respondent's fixed assets related to the production of subject merchandise, therefore, "allocation of interest expense based on cost of sales would not appropriately recognize the expense related to the capital investment necessary for semiconductors (*i.e.*, subject merchandise) compared to the other lines of business."<sup>137</sup> This is the same argument Abitibi is making here. Commerce's first reviewing court, the Court of International Trade, upheld the reasonableness of this methodology in the circumstances of that case.<sup>138</sup> The result in that case was to allocate *more* financial expense to the product under consideration than would be the case using a COGS methodology.

141. Since the 1993 decision in *DRAMS from Korea*, Commerce has not once departed from its COGS methodology, including in later administrative reviews of *DRAMS from Korea*. In case after case, it has indicated that a COGS allocation methodology is its "standard methodology" or "reflects its consistent practice," from which it will not depart.

**49. Please comment on the statement contained in para. 184 of the US *First Written Submission*:**

**"[i]n 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." (footnote excluded)**

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<sup>136</sup> Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15,467, 15,467 (Dep't Commerce 23 March 1993) (Exhibit CDA-145).

<sup>137</sup> *Ibid.* at 15,472

<sup>138</sup> See *Micron Technology, Inc. v. United States*, 893 F.Supp. 21, at 9 (Ct. Int'l Trade 1995) (Exhibit CDA-146) ("the court concludes that Commerce provided a reasoned analysis for rejecting its [cost of sale] methodology").

142. The US reference to the findings of the panel does not address any of the claims raised by Canada. The United States uses that case in support of its position that an authority has substantial discretion in calculating general costs. The case in fact stands for nothing more than the fact that an investigating authority's discretion is bound by the language of the *Anti-Dumping Agreement*.

**50. Please comment on the statement contained in para. 185 of the US *First Written Submission*:**

**"[t]his 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."**

143. This question is the same as Question 38. In respect of Canada's claim relating to Abitibi, Canada takes the position that Commerce's use of its COGS methodology to allocate Abitibi's financial expense fell outside of the parameters set out in Articles 2.2.1.1 and 2.2.2. While, as stated, those provisions do not require "particular methodologies" they do expressly provide specific requirements. One such requirement is that an authority "shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer." Commerce did not consider Abitibi's evidence in determining the allocation methodology. It made no factual findings specific to Abitibi, but instead resorted to the standard methodology it always applies. The COGS methodology did not result in an amount of interest expense for lumber that reasonably reflects interest expenses associated with the production and sale of softwood lumber. And Commerce impermissibly relied on an overall allocation when the company presented actual data regarding the assets and thus capital required for each of its business segments.

**51. Please comment on the statements contained in footnote 207 to the US *First Written Submission*.**

144. Canada's claim under Article 2.4 rests on the findings of the Appellate Body in *EC – Bed Linen*. The Appellate Body plainly stated:

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. *This is a general obligation that, in our view, informs all of Article 2, but applies, in particular to Article 2.4.2 . . .*<sup>139</sup> (emphasis added)

145. Based on this "general obligation", Canada therefore argues that where the United States, in constructing normal value, establishes an unreasonable amount for G&A or an amount for costs of production that do not reasonably reflect costs for producing and selling the product under investigation, this then results in an improper calculation of normal value which in turn results in improper comparison between that normal value and export price for purposes of Article 2.4.

**52. Please comment on the statements contained in paras. 192-193 of the US *First Written Submission*.**

146. As explained in Question 47 above, Abitibi's methodology equally takes into consideration its actual capital requirements both for current production activities and for the acquisition of *all assets*, not just fixed assets (*i.e.*, land and buildings). Commerce's methodology did not since it ignored completely non-depreciable assets, understated the capital required for depreciable assets (by considering only the depreciation expense instead of the full cost), and overstated the capital required for current production activities (by failing to consider that production is sold and thus is financed only for a short period of time).

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<sup>139</sup> EC – Bed Linen, at 59.

147. Canada fully agrees that money is fungible, and thus a proper allocation of financial expense must accurately consider all financing needs including all asset purchases as well as the amount of working capital (*i.e.*, current cash needs) needed to fund ongoing production operations. The problem is that Commerce's methodology fails this standard.

### G.3 Calculation of G&A Expenses of Tembec

#### To Canada:

**53. Please comment on the statements contained in paras. 197 and footnote 230 to the US First Written Submission:**

**"Canada argues that 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.**

**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."**

148. These statements are untrue and misconstrue the facts with regard to the reliability of Tembec's data. In fact, the Forest Products Group's data were treated by Commerce as reliable for all purposes, except for G&A.

149. First, as Canada has stated in its First Oral Statement, paragraphs 90-91, the Forest Products Group's data, which Commerce rejected, *were* maintained in accordance with GAAP. Tembec's 2000 Annual Report, at page 44 at the bottom of the page, states clearly that "[t]he accounting policies used in [the five business divisions] are the same as those described in the summary of significant accounting policies."<sup>140</sup> As well, the Forest Products Group's profit and loss statement, from which the G&A amount was taken, was maintained in accordance with GAAP. At verification, Commerce traced the profit and loss statement directly to Tembec's audited financial statements.<sup>141</sup> During the investigation, Commerce never questioned whether these data were in accordance with GAAP, nor did it put such questions to Tembec.

150. Second, the books and records of Tembec's Forest Products Group are part of the books and records that Tembec's outside auditors reviewed in order to certify that the consolidated financial statements are in accordance with GAAP. It is impossible to audit the consolidated financial statements of a company without auditing the underlying books and records that feed into those consolidated financial statements.

151. Third, the company-wide G&A factor that Commerce used in its final determination was not derived exclusively from the "audited" consolidated income statement of Tembec Inc. The data from the Tembec Inc. income statement were modified to remove packing expenses. The data on packing

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<sup>140</sup> Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report) at 44 (Exhibit CDA-94). *See also* Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report), at 33-35 (Exhibit CDA-148).

<sup>141</sup> *See* Tembec Cost Verification Exhibit 20 at 1 and 2 (Exhibit CDA-95 – Contains Business Confidential Information) and Tembec Cost Verification Exhibit 10, at 1 (Exhibit CDA-96 – Contains Business Confidential Information).

expenses had to be compiled by adding up the packing expense information reported in the divisional accounting records for each of Tembec's divisions.<sup>142</sup>

152. Fourth, the evidence indicated that Commerce having connected the G&A amount to the audited financial statements is the Cost Verification Report Exhibit 20, the second page of which is a worksheet tying the Forest Products Group G&A factor to the financial statements in the Annual Report.<sup>143</sup> The rest of the exhibit shows that Commerce also used the Forest Products Group statements to verify the company-wide G&A and demonstrates the linkage between the Forest Products Group Statements to the audited company-wide financial statements. When Commerce makes a document a verification report exhibit, this indicates that Commerce has accepted the content of that document.

153. Another example of the linkage is Cost Verification Report Exhibit 10,<sup>144</sup> which demonstrates that the Forest Products Group statements from which the Forest Product Group G&A factor was derived constituted the key documents through which all of the cost and sales data were linked to the audited financial statements. Commerce at verification tied the cost and sales databases subsequently used in its final determination through the Forest Products Group's profit and loss statement<sup>145</sup> to the accounting record showing the consolidation of all of the divisional P&Ls,<sup>146</sup> which then tied into the Consolidated Statement of Operations in Tembec's Annual Report.<sup>147</sup>

154. For example, Commerce traced the Forest Products Group's cost of sales for fiscal year 2000 of \$[[ ]]<sup>148</sup> to the same number for the Forest Products Group in the consolidation document. It then noted that sum total of the cost of sales figures for all of the divisions<sup>149</sup> equals [[ ]], which in turn equals the cost of sales figure reported in the Consolidated Statement of Operations in Tembec's Annual Report.<sup>150</sup>

54. **Please comment on the statements contained in para. 201 of the US *First Written Submission*:**

**"Canada states that '[t]he G&A factor derived from the Forest Products Group includes a properly allocated portion of corporate G&A. . . .' [footnote exclude d] Implicit in this statement is an acknowledgement 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."**

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<sup>142</sup> See Tembec Cost Verification Report Exhibit 20 at 1 (Exhibit CDA-95 – Contains Business Confidential Information)

<sup>143</sup> See Tembec Cost Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc., Exhibit 20 (29 January 2002), at 2. (Exhibit CDA-95)

<sup>144</sup> Tembec Cost Verification Exhibit 10, at 1 (Exhibit CDA-96 – Contains Business Confidential Information).

<sup>145</sup> Tembec Cost Verification Exhibit 10, at 3-7 (Exhibit CDA-149 – Contains Business Confidential Information).

<sup>146</sup> Tembec Cost Verification Exhibit 10, at 2 (Exhibit CDA-149 – Contains Business Confidential Information).

<sup>147</sup> Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report), at 31, which was on the record below as Cost Verification Report Exhibit 5) (Exhibit CDA-148).

<sup>148</sup> Tembec Cost Verification Exhibit 10, at 3 (Exhibit CDA-149 – Contains Business Confidential Information).

<sup>149</sup> Tembec Cost Verification Exhibit 10, at 2 (Exhibit CDA-149 – Contains Business Confidential Information).

<sup>150</sup> Tembec Section A Questionnaire Response (22 June 2001), Exhibit A-15 (Tembec Inc. 2000 Annual Report), at 31 (Exhibit CDA-148).

155. The Forest Products Group data did not have to be “supplemented” to establish a G&A amount for softwood lumber because Tembec recorded G&A expenses for its headquarters operations on each of its products group’s accounting records in the ordinary course of business. Commerce verified that the sum total of the G&A expenses recorded on the books of Tembec’s products groups equalled the G&A expense recorded on Tembec’s audited financial statements for the company as a whole, thus specifically verifying what it now attempts to deny: that the Forest Products Group G&A included distributed company-wide G&A.<sup>151</sup>

**55. Could Canada please indicate whether there is information on the record on the status of the financial statement of the Forest Products Group? (for example, whether it was audited or not, whether it complied with Canadian GAAP, whether the respondent commented on the status of that statement, etc.) If so, please provide copies of the relevant documents.**

156. Please see the response to Question 53.

#### **G.4 Calculation of G&A (Legal Costs) of Weyerhaeuser**

**To Canada:**

**58. Could Canada please direct the Panel to where in the record it can find Weyerhaeuser's arguments on the treatment of certain legal settlement claims incurred by Weyerhaeuser US. Please include references to documents on the record, identifying with precision where on the document Weyerhaeuser's argument are to be found. Also provide a concise summary of Weyerhaeuser's arguments.**

157. The Record evidence is as follows:

- In response to the Department’s initial and supplemental questionnaires to the respondents sent July – November 2001, Weyerhaeuser reported its costs of producing softwood lumber, including G&A expenses. This reported information did not include the hardboard siding settlement expenses because they were not treated as a G&A expense by Weyerhaeuser on its books and did not pertain to the production of the like product. Commerce used this reported cost information in its Preliminary Determination. The Preliminary Determination makes no mention of the hardboard siding expense.
- Commerce’s Cost Verification Report<sup>152</sup> Commerce did not identify the hardboard siding expense as a potential issue until it released its cost verification report in January 2002. The verification report was not released until after the record of the investigation was closed. Even then, Commerce did not adequately explain why it might reclassify the hardboard siding expense, stating simply that: “[Weyerhaeuser] included in the cost of sales associated with the Product’s ‘Costs and Expenses’, [[ ]] associated with product claims, which might be more appropriately included as G&A, not cost of sales.”

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<sup>151</sup> Tembec Cost Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc., Exhibit 20 (29 January 2002) (third page – not numbered) (Exhibit CDA-95 – Contains Business Confidential Information).

<sup>152</sup> DOC Verification Report on the Cost of Product and Constructed Value Data Submitted by Weyerhaeuser Company Ltd. (22 January 2002), at 4, para. 3, subpara. 2 (Exhibit CDA-97 – Contains Business Confidential Information).

- Weyerhaeuser's Case Brief to Commerce following the Verification Report.<sup>153</sup> Weyerhaeuser filed several briefs after the verification report was issued. Weyerhaeuser stated that:

[the hardboard siding expense] is not general in nature and it does not relate to the operations of the company as a whole. As disclosed in note 14 of Weyerhaeuser's consolidated financial statement, this cost relates to a proposed class action settlement of the hardboard siding claims [footnote omitted]. The settlement class consists of all persons who own or owned structures in the United States on which the company's hardboard siding has been installed. Thus, the facts on the record clearly show that this cost is associated with a specific product line of non-subject merchandise and that the expense does not relate to the operations of the company as a whole. Thus, it should not be included as a component of corporate G&A.

- Final Determination:<sup>154</sup> Commerce rejected this argument in its Final Determination, stating its rationale for reclassifying the expense for the first time:

while the costs relate to non-subject product . . . the Department typically allocates business charges of this nature over all products because they do not relate to production activity, but to the company as a whole.' Stated another way, Commerce states that if an expense does not relate to production activity, it must relate to the 'company as a whole.

- In Weyerhaeuser's Ministerial Error Allegation Letter,<sup>155</sup> Weyerhaeuser stated that Commerce's position was in error:

In revising Weyerhaeuser's G&A ratio, the Department included claims on hardboard siding . . . as a component of parent G&A. The Department has made a ministerial error by including this amount. The Department does not typically include this type of expense as a component of COP because it has no relationship to the production or sale of the subject merchandise. In this instance, Weyerhaeuser agreed to settle a suit by homeowners who claim that the company sold them faulty hardboard siding. . . Clearly this expense does not relate to the production and sale of Canadian softwood lumber. This expense does not relate to the administrative activities of the company or corporation as a whole and is not specific to the manufacture, design or sale of the product under investigation.

158. Weyerhaeuser's argument before this Panel can be summarized as follows. Commerce improperly calculated Weyerhaeuser's G&A amount for its production of softwood lumber.

- The Facts: As stated previously in the response to Question 43, the producer and exporter of the merchandise subject to Commerce's investigation is Weyerhaeuser Canada Limited. Weyerhaeuser Canada is a subsidiary of a US company, Weyerhaeuser US. In calculating G&A expenses for Weyerhaeuser Canada's production and sale of softwood lumber, Commerce will attribute a part of the G&A of the parent company to the subsidiary. At issue is one expense that Commerce

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<sup>153</sup> Weyerhaeuser Case Brief (13 February 2002) at 63 and 64 (Section c.) (Exhibit CDA-98 – Contains Business Confidential Information).

<sup>154</sup> IDM, at 134, Comment 48b (Exhibit CDA-2).

<sup>155</sup> Weyerhaeuser Comments on Ministerial Errors (8 April 2002), at 67 (Exhibit-100 – Contains Business Confidential Information).

classified as parent-company G&A (contrary to Weyerhaeuser US's own books and records) and then attributing that expense to Weyerhaeuser Canada's production and sale of softwood lumber. More particularly, Commerce improperly included in the parent company G&A a \$130 million charge for litigation settlement expenses related to hardboard siding (which is unrelated to softwood lumber), a product produced by the parent in the United States in years 1981 – 1999 (before the POI).

159. Weyerhaeuser makes two specific claims:

- Commerce acted contrary to Article 2.2.2 by including cost data that did not pertain to the production and sale of the product under investigation. Weyerhaeuser argued before Commerce that the hardboard siding expense was not general in nature and therefore not attributable to the company as a whole.<sup>156</sup> It was a cost that did not pertain to the production and sale of softwood lumber in Canada for Weyerhaeuser Canada and therefore incorrectly increased the G&A cost attributable to lumber. Commerce's conclusion to the contrary was not a proper establishment of the facts, nor an evaluation of the facts that was unbiased and objective.
- Commerce violated Article 2.2.1.1 by improperly ignoring Weyerhaeuser's books and record and establishing G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber. Weyerhaeuser did not treat this settlement fund as a general expense on its records as Commerce indicated. It is a separate line item in its corporate financial statement.<sup>157</sup> Nor should this expense be treated as a general legal expense. Weyerhaeuser US characterized its general legal expenses as G&A in its financial statement.<sup>158</sup> Rather, the company recorded the hardboard siding expense as a separate line item – not in G&A – and given its clear association with the production and sale of non-like product, should not have been included in Commerce's G&A calculation in this case. By including this cost, Commerce calculated a cost that did not "reasonably reflect the costs associated with the production and sale" of softwood lumber.

59. Please comment on the following statement contained in para. 207 of the US *First Written Submission*:

**"[DOC] 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. In addition, Weyerhaeuser had treated it as a general cost on its audited financial statement." (footnotes omitted)**

160. These two sentences express two separate and incorrect points. Commerce makes the first point in order to support its argument that any expense that does not relate specifically to production is "general" and is therefore properly characterized as a general expense attributable to the production and sale of the like product. However, this is not Commerce's traditional practice and it violates Article 2.2.2 of the *Anti-Dumping Agreement*. Contrary to Commerce's statement, Commerce "normally computes . . . an amount of G&A from related companies which pertains to the product

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<sup>156</sup> Weyerhaeuser Case Brief (13 February 2002), at 63-64 (Exhibit CDA-98 – Contains Business Confidential Information).

<sup>157</sup> Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).

<sup>158</sup> Weyerhaeuser Cost Verification Exhibit 26, at 26 (Exhibit CDA-121 – Contains Business Confidential Information).

under investigation. G&A . . . expense items are not considered fungible in nature. Thus . . . expenses realized by a related company do[] not necessarily affect the general activity of the respondent.<sup>159</sup> This policy facially comports with Article 2.2.2, which requires “the amounts for administrative, selling and general costs and for profits 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 this instance, Commerce failed to establish any relationship between the hardboard expense incurred and the production of Canadian softwood lumber. On the contrary, the expense on its face relates to the production and sale of non-subject merchandise.

161. Commerce did follow its policy to only include related cost data with respect to Weyerhaeuser’s other non-production related expenses. As noted, Weyerhaeuser US financial statement reports about \$1 billion in SG&A expenses.<sup>160</sup> Yet, according to Attachment 2 of Commerce’s 21 March 2002 memo<sup>161</sup>, only [[ ]] of Weyerhaeuser US’s SG&A was included in the parent company G&A calculation. In arriving at a figure of [[ ]] from \$1 billion, Commerce excluded numerous expenses because they did not relate to the production and sale of Canadian softwood lumber. Inexplicably, Commerce failed to apply the same rule to the hardboard siding expense.

162. Commerce makes the second point to support its position based on the “fact” that “Weyerhaeuser had treated [the hardboard siding settlement expense] as a general cost on its audited financial statement.”<sup>162</sup> That is not true. Weyerhaeuser’s consolidated financial statement states that Weyerhaeuser US spent \$1 billion in SG&A expenses in 2000. It also identifies a separate line item called “charge for settlement of hardboard siding claims,” which reported \$130 million in charges for 2000.<sup>163</sup> Had Weyerhaeuser considered the hardboard siding claim expense as a general expense, it presumably would have included that amount as part of the 2000 GS&A expense. Therefore, Commerce’s claim that the Company treated this charge as GS&A is false.

**60. Please comment on the following statement contained in para. 208 of the US *First Written Submission*:**

**"[DOC]'s decision on this issue is supported by Weyerhaeuser Company's own books and records, 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." (footnotes omitted)**

163. Again, these sentences address two separate points. The first statement is simply false. As noted in the response to Question 58, Weyerhaeuser’s consolidated financial statement provides Weyerhaeuser US’s SG&A expenses in 2000 and cites a separate line item called “charge for settlement of hardboard siding claims”.<sup>164</sup> Therefore, Commerce’s claim that the Company treated this charge as SG&A is incorrect.

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<sup>159</sup> See *Brass Sheet and Strip from Canada*, 61 Fed. Reg. 46,618, 46,619 (Dep’t. Commerce) (Final Antidumping Administrative Review) (Exhibit CDA-104). (emphasis added)

<sup>160</sup> Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).

<sup>161</sup> DOC Memorandum on Weyerhaeuser’s Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (21 March 2002) at Attachment 2 (Calculation at the Top) (Exhibit CDA-105 – Contains Business Confidential Information).

<sup>162</sup> First Written Submission of the United States, at para. 207.

<sup>163</sup> Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53. (Exhibit CDA-101).

<sup>164</sup> Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).

164. The second statement was not made in the context of the hardboard siding claim that is at issue in this case. Rather, the statement cited to by the United States relates to pending and threatened environmental litigation.<sup>165</sup> Further, this statement does not relate to whether a particular expense should be classified as a general or administrative expense consistent with Article 2.2.2. Article 2.2.2 requires that any expense to be included as a selling, general or administrative expense must relate to the production and sale of the like product. The statement neither attributes the expenses to any particular portion of Weyerhaeuser's business nor the business as a whole. It simply acknowledges that the company incurred certain costs.

## G.5 Calculation By-Product Revenue Offset – West Fraser

To Canada:

64. Please comment on the statement contained in para. 223 of the US *First Written Submission*:

**“Canada claims Commerce should have relied upon sales by other respondents to non-affiliates in B.C. 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.” (footnote omitted)**

165. Contrary to this US assertion, Canada is not asking the panel to find that Commerce should have preferred one source of evidence on BC market prices (*i.e.*, other respondents' woodchip sales to unaffiliated parties) over another source of evidence on BC market price (*i.e.*, West Fraser's tiny quantity of woodchip sales to unaffiliated parties). Rather, Canada argues that Commerce was required to consider *all* record evidence relevant to the issue of whether West Fraser's affiliated woodchip sales were made at inflated, non-market prices, *including* evidence on the prices charged by other respondents in British Columbia for their sales to unaffiliated purchasers. That argument is fully consistent with the finding of the panel in *United States – Hot Rolled Steel* that, in determining whether an unbiased and objective investigating authority could have reached the conclusions at issue, a panel must “consider whether all the evidence is considered, including facts which might detract from the decision actually reached by the investigating authority.”<sup>166</sup>

166. Moreover, the United States is incorrect in implicitly suggesting that Article 2.2.1.1 sets out an “evidentiary preference” that instructed it to use West Fraser's own sales data to unaffiliated parties as its exclusive evidence of British Columbia market prices, irrespective of other evidence of market prices. Article 2.2.1.1 makes no distinction between affiliated and unaffiliated sales data. Article 2.2.1.1 requires that the cost calculation reasonably reflect the costs associated with the production and sale of the product at issue. With respect to by-product revenues, this requires that the revenues recorded in an exporter's books and records must reasonably reflect the market values of the by-products so as not to overstate or understate the costs associated with the main product. If the revenues recorded in the books and records meet this requirement, the authority should use such recorded revenues. In this case, the “evidentiary preference” expressed in Article 2.2.1.1 requires, in fact, the use of West Fraser's actual recorded figures for its chip sales to affiliated parties.

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<sup>165</sup> Weyerhaeuser Section A Questionnaire Response (25 June 2002), Exhibit A-15 (Audited Financials), at 74 which addresses Weyerhaeuser's separate litigation expenses (Exhibit CDA-101).

<sup>166</sup> United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Panel, WT/DS184/R, adopted 23 August 2001, at para 7.26.

**65. In para. 224 of its *First Written Submission*, the US states:**

"[c]ontrary to the arguments made by Canada, [footnote omitted] 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 other mill. [footnote omitted] 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."

