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Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
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EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2319
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Guatemala – Cement I	Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797
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Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345

Short Title	Full Case Title and Citation
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*

HIS REPORT

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Abbreviation	Full Title / Meaning
Panel Request	Request for the Establishment of a Panel contained in document WT/DS264/2
PIR	Pacific Inland Resources, is a sawmill owned by West Fraser in BC
POI	Period of Investigation
Preliminary Determination	Decision imposing preliminary anti-dumping measures on softwood lumber products from Canada as published in p. 56062 *et seq.* of the Federal Register on 6 November 2001 (Exhibit CDA-11, as re-submitted on 30 June 2003)
QRP	Quesnel River Pulp, a paper mill affiliated to West Fraser
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SG&A	Selling, General and Administrative costs (Article 2.2.2 of the *AD Agreement*)
Slocan	Slocan Forest Products Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
SPF	Spruce-pine-fir, a type of tree
Tariff Act	United States Tariff Act of 1930, as amended (Exhibit CDA-7)
Tembec	Tembec Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
Vienna Convention	*Vienna Convention on the Law of Treaties* (see footnote 168 of this Report)
West Fraser	West Fraser Mills Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
Weldwood	Weldwood of Canada Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
WSPF	Western-spruce-pine-fir, a type of tree
Weyerhaeuser Canada	Weyerhaeuser Canada Ltd., one of the Canadian producers and exporters of softwood lumber subject to investigation
Weyerhaeuser US or Weyerhaeuser Company	Weyerhaeuser Company, parent company of Weyerhaeuser Canada
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

Joiners and the Paper, Allied-Industrial, Chemical and Energy Workers International Union, with the subject merchandise certain softwood lumber products imported from Canada.

2.2 On 23 April 2001, DOC initiated the investigation and published the Notice of Initiation on 30 April 2001.[4] Due to the large number of exporters of the subject merchandise, DOC limited its investigation to the six largest producers and exporters of Canadian softwood lumber, namely, West Fraser, Slocan, Tembec, Abitibi, Canfor and Weyerhaeuser Canada.

2.3 The scope of the investigation was defined in the Notice of Initiation as follows:

> "[t]he products covered by this investigation are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the HTSUS, and any softwood lumber, flooring and siding described below. These softwood lumber products include:
>
> (1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;
>
> (2) Coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or fingerjointed;
>
> (3) Other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and
>
> (4) Coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or fingerjointed".[5]

2.4 The period of investigation for the dumping determination was established as 1 April 2000 to 31 March 2001.

2.5 DOC issued its Preliminary Determination on 31 October 2001, which was published in the Federal Register on 6 November 2001.[6] It issued a determination on the scope of the products covered by the investigation on 12 March 2002, and held a hearing on the matter on 19 March 2002.[7]

2.6 The final anti-dumping duty order was published in the Federal Register on 2 April 2002[8], and amended on 22 May 2002[9], imposing anti-dumping duties, ranging from 2.18 per cent to 12.44 per cent on Canadian softwood lumber producers and exporters. The final scope of the anti-dumping order included a number of product exclusions.[10]

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[4] Exhibit CDA-9, Initiation, p. 21328 *et seq*.
[5] *Id*., p. 21329.
[6] Exhibit CDA-11, Preliminary Determination, p. 56062 *et seq*.
[7] Exhibit CDA-1, Final Determination, Federal Register, Vol. 67, No. 99, p. 15539.
[8] *Id.*, p. 15539, *et seq*.
[9] Exhibit CDA-3, Amended Final Determination. *See* para. 7.139, *infra*, for the amended scope of the final anti-dumping duty order.
[10] *Ibid*.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

3.1 Canada requests the Panel in its first written submission to:

(a) find that the Petition filed by the US domestic industry did not contain "such information as [was] reasonably available" to the Petitioner, nor did it contain adequate and accurate evidence of dumping sufficient to justify the initiation of the investigation, thereby rendering the initiation inconsistent with US obligations under Articles 5.2 and 5.3 of the *AD Agreement*;

(b) find that DOC failed to terminate the investigation for lack of sufficient evidence of dumping thereby rendering the conduct of the dumping investigation inconsistent with US obligations under Article 5.8 of the *AD Agreement*;

(c) find that DOC erroneously determined there to be only one like product and product under consideration, thereby rendering the conduct of the investigation inconsistent with US obligations under Articles 2, 3, 4.1, 5, 6.10 and 9 of the *AD Agreement*;

(d) find that DOC applied a number of improper methodologies in calculating normal value and export price that resulted in unfair comparisons between the two, thereby rendering dumping determinations inconsistent with US obligations under Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, and 2.4.2 of the *AD Agreement.* In particular DOC:

(i) failed to make due allowance for differences that affected price comparability, in particular differences in physical characteristics (i.e., thickness, width and length) of softwood lumber products;

(ii) illegally "zeroed" negative margins of dumping;

(iii) failed to calculate and/or allocate reasonable amounts for administrative, selling and general expenses in computing costs for specific exporters, including an improper allocation for financial expenses and for litigation settlement expenses involving product liability claims for a non-investigated product;

(iv) failed to apply reasonable amounts for by-product revenues from the sale of wood chips, as offsets in calculating costs; and

(v) failed to offset a difference in price comparability arising from futures contracts profits after concluding that such a difference existed.

(e) find that the United States acted inconsistently with its obligations under Articles VI:1 and VI:2 of GATT 1994 and Articles 1, 9.3 and 18.1 of the *AD Agreement*;

(f) recommend to the DSB that the United States bring its measure into conformity with its obligations under the WTO, that it revoke the anti-dumping order in respect of softwood lumber from Canada, and that it return the cash deposits collected pursuant to an illegal investigation and an illegal determination of dumping.

4.6 Article VI:2 of *GATT 1994* allows Members of the WTO to impose anti-dumping duties to "offset or prevent dumping". Article 1 of the *AD Agreement* requires that anti-dumping measures be applied only under the circumstances provided for in Article VI of *GATT 1994* and pursuant to investigations initiated and conducted in accordance with the provisions of the *AD Agreement.*

4.7 Canada requested consultations with the United States on 13 September 2002 pursuant to Article 4 of the *DSU*, Article XXII of *GATT 1994* and Article 17 of the *AD Agreement.* Consultations were held on 11 October 2002. Unfortunately, those consultations failed to settle the dispute. On 19 December 2002, Canada made its first Panel Request pursuant to Articles 4 and 6 of the *DSU*, Article XXIII of *GATT 1994* and Article 17 of the *AD Agreement.* The DSB established the Panel on 8 January 2003. The terms of reference of the Panel are as set out in Article 7.1 of the *DSU.*

4.8 In the Final Determination, DOC committed a number of fundamental errors that render the imposition of anti-dumping duties on softwood lumber from Canada by the United States inconsistent with US obligations under both *GATT 1994* and the *DSU*

(iv) failed to apply reasonable amounts for by-product revenues from the sale of wood chips, as offsets in calculating costs; and

(v) failed to offset a difference in price comparability arising from futures contracts profits after concluding that such a difference existed.

4.9 With respect to Canada's first claim regarding the failure of DOC to initiate the investigation in accordance with US WTO obligations, the Petitioner offered no specific evidence related to any particular company in Canada to show actual dumping. The Petitioner provided no evidence of actual Canadian producer prices or costs to support its dumping allegations. Yet, evidence showed that one

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 were irrelevant and that adjustments were, therefore, not necessary. The WTO has ruled that all differences affecting price comparability must be accounted for.[21]

4.13 In *EC – Bed Linen*, the Appellate Body found the practice of "zeroing" negative margins of dumping to be inconsistent with the *AD Agreement.* The Appellate Body held that the requirement in Article 2.4.2 of the *AD Agreement* to compare weighted average normal values and weighted average export prices of "all comparable transactions" precludes the practice of "zeroing" by which negative margins of dumping are disregarded.[22] The Appellate Body also ruled that "zeroing" results in an "unfair comparison" between normal value and export price, and is, therefore, inconsistent with Article 2.4 of the *AD Agreement.* DOC admits that it "zeroed" negative margins of dumping in the anti-dumping investigation against all softwood lumber imports from Canada.[23] As a result, the dumping margins found by DOC for each company investigated and the "all others rate" were inflated. The US practice is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* for the same reasons the Appellate Body condemned the EC's practice in *EC EC*

not associated with the production or sale of the product must not be included in the calculation of the exporter's costs. DOC committed several egregious errors in its calculations, which, in all instances, resulted in an inflation of individual exporters' costs of production and margins of dumping.

4.17 In regard to Abitibi, DOC allocated financial expense to softwood lumber that did not "reasonably reflect the costs associated with the production and sale of the product under consideration". DOC incorrectly deemed financial costs to be allocable to all aspects of Abitibi's operations in proportion to cost of sales, notwithstanding un-rebutted evidence that all its production and sale of non-subject products, including newsprint, pulp and value-added papers, were significantly more capital intensive relative to cost of sales than was lumber.

4.18 DOC's calculations of Tembec's "administrative, selling and general costs" were not reasonable in that they were not based on actual data that Tembec had provided to DOC in relation to the production and sale of the product under consideration. Instead, DOC calculated these costs based on the production of all products produced worldwide by Tembec, the major proportion of which consisted of pulp, paper and chemicals, which incurred significantly different G&A expenses than the production and sale of softwood lumber in Canada.

4.19 In regard to Weyerhaeuser Canada, DOC allocated a portion of certain charges associated with the settlement of legal claims of Weyerhaeuser Company's (Weyerhaeuser Canada's parent company) sales of hardboard siding (not a softwood lumber product) in the United States, as part of Weyerhaeuser Canada's G&A costs. These costs bore no relationship whatsoever to Weyerhaeuser Canada's cost of production of softwood lumber. As the record demonstrates, the litigation settlement expenses were not a company-wide expense that related to the production and sale of softwood lumber; rather they were related to the production and sale of an unrelated product, hardboard siding.

4.20 DOC treated revenue offsets from wood chip sales from West Fraser and Tembec in a manner that did not "reasonably reflect the costs associated with the production and sale of the product under consideration," as required under Article 2.2.1.1 of the *AD Agreement*. In West Fraser's case, DOC failed to calculate revenues from wood chip sales on the basis of records kept by the company, even though those records showed that West Fraser's sales were made at "market prices" and reasonably

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.23 The following are the arguments of the United States in its first written submission:

4.24 Pursuant to a properly initiated investigation, Commerce concluded, in its Final Determination published on 2 April 2002, that softwood lumber from Canada was being sold in the United States for "less than fair value".[24] Commerce found dumping with respect to each of the six Canadian respondents accounting for the largest amount of production in Canada: (1) Abitibi, (2) Canfor, (3) Slocan, (4) Tembec, (5) West Fraser, and (6) Weyerhaeuser Canada.[25]

4.25 In general, Canada's claims of error in the initiation and conduct of the softwood lumber investigation concern the sort of fact-bound decisions that any investigating authority must make in the course of an anti-dumping investigation. Among other things, Canada challenges how Commerce defined the scope of the product it investigated, how it determined the sufficiency of the evidence to initiate an investigation, and how it calculated various costs and adjustments. The claims are disparate, but they share a common theme. In much of its argument, Canada is asking the Panel to place itself in the shoes of Commerce and make new determinations, as if it were the investigating authority. As such, these claims are inconsistent with the applicable standard of review.[26]

4.26 An anti-dumping proceeding is a complex matter, involving hundreds, if not thousands, of individual decisions that come together to yield a final determination. It is not inconceivable that two different investigating authorities would look at the same facts and reach different conclusions. Recognizing that possibility, the *AD Agreement* provides that an authority's proper establishment of the facts and unbiased and objective evaluation "shall not be overturned" "even though the panel might have reached a different conclusion".[27] Nevertheless, in this dispute, Canada raises a number of claims that effectively ask this Panel to substitute its evaluation of the facts for Commerce's evaluation of the facts. Canada has even sought to introduce new claims not contained in its Panel Request and new evidence not made available to Commerce in the underlying investigation.

4.27 The Panel first should rule, as a preliminary matter, that certain claims Canada makes in connection with its argument concerning the scope of the "product under consideration" are beyond the Panel's terms of reference. In its Panel Request, Canada claimed that Commerce "erroneously determined there to be a single like product (under US law, termed 'class or kind' of merchandise) rather than several distinct like products", and that this determination violated Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4, and 5.8 of the *AD Agreement* and Article VI:1 of the *GATT 1994*.[28] In its first written submission, Canada adds to this claim, now alleging that "in defining the 'product under consideration'," Commerce violated all of Article 2 of the *AD Agreement* (not just Article 2.6), Article 3, all of Article 4 (not just Article 4.1), all of Article 5 (not just Articles 5.1, 5.2, 5.3, 5.4, and 5.8), Article 6.10, and Article 9."[29] Canada's expansion of its claim through its first written submission is fundamentally at odds with the requirement that a complaining Member state its claims clearly in its panel request, citing the particular provisions it alleges to have been violated.[30] That requirement "defin[es] the terms of reference of a panel and ... inform[s] the respondent and the third parties of the claims made by the complainant".[31] Here, Canada did not claim violations of provisions

[24] Exhibit CDA-1, Final Determination, and Exhibit CDA-2, IDM, as amended (Exhibit CDA-3). "Fair value" is the US law term corresponding to "normal value," as that term is used in Article VI of the *GATT 1994* and in the *AD Agreement*.

[25] Exhibit CDA-3, Amended Final Determination.

[26] Article 17.6(i) of the *AD Agreement*.

[27] *Ibid*.

[28] WT/DS264/2, para. 2.

[29] Canada first written submission, paras. 115 and 142.

[30] Article 6.2 of the *DSU* states that a request for a panel "shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

[31] Appellate Body Report, *Korea – Dairy*, para. 124.

other than those cited in its Panel Request. Accordingly, the Panel should decline to consider the additional claims raised for the first time in Canada's first written submission.

4.28 As a second preliminary ruling, the Panel should decline to consider Exhibit CDA-77. In introducing this exhibit, Canada improperly asks the Panel to consider evidence that was not made available to Commerce in the underlying investigation. Specifically, this evidence consists of a regression analysis performed by one of the Canadian respondents that purports to manipulate certain data used in Commerce's normal value and net realizable value calculations. It is presented here to support Canada's claim that Commerce erred in not making due allowance for particular physical differences in softwood lumber that Canada alleges affect price comparability.[32] However, it was not made available to Commerce during the underlying investigation. Under Article 17.5(ii) of the *AD Agreement*, a panel's review of an anti-dumping investigation is to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Consideration of Canada's new evidence is inconsistent with that provision. Further, in asking the Panel to consider this new evidence, Canada effectively is asking the Panel to undertake its own establishment and evaluation of the facts, contrary to Article 17.6(i) of the *AD Agreement*. Accordingly, the Panel should decline to consider Exhibit CDA-77.

4.29 The standard of review applicable to the present dispute is set forth in Article 17.6 of the *AD Agreement*. With respect to findings of fact, Article 17.6(i) provides that the question is whether an investigating authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. Conversely, the question is *not* whether a panel would have established the facts or evaluated those facts in the same way as the investigating authority. As the Appellate Body and other panels repeatedly have observed, a panel's role is not to find and evaluate facts *de novo*.[33]

4.30 With respect to interpretations of the *AD Agreement*, the question under Article 17.6(ii) is whether an investigating authority's interpretation is permissible. Article 17.6(ii) acknowledges that there may be provisions of the *AD Agreement* that "admit[] of more than one permissible interpretation". Where that is the case, and where an investigating authority has adopted one such interpretation, the panel should find that interpretation to be consistent with the *AD Agreement*.[34]

4.31 Canada's first claim is that Commerce should have declined to initiate its investigation (or terminated the investigation once it did initiate) because the application for relief by US softwood lumber producers (in US law terms, "the petition") did not include certain information alleged to have been reasonably available to the petitioners (specifically, cost and price data for Weldwood, a subsidiary of petitioner IP). The Panel should reject this argument, because the applicable standard for initiation under Article 5.3 of the *AD Agreement* (and for continuation of an investigation under Article 5.8) – the "sufficient evidence" standard – was met. There is no obligation under the *AD Agreement* for an investigating authority to decline to initiate or to decline to continue an investigation on the grounds that the application did not include evidence beyond what is sufficient to warrant initiation or continuation.

4.32 In this case, petitioners included in their petition evidence from multiple, independently reliable sources demonstrating prices for which softwood lumber was being sold in Canada, costs of production of softwood lumber in Canada, and prices for which softwood lumber was being sold for

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[32] Canada first written submission, para. 148, note 139.

[33] *See, e.g.*, Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *Thailand – H-Beams*, paras. 114 and 117; Panel Report, *US – Steel Plate*, para. 7.6.

[34] Panel Report, *Argentina – Poultry*, para. 7.341 and note 223:

> "[w]e recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it".

export to customers in the United States. This evidence demonstrated, first, that softwood lumber was being sold in Canada for prices below cost of production. Accordingly, pursuant to Article 2.2 of the *AD Agreement*, the evidence substantiated reliance on constructed (normal) value as a basis for determining whether there was dumping of softwood lumber. Second, the evidence in the petition demonstrated that export prices for softwood lumber were below constructed normal value – i.e., that softwood lumber was being dumped in the United States.

of prices of all comparable export transactions", not all export transactions will be equally comparable with all normal value transactions. Consequently, once the comparison has been identified pursuant to Article 2.4, it would be improper to compare a weighted av

normal value and export price *once normal value has been properly determined*. Article 2.4 does not relate to what is at issue here – i.e., the proper determination of normal value in the first instance.[42]

4.50 In calculating cost of production for Abitibi, Commerce allocated financial costs (i.e., interest on borrowed funds) based on COGS (the same allocation method used for all respondents). Commerce made this allocation after considering Abitibi's arguments that its lumber producing division was less asset-laden than its other divisions. Commerce used a COGS allocation, rather than the allocation urged by Abitibi, because the COGS allocation better reflected the fact that financial costs are general costs, relating to the overall cash needs of the company as whole. Also, Commerce determined that its method better accounted for the fact that money is fungible – that is, that borrowed funds may be used to purchase assets or fund ongoing operations. Moreover, Commerce's allocation method accounted for differing asset values, inasmuch as more asset-laden divisions would have higher depreciation expenses, which would increase the cost of manufacturing products in those divisions, resulting in a proportionately greater allocation of financial cost than to less asset-laden divisions.

4.51 In calculating cost of production for Tembec, Commerce determined a reasonable amount for G&A costs based on Tembec's books and records that were shown to be in accordance with Canadian GAAP, consistent with Article 2.2.1.1 of the *AD Agreement*. Canada argues that, instead of relying on Tembec's books and records, Commerce should have relied on a separate statement of division-specific costs. However, as that separate statement was unaudited and never shown to be in accordance with Canadian GAAP, Commerce appropriately declined to rely on it. Finally, G&A costs are, by definition, company-wide costs, rather than costs attributable to a particular product or division. Thus, it was proper for Commerce to rely on Tembec's company-wide books and records, rather than a separate, division-specific statement.

4.52 In calculating cost of production for Weyerhaeuser Canada, Commerce included within G&A costs an apportioned amount of litigation settlement costs reported in the books and records of the company's parent, the Weyerhaeuser Company. Canada argues that these costs related to production of goods other than softwood lumber and, therefore, should not have been allocated to the cost of producing softwood lumber. However, litigation costs are quintessential general costs, relating to a company as a whole. In this case, the litigation costs were incurred years after production of the good at issue (hardboard siding) and could not reasonably be considered a cost of producing that good. Indeed, Weyerhaeuser Company's own audited financial statement treated these costs as general costs. Thus, it was appropriate under Articles 2.2, 2.2.1, and 2.2.1.1 for Commerce to allocate a portion of Weyerhaeuser Company's company-wide legal costs to Weyerhaeuser Canada's cost of producing softwood lumber.

4.53 In calculating respondents' costs of production of softwood lumber, Commerce treated sales of wood chips (a by-product in the production process) as an offset, reducing a given respondent's total cost of production. Canada claims that Commerce erred in its calculation of the wood chip offset for respondents West Fraser and Tembec. In both cases, Commerce's calculation was consistent with Articles 2.2, 2.2.1, and 2.2.1.1 of the *AD Agreement* and should be upheld.

4.54 In the case of West Fraser, the issue for Commerce was how to measure sales of wood chips by the company to affiliated companies. To determine whether sales to affiliates reflected market prices for wood chips, Commerce compared those sales to West Fraser's sales to non-affiliated entities, as recorded in West Fraser's records. Commerce found that West Fraser's sales to non-affiliated entities were at market prices and that these sales, therefore, represented an appropriate benchmark for determining whether sales to affiliated entities were at market prices. Applying this benchmark, Commerce found certain of West Fraser's sales to affiliated entities (in Alberta) to be at market prices, and relied in part on those sales in calculating the offset. Commerce found other sales

[42] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

to affiliated entities (in BC) not to be at market prices, and made adjustments based on the benchmark of non-affiliated sales. Consistent with Article 2.2.1.1, Commerce made its calculation based on data from the producer's own records.

4.55 In the case of Tembec, the issue was how to measure the value of transfers of wood chips between divisions within the company. Commerce analyzed the wood chip sales transactions between Tembec's sawmills and its pulp mill division to evaluate whether the internally set transfer prices were reasonable. Commerce found that prices recorded in Tembec

evidence identifying a single Canadian exporter or provide 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.

4. Zeroing of Negative Margins

4.73 Canada has demonstrated that the US practice of "zeroing" negative margins of dumping contravenes Articles 2.4 and 2.4.2 of the *AD Agreement.* The United States is now saying that the interpretation by the Appellate Body in *EC – Bed Linen* is a misinterpretation of Articles 2.4 and 2.4.2 and that the Report of the Appellate Body in *EC – Bed Linen* should not be relied upon by the Panel. However, the United States itself has acknowledged that adopted reports should be taken into account where they are relevant to any subsequent dispute, especially where a report of the Appellate Body is concerned. The zeroing methodology applied by Commerce in this case is the same as was considered by the Appellate Body in *EC – Bed Linen.*

4.74 The United States looks to the negotiating history of the *AD Agreement.* However, pursuant to Article 32 of the *Vienna Convention*, the negotiating history of the text of an agreement is only relevant as a supplementary means of interpretation. In Canada's view, the text itself of Articles 2.4 and 2.4.2 is clear and the Appellate Body so found in *EC – Bed Linen*.

5. Company-specific Issues

4.75 Under Articles 2.2.1.1 and 2.2.2 a cost is "associated with" and data will "pertain to" production where the cost and data relate to the costs for producing and selling the product. Article 2.2.1.1 also requires that "[a]uthorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter and producer..". Article 2.4 requires that the comparison between export price and normal value shall be "fair". Commerce failed to meet these requirements.

4.76 Commerce miscalculated Abitibi's interest expenses to softwood lumber by (1) failing to comply with its obligations under Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs", and by (2) failing to comply with its obligations under Article 2.2.1.1 and 2.2.2 to use a methodology that resulted in an allocation that "reasonably reflects" the costs "associated with" and "pertaining to" the "production and sale of softwood lumber". The US submission confirms that Commerce did not consider the merits of the record evidence regarding Abitibi in selecting its COGS allocation methodology. Moreover, the record evidence establishes that a COGS-based allocation was distortive and over-allocated interest expenses to Abitibi's softwood lumber operations relative to its non-investigated products – pulp, paper, and newsprint.

4.77 In calculating Tembec's G&A expenses, Commerce rejected G&A data from Tembec's FPG (which was accurate and reliable and used by Commerce for all purposes except for calculating G&A) in favour of company-wide G&A data that overwhelmingly reflected the cost of producing pulp, paper and chemicals worldwide, not only softwood lumber produced in Canada. In doing so, Commerce failed to calculate a G&A amount that "reasonably reflected" Tembec's cost of production and sale of softwood lumber contrary to Article 2.2.1.1 and included costs in Tembec's G&A that did not pertain to Tembec's cost of producing and selling softwood lumber contrary to Article 2.2.2.

