ANNEX A

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

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

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

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

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

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

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

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

[2] *Egypt –*

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

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

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

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

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

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

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

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

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

3. A complete copy of Exhibit CDA-11 is provided with the exhibits to these responses. A complete copy of the 3-volume transcript of the hearing of the NAFTA Chapter 19 binational panel reviewing the final anti-dumping determination containing approximately 1,000 pages, from which Exhibit CDA-4 is taken, is being provided in .pdf format on CDi

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

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

B. ARTICLES 5.2/5.3

To Canada:

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

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

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

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

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

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

20. In short, the *Random Lengths* reported prices are estimates or judgments based on informal enquiries conducted by *Random Lengths* personnel. Informal estimates of this sort are not actual transaction prices or price quotations. Such estimates did not amount to sufficient evidence to support

information outside of the *Random Lengths* data, relied on by Commerce to initiate the investigation.[23]

First US "Price Quote"

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

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

Second US "Price Quote"

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

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

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

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

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

[23] Ibid.

[24] Petition, Vol. VI, Exhibit VI.C-14, "US Price Quote" (Exhibit CDA-45).

[25] Petition, Vol. III, at III-10 (Exhibit CDA-37).

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

[27] Petition, Vol. VI, Exhibit VI.D-14 (public version, as originally filed) (Exhibit US-16).

[28] In addition, the affiant assumed that "the mark-up received by lumber wholesalers in the United States has historically been five (5) per cent of the purchase price". See *Ibid*.

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

30. The Application, however, upon which Commerce relied at the time of initiation, contained no evidence of dumping of products falling within five of the Applicant's self-described seven productly abnf initiation

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

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

37. There was inadequate and insufficient information before Commerce concerning product-specific costs. Commerce made its initiation decision without any evidence before it of how the Applicant calculated manufacturing costs for the SPF species or of how company costs were allocated to the specific 2x4 kiln-dried dimension or stud lumber.[39]

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

52.

Agreement, including the *Anti-Dumping Agreement*, sets out the obligations of WTO Members, not private parties.[53]

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

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

C. ARTICLE 5.8

To Canada:

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

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

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

57. Viewed in this light it is clear this is a case in which information presented after the decision to initiate could have invalidated the deficient information on which Commerce relied in its initiation. Moreover, it is telling that Commerce was advised of the existence of significant and extensive actual price and cost information readily available to the Applicants five days **before** the notice initiating the investigation was published[56] and 30 days before the respondents were selected and anti-dumping questionnaires were issued. It is apparent Commerce would have had ample time to collect and analyze the price and cost information possessed by Weldwood, for example, and to re-evaluate its

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

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

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

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

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

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

D. ARTICLE 2.6

To Canada:

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

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[57] First Written Submission of the United States, at para. 68.

[58] Weldwood was one of the 15 largest producers and exporters of softwood lumber that received a mini-questionnaire from Commerce on 25 April 2001. *See* Letter from Hunton & Williams re Softwood Lumber from Canada with attached Questionnaire Response of Weldwood of Canada Limited, 3 May 2001 (Exhibit CDA-138

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

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

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

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

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

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

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

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

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

E. ALLOWANCE FOR DIFFERENCES IN DIMENSIONS

To Canada:

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

75. See response to Question 22 below.

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

76. Canada will address these two questions together as both address the nature of argument and information presented by the Canadian and other parties in the underlying proceeding before Commerce. Before detailing all 5failed t(afBefore detaili) 1vment a Tc 0.1cbpj T* -0.u51008 Te 0.3393mensio

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

79. In its October 2001 preliminary determination, Commerce confirmed the importance it attached to dimension. In its preliminary determination, Commerce limited its price-to-price comparisons only to identical merchandise, with identical defined so as to include products that had

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

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

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

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

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

- The Petition itself acknowledged that dimension affects the price of lumber. It noted that "a very precise comparison of products is necessary if the Commission hopes to develop useful price information."(emphasis in original).[64] The Petition suggested

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

sides planed), (9) edge trimming (eased or square edges), and end trimming (precision end trimmed or not).[71] (emphasis added)

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

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

- BCLTC responds to the applicant's proposal, and other respondents all adopt the BCLTC response. It notes that both the applicant and respondents have identified thickness, width and length as relevant and important characteristics.

- Respondent's position on the relative importance of characteristics affecting price comparability is as follows: "In sum, the product matching criteria and hierarchy for the products under investigation should be: 1) species; 2) lumber type; 3) treatment; 4) moisture content; 5) grade; *6) thickness and width; 7) length;* 8) surface treatment; and 9) end trim."[74] (emphasis added).

- Weyerhaeuser specifically identified dimension as a physical product characteristic that affects price comparisons, stating: "Petitioners also propose to rank width and thickness separately and apparently propose to rank width first. This does not follow industry practice, nor market valuation. Different size products are generally not substituted for each other and are not directly comparable, and thickness is the more important factor. (For example, a 2x4 is even less similar to a 4x4 than it is to a 2x6.)"[75]:

- The applicant expressly recognizes the link between dimension and price. It addresses so-called "random-length" transactions, circumstances in which a customer purchases, at a single average price, lumber of a specified thickness and width, but with a range of lengths, since it wants to offer a range of lengths to its customer. It contends that "comparisons of transactions sold on a R/L [random length] basis is not appropriate if those comparisons do not take into account the *length* composition of the transaction (number of pieces of each length), and *the different market value for pieces of different lengths . . . .*"[76] (emphasis added). Moreover, with respect to

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

[72] *Ibid.*, at 17 [Arnold & Porter Letter to the Department of Commerce, "Softwood Lumber from Canada: Anti-

precision end trimmed ("PET") lumber, the applicant notes that "PET lumber should be separately identified in the model match because the length is specified within narrow tolerance and that distinction *is an important determinant of the customer's choice of product*."[77] (emphasis added)

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

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

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

- Abitibi reiterated that thickness, width and length each should be taken into account, in that order (and after considering grade and moisture content, but before surface finish, end trimming, and further processing). For width, Abitibi noted that value differences were important, but differed. It noted for example that "the value difference between a 2x6 and a 2x8 is less that the between a 2x6 and a 2x4."[84] For length, Abitibi noted that length affected commercial value, but that there certain break points: "There tend to be significant breaks in the commercial value of softwood lumber products of different lengths at two points: 16-foot lengths and 22-foot lengths. Abitibi suggests, therefore, that the Department divide the length criterion into three groups: less than 16 feet, 16 feet to less than 22 feet, and 22 feet plus."[85]

- As to the calculation of an adjustment (DIFMER) when non-identical products are compared, Abitibi affirmed "its willingness to provide such data as it may have available that the Department might require, but expressly seeks the Department's guidance as to what additional data Abitibi should submit to permit the calculation of the appropriate value-based difmers. We could locate no published decision indicating how the Department calculates value-based difmers, much less what data it requires to do so, and thus need guidance on this issue."[86] Commerce did not respond to this express request for guidance.