**Could Canada confirm whether West Fraser did raise this claim to DOC, and if so, could Canada please direct the Panel where in the record this evidence can be found?**

167. The record shows that West Fraser did expressly point out to Commerce that woodchip sales made from its McBride sawmill (which constituted over 50 per cent of West Fraser's total unaffiliated sales in British Columbia) were not reflective of average market prices for the POI as a whole. This is reflected in Commerce's cost verification report for West Fraser which notes:

Company officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April and May. They explained that the sales value of the chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price.<sup>167</sup>

168. West Fraser did not make specific arguments in its briefs before Commerce regarding chip sales made by McBride or the tiny quantity of its sales to unaffiliated parties in British Columbia because there was no reason to do so at that time.<sup>168</sup>

**66. Please refer to para. 225 of the US *First Written Submission*. Please comment.**

169. In its first submission, Canada observed that Commerce applied inconsistent benchmarks to Canfor and West Fraser in determining whether their respective chip sales to unaffiliated parties were made at market prices. In paragraph 225, the United States defends this action by arguing that "[unaffiliated] 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."<sup>169</sup> In contrast, the United States notes that the best evidence for Canfor was other companies' arm's length sales because Canfor did not have any BC chip sales to unaffiliated parties.<sup>170</sup>

170. The United States creates a false, *post hoc* distinction. Commerce itself did not find that West Fraser's chip sales to unaffiliated parties provided a better benchmark because they reflect West Fraser's "own product mix". Like Canfor, West Fraser sold woodchips from its sawmills located throughout British Columbia, and Commerce identified no evidence that West Fraser's woodchips

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<sup>167</sup> DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by West Fraser Mills Ltd. (4 February 2002), at F.3, second paragraph (Exhibit CDA-110 – Contains Business Confidential Information).

<sup>168</sup> The limited volume of unaffiliated sales (1666 ODTs or less than the amount a large pulp mill would use in a single day) was self-evident. The onus was on Commerce to evaluate the usability of the data before it. Moreover, in its preliminary determination Commerce examined West Fraser's woodchip sales on a country-wide basis. For the final determination, West Fraser argued that Commerce should base its determination on the information regarding sales on a *mill-specific* "regional" basis. Commerce provided West Fraser with no indication that it was considering adopting the alternative, *province-specific* methodology in its Final Determination. Certainly, West Fraser was not required to guess that Commerce might adopt such a methodology, and then make arguments that would only be relevant in that eventuality.

<sup>169</sup> US First Written Submission, at para. 225.

<sup>170</sup> *Ibid.*, at para. 226.

somehow differed from those of Canfor or any other producer. Indeed, the record shows that [[ ]]<sup>171</sup> Nor, for that matter, is there any evidence that the unaffiliated sales made by West Fraser's McBride and Pacific Inland Resources mills were somehow *more* reflective of the woodchips produced and sold by other West Fraser mills in other parts of British Columbia, as the United States alleges. Rather, Commerce's decision to treat West Fraser differently than Canfor was based solely on its blind adherence to its methodology of exclusively using West Fraser's own unaffiliated sales as its benchmark for market price – a methodology that, in this case, is inconsistent with an unbiased and objective examination of the record evidence *as a whole*.

171. Indeed, the contrast with Canfor underscores Commerce's failure to treat West Fraser in an unbiased and objective manner. Both West Fraser and Canfor had sawmills located throughout the province of British Columbia. Both West Fraser and Canfor sold the overwhelming majority (100 per cent in the case of Canfor, 99.7 per cent for West Fraser) of the woodchips produced at their BC mills to affiliated pulp and paper mills.<sup>172</sup> And for both companies the relevant enquiry Commerce was required to perform was the same: whether their BC sales of woodchips to affiliated parties were made at market prices. Notwithstanding these similarities, Commerce applied to West Fraser a significantly lower and less advantageous benchmark for what constituted "market prices" in British Columbia, based solely on the fact that West Fraser sold 1,666 tons of woodchips – approximately the amount used by a large pulp mill in a single day – to unaffiliated parties in British Columbia. Specifically, whereas Commerce used a benchmark of approximately [[ ]] as the market price in reviewing Canfor's affiliated woodchip sales in British Columbia, Commerce applied a benchmark of just [[ ]] as the market price in reviewing West Fraser's affiliated woodchip sales in British Columbia.<sup>173</sup> Canada submits that an unbiased and objective finder of fact could not conclude that this seemingly insignificant distinction justifies Commerce's fundamentally dissimilar treatment of West Fraser. Commerce's finding reduced West Fraser's by-product offset by [[ ]] (CDA-108 Attachment 1 ("Difference")).

172. Finally, in footnotes 267 and 268 to paragraph 225 of its *First Written Submission*, the United States discusses West Fraser's and Canfor's woodchip sales in Alberta, as well as British Columbia, in asserting that "Commerce carefully distinguished the market situation" of these two companies. However, whether West Fraser's sales operations in Alberta were, or were not, similar to those of Canfor is irrelevant. The issue Canada has challenged is Commerce's dissimilar treatment of West Fraser's woodchip sales from mills *in British Columbia*, not Alberta.

**67. Please refer to paras. 226-227 and note 270 to the US *First Written Submission*. Please comment.**

173. In its First Submission, Canada showed that Commerce revalued (on the basis of the unaffiliated sales price) certain chip sales made by West Fraser to an affiliated customer, Quesnel River Pulp ("QRP"), even though it specifically verified that those sales had been made at market prices, based on a comparison with the prices QRP paid to an unaffiliated chip supplier. In paragraph 226, the United States characterizes Canada's argument as asking the panel to find that data from QRP was "more relevant," and it asserts that such data is not "a better indication of the market value of West Fraser's wood chips than West Fraser's own unaffiliated wood chip sales used by

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<sup>171</sup> See West Fraser Cost Verification Exhibit C5, WF-Cost-007520-21 showing West Fraser's woodchip swaps with other respondents, including Canfor) (Exhibit CDA-150 – Contains Business Confidential Information).

<sup>172</sup> See DOC Memorandum on Canfor's Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (21 March 2002), Attachment 1 (Exhibit CDA-109 – Contains Business Confidential Information).

<sup>173</sup> *Ibid.* Note that these average prices are calculated from the data in Attachment 1 in Exhibit CDA – 109: for West Fraser, [[ ]] and for Canfor, using total sales [[ ]]. Contains Business Confidential Information.

Commerce.”<sup>174</sup> In a footnote, the United States also states that such “additional information” was “superfluous” because “West Fraser’s BC chip sales to affiliated parties had already failed Commerce’s primary test.”<sup>175</sup>

174. The United States’ argument misses the point. Canada did not claim that QRP data were “more relevant.” Rather, Canada argues that Commerce unreasonably disregarded chip sales made by West Fraser’s large sawmill in Quesnel, BC (West Fraser Mills) to QRP, even though Commerce itself specifically recognized that QRP paid West Fraser market prices for those sales.<sup>176</sup> The US argument does not address this basic inconsistency. Nor is it correct to say that such evidence is “superfluous,” even with respect to affiliated sales made by other West Fraser sawmills in British Columbia. At the very least, this evidence – which the United States does not deny weighs against Commerce’s findings – must be considered in determining whether Commerce’s finding was based on an unbiased and objective evaluation of the record evidence *as a whole*.

175. Finally, the United States claims that, even if such information is relevant, West Fraser failed to submit “the entirety of its affiliated pulp mill purchases on the record.”<sup>177</sup> During verification West Fraser provided Commerce with information on chip purchases by QRP to illustrate that if West Fraser’s highest priced sales to affiliated parties were not made at inflated prices, then its lower priced sales similarly were not inflated. Had Commerce considered this information inadequate, it was Commerce’s responsibility to notify West Fraser of this fact. Commerce, however, did just the opposite: it requested samples of affiliated and unaffiliated sales made by West Fraser’s Blue Ridge (Alberta) and Pacific Inland (BC) mills, verified that information, and then represented that no further information was necessary on this point. Indeed, Commerce ended cost verification one day earlier than scheduled because it required no further information from West Fraser, and its verification report does not indicate that the information it received with respect to the wood chip issue was in any way inadequate. It was not until Commerce issued its final determination that West Fraser became aware that the information it provided was alleged to be “selective” and “inadequate”.

176. In light of these facts, the United States’ attempt in paragraph 229 to make it appear that West Fraser failed to provide Commerce with all the information it required should be rejected.

## G.6 Calculation of By-Product Revenues – Tembec

### To Canada:

69. It is stated in para. 258 of Canada's *First Written Submission* that:

**"DOC relied on internal transfer prices to calculate the by-product revenue offset for Tembec, notwithstanding ample evidence on the record that established that these internal prices are set significantly below market prices."**

**Please state in detail which evidence was on the record showing that internal prices were set significantly below market prices. Refer to specific portions of documents on the record where that evidence was contained.**

177. Contrary to US assertions, Tembec did provide Commerce with record evidence that Tembec’s internal woodchip prices were set only for internal accounting purposes. Also, contrary to

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<sup>174</sup> US First Written Submission, at para. 226.

<sup>175</sup> *Ibid.*, at para. 227 n. 274.

<sup>176</sup> IDM, Comment 11, at 61 (CDA-2); DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by West Fraser Mills Ltd. (4 February 2002), at 23-24 (Exhibit CDA-110 – Contains Business Confidential Information).

<sup>177</sup> US First Written Submission, at para. 227 & n.274.

US assertions, Commerce reviewed the data for each of Tembec's unaffiliated party sales in British Columbia (which are the basis of this claim), and verified that those customers paid [[ ]] more than the internal transfer prices.<sup>178</sup> The evidence is as follows:

- The Cost Verification Report at page 25<sup>179</sup> and Exhibit 14 to that Report displays the huge price differential between market prices for woodchips and Tembec's internal transfer price. Exhibit 14 to the Cost Verification Report<sup>180</sup> in its entirety demonstrates that the internal prices were set well below market prices, but the point is most evident on pages 2 and 9, which summarizes the information in the underlying source documents that constitute the bulk of the exhibit. Page 2 is a copy included in the verification exhibits of a by-product revenue calculation worksheet from Tembec's questionnaire response. The third line of the worksheet reports the total quantity of woodchips that each of Tembec's British Columbia sawmills transferred to affiliated parties. The total for all three mills was [[ ]] BDMT (bone dried metric tons). The sixth line reports the sales value based on the internally set transfer prices (as noted in the handwriting of the Commerce verifier) which for the three mills combined equalled \$[[ ]]. Dividing the sixth line by the third line equals the transfer price of \$[[ ]] per BDMT. The first two lines on page 9 report the total sales value and quantity for Tembec's woodchip sales in British Columbia to unaffiliated parties and the source of that information. The handwriting on this page is that of the Commerce verifier and the letter "I" on these two lines indicates that the verifier traced the amounts reported in these lines to the original invoices. The figure of \$[[ ]] per BDMT reported in the third line is the per unit unaffiliated sales price derived by dividing the first line by the second line.<sup>181</sup>
- This price difference had been explained as arising for internal accounting purposes in Tembec's verified Questionnaire Response, dated 23 July 2001, at D-24 where Tembec stated "[[ ]]"<sup>182</sup>
- In its Second Supplemental Questionnaire Response, dated 16 November 2001 at SD-20 through SD-23 Tembec again explained "[[ ]]"<sup>183</sup>
- Tembec's noted in its case brief before the agency, dated 12 February 2002, that "In the Preliminary Determination, the Department correctly recognized that Tembec's intra-company transfers of chips did not reflect market prices."<sup>184</sup>

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<sup>178</sup> See Tembec Cost Verification Report, at 25 (Exhibit CDA-112 – Contains Business Confidential Information) and DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (29 January 2002) at Exhibit 14, at 8 (Exhibit CDA-114 – Contains Business Confidential Information).

<sup>179</sup> *Ibid.* (Exhibit CDA-112 – Contains Business Confidential Information).

<sup>180</sup> DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc. (29 January 2002), at Exhibit 14 (Exhibit CDA-114 – Contains Business Confidential Information).

<sup>181</sup> *Ibid.*, at 9. (Exhibit CDA-114)

<sup>182</sup> Tembec Section D Questionnaire Response (23 July 2001), at D-24. (Exhibit CDA-151 – Contains Business Confidential Information).

<sup>183</sup> Tembec Second Section D Supplemental Questionnaire Response (15 November 2001), at SD-20 – SD-23. (Exhibit CDA-152 – Contains Business Confidential Information).

<sup>184</sup> Tembec Rebuttal Brief (19 February 2002), at 19. (Exhibit CDA-153 – Contains Business Confidential Information).

**70. Please explain the statement contained in para. 261 of Canada's *First Written Submission* that:**

**"Article 2.2.1.1 of the *Anti-Dumping Agreement* reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets."**

178. Article 2.2.1.1 specifies 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 of the exporting country and *reasonably reflect the costs associated with the production and sale of the product under consideration.*" (emphasis added) There is no dispute that Commerce uses by-product revenues in its cost calculations. Tembec's records are maintained according to GAAP, but by-product revenues on Tembec's books do not reasonably reflect market prices for woodchips because they are internal transfer prices artificially set for accounting purposes. Under Article 2.2.1.1, unless the by-product offset reasonably reflects the market value for the by-products at issue, the calculation of the cost of the main product (in this case, softwood lumber) would be either overstated or understated. Thus, when the market value of by-product sales is not reflected in a company's own books and records, as was the case for Tembec, Article 2.2.1.1 requires an alternative valuation. The use of Tembec's internal transfer prices in calculating lumber costs violates Article 2.2.1.1 because of the requirement that the cost calculation must reasonably reflect the costs associated with the production and sale of the product under consideration.

**71. Please comment on the statements contained in para. 235 of its *First Written Submission*:**

**"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"). [footnote excluded] Canada contends that Tembec's inter-divisional wood chip sales were "set arbitrarily to provide an internal preference." [footnote excluded] However, no evidence in the record before Commerce supports that contention."**

179. Please see Canada's answer to Question 69 above, which references the evidence of record demonstrating that Tembec's inter-divisional woodchip sales were set arbitrarily to provide an internal preference for pulp and paper operations. All the Questionnaire Responses; the Verification Report exhibits; and the Tembec case brief were before Commerce and on the record.

**72. Please comment on the statements contained in paras. 241-242 and footnote 295 to the US *First Written Submission*:**

**"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."<sup>295</sup>**

**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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<sup>295</sup> 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 (21 March 2002), at 2, Exhibit US-58, and is contrary to Commerce’s ultimate conclusion.” (footnote excluded)**

180. First, the US misstates the “question” at issue. As explained, by-products are an unavoidable product from the production of lumber and do not have independent costs (or profits). Rather, the by-product revenue offset must reasonably reflect the market value for the by-products at issue; otherwise the calculation of the cost of the main product (in this case, softwood lumber) would be either overstated or understated.

181. Second, please see Canada’s answers to Questions 69 and 71 above for evidence regarding the verification of Tembec’s internal transfer prices. The record evidence demonstrates that Tembec’s internal transfer prices for woodchips did not reflect market prices, and therefore would not lead to a calculation that reasonably reflects the true costs of producing and selling lumber if used to establish Tembec’s by-product offset. The record evidence also is that Tembec sold woodchips to unaffiliated parties for market prices. The record includes both the internal transfer prices and the market prices. Despite a full verification of precisely this issue, Commerce excluded from its report any narrative on the subject, and now attempts to use that deliberate omission to argue that the record does not contain the evidence. The record, and the Verification Report itself, demonstrate the contrary. The record includes Tembec’s Questionnaire Responses, which expressly, in the narrative, addresses the issue. The Questionnaire Responses were fully verified. The Cost Verification Report, in Exhibit 14, contains the data that show the discrepancy between internal and market prices. And Tembec’s case brief before Commerce, also a record document, shows and explains the differences. Commerce’s willful exclusion of the facts from its narrative in its Verification Report cannot overcome the rest of the record evidence that Commerce is trying so hard to avoid..

**73. Please comment on the statements contained in para. 243 of the US *First Written Submission*:**

**"[i]n 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. 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. Accordingly, Commerce concluded that inter-divisional sales as reflected in Tembec’s books and records reasonably reflected costs of wood chip production."**

182. The [[ ]] difference between internal prices and market prices cannot be attributed to profit as the United States purports. By-products, by definition, have neither profits nor costs. In this case, Commerce made no findings about profits.<sup>185</sup> The Final Determination includes no evidence of any adjustment for profit in relation to the price differential between recorded woodchip sales. This *post hoc* rationale must therefore be rejected. In addition, Commerce’s entire discussion of by-product issues in its final determination is contained in Comment 11 of the Issues and Decision Memorandum.

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<sup>185</sup> See IDM, Comment 11, at 60-61. (Exhibit CDA-2)

Nowhere in that discussion does the word “profit” appear, nor is there any mention of any adjustment for profit, nor any taking account of profit. Nowhere in the calculations for Tembec is there any analysis of profit in connection with by-products. Therefore, this rationale does not justify Commerce’s determination that Tembec’s internal transfer prices did indeed represent market value.

## G.7 Futures Contracts

### To Canada:

#### **75. Explain, with a numerical example, the basis of Canada’s claim argument with respect to the by-product revenue offset.**

183. Canada’s claim is as follows. A by-product is a product that is produced unavoidably through the production of one or more main or principal products. In this case, woodchips are a by-products of the production of softwood lumber. Woodchips are produced by sawmills and sold to pulp mills for making such things as paper. Because woodchips are produced unavoidably, they have no costs and respondents’ records therefore, only reflect revenues and prices at which woodchips were sold.

184. Commerce, in accordance with recognized accounting principles, deducts the revenues that a respondent receives from its sales of a by-product from the costs of producing the main product. Therefore, woodchip by-product revenues will be deducted from respondents’ costs of producing and selling lumber.

185. By way of example, assume that it costs a lumber company \$150 in both direct and indirect costs to produce 1,000 board feet of lumber. Also assume that the production of that 1,000 board feet of lumber also generated small quantities of woodchip by-products with a value of \$10. To calculate that company’s cost of production, Commerce will “offset” (*i.e.*, deduct) the \$10 in revenues received from the sale of those by-products from the \$150 cost of producing the 1,000 board feet of lumber, thus resulting in a cost of production for the lumber of \$140.

186. When dealing with sales of woodchips between affiliated or related parties, Commerce will evaluate whether woodchip revenues and prices recorded on a respondents’ books are accurate and not arbitrarily set at inflated prices to improperly reduce production costs. Commerce makes this determination by comparing a respondents’ affiliated sales prices to its unaffiliated sales prices. If affiliated prices are higher than unaffiliated prices, the affiliated prices are considered inflated and Commerce will re-calculate all affiliated sales transaction revenues at the unaffiliated price.

187. By way of example, for Tembec’s sales from its sawmills in British Columbia, the data was as follows. As stated in Question 69, the transfer price for woodchips to affiliated parties was [[ ]]. The sales price to unaffiliated parties was [[ ]]. This means that in Tembec’s case, its sales prices to affiliated parties were not at market prices because they were *too low*. The United States asserts that this [[ ]] difference in price was attributable to “profit” (something Commerce never found in the investigation) and that Tembec’s affiliated sales were in fact at market value. Woodchips can have no profit since they have no costs. Therefore, the US justification is incorrect. Tembec’s recorded revenues should have been recalculated because they could not be used to calculate Tembec’s costs for producing and selling lumber.

**76. By emphasizing the terms "and any other differences which are also demonstrated to affect price comparability." in para. 271 of its *First Written Submission*, does Canada argue that the requested adjustment should have been granted based on that language in Article 2.4? To what extent did Slocan demonstrate in the course of the investigation that the alleged difference affected comparability? Please provide references to documents on the record (indicate page, paragraph and sentence) where Slocan proved that the alleged difference affected price comparability.**

188. Article 2.4 of the *Anti-Dumping Agreement* provides that “[d]ue 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.” Slocan’s futures hedging activity was a condition of sale unique to the US market that affected prices of all sales in that market. Therefore, the revenues (or losses) earned from that activity constituted a difference between the Canadian and US markets affecting price comparability. Article 2.4 mandates that in such circumstances, an administering authority must make an adjustment. As Commerce itself noted in its final determination, Slocan’s futures contracts were related to its core business of selling lumber. In particular, its futures contracts related directly to its export sales of lumber to the US market.

189. As a practical matter, a respondent in a US anti-dumping investigation is not required to separately establish the effect of price comparability for every potential adjustment. Although Article 2.4 requires the United States to adjust for all differences affecting price comparability, Commerce does not normally make a separate finding regarding price comparability for every adjustment. It is not among the criteria that Commerce uses, so one would not expect to find a discussion of the issue on the record of an investigation. For example, it is universally acknowledged that Commerce should, and does, adjust for the cost of freight. Freight costs are usually very different for home market and US sales, and Commerce corrects for that difference by subtracting freight from the price to the customer to obtain comparable ex-factory prices. At no point, however, does Commerce expressly analyze the extent to which freight differences affect price comparability. Neither does it require respondents to prove anew in every investigation that there is an effect on price. Commerce simply makes the adjustment. Its obvious effect on price is accepted by Commerce without individual, independent demonstration. Note that in this investigation, Commerce never stated that futures contract revenues did not affect price comparability between export and domestic sales. Rather, its rationale for refusing the adjustment was that futures contract revenues were not “sales” contemplated by Article 2.4.

190. That said, there is evidence in the record demonstrating that Slocan’s hedging activity affected one market and not the other, creating a difference in conditions of sale between the two markets. All *ex pit* settlements appeared on Slocan’s database of US sales in the investigation.<sup>186</sup> They were identified as a separate sales channel in the CHANNELU database field. In contrast, there was no *ex pit* settlement channel of sale in the home market database, because Slocan’s hedging activity was in the United States only.<sup>187</sup> Commerce verified that the contents of these fields were accurate, and there is no dispute as to the amount of the revenues earned or the market in which they occurred.<sup>188</sup>

191. By proving the existence and amount of the revenues, and by demonstrating that they occurred in one market only, Slocan provided all of the proof necessary, and all that the United States ever requires in an investigation, to show that a difference has affected price comparability.

**77. The Panel notes the following statement in para. 273 of Canada's *First Written Submission*:**

**"[i]t was DOC that determined that this difference affected the comparability of the two softwood lumber markets."**

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<sup>186</sup> Slocan’s Sections B-D Questionnaire Response (24 July 2001), at C-12 to C-13, (Exhibit CDA-154 – Contains Business Confidential Information).

<sup>187</sup> See *Ibid.*, at B-14 (CHANNELH field).

<sup>188</sup> DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Slocan Forest Products Ltd. (1 February 2002), at 26 (Exhibit CDA-118).

The Panel also notes the following statement contained in note 313 to the *US First Written Submission*:

"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)."

Could Canada please point to the relevant document on the record (indicate page, paragraph and sentence) where that determination is made?

