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UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA (WT/DS264)

Report of the Panel

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US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R
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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Title / Meaning
Abitibi	Abitibi-Consolidated Inc., one of the Canadian producers and exporters of softwood lumber subject to investigation
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
BC	British Columbia
Canfor	Canfor Corporation, one of the Canadian producers and exporters of softwood lumber subject to investigation
CME	Chicago Mercantile Exchange
COGS	Cost of Goods Sold
Commerce or DOC	United States Department of Commerce
DIFMER or difmer	Differences in Merchandise
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
ESPF	Eastern spruce-pine-fir, a type of three
Final Determination	Decision imposing definitive anti-dumping measures on certain softwood lumber products from Canada as published in p. 15539 *et seq.* of the Federal Register on 2 April 2002 (Exhibit CDA-1), as amended by a notice published in p. 36068 *et seq*. of the Federal Register on 22 May 2002 (Exhibit CDA-3)
FPG	Tembec's Forest Product Group division, which includes Tembec's softwood lumber business
GAAP	Generally Accepted Accounting Principles
G&A	General and Administrative costs (Article 2.2.2 of the *AD Agreement*)
GATT 1994	*General Agreement on Tariffs and Trade 1994*
IDM	DOC's "Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada" of 21 March 2002 (Exhibit CDA-2)
IP	International Paper, one of the applicant companies
ITC	United States International Trade Commission
MBF	Thousand Board Feet, unit used to measure softwood lumber's volume

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

I. INTRODUCTION

A. COMPLAINT OF CANADA

1.1 On 13 September 2002, Canada requested consultations with the Government of the United States pursuant to Article 4 of the *DSU*, Article XXII of the *GATT 1994* and Article 17 of the *AD Agreement*, concerning the Final Determination of sales at less than fair value with respect to certain softwood lumber products from Canada published in the Federal Register on 2 April 2002, and amended on 22 May 2002, pursuant to section 735 of the Tariff Act.[1]

1.2 On 11 October 2002, Canada and the United States held the requested consultations, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 6 December 2002, Canada requested the establishment of a panel to examine the matter.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 8 January 2003, the DSB established a Panel in accordance with Article 6 of the *DSU* and pursuant to the request made by Canada in document WT/DS264/2.

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "[t]o examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS264/2, the matter referred by Canada to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 On 25 February 2003, the parties agreed to the following composition of the Panel:[3]

Chairman: Mr. Harsha V. Singh

Members: Mr. Gerhard Hannes Welge
Mr. Adrián Makuc

1.7 The Panel was formally composed on 4 March 2003.

1.8 The European Communities, India and Japan reserved their third-party rights.

C. PANEL PROCEEDINGS

1.9 The Panel met with the parties on 17-18 June 2003 and 11-12 August 2003. The Panel met with third parties on 18 June 2003.

1.10 On 16 January 2004, the Panel provided its interim report to the parties. See Section VI, *infra*.

II. FACTUAL ASPECTS

2.1 On 2 April 2001, an anti-dumping application was filed with DOC and the ITC by the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and

[1] WT/DS/264/1.
[2] WT/DS/264/2.
[3] WT/DS/264/3.

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

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

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

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

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

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

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

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

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

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

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

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

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

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

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

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

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

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

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

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

B. UNITED STATES

3.2 The United States requests that the Panel reject Canada's claims in their entirety.[11]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set forth in their written and oral submissions to the Panel, and in their answers to questions and in their comments thereon. The parties' arguments as presented in their submissions are summarised in this section. The summaries are based on the executive summaries submitted by the parties. The parties' written answers to questions and comments thereon are set forth in the Annexes to this Report. (*See* list of annexes at page vii, *supra*)

A. FIRST WRITTEN SUBMISSION OF CANADA

4.2 The following are Canada's arguments in its first written submission:

4.3 On 21 March 2002, for the first time in the long-standing softwood lumber dispute between Canada and the United States, a final dumping finding was announced against Canadian imports of softwood lumber into the United States.

4.4 More particularly, on 2 April 2002, DOC's[12] final affirmative determination of dumping against certain softwood lumber products from Canada was published in the Federal Register.[13] The "softwood lumber products" covered by DOC's single-determination were defined extremely broadly, and covered multiple tariff classifications and diverse products ranging from standard dimension framing lumber used in home construction, to engineered wood products such as finger-jointed flangestock, and further manufactured products including mattress box spring frame components, as well as railroad ties, shelving, siding, decking, flooring and moulding.