4.78 For Weyerhaeuser Canada, Commerce improperly included an amount for litigation settlement costs incurred by Weyerhaeuser Company for claims related to its hardboard siding products sold in the United States in prior years. The G&A expense Commerce calculated did not

Tc 0.2269 Tw (Tei09 Tc 0e275 T88ts) Tj 26.25 0 TD 0.225 Tc 0 Tw (') Tj 2.250896 TD -0.085 T
sos cost of p2861 Tw (anos s1 s costtestabnnd selling softw, doing so,) Tj 0 -12.7308 TD -0.068 Tc 1.od lumber contrary s reflec2

4.79 For Tembec, Commerce improperly established a by-product offset by relying on internal transfer prices that were significantly lower than unaffiliated sales prices. In doing so, Commerce acted inconsistently with Article 2.2.1.1 because the record evidence clearly established that the internal prices were undervalued. The significant difference between internal prices and market prices cannot be attributed to profit as the US purports. By-products have neither profits nor costs and Commerce made no findings about profits. The US assertions that Tembec provided inadequate and "self-serving" data on purchases from unaffiliated companies are untrue and were never raised by Commerce. Commerce had the burden to advise Tembec if it found any data were inadequate.

4.80 For West Fraser, Commerce improperly rejected data recorded on West Fraser's books for wood chip sales made to affiliated parties in BC on the grounds that the sales underlying those data were made at inflated non-market prices. This was not an unbiased and objective examination of the record as a whole and resulted in a determination of costs, contrary to Article 2.2.1.1. Commerce ignored 99.7 per cent of the record evidence on BC market prices in finding incorrectly that West Fraser's affiliated sales were not reflective of BC market prices. The United States blames West Fraser for Commerce's own failure in evaluating the evidence. The tiny quantity of West Fraser's unaffiliated chip sales in BC on which Commerce relied was self-evident and Commerce's own verification report shows that it was put on notice by West Fraser's officials that over half of those sales were made early in the period of investigation, when prices were lowest. Commerce also re-valued certain sales to an affiliated pulp mill that Commerce verified reflected market prices. Commerce never raised an issue that any of these data was selectively provided and West Fraser never had the opportunity to provide any fur TD -.y2p by We

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prerequisite".[45] The factors that Canada cites in paragraph 6 of its 10 June 2003 response come into play only if that minimum prerequisite has been met, which was not the case here.

4.86 The United States' second request for a preliminary ruling is with respect to Canada's improper introduction in its first submission of facts not available to Commerce in the underlying investigation. Specifically, Canada put before the Panel Exhibit CDA-77, a regression analysis. This analysis was prepared by respondent Tembec six months after the investigation was completed. Canada's attempt to have the Panel consider this exhibit is simply not consistent with Article 17.5(ii) of the *AD Agreement*.

4.87 Canada claims that respondents did not present the exhibit to Commerce, because Commerce's decision to deny a price-based adjustment for dimensional differences was "unexpected". That claim is not credible. Commerce's requirements for establishing such an adjustment are clear from its questionnaire and its regulations. Had the Tembec regression been presented to Commerce during the investigation, Commerce could have evaluated it to clarify and identify the data used as well as the fundamental assumptions employed.

4.88 Contrary to Canada's assertion[46], this regression analysis is not the "exact same type of document" that was at issue in the *EC – Bed Linen* case. At issue in *EC – Bed Linen* was a table summarizing the declarations of industry support, evidence that had always been available to the EC investigating authority.[47] The regression analysis is not a mere summary table.

4.89 On Canada's challenge to Commerce's initiation of its investigation, the standard, in Article 5.3 of the *AD Agreement*, is "whether there is sufficient evidence to justify the initiation of an investigation". A similar sufficiency standard governs a determination of whether to terminate an investigation under Article 5.8. Neither provision requires evidence greater than sufficient evidence.

4.90 Canada relies primarily on Article 5.2, arguing that an investigating authority should decline to initiate an investigation unless the application contains *all* information reasonably available to the petitioners regarding dumping, injury, and causal link. However, Article 5.2 describes the contents of an application for a dumping investigation. It does not contain a standard for accepting or rejecting an application. That standard is set forth in Article 5.3.

4.91 Canada rests its argument on the reference in the *chapeau* of Article 5.2 to "such information as is reasonably available to the applicant" on matters listed in the four sub-paragraphs that follow. Canada improperly reads the word "all" into this phrase. In fact, the reference to information "reasonably available" simply sets a limitation on what is expected of petitioners. Yet, Canada turns this limitation into a limitless obligation.

4.92 The evidence of dumping in the softwood lumber petition was sufficient to support initiation.[48] The evidence included country-wide, industry-wide cost and price data from multiple reliable sources.[49] The information that Canada claims was improperly excluded could not have altered the adequacy and accuracy of the information actually included.

4.93 On "product under consideration", Canada rests its argument primarily on Article 2.6 of the *AD Agreement*. Yet, Article 2.6 contains no obligation at all on how an investigating authority is to

[45] Appellate Body Report, *Korea – Dairy*, para. 124.
[46] Canada response to the US preliminary objections, para. 27.
[47] Panel Report, *EC – Bed Linen*, paras. 6.42-6.43 and Annex 2-2 thereto.
[48] Canada does not challenge the sufficiency of the application with regard to injury and causal link. Accordingly, the US confines its discussion to evidence of dumping.
[49] US first written submission, paras. 50-62.

4.103 Canada makes a number of company-specific claims. The *AD Agreement* provides only general guidance on how an investigating authority is to establish a producer

4.113 Canada suggests that the absence of any limits on an investigating authority's definition of the "product under consideration" could lead to "absurd result[s]". However, the absurd circumstances that Canada hypothesizes simply are not at issue here.

4.114 Regarding Canada's claim for an adjustment for differences in dimension, Canada has made several misleading and unsubstantiated assertions. For example, Canada's oral statement claims that, "[t]he United States contravened Article 2.4 by not taking into account dimension of softwood lumber in comparing export price to normal value". However, Commerce took dimension into account by accepting dimension in its model match methodology.

4.115 Similarly, Canada argues that all the parties, including the US petitioners, asserted that dimension affected price[52], but cites to no record evidence of this. The parties did not express a common view. Canada now concedes that "the market established prices based on the supply and demand for each product, not because one product is smaller or larger than the other".[53]

4.116 Canada argues that the United States must be found to have concluded, in effect, that differences in dimension affected price comparability because Commerce accepted dimension in its product matching hierarchy. However, Commerce's matching criteria do not dictate what price adjustment it must make. Canada confuses two separate decisions made by Commerce. The product matching decision is made early in the investigation, before facts relevant to price comparability are gathered and evaluated.

E. SECOND WRITTEN SUBMISSION OF CANADA

4.117 In its second written submission, Canada made the following arguments:

1. Initiation and Termination of the Investigation

4.118 In initiating and later failing to terminate the investigation, Commerce violated Articles 5.2, 5.3 and 5.8 of the *AD Agreement.*

4.119 The United States violated Article 5.2 because Commerce initiated the investigation in spite of the undisputed fact that the Applicant had information about costs, as well as home market and export prices reasonably available to it that it did not provide to Commerce as part of its "Application".

4.120 The United States asserts that Article 5.2 does not impose an obligation on investigating authorities. The US position is untenable because the *AD Agreement* only concerns obligations on Members. Its position is also belied by the decision in *US – 1916 Act (Japan)* in which the United States itself was held to violate Article 5.2.

4.121 The United States also asserts that a breach of Article 5.2 has no consequences and that the sole obligation on investigating authorities under the combination of Articles 5.2 and 5.3 is to ensure that an application contains sufficient evidence to justify initiation. To the contrary, a *Vienna Convention* analysis of Article 5.2 demonstrates that it is an independe Article 5.2 bsiolafcand 5. Tc 1.1267 u/F1 1

the Applicant on home market prices, export prices, and costs were adequate, accurate and therefore sufficient, to justify initiation.

4.123 The Applicant's cost data were flawed in at least four ways: first, the Applicant based its allegations of BC and Quebec producers' costs on US surrogate companies that were not

kinds" of merchandise but subordinated these criteria to a "no clear dividing line"/"continuum" test. For bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar, the United States examined whether each of these closely resembled a limited (and varying) subset of

4.153 Commerce had the necessary evidence; it simply resisted basing any adjustment for dimension on differences in value (price).

4. Commerce's Practice of "Zeroing" Violated Articles 2.4 and 2.4.2 of the *AD Agreement*

4.154 Commerce violated Article 2.4.2 in calculating margins of dumping for Canadian lumber when it changed to zero any intermediate stage margins resulting from comparisons in which export price exceeded normal value. In conducting this zeroing, it failed to consider fully "all comparable export transactions" as required by Article 2.4.2 in conducting its comparison of weighted average export price with weighted average normal value.

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expense, as demonstrated, Commerce included costs that did not "pertain to" the production and sale of lumber contrary to Article 2.2.2.

4.167 To date, the United States has failed to address any of the factual evidence or arguments presented above. It has responded by offering generalizations that do not withstand scrutiny, or by mischaracterizing Canada's or Abitibi's arguments.

(b) The Allocation of G&A Expenses for Tembec

4.168 The United States continues to seek to justify Commerce's findings by arguing that Commerce's method was predictable and therefore more reliable, that the FPG data were unreliable because they were unaudited and divisional data. These arguments do not support Commerce's rejection of the FPG's data as a basis for determining Tembec's G&A.

4.169 Article 2.2.2 of the *AD Agreement* requires Commerce to calculate G&A expenses based on actual data pertaining to the production and sales of the like product. The G&A expenses from both the FPG and the overall company are verified and on the record (i.e., they both satisfy the "actual data" requirement). Commerce defended the use of Tembec's company-wide data by stating that its "consistent and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company…" In this case, however, its method effectively required reliance on data that did not pertain to the production and sale of softwood lumber and distorted Tembec's margin of dumping in violation of Article 2.2.2. It also resulted in the calculation of costs that were not "associated with" the actual cost to Tembec for producing and selling softwood lumber, contrary to Article 2.2.1.1.

4.170 Commerce calculated Tembec's G&A rate based on the company-wide G&A expenses even though Tembec submitted documented evidence that its pulp and paper operations incurred significantly higher G&A expenses than its lumber operations, as well as evidence on the reliability of the FPG data. Using the more accurate and reflective data from the FPG would have resulted in lower costs which, ultimately, would have resulted in a lower margin for Tembec. The United States now offers, as an additional defence of its practice, that Tembec's FPG G&A data were "not audited" and not kept in accordance with Canadian GAAP. First, this defence is a *post hoc* rationalization of Commerce's determination. Second, as elaborated in Canada's response to question 54 of the Panel, the FPG data were audited. Finally, the FPG data were maintained in accordance with GAAP.

(c) The Allocation of G&A Expenses for Weyerhaeuser

4.171 The United States argues that the hardboard siding charge is a general expense attributable to Weyerhaeuser Canada's cost of producing softwood. The United States' only support for this claim is that the hardboard siding expense is really a "legal" expense. However, the USD130 million charge for hardboard siding settlements does not reflect lawyer salaries, copying of briefs, travel to court, or other types of "legal" expenses that are often considered to be "general". As described on page 51 of Weyerhaeuser Company's financial statement, the hardboard siding charge was unique. The charge was specifically meant to fund future claims related to hardboard siding. The expense was not even incurred in the year Weyerhaeuser Company took the charge; it was simply meant to reflect the contingency on its books. In reality, the expense affected one line of business, in the United States, that was unrelated to Canadian softwood lumber – nothing more.

4.172 The United States further tries to justify Commerce'

expense (the integration expense) was included in Commerce's G&A calculation. Further, the language that the costs are "generally incidental to its business", as the full quote demonstrates, was referenced in terms of pending and threatened environmental litigation.

4.173 Finally, the United States hinges its entire argument on the belief that Canada cannot demonstrate that the settlement charge relates to the production and sale of hardboard siding. Such an approach is inconsistent with Articles 2.2.2 and 2.2.1.1, the findings of the panel in *Egypt – Steel Rebar*, and Commerce's own practice. As stated in *Egypt – Steel Rebar*, a cost may be attributed to the production and sale of the like product only if the facts of the case point out that the cost was associated with the product under investigation. Applied to the hardboard siding settlement charge, the United States may not base its decision to include the charge on the fact that Weyerhaeuser Company did not demonstrate that the charge relates to production activity, or that it normally treats these types of expenses in this manner. The hardboard siding expense is a settlement fund concerning a product unrelated to the like product, produced in the United States by Weyerhaeuser Company. Accordingly, the hardboard siding expense did not "pertain to" the production and sale of softwood lumber as required by Article 2.2.2. Nor did including this expense result in a cost that "reasonably reflected" Weyerhaeuser Canada's costs "associated with" the production and sale of softwood lumber in accordance with Article 2.2.1.1. US findings in this regard were neither a proper establishment of the facts nor an evaluation of the facts that was unbiased and objective.

4.174 The US arguments also fail to properly identify Weyerhaeuser Company's burden during the investigation. Weyerhaeuser Company was required to demonstrate that the expense was not related to the production and sale of Canadian softwood lumber, nothing more. Commerce never requested additional information to add to this record evidence. Finally, the US argument violates Commerce's own practice. When Commerce calculates G&A for a parent company that owns the producer or exporter under investigation, as here, Commerce has recognized that G&A expense items are not considered fungible in nature. The United States never addresses this policy in its first written submission or response to the Panel's questions. The record in this case demonstrates that for other "general" expenses, Commerce in fact followed this policy.

(d) West Fraser's By-product B 1D0.145c 0.9/paren142 Tc 0 Tw 76Tc 0 Tw (B) Tj 7.5 0 TD 0.375 Tc (y) Tj

in BC were too small or unrepresentative. Second, the United States asserts that Commerce acted reasonably because West Fraser's unaffiliated transactions within BC were found to be commercial transactions. As record evidence shows that the majority of West Fraser's BC sales to unaffiliated parties were made during the first two months of the POI, when prices were lowest, the average price of those sales cannot reflect market prices for the POI. Third, the United States claims that "[s]o long

is no record evidence upon which such a finding could have been made. Third, the argument assumes that Tembec's accountants would assign a cost to a by-product when GAAP provides that no costs are assigned to by-products.

4.184 The United States claims that "there are no easy methods to assess value under such conditions" and that, because Commerce used the company's own valuation, it determined a reasonable figure for by-product revenue. These claims were not advanced by Commerce in the IDM, and they are not correct. It would have been very easy to assess the value of the wood chips by using the records kept by Tembec of its unaffiliated sales and purchases of wood chips.

(f) Slocan's Futures Revenue Offset

4.185 Commerce rejected Slocan's position that futures revenue formed part of direct selling expenses. In doing so, Commerce asserted that it did not consider the revenue to "result from and bear a direct relationship to [a] particular sale in question". This is not correct. Article 2.4 requires that "[d]ue allowance shall be made … for differences which affect price comparability". The ordinary meaning of this provision cannot support the US interpretation. Article 2.4 does not refer to

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

4.191 Under Article 5.3, Canada disputes the sufficiency of the evidence supporting initiation and argues that the Weldwood data would have provided a superior basis for deciding whether to initiate.[54] However, the Weldwood data necessarily would have represented the experience of only a single company, rather than the diverse cost and price data actually set forth in the application. But, even assuming, *arguendo*, that Canada's assessment in this respect is correct, it has no bearing on the question before this Panel.

4.192 The evidence that Commerce relied upon to initiate included data from the lumber industry publication *Random Lengths*. Canada incorrectly asserts that *Random Lengths* "commingles" Canadian and US data. Its assertion that the *Random Lengths* data are "not actual transaction prices" but "informal estimates" is also incorrect. Moreover, Canada's questioning of the reliability of *Random Lengths* data is contradicted by its own reliance on that very same source.[55]

4.193 Canada also argues that the application demonstrated dumping of only a limited number of categories of lumber.[56] Canada's argument assumes the correctness of its own claim regarding the product under consideration; that is, it assumes that each "category" of softwood lumber in fact constitutes a separate "product under consideration" and thus requires a separate demonstration of dumping for purposes of initiation. However, Canada's product-under-consideration argument has no basis in the *AD Agreement*.

4.194 Finally, Canada argues that Commerce's initiation was tainted by a lack of evidence of home market sale prices in BC.[57] The application contained evidence of home market sales below cost in Quebec. This provided a basis for using constructed value to establish normal value. The *AD Agreement* does not require investigating authorities to conduct separate cost tests on different markets within "the domestic market of the exporting country".

4.195 Commerce's establishment of the facts with respect to softwood lumber costs was also proper. Canada's claim that the application "fail[ed] to have costs of significant or representative producers" is incorrect for two reasons.[58] First, with respect to the vast majority of costs, data from US mills were used only to provide production factors, which were then valued using data Canada does not dispute are representative of Canadian costs of production.[59] Second, the US mills whose data were used in the cost model were themselves significant and representative producers of softwood lumber.

4.196 Finally, Canada's allegation that "Commerce relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces"[60] is demonstrably false. The cited affidavit provides *separate* per-MBF freight rates for shipment to Boston from four regions, one of which is the Maritime Provinces.[61]

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[54] *See, e.g.*, Canada first written submission, paras. 86, 95, and 99; Canada response to question 9 of the Panel, paras. 45-49.

[55] Canada response to question 4 of the Panel, paras. 6-7.

[56] Canada response to question 8 of the Panel, paras. 28-30.

[57] *See, e.g.*, Canada response to question 19 of the Panel, para. 61.

[58] Canada response to question 8 of the Panel, paras. 34-35.

[59] *See* US first written submission, paras. 53-54 and exhibits cited therein.

[60] Canada response to question 8 of the Panel, para. 40.

[61] Exhibit CDA-41, Petition Exhibit VI.C-9, para. 4.

2. Product under Consideration

4.197 Canada has not identified an obligation arising out of Article 2.6 of the *AD Agreement* that the United States violated in this case. Canada's st (aor Tc -0pom onej -4ory togato -4r reflects its inability tog4.75 -2

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4.209 Further, Canada has stated positions that are: (a) inconsistent with the *EC – Bed Linen* Report and (b) internally inconsistent. First, after relying heavily on the Appellate Body Report in *EC – Bed Linen*, Canada is now espousing positions at odds with that report. Canada now agrees with the United States that a two-stage process for determining whether a producer or exporter has engaged in dumping is appropriate under Articles 2.4 and 2.4.2 of the *AD Agreement.*[71] However, the Appellate Body, in arriving at its finding in *EC – Bed Linen* found "nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished [...], nor to justify the distinctions [...] among *types or models* of the same product on the basis of these 'two stages'".[72] Thus, Canada now appears to agree with the United States that the reasoning in *EC – Bed Linen*

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financial costs relate solely to its assets. Because money is fungible, financial costs cannot be attributed to any one expenditure – whether to asset purchases or to any other particular investment.[79] Rather, and consistent with Canadian GAAP's treatment of financial costs as a general cost, Commerce concluded that financial costs relate to Abitibi as a whole and are reflective of Abitibi's overall borrowing needs.

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

4.216 Canada was unable to provide evidence that Tembec's "divisional G&A" was in accordance with Canadian GAAP.[80] Instead, Canada argues that an assertion in an unaudited portion of Tembec's financial statement establishes that the "divisional G&A" is in accordance with Canadian GAAP.[81] However, this note to the audited financial statements does not address directly Tembec's treatment of its G&A costs, nor does the record establish that Tembec's "divisional G&A" was among the items audited.[82] Canada argues that, because Tembec's overall G&A cost was audited, the G&A cost that Tembec attributed to various divisions must also have been audited[83], but that conclusion does not

4.227 With respect to **Slocan**, Canada asserts that Commerce should have made some adjustment for futures contract profits, even though Slocan itself failed to substantiate either of the alternative treatments it sought. As the panel in *Egypt – Steel Rebar* noted, responding parties have an obligation to assert and to justify the information and arguments required to prove their claims.[98] Slocan requested two alternative and directly contradictory treatments of its hedging profits, but the evidence did not support either claim.[99]

4.228 Neither Slocan nor Canada has explained how Slocan'

not limited to a particular methodology, or to a particular stage of a methodology. Rather, it is general in its terms, applying universally to dumping comparisons.

4.246 The United States asks this Panel to turn to negotiating history. The text of Article 2.4.2 is clear and requires no resort to negotiating history. Besides, the negotiating history does not sustain the US position.

all assets. It also considers the amount of time that money is needed for each type of expense. All current production expenses are fully taken into account because every expense incurred to produce a good is included in the value of assets. Given Abitibi'

concept of "direct selling expenses" as defined under US domestic law has a more restrictive meaning, it is irrelevant and not before this Panel.

H. SECOND ORAL STATEMENT OF THE UNITED STATES

4.270 In its second oral opening and closing statements, the United States made the following arguments:

1. Opening Statement

4.271 At this stage in the proceedings, the United States recognizes that the issues have been laid out in great detail and are well known to the Panel. However, in its responses to questions and in its rebuttal submission, Canada has made numerous statements that (1) wrongly assert that the United States concedes or acknowledges certain points; (2) take US statements out of context; or (3) otherwise mischaracterize the arguments of the United States. The effect of these misstatements is to seriously distort the facts and issues. The United States will address Canada's most significant misstatements to clarify the facts and the issues in this dispute.

4.272

4.275 In its rebuttal submission, Canada made several statements regarding the US argument on Article 5.2 that call for reply. First, Canada incorrectly asserted that Commerce "admits knowing at the time of initiation" that the Application "did not contain certain highly pertinent transaction-specific information, reasonably available to the Applicant in violation of Article 5.2".[104] The statement from which Canada infers this supposed admission is not an admission of the relevance of the Weldwood data, nor of any obligation on the investigating authority under Article 5.2.

4.276 Second, Canada erroneously characterizes the US argument as rendering Article 5.2 a nullity.

applicant's use of *Random Lengths* data by questioning whether they represent actual transactions. The United States has responded to this allegation in prior submissions, demonstrating that *Random Lengths* data do represent actual transactions.

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4.281 Finally, Canada continues to argue that Commerce violated Article 5.8 by declining to evaluate "the Weldwood data or any other data that may have been available in the light of the ongoing sufficiency of evidence requirement".[107] This argument is flawed for several reasons. First, the United States explained that these data *could not* have negated the sufficiency of the data on which Commerce relied at the time of initiation because they reflect the experience of a single company, whereas the data actually relied upon for initiation reflected the experience of a broad cross-section of Canada's lumber producing and exporting industry. Second, Canada ignores the fact that Weldwood's data were submitted two months after the initiation of the investigation, as a "voluntary" response. The data were received concurrently with the submissions of the six examined Canadian respondents, each of whose data demonstrated dumping. In light of the evidence of dumping obtained during the investigation, it is not at all clear how Canada believes the United States violated its obligation under Article 5.8. That provision requires termination of an investigation "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". Yet, here, the evidence accumulated during the investigation reenforced rather than weakened the basis for concluding that there was dumping. Canada ses basis for conbtWm

treats it as if it were the very foundation for Commerce's decision. Read in context, it is clear that this is not the case. Commerce expressly acknowledged that it could not base its determination on the diversity of characteristics among lumber products. Rather, it recognized an obligation under its own practice to apply the *Diversified Products* factors.

4.285 Moreover, even on its own terms, Canada's product-under-consideration claim must fail. Canada infers from Article 2.6 a rule governing the definition of the product under consideration. Although none of the key terms in Article 2.6 refer to the quality of two things being identical, Canada somehow infers a requirement "that the essential, distinctive traits of one product must be very nearly *identical* to the essential distinctive traits of the other product".[112] (emphasis added) Not only is such a requirement entirely absent from Article 2.6, even an inference of such a requirement is not supported by the language of Article 2.6.