192. In the Issues and Decision Memorandum accompanying its Final Determination, Commerce stated "we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber[.]"<sup>189</sup> The Memorandum was based on Commerce's factual findings at verification, as reported in its verification reports.<sup>190</sup> The record evidence before Commerce was as follows:

- Commerce had before it an explanation of the purpose and effect of hedging contracts.<sup>191</sup>
- At verification, Commerce confirmed that Slocan was a "hedger" rather than a "speculator" in the lumber market. (The CME requires each participant to identify itself as one or the other).<sup>192</sup> Revenue earned by a speculator might or might not affect prices in the market, but futures revenue earned by a hedger affects prices by definition. The sole purpose of a hedging contract is to shield against fluctuations in price. Hedges have a stabilizing effect on the market by bringing a measure of predictability to an otherwise volatile commodity market.
- During the open life of the contract, Slocan monitors US market conditions to determine whether it should settle the contract *ex pit* and thereby ship, or let the contract go to term and then ship, or liquidate (sell) the contract and not ship.<sup>193</sup> The contracts that happen to be sold rather than fulfilled by delivery of physical goods are not a separate activity at all, but are an integral part of Slocan's selling activities. The decision to sell the contract or deliver the goods depends on the current price trends in the market. The hedging company has greater flexibility to respond to changes in price trends because it knows that a certain percentage of its sales (those through the CME) will achieve a certain minimum income (either by completing delivery at the agreed price or by liquidating the contract for an agreed price). The prices that it offers on other sales are thus different than they would have been absent the safety net that hedging contracts provide. Thus, hedging activity, by definition, affects prices for all sales in the market, not only those made through the CME.

193. Given the purpose and definition of hedging activity, a factual determination that "Slocan's lumber futures hedging activity is related to its core business of selling lumber" is a determination that

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<sup>189</sup> IDM, Comment 21, at 94. (Exhibit CDA-2)

<sup>190</sup> Cost Verification Report at 15, Exhibit CDA-155; Memorandum from David Layton et al. to Gary Taverman, at 15 (28 Jan. 2002), (Sales Verification Report) (Exhibit CDA- 117).

<sup>191</sup> Slocan Sales Verification Exhibit 21 *Random Length--An Introductory Hedge Guide*, at VE02362 to VE02380 (Exhibit CDA-119 – Contains Business Confidential Information).

<sup>192</sup> *Ibid.*, at VE2381 to VE2384 (Exhibit CDA-119 – Contains Business Confidential Information).

<sup>193</sup> *Ibid.*

“futures revenue affected prices.” That was the basis for Canada’s statement at para. 273 of its First Written Submission.

**78. The Panel notes the following statement in para. 246 of the US *First Written Submission*:**

**"[DOC] found that revenues from futures contracts were recorded in Slocan’s books as sales-type revenues, not as production revenues." (footnote excluded)**

**In the view of Canada, would not Slocan’s own treatment of these revenues contradict its requests that those revenues be treated as “investment revenues”? Please explain.**

194. At no point did Slocan suggest that the best way to treat its futures revenues was as “investment revenues.” On the contrary, Slocan argued (and continues to argue before the NAFTA dispute settlement panel), that its futures revenues are properly treated as offsets to direct selling expenses. This is consistent with the fact that revenues from futures contracts were recorded in Slocan’s books as “sales-type revenues.”

195. It was Commerce, and not Slocan, that first suggested that Slocan’s futures revenues were more properly treated as “investment revenues” rather than as direct selling expenses. Specifically, in its *Analysis Memorandum for Slocan Forest Products, Ltd.*, Commerce stated that:

In the field DIRSELU2 in the US sales database, Slocan has reported the profit or loss associated with sales made on the futures market. *We conclude that this is an investment revenue*, and should not be treated as a sales specific deduction/addition. As this is not a direct selling expense, we have disallowed this price adjustment and have not included this field in our calculations.<sup>194</sup> (emphasis added)

196. In response, Slocan argued that *if* Commerce continued to refuse to treat the revenues as part of direct selling expenses, then it should at least follow through on its decision to treat them as “investment revenues” by applying them as an offset to financial expenses.<sup>195</sup> This was an argument “in the alternative” only, and in no way changed Slocan’s position that the best way to treat the revenues was as an offset to direct selling expenses.

197. Before this Panel, Canada’s position is that while Commerce may have had the discretion to determine whether to treat Slocan’s futures revenues as direct selling expenses or as investment revenues, it did not have the discretion to refuse to make any adjustment at all. Furthermore, Slocan did not have to “guess right” about how Commerce wanted to characterize the adjustment, before Slocan could qualify for an adjustment. Slocan met its only responsibility to bring the difference to the attention of Commerce, and to provide it with the relevant data with which to make an adjustment. Once Commerce determined that the futures revenues were unique to the US market and that they were hedging activity, which is designed to affect prices, all of the underlying facts required were established, and Commerce was then bound by Article 2.4 of the *Anti-Dumping Agreement* to make an adjustment.

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<sup>194</sup> DOC Analysis Memorandum for Slocan Forest Products Ltd. for the Preliminary Determination in LTFV Investigation on Certain Softwood Lumber Products from Canada (30 October 2001), at para. 8 (Exhibit CDA-116).

<sup>195</sup> Slocan Case Brief, at 10-11, 73 (12 Feb. 2002). (Exhibit CDA-156– Contains Business Confidential Information).

79. Please comment on the findings contained in para. 6.77 of the *US – Stainless Steel* panel report:

**“[i]n our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4.” (footnote omitted)**

198. Commerce recognized that Slocan is an active player in the futures market.<sup>196</sup> As a hedger, Slocan participated in the futures market in order to affect its net realized profits for overall sales activities in the US market. Its hedging activity was a deliberate effort to affect pricing across the entire US market. In its books and records, Slocan treated liquidated hedging contracts as lumber sales, listing the CME as the customer. Hedging contracts that went to term or that were subject to *ex pit* settlements were booked as lumber sales to the person taking delivery of the physical goods. With each contract, Slocan had a choice as to who the customer would be – the CME or another buyer – based on the price it could obtain from each when the contract came to term. When Slocan determined the price to be charged to its US customers, it did so knowing that it had the option of protecting that price by (1) purchasing more or fewer hedging contracts, and (2) liquidating more or fewer contracts rather than making physical delivery of the goods. Slocan did not have these options when determining the prices for its Canadian customers. This was a difference in market conditions that was not merely anticipated, but was expressly designed, to affect pricing decisions in lumber exports to the US market.

80. Please comment on the statements contained in para. 252 of the US *First Written Submission*:

**"[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."**

199. Canada is not suggesting that Commerce should have treated Slocan's lumber revenues as an offset to *both* direct selling expenses and financial expenses. Slocan never argued to Commerce that it should adjust twice for futures revenues. That would be double-counting – an error as egregious as Commerce's "zero-counting" of the adjustment, as if it did not exist at all. Rather, as described above, Slocan argued that the revenues should be treated as an offset to direct selling expenses. Only when Commerce determined that they were more properly treated as "investment revenues" did Slocan suggest that, *in the alternative*, Commerce should at least account for the revenues as offsets to financial expenses.<sup>197</sup>

200. The United States is correct that a given expense or revenue item cannot be both a selling expense and a cost of production item. But it is incorrect in its belief that a properly documented and

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<sup>196</sup> DOC Verification Report on the Cost of Production and Constructed Value Data Submitted by Slocan Forest Products Ltd. (1 February 2002), at 26 (Exhibit CDA-118); DOC Memorandum on Verification of the Sales Response of Slocan Forest Products Ltd (28 January 2002), at 7-8 (Exhibit CDA-117).

<sup>197</sup> Slocan Case Brief, at 67-72 (12 Feb. 2002) (Exhibit CDA-156– Contains Business Confidential Information).

verified expense or revenue item could be *neither* a selling expense *nor* a cost of production item. Once Commerce determined that the futures revenues existed, that they were present in one market only, and that they related to its core business of selling the product under investigation, it was required by Article 2.4 to treat those revenues as either one or the other, and to make an adjustment accordingly. It could not “zero-count” the adjustment, as if it did not exist.

## ANNEX I

### G.1 Common Questions on Various Company-Specific Issues

#### To Canada:

**37. For each of the company-specific issues examined below, Canada is requested to summarize the arguments raised by the relevant exporter in the context of the investigation. References to documents on the record should be included (exhibit number, page and paragraph of the document). Canada is also requested to summarize the reasons which were given by DOC, if any, when rejecting the exporter's request. To clarify and summarize the issues, Canada may present the above data in tabular form.**

#### 1. Abitibi

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Abitibi: Allocation of Financial Expenses	Beginning with its <i>first</i> cost questionnaire response, Abitibi argued that Commerce's COGS allocation methodology, required by the questionnaire, would result in an unreasonable allocation of financial expense as between its lumber products, on the one hand, and its newsprint, paper, and pulp products on the other, because "{o}ur different business lines have <i>vastly different financing requirements, which differences are not captured by an allocation of net financing expenses based on cost of sales.</i> " Abitibi 23 July 2001 Response at D-45 (emphasis supplied) Exhibit CDA-83. <i>See also</i> Abitibi 10 Sept. 2001 Response at SD-35-36, Exhibit CDA-84 (arguing for an asset based allocation of financial expenses "due to the highly divergent asset and financing requirements of lumber operations on the one hand and pulp and paper operations on the other."); Abitibi 26 Sept. 2001 Letter at 12 Exhibit CDA-158 ("Where, as here, allocation of financing expenses based on cost of sales is distortive, because different product lines demonstrate different capital requirements, per dollar of sales or per dollar of cost of sales, the Department must depart from its traditional methodology because that allocation	Abitibi provided specific data to support its arguments. With respect to production costs, it noted that, "[f]or calendar year 2000, lumber sales were CN\$638 million, requiring assets of CN\$ 859 million, meaning that each dollar of assets produced \$0.74 in sales. Newsprint and paper each required more than 50 per cent more assets. Newsprint required assets of CN\$7,276 million to produce CN\$3,438 million in sales, or a ratio of 0.47. Value-added paper and pulp required assets of CN\$3,120 million to produce sales of CN\$1,601 million, for a ratio of 0.51. The asset and thus financing needs of lumber is significantly less than that of pulp, value-added papers, and newsprint. Abitibi 23 July 2001 Response at D-45 Exhibit CDA-83. With respect to sales, Abitibi noted that its "standard terms of sale for lumber are [[ .]] For North American newsprint, paper, and pulp, standard terms of sale are [[ .]] In terms of outstanding accounts receivable, the average number of days outstanding for past due receivables in lumber as of March 2001 was [[ ]] days. For pulp the corresponding figure was [[ ]] days. For value added papers and newsprint, [[ ]]	On 10 August 2001, Commerce issued a supplemental cost questionnaire to Abitibi, which did not question Abitibi's analysis, or the evidence it offered with respect to the allocation methodology for financial expenses. Commerce also did not seek additional evidence relating to the issue of the proper allocation of financial expenses. Without explanation, Commerce directed Abitibi to revise its allocation so as to use Commerce's standard methodology. Commerce 10 August 2001 Supplemental Section D Questionnaire to Abitibi, Question 41 Exhibit CDA-92. Commerce used its COGS methodology for Abitibi in its preliminary determination. No reasons were given. <i>See</i> Memorandum from LaVonne Jackson to Neal Halper, Director, office of Accounting, Re: Cost of Production and Constructed value Calculation Adjustments for the Preliminary Results (30 Oct. 2001) at 2 and Attachment 2 Exhibit CDA-89. Commerce did not depart from its COGS allocation methodology in the final determination. Commerce effectively acknowledged that its methodology was not selected based on the evidence presented in

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	<p>methodology is unreasonable.”); Abitibi 12 Feb. 2002 Case Brief to Commerce, at 50-55, Exhibit CDA-81 (“under any measure, the capital requirements of pulp and paper operations are substantially greater than those of lumber operations. The Department’s COGS methodology unfairly assumes that each dollar of cost of these different operations bears the same financial expense, which is demonstrably untrue for Abitibi.”)</p>	<p>days. Plainly, by any measure, the financing needs of these different products are not proportionate to cost of sales, and an allocation based on cost of sales is highly distortive.” Abitibi 23 July 2001 Response at D-45 Exhibit CDA-83. In its Case Brief, Abitibi provided a table summarizing the record data. <i>See</i> Abitibi’s 12 Feb. 2002 Case Brief at 54 Exhibit CDA-81.</p>	<p>the case, but rather reflected its “established practice” of applying a uniform, “consistent and predictable” methodology in all cases. Commerce Final Determination, Issues and Decision Memorandum, at Comment 15 Exhibit CDA-2.</p>
	<p>Abitibi proposed an alternative to Commerce’s COGS allocation methodology. Using actual business segment data contained in its audited financial statements, Abitibi suggested that Commerce first allocate its total financial expense among its different business segments in proportion to the total assets used by that business segment. <i>See</i> Abitibi 23 July 2001 Response at D-44, Exhibit CDA-83. Once a financial expense for lumber was determined in this fashion, Abitibi agreed that it would be appropriate to allocate this expense among the different, individual lumber products it produced and sold in proportion to cost of sales, as different lumber products are produced and sold using basically the same assets. Abitibi also argued that COGS undervalues capital assets. It contended that certain capital assets are non-depreciable, and that, in any event, the depreciation expense does not reflect the value of the asset that must be financed. Abitibi also pointed out that “{u}nder the Department’s traditional methodology, roughly 13.6 per cent of total financing costs will be assigned to lumber, notwithstanding the fact that lumber requires only 7.6 per cent of Abitibi’s assets, and accounts for only 10.6 per cent of its depreciation expense. {T}he fact that depreciation is included in cost of sales does not remove or materially mitigate the</p>	<p>Abitibi calculated its financial expenses for lumber on this basis, and responded to Commerce’s cost questionnaire with full data and supporting worksheets showing its asset-based allocation methodology. <i>See</i> Abitibi 23 July 2001 Response at Annex D.6 Exhibit CDA-83. <i>See</i> Abitibi’s 12 Feb. 2002 Case Brief at 54 (table summarizing the record data) Exhibit CDA-81.</p>	<p>In its Preliminary Determination, Commerce simply ignored Abitibi’s submitted methodology and data without comment. <i>See</i> Memorandum from LaVonne Jackson to Neal Halper, Director, Office of Accounting, Re: Cost of Production and Constructed value Calculation Adjustments for the Preliminary Results (30 Oct. 2001) at 2 and Attachment 2 Exhibit CDA-89. Rather than responding directly to Abitibi’s arguments, Commerce mischaracterized or ignored them in its Final Determination: “Setting aside Abitibi’s assumptions that the debt of the company only relates to assets belonging to the pulp and paper activities, the Department’s method addresses Abitibi’s concern that those activities are more capital intensive. Specifically, those activities would have a higher depreciation expense on their equipment and assets. Thus, when the consolidated financial expense rate is applied to the cost of manufacturing of lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense. Commerce Final Determination, Issues and Decision Memorandum, at Comment 15 at 77, Exhibit CDA-2.</p>

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	distortion.” Abitibi’s 12 Feb. 2002 Case Brief at 54-55 Exhibit CDA-81.		

2. Tembec

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Tembec G&A	Tembec stated in its initial questionnaire response that it was reporting its G&A expenses based on the expenses recorded on the books of its Forest Products Group, which Tembec noted is the business unit within which all of the subject merchandise was produced. The response identified the cost categories covered by the G&A data, which include, among many other cost categories, administration fee – Head Office. Tembec’s 12 February 2002 case brief argued, based on the US statutory provision that implements Article 2.2.2, that G&A must be based on “actual data pertaining to production and sales of the foreign like product by the exporter in question;” that the company-wide data did not meet this requirement because most of Tembec’s sales are in pulp, paper and chemicals; but that the verified data from the Forest Products Group would meet the legal requirements.	Response of Tembec Inc to Section D of the Department of Commerce Antidumping Questionnaire, 23 July 2001 (Exhibit CDA-159) at pages D28, D-29 and D-32; Case Brief of Tembec Inc., 12 February 2002 (Exhibit CDA-160) at pages 41-42.	“Because there is no definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has developed a consistent and predictable practice for calculating and allocating G&A expenses. This consistent and predictable method is to calculate the rate based on the company-wide G&A costs . . . “ Issues and Decision Memorandum (Exhibit CDA-2) Comment 33, page 105.
Tembec By-product Revenue Offset	Tembec stated in its initial questionnaire response that [[  ]] Tembec provided a detailed explanation, accompanied by a sworn declaration, worksheets and supporting documentation, of its woodchip purchases and sales, both internal transfers and market transactions, in its 15 November 2001	Response of Tembec Inc to Section D of the Department of Commerce Antidumping Questionnaire, 23 July 2001 (Exhibit CDA-151) at page D-24; Response of Tembec Inc to the Second Section D Supplemental Questionnaire, 15 November 2001 (Exhibit CDA-152) at pages SD-20 to SD-23 and Exhibits SD-42, SD-43, SD-44, SD-46; Rebuttal Brief of Tembec Inc., 19 February 2002 (Exhibit CDA-153) at pages 15-22.	“Based on the comparison of Tembec's B.C. sawmills' internally set transfer prices for wood chips to the B.C. sawmills' chip sales to unaffiliated purchasers, we concluded that the internally set transfer prices are not preferential. . . . For Tembec's Quebec and Ontario wood chip sales . . . since we have determined that its B.C. mills do not sell wood chips to other Tembec divisions at preferential prices, we deem it reasonable to conclude that their Ontario and Quebec saw mills did not receive preferential prices for its internally

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	supplemental questionnaire response. Tembec repeated its argument that the internal transfer prices were set administratively without reference to market prices. Tembec argued in its 19 February 2002 rebuttal brief, in response to the applicant's argument that affiliated party transactions should be used, that DOC should calculate Tembec's by-product revenue offset based on the market prices for woodchips as demonstrated during verification.		transferred wood chips." Issues and Decisions Memorandum (Exhibit CDA-2), Comment 11, page 61.

3. Weyerhaeuser

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Weyerhaeuser G&A	In Weyerhaeuser's Case Brief to the DOC at 63-64, Exhibit CDA-98, Weyerhaeuser stated that: "[the hardboard siding expense] is not general in nature and it does not relate to the operations of the company as a whole. As disclosed in note 14 of Weyerhaeuser [US]'s consolidated financial statement, this cost relates to a proposed class action settlement of the hardboard siding claims. [footnote to Weyerhaeuser's Section A response at Exhibit A-15 omitted]. The settlement class consists of all persons who own or owned structures in the United States on which the [US] company's hardboard siding has been installed. Thus, the facts on the record clearly show that this cost is associated with a specific product line of non-subject merchandise and that the expense does not relate to the operations of the company as a	Weyerhaeuser's Case Brief to the DOC, CDA-98 at 63-64; Weyerhaeuser's Section A response at Exhibit A-15, Exhibit CDA-101; Weyerhaeuser's Ministerial Error Allegation letter dated 8 April 2002, CDA-100 at 6-7.	"while the costs relate to non-subject product . . . the Department typically allocates business charges of this nature over all products because they do not relate to production activity, but to the company as a whole." [IDM, Comment 48(b), CDA-2, page 134.

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	<p>whole. Thus, it should not be included as a component of corporate G&amp;A.”<sup>1</sup></p> <p>In Weyerhaeuser’s Ministerial Error Allegation letter dated 8 April 2002, at 6-7, Exhibit CDA-100, Weyerhaeuser stated that:</p> <p>“In revising Weyerhaeuser’s G&amp;A ratio, the Department included claims on hardboard siding . . . as a component of parent G&amp;A. The Department has made a ministerial error by including this amount. The Department does not typically include this type of [[  ]] expense as a component of COP because it has no relationship to the production or sale of the subject merchandise. In this instance, Weyerhaeuser [US] agreed to settle a suit by homeowners who claim that the [US] company sold them faulty hardboard siding. . . Clearly this expense does not relate to the production and sale of Canadian softwood lumber. This expense does not relate to the administrative activities of the company or corporation as a whole and is not specific to the manufacture, design or sale of the product under investigation.”</p>		

<sup>1</sup> During the investigation, Weyerhaeuser argued that (1) the hardboard siding expense was not a general expense properly attributed to the production and sale of Canadian softwood lumber, and (2) that the expense is properly characterized as a “cost of sale.” Either would have sufficed to correct the DOC’s classification of the expense as a “general expense.” The DOC rejected both claims. In this WTO appeal, Canada has raised an issue with the DOC’s reasoning with respect to item (1) only.

4. West Fraser (by-product):

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
West Fraser By-product Revenue Offset	<p>During cost verification, West Fraser explained that Commerce’s preliminary decision to compare the average prices of West Fraser’s sales to affiliated and unaffiliated parties across all provinces (to determine whether the former had been made at market prices) was unreasonable, since the price difference Commerce observed resulted from timing differences and local supply and demand factors, rather than inflated prices for sales to affiliates. West Fraser therefore discussed pricing for individual mills and, in effect, urged that the “market” for purposes of 19 U.S.C. § 1677b(f)(2) be defined as the geographic area close to individual pulp and lumber mills.</p> <p>To show that its affiliated sales were made at market prices, West Fraser provided Commerce with monthly data for the year 2000 for chip purchases made by one of its affiliated pulp mills, QRP. This data showed that the prices QRP paid to West Fraser (for woodchip sales from “West Fraser Mills” in Quesnel, BC) were consistent with the prices QRP paid to its principal unaffiliated chip supplier, [[ ]]. West Fraser’s choice of QRP was appropriate because (a) those sales were West Fraser’s highest-priced sales to affiliated purchasers and, therefore, were the most likely to have been above market prices, and (b) the volume of West Fraser’s sales to QRP was significant.</p> <p>To determine whether West Fraser’s affiliated sales were made at market prices, Commerce officials also requested sample information regarding sales made to affiliated and unaffiliated purchasers by West Fraser’s Blue Ridge (AB) mill and by its Pacific Inland (BC) mill, the two West Fraser lumber mills that had sales to both affiliated and</p>	<p>DOC Verification Rept. at 23 (Exhibit CDA-110); West Fraser Cost Verification Exhibit C5, WF-Cost-007520-21 (CDA-150) (showing chip swaps West Fraser engaged in to minimize transportation costs). <b>Contains Business Confidential Information on both pages.</b></p> <p>West Fraser Cost Verification Exhibit C5, WF-Cost-007548 (CDA-107) (providing monthly comparisons); West Fraser’s Appendix D-2 – Revised (CDA-106)</p> <p>[[ ]].</p> <p>West Fraser Cost Verification Exhibit C5, WF-Cost-007589-007593 (CDA-111) (further documentation requested and verified by Commerce)</p> <p>West Fraser’s Case Br. of 12 Feb. 2002, at 46-48 (US Exh. 55); West Fraser Rebuttal Br. of 19 Feb. 2002, at 19-21 (US Exh. 54).</p>	<p>While it acknowledged that the documentation West Fraser provided at verification showed that QRP paid similar prices to West Fraser as to an unaffiliated party for purchases of woodchips, Commerce stated that these comparisons “were selectively provided . . . and not based on a sample chosen by the Department.” IDM, Comment 11 at 61 (CDA-2). Commerce also stated that “[t]hese comparisons represented only a portion of the total wood chip purchases by . . . West Fraser’s pulp mills and there is no record evidence to determine what the results might be if all mills were included.” <i>Id.</i> Commerce made these findings despite the fact that its verification report for West Fraser did not list woodchip sales to affiliates among the issues that “will require further consideration.” DOC Verification Rept. at 2 (Exhibit CDA-110). Commerce’s decision memorandum also did not address the further evidence that Commerce specifically requested and verified on woodchip sales made by West Fraser’s Blue Ridge and Pacific Inland sawmills. Instead of basing its decision on the mill-specific information reviewed at verification, Commerce adopted a new methodology in which it compared the average prices of West Fraser’s affiliated and unaffiliated woodchip sales on a province-by-province basis to determine whether the former had been made at market prices. <i>See id.</i> at 60.</p>

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	unaffiliated purchasers. After verifying that additional information, the Commerce officials neither requested any further information on West Fraser's affiliated woodchip sales, nor indicated that the information provided was inadequate. Consistent with these facts, in its briefs before Commerce West Fraser argued that the mill-specific information that had been verified by Commerce showed that West Fraser's woodchip sales to affiliated parties had in fact been made at market prices.		
	Immediately after Commerce issued its Final Determination, in which it adopted a province-by-province methodology for the first time, West Fraser submitted a letter to Commerce arguing that its oversight in using West Fraser's <i>de minimis</i> volume of unaffiliated woodchip sales in British Columbia as its exclusive benchmark for BC market prices constituted a ministerial error.	Letter from West Fraser to DOC of 04/09/02 (CDA-161). Contains Business Confidential Information on pages 4-5.	Commerce rejected West Fraser's ministerial error claim, stating that "[t]he adjustment made to West Fraser's by-product revenue is clearly an intentional methodological choice made by the Department" and, thus, not a ministerial error. See DOC Memorandum re Ministerial Error Allegations (25 Apr. 2002) at 17 (CDA-162).