4.5 Notwithstanding that there are hundreds of Canadian exporters of softwood lumber to the United States, only six Canadian exporters namely, West Fraser, Slocan, Tembec, Abitibi, Canfor and Weyerhaeuser Canada (6 mandatory respondents or respondents) were assessed individual margins of dumping.[14] The average margin of dumping for these 6 respondents was used to establish the "all others" rate for all other exporters.[15]

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[11] US first written submission, para. 254.

[12] DOC is the investigating authority in the United States that determines whether dumping exists.

[13] Exhibit CDA-1, Final Determination. The notice was accompanied by DOC's IDM (Exhibit CDA 2), dated 21 March 2002. On 22 May 2002, the United States published the Amended Final Determination (Exhibit CDA-3).

[14] Article 6.10 of the *AD Agreement* provides that:

> "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

In the Final Determination, the six mandatory respondents were assessed the following margins of dumping: Abitibi – 12.44 per cent; Canfor – 5.96 per cent; Slocan – 7.71 per cent; Tembec – 10.21 per cent; West Fraser – 2.18 per cent; Weyerhaeuser – 12.39 per cent (Exhibit CDA-3, Amended Final Determination).

[15] An "all others" margin of dumping of 8.43 per cent was applied to all other Canadian exporters of certain softwood lumber products. *Ibid*.

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

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

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

(a) the Petition[16] filed by the US domestic industry did not contain "such information as [was] reasonably available" to the Petitioner[17], nor did it contain adequate and accurate evidence of dumping sufficient to justify the initiation of the investigation, thereby rendering the initiation inconsistent with US obligations under Articles 5.2 and 5.3 of the *AD Agreement*;

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

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

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

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

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

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

[16] The "Petition" is the written application filed on behalf of the domestic industry in the United States to initiate a dumping investigation.

[17] The major applicant (or "Petitioner", as referred to in the United States) was the "Coalition for Fair Lumber Imports Executive Committee", an association of US softwood lumber producers established for the purposes of pursuing trade actions against Canadian softwood lumber products. The petition was also filed by the United Brotherhood of Carpenters and Joiners; and the Paper, Allied-Industrial, Chemical and Energy Workers International Union.

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

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

4.9 With respect to Canada's first claim regarding the failure of DOC to initiate the investigation in accordance with US WTO obligations, the Petitioner offered no specific evidence related to any particular company in Canada to show actual dumping. The Petitioner provided no evidence of actual Canadian producer prices or costs to support its dumping allegations. Yet, evidence showed that one of the leading members of the petitioning coalition's Executive Committee, IP, wholly owned Weldwood, one of the major Canadian exporters of softwood lumber to the United States. The Petitioner had in its possession and control Weldwood data. For this reason alone, DOC ought to have concluded that the Petitioner had in its possession detailed and better data on actual Canadian producer prices and costs, and that, therefore, the Petition did not contain such information as was reasonably available to the Petitioner. DOC's decision to initiate the investigation was based on the Petitioner's misrepresentation that it did not have access to such information, and, therefore, that it was entitled to rely on other less probative information to support its dumping allegation. Even when DOC learned of the existence of such information, DOC failed to seek to obtain such information. DOC itself admitted that it did not seek further information.[18]

4.10 An objective investigating authority evaluating all of this evidence could not have determined that the Petition contained (i) such information as was reasonably available to the Petitioner, or (ii) adequate and accurate evidence of dumping sufficient to initiate the investigation. Failure to meet these two requirements meant that DOC had an obligation not to initiate the investigation, and where the investigation had already been initiated, DOC had an obligation to terminate it upon learning of the deficiencies in the information put forward by the Petitioner, or, at the very least, to address the deficiencies in the Petition. The WTO has ruled that an applicant cannot provide just any information or documentation to justify the initiation of an investigation.[19]

4.11 Notwithstanding the disparate nature of different softwood lumber products covered by the Petition, DOC determined there to be only one "product under consideration" and one "like product" (i.e., all "softwood lumber products"). DOC, therefore, conducted only one investigation on all softwood lumber products ranging from dimensional lumber to further manufactured products and even engineered wood products. The exporter parties to the investigation (i.e., the respondents) requested DOC to determine that certain products were so distinct from the general category of "softwood lumber" that they deserved to be recognized as distinct "products under consideration" and "like products" from softwood lumber, with different attributes, requiring distinct analysis and treatment. DOC either ignored these requests or dismissed them without proper justification. DOC's finding that all softwood lumber products are part of a "continuum of products" is an obvious contradiction to the evidence of record, and is contrary to the *AD Agreement*.