4.286 Finally, in its rebuttal submission, Canada seeks support for its position from the panel report in *Indonesia – Autos*.[113] Its reliance on that case is misplaced for at least two reasons. First, and most importantly, the panel in *Indonesia – Autos* was not reviewing an investigating authority's determination under the standard in Article 17.6 of the *AD Agreement*. Second, unlike the present case, there was no question in *Indonesia – Autos* as to the identity of the product under consideration.

4.287 The next issue is Canada's **"due allowance for physical differences" claim**. Canada's claim under Article 2.4 of the *AD Agreement* is that Commerce was required to make calculation adjustments to account for certain dimensional differences in the transactions it compared. But Canada omits critical pieces of the puzzle which, when put in their proper place, reveal that width, thickness and length *were* taken into account in the product comparisons.

4.288 Canada's submissions also contain significant distortions of fact and mischaracterizations of the US position. For example, at para. 240 of its first written submission, Canada asserts (AD 1

4.290 The United States turns now to Canada's claim regarding **calculation of the overall dumping margin**. Canada has failed to establish that the *AD Agreement* requires Members to offset dumping margins with non-dumping amounts found in distinct comparisons. Throughout this proceeding, the United States has maintained that (1) Articles 2.4 and 2.4.2 do not create an offset obligation; (2) the *EC – Bed Linen* Appellate Body Report is not binding on the Panel, and the Panel should not rely on it; and (3) the negotiating history confirms the US interpretation, that Article 2.4.2 was crafted to address the symmetry of comparisons in dumping calculations, not the offset issue.

4.291 In its rebuttal submission, the United States demonstrated that Canada effectively is seeking to isolate different parts of the phrase "all comparable export transactions" for different purposes. Under Canada's theory, the term "comparable" export transactions would apply in the first stage of the dumping calculation, and "all" export transactions would apply in the second stage. In its rebuttal submission, rather than explain or justify this position, Canada takes a new position. Now, it would have the Panel find that the meaning of each term – "all" and "comparable" – changes depending on the stage of the calculation. Canada's theory that the same word takes on a different meaning depending on the stage of the dumping calculation at issue finds no support in ordinary rules of treaty interpretation.

4.292 Moreover, Canada's new theory fails to address the fact that under Article 2.4.2 there are three alternative bases for establishing dumping margins. Two of those bases provide for comparisons using individual export transactions. The availability of these transaction-specific options makes it clear that Article 2.4.2 applies to the first stage of the calculation – that is, prior to the establishment of an overall margin. At the same time, it is equally clear that Article 2.4.2 does not address how these transaction-specific margins are to be combined to establish an overall margin. Under Canada's argument, the first basis for establishing dumping margins – the weighted average-to-weighted average basis – would apply to both stages of the calculation. However, the other two bases for establishing dumping margins plainly apply only to the first stage. Thus, Canada's theory leads to an interpretation of Article 2.4.2 in which the scope of the obligation differs depending on the basis for establishing dumping margins. Yet, the provision itself does not support such differential interpretation.

4.293 With respect to the Appellate Body Report in *EC – Bed Linen*, the United States has just two points to make. First, Canada mistakenly asserts that the United States has not denied that its practice is identical to the EC's practice addressed in *EC – Bed Linen*. Here again, Canada mischaracterizes a statement by the United States where the United States explained that, without access to the details of the EC calculation, the US could not assess the similarities or differences in the practices. Second, Canada argues that as an adopted Appellate Body Report, *EC – Bed Linen* should be taken into account where it is relevant. As discussed in the US first written submission, the concept of *stare decisis* does not apply to WTO disputes.[115] This Panel is not bound to follow *EC – Bed Linen.* Like the panel in *Argentina – Preserved Peaches*[116], the Panel should not refrain from re-evaluating an adopted report where appropriate. The United States respectfully suggests that, in this case, such re-evaluation is appropriate. The Panel should find that *EC – Bed Linen* is not persuasive.

4.294 With respect to the negotiating history of Article 2.4.2, there are two points to make. First, Canada does not dispute that the *AD Agreement* negotiations clearly distinguished between two separate issues: (1) the symmetry of comparisons, and (2) whether offsets would be required when combining the results of comparisons. Canada improperly seeks to use language addressing the symmetry issue to create an obligation with respect to offsets. Second, Canada suggests that the United States' reference to the negotiating history is based upon an ambiguity or manifest absurdity, which Canada claims derives from "the United States' own unilateral interpretation of

[115] US first written submission, paras. 173-177.
[116] Panel Report, *Argentina – Preserved Peaches*, para. 7.24.

Article 2.4.2".[117] To the contrary, the United States refers to the negotiating history to confirm the ordinary meaning of the terms of Article 2.4.2. Given Canada's own practice and the practice of other Members in calculating overall dumping margins[118], the US interpretation can hardly be described as "unilateral".

4.295 Finally, in its rebuttal submission, Canada asserts that offsets are required by the "fair comparison" language in Article 2.4. However, Canada has not articulated the basis for this argument, other than its reliance on *EC – Bed Linen*. The fair comparison language does not stand alone but is contained within Article 2.4. That provision tells an authority how to achieve a fair comparison by making due allowance for differences in comparisons which affect price comparability. By making Article 2.4.2 subject to Article 2.4, the Members ensured that any transactions being compared, either individually or as a weighted average, would have been identified and, as appropriate, adjusted in accordance with the provisions of Article 2.4. Nothing in Article 2.4 requires an offset of non-dumped amounts against dumping margins.

4.296 Canada makes a number of **company-specific claims**. Throughout these claims, Canada argues that the United States ignored record evidence and instead, blindly applied standard methodologies. Commerce applied its standard methodologies only after careful consideration of the

the parent company's G&A expenses, including a portion of the litigation costs, within Weyerhaeuser Canada's G&A, resulting in a reasonable allocation of Weyerhaeuser Company's general costs to softwood lumber consistent with the *AD Agreement.*

4.300 During the period of investigation, **West Fraser** sold **wood chips** to affiliated companies in BC. In determining whether a company's records reasonably reflect costs associated with production and sale of a product, Commerce considers whether transactions between affiliated parties occurred at arm's length prices. Here, it concluded that West Fraser's affiliated sales did not occur at arm's length prices. Thus, it relied on West Fraser's unaffiliated sales of chips in valuing the offset. It found these sales to non

duty to grant adjustments that have been neither requested nor demonstrated by the respondent.[122] Therefore, Commerce properly did not grant the two offsets requested by Slocan.

2. Closing Statement

4.303 The United States seeks to make clear its position on the recommendation Canada is asking the Panel to make that the United States revoke the anti-dumping duty order and return all cash deposits collected.[123] Canada apparently is seeking a suggestion rather than a recommendation, under Article 19.1 of the *DSU*. In *US – Hot-Rolled Steel*, the panel rejected a request by Japan similar to Canada's request in this case.[124] Since the US measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. However, even under Canada's claims and arguments in this dispute, Canada's request for a suggestion would go beyond anything relevant to implementing a recommendation and instead seeks action nowhere called for under the WTO.

4.304
Canada initially takes one position, then alters that position following US responses demonstrating the flaws in the initial position. This is particularly noticeable when it comes to initiation, product under consideration, and calculation of an overall dumping margin.

4.305 The inconsistency in Canada's argumentation is telling, because Canada appears to have brought this case without knowing whether and how the United States violated its WTO obligations. This should give the Panel pause. For the reasons set forth in US submissions and statements, applying the Article 17.6 standard of review, the Panel should find Commerce's initiation and conduct of the lumber investigation to have been 4.304'
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5.21 The United States does not dispute the similarity of the two methodologies, but confines itself to rejecting the precedential value of the decision of the Appellate Body in *EC – Bed Linen* and attempts to reargue the case. Although the Appellate Body's decision in *EC – Bed Linen* only binds the parties to that case, the Appellate Body expects Panels to take account of the legal clarifications concerning Articles 2.4 and 2.4.2 of the *AD Agreement*. Of course, the panels and the Appellate Body may reconsider or refine certain legal interpretations on the basis that certain legal arguments were not made by the parties and therefore not addressed by the Appellate Body. However, the arguments advanced by the United States in addition to those already addressed in *EC – Bed Linen* to defend its "zeroing" methodology are not of such a nature.

5.22 Most of the arguments have already been addressed by the Appellate Body, in particular those relating to the relevance of the product definition. As a new argument, the United States seeks to question the interpretation by the Appellate Body of the first symmetrical method set out in Article 2.4.2 of the *AD Agreement* by arguing that Canada's arguments lead to an anomalous result in so far as it would lead to a prohibition of "zeroing" in the first symmetrical method of comparison while the use of "zeroing" would be left to the discretion of Members in the two other methods. Furthermore, the United States argue that the negotiators did not intend to address the offset issue. Those arguments cannot be accepted.

5.23 "Zeroing" is prohibited when resorting to the first symmetrical method of comparison as a result of the word "all" in the sentence "a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions" in Article 2.4.2 of the *AD Agreement* (emphasis added). The second and third methodology, however, concern situations not relevant to this case. Canada's claim is explicitly confined to the first symmetrical methodology (weighted average normal value/weighted average export prices). The EC further notes that, in any case, the use of the third methodology is only allowed in well defined circumstances and is subject to strict conditions.

5.24 As to the reference to the negotiating history of the *AD Agreement*, the EC considers that according to Article 32 of the *Vienna Convention*, there is no need for considering the negotiating history of a text where the interpretation thereof can be based on the letter as is the case for Article

context at paragraph 193 "[i]n short, an 'objective examination' requires that the domestic industry,..., be investigated in an unbiased manner, without favouring the interests of any interested party".

5.43 This rule in the *AD Agreement*, as explained by the Appellate Body, squarely applies to the authorities' discretion on how to construct a respondent's cost of production.

(c) DOC's Valuation of Wood Chips, to which DOC Applied its Established Practice, is

AD Agreement thus demonstrates that the requirements thereunder are addressed to the applicant but not to the investigating authority.

5.51 Second, Article 5.1 of the *AD Agreement* elucidates that the application is made "by or on behalf of the domestic industry". Therefore, any shortcoming of the application falls within the sphere of responsibility of the applicant but not of the investigating authority. The authority is simply not responsible for submitting an application that fulfils the requirements under Article 5.2 of the *AD Agreement.*

5.52 The EC would therefore concur with the US position that Article 5.2 of the *AD Agreement* does not impose a specific obligation on investigating authorities.[126]

2. Article 5.3 of the *AD Agreement*

5.53 Canada claimed that the United States violated its obligations under Article 5.3 of the *AD Agreement* because the application did not contain "sufficient evidence" to justify the initiation of the investigation.[127]

5.54 The EC would refrain from commenting on the substance of this claim. However, from a systemic point of view, the EC would submit that Article 5.3 of the *AD Agreement* is a pivotal provision in determining whether the investigating authorities correctly initiated an anti-dumping investigation. In this context, other requirements for the application, such as those referred to under Article 5.2 of the *AD Agreement*, may also become relevant. Thus, in order to discharge its obligations under Article 5.3 of the *AD Agreement* the investigating will also have to take into account whether the application contains all necessary information as required under Article 5.2 of the *AD Agreement.*

3. Article 5.8 of the *AD Agreement*

5.55 Canada claimed that even if the US authorities had initiated the investigation in accordance with Article 5.3 of the *AD Agreement* it should have terminated the examination at a later stage in the light of the insufficient evidence on the commercial relationship and the cost and pricing data.[128] In Canada's view the United States, therefore, violated its obligations under Article 5.8 of the *AD Agreement.*

5.56 The EC would recall that Article 5.8 of the *AD Agreement* provides for two alternative scenarios: Either the application did not contain sufficient evidence from the outset or during the investigation it becomes apparent that evidence is insufficient.

5.57 As concerns the first alternative, the EC would agree with the Panel findings in *Mexico – tCorn Syrup* AD investie E7 AD *Agreement*

5.59 The EC would note that once an investigation has been initiated (in accordance with Article 5.3 of the *AD Agreement)* these questions typically evolve in the course of the investigation. Therefore, an obligation to terminate an ongoing investigation under Article 5.8 of the *AD Agreement* due to lack of "sufficient evidence" should be interpreted in a more flexible manner. This view is corroborated by the first sentence of Article 5.8 of the *AD Agreement* which provides that any termination is contingent upon whether the "authorities concerned *are satisfied* that there is no sufficient evidence of either dumping or of injury to justify proceeding with the case" (emphasis added). Accordingly, investigating authority have a considerable margin of discretion whether to terminate an investigation due to lack of sufficient evidence or not.

4. The Practice of "Zeroing" – Violation of Articles 2.4 and 2.4.2 of the *AD Agreement*

5.60 Turning now to the US "practice of zeroing", the EC understands that the scope of this complaint does not concern the US statute *per se*. Canada only appears to attack the practice of "zeroing" as relevant for original investigations.

5.61 The EC considers that the US methodology for determining the numerator for the purposes of

investigation in a narrower way".[133] Yet, once the product under consideration has been defined broadly as in this investigation, a margin of dumping based on the first symmetrical method of Article 2.4.2 of the *AD Agreement* must take full account of negative amounts of dumping.[134]

5.65 As to the textual, contextual arguments and those relating to the negotiating history[135], the EC refers to its third party brief.[136]

5.66 In short, the EC fully supports Canada's request that the Panel should find that the US practice of "zeroing" is incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement*.

D. THIRD PARTY ORAL STATEMENT OF JAPAN

5.67 Japan, in its oral statement, made the following arguments:

1. The Basic Principle of Good Faith

5.68 Japan would like to bring the attention of this Panel to the bedrock principle of good faith under Articles 26 and 31 of the *Vienna Convention*. As the Appellate Body has repeatedly recognized, Members are obliged to perform their WTO treaty obligations in good faith.[137] In *US – Hot-Rolled Steel*, for example, the Appellate Body stated that the "organic principle of good faith" is "a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*...".[138] In *US – Shrimp*, the Appellate Body has explained that this general principle "prohibits the abusive exercise of a state's rights"[139], and that the exercise of a state's right should be "*fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed".[140] (emphasis in original) As clarified by the Appellate Body, the basic principle of good faith requires the authorities to act in an even-handed manner that respects fundamental fairness.[141]

5.69 One of the expressions of this principle is Article 17.6(i) of the *AD Agreement*. While this Article instructs the Panel to review whether the authorities evaluated facts in an unbiased and objective manner, this Article, at the same time, "in effect defines when investigating authorities can be considered to have acted inconsistently with the *AD Agreement* in the course of their "establishment" and "evaluation" of the relevant facts".[142] The principle of good faith therefore requires the authorities to exercise its discretion in an even-handed, fair, unbiased and objective manner under the *AD Agreement*.[143]

5.70 This basic principle of good faith is particularly important in the interpretation and application of the *AD Agreement* because the authorities exercise substantial discretion under the *AD Agreement*. Keeping this in mind, individual issues should be reviewed.

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[133] Appellate Body Report, *EC – Bed Linen*, para. 62.
[134] The EC does not address the issue of product definition in this submission, but reserves its position.
[135] US first written submission, paras. 161 and 167 *et seq*.
[136] EC third party submission, paras. 36-39.
[137] *See, e.g.*, Appellate Body Report, *e.g.*
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port,

2. Prohibition of Zeroing

5.71 Japan demonstrated in its third party written submission that the zeroing practice is inconsistent with Article 2.4 of the *AD Agreement* in conjunction with Article 2.1 thereof.

5.72 It appears that the United States ignored the significance of the chapeau of Article 2.4. The general obligation of "a fair comparison" set forth in the chapeau is another expression of the basic principle of good faith and fundamental fairness with respect to the calculation of the margin of dumping. In order for a comparison to be "fair", the authorities may not exercise its discretion in a manner that gives "unfair advantage" to one interested party. DOC's practice of zeroing, which replaces negative margins with zero to calculate the margin of dumping of a product, works only to create and inflate the margin of dumping. This practice cannot be viewed as "fair" under Article 2.4 of the *AD Agreement*, nor consistent with the basic principle of good faith.

5.73 The United States seems to argue that Article 2.4.2 provides for calculation of the margin of dumping only on a model-specific basis.[144] The United States attempted to justify this argument, reading that the term "margin" in Article 2.4.2 out of context.

5.74 Japan disagrees. The *AD Agreement* requires the authorities to establish a single margin of dumping of a product, and accordingly to determine "dumping" of "a product", on a company-specific basis. This requirement is explicit in Article 6.10, which states "[t]he Authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".[145] (emphasis added) The Appellate Body in *EC – Bed Linen (Recourse to Article 21.5 DSU)* confirmed this, stating "'dumping is a determination made with reference to a product from a particular producer [or] exporter[.]'"[146] Japan also would like the Panel to recall that Article 2.1 informs Article 2.4 that the "fair comparison" must be made with respect to the product under consideration as a whole, as discussed in Japan's written submission. In sum, the *AD Agreement* requires the authorities to calculate the margin of dumping for the product under consideration as a whole on a company-specific basis, not on a model-specific basis.

5.75 The term "margins" in Article 2.4.2 is not an indication that the practice of zeroing is permitted. A multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of the administrative convenience to take into account the differences in physical characteristics, [illegible] (comparison method) Tj 88.5 25 7 Tc

investigation in question, the United States treated the various models of softwood lumber as "a product" under Article 2.1 and as the like product under Article 2.6, or in US term "a class or kind of merchandise".[148] The United States also based its determination of the US domestic industry and its injury on the like product of softwood lumber, a single product. In the US first written submission, responding to Canada's claim that certain types of softwood lumber differ from others, the United States argued "none of these products were so essentially different from other products covered by the investigation as to warrant drawing 'clear dividing lines' between those products".[149] The United States then may not be allowed to argue conveniently only in the zeroing issue that the certain types of softwood lumber must be treated differently from other types.

5.77 As such, Japan submits that the Panel reject arguments by the United States, and this Panel find that the zeroing practice is prohibited under Article 2.4 in conjunction with Article 2.1.

3. Calculation of Selling, General and Administrative Expenses

5.78 The second issue that Japan would like to address is the SG&A calculation methodology adopted by DOC. Again, Japan would like to emphasize that the authorities are required to conduct an anti-dumping investigation in an even-handed, fair, unbiased and objective manner. In this connection, Article 2.2.1.1 requires the authorities to "consider all available evidence on the proper allocation of costs". Consequently, to act in a fair and objective manner, the authorities must determine the proper allocation method of SG&A upon reviewing all evidences presented by an exporter or producer. The requirement for the authorities to base its determination of the allocation method on all evidence presented by a producer means that the determination must be made on a company-specific basis.

5.79 In this investigation, it appears that the United States preferred to apply its established "standard methodology"[150], which allocates financial expenses based on COGS. The United States "[i]f the alvdh65T488 5 0 8 3d1 TcTD -0.0l3j 29.25u Tc TD , how

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Panel has carefully reviewed the arguments and proposed amendments to the text of the Interim Report, and addresses them *ad seriatim*, in accordance with Article 15.3 of the DSU.[153]

6.2 The **United States** requests us to amend paragraph 7.32 of the Interim Report to reflect the fact that the regression analysis was in fact never submitted to DOC. **Canada** did not comment on this issue.

6.3 We agree with the United States and, accordingly, amended paragraph 7.32 of this Report.

6.4 **Canada** requests us to make some amendments to the fifth sentence of paragraph 7.159; fifth, sixth and seventh sentences of paragraph 7.171; and fifth sentence of paragraph 7.173 of the Interim Report regarding our examination of "Claim 5: Article 2.4 – Adjustment for Differences in Physical Characteristics". Canada asserts that our description of DOC's methodology used at the preliminary stage was not accurate and proposed wording to correct it. The **United States** asserts that, through its proposed changes to the above-cited paragraphs of the Interim Report, Canada apparently intended to clarify that certain similar product matches were possible and were made by DOC in the Preliminary Determination. In the view of the United States, Canada's proposed changes do not accurately describe the methodology used by DOC at the preliminary stage. In particular, the United States asserts that Canada's proposals are unclear and misleading, because they fail either to identify the similar matches that DOC made in the Preliminary Determination or to adequately explain that similar matches were made only where DOC was able to quantify an appropriate adjustment. Bearing in mind the alleged purpose of Canada's comments, the United States requests us not to accept the changes proposed by Canada but suggests some adjustments to the above-referred paragraphs of the Interim Report.

6.5 The gist of Canada's comment is that DOC's approach at the preliminary stage be reported accurately in certain paragraphs of this Report. We agree with this comment and made certain changes, which can be found in paragraphs 7.159, 7.171, and 7.173, *infra*, of this Report. Footnotes 310-312, 323-325 and 329, *infra*, have been added to those paragraphs to indicate the source of the information referred to in those paragraphs.

6.6 Regarding "Claim 6: Articles 2.4 and 2.4.2 – Zeroing", the **United States** requests us to delete footnote 341 of the Interim Report (footnote 361 of this Report). The United States argues that it is not within the Panel's terms of reference to rule on whether an offset for non-dumped comparisons is required when determining the overall margin of dumping under the transaction-to-transaction and weighted average normal value-to-individual export transaction methodologies set forth in Article 2.4.2 of the *AD Agreement*. In the view of the United States, that question need not be answered to resolve this dispute. The United States asserts that the statement contained in the footnote is of additional concern because it states a conclusion without setting forth any reasons for that conclusion. Finally, the United States asserts that the discussion in footnote 341 seems to misconstrue the US references to the transaction-to-transaction and weighted average normal value-to-individual export transaction methodologies. Thus, the United States asserts that the purpose of the references that it made to those two methodologies in its submissions to us was "simply to illustrate that Article 2.4.2 contemplates multiple stages to arrive at a single anti-dumping duty margin and speaks only to alternative methodologies for performing the first stage."[154] **Canada** asserts that Article 11 of the *DSU* gives the Panel full scope to express, in footnote 341, its views as to whether zeroing would be permitted in the determination of a margin of dumping based on the other two methodologies referred to in Article 2.4.2 of the *AD Agreement*. In Canada's view, a panel is free to set forth its interpretation of parts of a provision that are not the object of litigation when such interpretation is useful or necessary for the interpretation of the provision in question – in the case at

[153] Section VI of this Report entitled "Interim Review" therefore forms part of the findings of the final panel report, in accordance with Article 15.3 of the *DSU*.

[154] US Comments on the Interim Report, par. 6.

issue, Article 2.4.2 – as a whole. In the view of Canada, the Panel's statement in footnote 341 is connected logically and directly to the Panel's explanation of its legal reasoning. Therefore, footnote 341 should not be removed. Canada further argues that, it was the United States, in paragraph 151 and following of its first written submission, that referred to the other two methodologies provided for in Article 2.4.2 and first raised the issue of the relevance of these methodologies. Finally, **Canada** argues that, the United States is making a legal argument seeking to have the Panel reconsider a substantive position related to the core of submissions on this matter. Canada submits that this goes beyond the scope of the requirement of 0839 Tc Tw (haaised1-l')TD -0.0665e 341 is

6.10 In addition to the above, the **United States** requests us to clarify that the statement contained in the third sentence of paragraph 7.243 of the Interim Report (identical paragraph in this Report), that DOC allocated 13.6 per cent of the total amount for financial expense to softwood lumber, was an assertion made by Canada. **Canada** did not comment on this point.

6.11 After examining the comment of the United States, we have concluded that it is appropriate to make the requested amendment to paragraph 7.243 of this Report.