5. Slocan

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Slocan futures revenue	Slocan traded lumber futures in the US market. In its books and records Slocan records the profits and losses from futures trading as lumber selling activity, so it reported the net revenue earned in the POI to Commerce as a direct selling expense.	Verification Exhibit 21, Exhibit CDA-119 (public excerpt – explanation of futures trading) Slocan Cost Verification Report at 26, Exhibit 118; Slocan Case Brief at 70 n.24, Exhibit CDA-156 (revenue recorded in books and records)	
	Commerce rejected this approach in its preliminary determination and stated that the futures revenue was "an investment revenue."	Preliminary Determination Analysis Memorandum at 7 at paragraph 8, Exhibit CDA-116 (futures revenue was investment revenue)	"In the field DIRSELU2 in the US sales database, Slocan has reported the profit or loss associated with sales made on the futures market. We conclude that this is an investment revenue, and should not be treated as a sales specific deduction/addition. As this is not a direct selling expense, we have disallowed this price adjustment and have not

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
			included this field in our calculations.” <i>Prelim. Det. Analysis Mem. at 7</i> at paragraph 8, Exhibit CDA -116..
	In its case brief, Slocan argued that <i>if</i> this was Commerce’s decision, then it should account for futures profits and losses as a financial expense, as it would for other investment revenues.	Slocan Case Brief at 67-72, Exhibit CDA-156 (“The Department Should Include Slocan’s Futures Profits and Losses in Direct Selling Expenses, or, If It Does Not Do That, Include the Profits and Losses in Slocan’s Financial Expense.”)	“Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan’s financial expenses.” IDM, Exhibit CDA-2, Comment 21 at 94.
	Commerce rejected this alternative also and did not account for the futures revenue anywhere in its calculations.	IDM, Exhibit CDA-2, (failure to account for revenue as either a selling expense or a financial expense)	<p>“{W}e have not included in our analysis profits on the sale of a futures contracts that did not result in the shipment of subject merchandise. Such 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.</p> <p>We also have not applied these profits as an offset to Slocan’s direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs the Department to make circumstance of sales adjustments only for direct selling expenses and assumed expenses. Section 351.410(c) defines direct selling expenses as “expenses . . . that result from and bear a direct relationship to the particular sale in question.” Accordingly, where no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct selling expenses.</p> <p>Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan’s financial expenses. In support of this argument, Slocan disputes the Department’s statement in its preliminary determination calculation memo that these profits are “investment revenues” by stating that Slocan is engaging in hedging rather than speculative activity, and that sales on the futures market are integral parts of the company’s normal sales and distribution process. While we agree that Slocan’s lumber futures hedging activity is related to its core business of selling</p>

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
			lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity. As such, the futures profits should not be used to offset the company's interest expense." IDM, Exhibit CDA-2, Comment 21 at 94.
	Commerce's failure to make any adjustment at all for Slocan's futures revenue violated GATT arts. VI:1-2 and AD Agreement Arts. 2.4 and 9.3 because it did not make "due allowance... for factors which affect price comparability{.}"		

## ANNEX A-2

### RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(30 June 2003)

#### Questions to the Parties

1. The following responses of the United States answer the 19 June 2003 questions to the United States and to both parties. In several instances, the United States has also addressed questions posed by the Panel to Canada.

#### A. GENERAL ISSUES

##### To the US:

**5. In para. 36 of its *First Written Submission*, the US identifies one instance where, in the view of that party, Canada requested the Panel to engage in what effectively would be a *de novo* review of DOC's establishment and evaluation of the facts in this matter. In the view of the US, are there any other such instances? If so, please identify in detail.**

2. Paragraph 36 of the US First Written Submission references paragraph 83 of Canada's First Written Submission. In that paragraph, Canada explained, as a general matter, what it believes the Panel must do to determine whether Commerce's evaluation of facts was unbiased and objective. First, since Canada made that statement as a general proposition within its "Standard of Review" discussion, it presumably frames the approach Canada would urge on each of the questions of fact presented in this case. Second, several specific instances in which Canada is asking the Panel to engage in *de novo* review are as follows:

3. Canada's presentation of a new regression analysis (Exhibit CDA-77) to support its contention that Commerce should have made a price adjustment to account for differences in the dimension of lumber in transactions compared amounts to a request for *de novo* fact finding. This exhibit was not before Commerce in the underlying investigation. At the June 17 Panel meeting, Canada stated that it intends to submit an expert's memorandum to explain the exhibit. The introduction of new evidence and a stated intention to introduce an expert's memorandum (which itself would be new evidence) to explain the new evidence demonstrates an improper attempt to have the Panel find facts as if it were the investigating authority.

4. In the case of Commerce's calculation of cost of production for Abitibi, Canada is asking the Panel to determine whether one method for allocating general and administrative ("G&A") costs is more reasonable and accurate than another. At paragraph 203 of its First Written Submission, Canada asserts, without citation, that "DOC failed to evaluate Abitibi's circumstances and evidence before it so as to develop the most accurate and reasonable method for determining the financial expenses

associated with the production and sale of softwood lumber.” Inherent in Canada’s statement is a plea for the Panel to weigh the evidence and find Abitibi’s proposed method more “accurate and reasonable” than Commerce’s. That is a request for *de novo* review.

5. Canada’s claim regarding West Fraser’s wood chip offset is another illustration. Commerce examined West Fraser’s wood chip sales to affiliated entities and “tested” revenues from those sales against revenues from the company’s own sales to unaffiliated entities. Canada complains about the “weight” Commerce attached to certain facts versus others.<sup>1</sup> Weighing facts is the responsibility of the investigating authority. In asking the Panel to re-weigh the facts, Canada is again asking for a *de novo* review.

6. A fourth example is Canada’s claim regarding product under consideration. This is highlighted in paragraph 35 of Canada’s Oral Statement at the 17 June Panel meeting. There, Canada states that the product under consideration “should have been limited to commodity dimension lumber.” Effectively, Canada is asking the Panel to adopt its view of where the lines should have been drawn with respect to the product under consideration. That is a request for *de novo* review.

7. The foregoing list is illustrative rather than exhaustive. As stated at the beginning of this response, the United States understands Canada’s overarching explanation of standard of review as a statement of how Canada would have the Panel look at each of the issues in dispute.

**6. In footnote 166 to its *First Written Submission*, the US states:**

**"[t]he 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.<sup>166</sup>**

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<sup>166</sup>See Section III, *supra*. See also, *EC-Pipe Fittings Panel Report*, para. 7.33. However, even if this Panel considers this analysis, despite the US 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 [ ] per cent 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."

**Could the US please clarify its position regarding Exhibit CDA-76 in light of the above statement?**

8. Footnote 166 of the US First Written Submission appears in paragraph 137 and refers to the US objection under Article 17.5(ii) to the new information presented by Canada in its Exhibit CDA-77 (the regression analysis). To clarify this point, the footnote makes reference to the charts contained in Canada’s Exhibit CDA-76. These charts were also not presented to Commerce during the underlying proceeding, although the data upon which they are based apparently are derived from the respondents’ submitted databases and do not involve the kind of manipulation of data presented by the new regression analysis contained in Canada’s Exhibit CDA-77. Although the United States did not object to Canada’s inclusion of the data and analysis contained in Exhibit CDA-76, the United States nonetheless believes that Canada’s submission of these charts demonstrates that Canada is asking this Panel to re-weigh the evidence and conduct a *de novo* review of the facts.

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<sup>1</sup>See Canada’s First Written Submission, para. 244.

To both parties:

7. Please comment on the findings contained in para. 7.3 of the *Egypt – Steel Rebar* panel report:

**"the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-Rolled Steel*, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

9. The quoted passage involves the *Egypt – Steel Rebar* panel's analysis of the respective responsibilities of the investigating authority and the interested parties in an antidumping investigation. Specifically, it relates to those instances in which the AD Agreement imposes certain procedural obligations on the investigating authority, but "leaves to the discretion of the investigating authority exactly how they will be performed."<sup>2</sup> This discussion is particularly relevant to Commerce's application of certain cost calculation methodologies challenged by Canada, as well as Canada's claim for a price adjustment for differences in the dimension of the softwood lumber products compared. With respect to each of these calculations, the action taken by Commerce falls within the discretion afforded by the AD Agreement, and Canada's claims are without merit.

10. This statement by the *Rebar* panel highlights the responsibility, in the first instance, for an interested party to submit any relevant information on the record to be considered by an investigating authority. With respect to differences in dimension, Article 2.4 states that a due allowance will be provided "in each case, on its merits," and when differences are "demonstrated" to affect price comparability. Whether a factor has been demonstrated to affect price comparability is a matter for "the judgement and discretion of the investigating authority to resolve on the basis of the record before it."<sup>3</sup> In this case, Commerce provided interested parties with ample opportunity to provide relevant information on the record with respect to any claimed price adjustments for differences in dimension. The questionnaire informed the interested parties of the requirements to establish an adjustment for differences in merchandise<sup>4</sup>, a 14 September 2001 letter from Commerce informed the

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<sup>2</sup> Egypt– Steel Rebar Panel Report, para. 7.2.

<sup>3</sup> *Id.* at para. 7.3.

<sup>4</sup> See Letter to Abitibi enclosing Questionnaire (25 May 2001) at B-29 (requesting variable cost of manufacturing information for all sales of similar, rather than identical products, *i.e.*, if there are differences in

parties that Commerce would consider matching similar, not just identical, softwood lumber products<sup>5</sup>, both identical and similar softwood lumber products were matched in the 6 November 2001 Preliminary Determination,<sup>6</sup> after which there was still opportunity for comment and the submission of new factual information.<sup>7</sup> In spite of these opportunities, the Canadian respondent companies' requests for a price adjustment remained unsubstantiated. Therefore, Canada's complaint on this issue, particularly its efforts now to submit new evidence in the form of a regression analysis (Exhibit CDA-77), should be rejected. As the *Egypt – Steel Rebar* panel concluded: “[W]here opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel.”<sup>8</sup>

11. There are at least two other examples in Canada's claims where the interested party in the underlying investigation failed to make submissions or to present evidence or arguments. First, contrary to Canada's argument here, West Fraser never raised the claim that its unaffiliated sales in British Columbia were “too small” to be a valid basis for assessing the market value of affiliated transactions, nor did it present evidence or argument to that effect.<sup>9</sup> Second, again contrary to Canada's argument here, Slocan never requested that its futures profits be used as an adjustment to anything other than a direct selling expense or an interest expense.<sup>10</sup> In both cases, the Canadian companies failed to meet their obligations to raise any relevant issues and adequately prove their claims.

B. ARTICLES 5.2/5.3

To the US:

**12. Please indicate whether the relationship between IP and Weldwood was disclosed by the applicants in the Application, and if so, whether this fact was discussed and considered by the DOC in the context of the initiation of the investigation.**

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physical characteristics) and at I-5 (defining and describing the adjustment for differences in physical differences) (Exhibit US-36). The Questionnaire also refers interested parties to Commerce's regulations on this issue, which were also provided in the US First Written Submission in Exhibit US-44.

<sup>5</sup> See Letter to Abitibi Consolidated Inc. (14 Sept. 2001) (Exhibit CDA-75).

<sup>6</sup> *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 (6 Nov. 2001) (“*Preliminary Determination*”) (Exhibit CDA-11); see also Final Determination, Comment 7 (Exhibit CDA-2).

<sup>7</sup> See Commerce's regulations, 19 C.F.R. § 301(b)(1)(providing that new information may be submitted in investigation until seven days prior to date of commencement of verification) (Exhibit US-65). Verifications normally take place after the Preliminary Determination in investigations, as they did in the *softwood lumber investigation*.

<sup>8</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.3 (footnote omitted).

<sup>9</sup> Under US procedures, parties are provided a final opportunity to present all relevant issues that remain in dispute. See 19 C.F.R. § 351.309(c)(2) (Exhibit US-69). West Fraser never raised a single point regarding the quantity of these unaffiliated sales in British Columbia. See West Fraser's Case Brief of 12 February 2002, at 46-48 (Exhibit US-55); West Fraser's Rebuttal Brief of 19 February 2002, at 19-21 (Exhibit US-54).

<sup>10</sup> Slocan only requested two alternative treatments for the amount corresponding to these profits, and contradictory ones at that. If there was a third way to treat them – as indirect selling expenses – that claim was never made. In its 23 July 2001 Questionnaire Response, Slocan unambiguously stated that the hedging profits should be treated as an offset to direct selling expenses in the US market, as an adjustment for differences in the conditions and terms of sale. Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, 23 July 2001, pp. C35-37 (Exhibit US-71). In the same submission, Slocan unambiguously asserted that it did not incur indirect selling expenses. *Id.* at p. C-37 (Exhibit US-71).

12. The industry support section of the application addressed the question of quantifying the portion of the US industry that chose not to support the application because of their own affiliations with Canadian producers. In Petition Exhibit IB-7, the applicants provided a Canadian newspaper article on this issue in which Weldwood is mentioned as “owned by International Paper.”<sup>11</sup> In its initiation decision, however, Commerce did not discuss the Weldwood-IP relationship, because it was not relevant to either the industry support question or the sufficiency of the evidence presented in the application as to prices and costs.

13. Article 5.2 of the AD Agreement requires the application to list known domestic producers of the product under consideration and known exporters or foreign producers. The application included Weldwood in the list of Canadian producers/exporters.<sup>12</sup> Article 5 does not require the investigating authority to discuss and consider relationships between companies whose data are not necessary for a finding of “sufficient evidence to justify the initiation of an investigation.”

**13. In para. 66 of its *First Written Submission*, the US states:**

**"[t]he 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."**

**Bearing the above statement in mind, did DOC have industry-wide data on cost of production, home market sales and export prices before it at the time of initiation? If not, did DOC gather that information when examining whether the requirements of Article 5.3 were met?**

14. The application contained data on cost of production, home market sales, and export price for many companies in the two largest lumber-producing provinces in Canada: British Columbia in western Canada and Quebec in eastern Canada. Thus, the application data were representative of the Canadian industry.<sup>13</sup> Commerce did not gather additional, nationwide data when examining whether the requirements of Article 5.3 were met, because the information provided in the application was sufficient to initiate an antidumping investigation.

**14. The Panel notes the following statement made by Canada in para. 17 of its *First Oral Statement*:**

**"[m]embers of the Petitioner buy lumber from Canadian companies to fill out their product lines daily. They do regular business with Canadian companies, which results in thousands of transactions and billions of dollars worth of cross-border trade. All of these facts were known by Commerce. Accordingly, it is inconceivable that the application was accepted without information on a single actual transaction involving a sale of softwood lumber either in Canada or the United States. The application did not contain transaction-specific evidence identifying a single Canadian exporter or providing any specific examples of price or cost. The Petitioner's claim that such information was not “reasonably available” is simply not credible and should never have been accepted by Commerce." (footnotes omitted)**

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<sup>11</sup>See Exhibit US-62.

<sup>12</sup>See Petition Exhibit IB-9 (Exhibit US-63).

<sup>13</sup>See US First Written Submission at paras. 52-62 and sources cited therein, which detail the diverse sources of data in each of these three categories.

**In light of the substantial cross-border trade in lumber products between Canada and the US (as stated by Canada in the above citation), was not information on export price from Canadian producers and exporters reasonably available to the applicant?**

15. Information on export prices was reasonably available to the applicant and was provided in the application.<sup>14</sup> Because the export prices that were provided in the application (including the full period of investigation *Random Lengths* export price information for both Eastern and Western S-P-F, the affidavit on lost sales and the price quotation affidavit) were sufficient for initiation, no further export price information was necessary. Commerce, therefore, made no determination, during the initiation process or the subsequent investigation, as to whether *still more* information on export prices from Canadian producers and exporters was *also* reasonably available to the applicant. The AD Agreement does not require such determinations in these circumstances.

16. Paragraph 17 of Canada's First Oral Statement, moreover, significantly distorts the facts. It is not accurate that "the application was accepted without information on a single actual transaction involving a sale of softwood lumber either in Canada or the United States." As demonstrated by the record and detailed in our First Written Submission at paragraphs 48-64, the application contained extensive evidence on actual sales of softwood lumber in both Canada and the United States from *Random Lengths* and from affidavits. The claim in paragraph 17 of Canada's First Oral Statement that "[t]he application did not contain transaction-specific evidence identifying a single Canadian exporter or providing any specific examples of price or cost" is true only in the sense that the Canadian producers associated with the specific transactions underlying the data in the application were not named; that does not make the evidence any less "transaction-specific."

**15. Please comment on the statement contained in para. 23 of Canada's First Oral Statement:**

**"it was demonstrated that the Random Lengths data contained in the application commingled Canadian and US producer prices, and, thus, were not representative of Canadian sale prices."**

17. This statement is incorrect. Canada's First Oral Statement, at paragraph 23, refers, in turn, to Canada's First Written Submission. The only "demonstration" to be found in that submission regarding the alleged commingling of *Random Lengths* data are statements in paragraphs 91 and 104. At paragraph 91, Canada misleadingly suggests that the *applicant* (the Coalition for Fair Lumber Imports Executive Committee) characterized the *Random Lengths* data as commingled: "According to the Executive Committee, the following information [was] relied upon by DOC to initiate the investigation . . . (1) *Random Lengths* pricing data for Eastern Spruce-Pine-Fir that commingled both Canadian and non-Canadian producer prices . . . ." This and other misleading statements in paragraph 91 are indiscriminately "supported" by a lengthy citation in footnote 87 of various exhibits in the application, most of which have no bearing on the "commingled data" allegation. Canada repeats the claim, absent even the limitation to Eastern S-P-F, at paragraph 104 of its First Written Submission: "The *Random Lengths* pricing data commingled both Canadian and non-Canadian producer prices." Once again, that claim and others are "supported" only by an indiscriminate citation of exhibits, none of which "demonstrates" that the *Random Lengths* data relied upon in the application "commingles" Canadian and US sales.

18. The United States, in its own First Written Submission, and in response to the Panel's questions during the first Panel meeting, clarified the facts. As an initial matter, the "*Random Lengths* pricing data" contained in the application comprises three different groups of data used to demonstrate the existence of dumping of softwood lumber by Canadian exporters and producers.

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<sup>14</sup>See exhibits cited at paras. 57-61 of the US First Written Submission.

19. First, at paragraph 52 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Eastern S-P-F* "delivered to Toronto" as a source of Canadian home market softwood lumber prices used to demonstrate the existence of below-cost sales in the Canadian market. In footnote 46, the United States explained that "[a]lthough Canada has claimed that these prices, 'commingle', US and Canadian data, the publishers of *Random Lengths* have expressly stated that the prices in the "Toronto delivery" column are based *exclusively* on production from mills in Canada." As authority for this, the United States referenced an 19 April 2001 letter from *Random Lengths* to this effect, which was placed on the record in an applicant's submission of 20 April 2001.<sup>15</sup>

20. Second, at paragraph 58 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Western S-P-F* delivered to the Chicago and Atlanta markets as a source of export prices used to demonstrate below-cost (*i.e.*, "dumped") sales to the US market. In footnote 58, the United States noted that "*Random Lengths* defines 'Western S-P-F' as 'Lumber of the Spruce-Pine-Fir group produced in British Columbia or Alberta.'<sup>16</sup>

21. Third, at paragraph 61 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Eastern S-P-F* delivered to Boston and the Great Lakes region as an additional source of export prices used to demonstrate below-cost (*i.e.*, "dumped") sales to the US market. Canada's "commingling" claim with respect to this data group is based on the "Terms of the Trade" definition of "Eastern S-P-F": "Lumber of the Spruce-Pine Fir group produced in the eastern provinces of Canada, including Saskatchewan and Manitoba. Also used in reference to some lumber produced in the northeastern United States."<sup>17</sup>

22. This definition itself reflects the fact that the *primary* meaning of this term is limited to certain Canadian-produced lumber. Its use as a "term of the trade" in connection with US-produced lumber is not only secondary, but also separate. In footnote 67 of its First Written Submission, the United States explained that a reasonable reading of statements by *Random Lengths*' publisher on the record demonstrated that Canada's claim lacked merit. As authority for this, the United States referenced an 19 April 2001 letter from *Random Lengths* which had been placed on the record of the case in a submission made by the applicant on 20 April 2001.<sup>18</sup> That letter states, among other things, that the Eastern S-P-F prices reported in *Random Lengths* "are representative of lumber produced in the Eastern Canadian provinces." With respect to this species group, the publisher of *Random Lengths* states that, although his publication "receives" information on SP-F from mills in New England, "current grading rules" require the New England product to be designated as S-P-F-S (for "south"), whereas "we focus our information gathering and price reporting on Eastern S-P-F coming out of Eastern Canada."

23. This combination of evidence shows that *Random Lengths* recognizes a market distinction between Canadian-produced and US-produced S-P-F and does not commingle data on the Canadian-produced "Eastern S-P-F" with data on US-produced (Eastern) "S-P-F-south" lumber.

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<sup>15</sup> We note that Exhibit US-1 mistakenly included a different submission made by the applicant on that same date. The *Random Lengths* letter regarding Toronto delivery was submitted on the public record of the investigation and is attached as a new exhibit to these responses to the Panel's questions. See Fiche 22, Frame 80 (Exhibit US-60).

<sup>16</sup> The cited authority for this is Petition Exhibit III.9 (relevant excerpts from the *Random Lengths* publication "Terms of the Trade") (previously submitted in this dispute as Exhibit US-17). The relevant page from "Terms of the Trade" was inadvertently omitted from Exhibit US-17. A complete version of Petition Exhibit III.9 is attached as Exhibit US-61; the definition of Western S-P-F is at page 370 of that publication.

<sup>17</sup> See Petition Exhibit III-9, at p. 114 (Exhibit US-1; Exhibit US-61).

<sup>18</sup> As explained above, Exhibit US-1 mistakenly included a different submission made by the applicant on the same date, and the United States is now providing the correct record document to the Panel as Exhibit US-60. The *Random Lengths* letter in question is at Fiche 22, Frame 79.

24. Further, other export price data in the application, such as the *Random Lengths* Western S-P-F data discussed at paragraph 58 of the US First Written Submission, would have been independently sufficient to justify initiation.