4.12 DOC further erred by failing to make due allowance in normal values for physical differences in softwood lumber products to maintain price comparability and to ensure a fair comparison between normal value and export price. The evidence before DOC showed that the value of softwood lumber varies depending on the size of the product (including differences in thickness, width and length), and DOC itself acknowledged this to be the case.[20] There was, therefore, no justification for ignoring

[18] Exhibit CDA-4, NAFTA Anti-Dumping Panel Hearing Transcript, Vol. 1, p. 158.

[19] Regarding the standard of sufficiency of evidence to justify initiation of an investigation, the panel in *Mexico – Corn Syrup*, para. 7.94, considered "instructive" the panel's reference in *Guatemala – Cement I*, para. 7.55 to the GATT panel's decision in *US – Softwood Lumber II* that "'sufficient evidence' clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just 'any evidence.'"

[20] Exhibit CDA-2, IDM, Comment 8, p. 51 when it states that:

these differences, and comparing prices for different-sized products without adjusting for such product differences. An objective investigating authority evaluating the evidence could not have determined that size differences in softwood lumber were irrelevant and that adjustments were, therefore, not necessary. The WTO has ruled that all differences affecting price comparability must be accounted for.[21]

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

4.14 A number of other calculations, comparisons and determinations made by DOC rest on impermissible interpretations of the *AD Agreement*, were made without a proper establishment of the facts and/or were based on an evaluation of the facts that was neither unbiased nor objective. Accordingly, these methodologies and the ultimate determinations cannot be upheld by the Panel in light of the applicable standard of review under Article 17.6 of the *AD Agreement*.

4.15 DOC computed costs of production for individual softwood lumber products both for purposes of determining whether sales in the Canadian domestic market were made at prices below costs of production under Article 2.2.1 of the *AD Agreement* and for purposes of computing normal value under Article 2.2 when there were no sales of softwood lumber in the Canadian domestic market or where such sales did not permit a proper comparison. In computing such costs of production DOC was obligated to include reasonable amounts for SG&A costs.

4.16 The *AD Agreement* provides that such costs must be calculated on the basis of records kept by the exporter and/or data made available by the exporter to the investigating authority during the course of the investigation. In each case, the amounts for SG&A costs must be based on actual data and must reasonably reflect the costs associated with the production and sale of the product under consideration in the country of origin. Where cost allocations become necessary, the investigating authority must consider all available evidence on the proper allocation of costs. Thus, G&A expenses

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> "[s]pecifically, in this case, where products have differences in dimension (i.e., length, width or thickness) we recognize that these physical differences could result in differences in market value."

[21] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 176-177, where the Appellate Body found that "Article 2.4 expressly requires that 'allowances' be made for '*any other differences* which are also demonstrated to affect price comparability". (emphasis added) There are, therefore, no differences "affec[ting] price comparability" which are precluded, as such, from being the object of an "allowance". *See* also Panel Report, *Argentina – Ceramic Tiles*, paras. 6.113-6.116, where the panel found that the investigating authority "acted inconsistently with Article 2.4 by failing to make adjustments for physical differences affecting price comparability".

[22] Appellate Body Report, *EC – Bed Linen*, para. 66. *See* also Panel Report, *EC – Tube or Pipe Fittings*, where the panel found at para. 7.218 that: "[r]egardless of the magnitude of its effects, "zeroing" constitutes a violation of the obligations imposed by Article 2.4.2 of the Agreement *per se*".

[23] *See* Exhibit CDA-2, IDM, Comment 12, pp. 65-66 and Exhibit CDA-5, NAFTA Anti-Dumping Panel Hearing Transcript, Vol. I, pp. 231-233.

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

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

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

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

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

4.21 Finally, DOC improperly refused to allocate Slocan's futures contract revenues that were related to the production and sale of softwood lumber. DOC was required to make an adjustment to take into account these revenues. DOC was required to account for these revenues, as an offset to financial or selling expenses, or through some other reasonable method.