6.12 Regarding "Claim 8: Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 – Determination of General & Administrative Expenses: Tembec", **Canada** asserts that the fifth sentence of paragraph 7.246 of the Interim Report (identical paragraph in this Report) contains a clerical error which has modified the meaning of this sentence. According to Canada, the internal divisional financial statements included *all* amounts for G&A costs charged by Tembec to each of its divisions, plus a properly allocated portion of overall corporate G&A. Thus, Canada requests us to replace the word "some" in "including some amounts for G&A costs that are charged directly by Tembec" with the word "all".[160] In so requesting, Canada refers us to a citation in paragraph 209 of its first written submission. The **United States** asserts that Canada's proposed insertion of the word "all" in the fifth sentence is misleading. In the view of the United States, Canada did not provide evidence that the FPG divisional G&A properly included *all* the G&A attributable to softwood lumber. The United States asserts that Canada's citation, in its 6 February 2004 letter, to its own first written submission does not change the fact that there was an absence of evidence in the record on this point. The United States, however, appears to propose that the term "some" is deleted.

6.13 After considering the comments of the parties, we are of the view that the words "some", as reflected in paragraph 7.246 of the Interim Report (identical paragraph in this Report), and the word "all", as proposed by Canada now, might be understood to contain a value judgement on the part of the Panel. In light of our discussion of this issue in paragraphs 7.250-7.269, *infra*, which goes to the heart of the claim, we have replaced the word "some" with the neutral word "those" in the fifth and seventh sentences of paragraph 7.246, *infra*, of this Report. In addition to the above, we have added footnotes 382 and 383 to paragraph 7.246 of this Report to indicate the source of the information referred to in that paragraph.

6.14 **Canada** also refers to minor clerical errors in the fifth sentence in paragraph 7.246 of the Interim Report and requests us to correct them, that is, to add the word "its" and to change the term "division" to "divisions". The **United States** agrees.

6.15 We have therefore corrected the errors and have changed the wording accordingly (*see* fifth sentence of paragraph 7.246, *infra*, of this Report).

6.16 In addition, **Canada** requests us to replace the words "[i]nstead of" in the seventh sentence of paragraph 7.246 of the Interim Report, by the words "[i]n addition to".[161] The **United States** agrees with this request.

6.17 We agree with Canada's proposal and made the requested change to the seventh sentence of paragraph 7.246 of this Report.

6.18 **Canada** requests us to add in paragraph 7.299 of the Interim Report (identical paragraph in this Report) – addressing "Claim 10: Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 – Reasonable Amounts for Byw (6.17i85 0 TD 0.0038 Tc(-) Tj 3.75 0 TD -006532 Tc 087767 Tw Product(Reveque fromf theSalce ofWood Ch

respectively. Canada also refers to DOC's discussion and analysis found in Tembec's Cost Verification Report.[162] The **United States** asserts that, although it is true that Tembec submitted examples of sales by some of its sawmills to unaffiliated purchasers of wood chips produced by its sawmills, as DOC explained in the IDM, these reported sales and comparisons with other prices were selectively chosen by Tembec and were not based on a sample chosen by DOC. The United States that, if the Panel were to make a modification based on Canada's proposal, the modification should make clear comparisons with other prices were selectively chosen by Tembec.

6.19 We note Canada's statement in paragraph 256 of its first written submission that "Tembec (...) makes arm's length sales of wood chips at market prices in Western Canada." The correctness of this statement is not disputed by the United States. Bearing this in mind, we agree with the change, as shown in paragraph 7.299 of this Report, *infra*. We note the US request that we add a reference to the fact that Tembec had submitted a selective number of examples of arm's length sales by its sawmills to unaffiliated purchasers. The United States directs us to DOC's findings in Comment 11 of the IDM.[163] However, the only reference we could find in the section containing DOC's findings on this issue to data selectively provided by Tembec concerns information regarding prices for wood chip purchases made by its pulp mills from unaffiliated parties. For this reason, the addition proposed by the United States ha6.19s4.25 1w900.26425 cm0 TD 0.0506075 4-12 vases made by47.5rese repo,5 Tw (2685TD 0.0675Tc 0
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that this non-compliance with Article 2.6 caused non-compliance with other substantive obligations of the

> *the Agreement if it rests upon one of those permissible interpretations*". (emphasis added)

7.11 Article 17.6(ii) requires us to apply the customary rules of interpretation of treaties, which are reflected in Articles 31-32 of the *Vienna Convention.* As noted above, Article 31 of the *Vienna Convention* provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Thus, our task is in this respect no different from the task of all panels in interpreting the text of the WTO agreements pursuant to Article 3.2 of the *DSU*. What Article 17.6(ii) of the

add facts or arguments only contained in those annexes, but just give the possibility to confirm what was contained in the main presentations".

7.16 We are of the view that panels should not be expected to ferret out the facts and arguments from annexes to submissions, even in fact-intensive cases such as the one at issue. Parties should present the relevant facts and make their legal arguments in submissions which are exhaustive in themselves, with annexes attached thereto only to substantiate the facts and/or arguments already presented in the submissions to which they are attached.

C. PRELIMINARY OBJECTIONS

1. Introduction

7.17 The **United States** raised two preliminary objections, but did not request us to rule on them on a preliminary basis. The two objections raised are: (i) that Canada has included in its first written submission claims wit

(b) Arguments of the Parties

7.20 The **United States**

Panel Request[188]	**First Written Submission**[189]	**Replies to questions 1 and 85**
Article 2.6	Article 2	Article 2.6
-	Article 3	-
Articles 5.1, 5.2, 5.3, 5.4 and 5.8	Article 5	Articles 5.1, 5.2 and 5.4[190]
-	Article 6.10	-
-	Article 9	-

* This table refers to those provisions of the *AD Agreement* falling within the terms of reference of the Panel regarding the "like product" issue only

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7.30 We therefore find that the alleged violation of Articles 2 (with the exception of Ar

in establishing this relationship is fitting a line through the set of points made by the independent or explanatory variables. The line is fit by minimising the squared distance between itself and the points. This methodology is called the Ordinary Least Square regression (OLS) and was used to produce Exhibit CDA-77.[205] When a regression analysis is done, one has a choice whether it should involve a single equation or more, whether the model is linear or non-linear. Furthermore, there is a choice of the explanatory variables to be included in the analysis.

7.40 In our view, a regression analysis involves an analysis of data which could be done in many different ways, and the choices made may have a significant impact on the conclusions drawn. A regression analysis is not mere data which can be taken at face value. Rather, further clarification is required, and an evaluation must be made of the probative value of such an analysis in light of such factors as the data chosen, the precise methodology used and the variables selected. It is the role of an investigating authority to perform such an evaluation of the evidence placed before it, and the role of a panel to review whether the investigating authority's evaluation was proper in light of the standard of review set forth in Article 17.6(i) of the *AD Agreement*. For us to consider a regression analysis that was not placed before the investigating authority would require us to perform a *de novo* review rather than to determine whether the investigating authority's evaluation of the facts was proper. Thus, while a regression analysis may be based upon data which are "evidence" before an investigating authority, we consider that the result of a regression analysis using those data is "evidence" in its own right, distinct from the underlying data on which it is based.

7.41 Canada relies upon the panel report in *EC – Bed Linen* for the proposition that Article 17.5(ii)

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7.42 Canada contends that the regression analysis contained in Exhibit CDA-77 could not have been submitted earlier, as the parties were not put on notice by DOC that it might determine to exclude dimension of softwood lumber as a factor requiring a price-based Article 2.4 adjustment, contrary to DOC's recognition, at the preliminary determination stage, of the need for an adjustment for dimension.[208] Canada requests us to "bear in mind the US obligations under Article 6.1 of the *AD Agreement* to give all parties notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation".[209] If, however, Canada believed that the United States improperly limited the evidence that was placed in the record of the underlying investigation on this issue, the proper course of action would have been to assert a claim in that regard. Canada did not, however, advance any such claim in its Panel Request. As there is no such claim under Article 6.1 within our terms of reference, we will not further consider Article 6.1.

7.43 We therefore find that the evidence submitted to us as Exhibit CDA-77 represents facts which were not made available in conformity with appropriate domestic procedures to the authorities of the importing Member in accordance with the provisions of Article 17.5(ii) of the *AD Agreement*, and we will not take it into consideration.

D. CLAIM 1: ARTICLE 5.2 – APPLICATION DID NOT CONTAIN INFORMATION "REASONABLY AVAILABLE TO THE APPLICANT"

(a) Factual Background

7.44 DOC received an application for the initiation of an anti-dumping investigation concerning certain softwood lumber products from Canada. The application contained certain information on prices at which the product in question was sold when destined for consumption in Canada, on the constructed value of the product, as well as on export prices of softwood lumber exported from Canada to the United States. The application was examined by DOC and in the process a deficiency letter was sent to the applicant with the request to submit additional data and provide clarifications with respect to certain matters. The applicant responded to the request by submitting additional data and clarifications.

(b) Arguments of the Parties/Third Parties

7.45 **Canada** asserts that Article 5.2 of the *AD Agreement* requires that an application for initiation of an anti-dumping investigation contain such information on prices "as is reasonably available to the applicant". Canada asserts that the applicant misrepresented to DOC that it: (1) did not have access to

application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3".

7.52 From the wording of the chapeau of Article 5.2, it is clear that "an application … *shall* include evidence of *(a)* dumping, *(b)* injury … and *(c)* a causal link between the dumped imports and the alleged injury". (emphasis added) The mandatory requirement that evidence of dumping be included in the application is therefore quite clear. Furthermore, it is also clear that a simple assertion of dumping which is not substantiated by relevant evidence, "cannot be considered sufficient to meet the requirements of this paragraph". Article 5.2 further provides that "[t]he application shall contain such information as is reasonably available to the applicant" on the matters set out in sub-paragraphs (i)-(iv).

7.53 Canada initially asserted that the applicant did not submit "all of the information that was reasonably available to it" with respect to cost and price evidence.[210,211] "The Petition, therefore, did not contain "such information as [was] reasonably available to the applicant" concerning prices at which Canadian softwood lumber was being sold in the US and Canadian markets".[212] From these statements, we infer that Canada initially argued that an application should contain *all* information which is reasonably available to the applicant.[213] However, from its subsequent submissions we do not understand Canada to further pursue the argument that the word "such" in "such information as is reasonably available to the applicant" means "all" or "any" information as is reasonably available to the applicant.[214] Nevertheless, for the sake of certainty, we set out below the reasons why we do not believe

[210] Canada first written submission, para. 97.

[211] We do not understand Canada to dispute that the application contained information referred to in sub-paragraphs (i) to (iv) of Article 5.2. Canada contests the adequacy and accuracy of some of the information contained in the application. This issue is addressed under Claim 2, *infra*.

[212] Canada first written submission, para. 97. In the same vein, WT/DS264/2, para. 1(a).

[213] Similar understanding is expressed by the United States and the EC. (*See* US second written submission, para. 8 and EC third party submission, paras. 7-8)

[214] Canada second written submission, paras. 18-25.

that Article 5.2 requires an applicant to submit "all" information on the matters identified in Article 5.2 as is reasonably available to it.

7.54 We note that the words "such information as is reasonably available to the applicant", indicate that, if information on certain of the matters listed in sub-paragraphs (i) to (iv) is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the "reasonably available" language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* information reasonably available to it to substantiate its allegations.[215] This is particularly true where such information might be redundant or less reliable than, information contained in the application. Of course, this does not mean that such information will necessarily be sufficient to justify initiation under Article 5.3 – that is a separate question, not encompassed by the issue before us here, but which is the subject of our examination in paragraphs 7.71-7.127, *infra*.

7.55 We therefore disagree with Canada's initial view that the inclusion of the term "reasonably available" places an additional requirement on an applicant. In light of our analysis above, it is clear that Article 5.2 requires that an application contain relevant evidence of dumping, injury and causation and that it sets forth a list of the types of information it must contain. We believe that the words "reasonably available" mean that the specified information must be submitted *to the extent* reasonably available to the applicant. It is therefore a modulation of the requirement to provide such information in light of its availability, so as to make the application compliant with Article 5.2 even if it does not include all the specified information if such information was simply not reasonably available to the applicant.

7.56 Canada's interpretation would require us to conclude that the "reasonably available" language serves to *toughen* the obligation, to such an extent that, even if all specified information is provided, the application would not meet the requirements of Article 5.2 if *all* relevant information that is "reasonably available" is not provided in the application. If this is what the drafters had intended, they could have included "shall contain *all* such information as is reasonably available", rather than "such information". We are of the view that the drafters had good reasons why they did not include the word "all" in the text as it would mean that an investigating authority would have to review even the best-documented application to make sure some additional information could not have been provided. In this very case, with Canada stating that the applicant companies do regular business with Canadian companies which results in thousands of transactions[216] docs authori,9l72,875

7.58 We note that Article 5.2(iii) requires in this case that the application should contain information on prices at which softwood lumber is sold when destined for consumption in Canada – or, where appropriate, information on the constructed value of softwood lumber in Canada – and information on export prices to the United States.

7.59 We therefore now turn to the specific facts of this case to determine whether the required information was contained in the application. On 2 April 2001, DOC received an application containing the following information:[217]

- Information on prices in the Canadian market:
  - Average MBF prices[218] for WSPF sold in BC during the last three quarters of 2000;[219]
  - MBF prices, as published in *Random Lengths*, a reputable industry publication, for the year immediately preceding the application for ESPF kiln dried, 2"x4" by thickness and width, in various lengths, delivered to Toronto.[220]
- Information on export prices based on *Random Lengths* data on multiple sales of WSPF for delivery to the United States:[221]
  - An overall average of weekly prices reported throughout the period of 1 April 2000 through 31 March 2001, for a softwood lumber product: kiln-dried WSPF 2x4s "standard and better" in random lengths delivered to two major markets, Chicago and Atlanta, respectively;
  - An average transaction price for kiln-dried WSPF 2x4 "standard and better" in random lengths delivered to Chicago during the week ending 19 January 2001;[222]
  - A price quotation affidavit from a knowledgeable industry source testifying on an offer from a US trading company for Canadian WSPF kiln-dried random length 2x4s from BC for sale in March 2001, at a delivered price to a specified destination in the US market.[223] The affidavit contained information on the historical mark-up received by lumber wholesalers (5 per cent), and on the likely means of shipment;[224]
  - A "lost sales" affidavit from a US lumber producer, reporting four separate instances in which the affiant lost sales on 15 December 2000, to potential customers in the

[217] Exhibit CDA-9, Initiation, p. 21328.

[218] "MBF prices" are prices per thousand board feet. A "board foot" is a three dimensional unit described as the quantity of lumber contained in a piece of lumber 1 inch thick, twelve inches wide, and 1 foot long, or the equivalent in other dimensions. (Exhibit CDA-37, Application, p. III-9.)

[219] Exhibit CDA-10, Initiation Checklist, p. 7. Information sourced from the BC Ministry of Forest's published market pricing system lumber values.

[220] *Id.*, pp. 7-8.

[221] Exhibit CDA-10, Initiation Checklist, pp. 6-7.

[222] *Ibid.*, and CDA-41, Application – Freight Affidavit. The applicant originally based the WSPF freight adjustment on the same freight expense they had used for the much shorter distance between Quebec and Boston for the ESPF adjustment. In the application amendments of 10 April 2001, the applicant submitted another, allegedly "more accurate, but still very conservative", rate for freight between BC and US destinations (Exhibit CDA-40, Application Amendments). The rate is regarded as "conservative" because it is calculated based on a shorter distance than distances from any BC point of origin to the markets to which the WSPF products were delivered.

[223] Exhibit CDA-10, Initiation Checklist, pp. 7-8, and Exhibit CDA-40, Application Amendments.

[224] In calculating that ex-factory price, the applicant made an adjustment by backing out the freight between less-distant locations, resulting in removing less than the actual freight charge would likely have been.

United States (the buyers) because those buyers reported that "Quebec producers" offered the same product at a price which was lower than the affiant's offering price. The terms were the same for both the Canadian and the US product;[225]

- *Random Lengths* data on export prices on multiple sales of ESPF during the period April 2000 to March 2001 for delivery to two different US localities:[226]

  (i) A POI average of weekly reported prices for kiln-dried ESPF 2x4s in random lengths delivered to Boston and the Great Lakes region, respectively;

  (ii) A POI average of weekly reported prices for kiln-dried ESPF 2x4 8

7.60 Based on this information the applicant calculated estimated margins of dumping, ranging from 22.5 per cent to 72.9 per cent.[236]

7.61 We consider it evident from the above enumeration that the application in this investigation contained information on prices at which softwood lumber is sold when destined for consumption in Canada, on the constructed value of softwood lumber in Canada, and on export prices to the United States. In light of our conclusions regarding the requirements of Article 5.2, we therefore find that the application contained the information required by Article 5.2(iii). Accordingly, we conclude that Canada has failed to establish that the United States has acted inconsistently with Article 5.2.[237]

E. CLAIM 2: ARTICLE 5.3 – ALLEGEDLY INSUFFICIENT EVIDENCE TO JUSTIFY INITIATION OF AN INVESTIGATION

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therefore clear that the applicant had actual transaction prices and cost data reasonably available to it that were not provided to DOC in its application, a fact that DOC should have been aware of when it examined the accuracy and adequacy of the evidence provided in the application to determine whether there was sufficient evidence to justify the initiation of the investigation.

7.65 According to Canada, price and cost information were required to justify initiation under Article 5.3. Finding support for its position in the *Guatemala – Cement I* and *Guatemala – Cement II* panels, Canada is of the view that an investigating authority must have regard to the manner in which the applicant justifies its allegation of dumping in order to determine whether there is sufficient evidence of dumping to justify initiation.[240] That is, Canada asserts that, as Article 2.2 permits a dumping margin to be based on a constructed value comparison (as was done in the investigation at issue) only where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, and as Article 2.2.1 sets out how the cost calculation is to be done, DOC was required to assess whether the evidence provided by the applicant on each of the relevant elements – home market prices, export prices and costs – was adequate, accurate and sufficient, to justify initiation under Article 5.3.[241]

7.66 Canada states that using the applicant's *Random Lengths* price data for Quebec, a comparison of all of the Quebec ex-factory price data for ESPF (2X4, Studs&Btr, KD, RL and 2X4-8', PET, KD) products sold in Quebec and in the United States, shows that the US price was consistently higher during the period and that there was therefore no price-to-price dumping demonstrated by the evidence in the application.[242] There was, therefore, no basis upon which to initiate the investigation without adequate and accurate cost data.[243] Canada also challenges the accuracy and adequacy of certain information submitted by the applicant as evidence to substantiate the allegation of dumping.

7.67 According to the **United States**, the information actually included in the application provided sufficient evidence to form the basis for initiation of the investigation[244], and the Weldwood data – that Canada alleges were reasonably available to the applicant – could not have negated the sufficiency of the data included in the application.[245]

7.68 The United States asserts that the Weldwood data would have represented only the experience of a single company and would not have represented the diverse cost and price experience actually set forth in the application. The Weldwood data may or may not have constituted evidence of dumping. Whichever conclusion the data supported, they could not have changed the fact that other information in the application constituted evidence of dumping. Even **f** it is assumed, *arguendo*, that the Weldwood data were of a better quality than the data contained in the application, this has no bearing on the question before the Panel – Article 5.3 does not speak to the quality of the data that form the basis for initiation other than requiring that they be accurate and adequate and there be sufficient evidence to justify initiation. According to the United States, the data submitted by the applicant were sufficient for purposes of initiating an investigation.

7.69 According to the United States, DOC examined the application closely for purposes of evaluating the accuracy and adequacy of the information submitted to it, compared the application's assertions to the evidence submitted in support of those assertions, and analyzed the application step-by-step to ascertain whether there was sufficient evidence to initiate an investigation. As a result of this process, DOC required the applicant to provide additional data and clarifications. DOC

[240] Canada second written submission, paras. 30-32.
[241] *Id.*, paras. 34-35.
[242] *Id.*, para. 37 and Canada response to question 8 of the Panel, para. 33 and note 32 thereto. Iner there was ,4

summarized its analysis of the application in a nineteen-page analysis memorandum after having conducted its own independent analysis, which included adjustments to the applicant's margin of dumping calculations. DOC satisfied itself as to the accuracy and adequacy of the evidence of dumping submitted to it and found that the information submitted was sufficient to support the decision to initiate the investigation.

7.70

provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation. It is therefore clear that, an application might satisfy the requirements of Article 5.2, but *not* necessarily those of Article 5.3 as the evidence contained in the application might be judged by the investigating authority not to be sufficient to form the basis for initiating the investigation. Although we recognize that, because the Appellate Body reversed the panel's conclusions in *Guatemala – Cement I* on the issue of whether the dispute was properly before it, that panel's conclusions in this regard have no legal status, we find its statements on this issue instructive and we agree with it when it states that:

> "… the fact that the applicant has provided, in the application, all the information that is "reasonably available" to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather,

Article 5.3 contains no express reference to evidence of dumping, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. Article 5.2 makes it clear that the application has to contain evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that is sufficient to justify the initiation of the investigation. Reading Article 5.3, in the context of Article 5.2, the evidence mentioned in Article 5.3 can only mean evidence of dumping, injury and causation.

7.78 What constitutes sufficient evidence to justify the initiation of an anti-dumping investigation, is not defined in the *AD Agreement*. However, in addressing this issue, we consider it appropriate to follow the approach taken by previous panels which have examined claims under Article 5.3 of the *AD Agreement* in that we will determine whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify the initiation of the investigation.[252]

7.79 Having regard to our standard of review, we shall therefore examine whether an objective and

of the investigation. According to the United States, the Weldwood data related only to one specific company and could therefore not detract from the more representative data which were actually submitted and which formed the basis for the DOC's decision regarding the sufficiency of the evidence to justify initiation of the investigation.

7.87 We recall our finding above that Article 5.2 of the *AD Agreement* requires that the application shall contain such information which is reasonably available to the applicant to substantiate its claim of, *inter alia*, alleged dumping, meaning that the application need not contain *all* information reasonably available to the applicant, but only information to support a *prima facie* case. We further note that Article 5.3 requires that the investigating authority "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 the investigation". From the wording of Article 5.3, it is Tc 3.37 *inter alia* j u s t

7.97 Recalling the fact that this issue relates to the initiation of the investigation and the standard of review which we have to apply, we are of the view that it cannot be expected from an investigating authority to do a cost allocation in the same way as it is required to do when making a preliminary or a final determination of dumping. We agree with the United States that the issue of precisely how to allocate costs to different products is not an issue that needs to be definitively resolved prior to initiation of an investigation – the cost allocation in any anti-dumping investigation is normally of a very contentious nature, as is also evident from this case. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(iii) Period covered by the cost model data

7.98 Canada states both the cost models constructed for Quebec and BC relied on certain manufacturing and cost data for less than a full year (2000). Canada contends that the failure to capture costs associated with a full operating cycle for the purposes of initiation is clearly insufficient. Canada asserts that home construction, and thus dimensional and stud lumber sales, is a seasonal business. According to Canada, such reliance on a period less than one fiscal year is misleading and provides a distorted view of unit production costs. There is no evidence on the record of any analysis by DOC of the adequacy of these "abbreviated" cost reporting periods.[263] The United States responded that the application contained cost data from four US mills, of which data for one covered the whole year, and taken as a whole, the data from these four mills covered the entire calendar year 2000.[264] The applicant also explained why each of the four companies provided data for particular months, mainly because those were the only periods for which the specific companies had audited data available.[265]

7.99 In considering this issue, we note that DOC had cost data which, taken together, covered a whole year, and the cost data of one company covered the whole period. Although Canada implies that the seasonality of the lumber industry would affect the information to such an extent as to render it insufficient, Canada has not proffered any arguments or evidence to substantiate this view so as to enable us to come to a conclusion that an unbiased and objective investigating authority could not have found that the information available to it was sufficient to justify initiation on this basis. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(iv) Home market sales information for Quebec as a basis to conclude that constructed value could be used to establish normal value for purposes of initiation

7.100 Canada asserts that, as DOC rejected the price information on western SPF submitted by the applicant as support for the allegation that western SPF softwood lumber was being sold below cost, there were no home market prices for western SPF available to test whether sales of this product were below cost.