**To both parties:**

**16. In the view of Canada/the US, which obligation(s) are imposed by Article 5.2? Which entity or entities is/are the addressee(s) of the obligation(s)?**

25. Article 5.2 does not impose an obligation on investigating authorities. It describes the contents of an application.

26. Canada's argument regarding Article 5.2 rests on the flawed premise that Article 5.2 must be read as imposing a stand-alone obligation, independent of the obligation under Article 5.3. This is not what Article 5.2 does at all. Article 5.2 is a description of the contents of an application. It provides context for an investigating authority's obligation under Article 5.3 to determine whether there is sufficient evidence to initiate an investigation.

27. The proposition that Article 5.2 does not impose a stand-alone obligation on investigating authorities is not nearly as unusual as Canada suggests.<sup>19</sup> Elsewhere in the WTO Agreements, one finds provisions that do not themselves impose obligations but that provide context for obligations set forth elsewhere. An example is Article III:1 of the GATT 1994. Article III:1 states that certain laws, regulations and requirements "should not be applied to imported or domestic products so as to afford protection to domestic production." In *Japan–Alcoholic Beverages*, the Appellate Body explained that the Panel in that case had correctly found "a distinction between Article III:1, which 'contains general principles', and Article III:2, which 'provides for specific obligations regarding internal taxes and internal charges.'"<sup>20</sup> A similar relationship exists in this case between AD Agreement Article 5.2 and Article 5.3.

28. Another example of an agreement provision that does not impose an obligation but provides context for obligations found elsewhere is Article 4.1 of the Agreement on Agriculture, which provides

Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

29. In *EC–Bananas*, the EC argued that Article 4.1 is a substantive provision, which, read in the context of Article 21.1 of the Agreement on Agriculture (providing that the provisions of the GATT 1994 "shall apply subject to the provisions of this Agreement"), demonstrates that Schedules of concessions supercede the requirements of Article XIII of the GATT 1994.<sup>21</sup> Accordingly, the EC contended that the tariff rate quotas provided for in its Schedule would not be subject to Article XIII.<sup>22</sup> The Appellate Body disagreed, concluding that "Article 4.1 does no more than merely indicate where market access concessions and commitments for agricultural products are to be found."<sup>23</sup>

30. The Appellate Body's interpretation of Article 4.1 of the Agreement on Agriculture illustrates the fact that sometimes an agreement provision may serve a limited purpose, and that obligations

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<sup>19</sup> See Canada's First Oral Statement, para. 10.

<sup>20</sup> Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, adopted 1 Nov. 1996, pp. 17-18.

<sup>21</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 20.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at para. 156.

should not be extracted from a provision unless the language explicitly supports that interpretation. Article 5.2 of the AD Agreement serves just such a limited purpose—describing the contents of an application. Where paragraphs in Article 5 impose obligations on investigating authorities, they refer explicitly to what "the authorities" shall or shall not do. This is the case, for example, in Articles 5.3, 5.4, 5.5, 5.6, and 5.8. There is no such reference in Article 5.2. The Panel should reject Canada's attempt to read an obligation into Article 5.2 that is not there.

**17. In the view of the Parties, is there a hierarchy in which the applicant should endeavour to submit the information, as is reasonably available to it, required under Article 5.2(iii)? Please motivate your response fully.**

31. Article 5.2(iii) gives three alternative bases for identifying normal value: (1) information on home market prices, or "where appropriate," (2) information on prices for sales to a third country or countries, or (3) information on the constructed value of the product. Article 5.2 (iii) also gives two alternative bases for identifying export price: (1) information on export prices, or "where appropriate," (2) information on "the prices at which the product is first resold to an independent buyer in the territory of the importing Member" (*i.e.*, "constructed export prices").

32. The alternatives described in Article 5.2(iii) are not interchangeable. With respect to identifying normal value, for example, home market prices in the ordinary course of trade are normally preferable to the other two categories. However, if there are not sufficient sales in the home market for the home market to provide a viable basis of comparison, or if the home market sales database does not offer, because of significant volumes of below-cost sales, a reliable indication of sales made in the ordinary course of trade, it is "appropriate" to use sales in third country markets or constructed value, respectively, even if there are some home market prices on the record. In other words, the "appropriateness" of using the later-listed alternatives depends not upon the absence of data corresponding to the first-listed alternative, but upon other circumstances. The application in this case, for example, began the process of identifying normal value by looking to Canadian home market prices. Because the applicants demonstrated widespread sales below cost in the Canadian market, however, they properly relied upon constructed value as the basis for comparison to export price for purposes of providing evidence of dumping sufficient for initiation of the investigation.

33. It may be that the Panel's question has to do with another sort of "hierarchy on which the applicant should endeavor to submit information." Canada claims that if company-specific sales and cost data for Weldwood were reasonably available to the applicants, then the applicants were required to base their application on these data. But this claim implies that Article 5.2 imposes a data hierarchy, in which data specific to a named company are deemed superior to other types of data, and that, if data in this allegedly higher category are available, alternative types of data may not be used to demonstrate dumping in an application. Article 5.2 contains no such obligation. There is no hierarchy of the types of information an applicant should endeavor to submit to show dumping sufficient to initiate an investigation. As explained at the first Panel meeting, in this case, because of the large number of softwood lumber producers in Canada, the United States believes that the aggregate data submitted in the application provided a relevant, broad picture of pricing practices of the industry.

**E. ALLOWANCE FOR DIFFERENCES IN DIMENSIONS**

**To the US:**

**25. Please explain in detail how DOC carried out the product comparison in case of non-identical CONNUMs. Of the total number of comparisons made, how many were based on identical CONNUMs?**

34. To carry out the product comparison, Commerce first identified the matching characteristics in order of importance, as suggested by the interested parties.<sup>24</sup> These characteristics, from most to least important were: (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).<sup>25</sup> With the exception of grade group, these characteristics were included in the questionnaire. Grade group was added for the Final Determination based on suggestions received from the parties in response to Commerce's 9 August 2001 request for suggestions regarding a model matching hierarchy.<sup>26</sup>

35. At the suggestion of the parties, Commerce did not match across product category, species or grade group. Therefore, all matches are identical with respect to those characteristics. Commerce first compared the control numbers of the US products to those of the home market products to determine if an identical match was available. If an identical match for all characteristics was not available, Commerce's matching methodology found the *most similar* match. Commerce's computer programme accomplished this by finding the most similar match for each characteristic based on its order of importance. For example, it tried to find a product of the identical grade regardless of the less important characteristics. If there were multiple sales of the identical grade, it tried to find a product where grade and moisture content were identical and so on, keeping as many of the characteristics identical to the US sale product as possible, until it found the most similar match. If there were no sales of the identical grade, it found the product with the most similar grade. If there were multiple sales of the most similar grade, it tried to find a sale with the identical moisture content, and continued in this fashion along the hierarchy of characteristics until it found the most similar match.

36. To achieve the most appropriate similar match, each identified trait *within* each model characteristic was assigned a numeric value.<sup>27</sup> For example, with regard to moisture content, dry lumber was assigned a value of one, kiln-wet lumber was assigned a value of three and green lumber was assigned a value of four. When determining a proper similar match, the programme looked at the difference between the number assigned for each characteristic of the US product and those of the possible matches. In the case of moisture content, if no product with the identical moisture content was available, the computer would have chosen to match US sales of green lumber to sales of kiln-wet lumber ( $4-3 = 1$ ), the most similar comparison available. Only if no possible match to kiln-wet lumber was available, would it have matched to sales of dry lumber ( $4-1 = 3$ ).<sup>28</sup>

37. Commerce took additional steps to further refine its matching methodology by using available cost data. When matching similar, rather than identical, grade or further processing characteristics, if two equally similar matches were available, the computer chose the match with the smallest variable cost difference. With regard to all three dimensional characteristics, because there was no cost difference, when two equally similar matches were available, both matches were selected and their normal values averaged. For example, the US price of an 8' board would be compared to the weighted average normal value of a 6' and a 10' board, which were identical in every other respect.<sup>29</sup>

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<sup>24</sup> While Commerce accepted the suggestions of the parties in this regard, this acceptance was not dependent upon a demonstration of effect on price comparability.

<sup>25</sup> *See, e.g.*, 25 April 2002 Amended Final Margin computer programme for Weyerhaeuser Corporation at line 2808-2809 (Exhibit US-66).

<sup>26</sup> Final Determination, Comment 7 (Exhibit CDA-2).

<sup>27</sup> *See* the 25 April 2002 Amended Final computer programme for Weyerhaeuser Corporation, at lines 3220-3362, assigning numeric values to each trait within each characteristic (Exhibit US-66).

<sup>28</sup> *See id.* at lines 3306-3308.

<sup>29</sup> Final Determination, Comment 7 (Exhibit CDA-2).

38. At a further suggestion of the Canadian parties, length was classified into the following length bands: less than 16'; 16' - less than 22'; 22' and above.<sup>30</sup> Commerce first attempted to match within each length band, and matched across length bands only when a similar match was not available within the band. In order to accomplish this, Commerce assigned lengths in the less than 16' category numerical values ranging from 100-105, the 16' - 22' category was assigned numbers ranging from 200-202 and the over 22' category was assigned numbers over 300. Sales composed of various lengths (random lengths) where the respondent was unable to separate the sale into its component lengths, were assigned a code of 999.<sup>31</sup> Therefore, if no identical length piece was available, a 14' piece of softwood lumber would match to a 10' piece of lumber before matching to a 16' piece of lumber.

39. Width and thickness were assigned sequential numbers based on ascending size. The computer matched to the product with the smallest difference in numeric value (*i.e.*, the closest number) first. One company, Weyerhaeuser, made sales of random widths and thicknesses and these were assigned a numeric value of 999.<sup>32</sup>

40. Identical matches account for [[ ]] per cent of all matches of export sales by volume. Similar matches account for [[ ]] per cent and constructed value accounts for [[ ]] per cent.<sup>33</sup>

**26. In the view of the Parties, does Article 2.4 impose (or disallow) the use of any specific methodology in order to determine the amount of an allowance for differences in physical characteristics?**

41. Article 2.4 does not impose or disallow any specific methodology regarding the determination of the amount for a due allowance for differences in physical characteristics. It requires a showing or demonstration, "in each case, on its merits," that there is an effect on price comparability of the difference in physical characteristics before a due allowance is made. However, the provision does not address: (a) how an investigating authority will *identify whether* there is an effect on price comparability, nor (b) how to *measure* the allowance due once that identification has been made.

**27. Article 2.4 provides that: "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in (...) physical characteristics." Could the text be interpreted to suggest that once differences in physical characteristics have been found, price comparability is automatically affected, or is there still a requirement that the effect on price comparability must be shown in addition?**

42. The text of Article 2.4 does not require an automatic adjustment based on the mere existence of physical differences. Such an interpretation would render the terms "in each case, on its merits" and "demonstrate" meaningless. These terms plainly require a case-by-case analysis to determine whether the facts support any allowance for differences in physical characteristics due to an effect on price comparability.

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<sup>30</sup> *Id.*

<sup>31</sup> See Exhibit US-66 at lines 3310-3321.

<sup>32</sup> See *id.* at lines 3323-3336 (thickness) and 3338-3351 (width).

<sup>33</sup> See Exhibit US-68 (which summarizes the data) and Exhibit US-67 (which provides the computer output from the record for each company from which the data was obtained). Commerce has used volume (thousand board feet) in response to the Panel's question because the dumping margins were weighted by volume of export sales. Accordingly, only volume provides a meaningful indication of the relative "number of comparisons" based on identical matches. Based on number of comparisons, the identical matches accounted for [[ ]] per cent of all export sales, similar matches accounted for [[ ]] per cent, and constructed value for [[ ]] per cent. See Exhibit US-70.

43. Differences in physical characteristics are not necessarily reflected in differences in the expenses or costs of the producer, nor are they necessarily reflected in the price to the customer. For example, a toy manufacturer may sell a series of toy trucks. Each toy truck may have different working parts, and differ significantly in physical appearance and even toy function - one is a fire truck, the other a dump truck, another a garbage collection truck. Yet all of these toys may have the same costs of production, and may normally be sold for the same price. Therefore, a due allowance, or appropriate adjustment, for differences in physical characteristics would not be warranted *per se*, on the basis of physical differences. Additional evidence would have to be presented to substantiate the due allowance or appropriate adjustment. In order to give the relevant terms of Article 2.4, particularly “in each case, on its merits” and “demonstrate,” their ordinary meaning, the investigating authority must first determine, based on record information, that differences in physical characteristics affect price comparability, before making an adjustment.

44. The sentence from Article 2.4 quoted in the Panel’s question concludes with the phrase “and any other differences which are also demonstrated to affect price comparability.” The use of the term “also demonstrated” confirms the need for a demonstration that the physical differences at issue affect price comparability. We note the panel’s statement in *Egypt – Steel Rebar*, in considering a due allowance for imputed credit expenses (which results from a condition or term of sale) that “[i]n short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made.”<sup>34</sup> The Canadian respondents in this case did not demonstrate the effect on price comparability of differences in dimension.

F. ZEROING

To the US:

**32. Could the US indicate which methodology was used by DOC when comparing normal value to export price in the investigation at issue?**

45. In this investigation, the United States made comparisons between normal value and export price using the weighted average to weighted average comparison methodology consistent with Article 2.4.2 of the AD Agreement. We note that in certain cases normal value was based on constructed value.

**33. In para. 31 of the EC’ *Third Party Submission*, it is stated that:**

**“[t]he European Communities considers that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC “zeroing” methodology already found to be incompatible with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement in European Communities – Bedlinen*.”**

**Does the US agree with the above proposition?**

46. The United States does not have access to the computer programme and detailed calculation methodologies utilized by the EC in the *EC–Bed Linen* case. Consequently, the United States is not in a position to assess whether the methodology utilized by the United States in this investigation “in no way differs” from that utilized by the EC.

**34. Please comment on paras. 8-10 of Japan’s *First Oral Statement*.**

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<sup>34</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.352.

47. To fully address the statements made in these paragraphs, it is necessary to include a discussion of paragraph 7, which sets up the basis for Japan's arguments in the subsequent paragraphs.

48. In paragraph 7 of its First Oral Statement, Japan mis-characterizes the US argument. The United States does not suggest that Article 2.4.2 provides "for calculation of the margin of dumping *only* on a model-specific basis";<sup>35</sup> rather, the United States argues that model-specific, level-of-trade-specific comparisons are permitted under Article 2.4.2. In fact, two of the three methodologies in Article 2.4.2 provide for the calculation of transaction-specific margins of dumping. The third methodology (weighted average to weighted average comparisons) refers to a comparison with "all comparable export transactions." Interpreting this phrase consistently with Article 2.4, an investigating authority may calculate multiple margins of dumping.

49. Also in paragraph 7, Japan mis-quotes Article 2.4.2 of the AD Agreement. The word "margin" – singular – does not appear in Article 2.4.2. Only the plural – "margins" – appears in that provision.

50. In paragraph 8 of Japan's First Oral Statement, Japan essentially makes the same point that the United States made in paragraph 154 of its First Written Submission (albeit relying on a different provision of the AD Agreement): that it is necessary to calculate an overall dumping margin for investigated companies. While Japan referenced Article 6.10 and the United States referenced Article 5.8, in either case, the need for an overall dumping margin is based on obligations separate from those found in Article 2.4.2. Moreover, Article 2.4.2 of the AD Agreement does not specify the methodology to be used to aggregate the "margins of dumping" into an overall dumping margin.

51. In paragraph 9, Japan appears to agree with much of the US position with respect to Article 2.4.2. Although Japan suggests that multiple comparisons may occur under Article 2.4.2 as a matter of "administrative convenience," Japan also recognizes that such multiple comparisons may be appropriate to take into account (among other things) differences in physical characteristics among several models of the product under consideration. Japan recognizes that this step, which occurs pursuant to Article 2.4.2, is "in the middle of the entire process to calculate an individual margin of dumping for an exporter/producer." Moreover, Japan appears to recognize that Article 2.4.2 itself does not establish any obligation as to how the margins of dumping are aggregated. In any event, no additional comparison occurs when an authority aggregates "all of these intermediate margins obtained from multiple comparisons." Therefore, Article 2.4.2, which addresses comparisons only, does not speak to this process of aggregating margins.

52. In paragraph 9, Japan suggests that the legal basis for offsetting dumping margins with non-dumping amounts is the principle of good faith. Pursuant to this Panel's terms of reference and Articles 3.2, 7, and 19.2 of the DSU, this Panel's task is to review the consistency of the US antidumping duty determination with the Antidumping Agreement. Any review of the United States' so-called "good faith" beyond the relevant provisions of the Antidumping Agreement is outside the scope of WTO dispute settlement.

53. Also in paragraph 9, Japan uses the term "negative margins." Article 2.1 of the AD Agreement provides that dumping occurs when a product is sold at less than its normal value. When a proper comparison is made pursuant to the terms of Article 2.4.2 and the weighted average export price is greater than the weighted average normal value, the transactions in question were not dumped. The AD Agreement does not recognize "negative margins," and Japan cites no authority for this concept.

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<sup>35</sup>Japan First Oral Statement, para. 7 (emphasis added).

54. In paragraph 10, Japan mis-characterizes the position of the United States with respect to the issue of comparability. The determination of the scope of the product under consideration is distinct from the determination of price comparability between weighted-average export transactions and weighted-average normal values under Article 2.4.2. Japan incorrectly suggests that the United States argued that not all softwood lumber was comparable for purposes of Article 2.4.2. As the United States discussed in paragraphs 162 and 163 of its First Written Submission, sales of all models at all levels of trade are not *equally* comparable. For example, if there is a home market sale of an identical model at the same level of trade, the United States would use that as the comparison (comparing the weighed average normal value to the weighted average of all comparable (in this case, identical, same level of trade) export transactions). Identical models sold at different levels of trade and non-identical models are nonetheless still “able to be compared.” However, their differences in physical characteristics and level of trade would make them less comparable and, when those differences affected price comparability, it would be appropriate to make due allowance for the differences, pursuant to Article 2.4. Distinguishing among models and levels of trade is permissible under Article 2.4.2 (as Japan seems to recognize in paragraph 9 of its First Oral Statement), but does not require that the United States consider each model and level of trade to constitute a distinct “product under consideration” for purposes of the AD Agreement.

**35. Please comment on para. 20 of EC’s First Oral Statement.**

55. Much of what the EC states in this paragraph re-asserts the conclusion drawn in the *EC – Bed Linen* case, and is premised on the reasoning of the Appellate Body in that case. In its First Written Submission<sup>36</sup> and in its Opening and Closing Statements at the first Panel meeting,<sup>37</sup> the United States explained why the *EC – Bed Linen* report is not binding on this Panel and why it should not be followed in this case. The United States has nothing to add on this question at this time.

56. In the first sentence of paragraph 20, the EC appears to suggest that the issue of multiple comparisons is only relevant to “a broad determination of the product under consideration and the like domestic product.” The United States disagrees. Article 2.4 of the AD Agreement requires that other differences that affect price comparability, beyond differences in physical characteristics, also be taken into account when making comparisons. For example, differences in level of trade are among the differences that may affect price comparisons. Thus, even when there is only one “model” of the “product under consideration,” it may still be appropriate to have multiple comparisons if there are sales at multiple levels of trade in the markets being examined. In order to capture level of trade distinctions, or model distinctions, if any, multiple comparisons may be necessary and appropriate under the weighted average to weighted average comparison methodology of Article 2.4.2 for calculating margins of dumping on “comparable” export transactions.

57. We note that, like Japan, the EC relies upon the term “negative dumping margins.” As discussed in response to Question 34, above, the AD Agreement does not recognize “negative dumping margins” and the EC cites no authority for this concept.

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<sup>36</sup>See US First Written Submission, paras. 173-78.

<sup>37</sup>See Opening Statement of the United States at the first meeting of the Panel, para. 38; *see also* Closing Statement of the United States at the first meeting of the Panel, para. 6.

G. COMPANY-SPECIFIC ISSUES

G.1 Common Questions on Various Company-Specific Issues

To the US:

**41. With regard to each of the company-specific issues in its *First Oral Statement*, please address the comments made by Canada that the investigation was not conducted in an unbiased and objective manner. Those comments should address, *inter alia*,**

- **Canada's allegations in various paras. of its *First Oral Statement* that statements containing factual data presented by the US in its *First Written Submission* were incorrect (see for instance para. 94 of Canada's *First Oral Statement*) and**
- **Canada's contention that DOC "did not consider the merits of the record evidence" submitted by certain exporters concerning the company-specific issues before the Panel (see for instance para. 79 of Canada's *First Oral Statement*).**

58. The United States will first address Canada's contention that Commerce did not conduct the investigation in an unbiased and objective manner.

59. During the course of the lumber investigation, Commerce calculated costs for purposes of determining whether sales were made below the cost of production and, where necessary, for constructing normal value. Canada argues that, in calculating these costs, Commerce ignored evidence and automatically applied its standard cost methodologies without regard for the factual circumstances of individual producers. However, as is clear from its Final Determination, Commerce fully considered the lumber producers' evidence and arguments and diligently followed the preference in Article 2.2.1.1 for relying on a company's own records where appropriate.

Abitibi G&A

60. In determining cost of production for a product under investigation, it is necessary to attribute to the product some part of the producer's general and administrative (G&A) costs, including financial costs. While the AD Agreement does not prescribe a particular method for allocating these costs, we have provided background on Commerce's practice in response to Question 43. In the case of respondent Abitibi, Commerce applied a "cost of goods sold" methodology in allocating the company's financial costs. While not objecting to the "cost of goods sold" methodology *per se*, Canada contends that Commerce should have applied a different methodology, one based on the value of assets in each of Abitibi's divisions, in allocating financial cost.

61. Canada's claim – that Commerce failed to consider all relevant evidence before selecting an allocation method – is incorrect. As discussed fully in Comment 15 of the Final Determination, Commerce declined to employ Abitibi's suggested methodology after considering the facts and arguments for and against it in an unbiased and objective manner. Commerce reasoned that money is fungible, and interest costs, by definition, relate to the overall borrowing needs of a company. Borrowed money may be used for a full range of purposes, including financing fixed assets or ongoing operations. There is no basis for allocating borrowed money to only one activity. In light of this fact, the "cost of goods sold" methodology was a reasonable basis for allocating interest costs.

62. Moreover, contrary to Canada's contention, the "cost of goods sold" methodology does not ignore asset values. Those values are reflected in the depreciation costs included in the cost of goods

sold and the cost of manufacturing the like product to which the financial expense ratio is applied. That is, greater depreciation costs will be allocated to more asset-heavy divisions of a company.

#### Tembec G&A

63. As discussed in the Final Determination, Commerce rejected Tembec's division-specific methodology, because G&A costs, by definition, relate to the company as a whole.<sup>38</sup> Canada argues that Commerce should have calculated G&A costs on Tembec's division-specific basis, rather than a company-wide basis. However, Tembec's proposed G&A methodology contradicts the general nature of this cost. It is based on the unsubstantiated premise that general costs are incurred on a divisional rather than a company-wide basis. Moreover, Tembec's methodology is based on unaudited amounts of G&A costs. In sharp contrast, Commerce's methodology is based on the G&A reported in Tembec's audited financial statement, and is therefore consistent with Article 2.2.1.1.