4.22 It is clear that the investigation should not have been initiated. Moreover, rectification of other errors reveal either that imports of Canadian softwood lumber into the United States are not being dumped, or that the margins of dumping established by DOC for each respondent and the "all others rate" have been artificially inflated. Consequently, the United States acted inconsistently with its obligations under Articles VI:1 and VI:2 of *GATT 1994* and Articles 1, 9.3 and 18.1 of the *AD Agreement*. The Panel should, therefore, recommend to the DSB that the United States bring its measure into conformity with its obligations under the WTO, that it revoke the anti-dumping order in respect of softwood lumber from Canada, and that it return the cash deposits collected pursuant to an illegal investigation and an illegal determination of dumping.

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

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

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

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

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

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

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

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

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

[27] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.33 The Weldwood data could not have contradicted the data included in the petition, or otherwise detracted from its adequacy and accuracy. At most, the Weldwood data would have given Commerce information about a single producer in a market consisting of hundreds of producers. This would have been in addition to the country-wide data from diverse sources actually included in the petition. Whatever a single company's data might have shown, it could not have negated the sufficiency of the country-wide data actually in the petition demonstrating dumping of the subject product.

4.34 Article 5.2 of the *AD Agreement* does not require Commerce to reject a petition that excludes some data, even though the data included are sufficient to warrant initiation of an investigation, and even though the excluded data could not have negated the sufficiency of the included data. The question for Commerce in deciding whether to initiate an investigation is set forth in Article 5.3. That question is whether the evidence in the petition is sufficient to warrant initiation. Similarly, under Article 5.8, the question whether to continue or terminate an investigation hinges on sufficiency. Canada's suggestion that the *AD Agreement* contains a standard for initiation and continuation of an investigation other than sufficient evidence is unfounded and should be rejected.

4.35 Canada's second claim is that Commerce defined the scope of the "product under consideration" (by which Canada appears to mean the product under investigation – in this case, softwood lumber) too broadly. Canada cites no provision of the *AD Agreement* governing the way in which an investigating authority defines the product under investigation. Instead, it asserts the existence of an obligation to explain how different articles within the product under consideration "closely resemble each other"[35], contends that Commerce violated that obligation, and maintains that violation of that obligation violated various articles of the *AD Agreement* (several of which were not identified in Canada's panel request, and none of which provide rules for identifying the product under investigation).

4.36 The short answer to Canada's scope argument is that there is no obligation under the *AD Agreement* to define the "product under consideration" in the manner Canada proposes. The absence of an obligation is demonstrated by the diverse practice of WTO Members, including Canada. Without an obligation there can be no violation.

4.37 Furthermore, the test actually applied by Commerce in defining the scope of the product under consideration in this case was clearer and more detailed than the vague "close resemblance" test that Canada proposes. In determining whether particular products were properly within the scope, Commerce considered (1) the general physical characteristics of the product, (2) the expectations of the ultimate purchaser, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. With respect to the particular softwood lumber products that Canada claims should have been excluded – Western Red Cedar, Eastern White Pine, softwood lumber boards used in bed frames, and softwood lumber boards used in finger-jointed flangestock – Commerce evaluated the five factors and found the resemblances to other examples of softwood lumber sufficiently great to preclude subdivision into multiple products under consideration.

[35] Canada first written submission, para. 125.

4.38 Canada's third claim is that, in comparing (normal) value to export price, Commerce violated Article 2.4 of the *AD Agreement* by not adjusting for differences in the dimensions of softwood lumber. The Panel should reject this claim, because Canadian respondents failed to show that differences in the dimension of the softwood lumber compared in this case affected price comparability. Commerce's decision not to make due allowance absent such a showing did not violate Article 2.4.

4.39 Article 2.4 requires that, in comparing export price and normal value, an investigating authority make "[d]ue allowance" for certain differences in the particular products being compared. The requirement to make due allowance applies only to "differences which affect price comparability," and the determination whether to make due allowance is to be made "in each case, on its merits". Other panels have explained that due allowance for physical or other differences that affect price comparability is not automatic.[36] Any claimed adjustment must be established on a case-by-case basis and is warranted only to the extent the differences affect price comparability.