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7.101 The issue that we need to address in this instance is whether the home market sales information for Quebec was sufficient as a basis to conclude that constructed value could be used to establish normal value for purposes of initiation. In other words, is the information on eastern SPF sufficient as a basis to determine that a constructed (normal) value should be calculated for all subject softwood lumber products. We note that a similar issue was addressed by the panel in *Argentina – Poultry* when it considered whether an application containing data on home market prices in a particular region of the exporting country was sufficient, or whether additional price data should have been submitted. The panel concluded that "it is sufficient for an investigating authority to base its decision to initiate on evidence concerning domestic sales in a major market of the exporting country subject to the investigation, without necessarily having data for sales throughout that country".[267] Although we are conscious that the facts of *Argentina – Poultry* differ from the facts of the case at hand, we nonetheless consider that they are sufficiently analogous to be relevant to our analysis here. We note that eastern SPF softwood lumber products constitute one of the two major categories into which the subject product was divided, and we are of the view that there is no requirement that evidence of dumping of all categories or sub-sets of the imported product is necessary to justify a decision to initiate. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

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> "[a]ny information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it." (footnote omitted)

7.120 Canada has made no assertion that the information that was not disclosed was incorrectly deemed confidential by the DOC in this instance. Nor has Canada provided us with any evidence or arguments that would suggest that the information contained in the affidavits is untrue and therefore not reliable. In examining the affidavits at issue[283], we note that the information disclosed, indicates the dates, the products, the origin of the products as Canada, the terms of sale and prices. The only information deleted from the confidential versions of the affidavits are the names of the affiants, their positions, their employers, and, in one case, who made the offer to sell. In our view, all the information material to the issue has been disclosed. In these circumstances, we can see no basis for a conclusion that the obligatory non-disclosure of certain confidential information in the affidavits somehow undermined their reliability or relevance as evidence of prices. If Canada is of the view that the affidavits contain false or misleading information, we are of the view that they should have pursued the matter in the appropriate forum in the United States. Canada did not submit any evidence to this effect. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation of the investigation on this basis.

(vii) Price information covered only two categories of softwood lumber

7.121 Canada claims that the application contained price information only on two of the seven categories of softwood lumber identified by the applicant. The seven categories are: (1) studs; (2) boards; (3) dimension lumber; (4) timbers; (5) stress grades; (6) selects, and (7) shop.[284] Pricing information and dumping calculations in the application, and on which DOC based its decision to initiate an investigation, covered only two narrowly defined products, namely, SPF 2x4 kiln-dried dimension lumber, and SPF kiln-dried stud lumber, although the applicant requested DOC to initiate an investigation covering numerous softwood lumber products.[285] Canada therefore asserts that the evidence was not sufficient for purposes of an Article 5.3 determination.

7.122 The United States asserts that, as there is no obligation to treat each "category as a separate product under consideration, it had no obligation to find evidence of dumping in each category in order to initiate an investigation."[286]

7.123 Article 5.3 requires that, at initiation, there must be sufficient evidence of dumping of the product as a whole that an unbiased and objective investigating authority could conclude that there was sufficient evidence to justify initiation. Clearly, evidence of dumping regarding an insignificant sub-set of the imported product would not be sufficient in this context, an argument not made by Canada. We note that, in the case at hand, the categories for which pricing information was submitted, including 2x4s kiln-dried dimension softwood lumber and 2x4 kiln-dried studs, falls within commonly traded softwood lumber product categories which together form the product under investigation.[287] We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

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[283] Exhibits US-16, Application – Exhibit VI.D-14, and Exhibit CDA-45.
[284] Exhibit CDA-36, Application – Volume I.
[285] Canada response to question 8 of the Panel, para. 29.
[286] US second written submission, para. 20.
[287] US first written submission, paras. 52 and 58.

(viii) Information on freight costs

7.124 Canada asserts that the application did not contain adequate information regarding freight costs.[288] Although freight is a significant component of the price for lumber, Canada asserts that 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. Canada cites the following examples in support of its allegation:

- In the case of Quebec, DOC relied upon an average freight cost from Quebec to the United

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(ix) Conclusion

7.127 After examining Canada's assertions regarding the sufficiency of the information contained in the application and on which DOC based its decision to initiate the investigation, and considering our comments above regarding the nature of the obligations under Articles 5.2 and 5.3 of the *AD Agreement*, we conclude that an unbiased and objective investigating authority could have concluded that there was sufficient evidence on dumping in the application to justify the initiation of the softwood lumber anti-dumping investigation at issue. We therefore find that the United States has not violated the provisions of Article 5.3 of the *AD Agreement*.

F. CLAIM 3: ARTICLE 5.8 – "SUFFICIENCY OF EVIDENCE" OF DUMPING AT AND AFTER INITIATION OF INVESTIGATION

(a) Factual Background

7.128 DOC initiated the anti-dumping investigation on the basis of the evidence submitted to it by the applicant and did not terminate the investigation once it became known to DOC that Weldwood, a major Canadian producer and exporter of softwood lumber, was wholly-owned by IP, one of the applicant US producers.

(b) Arguments of the Parties/Third Parties

7.129 **Canada** argues that Article 5.8 applies both prior to initiation and throughout the investigation. Canada claims that DOC failed, after initiation, in its ongoing obligation to assess the sufficiency of the evidence of dumping and to terminate the investigation.[294] Canada asserts that, although evidence might have been judged sufficient at the time of initiation, it does not mean that throughout the investigation there necessarily is sufficient evidence to justify proceeding with the investigation. DOC was notified by the respondents of the deficiencies in the application resulting from the omission of the Weldwood pricing information. An objective judgement of the sufficiency of the evidence of dumping required DOC to take into account the impact of this omission, which was not done. The relevance of evidence should not be prejudged without first having given proper consideration to that evidence. Canada therefore claims that DOC acted inconsistently with Article 5.8 as an objective judgement of the sufficiency of the evidence was not done once the more probative information was brought to the attention of DOC.

7.130 The **United States** asserts that, as the Weldwood data were not necessary to support either DOC's initiation, or its continuation, of the investigation, Canada's claim that DOC was required to terminate the investigation once DOC became aware of the IP/Weldwood relationship, and therefore the availability of Weldwood price information, has no support in Article 5.8. According to the United States, the application contained sufficient information to justify the initiation of the investigation and the availability of the Weldwood data did not and could not render inadequate the information initially provided to DOC by the applicant. DOC's decision not to terminate the investigation is therefore consistent with Article 5.8.

7.131 According to the **EC**, as third party to the proceedings, Article 5.8 distinguishes two scenarios: either the application did not contain sufficient evidence in which case it should be rejected; or during the investigation it becomes apparent that evidence is insufficient thus requiring a prompt termination of the proceedings. On the first scenario, the EC argues that before an investigation is initiated Articles 5.3 and 5.8 of the AD *Agreement* have the same scope of application with regard to the question of whether there is 'sufficient evidence'. As to the second alternative, i.e., after initiation, it is evident that the investigation must reveal "sufficient evidence" of dumping, injury and a causal link to proceed with the investigation. If the investigation fails to produce this evidence,

[294] Canada second written submission, para. 58.

the authorities should terminate the examination as promptly as possible. Under this scenario, the question of whether "sufficient evidence" exists would have to be adjudicated in a more flexible way depending on the respective state of investigation.

(c) Evaluation by the Panel

7.132 The primary issue before us, is whether Article 5.8 of the *AD Agreement* imposes an ongoing obligation on an investigating authority to examine the sufficiency of the evidence on which its decision to initiate the investigation was based during subsequent stages of the investigation and to terminate the investigation, if it has concluded that the evidence on which the initiation decision was based, was not sufficient in light of additional information which has come to light.

7.133 Article 5.8 of the *AD Agreement* provides in relevant part as follows:

> "[a]n application under paragraph 1 shall be rejected and 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."

7.134 From the wording of Article 5.8, it is clear that it addresses two situations. The first one addressing the situation where the application is to be rejected before the initiation of the investigation, and the second dealing with the termination of the investigat

served its purpose. Logically, the continuing obligation to terminate an investigation where an investigating authority is satisfied that there is not sufficient evidence to justify proceeding must be based on an assessment of the overall state of the evidence deduced before it in the investigation, not on an assessment of the continuing sufficiency of the information in the application. We are of the view that it could not have been the intention of the drafters of Article 5.8 that its interpretation could result in that an investigation could have been initiated on the basis of sufficient evidence, but that the very same investigation had to be terminated if additional evidence was made available by the respondents at a later stage, while the evidence being gathered during the course of the investigation, indicates dumping.

7.138 Canada's claim of a violation of Article 5.8 therefore fails.

G. CLAIM 4: ARTICLE 2.6 - "LIKE PRODUCT" AND "PRODUCT UNDER CONSIDERATION"

(a) Factual Background

7.139 The final scope of the anti-dumping duty order was determined by DOC to be as follows:

closely resembling". Canada's position is that the group of products within the "like product" as

However, in response to a question from the Panel, Canada restated its claim as based on Article 2.6 of the *AD Agreement* only, with consequential violations of "*e.g.*, Articles 5.1, 5.2, and 5.4".[300]

7.146 We note that Article 2.6 is a definitional article, and as such it is not clear to us that it contains *in itself* obligations on Members, or in any event that it could be the basis for an *independent* violation. On the other hand, it appears to us that Canada's claim is predicated on the proposition that DOC took an approach to the definition of like product which deviated from that in Article 2.6. Thus, a threshold and potentially dispositive issue is whether DOC in fact took an approach to like product which deviated from that of Article 2.6. In the event that we were to determine that it did not, Canada's claim would fail with regard to the consequential violations.[301] Accordingly, we turn to an examination of Article 2.6.

7.147 Article 2.6 of the *AD Agreement* provides as follows:

> "[t]hroughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which,

7.152 In our view, this means that the "like product", for purposes of the dumping determination, is the product which is destined for consumption in the exporting country. The "like product" is therefore to be compared with the allegedly dumped product, which is generally referred to in the *AD Agreement* as the "product under consideration".[302] In the case of the injury determination (and the determination of domestic industry support for the application), the word "like product" refers to the product being produced by the domestic industry allegedly being injured by the dumped product. In both instances it is clear that the starting point can only be the product allegedly being dumped and that the product to be compared to it for purposes of the dumping determination, and the product the producers of which are allegedly being injured by the dumped product, is the "like product" for purposes of the dumping and injury determinations, respectively.

7.153 Article 2.6 therefore defines the basis on which the product to be compared to the "product under consideration" is to be determined, that is, a product which is either identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of "like product" implies a comparison with another product, it seems clear to us that the starting point can only be the "other product", being the allegedly dumped product. Therefore, once the product under consideration is defined, the "like product" to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the "product under consideration" should be determined.

H. CLAIM 5: ARTICLE 2.4 – ADJUSTMENT FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS

(a) Factual Background

7.159 At the outset of the investigation, DOC established – in consultation with the parties – the distinguishing physical characteristics of softwood lumber in order to match products sold in the home market with those exported to the United States. These characteristics were as follows: (1) product category; (2) species; (3) grade group; (4) grade; (5) moisture content; (6) thickness; (7) width; (8) length; (9) surface finish; (10) end trimming; and, (11) further processing. Only where lumber shared the above 11 characteristics was a particular type considered to have *identical* physical characteristics. In the Preliminary Determination, DOC carried out price-to-price[309] comparisons of *identical* types of softwood lumber. For comparisons of *non*-identical types, DOC first attempted to adjust normal value by the net difference in the variable manufacturing costs associated with the differences in the physical characteristics of the two products compared.[310] However, there were a number of actual physical differences between products for which respondents were unable to identify a cost difference.[311] In view of the above, DOC determined that "it [was] not appropriate to match products that do not have the following identical physical characteristics: grade, thickness, width and length."[312] For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases. DOC's approach changed at the definitive stage. At the request of some Canadian exporters, DOC acceded to extend price-to-price comparisons to *non*-identical types. Several Canadian exporters argued that, were DOC to compare *non*-identical types, DOC should make an adjustment for differences in thickness, width, and length (or collectively "differences in dimension").[313] For the reasons explained in the IDM, DOC did not make this adjustment:

> "[a]s the parties have noted, this case involves among the most complex product comparisons [DOC] has faced. Where we do not have identical home market sales within the ordinary course of trade, we have attempted to base normal value on sales of the most similar product and we have attempted to adjust for such physical differences where we have adequate information to do so. Section 773(a)(6)(C)(ii) of the Act provides for an adjustment to normal value for differences in the physical characteristics of the products being compared. The statute grants [DOC] discretion to determine a suitable method to calculate a difmer adjustment and does not restrict [DOC]'s selection of an appropriate methodology to any particular approach. See, e.g., *NTN Bearing Corp. of Am. v. United States*, Slip Op. 2002-07 (CIT, January 24, 2002) at 130.

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[309] By "price-to-price" we refer to comparisons of normal values based on home market (Canadian) lumber prices with export prices to the United States.

[310] Exhibit CDA-11, Preliminary Determination, p. 56,066. *See* also Exhibit CDA-2, Comment 8, p. 51.

[311] *Ibid.*

[312] *Ibid.*

[313] The standard unit of measure in the North American lumber industry is a "board foot". A board foot is the equivalent of a piece of wood 1 inch thick, 12 inches wide, and 1 foot long. In other words, a board foot is 1 square foot of lumber, 1 inch thick. Softwood lumber is therefore commonly measured and sold in terms of volume, usually in thousand board feet, MBF, rather than in pieces of any given dimension (Exhibit CDA-30, "Buying and Selling Softwood Lumber", p. 2). It should also be noted that lumber is extracted from logs, the lumber is then converted into lumber products in a sawmill. The different lumber products resulting from this production process are joint products, as a single process yields multiple products simultaneously. How a piece of lumber is eventually deconstructed into its composite products will to some degree depend, *inter alia*, on market demand. In other words, the same piece of lumber can be deconstructed into different sets of products, depending on the demand and prices of the products which can be produced from the piece of lumber.

> (…)
>
> Therefore, for all the reasons discussed above, we have not made a value-based difmer adjustment for the final determination".[314] (footnotes omitted)

(b) Arguments of the Parties

7.160 In the view of **Canada**, Article 2.4 provides that, in its comparison between export price and normal value, the investigating authority must make due allowance in every instance for differences which affect price comparability, including physical differences. Canada contends that the fact that lumber size affected the price per board foot at which softwood lumber products were sold was undisputed by all parties. Canada asserts that DOC did not conclude that differences in dimension could *not* affect market value. In the view of Canada, DOC's decision not to grant an adjustment was

price comparability.[315,316] The issue before us is therefore whether the United States did not act consistently with its obligations under Article 2.4 of the *AD Agreement* when it did not grant the adjustment for differences in dimensions requested by the exporters where price-to-price comparisons of *non*-identical types were made.

7.164 Article 2.4 provides in pertinent part:

> "[a] fair comparison shall be made between the export price and the normal value. (…) Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (…) The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties". (footnote omitted)

7.165 Article 2.4 requires that, where there are *differences* between export price and normal value which affect the comparability of these prices, "[d]ue allowance shall be made" for those differences. We note that a difference in physical characteristics is one of the factors which *may* affect the comparability of prices.[317] We agree with the panel in *EC – Tube or Pipe Fittings* that the requirement to make due allowance for such differences, in each case on its merits, means that the authority must *at least* evaluate identified differences – in this case, differences in dimension – with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4, and make an adjustment where it determines this to be necessary on the basis of its evaluation. We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability. An interpretation that an adjustment would have to be made automatically where a difference in physical characteristics is found to exist would render the term "which affect price comparability" nugatory.[318]

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[315] We do not understand Canada to claim that the United States acted inconsistently with Article 2.4 in not making an adjustment for differences in physical characteristics when *identical* types or models were compared.

[316] Although there are references in Canada's submissions to the allocation of costs in the case of thickness, length and width (cost vs. value based allocation), we do not understand Canada to have challenged DOC's decision on that matter. (Canada comments on US responses to questions from the Panel, Comments to US response to question 102, note 25)

[317] The panel in *EC – Tube or Pipe Fittings* found that:

> "[d]ifferences in taxation are explicitly listed as a factor that must be taken into account under Article 2.4 *to the extent they may* affect price comparability, and for which due allowance shall be made, in each case, on its merits". (emphasis added) (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157)

[318] The principle that interpretation must give meaning and effect to all the terms of a treaty is well-established in WTO dispute settlement. *See*, for instance, Appellate Body Report, *US – Gasoline*, para. 23. In *EC – Bed Linen*, the Appellate Body reversed a finding of the panel on the ground that that panel "in effect, reads the requirement of calculating a "weighted average" out of the text in some circumstances. In those circumstances, this would substantially empty the phrase "weighted average" of meaning". (Appellate Body Report, *EC – Bed Linen*, para. 75) Thus, we are precluded from adopting an interpretation of a provision in the *AD Agreement* which would substantially empty it of meaning. In the case before us, adopting an interpretation that an adjustment must be made automatically in all cases where a given difference is found to exist would, in our view, empty the phrase "which affect price comparability" of any meaning. We must therefore reject such an interpretation.

Further, such an interpretation would make little sense in practice, as not all differences in physical characteristics necessarily affect price comparability.[319]

7.166 In addition, the panel in *EC – Tube or Pipe Fittings* found that:

> "[t]he issue of which specific "allowances" should be made in any case depends very much on the particular facts of the case. The last part of the last sentence of Article 2.4, that the authorities "shall not impose an unreasonable burden of proof" on interested parties, does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments. In a similar vein, an investigating authority in possession of the requisite information substantiating a claimed adjustment would not be justified in rejecting outright that claimed adjustment.
>
> Thus, while it is incumbent upon the investigating authorities to ensure a fair comparison,[154] so also is it incumbent upon interested parties to substantiate their assertions concerning adjustments as constructively as possible. The duty of an investigating authority to ensure a fair comparison cannot, in our view, signify that an investigating authority must accept *any* claimed adjustment. Rather, the investigating authority must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited. On this basis, we examine Brazil's claim under Article 2.4.
>
> [154] We recall the view of the Appellate Body that the obligation to ensure a fair comparison under Article 2.4 "lies on the investigating authorities" and not on exporters. Appellate Body Report, *US-Hot-Rolled Steel*, *supra*, note 40, para. 178."[320]

7.167 We agree with the panel in *EC – Tube or Pipe Fittings* that the requirement in the last sentence of Article 2.4 that the authorities "shall not impose an unreasonable burden of proof" on interested parties does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments. In line with the views expressed by that panel, we consider that Article 2.4 requires that investigating authorities ensure a fair comparison, and that interested parties substantiate their assertions concerning adjustments as constructively as possible. Based on our understanding of Article 2.4, we consider that the duty of an investigating authority to ensure a fair comparison cannot signify that an investigating authority must grant *any* claimed adjustment. On the other hand, we are of the view that an investigating authority in possession of the requisite evidence substantiating a claimed adjustment would not be justified in rejecting that claimed adjustment. Finally, bearing in mind the text of Article 2.4, we consider that this provision does not impose on investigating authorities any particular method for examining whether any given difference affects price comparability.

7.168 Before proceeding with the analysis, we recall that we have considered the comments of both parties with respect to whether certain evidence presented by the parties in this dispute was properly before us and that we have concluded in paragraph 7.43, *supra*, that we are precluded from taking into consideration the regression analysis contained in Exhibit CDA-77. As Exhibit CDA-186 also contains a regression analysis that neither Canada nor the respondents had submitted to DOC in the context of the investigation, we will not consider Exhibit CDA-

before us.[321] When examining this argument of Canada, we keep in mind our findings contained in paragraph 7.41, *supra*. As it is clear to us that these charts display in graphical form data which was before DOC during the course of the investigation, we are of the view that these exhibits fall within the same category of evidence as discussed by the panel in *EC – Bed Linen*. We therefore find that Exhibits US-42, 43, 76 and 81 are properly before us.

7.169 In this dispute, Canada argues that the fact that differences in dimension affected price comparability, where *non*-identical types or models were compared, was never an issue in the context of the investigation. Canada asserts that, from the very outset, all parties and all US investigating agencies involved[322] agreed that differences in dimension affected price comparability. The United States, on the other hand, argues that neither the Canadian exporters – in the context of the investigation – nor Canada – now before us – demonstrated that differences in dimensions affected price comparability. The parties thus disagree on whether the exporters demonstrated that the differences in dimensions, where non-identical types were compared, affected price comparability between the *non*-identical types compared.

7.170 As previous panels have noted, Article 2.4 requires a fact-based, case-by-case analysis. This is what we will do. We will start setting out the relevant facts as submitted by the parties and, subsequently, we will examine them in light of our understanding of the obligations imposed by Article 2.4, as set forth in paragraphs 7.165-7.167, *supra*. In so doing, we must be mindful of our standard of review and not perform a *de novo* review of the facts.

7.171 Following initiation, DOC established – in consultation with the parties – the distinguishing physical characteristics of softwood lumber in order to match products sold in Canada with those exported to the United States. These characteristics included, *inter alia*, thickness, width, and length. Exporters were requested to construct code numbers in accordance with the agreed product matching mechanism for each distinct product. Therefore, each code number represented a type with physical characteristics differing from products falling under any other code number. Exporters were requested to prepare and submit their cost and sales databases containing information on a per-type basis. At the preliminary stage, DOC carried out comparisons of *identical* types of softwood lumber. For comparisons of *non*-identical types, DOC first attempted to adjust normal value by the net difference in the variable manufacturing costs associated with the differences in the physical characteristics of the two products compared.[323] However, there were a number of actual physical differences between products for which respondents were unable to identify a cost difference.[324] In view of the above, DOC determined that "it [was] not appropriate to match products that do not have the following identical physical characteristics: grade, thickness, width and length."[325] For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases. The issue of the adjustment for differences in dimensions when comparing *non*-identical types was therefore not relevant at that stage.

7.172 In their subsequent comments, various respondents argued that DOC should move away from constructed (normal) values and compare *non*-identical types, making the necessary adjustments where required. The United States asserts that DOC considered the exporters' comments and accepted them.[326] In so doing, DOC examined whether the adjustment for differences in dimensions would be

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[321] Canada comments on the US responses to questions from the Panel, Comments to US response to question 97, para. 9 and note 11.

[322] These agencies are the ITC and DOC.

[323] Exhibit CDA-11, Preliminary Determination, p. 56066. *See* also Exhibit CDA-2, Comment 8, p. 51.

[324] *Ibid.*

[325] *Ibid.*

[326] A detailed explanation of how the determination of which non-identical types should be compared for the purposes of the final determination can be found in the US response to question 25 of the Panel, paras. 34-39.

justified. In this regard, we note that, according to US law and practice, DOC will first try to determine whether a given difference yields variable cost of manufacturing differences. If so, a difference in price can be connected with the difference at issue and an adjustment will be granted. However, where a given difference does not yield variable cost of manufacturing differences, DOC examines whether there are differences in market value between the *non*-identical types compared. In the case before us, the United States asserts that DOC determined that there were no differences in variable cost of manufacturing between *non*-identical types compared, i.e., between types compared having different dimensions. DOC also examined whether there were differences in market value, but it concluded that "in this case that there is no information on the record by which we can calculate a difmer adjustment to account for differences in dimension based either on cost or value".[327] In analysing the respondents' request for an adjustment, DOC also found that "in this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as Abitibi argued, the record shows that lumber prices for different products fluctuated in relation to each other over the course of the POI. Consequently, there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared".[328] Quoting the excerpts just cited, the United States argues that DOC could not find that the differences in dimensions were demonstrated to affect price comparability; hence, the rejection of the exporters' request for an adjustment.