#### Weyerhaeuser G&A

64. With respect to Weyerhaeuser, Commerce included an allocated portion of certain litigation settlement costs in Weyerhaeuser's general and administrative (G&A) costs. A parent company will frequently incur general costs, such as these litigation settlement costs, that are costs of doing business for all of the operations of the parent company. Where a subsidiary is a respondent producer/exporter in an antidumping investigation, Commerce's ordinary practice is to apportion the parent's G&A costs over sales of all merchandise produced by the entire company, provided the costs are general to the operations of the entire company. This practice comports with Articles 2.2.1.1 and 2.2.2, and is not disputed by Canada. Nor was it disputed by Weyerhaeuser during the investigation.

65. What is in dispute is Commerce's decision to include in Weyerhaeuser's G&A an apportioned amount of the litigation settlement charges at issue. Commerce did so based on its reasoning that business charges of this nature should be allocated "over all products because they do not relate to an [sic] production activity, but to the company as a whole."<sup>39</sup> Information submitted by Weyerhaeuser did not support a deviation from this practice. Weyerhaeuser's own financial statement did not classify the litigation expenses as part of the cost of products sold.<sup>40</sup> Instead, Weyerhaeuser recorded the litigation settlement costs among its general costs, albeit in a separate line item. The general nature of these litigation settlement costs is revealed by explanatory note 14 to the financial statement, which states that such legal proceedings are "generally incidental to its business."<sup>41</sup>

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<sup>38</sup>Final Determination, Comment 33 (Exhibit CDA-2).

<sup>39</sup>Final Determination, Comment 48b, p. 134 (Exhibit CDA-2).

<sup>40</sup>Weyerhaeuser 2000 Annual Report, p. 53 (Exhibit CDA-101).

<sup>41</sup>*Id.* at p.75, n. 14 (Exhibit CDA-101). Because Canada suggested orally at the first Panel meeting that this reference was not describing the litigation settlement claims at issue, it may be useful to review the statement in full:

The company is a party to legal proceedings and environmental matters generally incidental to its business. Although the final outcome of any legal proceeding or environmental matter is subject to a great many variables and cannot be predicted with any degree of certainty, the company presently believes that the ultimate outcome resulting from these proceedings and matters, including those described in this note, would not have a material effect on the company's current financial position, liquidity or results of operation; however, in any given future reporting period, such proceedings or matters could have a material effect on results of such operations.

*Id.* Thus, Weyerhaeuser's own books and records support the conclusion that these litigation settlement claims related to the operations of the company as a whole.

66. Canada makes two arguments on this issue. First, Canada states that the litigation settlement costs were not included in the “G&A” line item on Weyerhaeuser’s books and records.<sup>42</sup> But this is semantics. Simply because Weyerhaeuser broke this litigation cost out of G&A and reported it as a separate line item does not justify excluding it from the company’s general costs. As described above, note 14 to the firm’s own consolidated financial statement supported accounting for the costs as general costs.

67. Second, Canada claims that the litigation settlement costs pertained to the production and sale of hardboard siding.<sup>43</sup> However, simply because the settlement arose from claims relating to hardboard siding does not make these costs of producing hardboard siding. In fact, these claims arose years after the hardboard siding involved in the litigation was produced. Moreover, Canada has failed to provide any recognized alternative accounting category for this cost that is consistent with Weyerhaeuser’s own treatment of it in its audited financial statement. For these reasons, Commerce properly included the litigation settlement costs in its calculation of total G&A, in accordance with Articles 2.2.1.1 and 2.2.2.

#### By-Product Offset for Wood Chips

68. Canada’s next set of arguments concerns Commerce’s calculation of offsets to certain respondents’ costs of production. Production of softwood lumber yields wood chips as a by-product. Producers are able to sell the wood chips to pulp mills. In calculating companies’ costs of producing softwood lumber, Commerce took wood chip sales into account as an offset. That is, Commerce reduced a company’s cost of softwood lumber production by an amount determined to be the cost of producing wood chips.

69. Canada challenges the methodologies Commerce used in valuing wood chip offsets. In evaluating that claim, the appropriate starting point is Article 2.2.1.1 of the AD Agreement. As we noted in discussing allocation of G&A expense, that provision does not prescribe particular methodologies for calculating cost of production. However, Article 2.2.1.1 does state that investigating authorities shall normally rely on a producer’s records, provided that they are kept in accordance with generally accepted accounting principles and reasonably reflect costs associated with production and sale of the product under consideration. For both of the companies at issue, that is precisely what Commerce did.

#### West Fraser Wood Chips

70. Wood chips have no independent cost associated with their production, because they are a by-product of lumber production. The task for Commerce was to identify a reasonable value for this by-product. In determining a wood chip offset for respondent West Fraser, Commerce reviewed West Fraser’s sales to affiliated entities and compared that information to data on West Fraser’s sales to unaffiliated parties, as a benchmark. The benchmark was used to determine whether sales to affiliated entities were at market prices and to make adjustments as appropriate.

71. Arguing that this valuation method was in violation of the AD Agreement, Canada claims that West Fraser’s sales volumes to unaffiliated entities were “tiny.”<sup>44</sup> On the contrary, the amounts of chips sold by the McBride and Pacific Island Mills were significant in terms of tonnage and value.<sup>45</sup> West Fraser never argued that the quantity of wood chips sold cast doubt on the reasonableness of the value of those sales as a benchmark during the investigation. So long as the wood chip transactions

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<sup>42</sup> See Canada’s First Oral Statement, para. 94.

<sup>43</sup> See *id.* at para. 93.

<sup>44</sup> Canada’s First Oral Statement, para. 109.

<sup>45</sup> See US First Written Submission, para. 219, n. 251; West Fraser Cost Verification Exhibit C5, WF-Cost-007503 (Exhibit CDA-106).

were commercial in nature, the actual volume of those transactions is irrelevant. As the United States explained in its First Written Submission, Canfor argued that some of its transactions were not commercial in nature, and Commerce agreed with that assessment of those transaction and did not use values derived from those transactions in its calculations. West Fraser, on the other hand, never made such an argument.<sup>46</sup>

72. Canada's arguments ignore the preference in Article 2.2.1.1 for basing cost calculations on a company's own records. If West Fraser's records were somehow not representative of its sales, then West Fraser had an obligation to demonstrate that fact. It did not do so.

#### Tembec Wood Chips

73. Tembec, unlike West Fraser, had no sales of wood chips to affiliated parties. Instead, it had inter-divisional sales, which Commerce determined to be a reasonable basis for determining the value that Tembec attributed to wood chips. Article 2.2.1.1 obligates investigating authorities to use the books and records of an investigated party in calculating costs if the value on the books and records reasonably reflects a cost of production. The same obligation holds true for the valuation of a by-product for purposes of an offset. Canada challenges Commerce's use of Tembec's actual valuation of wood chips, and states a preference for using another value. However, the fact that Tembec's market transactions were valued higher than Tembec's interdivisional transfers does not undermine the reasonableness of the value Tembec itself assigned to the by-products. Commerce reviewed these amounts, and consistent with its obligations under Article 2.2.1.1 of the AD Agreement, it used these figures.

74. Canada argues that Commerce should not have relied on Tembec's records, because those records showed that inter-divisional transaction values were arbitrary.<sup>47</sup> However, contrary to Canada's assertion, Commerce made no such determination, and the evidence does not support that claim. In the end, Canada asks this Panel to determine, in effect, that Tembec's own valuation data were arbitrary, and that Commerce's rationale for using these data violated the AD Agreement. The facts of the record do not support such a finding.

#### Slocan's Profits from Futures Trading Contracts

75. Canada argues that Commerce failed to properly account for profits from respondent Slocan's sales of lumber futures contracts. But, as the United States said in paragraph 247 of its First Written Submission, Slocan only requested two alternative treatments for these profits: (1) adjustment to direct selling expense and (2) offset to financial costs. If there was a third way to treat them – as indirect selling expenses – that claim was never made.

76. Slocan unambiguously stated that the hedging profits should be treated as an adjustment to direct selling expenses in the US market for differences in the conditions and terms of sale.<sup>48</sup> However, the facts demonstrated that these profits were not direct selling expenses. They were not directly related to particular softwood lumber sales.<sup>49</sup>

77. We disagree with Canada's suggestion (First Oral Statement, paragraph 121) that Article 2.4 does not require a price adjustment to be directly related to the actual sales transaction being compared. An adjustment cannot be demonstrated to affect price comparability, as required under

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<sup>46</sup>See US First Written Submission, para. 225, n. 268.

<sup>47</sup>Canada's First Written Submission, para. 260.

<sup>48</sup>See Slocan 23 July 2001 Section B, C, & D Questionnaire Response, C35-37; in the same submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.

<sup>49</sup>See Slocan Cost Verification Report at 26 (CDA-118); see Final Determination, Comment 21 (CDA 2).

Article 2.4, if it is not related to an actual transaction. If Slocan's futures contracts were indirect selling expenses, Slocan had an obligation to make that claim, which it did not.

78. Slocan also asked that its hedging profits be treated as an offset to financing costs. However, as an accounting matter, Slocan's own books and records treated the profits at issue as a type of lumber revenue, albeit revenue that was not generated by actual sales of softwood lumber. Therefore, it would have been inappropriate for Commerce to disregard Slocan's own treatment of the profits as linked somehow to lumber sales and instead treat them as offsets to cost of production.

79. Next, the United States addresses certain specific and incorrect allegations made by Canada in its Oral Statement.

- **First Oral Statement, paragraph 18**

80. Canada's claim in paragraph 17 of its First Oral Statement that the application did not contain "actual transaction information" is incorrect. For elaboration on this issue, see US Response to Question 14. Canada's suggestion that acceptance of the application was not something "an objective investigating authority assessing the evidence" would have done is also incorrect. The AD Agreement does not require that the application contain information beyond what is sufficient to support initiation.

- **First Oral Statement, paragraph 20**

81. Canada's claim that the United States "cannot credibly argue . . . that Commerce conducted an objective further examination of the information provided in the application" ignores the record evidence regarding Commerce's "further examination" of the application.<sup>50</sup> Instead, Canada bases this charge on the premise that, had Commerce conducted an "objective further examination, it would have discovered that the Petitioner was holding back extremely important and relevant evidence." As explained in the US First Written Submission, because the experience of one company could not have negated evidence of dumping by other companies, the Weldwood data could not have had the significance Canada attaches to it.<sup>51</sup>

- **First Oral Statement, paragraph 29**

82. Weldwood placed certain sales data on the record when seeking to be considered a voluntary respondent in the investigation. The fact that the United States did not analyze this data cannot justify Canada's suggestion that Commerce remained "willfully blind to evidence which would throw the applicant's application into doubt." The United States demonstrated, at paragraphs 65-69 of its *First Written Submission*, that the Weldwood data could have shown, *at most*, that Weldwood was not dumping. It could not have negated the evidence of dumping in both eastern and western Canada contained in the application. As such, the Weldwood data could not reasonably be described as "evidence which would throw the applicant's application into doubt." Commerce did, in fact, decline to analyze the data submitted by Weldwood after initiation. As a practical matter, Commerce could only analyze data from six out of the hundreds of Canadian softwood lumber producers. It chose which companies' data to analyze according to the value of exports to the United States. Documentation regarding Commerce's handling of the Weldwood data remained part of the case record throughout the investigation.<sup>52</sup>

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<sup>50</sup>See US First Written Submission, paras. 63-64 and the documents cited therein.

<sup>51</sup>See US First Written Submission, paras. 70-76.

<sup>52</sup>See Exhibit US-64.

- **First Oral Statement, paragraph 79**

83. Canada continues to claim that the United States failed to consider Abitibi's evidence relating to financial costs and asset values. This is incorrect. Commerce explains why it rejected Abitibi's argument in the Final Determination, Comment 15. Specifically, Commerce explained that it did not accept Abitibi's basic premise that interest costs could be tied to particular expenditures. In addition, Commerce explained that the methodology actually used accounted for the varying asset levels through depreciation costs.<sup>53</sup>

- **First Oral Statement, paragraph 89**

84. Canada argues that the United States was factually incorrect when it stated that Tembec's "divisional G&A" had to be supplemented with "headquarter G&A." Canada is incorrect. Canada stipulated in its First Written Submission that Tembec's suggested G&A methodology required the allocation of some portion of "headquarter G&A" to Tembec's softwood lumber division.<sup>54</sup> Thus, Tembec's methodology was not only based on the unaudited amount of G&A that Tembec claims was specific to the softwood lumber division, it also included an unaudited amount for "headquarter G&A."

- **First Oral Statement, paragraph 90**

85. Canada claims that Tembec's "division specific" G&A was in accordance with Canadian GAAP. This is an unsubstantiated claim. Moreover, the only evidence on the record indicates that this "division specific" G&A was *not* audited.<sup>55</sup> Commerce's methodology, in contrast, is based on an allocated portion of the G&A found in Tembec's audited financial statement. Thus, Commerce's methodology is in accordance with Article 2.2.1.1. Moreover, Tembec's methodology contradicts the most basic definition of general costs, which are costs incurred on behalf of an entire company, rather than a particular product.<sup>56</sup>

- **First Oral Statement, paragraph 94**

86. Canada claims that Weyerhaeuser did not report its litigation cost as a general cost to the company. Canada is incorrect. The US discussion of Weyerhaeuser at paragraphs 64-67 explains Commerce's basis for finding that Weyerhaeuser reported the litigation cost as a general cost.

- **First Oral Statement, paragraph 95**

87. Canada incorrectly asserts an absence of factual information that Weyerhaeuser's litigation costs were properly allocable to softwood lumber. The US discussion of Weyerhaeuser at paragraphs 64-67 explains Commerce's basis for finding that the litigation cost was a general cost.

- **First Oral Statement, paragraph 105**

88. Canada claims that Commerce "ignored the record evidence of prices at which Tembec's pulp mills in Ontario and Quebec purchased wood chips from affiliated suppliers." In fact, in the Final Determination, Commerce specifically addressed those transactions, explaining that "the documentation presented at verification" that contained these prices was "selectively provided by

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<sup>53</sup> See also US First Written Submission, para. 194.

<sup>54</sup> See Canada's First Written Submission, para. 209.

<sup>55</sup> See *Tembec's Annual Report, "Auditors Report,"* p. 34 (Exhibit US-12 at 3).

<sup>56</sup> Joel G. Siegel and Jae K. Shim, *Dictionary of Accounting Terms* (Barron's Educational Services, Inc. 2<sup>nd</sup> ed. 1995) (Exhibit US-47).

companies and not based on a sample chosen by the Department.”<sup>57</sup> Commerce added that “these comparisons represented only a portion of the total wood chip purchases by [Tembec]’s pulp mills and there is no record evidence to determine what the results might be if all mills were included.”<sup>58</sup>

- **First Oral Statement, paragraph 116**

89. Canada claims that Commerce “unreasonably disregarded certain sales by West Fraser as ‘inflated’ even though it verified that those sales reflected market prices.” Commerce never verified that those sales reflected market prices. In fact, it affirmatively determined that those affiliated sales did *not* reflect market prices.<sup>59</sup>

- **First Oral Statement, paragraph 120**

90. Canada argues that Commerce rejected the Slocan futures profit data despite evidence that the data related to lumber. See the US answer to Question 82 for a discussion of Commerce’s thorough evaluation of the facts.

**42. Please explain the methodology used with respect to treatment of by-product revenue offsets, and the manner in which by-product revenues were offset in the case before the Panel.**

91. In the process of manufacturing softwood lumber, wood chips are produced. These wood chips are minor in value when compared to lumber or joint products from the lumber production process, and they have no independent cost associated with their production. Therefore, by definition, they are by-products. These wood chips are subsequently sold by lumber sawmills to pulp mills through different types of transactions. Tembec’s sawmills sold wood chips to Tembec’s pulp mills through interdivisional transactions – sales within the same company. West Fraser, on the other hand, sold wood chips to affiliated pulp mills. Finally, both Tembec and West Fraser sold wood chips to mills with which they had no corporate relationship whatsoever.

92. In calculating a company’s cost of production of softwood lumber, Commerce will offset the total pool of joint lumber production costs by revenue from wood chip sales. Article 2.2.1.1 of the AD Agreement states that investigating authorities have an obligation to use a company’s books and records in its cost calculations if those books and records reasonably reflect the cost of production. This also applies to the valuation of an offset to the cost of production calculation. For purposes of the by-product offset, Commerce will use the actual valuation of a by-product from a company’s books and records, unless it believes that amount does not reflect a reasonable valuation of that by-product. In the case of the six respondents in the investigation, Commerce used the valuation for wood chips recorded by all of the companies except West Fraser.

93. West Fraser had sales to affiliated pulp mills and unaffiliated pulp mills. Unlike Tembec, it had no interdivisional transfers of wood chips. In evaluating sales to affiliated entities, Commerce applies as a benchmark sales to unaffiliated entities. In this way, Commerce determines whether an amount reported for an affiliated sale is a reasonable reflection of the actual cost of production (or actual value of a by-product in the case of a by-product offset). In the case of West Fraser’s Alberta transactions, because these sales of wood chips involved affiliated parties, Commerce compared them to West Fraser’s unaffiliated sales in Alberta and determined that the prices of wood chips in affiliated sales were appropriate to use in its calculations. With respect to the British Columbia transactions, Commerce reviewed West Fraser’s unaffiliated transactions within British Columbia and found them to be commercial transactions that reflected a market value. It then reviewed West Fraser’s affiliated

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<sup>57</sup>Final Determination, Comment 11 (Exhibit CDA-2).

<sup>58</sup>Final Determination, Comment 11 (Exhibit CDA-2).

<sup>59</sup>US First Written Submission, para. 220 and exhibit cited therein.

transactions and determined that the prices for wood chips paid by the affiliated parties did not reasonably reflect a market value for wood chips. Thus, Commerce removed the affiliated valuations in its calculations for West Fraser's sales in British Columbia and valued them with the price of wood chips in West Fraser's unaffiliated transactions.

94. Canada now argues that Commerce should have used the prices for West Fraser's affiliated transactions, because most of the transactions in British Columbia were with affiliated parties. Canada also argues that some of the unaffiliated transactions (from the McBride mill) were subject to a contract that kept prices constant. However, Canada does not discuss the commercial validity of the rest of the transactions (from the Pacific Island Resources mill).

95. West Fraser's total unaffiliated transactions involved a significant tonnage of wood chips to separate unaffiliated parties, with a significant commercial value.<sup>60</sup> However, it is not the volume of the transaction that makes it a market based transaction, but the commercial setting and the details surrounding the sale. In this case, West Fraser did not argue that its unaffiliated transactions were either too small or not market-based. Thus, Commerce determined that there was no reason to question the representativeness of these transactions, and it used the wood chip prices from these transactions to value West Fraser's by-product offset in its production costs.

96. With respect to Tembec, Canada claims that Commerce should not have used Tembec's interdivisional wood chip valuations, because Commerce (allegedly) verified that these prices were arbitrary and that Tembec's market sales were larger than its interdivisional sales. As Commerce explained in the Final Determination and the US First Written Submission, Commerce never verified that Tembec's interdivisional values were arbitrary,<sup>61</sup> and to the contrary, actually determined that Tembec's interdivisional value for wood chips reasonably reflected a value for that by-product.<sup>62</sup>

97. In determining a "reasonable" amount for valuing the *by-product offset* in interdivisional transactions, Commerce uses the same methodology that it uses for valuing *costs* in interdivisional transactions. As a standard corporate practice, interdivisional transfer values reflect actual costs of production (since the company does not need to include a profit in its price to itself). With respect to by-products, absent any independent costs, Commerce normally takes the internal value assigned by the company to a by-product as a surrogate for an appropriate value for the by-product, and then tests that value for reasonableness, as done here. Because Commerce normally values interdivisional transfers at actual cost, which is less than market value (because of the existence of profit in market value), a value assigned to a by-product is also commonly less than market value.

98. Canada argues that this makes no sense, because if a by-product has no cost, then there can be no "profit." However, even a by-product with no independent cost can be assigned a company's best assessment of a surrogate for cost. This is what Tembec did when it set its internal transfer price.

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<sup>60</sup>West Fraser Cost Verification Exhibit C5, WF-Cost-007503 (Exhibit CDA-106).

<sup>61</sup>When evaluating Tembec's British Columbia sawmills, Commerce stated:

We compared 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.* (Emphasis added).

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

<sup>62</sup>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." Final Determination, Comment 11 (Exhibit CDA-2). Pursuant to this analysis, it found that the weighted average transfer price between Tembec's own British Columbia sawmills and pulp mills was a reasonable surrogate for the actual cost of wood chips, and it therefore used this number as Tembec's by-product offset. *Id.*

There are no easy methods to assess value under such conditions, but Commerce examined Tembec's assessment and found that it was reasonable. Tembec set an internal surrogate for cost, and it also had an external market price; the difference between the two is the equivalent of "profit" in the normal setting where costs and sales prices are known.

99. Given these inherent difficulties, and contrary to Canada's analysis that there could be no "profit," there also has not been an "arbitrary" valuation, because Commerce used the company's own valuation data to make its determination of a "reasonable" figure for a by-product offset.

**43. When addressing Canada's company-specific issues relating to the determination of the SG&A expenses of Abitibi, Tembec and Weyerhaeuser, please explain which of the methodologies were applied by DOC to calculate the general and administrative expenses of Abitibi, Tembec and Weyerhaeuser and how they are consistent with the provisions of Article 2.2.2 of the Anti-Dumping Agreement.**

100. In answering this question, the United States will first provide a general description of its SG&A methodology.

101. In order to calculate SG&A, Commerce calculates selling costs, general and administrative costs, and interest costs. Direct selling costs, such as commissions, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question are assigned on a sales-specific basis to the extent possible.

102. Indirect selling costs, which do not result from a particular sale (*e.g.*, salesman's salaries, office supplies) are allocated over all sales made by the sales unit incurring the costs, on the basis of sales value.

103. Other than financial costs, general and administrative (G&A) costs for the like product are allocated to all sales by the producer, through application of a G&A ratio. The producer's total G&A is divided by the producer's total cost of goods sold. If the producer is part of a consolidated entity, Commerce includes in the calculation that portion (ratio) of the parent company's G&A pertaining to the producer under investigation. The resulting quotient is the G&A ratio and represents the amount of G&A incurred for each dollar of production cost. The G&A ratio is applied to the total cost of production of the like product in order to determine the non-financial general and administrative costs pertaining to the production of the like product.

104. Financial costs are also allocated to all sales by the producer (through a financial cost ratio). The producer's total interest cost is divided by the producer's total cost of goods sold. Because money is fungible, a dollar borrowed is not identifiable with any particular product within a company. For example, money borrowed by a company producing several different products may be expended as easily on lumber production as it is on paper production. Accordingly, in calculating the financial cost ratio, Commerce starts at the highest level of corporate consolidation. Thus, if a corporate entity consisted of a parent and several subsidiaries, Commerce would calculate its financial cost ratio based on the total financial cost reported on the parent's consolidated financial statement divided by the parent company's total cost of goods sold. The resulting quotient is the financial cost ratio and represents the financial costs the producer incurs for each dollar of production cost. The financial cost ratio is applied to the total cost of producing the like product in order to determine the financial costs pertaining to the production of the like product.

105. Commerce employed the methodology described above in calculating G&A costs for Abitibi, Weyerhaeuser, and Tembec. As this methodology was based on the actual cost data provided by Abitibi, Weyerhaeuser, and Tembec and was like product specific (*i.e.* the financial cost ratio and the G&A ratio were applied to the cost of producing softwood lumber), this methodology is fully consistent with the chapeau of Article 2.2.2, and with Article 2.2.1.1.