- Canfor reiterated that thickness, width and length (family code and length) should be taken into account, in that order (and after considering grade and moisture content, but before surface finish, end trimming, and further processing). Canfor further noted that "[g]iven the significant differences in application, cost and value, among the

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

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

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

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

different lengths of lumber sold, Canfor believes it is appropriate to establish groups, or families, of lengths for product matching purposes."[87]

- Slocan noted that thickness and width should be treated as separate characteristics, and also argued for grouping lengths into families: "in general Slocan believes that the 2-foot increments defined by the Department can be compared to their neighbors. However, there is a clear price break between 14' and the highly desirable 16' lengths, and between 16' – 20' lengths and 22' and above. There are consistent price gaps between 14' and under and 16' and higher, and between 16' –20', and 22' and above. Therefore Slocan proposes that the weighting be set up to make allowance for this commercial fact . . . ."[88]

- Tembec pointed to Commerce's legal authority to make allowances for differences in physical characteristics based on market values, and stated that "many of the physical differences between similar lumber products are not reflected in production costs, but result in significant differences in market valuation."[89] Tembec also contended that "when identical matches are not available the Department should base Normal Value on similar matches with DIFMERs calculated based on difference in variable cost supplemented with value-based DIFMERs as needed. Should the Department determine that it needs additional information . . . it should request that information in a supplemental questionnaire . . . ."[90]

- Weyerhaeuser reiterated that width, thickness, and length are physical differences that create differences in realizable value and urged that those characteristics be included in the product characteristics hierarchy. Weyerhaeuser noted again, as it had in its earlier submission, that: "Commercially, thickness is generally more important than width. Products of different thickness are often used for fundamentally different applications and thus are sold under different market conditions."[91] ded

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

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

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

> In the circumstances of this case, and to the extent the Department relies upon average production costs by mill, the Department should compute difmers based upon differences in market value. *See* 19 C.F.R. § 351.411(b);

- Based on these facts, Abitibi explicitly contended that (1) Commerce cannot limit its price-

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

- Even the applicant acknowledged that when making similar comparisons, Commerce would have to determine "whether a longer or shorter product or a wider or narrower product would be most appropriate to match when the identical product was not available."[115]

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

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

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

- In the final determination, Commerce, "based upon [the] submissions, as well as the Department's analysis, width and thickness were numbered sequentially and matched to similar products."[117]

- With respect to length, Commerce accepted respondents' arguments, and grouped products into length bands for matching purposes. Specifically, Commerce established three length bands: (1) less than 16 feet, (2) 16 feet to less than 22 feet, and (3) 22 feet and above.[118] For matching purposes, Commerce would first match within a band before matching to a different band. This recognizes that not all lengths are of equal value or are equally comparable. To the contrary, the band approach recognizes the higher value of 16 foot and 22 foot lumber relative to lower length lumber. Thus, 16 foot lumber could not be matched equally to 14 foot and 18 foot lengths – it would be matched to 18 foot only.

- Commerce explicitly recognized that "in this case . . . differences in dimension (*i.e.*, length, width or thickness) . . . could result in differences in market value."[119]

- Inconsistently with its foregoing findings and conclusions, Commerce elected not to calculate a DIFMER for differences in dimension. Although Commerce stated that "there is no information on the record by which we can calculate a difmer adjustment

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

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

[116] *Ibid*., at 136 [Rebuttal Brief on Behalf of the Petitioner at [illegible]

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

> **"Canada's examples of price variability, allegedly based on size, are without any citation to specific pieces of record evidence presented to Commerce. [footnote excluded] To the extent that these claims are based on analyses not presented to Commerce during the investigation, they cannot provide a basis for review of Commerce's conclusion on the record before it."**

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

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

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

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

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

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

the vast majority of non-identical comparisons made by Commerce were of products that differed only in length or width.

96. The United States claims that there were few non-identical comparisons made, that the few non-identical comparisons it made were of very similar dimension products, and thus little distortion could exist in the overall margin calculation. The facts show otherwise.

97. Following is a table showing, for each Canadian respondent, the number of price-to-price comparisons of (1) identical products and (2) non-identical products. The table also shows the average margins of dumping found for the identical and non-identical comparisons. As can be seen, the number of non-identical comparisons made by Commerce was significant. Indeed, for several companies Commerce made more non-identical comparisons than identical comparisons. Moreover, the impact of non-identical comparisons on the overall margin of dumping found also was significant. In fact, the non-identical comparisons generated [[ ]] of Tembec's overall margin. The margins of dumping found for non-identical comparisons was far higher, for every company, than the margins of dumping found for identical comparisons, highlighting the very distortion of which Canada complains.

CANADIAN RESPONDENT	MATCH TYPE	NUMBER OF COMPARISONS	WEIGHTED AVERAGE MARGIN
[[			]]
[[			]]
[[			]]
[[			]]
[[			]]
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Source: Analysis Memorandum for Abitibi-Consolidated, Output of Margin Programme (unnumbered page) (25 April 2002); Analysis Memorandum for Canfor Corporation did not provide a summary by match type; therefore the data is based on a computer run of Canfor's data; Anti-Dumping Duty Investigation on Certain Softwood Lumber Products from Canada - Analysis Memorandum for the Amended Final Determination for Slocan Forest Products Ltd. (Slocan), Output of Margin Programme at 35 (25 April 2002); Antidumping Duty Investigation on Certain Softwood Lumber Products from Canada – Analysis Memorandum for the Amended Final Determination for Tembec Forest Products Ltd. (Tembec), Output of Margin Programme at 42 (26 April 2002); Analysis Memorandum for West Fraser Mills Ltd., Output of Margin Programme at 25 (25 April 2002);

Analysis Memorandum for Weyerhaeuser Company, Output of Margin Programme (unnumbered page) (25 April 2002).[123]

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

TEMBEC

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of US Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[					]]
[[					]]
[[					]]

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Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of US Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]
[[					]]

Code: S4S = surfaced on four sides
EE = eased edges

WEYERHAEUSER

Dumping Margin	Identical Characteristics	Dimension of US Product	Dimension of Non-Identical Canadian Product Compared by Commerce	Home Market (Canadian) Price of US Product	Home Market (Canadian) Price of Non-Identical Canadian Product Compared by Commerce
[[[[					]]]]
[[					]]

[redacted]

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

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

103. In Canada's view, zeroing does not produce a fair comparison consistent with Article 2.4 because it does not average all model-specific margins equally, and thus the US practice is inconsistent with the obligations of the United States under Article 2.4. Canada notes that the Appellate Body agreed with this position in *EC – Bed Linen*, where it stated it was "of the view that a comparison between export price and normal value that does

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

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

109. Contrary to the allegation of the United States, Canada's interpretation of Article 2.4.2 does not prohibit the establishment of margins of dumping with respect to particular models of a product. Rather, the direction to conduct a "comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" involving the like product operates to require the authority to compare each weighted average normal value with all export transactions that are fairly comparable with that normal value, and **not to compare** those export transactions tnted i5 0 TDrmediate st

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

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

G. COMPANY-SPECIFIC ISSUES

G.1 Common Questions on Various Company-Specific Issues

To Canada:

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

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

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

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

116. Please see attached Annex I.

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

> **"[t]his Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as**

authorities "consider all available evidence on the proper allocation of costs". This requirement, in combination with the requirement that investigating authorities properly establish the facts and evaluate those facts in an "unbiased and objective" manner, prohibits the use of standard cost calculation methodologies in all cases, without regard to the particular facts of each case. This was confirmed by the panel in

To both parties:

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

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

123. By-product revenue offsets are an essential part of the calculation of the costs of the main product, in this case lumber. As noted above, the United States has adopted a general rule that transactions between affiliated parties may be disregarded when calculating costs, if those transactions do not fairly reflect market prices. To ensure that the requirements of Article 2.2.1.1 are met it is necessary for the by-product revenue offset to reflect the market value of those by-products. Indeed, unless the by-product offset reasonably reflects the markfa value ofr the by

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

Tembec:

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

Weyerhaeuser Company:

127. Weyerhaeuser Canada Limited, the producer and exporter of Canadian softwood lumber in Commerce's investigation, is a Canadian subsidiary of Weyerhaeuser Company ("Weyerhaeuser US"). Article 2.2.2 requires Commerce to consider only "actual data pertaining to production and sales … of the like product by the *exporter or producer under investigation*." In accordance with its normal practice, Commerce included a part of the parent-company G&A in the subsidiary's G&A calculation. This is reasonable to the extent that the parent company incurs expenses that would ordinarily fall on Weyerhaeuser Canada if Weyerhaeuser US did not exist (*e.g.*, Director salaries). However, Canada takes issue with the laremal prac Tw ( ) Tj 3.75 0 TD /F0 11.25 Tf -0.1129 Tc 0.300

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

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

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

G.2 Calculation Financial Expenses of Abitibi

To Canada:

47.

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

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

Could Canada please direct the Panel to the basis for this statement, that is, where in the record can the Panel find the document (indicate page, paragraph and sentence) in which DOC made the above-quoted finding? If this document has not been Tjtclud in the cali Wr thexhi ot

142.

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

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

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

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

54. Ple **: / 2 T c 2 . 9 9 1 4 2 R t a l e s D 6 e m e n f r . a l l 0 o f T h j e d i v i s i o n s 5 0 T D 0 T c 0 . 1 8 7 5**

155. The Forest Products Group data did not have to be "supplemented" to establish a G&A amount for softwood lumber because Tembec recorded G&A expenses for its headquarters operations on each of its products group's accounting records in the ordinary course of business. Commerce

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

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

- Final Determination:[154] Commerce rejected this argument in its Final Determination, stating its rationale for reclassifying the expense for the first time:

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

- In Weyerhaeuser's Ministerial Error Allegation Letter,[155] Weyerhaeuser stated that Commerce's position was in error:

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

159. Weyerhaeuser makes two specific claims:

- Commerce acted contrary to Article 2.2.2 by including cost data that did not pertain to the production and sale of the product under investigation. Weyerhaeuser argued before Commerce that the hardboard siding expense was not general in nature and therefore not attributable to the company as a whole.[156] It was a cost that did not pertain to the production and sale of softwood lumber in Canada for Weyerhaeuser Canada and therefore incorrectly increased the G&A cost attributable to lumber. Commerce's conclusion to the contrary was not a proper establishment of the facts, nor an evaluation of the facts that was unbiased and objective.

- Commerce violated Article 2.2.1.1 by improperly ignoring Weyerhaeuser's books and record and establishing G&A costs for Weyerhaeuser Canada that did not "reasonably reflect" its costs for producing and selling softwood lumber.Weyerhaeuser did not treat this settlement fund as a general expense on its records as Commerce indicated. It is a separate line item in its corporate financial statement.[157] Nor should this expense be treated as a general legal expense. Weyerhaeuser US characterized its general legal expenses as G&A in its financial statement.[158] Rather, the company recorded the hardboard siding expense as a separate line item – not in G&A – and given its clear association with the production and sale of non-like product, should not have been included in Commerce's G&A calculation in this case. By including this cost, Commerce calculated a cost that did not "reasonably reflect the costs associated with the production and sale" of softwood lumber.

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

> **"[DOC] found that because this cost was incurred years after the production of the hardboard siding at issue and was not part of the production process for that product, it could not properly be considered a cost uniquely allocable to hardboard siding production. In addition, Weyerhaeuser had treated it as a general cost on its audited financial statement." (footnotes omitted)**

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

[156] Weyerhaeuser Case Brief (13 February 2002), at 63-64 (Exhibit CDA-98 – Contains Business Confidential Information).
[157] Weyerhaeuser US Section A Questionnaire Response (22 June 2001), Exhibit A-15, at 53 (Exhibit CDA-101).
[158] Weyerhaeuser Cost Verification Exhibit 26, at 26 (Exhibit CDA-121 – Contains Business Confidential Information).

under investigation. G&A . . . expense items are not considered fungible in nature. Thus . . . expenses realized by a related company do[] not necessarily affect the general activity of the

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

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

To Canada:

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

> **"Canada claims Commerce should have relied upon sales by other respondents to non-affiliates in B.C. Canada's argument that Commerce should have preferred one source of evidence over another effectively is an improper request for this Panel to find facts *de novo.* Moreover, the evidentiary preference expressed directly contravenes Article 2.2.1.1, which instructs investigating authorities to rely on an exporter's or producer's records where they are available. In this case, such records were available." (footnote omitted)**

165. Contrary to this US assertion, Canada is not asking the panel to find that Commerce should have preferred one source of evidence on BC market prices (*i.e.*, other respondents' woodchip sales to unaffiliated parties) over another source of evidence on BC market price (*i.e.*, West Fraser's tiny quantity of woodchip sales to unaffiliated parties). Rather, Canada argues that Commerce was required to consider *all* record evidence relevant to the issue of whether West Fraser's affiliated woodchip sales were made at inflated, non-market prices, *including* evidence on the prices charged by other respondents in British Columbia for their sales to unaffiliated purchasers. That argument is fully consistent with the finding of the panel in *United States – Hot Rolled Steel* that, in determining

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

> **"[c]ontrary to the arguments made by Canada, [footnote omitted] West Fraser made no argument that the long-term contract by which one of its mills made sales during the investigation period did not represent valid market prices, nor did it make any argument about the arm's length nature of the sales made from its other mill. [footnote omitted] Thus, if the unaffiliated sales quantities [[ ]] in B.C. were "too low" in the view of West Fraser, it never made that claim to Commerce."**

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

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

> Company officials explained that the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred during April

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

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

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

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

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

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

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

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

Commerce."[174] In a footnote, the United States also states that such "additional information" was "superfluous" because "West Fraser's BC chip sales to affiliated parties had already failed Commerce's primary test."[175]

174. The United States' argument misses the point. Canada did not claim that QRP data were "more relevant." Rather, Canada argues that Commerce unreasonably disregarded chip sales made by West Fraser's large sawmill in Quesnel, BC (West Fraser Mills)

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

- The Cost Verification Report at page 25[179] and Exhibit 14 to that Report displays the huge price differential between market prices for woodchips and Tembec's internal transfer price. Exhibit 14 to the Cost Verification Report[180] in its entirety demonstrates that the internal prices were set well below market prices, but the point is most evident on pages 2 and 9, which summarizes the information in the underlying source documents that constitute the bulk of the exhibit. Page 2 is a copy included in the verification exhibits of a by-product revenue calculation worksheet from Tembec's questionnaire response. The third line of the worksheet reports the total quantity of woodchips that each of Tembec's British Columbia sawmills transferred to affiliated parties. The total for all three mills was [[ ]] BDMT (bone dried metric tons). The sixth line reports the sales value based on the internally set transfer prices (as noted in the handwriting of the Commerce verifier) which for the three mills combined equalled $[[ ]]. Dividing the sixth line by the third line equals the transfer price of $[[ ]] per BDMT. The first two lines on page 9 report the total sales value and quantity for Tembec's woodchip sales in British Columbia to unaffiliated parties and the source of that information. The handwriting on this page is that of the Commerce verifier and the letter "I" on these two lines indicates that the verifier traced the amounts reported in these lines to the original invoices. The figure of $[[ ]] per BDMT reported in the third line is the per unit unaffiliated sales price derived by dividing the first line by the second line.[181]