7.173 We note that the situation before us is not one in which the investigating authority did not undertake any step in order to ensure a "fair" comparison, as set forth in Article 2.4. Indeed, DOC, in agreement with, *inter alia*, respondents, identified the physical factors which could have an impact on prices and compared, where possible, identical types, that is, types having identical physical characteristics – including identical dimensions – both at provisional and definitive stages. At the provisional stage DOC decided that, because it could not find that certain differences in physical characteristics (grade and the dimensional characteristics at issue) yielded variable cost of manufacturing differences, it would *not* compare *non*-identical types.[329] That is, it would for instance not compare two types belonging to the same product category; species; and grade group; and having the same moisture content; thickness; width; length; surface finish; end trimming; and, further processing characteristics but having different *grade*. For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases.[330] It is also clear to us that DOC changed its approach between the provisional and definitive stages at the request of certain respondents. For the purpose of the Final

only with respect to these non-identical comparisons that we are called to determine whether the United States acted in conformity with Article 2.4.

7.174 Nor is the situation before us one in which the respondents were passive. Quite on the contrary. In its answer to a question from us limited to the issue of the demonstration that differences in dimension affec

7.177 This conclusion is not altered by Canada's response to question 22 of the Panel, in which Canada refers us to a number of documents in support of its arguments. We have carefully examined them. A first group of docume

7.182 Finally, Canada refers to several statements by DOC and ITC that – it considers – concede that the dimensional differences at issue here affected price comparability. Specifically, Canada refers to DOC's finding in the Preliminary Determination that "there are several significant differences in physical characteristics which affect price..."[337] and to the ITC's statement in its Preliminary Injury

I. CLAIM 6: ARTICLES 2.4 AND 2.4.2 – ZEROING

(a) Factual Background

7.185 In the anti-dumping investigation underlying this dispute, DOC divided the product under investigation into groups of identical, or broadly similar, product types. After making certain adjustments within each product type, DOC calculated a weighted average normal value and export price for each product type, and then compared the weighted averages for each product type. This process resulted in multiple values, one for each product type. In some instances this comparison showed that the weighted average export price for a specific product type was less that the weighted average normal value, while in other instances, the comparison showed that the weighted average export price was greater than the weighted average normal value. These values were then aggregated to produce one single value, the margin of dumping for the product under investigation for each investigated exporter. In the aggregation process, a value of "zero" was attributed to those product comparisons where the weighted average export price was greater than the weighted average normal value. DOC then aggregated the positive values from the individual product type comparisons, that is, those instances where the weighted average export price was lower than the weighted normal value, and divided the result by the total value of exports, to arrive at a weighted average margin of dumping.

7.186 For ease of reference of the reader, but without giving any legal status to the concept, we will follow the approach of the parties by referring to those instances where the export price is greater than the normal value, as "negative dumping margins" or "negative dumping".[341] We will refer to the process of attributing a "zero" value to the individual product type comparisons where the weighted average export price is greater than the weighted average normal value for the same product type as "zeroing".

(b) Arguments of the Parties/Third Parties

7.187 **Canada** asserts that the methodology used by the United States in the underlying investigation did not fully take into account "all comparable export transactions", in violation of the requirements of Article 2.4.2 of the *AD Agreement*. Canada notes that the practice of "zeroing", followed by DOC in this case, is identical to that used by the EC, which in *EC – Bed Linen* was found to be inconsistent with that Article. In addition, Canada claims that the methodology applied by DOC did not produce a fair comparison as required by Article 2.4 because it did not in fact average all values.

7.188 Although Canada agrees with the United States that Article 2.4.2 does not preclude an intermediate stage of comparing export prices with normal values on a product type basis before aggregating these values to determine an overall margin of dumping**,** Canada is of the view that Article 2.4.2 establishes a single standard for the calculation of a margin of dumping which is applicable to all stages of the calculation, whether intermediate or final. Canada therefore asserts that Article 2.4.2 requires that all export transactions have to be taken fully into consideration throughout the process of calculating the overall margin of dumping and not only in the first stage.

Canada has not invoked in its Panel Request an Article 6.1 violation with respect to DOC's determination at issue and consequently a claim based thereon is clearly outside the Panel's terms of reference. Hence, we refrain from ruling on whether the United States has acted inconsistently with Article 6.1 or any other provision in Article 6 of the *AD Agreement*.

[341] We note that there might be differences on how this methodology is applied by different investigating authorities. However, when we refer to the term "zeroing", we refer to the methodology as applied by the DOC in the underlying anti-dumping investigation as described by DOC in Exhibit CDA-2, IDM, pp. 65-66.

7.189 The **United States** replies that Articles 2.4 and 2.4.2 do not address the manner in which particular model-specific or level-of-trade-specific dumping margins are to be combined to determine an overall dumping margin. The United States asserts that, by arguing that the phrase "all comparable export transactions" refers to "[a]ll-trade-manner" -

"comparable" offers no indication of how the rest of the participants in the negotiations viewed the addition of this term. Canada also disagrees with the US view that its interpretation of Article 2.4.2 deprives the term "comparable" of any meaning. Canada agrees that "Article 2.4.2 applies to intermediate stage comparisons". For such comparisons, "comparable" ensures that model-specific comparisons only include transactions meeting the requirements of "price comparability" contained in Article 2.4, while "[a]ll" ensures that all transactions meeting those requirements are utilized.

7.194 Referring to the Appellate Body report *in EC – Bed Linen*, **Japan** asserts that the US practice is inconsistent with Article 2.4, read in conjunction with Article 2.1, of the *AD Agreement*.

7.195 The **EC** asserts 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. The EC requests the Panel to reject the arguments put forward by the United States concerning the compatibility of that methodology with the *AD Agreement*.

(c) Evaluation by the Panel

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contrary, Canada acknowledges that multiple averaging is permissible.[346] However, in light of the fact that multiple averaging is a prerequisite for the issue of zeroing to arise in the context of applying the weighted average-to-weighted average methodology, and taking into account the arguments of the parties and the reasoning developed by the Appellate Body in *EC – Bed Linen*[347], we consider that we

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7.206 We do not consider that, by definition, "all types or models falling within the scope of a 'like' product must necessarily be comparable"[351], nor more generally that all export transactions of the product under investigation will necessarily be comparable to the home market sales against which a comparison is to be made. Leaving aside the issue of the meaning of likeness, the fact that Article 2.4 explicitly provides for due allowances to be made for differences that affect price comparability means to us that, in the absence of such adjustments, certain transactions may not be comparable. In other words, the very reason due allowance may be necessary is precisely because the transactions might not otherwise be comparable. This lack of comparability could be due to differences in physical characteristics – a basis for allowance that is specifically identified in Article 2.4 – but Article 2.4 tells us that non-comparability could also arise from differences in conditions and terms of sale, levels of trade, quantities and other unspecified differences.[352] Thus, we do not believe that the significance of the reference to "comparable" export prices can simply be discounted on the grounds that the products/transactions must "necessarily be comparable".[353]

7.207 Of course, one way to ensure comparability is to make due allowance for certain differences, but given the inclusion of the term "comparable" in Article 2.4.2 we are not convinced that this method, however important, is the exclusive means allowed by the *AD Agreement* to ensure comparability. Nor, from a practical perspective, do we believe that such an approach would be desirable. In theory, of course, any difference between products/transactions can be accounted for by adjustments. In many cases, however, it may be difficult to determine whether a difference affects price comparability such that an adjustment is required, much less to establish the amount of the adjustment that would be appropriate. While some differences, such as differences in taxation, may be easy to quantify and adjust for, adjustments for differences in physical characteristics may be complex and highly uncertain, depending upon the number and extent of the differences in physical characteristics, and the extent to which those reflect differences in costs of production. The issue of whether or not DOC should have made due allowance for differences in dimension, addressed elsewhere in this Report, is a demonstration of how complex adjustment questions may be. The thaperences. Tc 1.088s0.1. T, day c 1.0078 Tw (co.12.75 TD 1057

comparison, and may therefore be able to minimize the extent of the adjustments that need to be made. We consider it unlikely that the drafters would have agreed to allow comparisons only at the most aggregated level (a single weighted-average-to-weighted-average comparison) or the most disaggregated level (transaction-to-transaction) while disallowing the intermediate approach of multiple averaging. Rather, it seems more likely to us that the intention of the drafters in specifying that Members shall normally be restricted to a weighted-average-to-weighted-average or transaction-to-transaction approach was to make clear that a weighted-average-to-transaction approach – a methodology that was widely used before the current *AD Agreement* came into effect – was only permitted in the limited circumstances specified in the second sentence of Article 2.4.2.

7.209 We are, of course, aware that Article 2.4.2 provides for the establishment of the existence of margins of dumping on the basis of *a* comparison of a weighted-average-normal-value with a weighted average of prices of all comparable export transactions, i.e., that the reference to "a" comparison is in the singular rather than in the plural. We note however that the second methodology (transaction-to-transaction) also refers to "*a* comparison of normal value to export prices on a transaction by transaction basis", yet the subsequent reference to export prices makes clear that in such a methodology investigating authorities are not restricted to establishing dumping margins by comparing one single normal value transaction to a single export price, but by definition will, in any case in which there is more than one transaction, be performing multiple comparisons of individual transactions. As for the reference to "*a* weighted average normal value", this use of the singular may be understood to mean that each group of "comparable" export transactions is to be compared to a single weighted-average-normal-value.

7.210 Our analysis of multiple averaging does not rely upon the reference in Article 2.4.2 to the establishment of "margins of dumping". Although it could be argued that this phrase is in the plural precisely because multiple averaging produces a dumping margin for each category of product/transaction compared, it could just as well be the case that it is in the plural because in many cases there will be multiple exporters or producers. We consider however that, assuming that the reference to "margins of dumping" means the margin of dumping for the product under investigation as a whole[354], our analysis above supports the conclusion that multiple averaging is nevertheless not prohibited by Article 2.4.2. In particular, while it may well be that the reference to "margins of dumping" is a reference to the overall margin for the exports of the product under investigation, this would mean simply that Article 2.4.2 provides guidance with respect to the methodologies used for determining the existence of such margins.[355] It would not, in our view, compel the conclusion that such overall margins could not be derived on the basis of multiple averaging.

7.211 In light of our analysis above, we conclude, and agree with the parties to this dispute, that the use of multiple averaging is not prohibited by the *AD Agreement*.

7.212 Having found that multiple averaging, *per se*, is not prohibited by the *AD Agreement*, we next consider whether the methodology applied by DOC in this case when aggregating the values generated from multiple averaging, in which "negative dumping" was attributed a zero value, is inconsistent with Article 2.4.2.

7.213 Bearing in mind our conclusion in paragraph 7.211, *supra*, regarding multiple averaging, we will now consider the obligations of an investigating authority when calculating a weighted-average-

[354] As the Appellate Body concluded in para. 53 of its Report in *EC – Bed Linen*.

[355] We note further that Article 2.4.2 requires that the "existence of margins of dumping during the investigation phase shall normally be established *on the basis of* a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. . . ". (emphasis added) We note that the ordinary meaning of the word "basis" is "the underlying support for a process". (*The Concise Oxford*

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methodologies set forth in Article 2.4.2, i.e., transaction-to-transaction and weighted average normal value-to-individual transaction export price.[361]

7.220 Finally, the United States asserts that the negotiating history of the *AD Agreement* confirms that the calculation of the margin of dumping using zeroing is consistent with Articles 2.4 and 2.4.2. Canada disagrees.

7.221 We note that Article 32 of the *Vienna Convention* provides that:

> "**Supplementary means of interpretation**
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

7.222 We also note that the Appellate Body has consistently found that:

> "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[362]

7.223 As we consider that the meaning imparted by the text of Article 2.4.2 of the *AD Agreement* itself, is neither equivocal nor inconclusive as to whether zeroing is inconsistent with Article 2.4 TD /FT* -0.j 8.25 0

> generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. 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 provided that such allocations have been historically utilized by the exporter or producer... "

7.236 Article 2.2.1.1 contains a number of obligations relating to an investigating autho

justify a conclusion that the United States has failed to comply with Article's 2.2.1.1 requirement that "[a]uthorities shall consider all available evidence on the proper allocation of costs". In our view, reasoning – whether generic or specific – is similarly valid and both can be used in support of any given conclusion. In the case before us, the IDM shows that not only generic but also specific reasoning was used by DOC in support of its conclusion as to how financial expense should be allocated, as discussed in further detail below. Canada's next argument concerns DOC's alleged assertion that "established practice would be followed because it is consistent and predictable".[374] DOC stated in the IDM that: "[b]ecause there is no bright-line definition in the [Tariff] Act of what a financial expense is or how the financial expense rate should be calculated, [DOC] has developed a consistent and predictable practice for calculating and allocating financial expenses".[375] Having

provided therein. Canada asserts before us that "a COGS allocation methodology for interest expense cannot meet the requirements of Article 2.2.1.1 because it cannot establish interest expense for Abitibi that "reasonably reflects the costs associated with the production and sale of the product under consideration"."[377] In our view, Article 2.2.1.1 does not impose the obligation that Canada seeks us to find. The proviso of Article 2.2.1.1 requires, in our view, that costs must normally be determined on the basis of the records kept by the producer or exporter under investigation *provided* that such records reasonably reflect the costs associated with the production and sale of the product under consideration. Hence, even if Canada's contention that the methodology used by DOC in order to calculate the amounts for financial costs for Abitibi over-allocated financial expense to softwood lumber were to be correct, we would be unable to conclude, on that basis, that DOC's methodology cannot meet the requirements of Article 2.2.1.1. For the foregoing reasons, we must reject Canada's claim. c o n s i d e r a t i o n .

softwood lumber.[381] We understand Canada's argument to rest on the fact that DOC determined the amounts for financial expense for softwood lumber based on an improper allocation methodology. However, bearing in mind our conclusion in paragraph 7.241, *supra*, we consider that, based on the facts before DOC at the time of determination, an unbiased and objective investigating authority could have computed the amount for financial expense to be attributed to softwood lumber on the basis of the methodology used by DOC for Abitibi. Having reached this conclusion, and taking into account that Canada has not advanced any other argument in support of its claim under Article 2.2.2, we conclude that Canada has not established that the United States acted inconsistently with that provision in determining the amount for financial expense for softwood lumber based on the methodology used by DOC.

7.245 Finally, Canada claims violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement.* With respect to Articles 2.2 and 22.1, Canada asserts that an incorrect calculation of costs impacts the determination of which sales may be used in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. With respect to Article 2.4, Canada asserts that, where the calculation of costs results in an improper normal value, a fair comparison will not be possible in violation of Article 2.4. Thus, we understand Canada's claims under Articles 2.2, 2.2.1 and 2.4 to rest upon a finding of violation of either Article 2.2.1.1 or 2.2.2 or of both. Having concluded that, in determining the amounts for financial expense to be attributed to softwood lumber, the United States did not violate Articles 2.2.1.1 and 2.2.2, we find that Canada's dependent claims under Articles 2.2, 2.2.1 and 2.4 fail.

K. CLAIM 8: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 2dependic ( ) Tjc1 9 ETERMIN2by5(A) T TD -0acbbni32e88 s13

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antidumping law does not prescribe a specific method for calculating the G&A expense rate. When a statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of [DOC]. 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, [DOC] 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 incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a divisional or product-specific basis. This practice is identified in [DOC]'s standard section D questionnaire, which instructs that the G&A expense rate should be calculated as the ratio of total company-wide G&A expenses divided by cost of goods sold. See Section D Questionnaire, page D-14. *This approach is consistent with Canadian GAAP's treatment of such period costs and recognizes the general nature of these expenses and the fact that they relate to the activities of the company as a whole rather than to a particular production process.* [DOC]'s methodology also avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions. Therefore, we normally calculate the G&A expense rate based on the respondent's unconsolidated oes abe ishd12u7s foed oes abogniosts a normally calculTw (oreleterif is licod) ,ulary betw-7

with Canadian GAAP. According to the United States, there was greater certainty that audited GAAP-consistent books and records would "reasonably reflect the costs" of softwood lumber. Second, DOC determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses. The United States takes issue with Canada's statement that "[t]he G&A factor derived from the FPG includes a properly allocated portion of corporate G&A…"[385] In the view of the United States, 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 amount for the FPG. With respect to the status of the FPG data, the United States asserts that Canada has been unable to provide evidence that Tembec's FPG divisional G&A records were kept in accordance with Canadian GAAP.

7.249 **Japan** makes general comments on Canada's SG&A-related claims which are contained in paragraph 7.232, *supra*.

(c) Evaluation by the Panel

7.250 Tembec requested DOC to determine the amounts for G&A costs based on its internal accounting methodology, under which the company charged some G&A expenses directly to each of its divisions. In application of DOC's normal practice and DOC's treatment of all other respondents in the investigation, DOC calculated the G&A expense rate for softwood lumber by allocating Tembec's company-wide G&A costs over its production of all products based on company-wide COGS, and disregarded the FPG G&A figures on the basis of which Tembec had calculated the amounts for G&A costs for softwood lumber in its questionnaire response. In determining the amounts for G&A costs based on the company-wide rate, Canada asserts that DOC overstated the costs of producing softwood lumber, resulting in a cost of production that did not reasonably reflect costs associated with Tembec's production of softwood lumber, contrary to Article 2.2.1.1, and included costs that did not pertain to the production and sale of softwood lumber, contrary to Article 2.2.2. In adopting such a methodology, Canada asserts that DOC also violated Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[386]

7.251 Canada argues that the record demonstrated that the FPG G&A data more accurately "pertained to" the production of softwood lumber. By contrast, in the view of Canada Tembec's company-

based on the respondent's *unconsolidated* operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent. In the case of Tembec, DOC found that "Tembec['s] divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation". DOC's second justification is that using its methodology

items were traced to Tembec's year 2000 Annual Report. A verification sheet containing a breakdown of SG&A cost items for each of the five divisions – including the FPG – is also included in Exhibit CDA-95. While the total amounts for SG&A costs for the FPG division contained in this verification sheet coincide with the total amounts for SG&A costs for the FPG division used in the "Revised Calculation of the G&A Ratio for the FPG Division", this does not show that there were no G&A costs under any of the other four divisions that pertained to the production and sale of the product under investigation. Canada has not pointed to any evidence on the record to that effect. We therefore conclude that DOC was entitled to depart from Tembec's FPG division-specific records and calculate the amounts for G&A costs based on Tembec's audited company-wide G&A data.[391,392]

7.260 We therefore find that an unbiased and objective investigating authority could have determined the amounts for G&A expenses for softwood lumber as DOC did and hence reject Canada's claim that the United States acted in violation Article 2.2.1.1.

7.261 Canada claims that Tembec's company-wide G&A data, a portion of which was allocated to softwood lumber, could not "pertain to" the production and sale of the like product in Canada because those figures represent Tembec's worldwide production, including products other than those subject to investigation and that the United States has therefore violated Article 2.2.2. For this reason, Canada argues that DOC's methodology resulted in reliance on data which did not pertain to the production and sale of softwood lumber. The United States replies that DOC determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses.

7.262 Article 2.2.2 provides in relevant part:

> "[f]or the purpose of paragraph 2, 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".

7.263 We consider that the text of the provision is self-explanatory: investigating authorities are

supports our view. If G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation.

7.266 The next issue we address is the attribution of G&A costs to discrete products produced or sold by a given company. Article 2.2.2 of the *AD Agreement* does not provide any guidance on this issue. Different investigating authorities use different allocation keys. In the case before us, the United States used as an allocation key the following: total company-wide G&A divided by the total company-wide COGS, thereby obtaining the G&A ratio for Tembec. This was then multiplied by the cost of production for softwood lumber in order to obtain the amounts for G&A costs for softwood lumber.

7.269 We recall that, in paragraphs 7.260 and 7.267, *supra*, we have concluded that Canada has not established that the United States has acted inconsistently with Articles 2.2.1.1 and 2.2.2 of the *AD Agreement*. Given that Canada's claims of violation of Articles 2.2, 2.2.1 and 2.4 are premised on violations of Articles 2.2.1.1 and 2.2.2, we conclude that Canada has not established that the United States acted inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.

DOC improperly ignored Weyerhaeuser Company's books and records and established amounts for G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its cost for producing and selling softwood lumber, contrary to Article 2.2.1.1. In the view of Canada, Weyerhaeuser Company did not treat this settlement cost as a general expense on its records, nor did it reasonably reflect the cost for producing or selling Canadian softwood lumber.

7.273 The **United States** replies that DOC found that the costs concerning the settlement of the hardboard siding claims were incurred years after the production of the hardboard siding at issue and were not part of the production process for that product. Therefore, those costs could not properly be considered a cost uniquely allocable to hardboard siding production, but that it was a cost "of doing business" to the company as a whole. In addition, the United States contends that Weyerhaeuser Company treated those expenses as a general cost in its audited financial statement. The United States asserts that DOC explained that it "typically allocates business charges of this nature over all products because they do not relate to [a] production activity, but to the company as a whole". The United States asserts that DOC's decision on this issue is supported by Weyerhaeuser Company's own books and records, which include these litigation settlement costs as a general cost, as opposed to a COGS. The United States argues that the inclusion of litigation costs reported on a consolidated financial statement in G&A costs does not contradict the reasoning of *Egypt – Steel Rebar*.

7.274 **Japan** submits general comments on Canada's SG&A-related claims which are contained in paragraph 7.232, *supra*.

(c) Evaluation by the Panel

7.275 The first issue before us is whether DOC acted inconsistently with Article 2.2.2 of the *AD Agreement* in attributing a portion of the charges for the settlement of hardboard siding claims to the G&A amount calculated for softwood lumber, the product under consideration.[405] Canada raises a separate claim under Article 2.2.1.1 and consequential claims based on Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[406]

7.276 We start our examination with Canada's Article 2.2.2 claim. Canada asserts that the United States acted inconsistently with Article 2.2.2 by including cost data that did not "pertain to" the production and sale of the product under investigation. In support of its claim, Canada asserts that the respondent argued before DOC that the hardboard siding cost was not general in nature and therefore not attributable to the company as a whole. In addition, Canada asserts that the charge at issue was a cost that did not pertain to the production and sale of softwood lumber in Canada for Weyerhaeuser Canada and therefore it should not have been taken into account when determining the amounts for SG&A costs to be attributed to softwood lumber's production and sale, i.e., the product under consideration. The United States disagrees.

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[405] We do not understand Canada to dispute the consistency with the *AD Agreement* of the methodology used by DOC in order to determine the amounts for G&A costs for Weyerhaeuser Canada. Nor do we understand Canada to dispute the consistency of DOC's inclusion in the calculation of the amounts of G&A expenses for softwood lumber of certain G&A expenses not booked in Weyerhaeuser Canada's records, but in its parent company's (Weyerhaeuser Company) records. We note that, in fact, Weyerhaeuser Canada included these items itself in its response to the questionnaire as G&A expenses which, in part, pertained to the production and sale of the like product. (Canada second written submission, para. 230, first bullet point) Finally, we note Canada's assertion that it does not argue before us that the hardboard siding settlement expense should have been classified as a cost related to the production of hardboard siding rather than as a G&A expense. (Canada second written submission, note 220)

[406] We note that, in the Panel Request, Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*

7.277 Before considering the facts in the dispute before us, we must examine the relevant provisions of the *AD Agreement* in order to determine what obligations are imposed on investigating authorities. In this regard, we note that Article 2.2 provides in relevant part:

> "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation *or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison*, the margin of dumping shall be determined by comparison (...) with *the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*." (emphasis added, footnote omitted)

7.278 We note that this general provision concerns the establishment of an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used. Furthermore, if an investigating authority resorts to the last methodology contained in Article 2.2 –

7.282 Bearing in mind our understanding of this provision, we must first examine Canada's arguments that the US$130 million charge could not be considered a "general" cost within the meaning of Article 2.2.2, and that the charge was not treated as a "general" cost on Weyerhaeuser Company's records. The examination of each of these issues requires us to address the facts involved. We recall that our standard of review is set out in Article 17.6 of the *AD Agreement*. In the case before us, we must determine whether the investigating authority's evaluation of the facts was unbiased and objective.