**To both parties:**

**44. What obligations does Article 2.2.1.1 impose: 1) in general on investigating authorities, and 2) with respect to the determination of by-product revenue offsets?**

106. Article 2.2.1.1 establishes obligations on investigating authorities with respect to their consideration and use of cost data provided by respondents in an investigation. It states that it is “[f]or the purpose of paragraph 2”, which means that, in the context of Article 2.2, it covers “*cost of production*” and also “a reasonable amount for administrative, selling and general *costs*.” In particular, investigating authorities are directed by this provision to:

- (1) calculate costs normally 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 exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration;
- (2) consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer. Emphasis should be placed on that evidence which establishes appropriate amortization and depreciation periods and allows for capital expenditures and other development costs; and
- (3) adjust appropriately for non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations (unless already reflected in the cost allocations).

107. Article 2.2.1.1 provides no specific guidance on the question of determining the reasonableness of the costs of by-products or by-product offsets.<sup>63</sup> It speaks more generally to the cost of production of the product under investigation. Where an exporter’s cost records in accordance with GAAP include a revenue offset, calculating a by-product offset can be a necessary step in calculating the cost of producing the product under consideration. The general guidance in Article 2.2.1.1 applies to each of the particular steps in calculating cost of production, including calculation of a by-product offset.

**45. For the terms "actual data pertaining to production and sales (¼) of the like product" in Article 2.2.2, please explain the application of this sentence in general and in light of the company-specific issues in this case.**

108. The chapeau of Article 2.2.2 expresses a preference for basing the amounts for administrative, selling and general costs and for profits on the actual amounts that pertain to the production and sale in the ordinary course of trade of the like product. If a producer’s actual data pertaining to the production of the like product is not available, or if sales of the like product have not been in the ordinary course of trade, Article 2.2.2 provides three alternative methodologies for calculating SG&A and profit.

109. Abitibi, Tembec, and Weyerhaeuser reported actual general and administrative costs that were incurred on behalf of each company. As these general and administrative costs, by definition, were

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<sup>63</sup>Indeed, the United States notes that the AD Agreement contains no requirement to make a by-product offset. The only issue is the extent to which an investigating authority has found that the cost records for production of the product under consideration are a reasonable reflection of the costs associated with such production. It becomes an issue, in most cases, where the GAAP of the exporting country allows an exporter’s records to use the by-product revenue as an offset.

incurred on behalf of each company, in their entirety, they pertained, in part, to the production and sale of the like product for each company. Therefore, a portion of each producer's actual costs was allocated to the like product by applying the G&A and financial cost ratios to the cost of manufacturing the like product. Because the selling, general, and administrative costs were based on each producer's actual data, sales were in the ordinary course of trade, and the costs pertained to the like product, these costs were calculated consistently with the chapeau of Article 2.2.2.

**46. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?**

110. Article 2.2.1.1 and Article 2.2.2 relate to the obligations of investigating authorities in calculating a producer's cost, including for purposes of determining whether the producer is selling below the cost of production and also constructing a normal value. Article 2.2.2 addresses administrative, selling and general costs and profit in particular, while Article 2.2.1.1 addresses all cost calculations (including G&A). Article 2.2.2 expresses a preference for basing the calculation of administrative, selling, and general costs and of profits on the actual amounts that pertain to the production and sales in the ordinary course of trade of the like product and the actual profits realized. However, if a producer's actual data pertaining to the production of the like product cannot be determined on this basis, Article 2.2.2 provides alternative methodologies for calculating these costs. Article 2.2.1.1 expresses a preference for basing the calculation of all costs on the books and records of the producer, provided that those books and records are kept in accordance with the GAAP of the country of production and that they reasonably reflect the costs associated with the production and sales of the like product. Thus, while both provisions express a general preference for costs to be calculated on a producer's data pertaining to or associated with the like product, Article 2.2.1.1 clarifies what kind of data an investigating authority is obligated to consider (*i.e.*, books and records kept in accordance with the GAAP of the country of production and that reasonably reflect the cost associated with the production and sales of the like product).

**G.2 Calculation Financial Expenses of Abitibi**

**To Canada:**

**47. Please comment on the statements contained in p. 77 of DOC's Memorandum of 21 March 2002 (Exhibit CDA-2):**

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

111. As the quoted passage indicates, Commerce's methodology reflects asset values, because the cost of goods sold, upon which financial costs are allocated, as well as the cost of manufacturing the like product to which the financial cost ratio is applied, both include depreciation values. Canada argues that because certain types of assets are not depreciated (*e.g.*, land and goodwill), Commerce's methodology is unreasonable.<sup>64</sup> However, the vast majority of Abitibi's assets (approximately C\$8 billion out of C\$11 billion in total assets) were "capital assets" and were represented in Commerce's financial cost methodology through depreciation costs.<sup>65</sup> Moreover, contrary to

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<sup>64</sup> See First Oral Statement of Canada, para. 84.

<sup>65</sup> See *Abitibi 2000 Consolidated Financial Statement*, p. 35 (Exhibit CDA-82).

Canada's assertion in its *First Oral Statement* (paragraph 84), Commerce included an amortized portion of goodwill in Abitibi's cost of production.<sup>66</sup>

### G.3 Calculation of G&A Expenses of Tembec

To the US:

56. In paragraph 200 of its *First Written Submission*, the US states that:

"Commerce determined that, because the division-specific amount at issue was unaudited, it was inherently 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." 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." (footnotes excluded)

Could the US please direct the Panel to where on the record did DOC make such determinations? Please provide detailed references to relevant portions of documents as well as copies thereof.

112. Commerce recognized in its Final Determination that Tembec reported its G&A based on an "internal accounting methodology" rather than on its audited financial statements.<sup>67</sup> Commerce also stated that it was employing its standard G&A methodology in order to avoid "any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionately between divisions."<sup>68</sup> Finally, Commerce noted that its standard G&A methodology "is consistent with Canadian GAAP's treatment of such period costs. . ." Commerce's decision to reject this unaudited G&A amount was reasonable, because an unaudited amount is of questionable reliability. The importance of the reliability of cost data is clearly recognized in Article 2.2.1.1, which states that an investigating authority should normally consider only those books and records that are kept in accordance with the GAAP of the country where the like product is produced and reasonably reflect the cost associated with the production and sale of the like product.

113. Commerce also recognized in its Final Determination that, consistent with the definition of "general costs," G&A relates to the company as a whole rather than a particular product. Commerce stated that its methodology was consistent "with the general nature of [G&A] expenses and the fact that they relate to the activities of the company as a whole rather than a particular production process."<sup>69</sup> Tembec's methodology contradicts this basic definition and is based on the unsubstantiated premise that general and administrative costs are incurred primarily on a divisional level.

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<sup>66</sup> Final Determination, Comment 16 (Exhibit CDA-2).

<sup>67</sup> *Id.* at Comment 33; *see also* Verification Report on the Cost of Production and Constructed Value Data Submitted by Tembec Inc., p. 26 (29 January 2002) (Exhibit US-73) (stating that Commerce tied Tembec's G&A costs to the audited financial statements).

<sup>68</sup> *See* Final Determination, Comment 33.

<sup>69</sup> *Id.*

**57. Could the US please indicate which of the methodologies in Article 2.2.2 did DOC use to determine the SG&A for Tembec?**

114. Commerce determined Tembec's SG&A under the chapeau of Article 2.2.2. As discussed in the answer to Question 43, Commerce calculated Tembec's G&A by applying the company-wide G&A ratio to the cost of manufacturing of the like product.<sup>70</sup> The resulting amount represents the G&A cost that pertains to Tembec's production and sale of the like product. As Commerce's methodology relied on Tembec's own data and calculated SG&A specific to the like product under investigation (*i.e.*, the G&A ratio was applied to the cost of manufacturing the like product), it is fully consistent with the chapeau of Article 2.2.2. Given the availability of Tembec's actual data pertaining to the production of the like product, there was no basis for Commerce to use the other methodologies available under Article 2.2.2(i), (ii), and (iii).

**G.4 Calculation of G&A (Legal Costs) of Weyerhaeuser**

**To Canada:**

**58. Could Canada please direct the Panel to where in the record it can find Weyerhaeuser's arguments on the treatment of certain legal settlement claims incurred by Weyerhaeuser US. Please include references to documents on the record, identifying with precision where on the document Weyerhaeuser's argument are to be found. Also provide a concise summary of Weyerhaeuser's arguments.**

115. One place on the record in which the Panel can find Weyerhaeuser's arguments on this legal settlement issue is in the Final Determination, Comment 48b (Exhibit CDA-2), where Weyerhaeuser's arguments, those of the petitioners, and Commerce's decision are fully summarized. This discussion reflects Commerce's consideration of all of the arguments and evidence before reaching its determination.

**To the US:**

**61. In para. 227 of its *First Written Submission*, Canada states that:**

**"[w]ithout providing any citations or evidence to support its conclusion, DOC simply stated that it "typically allocates business charges of this nature over all products because they do not relate to an {sic} production activity, but to the company as a whole."" (footnote omitted)**

**Could the US please comment on the above statement. In particular, could the US explain in detail how DOC came to the conclusion that it was justified to reject Weyerhaeuser's request for exclusion of certain legal settlement claims and direct the Panel to where in the record it could find the relevant DOC motivation?**

116. In response to this question, the United States refers the Panel to the discussion of "Weyerhaeuser G&A" in the US response to Question 41, paragraphs 65-67.

**62. With respect to Weyerhaeuser's arguments relating the treatment of legal settlement costs, it is stated in DOC's Memorandum of 21 March 2002 (Exhibit CDA-2) that:**

**"[w]hile the costs relate to non-subject product, hardboard siding, the Department typically allocates business charges of this nature over all**

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<sup>70</sup> See Section D Questionnaire - Cost of Production and Constructed Value, D-13 (Exhibit US-46).

**products because they do not relate to an (sic) production activity, but to the company as a whole."**

**In para. 211 of the US *First Written Submission*, it is stated that:**

**"[a]s in that case, the nexus here between the litigation costs at issue and production of the product at issue (hardboard siding) was attenuated."**

**In light of DOC's finding, could the US explain what the term "was attenuated" means in this context? In replying to this question, could the US please refer to documents/evidence on the record. Please describe and motivate your standard practice.**

117. In describing the relationship between the litigation costs and the production of hardboard siding as "attenuated," the United States was stressing that any relationship was weak at best. As explained in the US answer to Question 41, not only were these litigation expenses not of the type that are production costs (*i.e.*, the litigation does not make or help to make a product), but the expense was incurred anywhere from one year to as long as eighteen years after production and sale of the products at issue.

118. Canada's argument confuses a cost being (possibly) associated with a product and a cost being related to the *production* of a product. The mere fact that litigation was about hardboard siding does not mean that the litigation cost was a cost of producing hardboard siding.

119. When the United States used the word "attenuated," it was describing the weak link between the litigation and the cost of producing hardboard siding. The United States was underscoring the point that a long separation between production of a good and the incurring of a litigation expense associated with the good argues strongly against allocating the expense to the current cost of producing that good.

**63. In Egypt – Steel Rebar, the panel found that a "relationship test" is articulated in, inter alia, Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement. Could the US please comment on this? Is the US of the view that the fact that certain costs are found to be part of the general and administrative expenses of a company allows an investigating authority to automatically allocate a portion of such costs to the like product, or is the investigating authority obligated to establish a relationship between those costs and the production and sale of the like product?**

120. Article 2.2.2 of the AD Agreement requires that amounts for administrative, selling, and general costs 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." Article 2.2.1.1 requires that costs (including G&A costs) normally be calculated on the basis of an exporter or producer's records where, *inter alia*, those records "reasonably reflect the costs associated with the production and sale of the product under consideration." The *Egypt-Steel Rebar* panel characterized these provisions as setting forth a requirement that there be a "relationship" between the interest income at issue (which typically would be considered as part of G&A cost) and the costs of producing and selling the product under consideration.<sup>71</sup>

121. The United States does not disagree with the general proposition that the words "associated with" and "pertaining to" suggest some relationship between G&A costs and costs of producing and selling the product under consideration. Where the United States disagrees with the *Egypt-Steel Rebar* report, as the US understands it, is in the degree of relationship required. The panel in *Egypt-*

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<sup>71</sup>*Egypt-Steel Rebar*, para. 7.393.

*Steel Rebar* appeared to require that a given item of G&A expense – in that case, an offset to short-term interest expense – be related *exclusively* to production and sale of the product under consideration in order for it to be includable in that product’s cost of production.

122. It is important to recall the facts in *Egypt-Steel Rebar*. As the panel in that case observed, “[T]he calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation.”<sup>72</sup> There, respondents were seeking an offset to cost of production for short-term interest earned during the period of investigation. The investigating authority found that the respondents had not shown a relationship between the interest earned and the costs of selling and producing rebar. The panel agreed, stating that it had not found “evidence of record that would demonstrate any relationship of short-term interest income to the cost of producing rebar.”<sup>73</sup>

123. The panel in *Egypt-Steel Rebar* made a point of noting the respondents’ failure to respond to the investigating authority’s information requests.<sup>74</sup> It is, therefore, unclear what evidence would have satisfied the Panel of the existence of a relationship between short-term interest income and the cost of producing rebar. What is puzzling about the panel’s finding is that it seems to require that an element of G&A cost (in this case, a short-term interest offset) be related exclusively to the production and sale of the product under consideration. It was not enough that the element was part of G&A for the company producing the product. This is where the United States disagrees with the panel’s reasoning.

124. The degree of relationship between G&A and cost of selling and production apparently required by the *Egypt-Steel Rebar* panel runs contrary to the very concept of G&A. By definition, G&A costs consist of expenses incurred on a company-wide basis for the benefit of the company as a whole. In a company that produces multiple products, G&A costs are not exclusive to any one product. They are related to all of the products and are allocated accordingly.

125. A requirement that any given element of G&A cost be associated exclusively with a single product would lead to the absurd result of G&A cost never being allocable to a product where the producer has several different product lines. Plainly, Articles 2.2.1.1 and 2.2.2 do not require that absurd result.

126. In response to the second part of the Panel’s question, the United States is of the view that the fact that certain costs are found to be part of the G&A expenses of a company allows an investigating authority to automatically allocate a portion of such costs to the like product. Because general and administrative expenses are incurred for the benefit of a company as a whole, including all lines of production, they necessarily pertain to each particular line of production.

## **G.5 Calculation By-Product Revenue Offset – West Fraser**

**To the US:**

**68. Please comment on the following statements contained in para. 242 of Canada’s First Written Submission:**

**"[f]or DOC to have disregarded the costs set out in West Fraser’s records, DOC was required to determine that those records did not reasonably reflect the costs associated with the production and sale of the product under consideration. DOC did not make such a determination."**

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<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at para. 7.426.

<sup>74</sup>*Id.*

127. Canada's assertion is incorrect. Commerce did determine that West Fraser's sales to affiliated parties did not reasonably reflect the costs associated with the production and sale of wood chips. Commerce reached this determination by comparing West Fraser's sales to affiliated parties with its sales to unaffiliated parties, as recorded in West Fraser's books. Having determined that West Fraser's sales to affiliates did not reflect market prices, Commerce used the average price for West Fraser's wood chip sales to unaffiliated customers to determine the value of the wood chip offset.<sup>75</sup>

#### **G.6 Calculation of By-Product Revenues – Tembec**

##### **To Canada:**

**70. Please explain the statement contained in para. 261 of Canada's First Written Submission that:**

**"Article 2.2.1.1 of the Anti-Dumping Agreement reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets."**

128. Canada's statement is based on an incomplete reading of Article 2.2.1.1. The AD Agreement expressly provides that an investigating authority must ordinarily base cost calculations on an exporter or producer's books and records. This would include any valuation of the by-product reflected in the books and records of the producer or exporter, "provided that 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."

129. It is entirely possible that a given item in a company's books will reasonably reflect costs and still be lower than market price. This is because cost will not include factors such as profit and selling expense, which are elements of market price. Article 2.2.1.1 provides that cost calculations must reasonably reflect the *costs* associated with the production and sale of the product, not the market value of the product.

##### **To the US:**

**74. Explain on which basis the different rules mentioned in para. 216 of the US First Written Submission are consistent with Article 2.2.1.1.**

130. In paragraph 216 of its First Written Submission, the United States discusses different methods for valuing a by-product. There are three different scenarios: transactions between unaffiliated parties, transactions between affiliated parties, and transactions between divisions of the same corporate entity. For a detailed explanation of Commerce's practice in each of these scenarios, see the US answer to Question 42, above.

#### **G.7 Futures Contracts**

##### **To Canada:**

**79. Please comment on the findings contained in para. 6.77 of the US – Stainless Steel panel report:**

**"[i]n our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralize differences in a**

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<sup>75</sup> Final Determination, Comment 11 (Exhibit CDA-2).

**transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of prices within the meaning of Article 2.4." (footnote omitted)**

131. The passage cited in this question refers to differences between home market sales and export sales that may affect price comparability. It presumes that the seller has identified differences that affect particular sales. In this case, Slocan did not even show that the futures contracts at issue were terms and conditions related to particular sales of lumber in the United States. It did not demonstrate that the futures contracts amounted to a "difference" related to export sales, let alone a difference that affected price comparability.<sup>76</sup>

**To the US:**

**81. Please comment on the following statement contained in para. 277 of Canada's First Written Submission:**

**"DOC could have treated the revenues as an offset to selling expenses, as an offset to financial expenses, or as some other circumstance of sale adjustment. DOC erred, however, when it failed to make any adjustment to account for revenue generated by futures contract revenues."**

132. Slocan requested only two alternative treatments for its futures contract profits. If there was a third way to treat them – as offsets to indirect selling expenses – Slocan did not make that claim.<sup>77</sup>

133. In its 23 July 2001 Questionnaire Response, Slocan unambiguously stated that the hedging profits should be treated as an offset to direct selling expenses in the US market, as an adjustment for differences in the conditions and terms of sale.<sup>78</sup> It stated: "Sometimes Slocan will sell its short positions and take the loss or profit between the sale and strike prices. These expenses or revenues are linked to Slocan's sales in the United States and so are being reported as direct selling expenses."<sup>79</sup> Slocan failed to explain the link between these expenses or revenues and any particular US sales of lumber. It also said nothing about how its contracts might affect prices to US customers. In the same

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<sup>76</sup>It is evident from Slocan's financial statements that futures profits are just another source of income to the company. The record shows that, where no physical delivery of subject merchandise occurred, Slocan records the profits or losses from these futures contracts as a sales-type revenue in its books and financial statements. Slocan Case Brief at 70, n. 24 (Exhibit US-72). For all practical purposes in this case, since the revenue was not profit from the sale of lumber, it could just as easily have been revenue from the sale of another product. For example, profits from sales of pulp and paper in the United States are not a difference in conditions and terms of sale for lumber. Similarly, in this case, hedging profits are not tied to any sale of lumber.

<sup>77</sup>First, Slocan claimed that the futures contracts profits should be an offset to direct selling expenses. Commerce found that Slocan's futures contracts profits are not *direct* selling expenses, as they are not directly related to specific sales of softwood lumber. US First Written Submission, para. 250; Final Determination, Comment 21 (Exhibit CDA-2). Second, Slocan alternatively claimed that the futures contracts profits should be an offset to financing costs included in the calculation of Slocan's cost of production. Commerce found that Slocan's alternative argument also failed, because Slocan's own books and records recorded futures profits as sales revenues, not production expenses. US First Written Submission, para. 254; Final Determination, Comment 21 (Exhibit CDA-2).

<sup>78</sup>Response of Slocan Forest Products Ltd To Sections B, C, & D of the Department of Commerce Antidumping Questionnaire, 23 July 2001, pp. C35-37 (Exhibit US-71).

<sup>79</sup>*Id.* at pp. C-35-36 (Exhibit US-71).

submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.<sup>80</sup> The facts demonstrated that hedging profits were not direct selling expenses, because they were not directly related to particular softwood lumber sales.<sup>81</sup>

134. The United States disagrees with Canada's suggestion (First Oral Statement, paragraph 121), that Article 2.4 does not require a price adjustment to be directly related to the actual sales transaction being compared. An adjustment for alleged differences in conditions and terms of sale cannot be demonstrated to affect price comparability if it is not shown that the claimed difference is related to an actual transaction.<sup>82</sup>

135. In its statements to the Panel, Canada appears to have articulated a claim that is broader than the one Slocan made to Commerce. Slocan urged that its futures contract revenues warranted either an adjustment to "direct selling expense" or an offset to interest expense. Now, Canada argues that the revenues warranted an adjustment to "selling expense," significantly omitting the word "direct."<sup>83</sup>

136. Omission of the word "direct" effectively draws in indirect selling expense. However, Slocan never sought an adjustment to indirect selling expense. In fact, it stated that it had no indirect selling expenses in the United States.<sup>84</sup>

137. Under Article 2.4, Commerce had no obligation to make an adjustment that the respondent did not seek.<sup>85</sup> Article 2.4 requires that "due allowance" be made "in each case, on its merits" where a difference is "demonstrated" to affect price comparability. Since Slocan did not even make the argument for an adjustment to indirect selling expense, there was no basis for Commerce to determine that the merits warranted such an adjustment.

138. Slocan also had asked in the investigation that its hedging profits be treated as an offset to financing costs. However, as an accounting matter, Slocan's own books and records treated the profits at issue as a type of lumber revenue, albeit revenue that was not generated by actual sales of softwood lumber. Therefore, as noted in paragraph 246 of the US First Written Submission, it would have been inappropriate for Commerce to disregard Slocan's own treatment of the profits as linked, albeit indirectly, to lumber sales and instead treat them as offsets to cost of production.

**82. Please explain how DOC treated Slocan's futures contracts revenues at issue before the Panel in the various stages of the investigation, including whether or not any form of adjustment was granted in DOC's Final Determination.**

139. In its Preliminary Determination, Commerce found Slocan's futures contracts to be a type of investment activity. It did not grant an adjustment for direct selling expenses.<sup>86</sup> In a memorandum issued at the time of its Preliminary Determination, Commerce explained,

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<sup>80</sup>*Id.* at pp. C-37 (Exhibit US-71).

<sup>81</sup>See Slocan Cost Verification Report at 26 (Exhibit CDA-118); *see* Final Determination, Comment 21 (Exhibit CDA-2).

<sup>82</sup>See Panel Report, *Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 Feb. 2001, para. 6.77.

<sup>83</sup>See Canada's June 17 First Oral Statement, para. 120; Canada's First Written Submission, para. 277.

<sup>84</sup>See Slocan's 23 July 2001 Section B, C, & D Questionnaire Response, p. C-37 (Exhibit US-71).

<sup>85</sup>See Panel Report, *Egypt-Steel Rebar*, para. 7.3 ("[W]here opportunities have been provided by the authority for interested parties to submit into the record information and arguments on [a] point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel.").

<sup>86</sup>Preliminary Determination at 56,069 (Exhibit CDA-11).