4.40 In this case, the evidence made available to Commerce did not substantiate an adjustment for dimensional differences. Commerce did take dimensions – along with eight other categories of physical traits – into account in developing "matching" criteria (i.e., criteria for determining which articles to compare in the first place). Applying these criteria, Commerce compared transactions with identical product characteristics wherever possible. Where an identical match was not available for a given transaction, Commerce relied on a transaction with the next most similar product characteristics. This process minimized product physical differences, including dimensional differences, in the transactions being compared. Ultimately Commerce concluded that "there appears to be little, if any difference in home market prices that is attributable to differences in dimensions of the products compared, especially where those dimensional differences were minor".[37]

4.41 In stark contrast to the investigating authority in *Argentina — Ceramic Tiles*[38], a case on which Canada relies heavily[39], the investigating authority in the present case sought and evaluated extensive data regarding many physical characteristics, including dimensional differences. However, the Canadian respondents failed to make the requisite showing that the dimensional differences affected price comparability. Therefore, under Article 2.4, Commerce was not required to make any adjustment for such differences.

4.42 Canada's fourth claim is that, in combining individual dumping margins to determine an overall dumping margin, Commerce did not properly take account of non-dumped products, inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. The Panel should reject this claim, because Articles 2.4 and 2.4.2 do not address the manner in which particular model-specific or level-of-trade-specific dumping margins, for example, are combined to determine an overall dumping margin. Moreover, by arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation"[40], Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all", which immediately precedes it.

4.43 The comparison obligations contained in Article 2.4.2 are "[s]ubject to the provisions governing fair comparison in paragraph 4". Thus, Article 2.4 provides explicit context for the methods for establishing the existence of dumping under Article 2.4.2. This context means that, under the instruction in Article 2.4.2 to compare "weighted average normal value with a weighted average

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[36] *See, e.g.*, Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158; Panel Report, *Egypt – Steel Rebar*, para. 7.352.

[37] Exhibit CDA-2, IDM, Comment 8.

[38] Panel Report, *Argentina – Ceramic Tiles*.

[39] *See, e.g.*, Canada first written submission, para. 150.

[40] *Id.*, para. 171.

of prices of all comparable export transactions", not all export transactions will be equally comparable with all normal value transactions. Consequently, once the comparison has been identified pursuant to Article 2.4, it would be improper to compare a weighted average normal value with respect to one model or one level of trade to a weighted average of prices for a different model or different level of trade. Yet, Canada's prescription for combining particular dumping margins for purposes of developing a single, overall dumping margin would require precisely that, contrary to Articles 2.4.2 and 2.4.

4.44 That Articles 2.4.2 and 2.4 do not mandate a particular method for combining model-specific, level-of-trade-specific individual dumping margins to establish a single, overall margin is corroborated by the negotiating history of the *AD Agreement*. The negotiating history demonstrates that the question whether to address the methodology at issue here was squarely presented to the negotiators, and that the text was not modified (as compared to the *AD Agreement*'s predecessor, the *GATT Anti-Dumping Code*) to prohibit this methodology. Further, the negotiating history demonstrates that insertion of the word "comparable" into Article 2.4.2 was intended precisely to ensure that the term "all" not be interpreted as implying that average export price is to be established on the basis of sales both within and outside of the category of comparison.

4.45 Canada's claim relies exclusively on the Report of the Appellate Body in *EC – Bed Linen*. The United States was not a party to that dispute and is not bound by the report in that matter. As the Appellate Body has explained, dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[41] Moreover, the Appellate Body Report in *EC-Bed Linen* did not address several of the textual arguments presented by the United States in this matter. That is additional reason not to treat that Report as dispositive.

4.46 Finally, Canada makes six company-specific claims, five of which relate to Commerce's calculations of cost of production and constructed (normal) value, and one of which relates to Commerce's denial of a claim for an adjustment for differences in terms and conditions of sale. These claims improperly urge the Panel to adopt alternative evaluations of the facts, rather than demonstrate that Commerce improperly established the facts or evaluated them in a biased and non-objective way.

4.47 Commerce computed cost of production for individual softwood lumber articles for purposes of (a) determining whether sales in the Canadian domestic market were made at prices below cost of production, and (b) computing normal value, in accordance with Article 2.2 of the *AD Agreement*, when there were no sales of softwood lumber in the Canadian domestic market or when such sales did not permit a proper comparison. In computing these costs, Commerce included reasonable amounts for SG&A costs, as provided under Articles 2.2, 2.2.1 and 2.2.1.1.

4.48 Canada argues that, in calculating G&A costs, Commerce violated Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, and 2.4 of the *AD Agreement.* Many of Canada's arguments erroneously assume that Commerce applied its standard cost calculation methodologies to individual lumber producers without determining the appropriateness of these methodologies in light of the circumstances of each producer. However, as discussed at length in the Final Determination, Commerce only applied its standard methodologies after careful consideration of the facts in each case.