- This price difference had been explained as arising for internal accounting purposes in Tembec's verified Questionnaire Response, dated 23 July 2001, at D-24 where Tembec stated "[[ ]]"[182]

- In its Second Supplemental Questionnaire Response, dated 16 November 2001 at SD-20 through SD-23 Tembec again explained "[[ ]]."[183]

- Tembec's noted in its case brief before the agency, dated 12 February 2002, that "In the Preliminary Determination, the Department correctly recognized that Tembec's intra-company transfers of chips did not reflect market prices."[184]

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

[179] *Ibid.* (Exhibit CDA-112 – Contains Business Confidential Information).

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

[181] *Ibid.*, at 9. (Exhibit CDA-114)

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

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

[184] Tembec Rebuttal Brief (19 February 2002), at 19. (Exhibit CDA-153 – Contains Business Confidential Information).

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

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

178. Article 2.2.1.1 specifies that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and

determination. This alleged fact was not verified by Commerce, it appears nowhere in the Cost Verification Report, it is directly contrary to the Cost Calculation Memorandum (which concluded that "the company's internal transfer prices did not give preferential treatment to the sawmills"), see Commerce Memorandum on Tembec Cost Calculation Adjustments for the Final Determination (21 March 2002), at 2, Exhibit US-58, and is contrary to Commerce's ultimate conclusion." (footnote excluded)

180.

188. Article 2.4 of the *Anti-Dumping Agreement* provides that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Slocan's futures hedging activity was a condition of sale unique to the US market that affected prices of all sales in that market. Therefore, the revenues (or losses) earned from that activity constituted a difference between the Canadian and US markets affecting price comparability. Article 2.4 mandates that in such circumstances, an administering authority must make an adjustment. As Commerce itself noted in its final determination, Slocan's futures contracts were related to its core business of selling lumber. In particular, its futures contracts related directly to its export sales of lumber to the US market.

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

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

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

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

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

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[186] Slocan's Sections B-D Questionnaire Response (24 July 2001), at C-12 to C-13, (Exhibit CDA-154 – Contains Business Confidential Information).

[187] *See Ibid*., at B-14 (CHANNELH field).

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

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

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

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

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

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

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

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

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

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

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

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

196. In response, Slocan argued that *if* Commerce continued to refuse to treat the revenues as part of direct selling expenses, then it should at least follow through on its decision to treat them as "investment revenues" by applying them as an offset to financial expenses.[195] Thus, Slocan's argument

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

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

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

80. [illegible]

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

ANNEX I

G.1 Common Questions on Various Company-Specific Issues

To Canada:

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

1. Abitibi

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Abitibi: Allocation of Financial Expenses	Beginning with its *first* cost questionnaire response, Abitibi argued that Commerce's COGS allocation methodology, required by		

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Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
	methodology is unreasonable."); Abitibi 12 Feb. 2002 Case Brief to Commerce, at 50-55, Exhibit CDA-81 ("under any measure, the capital requirements of pulp and paper operations are substantially greater than those of lumber operations. The Department's COGS methodology unfairly assumes that each dollar of cost of these different operations bears the same financial expense, which is demonstrably untrue for Abitibi.")	days. Plainly, by any measure, the financing needs of these different products are not proportionate to cost of sales, and an allocation based on cost of sales is highly distortive." Abitibi 23 July 2001 Response at D-45 Exhibit CDA-83. In its Case Brief, Abitibi provided a table summarizing the record data. *See* Abitibi's 12 Feb. 2002 Case Brief at 54 Exhibit CDA-81.	the case, but rather refley -0 Tw1 Tw ((2. TD -0.2467 Tc 5 Tw (AT ET 21.7 In2293 Twng

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

2. Tembec

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
Tembec G&A	Tembec stated in its initial questionnaire response that it was reporting its G&A expenses based on the expenses recorded on the books of its Forest Products Group, which Tembec noted is the business unit within which all of the subject merchandise was produced. The response identified the cost categories covered by the G&A data, which include, among many other cost categories, administration fee – Head Office. Tembec's 12 February 2002 case brief argued, based on the US statutory provision that implements Article 2.2.2, that G&A must be based on "actual data pertaining to production and sales of the foreign like product by the exporter in question;" that the company-wide data did not meet this requirement because most of Tembec's sales are in pulp, paper and chemicals; but that the verified data from the Forest Products Group would meet the legal requirements.	Response of Tembec Inc to Section D of the Department of Commerce Antidumping	meet Tw (e 4.2no defTw (Tse i909 TAc Tc 8) Tj 0 Tc -0.1875 nts) Tf 6

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

3. Weyerhaeuser

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

Issue	Summary of Argument

4. West Fraser (by-product):

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection
West Fraser By-product Revenue Offset	During cost verification, West Fraser explained that Commerce's preliminary decision to compare the average prices of West Fraser's sales to affiliated and unaffiliated parties across all provinces (to determine whether the former had been made at market prices) was unreasonable, since the price difference Commerce observed resulted from timing differences and local supply and		

Issue	Summary of Argument	Record Evidence	Summary of DOC Reasons Given for Rejection

Issue

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

ANNEX A-2

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

(30 June 2003)

Questions to the Parties

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

A. GENERAL ISSUES

To the US:

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

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

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

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

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

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

6. A fourth example is Canada's claim regarding product under

To both parties:

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

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

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

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

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[2] Egypt– Steel Rebar Panel Report, para. 7.2.

[3] *Id.* at para. 7.3.

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

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

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

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

> **"[t]he product under consideration was a commodity-type product for which industry-wide data were likely to provide a more reliable representation than company-specific data for a single company responsible for only a small fraction of the Canadian exports to the United States."**

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

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

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

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

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[11] *See* Exhibit US-62.

[12] *See* Petition Exhibit IB-9 (Exhibit US-63).