7.283 As stated in paragraph 7.276, *supra*, parties disagree on whether the cost at issue is a "general" cost within the meaning of Article 2.2.2. The United States argues that the hardboard siding expense is a "general" cost because it does not relate to the production and sale of hardboard siding. In addition, the United States defines "general" costs as ""all expenses incurred in connection with performing general and administrative activities. Examples are executives' salaries and *legal expenses*"."[411] (emphasis in original) Canada contends that the expense at issue was not part of the "legal expenses" of Weyerhaeuser Company, but an "unique charge".[412] Canada further asserts that Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A costs and the settlement of legal claims relating to hardboard siding.[413]

7.284 Article 2.2.2 does not define "general" costs nor does it state which cost items should be considered to be "general" costs.[414] However, we recall that the term "general" is defined as "**1 b** including or affecting all or nearly all parts or cases of things".[415] Thus, "general" costs are costs affecting all or nearly all products manufactured by a company. In our view, and based on this definition, it is difficult to determine whether the charge at issue is a "general" cost. It could be argued that because the charge arises from the sale of hardboard siding, a product which was not subject to investigation, that charge could not possibly affect all products manufactured by Weyerhaeuser Company or its subsidiaries. However, it could also be argued that because of the large amount of the charge, the impact that it might have for instance on the brand name of the company as such, etc. such a charge might affect the lumber operations of the company or perhaps even the company as a whole.

7.285 We do not believe that we are required to define that term "general cost" for the purpose of resolving the dispute before us. Article 2.2 refers to three elements constituting a constructed (normal) value, namely cost of production; SG&A costs; and profits. As stated in footnote 405, *supra*, we do not understand Canada to pursue in this dispute the exporter's argument that the expense at issue was a cost related to the production of hardboard siding.[416] Canada has not claimed that the charge at issue should be considered part of the exporter's "profits", nor can we conclude that. In our view, the expense at issue can therefore only be part of the company's SG&A costs. We therefore agree with DOC's treatment of the expense at issue as part of Weyerhaeuser Company's G&A costs. In reaching this conclusion, we have taken into account the following comment of Canada:

> "the [US$]130 million charge for the hardboard siding settlements does not reflect lawyer salaries, copying of briefs, travel to court, or other types of "legal" expenses that are often considered to be "general". Weyerhaeuser itself [treated] the[] (..) legal

[411] US first written submission, para. 209.
[412] Canada second written submission, para. 235.
[413] Canada second written submission, para. 238 *et seq*.
[414] We do not refer to "selling" and "administrative" costs because parties have focused on the term "general" costs only.
[415] *The Concise Oxford Dictionary of Current English*

> expenses [in question] as "general", and they were included in G&A both in the company's financial statement and for Commerce's G&A calculation."[417]

7.286 In addition, Canada refers to the uniqueness of this charge based on the fact that Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A costs and the settlement of legal claims relating to hardboard siding.[418] In our view, the fact that the cost at issue is reported separately is *per se* not a convincing argument. There might be several reasons for reporting this cost separately, especially in the published financial statements of the company, for example, to increase the transparency regarding a specific non-

> .... there is no evidence on the record to demonstrate that the hardboard siding expense is even remotely related to the production and sale of Canadian softwood lumber."[420]

7.290 By contrast, the United States has consistently argued that "[g]eneral expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole and they are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable ".[421]

7.291 The question before us is to determine whether an unbiased and objective investigating authority could have concluded that the hardboard siding charge pertained to the production and sale of softwood lumber. We are of the view that, if it is determined that a given cost item relates to the production and sale of the product under consideration, even if it relates only partly to the product under consideration, a portion of that cost could be attributed to the product under consideration.[422]

7.292 We note that Canada has asserted before us there is no evidence on the record to demonstrate that the hardboard siding expense is even remotely related to the production and sale of Canadian softwood lumber. By contrast, the United States has stated that DOC found that one-time charges like the one at issue are a cost of doing business for the company. The United States further argues that the link between the litigation cost at issue and production of hardboard siding was attenuated because (1) the litigation was not part of the production process of hardboard siding and (2) the expense was incurred anywhere from one year to as long as eighteen years after production and sale of the hardboard siding.[423]

7.293 Bearing in mind the facts before us, i.e., that the expense related to hardboard siding that was produced and sold between one and eighteen years before the period of investigation and that the legal settlement cost did not relate to the production process as such of hardboard siding, facts not being contested by Canada, we consider that an unbiased and objective investigating authority could have refused to treat that charge as part of the cost of production of hardboard siding. Having reached that conclusion, and that this item was correctly characterized as a "general" expense, we consider that DOC was not unreasonable in concluding that the charge at issue was not a cost exclusively attributable to hardboard siding but also benefiting the production and sales of all other products manufactured and sold by Weyerhaeuser Company. We are therefore of the view that an unbiased and objective investigating authority could, in light of the facts before DOC at the time of determination, have determined that a portion of the charge at issue pertained to the production and sale of the product under consideration. For the foregoing reasons, we reject Canada's claim that the United States acted inconsistently with Article 2.2.2 of the *AD Agreement*.

7.294 We note the statement in Weyerhaeuser Company's year 2000 financial statement that the hardboard siding legal claim "is a claims-based settlement, which means that the claims will be paid as submitted over a nine-year period with no minimum or maximum amount".[424] We further note that DOC took into account the entire amount of the charge, i.e., the US$130 million, in the calculation of

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[420] Canada second written submission, paras. 245 and 247.

[421] US second written submission, para. 84. The United States has also acknowledged that it:

> "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". (US response to question 63 of the Panel, para. 121)

[422] *See* para. 7.281, *supra*.

[423] US response to question 62 of the Panel, para. 117.

[424] Exhibit CDA-166, Weyerhaeuser's Annual Report 2000, p. 51.

the G&A ratio for the period under investigation.[425] It appears from the record that the legal claims will be paid as submitted over a nine-year period. It might therefore be questionable whether an unbiased and objective investigating authority could have allocated the total amount of the claim, that is, US$130 million, to a one-year period, the period of investigation, only, even when, as is the case here, Weyerhaeuser Company itself booked the entire litigation cost to one year only. However, Canada has not argued before us on the consistency of this allocation methodology in the context of this claim. We therefore refrain from examining and ruling on this issue.

7.295 Canada also claims that the United States violated Article 2.2.1.1 by improperly ignoring Weyerhaeuser's books and records and establishing G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber. In support of its claim, Canada argues that Weyerhaeuser Company did not treat this settlement fund as a general cost on its records as it was a separate line item in its corporate financial statement, nor should this expense be treated as a general legal cost. Canada asserts that Weyerhaeuser Company characterized its general legal expenses as G&A costs in its financial statement. Canada argues that the exporter 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 the calculation of the amounts for G&A costs in this case. By including a portion of the legal settlement charge at issue in Weyerhaeuser Canada's cost calculation, Canada asserts that DOC computed a cost that did not "reasonably reflect the costs associated with the production and sale" of softwood lumber.

7.296 In examining this claim, we recall that in our view Article 2.2.1.1 imposes the obligation on the investigating authority to calculate costs based on the records kept by the exporter provided that certain conditions set therein are met.[426] We recall that, in our view, an unbiased and objective investigating authority could have concluded, based on the data before DOC at the time of determination, that the cost at issue was a "general" cost. We further found that such an investigating authority, bearing those facts in mind, could have concluded that the cost at issue was not linked to any particular product and, hence, an unbiased and objective investigating authority could have allocated a portion of the charge to softwood lumber, as DOC did. Bearing this in mind, and that the amount of the charge was taken by DOC from the records kept by the exporter – which is not disputed by Canada, we cannot agree with Canada in that DOC improperly ignored Weyerhaeuser's books and records and established amounts for G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber. Hence, we must reject Canada's claims based on Article 2.2.1.1.

7.297 Canada raises several consequential claims under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*

purchases on the record. Thus, even assuming that this evidence might have been relevant and more probative than West Fraser's own data, the United States considers that that omission prevented DOC from assessing any sales other than the self-serving examples selectively chosen by West Fraser. Referring to the *Egypt – Steel Rebar* Panel Report, the United States argues that Article 2.4 is concerned exclusively with the comparison between normal value and export price, not with the determination of normal value. For the foregoing reasons, DOC's determination of an offset for West Fraser's wood chip sales was based on a proper establishment of the facts and an objective and unbiased evaluation of those facts. Accordingly, it should be upheld under the standard of review in Article 17.6(i).

7.305 **Japan** asserts that Article 2.2.1.1 of the *AD Agreement* allows the authorities to deviate from a respondent's recorded cost of production if these records do not "reasonably reflect the costs associated with the production and sale of the product under consideration". This discretion must be exercised in good faith based on a proper establishment of facts and on an unbiased and objective evaluation of those facts. Referring to the Appellate Body Report in *US – Hot-Rolled Steel*[428], Japan

7.307 The issue before this Panel is the extent to which DOC was required to, or precluded from, deriving wood chip revenue from valuations in the records of the producers in question. In the case of West Fraser, DOC declined to value wood chip revenue based on sales to affiliated parties, while, in the case of Tembec, DOC relied upon internal transfers to value wood chip revenue. Canada, in effect, argues that DOC should have done precisely the opposite. With respect to West Fraser, Canada asserts that DOC was required by Article 2.2.1 to use the values included in that company's records for sales of wood chips to affiliated parties in BC. With respect to Tembec, by contrast, Canada argues that, because the values recorded in Tembec's books for internal transfers of wood chips were set below prevailing market prices, DOC was required by Article 2.2.1.1 to disregard those values, "since to use th[at] figure[] would result in a calculation that does not reasonably reflect the true cost of producing and selling softwood lumber".[432] In Canada's view, DOC's actions were inconsistent with an unbiased and objective evaluation of the record evidence as a whole and, as such, were inconsistent with the standards set out in Article 2.2.1.1 of the *AD Agreement*.

7.308 At the outset, we note that, with respect to the claims that will be examined in paragraphs 7.314-7.348, *infra*, Canada claims in its Panel Request violations of "Article 2 of the *Anti-Dumping Agreement*, including Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and paragraph 7 of Annex I, and Article VI:1 of the GATT 1994".[433] In addition, Canada asserts that "[a] fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*".[434] With respect to Tembec and West Fraser's claims relating to the valuation of by-product revenues, we understand Canada to assert in its restatement of claims, however, that the United States allegedly violated Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 only.[435] Bearing this in mind, in our examination in paragraphs 7.314-7.348, *infra*, we will refrain from addressing claims not contained in the restatement of claims and from ruling on those claims.

7.309 We note that the main legal basis for Canada's claim is Article 2.2.1.1. Before analysing the specific facts for each of the companies, we have to set out our general understanding of the obligations imposed by Article 2.2.1.1 on investigating authorities with respect to the determination of costs, in general, and, in particular, concerning the valuation of by-product revenues. Article 2.2.1.1 provides in relevant part 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."

7.310 As noted in paragraphs 7.236-7.237, *supra*, Article 2.2.1.1 requires that costs be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Where records are not kept in accordance with the GAAP of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority may depart from records kept by the exporter. We recall that Article 2.2.1.1 does not in our view require that

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margin of dumping. A higher cost of production would also lead to a higher constructed (normal) value, which would also raise the amount of any margin of dumping. This would therefore not be in the interest of an exporter.

[432] Canada second written submission, para. 256.

[433] WT/DS264/2, para. 3(d).

[434] *Ibid.*

[435] Canada response to question 1 of the Panel, para. 1(vi). In addition, we note that Canada has not advanced any arguments in support of other possible claims of violation other than those examined in this Section of the Report.

costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and s

7.313 Bearing the above general comments in mind, we will examine separately the tests and conclusion of DOC with respect to West Fraser and Tembec.

(i) Tembec

7.314 DOC concluded that the values entered into Tembec's records for internal transfers of wood chips were reasonable. In so doing, DOC rejected Tembec's arguments that the values recorded in its books for internal transfers were well below market prices, and that DOC should therefore value the internally transferred wood chips in accordance with actual market prices from arm's length transactions entered into by Tembec with third parties. Canada asserts that, in valuing wood chip revenue on the basis of the values recorded in Tembec's books, DOC contravened Article 2.2.1.1 by using records kept by the exporter which did *not* reasonably reflect the costs associated with the production and sale of the product under consideration. In addition, Canada argues that 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. Finally, Canada argues that, where the calculation of costs results in an improper normal value, a fair comparison will not be possible and Article 2.4 will also be violated.[440]

7.315 In examining the above issue, we first note that parties have not argued that Tembec's records were not in compliance with Canadian GAAP. Rather, the parties' arguments revolve around the words "reasonably reflect the costs associated with the production and sale of the product under consideration". The United States asserts that DOC examined in the context of the underlying investigation the reasonableness of the valuation of the by-product revenue offset, as reported in Tembec's records. DOC concluded that it was reasonable and rejected Tembec's assertion that by-product revenues on Tembec's books did not reasonably reflect market prices for wood chips because they were internal transfer prices artificially set for accounting purposes. Canada disagrees, and argues that Article 2.2.1.1 mandates rejection of an exporter's records where calculation of costs for the product under consideration would be overstated or understated if the investigating authority were to use those records as a basis for the purpose of determining the cost of production for the product under consideration.[441] In the view of Canada, that would occur where the company's books do not reflect the market value of by-product sales, as was the case for Tembec. In sum, Canada considers that the use of Tembec's internal transfer prices in calculating cost of production violates Article 2.2.1.1.

7.316 We note that Article 2.2.1.1 establishes that costs shall normally be determined on the basis of the records kept by the exporter concerned, provided that such records are in compliance with GAAP principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. We have examined in detail the obligations contained in Article 2.2.1.1 in paragraphs 7.236-7.237, *supra.* We therefore recall our interpretation of Article 2.2.1.1 that the role of the conditions set forth in the proviso of Article 2.2.1.1 is *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Recalling our interpretation referred to above, we therefore do not agree with Canada's claim that Article 2.2.1.1 "mandates rejection of an exporter's records where calculation of costs for the product under consideration would be overstated or understated if the investigating authority were to use those records as a basis for the purpose of determining the cost of production for the product under consideration." Canada's claim therefore fails.

7.317 Even if it is assumed, *arguendo*, that Article 2.2.1.1 imposes on an investigating authority a positive obligation as Canada has argued above, rather than a proviso, we could not agree with Canada that the facts before us support Canada's claim, as our analysis below shows.

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[440] *See* para. 7.308, *supra*.
[441] Canada response to question 70 of the Panel, para. 178.

7.318 We start our examination noting that Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records "reasonably reflect the costs associated with the production and sale of the product under consideration". We further note that DOC used the following test in order to determine the reasonableness of Tembec's recorded valuation for internal transfers of wood chips:

> "[i]n determining a "reasonable" amount for valuing the *by-product offset* in interdivisional transactions, [DOC] uses the same methodology that it uses for valuing *costs*

Canada argues – that, for the requirements of Article 2.2.1.1 to be met, it is necessary that the by-product revenue offset reflect the *market value* of those by-products.

Tembec's BC sawmills' wood chip sales prices to unaffiliated purchasers, if DOC had not taken into account, at the time of determination, the amount for profit.

7.323 Canada argues that by-products neither have costs nor do they yield profits. We do not understand the United States to argue that by-products have costs. Indeed, the IDM reads: "[d]ue to the fact that wood chips are a by-product of the production of softwood lumber, there is no separately identifiable costs associated with the wood chips that are transferred between Tembec divisions. Therefore, we analysed the wood chips sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices are reasonable".[452] While the IDM could have been more explicit on this point, we are satisfied with the explanations of the United States that the internal transfer price was treated as a surrogate for cost.[453] Canada may be correct in that for accounting purposes by-products do not have a cost. However, we are of the view that when selling wood chips the producer must, at least, recover certain costs it may incur with respect to the by-product. This could include *inter alia* storage and transport of the by-product at issue to the purchasers' premises. Even though for accounting purposes this may not be "costs", *strictu sensu*, for the purposes of the cost determination in an anti-dumping investigation we do not consider it unreasonable for an investigating authority to treat those items as costs. In addition, DOC appears to have taken into account other factors (the varying quality and types of wood chips) when assessing the reasonableness of the valuation of internal trards -4's sawmills and 495625 Tw 202

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foregoing reasons, we consider that Canada has *not* established that the United States acted inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the States acted

affiliated parties as an offset to softwood lumber's cost of production.[461] *First*, Canada asserts that, to show that its affiliated sales were made at market prices, West Fraser provided DOC with monthly data for the year 2000 for wood chip purchases made by one of its affiliated pulp mills, QRP. In the view of Canada, these data showed that the prices QRP paid to West Fraser – for wood chip sales from "West Fraser Mills" in Quesnel, BC – were consistent with the prices QRP paid to its principal *unaffiliated* chip supplier. Canada asserts that DOC officials not only verified the above information but also requested – and verified – additional information regarding sales made to affiliated and unaffiliated purchasers by West Fraser's Blue Ridge (Alberta) and PIR (BC) sawmills. Canada asserts that, in its Case Briefs, West Fraser argued that the mill-specific information that had been verified, showed that West Fraser's wood chip sales to affiliated parties had in fact been made at market prices. *Second*, Canada asserts that, immediately after DOC issued its Final Determination, West Fraser submitted a letter to DOC arguing that its use of West Fraser's "*de minimis*" volume of unaffiliated wood chip sales in BC as its exclusive benchmark for BC market prices constituted ministerial error.[462] West Fraser argued that, because its unaffiliated party chip sales in BC were "*de minimis*", DOC should have evaluated whether West Fraser's affiliated party sales were made at arm's length prices using the same method used for affiliated chip sales made by Canfor, which was similarly situated to West Fraser in that Canfor had no chip sales to unaffiliated purchasers in BC.[463] West Fraser requested DOC to compare the price of West Fraser's wood chip sales to affiliated purchasers with the weighted average price of the other respondents' unaffiliated chip sales in BC.[464]

7.331 We found the following statement in the IDM relevant to our examination of Canada's first argument:

> "[f]or West Fraser and Tembec we also disagree that the documentation presented at verification demonstrated that the prices it received from its affiliates for sales of wood chips reflected market prices. While we acknowledge that the documentation submitted at verification showed that certain affiliated pulp mills selected by these respondents paid similar prices to their sawmills and to unaffiliated parties for purchases of wood chips, we note that *the comparisons provided by each respondent were selectively provided by the companies and not based on a sample chosen by [DOC]*. These comparisons represented only a portion of the total wood chip purchases by both Tembec and West Fraser's pulp mills and there is no record evidence to determine what the results might be if all mills were included."[465] (emphasis added)

7.332 We note that Canada has not contested DOC's statements that West Fraser did not provide all the information on the sample chosen by DOC[466] in NDP has a sample 0 299.48 0.18 5 2 65 1 has a 0 1 0 [illegible]

inconsistently with Article 2.2.1.1 in not using the data provided by the exporter concerning QRP. For the foregoing reasons, we reject Canada's first argument.[468]

7.333

> value of CAN$ [****] compared to an average unaffiliated per-unit sales of CAN$ [****]."[474]

7.337 The excerpt quoted from West Fraser's Cost Verification Report refers to a schedule contained in an exhibit collected at verification – several months before the IDM and the Final Determination were issued – and included in Exhibit CDA-106. This exhibit reports separately *inter alia* the volume of wood chips sold by type of customer (affiliated and unaffiliated) made by each of West Fraser's sawmills in Canada. Totals (including volume and value) for sales to affiliated and unaffiliated parties are grouped by region, i.e., Alberta and BC.

7.338 We consider that, when arguing during the verification that any comparison in the aggregate is meaningless and that BC and Alberta should not be compared directly because wood chip prices vary significantly between those two regions, West Fraser could have anticipated that, if DOC accepted its argument, it might have considered comparing prices of wood chips sold by West Fraser's BC sawmills to affiliated parties in BC with prices of sales made by those sawmills to unaffiliated parties in that region. Based on its own data, West Fraser could already have seen during verification that the volume of wood chips sold to unaffiliated parties in BC during the POI was tiny (0.28 per cent of total wood chips sales in BC). For the foregoing reasons, we reject Canada's argument that West Fraser did not make certain specific arguments until a late stage in the investigation because there was no reason why West Fraser should have done so before.[475]

7.339 Even if, *arguendo*, we were to consider West Fraser's arguments, we would be unable to conclude that the United States acted inconsistently with Article 2.2.1.1 of the *AD Agreement.* First, Canada argues that the volume of wood chips sold by West Fraser to unaffiliated parties in BC was tiny. The United States replies that, so long the wood chip transactions were commercial in nature, the actual volume of those transactions is irrelevant.

7.340 In our view, the volume of wood chips sold does not determine, in and of itself, whether those transactions constitute an appropriate benchmark against which the average price of wood chips sold to affiliated parties can be compared. Canada appears to acknowledge this fact implicitly when it states that it did not make any arguments concerning West Fraser's sales from its PIR sawmill because sales of wood chips to unaffiliated parties made by PIR[476] "were not made at inflated prices" and "did not distort DOC's analysis".[477]

7.341 Canada argues that its McBride sawmill sold wood chips to unaffiliated parties early in the POI and pursuant to a long-term contract, and thus did not reflect market prices for the POI as a whole.[478] In support of its argument, Canada cites the following excerpt from West Fraser's Cost Verification Report:

> "[c]ompany officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April and May 2000. They explained that the sales value of chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price."[479]

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[474] Exhibit CDA-110, West Fraser's Cost Verification Report, p. 23. Confidential information contained in the bracketed sections has been removed.

[475] In any case, we note that Canada has not raised in the Panel Request any claim under Article 6 of the *AD Agreement*.

[476] We recall that this is one of the two sawmills owned by West Fraser which had sales of wood chips to unaffiliated parties in BC during the POI.

[477] Canada second written submission, para. 281.

[478] Canada first written submission, para. 249.

[479] Exhibit CDA-110, West Fraser's Cost Verification Report, p. 23.

7.342 The United States replies that West Fraser made no argument that the long-term contract by

test. In West Fraser's case, there was data available for the exporter concerned albeit corresponding to a small portion of West Fraser's total sales of wood chips in BC (0.28 per cent). Canada has not established that the average price data corresponding to sales of wood chips to unaffiliated parties in BC was unreliable. Hence, we do not consider that, based on the facts before us, it could be required from an unbiased and objective investigating authority to have treated Canfor and West Fraser in the same manner. For this reason, we reject Canada's argument.

7.347 For the foregoing reasons, we reject Canada's claim that, in re-valuing West Fraser's revenue from sales of wood chips to affiliated parties, instead of using the value recorded in West Fraser's books, the United States has acted inconsistently with Article 2.2.1.1.

7.348 With respect to Canada's claims regarding violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*, we note that Canada advances arguments identical to those mentioned in paragraph 7.325, *supra*, in support of those claims. This being the case and having found that Canada has not established that the United States acted inconsistently with Article 2.2.1.1 of the *AD Agreement* in re-valuing West Fraser's prices of wood chips sold to affiliated parties in BC, we conclude that Canada has not established that the United States acted inconsistently with Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. For this reason, we reject Canada's claims of violation of Articles 2.2, 2.2.1 and 2.4.