4.49 As a general matter, Canada's claims that Commerce's calculations of normal value violated Article 2.4 of the *AD Agreement* are misplaced. Article 2.4 relates to a fair comparison between

[41] Appellate Body Report, *Japan–Alcoholic Beverages*, p. 14 (footnote omitted); *see* also, Appellate Body Report, *US – Shrimp*, paras. 107-109 (extending the reasoning of *Japan – Alcoholic Beverages* to Appellate Body reports); Panel Report, *Argentina - Poultry*, para. 7.41 (panel not bound by adopted WTO panel reports).

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

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

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

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

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

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

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

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

4.55 In the case of Tembec, the issue was how to measure the value of transfers of wood chips between divisions within the company. Commerce analyzed the wood chip sales transactions between Tembec's sawmills and its pulp mill division to evaluate whether the internally set transfer prices were reasonable. Commerce found that prices recorded in Tembec's books for the transfer of wood chips between Tembec divisions reasonably reflected the actual cost of producing wood chips and, therefore, consistent with Article 2.2.1.1, relied on those prices in establishing a wood chip offset for Tembec.

4.56 Finally, Canada argues that Commerce failed to properly account for profits from respondent Slocan's sales of lumber futures contracts. In Commerce's investigation, Slocan requested two directly contradictory treatments for these profits. First, Slocan asked that the profits be treated as an offset to direct selling expenses in the US market, as an adjustment for the conditions and terms of sale. Alternatively, Slocan asked that the profits be treated as an offset to financing costs in the calculation of cost of production. However, as Commerce found, Slocan's futures contract profits were not directly related to any particular sales of softwood lumber and, therefore, were not an appropriate basis for adjustment under Slocan's first theory. On the other hand, since the profits amounted to sales revenue (albeit, not *direct* sales revenue), they would not have been an appropriate basis for offsetting cost of production. As Slocan failed to substantiate an offset under either theory, Commerce properly declined to grant an offset.

4.57 For the foregoing reasons, the US requests the Panel to reject Canada's claims in their entirety.

C. FIRST ORAL STATEMENT OF CANADA

4.58 In its first oral statement, Canada made the following arguments:

4.59 The Panel's role pursuant to Article 17.6(i) is to determine whether Commerce properly established the facts and evaluated the facts in an objective and unbiased manner. By reviewing the record pursuant to Article 17.6(i), the Panel is not engaging in a *de novo* review. The rule of Article 17.6(ii) only comes into play when a Panel concludes that there is "more than one permissible interpretation," after the application of the customary rules of treaty interpretation codified in Articles 31 and 32 of the *Vienna Convention*. An approach of total deference is inconsistent with the WTO jurisprudence on this issue.

1. Initiation and Termination of the Investigation

4.60 Articles 5.2 and 5.3 are separate obligations. Under Article 5.2, the investigating authority must decide whether to accept or reject the application on the basis of whether it contains such information as is reasonably available to the applicant on dumping, injury and causation. Only once the investigating authority has determined that the requirements of Article 5.2 have been met, can it move on to Article 5.3 to conduct a further examination of the information in the application to assess whether it is adequate and accurate and, therefore, sufficient to initiate the investigation.

4.61 Article 5.2(iii) requires that, if the information is of a kind or category of information set out in Article 5.2 and it is reasonably available to the applicant, then it is of the kind or category that must be included in the application. Article 5.2(iii) requires information on prices; it does not allow an applicant to pick and choose what information on prices it provides. Actual transaction prices for sales of lumber in the relevant markets was "reasonably available" to the Petitioner and ought to have been provided to the investigating authority. The application did not contain transaction-specific

evidence identifying a single Canadian exporter or provide any specific examples of price or cost. The Petitioner's claim that such information was not "reasonably available" is simply not credible and should never have been accepted by Commerce.

4.62 Commerce also initiated the investigation based on insufficient evidence of dumping, contrary to Article 5.3. Article 5.3 requires that an investigating authority objectively judge whether the application contains sufficient evidence of dumping, injury and causal link between the two. The investigating authority cannot simply accept the evidence in the application. Had Commerce fulfilled this obligation, it would have discovered that the Petitioner failed to provide extremely important information. A further examination of the information in the application should have revealed that one of Canada's largest producers, Weldwood, is wholly owned by the leader of the Petitioner, IP. Weldwood's data, if obtained, would have provided specific instances of Canadian and US prices and Canadian costs for the identical merchandise, and would have enabled Commerce to properly assess the adequacy and accuracy, and, therefore, the sufficiency of the information provided in the application.