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

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

15. Information on export prices was reasonably available to the applicant and was provided in the application.[14] Because the export prices that were provided in the application (including the full

19. First, at paragraph 52 of its First Written Submission, the United States discussed the use of *Random Lengths* pricing data for *Eastern* S-P-F "delivered to Toronto" as a source of Canadian home market softwood lumber prices used to demonstrate the existence of below-cost sales in the Canadian market. In footnote 46, the United States explained that "[a]lthough Canada has claimed that these prices, 'commingle', US and Canadian data, the publishers of *Random Lengths* have expressly stated that the prices in the "Toronto delivery" column are based *exclusively* on production from mills in Canada." As authority for this, the United States re

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

To both parties:

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

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

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

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

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

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

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

32. The alternatives described in Article 5.2(iii) are not interchangeable. With respect to identifying normal value, for example, home market prices in the ordinary course of trade are normally preferable to the other two categories. However, if there are not sufficient sales in the home market for the home market to provide a viable basis of comparison, or if the home market sales database does not offer, because of significant volumes of below-cost sales, a reliable indication of sales made in the ordinary course of trade, it is "appropriate" to use sales in third country markets or constructed value, respectively, even if there are some home market prices on the record. In other

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

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

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

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

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

27. Article 2.4 provides that: "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in (...) physical characteristics." Could the text be interpreted to suggest that once differences in physical characteristics have been found, price comparability is automatically

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

48. In paragraph 7 of its First Oral Statement, Japan mis-characterizes the US argument. The United States does not suggest that Article 2.4.2 provides "for calculation of the margin of dumping *only* on a model-specific basis";[35] rather, the United States argues that model-specific, level-of-trade-specific comparisons are permitted under Article 2.4.2. In fact, two of the three methodologies in Article 2.4.2 prov

54. In paragraph 10, Japan mis-characterizes the position of the United States with respect to the issue of comparability. The determination of the scope of the product under consideration is distinct from the determination of price comparability between weighted-average export transactions and weighted-average normal values under Article 2.4.2. Japan incorrectly suggests that the United States argued that not all softwood lumber was comparable for purposes of Article 2.4.2. As the United States discussed in paragraphs 162 and 163 of its First Written Submission,0.0359lof Art sofmodelftwood lin p

G. COMPANY-SPECIFIC ISSUES

G.1 Common Questions on Various Company-Specific Issues

To the US:

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

- **Canada's allegations in various paras. of its *First Oral Statement* that statements containing factual data presented by the US in its *First Written Submission* were incorrect (see for instance para. 94 of Canada's *First Oral Statement*) and**

- **Canada's contention that DOC "did not consider the merits of the record evidence" submitted by certain exporters concerning the company-specific issues before the Panel (see for instance para. 79 of Canada's *First Oral Statement*).**

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

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

Abitibi G&A

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

61. Canada's claim – that Commerce failed to consider all relevant evidence before selecting an allocation method – is incorrect. As discussed fully in Comment 15 of the Final Determination, Commerce declin

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

Tembec G&A

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

Weyerhaeuser G&A

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

65. What is in dispute is Commerce's decision to include in Weyerhaeuser's G&A an apportioned amount of the litigation settlement charges at issue. Commerce did so based on its reasoning that business charges of this nature should be allocated "over all products because they do not relate to an [sic] production activity, but to the company as a whole."[39] o f G &

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

67. Second, Canada claims that the litigation settlement costs pertained to the production and sale of hardboard siding0.43865ion and sale 42

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

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

Tembec Wood Chips

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

- **First Oral Statement, paragraph 79**

83. Canada continues to claim that the United States failed to consider Abitibi's evidence relating to financial costs and asset values. This is incorrect. Commerce explains why it rejected Abitibi's argument in the Final Determination, Comment 15. Specifically, Commerce explained that it did not accept Abitibi's basic premise that interest costs could be tied to particular expenditures. In addition, Commerce explained that the methodology actually used accounted for the varying asset levels through depreciation costs.[53]

- **First Oral Statement, paragraph 89**

84. Canada argues that the United States was factually incorrect when it stated that Tembec's "divisional G&A" had to be supplemented with "headquarter G&A." Canada is incorrect. Canada stipulated in its First Written Submission that Tembec's suggested G&A methodology required the allocation of some portion of "headquarter G&A" to Tembec's softwood lumber division.[54] Thus, Tembec's methodology was not only based on the unaudited amount of G&A that Tembec claims was specific to the softwood lumber division, it also included an unaudited amount for "headquarter G&A."

- **First Oral Statement, paragraph 90**

85. Canada claims that Tembec's "division specific" G&A was in accordance with Canadian GAAP. This is an unsubstantiated claim. Moreover, the only evidence on the record indicates that this "division specific" G&A was *not* audited.[55] Commerce's methodology, in contrast, is based on an allocated portion of the G&A found in Tembec's audited financial statement. Thus, Commerce's methodology is in accordance with Article 2.2.1.1. Moreover, Tembec's methodology contradicts the most basic definition of general costs, which are costs incurred on behalf of an entire company, rather than a particular product.[56]

- **First Oral Statement, paragraph 94**

86. Canada claims that Weyerhaeuser did not report its litigation cost as a general cost to the company. Canada is incorrect. The US discussion of Weyerhaeuser at paragraphs 64-67 explains Commerce's basis for finding that Weyerhaeuser reported the litigation cost as a general cost.

- **First Oral Statement, paragraph 95**

87. Canada incorrectly asserts an absence of factual information that Weyerhaeuser's litigation costs were properly allocable to softwood lumber. The US discussion of Weyerhaeuser at paragraphs 64-67 explains Commerce's basis for finding that the litigation cost was a general cost.

- **First Oral Statement, paragraph 105**

88. Canada claims that Commerce "ignored the record evidence of prices at which Tembec's pulp mills in Ontario and Quebec purchased wood chips from affiliated suppliers." In fact, in the Final Determination, Commerce specifically addressed those transactions, explaining that "the documentation presented at verification" that contained these prices was "selectively provided by

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[53] *See also* US First Written Submission, para. 194.

[54] *See* Canada's First Written Submission, para. 209.

[55] *See Tembec's Annual Report, "Auditors Report,"* p. 34 (Exhibit US-12 at 3).

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

companies and not based on a sample chosen by the Department."[57] Commerce added that "these comparisons represented only a portion of the total wood chip purchases by [Tembec]'s pulp mills and there is no record evidence to determine what the results might be if all mills were included."[58]

- **First Oral Statement, paragraph 116**

89. Canada claims that Commerce "unreasonably disregarded certain sales by West Fraser as

transactions and determined that the prices for wood chips paid by the affiliated parties did not reasonably reflect a market value for wood chips. Thus, Commerce removed the affiliated valuations in its calculations for West Fraser's sales in British Columbia and valued them with the price of wood chips in West Fraser's unaffiliated transactions.

94. Canada now argues that Commerce should have used the prices for West Fraser's affiliated transactions, because most of the transactions in British Columbia were with affiliated parties. Canada also argues that some of the unaffiliated transactions (from the McBride mill) were subject to a contract that kept prices constant. However, Canada does not discuss the commercial validity of the rest of the transactions (from the Pacific Island Resources mill).

95. West Fraser's total unaffiliated transactions involved a significant tonnage of wood chips to separate unaffiliated parties, with a significant commercial value.[60] However, it is not the volume of the transaction that makes it a market based transaction, but the commercial setting and the details surrounding the sale. In this case, West Fraser did not argue that its unaffiliated transactions were either too small or not market-based. Thus, Commerce determined that there was no reason to question the representativeness of these transactions, and it used the wood chip prices from these transactions to value West Fraser's by-product offset in its production costs.