N. CLAIM 11: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – DIFFERENCE IN PRICE COMPARABILITY ARISING FROM PROFITS ON FUTURES CONTRACTS: SLOCAN

(a) Factual Background

7.349 Canada's claim concerns DOC's treatment of Slocan's profits and losses from lumber futures (hedging contracts traded on the CMLu/F1 11. Tw (he/8Nving contracts traded on the CML8s trea74CML8sML8

> Slocan suggests that as an alternative, [DOC] apply the profits as an offset to Slocan's financial expenses. In support of this argument, Slocan disputes [DOC]'s statement in its preliminary determination calculation memo that these profits are "investment revenues" by stating that Slocan is engaging in hedging rather then 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".[483]

(b) Arguments of the Parties

7.350 **Canada** asserts that DOC used two directly contradictory lines of reasoning to disregard the profits. At the preliminary stage, Canada asserts that DOC had determined that revenue from trading softwood lumber futures contracts was investment revenue, and for that reason, rejected Slocan's claimed adjustment. At the definitive stage, DOC refused to treat those profits as an offset to Slocan's financial expenses, by stating that they related to Slocan's core business of selling lumber rather than to any investment activity. In the view of Canada, at a minimum, one of these determinations cannot stand and is, therefore, based on an evaluation of the facts which is neither unbiased nor objective. Bearing in mind DOC's finding that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, Canada argues that DOC should have granted Slocan an adjustment to direct selling expenses. Canada asserts that Article 2.4 supports its claim. Canada contends that Article 2.4 does not require any price adjustment to be directly related to a particular sales transaction. Canada argues that Article 2.4 required the United States to make due allowance for all differences that affected price comparability. Canada contends that Slocan's futures trading activity was either a "condition" of US sales, an "other difference" affecting price comparability, or both. Canada asserts that it was DOC's responsibility to decide how to classify Slocan's futures revenue and how to make "due allowance" for its effect on price comparability. Should DOC have been of the view that Slocan's request for such an adjustment was not founded, then Canada asserts that DOC could have made the adjustment by offsetting Slocan's financial expense by the income derived from futures contracts. Canada asserts that DOC's failure to make the requested adjustment to selling expense was inconsistent with the US obligation to use a reasonable amount for SG&A costs under Article 2.2 of the *AD Agreement*. Canada asserts that an objective and unbiased investigating authority evaluating the evidence before DOC could not have reached the conclusion that no adjustment was required to offset Slocan's futures contract revenues.

7.351 The **United States** replies that DOC found that Slocan's lumber hedging activity is linked to overall selling activities and reduction of Slocan's exposure to price changes. The United States asserts that hedging is only *indirectly*

under Article 2.4 of the *AD Agreement.* Canada claims that, if we concluded that the United States has not violated Article 2.4, we should find that DOC should have accounted for that revenue when determining the constructed (normal) value and that the United States, by not doing so, has violated Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2. From the record, it is clear to us that DOC did not dispute the existence of this revenue and that DOC accepted that the revenue was earned from hedging activities, rather than from speculation in futures contracts. The issue before us, is to determine whether DOC should have made an adjustment under Article 2.4 to take the net revenue from Slocan's futures contracts into account deter o"22

7.357 The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are

> "at verification [Slocan] demonstrated the effect on price comparability by proving that Slocan was a "hedger" in the lumber market and that the purpose and effect of hedging contracts is to affect prices in the market by shielding against fluctuations in price. Given the demonstrated purpose of hedging activity, [DOC]'s factual determination that "Slocan's lumber futures hedging activity is related to its core business of selling lumber" *was* a determination that futures revenue affected prices."[489] (emphasis in original)

7.362 Canada argues that Slocan demonstrated that its hedging activity in the United States affected price comparability. In support of this contention, we understand Canada to assert that Slocan's hedging activity only occurs in the United States and that the hedging activity was a deliberate effort to affect the pricing of its products sold in the US market only.

7.363 We note that the revenue at issue does not arise from particular sales transactions of softwood lumber as such, but rather that it is generated from the sale of the contracts, to be executed at a future date, themselves. This means that the very same contract can be sold and bought, or even re-bought by the original seller, a number of times before it is actually resulting in the physical delivery of the softwood lumber. We also note that it is stated in the DOC Verification Report of Slocan that:

> "[e]very futures contract that Slocan enters into carries an obligation to deliver 'physicals' – actual lumber – unless the contract is offset.
>
> When a futures contract expires without being offset, the Chicago Mercantile Exchange (CME) is the customer. Slocan ships the goods as directed by the CME. (...)
>
> Slocan engages in futures trading in order to hedge, not to speculate. The purpose of hedging is to reduce the risk of holding lumber inventory."[490]

7.364 Although the CME is located in the United States, the sellers and buyers of the futures contracts can also be located in Canada itself, as is the case with Slocan. Furthermore, we also note that eventual delivery of the softwood lumber in terms of the futures contracts can also take place in Canada.[491] Although we are aware that the revenue at issue has been generated through futures contracts which were offset and that no delivery has taken place, the product which forms the object of the contract can find its way back to the Canadian domestic market. In light of the above, it seems to us that questions can be raised as to whether the effect of Slocan's hedging activities can be isolated to the US market only, and that it therefore affects price comparability between the normal value and the export price. In addition, we note that the "greater flexibility to respond to changes in price trends" referred to by Canada in its submissions before us cannot, in our view, be isolated to the market of the country in which hedging takes place, i.e., the United States. Other than unsubstantiated assertions that "affects the other prices that Slocan is willing to offer and accept in th[e US] market", Canada has not presented evidence showing that hedging activities only impacted the setting of prices at which softwood lumber products are sold in the United States. In other words, Canada has not convinced us that the "price stability" effect implied in its submissions of the hedging activities did not play a role in the price setting of softwood lumber products when sold in Canada or any other

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[489] *Id*., para. 342, note 363.
[490] Exhibit CDA-119, Slocan's Cost Verification Report, p. VE02361.
[491] *Id.*, p. VE02366, when it is stated that:

> "[i]f your firm should wish to take delivery and it is in the U.S. or Canada east of the western boundaries of North Dakota, South Dakota, Nebraska, Kansas, Texas and Oklahoma, and the western boundary of Manitoba, Canada, the freight is the lowest published freight rate for 73-foot flatcars from Prince, British Columbia to your location."

market where Slocan sells them. We are therefore of the view that Canada has not established that there are "differences" between export price and normal value, which affect the "comparability" of these prices.

7.365 For the foregoing reasons, we conclude that an unbiased and objective investigating authority could have concluded that the adjustment requested by Slocan under Article 2.4, whether under the "conditions and terms of sale" or under the "any other differences" language, was not warranted and, hence, that such an investigating authority could have refused granting that adjustment. We therefore reject Canada's claim that the United States acted inconsistently with Article 2.4 of the *AD Agreement.*

7.366 In the alternative, Canada argues that, in accordance with Article 2.2.1.1, DOC should have offset financial expense with the futures profits in determining the constructed (normal) value.[492] The United States disagrees. In the view of the United States, it would have been inappropriate for DOC to disregard the treatment of those profits in Slocan's books and, instead, treat them as offsets to cost of production.

7.367 Article 2.2.1.1 reads as follows:

"

7.369 Canada argues that DOC's failure to grant an adjustment was inconsistent with the US obligations under Articles 2.2, 2.2.1 and 2.2.2 of the *AD Agreement*.[494] With respect to its Article 2.2 claim, Canada argues that that provision requires an investigating authority to use a reasonable amount for SG&A expenses.

7.370 Article 2.2 reads as follows:

> "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when (…) such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with (…) the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." (footnote omitted)

7.371 In accordance with this provision, the margin of dumping can in certain circumstances be determined by comparing the export price with the constructed (normal) value. This constructed (normal) value is to include the cost of production in the country of origin, plus a *reasonable* amount for SG&A costs, and for profits. While this provision requires that the amount for SG&A costs to be included in the constructed (normal) value must be reasonable, Canada has not argued on which grounds we should find that the amounts for SG&A costs determined by DOC were not reasonable. Canada merely claims that Article 2.2 has been violated by the United States, without providing a basis and arguments for its claim. We recall that, in our finding in paragraph 7.13, *supra*, we stated that it is for Canada, which has challenged the consistency of the US measure, to bear the burden of demonstrating that the measure is not consistent with – in this particular case – Article 2.2 of the *AD Agreement*. Furthermore, we recall that the role of a panel is not to make the case for either party. Canada has failed to present arguments in support of its claim that unreasonable amounts for SG&A costs were used by DOC in the case at issue when constructing (normal) value. We therefore reject Canada's claim that the United States has acted inconsistently with Article 2.2.

7.372 Canada has not advanced any argument in support of DOC's alleged violation of Article 2.2.2 of the *AD Agreement*. We recall that the role of a panel is not to make the case for either party. Canada has failed to present arguments in support of its claim. We therefore reject Canada's claim.[495]

7.373 Finally, Canada raises a consequential claim under Article 2.2.1. Canada asserts that an incorrect calculation of costs impacts the determination of which sales are useable in establishing normal value, contrary to Article 2.2.1. This claim must be rejected because Canada has not established that DOC determined costs incorrectly (*see* paragraph 7.368, *supra*).

Article 2.2.1.1 requires that "costs shall be determined on the basis of the records kept by the exporter", which we find DOC did. Thus, DOC acted in line with the mandate set forth in Article 2.2.1.1.

[494] Canada response to question 1 of the Panel, para. 1(vi). We note that, in the restatement of claims, Canada did not include Article 2.1 of the *AD Agreement* as one of the provisions allegedly violated by the United States. In view of this, we consider that the Article 2.1 claim is not bs inc paravof 2.1.1.9,,lue, contrar8 Tc 2217.25 -6.

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O. CLAIM REGARDING ARTICLE VI OF GATT 1994 AND ARTICLES 1, 9.3 AND 18.1 OF THE *AD AGREEMENT*

(a) Arguments of the Parties

7.374 **Canada** argues that, 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 dumpi

those claims which must be addressed in order to resolve the matter in issue in the dispute".[498] In light of the dependent nature of Canada's claim, we see no useful purpose to deciding it.[499] In particular, deciding such dependent claim will provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation on which it is dependent. In light of the foregoing, we consider it not necessary to examine Canada's claim under Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994*.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

8.1 In light of our findings, *supra*, we conclude that in the investigation at issue:

(a) the United States has acted inconsistently with:

(i) Article 2.4.2 of the *AD Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing";

(b) the United States has *not* acted inconsistently with:

(i) Article 5.2 of the *AD Agreement* in determining that the application contained such information as is required by Article 5.2;

(ii) Article 5.3 of the *AD Agreement* by determining that there was sufficient evidence of dumping to justify the initiation of the investigation;

(iii) Article 5.8 of the *AD Agreement* by not rejecting the application prior to initiation of the investigation, or by not terminating the investigation, due to the alleged insufficiency of the evidence on dumping;

(iv) Article 2.6 of the *AD Agreement* by determining there to be only a single like product and product under consideration;

(v) Article 2.4 of the *AD Agreement* by not granting an adjustment for differences in physical characteristics (differences in dimensions), as requested by some respondents;

(vi) Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement* in its calculation of the amounts for financial expense for softwood lumber in the case of Abitibi;

(vii) Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement* in its calculation of the amounts for general and administrative costs for softwood lumber in the case of Tembec;

(viii) Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement* in its calculation of the amounts for general and administrative costs for softwood lumber in the case of Weyerhaeuser;

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[498] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

[499] We note that a similar approach was followed by the panels in *Argentina – Poultry*, paras. 7.369-7.370; *Guatemala – Cement II*, para. 8.296; and *US – DRAMS*, para. 6.92.

(ix) Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 of the *AD Agreement*

Appellate Body *may suggest ways in which the Member concerned could implement the recommendations*". (emphasis added; footnotes omitted)

8.5 In light of the findings in paragraph 8.1, *supra*, we therefore recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the *AD Agreement*.

8.6 By virtue of Article 19.1, panels have discretion ("may") to suggest ways in which a Member could implement the relevant recommendation. However, a panel is not required to make a suggestion should it not deem it appropriate to do so. We do not consider it appropriate to make any recommendation to the Dispute Settlement Body in this regard.

IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL REGARDING CANADA'S CLAIM ON ZEROING

9.1 Although I join my colleagues on this Panel with respect to the findings on all other claims before us, I must respectfully disagree with the findings regarding zeroing (Claim 6). In my view, Canada has not established that zeroing is inconsistent either with the specific provisions of Article 2.4.2 or with the general "fair comparison" requirement of Article 2.4. At a minimum, I consider that the United States' interpretation of Articles 2.4.2 and 2.4 as not prohibiting zeroing is a permissible one. Accordingly, I would find that the United States did not act inconsistently with Articles 2.4.2 and 2.4 by reason of the zeroing of negative margins in the investigation underlying this dispute.

9.2 At the outset, I recall the standard of review that governs the work of panels (and the Appellate Body) when examining claims that a Member has violated the *AD Agreement*. Article 17.6(ii) provides that, where a provision of the *AD Agreement* admits of more than one permissible interpretation, a measure shall be found to be in conformity with that provision if it rests upon one of those permissible interpretations. Thus, our task is not to choose our preferred interpretation of Articles 2.4.2 and 2.4 of the *AD Agreement*, but to determine whether the interpretation advanced by the United States is permissible, under the rules of treaty interpretation applicable in WTO dispute settlement. Should we so find, then we must rule that the United States' actions in zeroing in this investigation are in conformity with Articles 2.4.2 and 2.4. In my view, Article 17.6(ii) applies at every step of our analysis: if any essential step in our reasoning depends upon an interpretation which is only one of multiple permissible ones, then we cannot find that the United States has acted inconsistently with the *AD Agreement*.

9.3 Although I disagree with my colleagues' findings on zeroing, I agree with their intermediate conclusion that multiple averaging is permitted by Article 2.4.2 of the *AD Agreement*. In my view, this is not a question of multiple permissible interpretations, but rather of the correct interpretation of that provision. My colleagues have fully explained the bases for their conclusions on multiple averaging, including the need to give meaning to the word "comparable", particularly given its inclusion in the text at a late stage in the negotiations; the appropriateness of reading the phrase "all comparable export transactions" as a whole in a manner which gives meaning to all elements; the relevance of the concept of "price comparability" in respect of Article 2.4 adjustments as context for understanding the term "comparable" in Article 2.4.2; the obvious illogic of interpreting Article 2.4.2 to require that comparisons be made either at the most aggregated (average to average) or least aggregated (individual to individual) level, while prohibiting comparisons at intermediate levels of aggregation[502]; and the consistency of multiple averaging with the overall objective of Article 2.4,

[502] It is difficult to understand why an investigating authority would be required either to compare the entire product under investigation to the entire foreign like product or individual export transactions to

which is to ensure a fair comparison. I would only add that the use of the term "margin*s* of dumping", although not conclusive as to whether multiple averaging is allowed, represents an additional element in the overall picture supporting the conclusion that multiple averaging is permitted.

9.4 While I see no need to repeat my colleagues' reasoning, I would like to emphasize the critical importance of multiple averaging in insuring a fair comparison. There will be differences between home market and export transactions in virtually all anti-dumping investigations. These differences may arise from, *inter alia*, physical differences, differences in level of trade, or date of sale.[503] While these differences may in principle be taken into account through adjustments, in many cases it simply will not be possible to identify and quantify their precise effects on price comparability. Further, there are a variety of different ways to get at the issue of price comparability and the making of adjustments. In the case of a wide variety of types or dates of sale, for example, even identifying which of the many groups should represent the standard towards which adjustments should aim will be unclear. Multiple averaging eliminates the need to consider such adjustments, thus reducing the influence of subjective judgment on outcomes. In my view, therefore, multiple averaging not only is not prohibited by the *AD Agreement*, but it is generally the most appropriate, fairest, most precise, most predictable, and in many cases the only possible way to insure a fair comparison.[504] We have to assume that the negotiators were aware of this as they negotiated the *AD Agreement*.

9.5 The reader may ask why it is necessary in this Report to discuss the permissibility of multiple averaging. After all, the parties agree that multiple averaging is permissible under Article 2.4.2[505], and the third parties have not contended otherwise.[506] The reason the discussion is relevant here is that Canada relies upon the Appellate Body ruling on zeroing in *EC – Bed Linen* in this dispute, and in my view that ruling is predicated, at least implicitly, on the conclusion that multiple averaging is prohibited by Article 2.4.2.[507] The Appellate Body's reasoning, which seems ultimately to be based on the view that by zeroing the EC calculated a weighted average that did not fully reflect the prices of some export transactions and thus fell afoul of the requirement to compare a weighted average normal value with a weighted average of all comparable export transactions, simply cannot be squared with a finding that multiple averaging is permitted. Thus, if multiple averaging *is* permitted – and the parties, my colleagues and I all agree that it is – one cannot simply rely upon the Appellate Body Report in *EC – Bed Linen* to conclude that zeroing is prohibited. Rather, we must consider whether there is some *alternative* basis to conclude that zeroing is prohibited by Article 2.4.2.

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individual home market transaction, while not being allowed to compare groups of export transactions to groups of comparable home market transactions.

[503] For purely practical reasons it can be excluded that the need for multiple averaging in the case of multiple models or types can be eliminated by conducting separate investigations for every model or type, since even a product under investigation which is defined in a seemingly narrow fashion, such as television sets or ball bearings of a specific dimension, may involve innumerable models or types.

[504] At the second meeting of the Panel with the parties, we asked representatives of both parties how often they had come across a case where there was only one step to do, i.e. where there was only one model, one level of trade and one period. The US representative responded that he was unaware of any investigation that fit that description, while the Canadian representative stated that he had experienced "one or two" single-stage cases.

[505] Canada argued before the Panel that its interpretation of Article 2.4.2 "... does not prohibit the establishment of margins of dumping with respect to particular models of a product." Canada response to question 31 from the Panel, para. 109.

[506] Japan noted that "[a] multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of administrative convenience to take into account the differences in physical characteristics among several models of a product." (Japan's third party oral statement, para. 5.75, *supra*)

[507] Thus, the Appellate Body stated that "[a]ll types or models falling within the scope of a "like" [illegible]

context that Article 2.4.2 is equally silent as to how to aggregate the results of transaction-by-transaction comparisons under the second methodology set forth in that provision. Article 2.4.2 provides that the existence of margins of dumping may be established "by a comparison of normal value and export prices on a transaction by transaction basis". Clearly, nothing in Article 2.4.2 gives specific guidance on how the results of individual transaction comparisons are to be aggregated, and the textual basis relied on by my colleagues for prohibiting zeroing when aggregating the results of multiple average-to-average comparisons ("all comparable export transactions") on its face does not apply to the transaction-by-transaction methodology. It is therefore clear that Article 2.4.2 does not prohibit zeroing in the context of the transaction-by-transaction methodology.[508] It would be very odd indeed for the drafters to have prohibited zeroing when aggregating the results of multiple average to average comparisons, while allowing it to be used when aggregating the results of comparisons performed on a transaction by transaction basis.[509]

9.11 The use of multiple averaging must have been widely known to negotiators, as the practice was the norm under the *Tokyo Round Anti-Dumping Code*. The negotiators should also have been fully aware of the zeroing issue.[510] They certainly should have realized that simply requiring average-to-average or transaction-by-transaction comparisons would not resolve the issue of aggregation in the subsequent stage. But if the drafters did not intend to prohibit zeroing, then what is the purpose of Article 2.4.2? In my view, Article 2.4.2 was intended to address a related but distinct issue from that of zeroing, i.e., the question of average to individual comparisons. Prior to the Uruguay Round, many investigating authorities compared individual export transactions to an average normal value. On its face, the purpose of Article 2.4.2 seems to be to require that, except in specified situations, there be symmetry in the comparisons made by investigating authorities, i.e., that Members *either* compare on an average to average *or* a transaction to transaction basis. Only where particular conditions are met may a Member perform a comparison of prices of individual export transactions to an average normal value.

9.12 I recall that, under Article 17.6(ii) of the *AD Agreement*, a panel may not find a measure to be inconsistent with a provision of the *AD Agreement* if that measure is based on a permissible interpretation of that provision. In this case, I consider that the US interpretation of Article 2.4.2 as not prohibiting zeroing is a permissible one. Thus, for the reasons set forth above, I would find that the application by DOC of "zeroing" in this case was not inconsistent with Article 2.4.2 of the *AD Agreement*.

9.13 Some may be troubled by the prospect that no specific rules exist regarding the manner in which the results of multiple average to average (and transaction-by-transaction) comparisons may be aggregated. The general provision of Article 2.4 is however still available, as discussed infra. In any event, the establishment of an anti-dumping margin is a highly complex exercise. Although Article 2 of the current *AD Agreement* is more detailed that its Tokyo Round predecessor, many aspects of margin calculation are not specifically addressed. If Members consider that the issue of how to aggregate the results of multiple comparisons is a lacuna that needs to be filled, then they should negotiate such rules in the appropriate forum. Dispute settlement involves the interpretation of rules

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[508] Nor, for the reasons set forth in paras. 9.14 to 9.24 *infra*, would zeroing be prohibited under a general "fair comparison" requirement under Article 2.4.

[509] My colleagues decline to address the issue of zeroing in the context of individual to individual transactions on the grounds that it is not within the Panel's terms of reference. While it is certainly true that no

agreed by Members. It cannot and must not be used as a substitute for rule-making through negotiation.

9.14 Canada also claims that the United States has violated the "fair comparison" requirement of Article 2.4 of the *AD Agreement* by the application of zeroing in this case, because zeroing unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value than to those for which the export price is greater than the normal value. Canada finds support for its position in a statement by the Appellate Body in *EC – Bed Linen*.[511] Having found that zeroing was inconsistent with Article 2.4.2, my colleagues exercised judicial economy and declined to rule on this claim. In light of my view that Article 2.4.2 does not prohibit zeroing, however, it is appropriate for me to proceed to a consideration of this alternative claim by Canada.

9.15 I recall that Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal value." There has not to date been any substantial analysis in WTO dispute settlement as to the precise legal role of this language, including whether it establishes an independent legal obligation or rather serves only to inform interpretation of other operative provisions of Article 2. Much less has there been any significant consideration of the manner in which it is to be interpreted and applied.[512] Nor did the parties provide significant argumentation on this issue. That said, the first sentence of Article 2.4 appears to be drafted in a manner which implies that it is independently operational and legally binding[513], and I will thus proceed on that assumption for the purposes of my consideration of this claim.

9.16 In terms of approach, I believe that a claim based on a highly general test such as "fair comparison" should be approached with caution by treaty interpreters. The concept of fairness is the abstract, highly subjective, and a too-ready reliance on the "fair comparison" requirement could 5fted.75 TDi7.ating wasrcise96.1047 Tc 1.6090 Tw (546rms of 26.2eMemb5 Tabw sub6.2n" terp of bilitinternegot

dumping. Advocates of the alternative approach argue that the harm caused to domestic producers by a dumped transaction – e.g., the loss of a sale or sale at a lower price than would have otherwise occurred – is not undone simply because another export transaction is made at greater than normal value, nor is the damage caused by dumping of a particular type or model undone simply because another model is sold at greater than normal value. Both approaches have strengths and weaknesses.

9.22 My task is not of course to decide which conceptual approach *I* prefer, but to examine whether the *AD Agreement* shows such a preference. The Agreement TD /-12.7drquirntcomwTD -0.045 064Tn1

9.24 For the foregoing reasons, and taking into account the standard of review under Article 17.6(ii), I would conclude that Canada has not established that the application of zeroing in the underlying investigation methodology was inconsistent with the United States' obligation under Article 2.4 to conduct a "fair comparison."

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