In the field DIRSELU2 in the US sales database, Slocan has reported the profit or loss associated with sales made on the futures market. We concluded that this is an investment revenue, and should not be treated as a sales specific deduction/addition.<sup>87</sup>

140. Also, in its Preliminary Determination, Commerce treated the futures trading profits as an offset to financial expenses.<sup>88</sup> Following verification and further argument, Commerce reversed its treatment of the profits as an offset to financial expenses.<sup>89</sup>

141. Slocan disagreed with Commerce's Preliminary Determination regarding direct selling expenses, and argued the issue further in its briefs.<sup>90</sup> Also, Commerce's verifications determined that Slocan used futures contracts to hedge its sales in general, rather than specific transactions.<sup>91</sup>

142. In its case brief in response to the Preliminary Determination, Slocan argued that Commerce disallowed "an integral part of Slocan's US selling activity" by treating profits earned on futures contracts as investment revenue instead of as a selling adjustment.<sup>92</sup> Specifically, Slocan argued that because the company uses the futures market in an effort to protect itself from future downward price trends, Commerce was mistaken in believing that Slocan uses the market for strictly speculative purposes. Slocan stated that "since every futures contract entered into by Slocan with the CME [the Chicago Mercantile Exchange] carries with it the obligation to deliver the actual lumber specified in the contract at the time and place specified, Slocan at all times keeps track of the contracts in relation to its other selling activity, in order to be sure of having the ability to deliver the 'underlying Physical' out of its own inventory." Slocan also cited to Commerce's verification report to support its argument.<sup>93</sup>

143. Slocan argued that "the futures profits are more appropriately treated as short-term investments" and should be treated as an offset to the company's financial expenses. Slocan argued that this situation is "unique from previous situations in which the Department has disallowed investment income on the grounds that the income is not related to the operations of the company," because this income is not generated by investment; rather, this income results from Slocan's "regular lumber sales philosophy."<sup>94</sup>

Commerce concluded:

**Department's Position:** Slocan's sales on the Chicago Mercantile Exchange (CME) can be divided into two categories: those that result in the shipment of subject merchandise, and those that do not. Any sales of subject merchandise that occurred during the POI as a result of a futures contract have been included in Slocan's reported sales list. However, we have not included in our analysis profits on the sale of futures contracts that did not result in the shipment of subject merchandise. Such 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.

We also have not applied these profits as an offset to Slocan's direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs the Department to make circumstance of sales adjustments only for direct selling expenses and assumed expenses. Section 351.410(c)

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<sup>87</sup>DOC Analysis Memorandum for Slocan Forest Products, Ltd. at 7, 30 October 2001 (Exhibit CDA-116).

<sup>88</sup>Preliminary Determination at 56,069 (Exhibit CDA-11).

<sup>89</sup>Final Determination, Comment 21 (Exhibit CDA-2).

<sup>90</sup>Final Determination, Comment 21 (Exhibit CDA-2); Slocan Case Brief at 69-72 (Exhibit US-72).

<sup>91</sup> See Cost Verification Report, Memorandum from Michael P. Harrison to Neal M. Halper, 21 February 2002, p. 26 (Exhibit CDA-118).

<sup>92</sup>Slocan Case Brief at 71 (Exhibit US-72).

<sup>93</sup>Final Determination, Comment 21 (Exhibit CDA-2); Slocan Case Brief at 71 (Exhibit US-72).

<sup>94</sup>Final Determination, Comment 21 (Exhibit CDA-2); Slocan Case Brief at 72 (Exhibit US-72).

defines direct selling expenses as "expenses . . . that result from and bear a direct relationship to the particular sale in question." Accordingly, where no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct selling expenses.

Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan's financial expenses. In support of this argument, Slocan disputes the Department's statement in its preliminary determination calculation memo that these profits are "investment revenues" by stating that Slocan is engaging in hedging rather than speculative activity, and that sales on the futures market are integral parts of the company's normal sales and distribution process. While we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity. As such, the futures profits should not be used to offset the company's interest expense.<sup>95</sup>

144. Accordingly, having heard the parties' arguments, verified the evidence, and evaluated the record for the Final Determination, Commerce did not accept either of Slocan's proposed adjustments.

**83. The Panel notes the following statement contained in para. 249 of the US First Written Submission:**

**"[t]he adjustment that Canada claims should have been made here is an adjustment for conditions and terms of sale."**

**On which basis does the US conclude that the adjustment that Canada claims, "should have been made here", is an adjustment for conditions and terms of sale?**

145. The basis for the quoted statement is Slocan's request for an offset to direct selling expenses for sales of US lumber.<sup>96</sup> An adjustment for direct selling expenses, by definition, is a type of adjustment for differences in conditions and terms of sale.<sup>97</sup>

**84. Could the US indicate whether DOC examined if the requested adjustment was justified under the following language of Article 2.4: "and any other differences which**

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<sup>95</sup>Final Determination, Comment 21 (Exhibit CDA-2).

<sup>96</sup>Final Determination, Comment 21 (Exhibit CDA-2) ("[W]here no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct expenses.").

<sup>97</sup>Differences in circumstances of sale are the US law equivalent to the AD Agreement's reference to differences in conditions and terms of sale. Under US law, an adjustment for direct selling expenses is a sub-category of an adjustment for differences in circumstances of sale. Section 773(a)(6)(C)(iii) of the Tariff Act of 1930 (Exhibit CDA-7) deals with circumstances of sales adjustments:

(6) Adjustments. The price described in paragraph (1)(B) shall be...

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to

... (iii) other *differences in the circumstances of sale*. (Emphasis supplied).

The specific circumstances of sale adjustment that Slocan requested was for profits from futures contracts to be used to offset "direct selling expenses." Commerce's regulations, 19 CFR Section 351.410(c), define "direct selling expenses":

(c) Direct selling expenses. "Direct selling expenses" are expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear *a direct relationship to, the particular sale in question*. (Emphasis supplied).

**are also demonstrated to affect price comparability''? If so, what were DOC's conclusions? Please identify the relevant documents on the record.**

146. Commerce examined only those bases for adjustment that Slocan requested. The quoted text from Article 2.4 presumes a request for such an adjustment, as well as a demonstration of effect on price comparability. Absent both a request and a demonstration, there is nothing to examine. Article 2.4 does not require an investigating authority, independent of evidence and argument by an interested party, to find bases for a price adjustment. The only attempt Slocan made at a demonstration of effect on price comparability was with respect to direct selling expense. For the reasons described in our response to Question 81, Commerce found no effect on price comparability to have been “demonstrated” in this case.

### ANNEX A-3

#### RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(30 June 2003)

1. Please comment on the findings contained in para. 7.3 of the Egypt – Steel Rebar panel report:

**"the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in US – Hot-Rolled Steel, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "co-operation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

1. The EC notes from the outset that the Panel made its findings unrelated to any specific provision under the *Anti-Dumping Agreement* ("*AD Agreement*") However, the exact obligations of the investigating authority and interested parties have to be determined on the basis of a relevant particular provision. In this respect overarching principles may have a certain bearing on the interpretation of a given obligation but they do not stand independently thereof.

2. This being said, the EC would recall that the Panel draw a distinction between two different sets of procedural obligations on an investigating authority:

- first, "those that are stated explicitly and in detail, and which have to be performed in a particular way in every investigation".

- second, "those that establish certain due process or procedural principles, but leave to the discretion of the investigating authority exactly how they will be performed."<sup>1</sup>

According to the Panel, the cited conclusions only apply to the second set of obligations.

3. The EC would caution on the accurateness of this distinction, in particular insofar as it would mean that general due process or procedural principles would not have any ramifications on explicit procedural obligations. Indeed, a detailed procedural obligation may be the concrete expression of the due process or good faith requirement and it may also be interpreted in the light thereof.

4. Turning to the specific Panel findings, the EC notes first that the Appellate Body's quotation from *US- Hot-Rolled Steel* was made in the context of Article 6 paragraph 8 in connection with paragraphs 2 to 5 of Annex II of the *AD Agreement* regarding the use of best information available as well as Article 6.13 of the *AD Agreement*. Yet, both provisions are not within the terms of reference of this Panel.

5. Second, the EC would be somewhat concerned by the Panel's statement that in case an interested party did not respond to a procedural obligation on the investigating authorities to "provide opportunities" to present evidence and or arguments, "there may be no factual basis in the record on which a panel could judge whether or not an 'opportunity' either was not 'provided' or was denied". Indeed, the EC would not endorse an interpretation of the Panel's statement according to which "adverse inferences" could be drawn from a "lack of factual basis" in the record concerning the provision or denial of an opportunity to present evidence or arguments. To the contrary, it would appear to the EC that in the case that an interested party did not respond a Member may generally be presumed to have acted in accordance with its treaty obligations and thus as having provided such a respective opportunity.

6. As to the last sentence of the Panel's findings, one has to distinguish two separate issues:

- first, under which conditions the investigating authorities may use best information available and
- second, the consequences of such use for the Panel proceedings.

7. As to the first aspect, Article 6.8 of the *Anti-Dumping Agreement* gives a proper indication on the use of best information available. The first sentence reads as follows:

In cases in which an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

Thus, a prerequisite for the application of Article 6.8 of the *Anti-Dumping Agreement* is the non-cooperation of the interested party. Thus, an interested party has an interest in cooperating actively with the investigating authority.

8. With regard to the second aspect, the EC would caution that a Panel would be *per se* precluded in reversing an investigating authority's decision if best available information had been used. The standard of review for Panel proceedings under the *Anti-Dumping Agreement* is set out under Article 17.6(i). Yet, whether an investigating authority came to a conclusion on the basis of a

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<sup>1</sup> Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, para. 7.2.

fully co-operative respondent or on the basis of best available information does not affect this standard. Indeed, even if an interested party did not cooperate, an investigating authority might have come to a conclusion on the basis of best information available that were in violation of the Anti-Dumping Agreement.

**2. What obligations does Article 2.2.1.1 impose in general on investigating authorities?**

9. Article 2.2.1.1 of the *AD Agreement* contains a general obligation on investigating authorities to rely primarily on the operator's record when calculating its costs. However, as evidenced in this article, this does not mean just any information by the operator but only those that meet certain standards, such as for instance the generally accepted accounting principles of the exporting countries. The ultimate purpose of Article 2.2.1.1 of the *AD Agreement* is, therefore, to reach a conclusion on costs that is as objective and reasonable as possible.

**3. For the terms "actual data pertaining to production and sales (...) of the like product" in Article 2.2.2, please explain the application of this sentence in general.**

10. Article 2.2.2 of the *AD Agreement* provides relevant guidance for the calculation of administrative, selling and general costs and for profits in case of a constructed normal value under Article 2.2 of the *AD Agreement*. The investigating authorities will use the respective data of the like product to the extent that they are available.

**4. What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?**

11. Article 2.2.2 and Article 2.2.1.1 of the *AD Agreement* do both apply within the context of paragraph 2 regarding the calculation of costs. Specifically, Article 2.2.2 deals with costs in relation to SGA and profits in case of the construction of normal value whereas Article 2.2.1.1 of the *AD Agreement* is a sub-paragraph to Article 2.2.1 of the *AD Agreement*. This provision in turn is relevant for the question whether sales in the domestic market and to third countries are made in the ordinary course of trade.

**5. Please comment on the statement contained in para. 185 of the US First Written Submission:**

**"[t]his 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."**

12. The EC would in principle agree with the US' statement. In this context, the Panel should also respect the limitations as set out in Article 17.6(i) of the *AD Agreement*. In the absence of specific requirements under the AD Agreement to use certain methodologies it is not for the Panel to make a *de novo* determination. However, this being said, the EC does not take a position for either side in this particular case.

**6. Please comment on the statement contained in para. 221 of the US First Written Submission:**

**"[t]he AD Agreement is silent as to how to assess affiliated party transactions relating to costs."**

13. The US made its statement in the context of Article 2.2.1.1 of the *AD Agreement*. The EC would agree with the US that this provision does not provide any special rule for the assessment of costs of affiliated party transactions.

14. The objective of the cost calculation under Article 2.2.1.1 of the *AD Agreement* is to "reasonably reflect the costs associated with the production and sale of the product under consideration". However, it is clear that affiliated party transactions are often made at distorted prices thus not giving a proper guidance on the "real" costs as formulated under Article 2.2.1.1 of the *AD Agreement*. It may, therefore, be more reasonable to disregard them. Yet, the EC does not take a position whether in the present case the US correctly dismissed the information on affiliated sales at hand.

**7. Please comment on the statements contained in para. 228 of the US First Written Submission:**

**“Canada asserts that Commerce’s calculation of West Fraser’s wood chip offset also violated its obligation to make a “fair comparison.” 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.” (footnote excluded)**

15. Without taking a position in this particular case, the EC considers that the first sentence of Article 2.4 of the *AD Agreement* is unequivocal. It reads:

A fair comparison shall be made between the export price and the normal value.

Thus, on its face the comparison requirement under Article 2.4 of the *AD Agreement* does not concern the calculation of the normal value. This has also been confirmed in the Panel report *EC - Malleable fittings* where the Panel rejected Brazil's claim of a violation of Article 2.4 on the basis that:

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 to ensure a fair comparison with export price under Article 2.4.<sup>2</sup>

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<sup>2</sup> Panel Report, *EC-Anti-Dumping Duties On Malleable Fittings Cast iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, not yet adopted, para. 7.140.

## ANNEX A-4

### RESPONSES OF JAPAN TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. Please comment on the findings contained in para. 7.3 of the *Egypt – Steel Rebar* panel report:

**"the actions of an interested party during the course of an investigation are critical to its protection of its rights under the AD Agreement. As the Appellate Body observed in *US – Hot-Rolled Steel*, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort to the best of their abilities from investigated exporters". The Appellate Body went on to state that "cooperation is indeed a two-way process involving joint effort". In the context of this two-way process of developing the information on which determinations ultimately are based, where an investigating authority has an obligation to "provide opportunities" to interested parties to present evidence and/or arguments on a given issue, and the interested parties themselves have made no effort during the investigation to present such evidence and/or arguments, there may be no factual basis in the record on which a panel could judge whether or not an "opportunity" either was not "provided" or was denied. Similarly, where a given point is left by the AD Agreement to the judgement and discretion of the investigating authority to resolve on the basis of the record before it, and where opportunities have been provided by the authority for interested parties to submit into the record information and arguments on that point, the decision by an interested party not to make such submissions is its own responsibility, and not that of the investigating authority, and cannot later be reversed by a WTO dispute settlement panel." (footnotes excluded)**

#### Reply

The authorities have general obligations to make efforts to collect from interested parties information that the authorities need for their dumping and injury determinations. For this purpose, the authorities must notify each interested party of information in detail, which the authorities need to receive. Article 6.1 of the AD Agreement provides that "all interested parties in an anti-dumping investigation shall be given notice of the information." Paragraph 1 of Annex II further provides "as soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party." The authorities may use facts available from other sources than the interested party, only where the party, whom the authorities made such request, "refuses access to, or otherwise does not provide, necessary information." See Article 6.8 of the AD Agreement. In this context, the Appellate Body stated that "cooperation is indeed a two-way process involving joint efforts," not a one-sided obligation on a responding party.

We would like to note that a Member may present to the panel its claims and arguments that parties in the investigation did not raise during the process of the investigation. Parties argue the

authorities' consistency with their national laws during the process of the investigation, while a Member claims and argues in a WTO dispute settlement consistency of the authorities' practice with the AD Agreement. Thus, claims and arguments in a WTO dispute settlement differ by its nature from arguments in the investigation process. It is particularly the case where the issue before the Panel is related to the administratively long-established and statutorily-approved rules, such as the zeroing, SG&A calculation, and revaluation of affiliated party transaction prices. The Appellate Body has confirmed this in *Thailand – H-Beams*<sup>1</sup>, in which it has stated “it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute.”<sup>2</sup>

**2. What obligations does Article 2.2.1.1 impose in general on investigating authorities?**

Reply

Article 2.2.1.1 imposes on the authorities general obligations that the authorities shall normally use a respondent's production costs as maintained in its accounting records for the calculation of costs and sales of the product under consideration. The term “normally” in the first sentence of this Article clarifies that this is the general rule, and there is an exception for this general rule. Article 2.2.1.1 provides the exception that the authorities may deviate their cost calculation from the respondent's recorded costs, if the recorded costs are either not in accordance with the generally accepted accounting principle (“GAAP”) of the exporting country, or do not reasonably reflect the costs associated with the production and sale of the product under consideration. In other words, the authorities must find either of these two conditions is not met before the authorities decide to deviate their calculation of costs, or selling, general or administrative expenses from the respondent's accounting records.

The authorities' finding on either of these conditions must be based on all available evidence on the proper allocation of costs, including that that is made available by the exporter or producer.<sup>3</sup> In accordance with Article 17.6(i), such finding must be based on evaluation of facts in an unbiased and objective manner. Thus, in order for the authorities to exercise their discretion to apply an exception to a respondent, the authorities must establish in an unbiased and objective manner that the respondent's recorded costs do not reasonably reflect the production or sales of the product or are not in accordance with the GAAP.

The exercise by the authorities of such discretion is not unfettered. As discussed in our previous statements<sup>4</sup>, the general principle of good faith instructs that the authorities must exercise their discretion in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party. The authorities would act inconsistently with the WTO Agreement, if the authorities would calculate costs of production of a respondent's product in a manner that gives disadvantage to the other interested party.

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<sup>1</sup> *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 on 12 March 2001.

<sup>2</sup> *Id.*, at para. 94.

<sup>3</sup> See Article 2.2.1.1. of the AD Agreement (“Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation.”)

<sup>4</sup> See Oral Statement of Japan at the First Substantive Meeting, Third Party Session, at paras. 2-4, 16-19. See also Third Party Submission of the Government of Japan, 19 May 2003, at paras. 24-27.

3. **For the terms "actual data pertaining to production and sales (...) of the like product" in Article 2.2.2, please explain the application of this sentence in general.**

Reply

The first sentence of Article 2.2.2 obliges the authorities to base per-unit SG&A on the "actual data" relating to sales by an responding party of like products in the exporting country, if the responding party's normal value is based on sales in the export country. If the normal value is based on sales to the third country, the authorities must base the SG&A on actual data relating to sales of like products to a third country. This sentence also instructs that the SG&A for the constructed value also must be based on the actual data.

"Actual data" under Article 2.2.2 conform to the provisions of Article 2.2.1.1 because such actual data can be found only in the respondent's accounting book.

This sentence, however, does not provide how the authorities shall allocate the "actual data" of SG&A to the product under consideration. The authorities must comply with provisions of Article 2.2.1.1 with respect to the allocation.

4. **What is the relationship, if any, between Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement?**

Reply

The respondent's recorded costs under Article 2.2.1.1, as discussed in our answer to the question 2 above, mean the production costs calculated, and maintained, in the respondent's accounting records in accordance with its ordinary accounting methodologies. These methodologies include valuation, accumulation, and allocation of consumed raw materials, by-product credits, direct labour, and variable and fixed factory overheads, and SG&A. Valuation of by-products and per-unit value of finished product inventory as shown in the respondent's accounting records, for examples, are ones of respondent's recorded costs under Article 2.2.1.1.

As discussed in our answer to the question 3, the first sentence of Article 2.2.2 instructs that the authorities shall base SG&A on "actual data". Article 2.2.1.1 applies to the allocation methodologies of the SG&A.

5. **Please comment on the statement contained in para. 185 of the US *First Written Submission*:**

**"[t]his 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."**

Reply

The authorities are required to accept a respondent's cost calculation methodology unless certain conditions are met, as discussed in our answer to the question 2 above. When such conditions are met, the authorities may exercise their discretion to calculate the per-unit cost of production of the product under consideration. The AD Agreement does not specify any particular methodologies that the authorities should use in such situations. Also as discussed in our answer to the question 2 above, however, the AD Agreement requires that the authorities exercise such discretion in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party.

**6. Please comment on the statement contained in para. 221 of the US *First Written Submission*:**

**“[t]he AD Agreement is silent as to how to assess affiliated party transactions relating to costs.”**

Reply

Article 2.2.1.1 of the AD Agreement, as informed by Article 17.6(i) thereof and the general principle of good faith under the Vienna Convention of Law of Treaties, provides how the authorities shall assess the cost of production of the product under consideration. Please see our answer to the question 2 above for further discussion on this issue. In order for the authorities to reevaluate the respondent's recorded affiliated party transaction value, therefore, the authorities first must find that such recorded value does not “reasonably reflect” the costs. Article 2.2.1.1, in conjunction with Article 17.6 (i) thereof and the general principle of good faith, further dictates that the authorities, upon such finding, must exercise their discretion to assess affiliated party transaction value in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party. The fact that Article 2.2.1.1 does not specify any particular methodologies relating to costs between affiliated parties does not relieve the authorities from these obligations.

As discussed in our previous submissions, the United States failed to exercise its discretion in an unbiased and objective manner in the anti-dumping investigation in question. First, the United States determined, erroneously, that the recorded value is unreasonable based only on the sales prices by respondents to affiliated parties and to unaffiliated party.<sup>5</sup> The United States ignored all other evidence showing other factors affecting sales prices to various purchasers, for example, sales volume, regions, and the terms and dates of the sales. Such determination is inconsistent with Article 2.2.1.1 in conjunction with Article 17.6(i), as the United States failed to evaluate all evidence in an unbiased and objective manner.

Second, the United States' exercise of its discretion to reevaluate the affiliated party transaction value is also inconsistent with Article 2.2.1.1 of the AD Agreement in conjunction with Article 17.6(i) thereof and the general principle of good faith. As discussed in our previous submissions, the United States devaluated a respondent's recorded by-product value, when such value was based on sales price to affiliated parties, and was higher than the sales price to unaffiliated parties.<sup>6</sup> The United States did not reevaluate the by-product value, which was based on sales prices to affiliated parties, if the value was lower than the sales price to unaffiliated parties.<sup>7</sup> By doing so, the United States exercised its discretion only to decrease the by-product value, accordingly, to increase the production cost of softwood lumber to create and increase the margin of dumping of the respondent. The US's exercise of the discretion in such manner was not even-handed, and did give unfair advantage to parties who have adverse interests to responding parties. If the United States were to exercise its discretion, it should have reevaluated in both cases. The manner in which the United States exercised its discretion in connection with valuation of by-product, therefore, is inconsistent with 2.2.1.1. in conjunction with Article 17.6(i) and the general principle of good faith.

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<sup>5</sup> US First Written Submission, at para. 219 (“Commerce applied its standard affiliated party transaction methodology to West Fraser, using West Fraser's own sales to unaffiliated parties as a benchmark.”)

<sup>6</sup> See, e.g., West Fraser's sales of wood chips to affiliated parties in British Columbia. *Final Determination*, Comment 11 (Exhibit CDA-2), as quoted in US First Written Submission, at para. 221.

<sup>7</sup> See, e.g., West Fraser's sales of wood chips to affiliated parties in Alberta during the POI. *Id.*

7. **Please comment on the statements contained in para. 228 of the US *First Written Submission*:**

**“Canada asserts that Commerce’s calculation of West Fraser’s wood chip offset also violated its obligation to make a “fair comparison.” 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.” (footnote excluded)**

Reply

We agree with previous panels in *Egypt – Rebar*, at para. 7.335, and in *Argentina – Poultry*, at para. 7.265, that Article 2.4 deals with a “fair comparison” between the export price and the normal value. The issue of Article 2.4 in connection with the revaluation by the United States of wood chip value, however, is moot because the establishment by the United States of the normal value is inconsistent with Article 2.2.1.1. The Panel, thus, does not need to reach the question on Article 2.4.