96. With respect to Tembec, Canada claims that Commerce should not have used Tembec's interdivisional wood chip valuations, because Commerce (allegedly) verified that these prices were arbitrary and that Tembec's market sales were larger than its interdivisional sales. As Commerce explained in the Final Determination and the US First Written Submission, Commerce never verified that Tembec's interdivisional values were arbitrary,[61] and to the contrary, actually determined that Tembec's interdivisional value for wood chips reasonably reflected a value for that by-product.[62]

97. In determining a "reasonable" amount for valuing the *by-product offset* in interdivisional transactions, Commerce uses the same methodology that it uses for valuing *costs* in interdivisional

There are no easy methods to assess value under such conditions, but Commerce examined Tembec's assessment and found that it was reasonable. Tembec set an internal surrogate for cost, and it also had an external market price; the difference between the two is the equivalent of "profit" in the normal setting where costs and sales prices are known.

99. Given these inherent difficulties, and contrary to Canada's analysis that there could be no "profit," there also has not been an "arbitrary" valuation, because Commerce used the company's own valuation data to make its determination of a "reasonable" figure for a by-product offset.

> **43. When addressing Canada's company-specific issues relating to the determination of the SG&A expenses of Abitibi, Tembec and Weyerhaeuser, please explain which of the methodologies were applied by DOC to calculate the general and administrative expenses of Abitibi, Tembec and Weyerhaeuser and how they are consistent with the provisions of Article 2.2.2 of the Anti-Dumping Agreement.**

100. In answering this question, the United States will first provide a general description of its SG&A methodology.

101. In order to calculate SG&A, Commerce calculates selling costs, general and administrative costs, and interest costs. Direct selling costs, such as commissions, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question are assigned on a sales-specific basis to the extent possible.

102. Indirect selling costs, which do not result from a particular sale (*e.g.*, salesman's salaries, office supplies) are allocated over all sales made by the sales unit incurring the costs, on the basis of sales value.

103. Other than financial costs, general and administrative (G&A) costs for the like product are 5 0 nd/F1 10.5 Tf 11.25 Tf -0.0esethoefAgh5 Tw alue.

To both parties:

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

106. Article 2.2.1.1 establishes obligations on investigating authorities with respect to their consideration and use of cost data provided by respondents in an investigation. It states that it is "[f]or the purpose of paragraph 2", which means that, in the context of Article 2.2, it covers "*cost* of production" and also "a reasonable amount for administrative, selling and general *costs*." In particular, investigating authorities are directed by this provision to:

(1) calculate costs normally on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration;

(2) consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer. Emphasis should be placed on that evidence which establishes appropriate amortization and depreciation periods and allows for capital expenditures and other development costs; and

(3) adjust appropriately for non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations (unless already reflected in the cost allocations).

107. Article 2.2.1.1 provides no specific guidance on the question of determining the reasonableness of the costs of by-products or by-product offsets.[63] It speaks more generally to the cost of production of the product under investigation. Where an exporter's cost records in accordance with GAAP include a revenue offset, calculating a by-product offset can be a necessary step in calculating the cost of producing the product under consideration. The general guidance in Article 2.2.1.1 applies to each of the particular steps in calculating cost of production, including calculation of a by-product offset.

45. For the terms "actual data pertaining to production and sales (¼) of the like product" in Article 2.2.2, please explain the application of this sentence <u>in general</u> and in light of the company-specific issues <u>in this case</u>.

108. The chapeau of Article 2.2.2 expresses a preference for basing the amounts for administrative, selling and general costs and for profits on the actual amounts that pertain to the production and sale in the ordinary course of trade of the like product. If a producer's actual data pertaining to the production of the like product is not available, or if sales of the like product have not been in the ordinary course of trade, Article 2.2.2 provides three alternative methodologies for calculating SG&A and profit.

109. Abitibi, Tembec, and Weyerhaeuser reported actual general and administrative costs that were incurred on behalf of each company. As these general and administrative costs, by definition, were

[63]Indeed, the United States notes that the AD Agreement contains no requirement to make a by-product offset. The only issue is the extent to which an investigating authority has found that the cost records for production of the product under consideration are a reasonable reflection of the costs associated with such production. It becomes an issue, in most cases, where the GAAP of the exporting country allows an exporter's records to use the by-product revenue as an offset.

incurred on behalf of each company, in their entirety, they pertained, in part, to the production and sale of the like product for each company. Therefore, a portion of each producer's actual costs was allocated to the like product by applying the G&A and financial cost ratios to the cost of manufacturing the like product. Because the selling, general, and administrative costs were based on each producer's actual data, sales were in the ordinary course of trade, and the costs pertained to the like product, these costs were calculated consistently with the chapeau of Article 2.2.2.

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

110. Article 2.2.1.1 and Article 2.2.2 relate to the obligations of investigating authorities in calculating a producer's cost, including for purposes of determining whether the producer is selling below the cost of production and also constructing a normal value. Article 2.2.2 addresses administrative, selling and general costs and profit in particular, while Article 2.2.1.1 addresses all cost calculations (including G&A). Article 2.2.2 expresses a preference for basing the calculation of administrative, selling, and general costs and of profits on the actual amounts that pertain to the production and sales in the ordinary course of trade of the like product and the actual profits realized. However, if a producer's actual data pertaining to the production of the like product cannot be determined on this basis, Article 2.2.2 provides alternative methodologies for calculating these costs. Article 2.2.1.1 expresses a preference for basing the calculation of all costs on the books and records of the producer, provided that those books and records are kept in accordance with the GAAP of the country of production and that they reasonably reflect the costs associated with the production and sales of the like product. Thus, while both provisions express a general preference for costs to be calculated on a producer's data pertaining to or associated with the like product, Article 2.2.1.1 clarifies what kind of data an investigating authority is obligated to consider (*i.e.*, books and records kept in accordance with the GAAP of the country of production and that reasonably reflect the cost associated with the production and sales of the like product).

G.2 Calculation Financial Expenses of Abitibi

To Canada:

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

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

111. As the quoted passage indicates, Commerce's methodology reflects asset values, because the cost of goods sold, upon which financial costs are allocated, as well as the cost of manufacturing the like product to which the financial cost ratio is applied, both include depreciation values. Canada argues that because certain types of assets are not depreciated (*e.g.*, land and goodwill), Commerce's methodology is unreasonable.[64] However, the vast majority of Abitibi's assets (approximately C$8 billion out of C$11 billion in total assets) were "capital assets" and were represented in Commerce's financial cost methodology through depreciation costs.[65] Moreover, contrary to

[64]*See* First Oral Statement of Canada, para. 84.
[65]*See Abitibi 2000 Consolidated Financial Statement*, p. 35 (Exhibit CDA-82).

57. Could the US please indicate which of the methodologies in Article 2.2.2 did DOC use to determine the SG&A for Tembec?

114. Commerce determined Tembec's SG&A under the chapeau of Article 2.2.2. As discussed in the answer to Question 43, Commerce calculated Tembec's G&A by applying the company-wide G&A ratio to the cost of manufacturing of the like product.[70] The resulting amount represents the G&A cost that pertains to Tembec's production and sale of the like product. As Commerce's methodology relied on Tembec's own data and calculated SG&A specific to the like product under investigation (*i.e.*, the G&A ratio was applied to the cost of manufacturing the like product), it is fully consistent with the chapeau of Article 2.2.2. Given the availability of Tembec's actual data pertaining to the production of the like product, there was no basis for Commerce to use the other methodologies available under Article 2.2.2(i), (ii), and (iii).