4.63 The information included in the application essentially amounted to nothing more than surrogate or secondary information considering what could and should have been provided. For instance, it was demonstrated that the *Random Lengths* data contained in the application commingled Canadian and US producer prices, and, thus, were not representative of Canadian sale prices. An objective and unbiased investigating authority could not have concluded that there was "sufficient evidence" of dumping to initiate.

4.64 Pursuant to Article 5.8, the investigating authority must terminate the investigation as soon as it is satisfied that there is not sufficient evidence of dumping or injury to justify proceeding with the case. This obligation applies both prior to initiation and throughout the investigation. A Canadian respondent informed Commerce of the nature of the relationship between Weldwood and IP, two days after initiation. Commerce did nothing with this information. Commerce also rejected Weldwood's subsequent attempt to file data regarding actual sales transactions. Thus the United States failed to comply with Article 5.8.

2. Like Product and Product under Consideration

4.65 Commerce defined the "product under consideration" and the "like product" as "all softwood lumber" and conducted a single anti-dumping investigation. Commerce's broad definitions did not identify a cohesive group of products that share common characteristics for either the "product under consideration" or the "like product". Consequently, Commerce did not meet the requirements of Article 2.6.

4.66 The Article 2.6 definition of "like product" limits its scope and diversity. When, as here, the scope and diversity of the "product under consideration" is overly broad, the "like product" may be neither identical to, nor have characteristics closely resembling, the product under consideration and the requirement of Article 2.6 cannot be satisfied. The terms "product under consideration" and the "like product" must be limited to a single group of products sharing common characteristics. Otherwise Article 2, which describes the dumping comparison between the "like product" and the "product under consideration" would allow dumping comparisons between sales of products that have no close resemblance to each other. Similarly, Articles 3, 4 and 5 would permit injury analyses that would cover multiple industries.

4.67 Canada's interpretation of Article 2.6 would not yield dozens or hundreds of discrete products. The United States found that at least 90 per cent of the products covered in the "product under consideration" consist of commodity dimension lumber. The application presented data only on the pricing of standard 2x4 SPF products that the United States has characterized as "representative softwood lumber products". The "product under consideration" should have been limited to

commodity dimension lumber, which is a defined and cohesive group of products according to the applicable legal criteria in the United States of physical characteristics, end uses, purchaser expectations, channels of distribution, advertising and display, and price. Instead, Commerce added in another 10 per cent of products that do not resemble commodity dimension lumber, including especially the four products in dispute.

4.68 Commerce erroneously identified isolated characteristics of different products within the "product under consideration" and then determined whether there was a comparable "like product" with the same isolated characteristics within the diverse group. This test, as applied, is not legally permissible under Article 2.6 because it fails to limit the anti-dumping investigation to a grouping of imported products that all share characteristics closely resembling each other. Bed frame components, finger-jointed flangestock, Eastern White Pine, and Western Red Cedar do not share common characteristics with commodity dimension lumber, and are substantially unlike 90 per cent of the products in the application.

3. Failure to Account for Dimensional Differences

4.69 When comparing normal value to export price, Article 2.4 requires an adjustment for all differences that affect price comparability. Differences in physical characteristics are identified as a difference affecting price comparability. The United States incorrectly argues that the evidence before Commerce did not support the conclusion that dimension affected price. The record before Commerce consisted of complete sales data for the six largest producers in Canada, showing all prices of all different products differentiated by dimension, among other characteristics. These data demonstrated that dimensional differences affected price. Canadian companies and US petitioners agreed on this point.

4.70 Indeed, Commerce determined that, when comparing domestic and export selling prices between markets, products had to be matched based on width, thickness, and length, among other matching criteria. Given that the only differences that matter for matching purposes are those that affect price, Commerce effectively determined that dimensional differences affected price comparability. It conducted itself accordingly during the investigation. Commerce's position that dimension affects price for matching but not for the adjustment for dimensional differences indicates a failure of objectivity.