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

To Canada:

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

115. One place on the record in which the Panel can find Weyerhaeuser's arguments on this legal settlement issue is in the Final Determination, Comment 48b (Exhibit CDA-2), where Weyerhaeuser's arguments, those of the petitioners, and Commerce's decision are fully summarized. This discussion reflects Commerce's consideration of all of the arguments and evidence before reaching its determination.

To the US:

61. In para. 227 of its *First Written Submission,* Canada states that:

> **"[w]ithout providing any citations or evidence to support its conclusion, DOC simply stated that it "typically allocates business charges of this nature over all products because they do not relate to an {sic} production activity, but to the company as a whole."" (footnote omitted)**

Could the US please comment on the above statement. In particular, could the US explain in detail how DOC came to the conclusion that it was justified to reject Weyerhaeuser's request for exclusion of certain legal settlement claims and direct the Panel to where in the record it could find the relevant DOC motivation?

116. In response to this question, the United States refers the Panel to the discussion of "Weyerhaeuser G&A" in the US response to Question 41, paragraphs 65-67.

62. With respect to Weyerhaeuser's arguments relating the treatment of legal settlement costs, it is stated in DOC's Memorandum of 21 March 2002 (Exhibit CDA-2) that:

> **"[w]hile the costs relate to non-subject product, hardboard siding, the Department typically allocates business charges of this nature over all**

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

> **products because they do not relate to an (sic) production activity, but to the company as a whole."**

In para. 211 of the US *First Written Submission*, it is stated that:

> **"[a]s in that case, the nexus here between the litigation costs at issue and production of the product at issue (hardboard siding) was attenuated."**

In light of DOC's finding, could the US explain what the term "was attenuated" means in this context? In replying to this question, could the US please refer to documents/evidence on the record. Please describe and motivate your standard practice.

117. In describing the relationship between the litigation costs and the production of hardboard siding as "attenuated," the United States was stressing that any relationship was weak at best. As explained in the US answer to Question 41, not only were these litigation expenses not of the type that are production costs (*i.e.*, the litigation does not make or help to make a product), but the expense was incurred anywhere from one year to as long as eighteen years after production and sale of the products at issue.

118. Canada's argument confuses a cost being (possibly) associated with a product and a cost being related to the *production* of a product. The mere fact that litigation was about hardboard siding does not mean that the litigation cost was a cost of producing hardboard siding.

119. When the United States used the word "attenuated," it was describing the weak link between the litigation and the cost of producing hardboard siding. The United States was underscoring the point that a long separation between production of a good and the incurring of a litigation expense associated with the good argues strongly against allocating the expense to the current cost of producing that good.

63. In Egypt – Steel Rebar, the panel found that a "relationship test" is articulated in, inter alia, Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement. Could the US please comment on this? Is the US of the view that the fact that certain costs are found to be part of the general and administrative expenses of a company allows an investigating authority to automatically allocate a portion of such costs to the like product, or is the investigating authority obligated to establish a relationship between those costs and the production and sale of the like product?

120. Article 2.2.2 of the AD Agreement requires that amounts for administrative, selling, and general costs be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." Article 2.2.1.1 requires that costs (including G&A costs) normally be calculated on the basis of an exporter or producer's records where, *inter alia*, those records "reasonably reflect the costs associated with the production and sale of the product under consideration." The *Egypt–Steel Rebar* panel characterized these provisions as setting forth a requirement that there be a "relationship" between the interest income at issue (which typically would be considered as part of G&A cost) and the costs of producing and selling the product under consideration.[71]

121. The United States does not disagree with the general proposition that the words "associated with" and "pertaining to" suggest some relationship between G&A costs and costs of producing and selling the product under consideration. Where the United States disagrees with the

Steel Rebar

127. Canada's assertion is incorrect. Commerce did determine that West Fraser's sales to affiliated parties did not reasonably reflect the costs associated with the production and sale of wood chips. Commerce reached this determination by comparing West Fraser's sales to affiliated parties with its sales to unaffiliated parties, as recorded in West Fraser's books. Having determined that West Fraser's sales to affiliates did not reflect market prices, Commerce used the average price for West Fraser's wood chip sales to unaffiliated customers to determine the value of the wood chip offset.[75]

G.6 Calculation of By-Product Revenues – Tembec

To Canada:

> **70. Please explain the statement contained in para. 261 of Canada's First Written Submission that:**
>
> > **"Article 2.2.1.1 of the Anti-Dumping Agreement reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets."**

128. Canada's statement is based on an incomplete reading of Article 2.2.1.1. The AD Agreement expressly provides that an investigating authority must ordinarily base cost calculations on an exporter or producer's books and records. This would include any valuation of the by-product reflected in the

> **transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of prices within the meaning of Article 2.4." (footnote omitted)**

131. The passage cited in this question refers to differences between home market sales and export sales that may affect price comparability. It presumes that the seller has identified differences that affect particular sales. In this case, Slocan did not even show that the futures contracts at issue were terms and conditions related to particular sales of lumber in the United States. It did not demonstrate that the futures contracts amounted to a "difference" related to export sales, let alone a difference that affected price comparability.

submission, Slocan unambiguously asserted that it did not incur indirect selling expenses.[80] The facts demonstrated that hedging profits were not direct selling expenses, because they were not directly related to particular softwood lumber sales.[81]

134. The United States disagrees with Canada's suggestion (First Oral Statement, paragraph 121), that Article 2.4 does not require a price adjustment to be directly related to the actual sales transaction being compared. An adjustment for alleged differences in conditions and terms of sale cannot be demonstrated to affect price comparability if it is not shown that the claimed difference is related to an actual transaction.[82]

135. In its statements to the Panel, Canada appears to have articulated a claim that is broader than the one Slocan made to Commerce. Slocan urged that its futures contract revenues warranted either an adjustment to "direct selling expense" or an offset to interest expense. Now, Canada argues that

are also demonstrated to affect price comparability"? If so, what were DOC's conclusions? Please identify the relevant documents on the record.

146. Commerce examined only those bases for adjustment that Slocan requested. The quoted text from Article 2.4 presumes a request for such an adjustment, as well as a demonstration of effect on price comparability. Absent both a request and a demonstration, there is nothing to examine. Article 2.4 does not require an investigating authority, independent of evidence and argument by an interested party, to find bases for a price adjustment. The only attempt Slocan made at a demonstration of effect on price comparability was with respect to direct selling expense. For the reasons described in our response to Question 81, Commerce found no effect on price comparability to have been "demonstrated" in this case.

ANNEX A-3

RESPONSES OF THE EUROPEAN COMMUNITIES TO
QUESTIONS POSED IN THE CONTEXT OF THE FIRST

fully co-operative respondent or on the basis of best available information does not affect this standard. Indeed, even if an interested party did not cooperate, an investigating authority might have come to a conclusion on the basis of best information available that were in violation of the Anti-Dumping Agreement.

2. What obligations does Article 2.2.1.1 impose <u>in general</u> on investigating authorities?

9. Article 2.2.1.1 of the *AD Agreement* contains a general obligation on investigating authorities to rely primarily on the operator's record when calculating its costs. However, as evidenced in this article, this does not mean just any information by the operator but only those that meet certain standards, such as for instance the generally accepted accounting principles of the exporting countries. The ultimate purpose of Article 2.2.1.1 of the *AD Agreement* is, therefore, to reach a conclusion on costs that is as objective and reasonable as possible.

3. For the terms "actual data pertaining to production and sales (…) of the like product" in Article 2.2.2, please explain the application of this sentence <u>in general</u>.

10. Article 2.2.2 of the *AD Agreement* provides relevant guidance for the calculation of administrative, selling and general costs and for profits in case of a constructed normal value under Article 2.2 of the *AD Agreement.* The investigating authorities will use the respective data of the like product to the extent that they are available.

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

11. Article 2.2.2 and Article 2.2.1.1 of the *AD Agreement* do both apply within the context of paragraph 2 regarding the calculation of costs. Specifically, Article 2.2.2 deals with costs in relation to SGA and profits in case of the construction of normal value whereas Article 2.2.1.1 of the *AD Agreement* is a sub-paragraph to Article 2.2.1 of the *AD Agreement.* This provision in turn is relevant for the question whether sales in the domestic market and to third countries are made in the ordinary course of trade.

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

> **"[t]his Panel should reject Canada's arguments that attempt to interpret the general language of the cost calculation provisions of the AD Agreement as requiring use of particular methodologies."**

12. The EC would in principle agree with the US' statement. In this context, the Panel should also respect the limitations as set out in Article 17.6(i) of the *AD Agreement.* In the absence of specific requirements under the AD Agreement to use certain methodologies it is not for the Panel to make a *de novo* determination. However, this being said, the EC does not take a position for either side in this particular case.

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

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

13. The US made its statement in the context of Article 2.2.1.1 of the *AD Agreement.* The EC would agree with the US that this provision does not provide any special rule for the assessment of costs of affiliated party transactions.

14.

ANNEX A-4

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

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

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

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authorities' consistency with their national laws during the process of the investigation, while a Member claims and argues in a WTO dispute settlement consistency of the authorities' practice with the AD Agreement. Thus, claims and arguments in a WTO dispute settlement differ by its nature from arguments in the investigation process. It is particularly the case where the issue before the Panel is related to the administratively long-established and statutorily-approved rules, such as the zeroing, SG&A calculation, and revaluation of affiliated party transaction prices. The Appellate Body has confirmed this in *Thailand – H-Beams*[1], in which it has stated "it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute."[2]

2. What obligations does Article 2.2.1.1 impose <u>in general</u> on investigating authorities?

<u>Reply</u>

Article 2.2.1.1 imposes on the authorities general obligations that the authorities shall normally use a respondent's production costs as maintained in its accounting records for the calculation of costs and sales of the product under consideration. The term "normally" in the first sentence of this Article clarifies that this is the general rule, and there is an exception for this general rule. Article 2.2.1.1 provides the exception that the authorities may deviate their cost calculation from the respondent's recorded costs, if the recorded costs are either not in accordance with the generally accepted accounting principle ("GAAP") of the exporting country, or do not reasonably reflect the costs associated with the production and sale of the product under consideration. In other words, the authorities must find either of these two conditions is not met before the authorities decide to deviate their calculation of costs, or selling, general or administrative expenses from the respondent's accounting records.

The authorities' finding on either of these conditions must be based on all available evidence on the proper allocation of costs, including that that is made available by the exporter or producer.[3] In accordance with Article 17.6(i), such finding must be based on evaluation of facts in an unbiased and objective manner. Thus, in order for the authorities to exercise their discretion to apply an exception to a respondent, the authorities must establish in an unbiased and objective manner that the respondent's recorded costs do not reasonably reflect the production or sales of the product or are not in accordance with the GAAP.

The exercise by the authorities of such discretion is not unfettered. As discussed in our previous statements[4], the general principle of good faith instructs that the authorities must exercise their discretion in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party. The authorities would act inconsistently with the WTO Agreement, if the authorities would calculate costs of production of a respondent's product in a manner that gives disadvantage to the other interested party.

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[1] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams form Poland*, WT/DS122/AB/R, adopted on 12 March 2001.

[2] *Id*., at para. 94.

[3] *See* Article 2.2.1.1. of the AD Agreement ("Authorities shall consider all available evidence on the .uvantage to l00.14j 2.25 TD 0 Tcaf a respof pr,estcl -4.5 8ctions of Iron or Non

3. For the terms "actual data pertaining to production and sales (…) of the like product" in Article 2.2.2, please explain the application of this sentence in general.

Reply

The first sentence of Article 2.2.2 obliges the authorities to base per-unit SG&A on the "actual data" relating to sales by an responding party of like products in the exporting country, if the responding party'

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

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

Reply

Article 2.2.1.1 of the AD Agreement, as informed by Article 17.6(i) thereof and the general principle of good faith under the Vienna Convention of Law of Treaties, provides how the authorities shall assess the cost of production of the product under consideration. Please see our answer to the question 2 above for further discussion on this issue. In order for the authorities to revaluate the respondent's recorded affiliated party transaction value, therefore, the authorities first must find that such recorded value does not "reasonably reflect" the costs. Article 2.2.1.1, in conjunction with Article 17.6 (i) thereof and the general principle of good faith, further dictates that the authorities, upon such finding, must exercise their discretion to assess affiliated party transaction value in an even-handed, fair, unbiased, and objective manner without giving unfair advantage to one interested party. The fact that Article 2.2.1.1 does not specify any particular methodologies relating to costs between affiliated parties does not relieve the authorities from these obligations.

As discussed in our previous submissions, the United States failed to exercise its discretion in an unbiased and objective manner in the anti-dumping investigation in question. First, the United States determined, erroneously, that the recorded value is unreasonable based only on the sales prices by respondents to affiliated parties and to unaffiliated party.[5] The United States ignored all other evidence showing other factors affecting sales prices to various purchasers, for example, sales volume, regions, and the terms and dates of the sales. Such determination is inconsistent with Article 2.2.1.1 in conjunction with Article 17.6(i), as the United States failed to evaluate all evidence in an unbiased and objective manner.

Second, the United States' exercise of its discretion to revaluate the affiliated party transaction value is also inconsistent with Article 2.2.1.1 of the AD Agreement in conjunction with Article 17.6(i) thereof and the general principle of good faith. As discussed in our previous submissions, the United States devaluated a respondent's recorded by-product value, when such value was based on sales price to affiliated parties, and was higher than the sales price to unaffiliated parties.[6] The United States did not revaluate the by-product value, which was based on sales prices to affiliated parties, if the value was lower than the sales price to unaffiliated parties.[7] By doing so, the United States exercised its discretion only to decrease the by-product value, accordingly, to increase the production cost of softwood lumber to create and increase the margin of dumping of the respondent. The US's exercise of the discretion in such manner was not even-handed, and did give unfair advantage to parties who have adverse interests to responding parties. If the United States were to exercise its discretion, it should have revaluated in both cases. The manner in which the exercise

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

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

Reply

We agree with previous panels in *Egypt – Rebar*, at para. 7.335, and in *Argentina – Poultry*, at para. 7.265, that Article 2.4 deals with a "fair comparison" between the export price and the normal value. The issue of Article 2.4 in connection with the revaluation by the United States of wood chip value, however, is moot because the establishment by the United States of the normal value is inconsistent with Article 2.2.1.1. The Panel, thus, does not need to reach the question on Article 2.4.