4.71 Despite acknowledging that physical differences could result in differences in market value, Commerce concluded that there was no information on the record by which it could calculate an adjustment for differences in dimension based either on cost or value. Thus it did not say that such an adjustment was not warranted, but that it could not calculate one. Commerce also asserted that the adjustment it could not calculate would, in any event, be minor. However, Article 2.4 makes no distinction for minor price effects, nor is there evidence that the price effects were minor.

4.72 The United States presented two diversionary arguments. First, it argues that Article 2.4 applies only when there is a particular pattern in the pricing. That prices do not match in a single procession of lower prices for smaller pieces and higher prices for larger pieces of softwood lumber is irrelevant to the premise that dimensions affect price. Second, the United States argues that price differences based on dimension fluctuated. Article 2.4 does not require a uniform price differential as a precondition to "due allowance" for differences which affect price comparability. The issue is whether differences in physical characteristics affect price comparability and thus have a distorting effect. Moreover, since annual average prices for each product of each exporter were compared, an annual average adjustment could reasonably have been made, and was required to be made by Article 2.4. Commerce did not consider fluctuation in prices to be an obstacle for other price comparison purposes. Just as annual average export prices and normal values were computed, so too could Commerce have calculated an annual average adjustment for dimensional differences between two non-identical products.

4. Zeroing of Negative Margins

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

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

5. Company-specific Issues

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

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

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

4.78 For Weyerhaeuser Canada, Commerce improperly included an amount for litigation settlement costs incurred by Weyerhaeuser Company for claims related to its hardboard siding products sold in the United States in prior years. The G&A expense Commerce calculated did not reasonably reflect Weyerhaeuser Canada's costs for producing and selling softwood lumber, but included data that pertained to the production and sale of other products than softwood lumber, contrary to Articles 2.2.1.1 and 2.2.2. Commerce incorrectly found that Weyerhaeuser Company treated the settlement claims as G&A on its records. The US first written submission does not point to any relationship between the hardboard siding settlement costs and Weyerhaeuser Canada's softwood lumber production.

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

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

4.81 In calculating Slocan's costs and margin of dumping, Commerce ignored revenues generated from Slocan's futures contracts and failed to make an adjustment for a difference that affected the price comparability of Slocan's sales, contrary to Article 2.4. Alternatively, Commerce calculated an amount for Slocan's financial costs that failed to reasonably reflect its costs for producing and selling lumber contrary to Article 2.2.1.1. Commerce completely discarded these data, effectively rejecting data on Slocan's records despite an express finding that those records related to Slocan's lumber activities. This was neither an unbiased nor objective evaluation of the facts.

D. FIRST ORAL STATEMENT OF THE UNITED STATES

4.82 The following summarizes the United States' arguments in its first oral opening and closing statements:

1. Opening Statement of the United States of America at the First Meeting of the Panel

4.83 In its first written submission, the US requests two preliminary rulings. First, Canada has, in its first written submission, improperly added to the list of provisions it claimed in its Panel Request were violated by virtue of Commerce's definition of the product under consideration. In response, Canada protests that it has not added any claims but only "additional arguments".[43] However, statements that actions were "inconsistent with US obligations" under particular articles of a WTO agreement plainly amount to claims under those articles.

4.84 The requirement that treaty provisions forming the basis of a claim be expressly identified in a panel request is by now well-established. The Appellate Body made a finding on this exact issue in its recent report in *US – Carbon Steel.*[44]

4.85 Canada purports to rely on the Appellate Body report in *Korea – Dairy*. In that case, the Appellate Body took it as a given that listing of the treaty provisions at issue was "a minimum

[43] Canada response to the US preliminary objections, paras. 2 and 13.
[44] Appellate Body Report, *US – Carbon Steel*, para. 172.

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

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

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

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

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

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

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

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

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

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

define the product under consideration in an investigation. That understanding of Article 2.6 is reflected in the diverse practices of many WTO Members, including Canada itself.

4.94 Under Article 2.6, the existence of a "product under consideration" is taken as a given. No matter how an investigating authority defines the product under consideration, that becomes the basis for determining whether other products are "like products".

4.95 Canada appears to turn the text of Article 2.6 on its head. Instead of taking "product under consideration" as the starting point, Canada seems to take "like product" as the starting point and argue that "like product" constrains how an investigating authority defines the product under consideration.

4.96 Canada contends that the Canadian respondents were entitled to an adjustment to home market softwood lumber prices whenever the products compared had any dimensional differences. However, the Canadian respondents were unable to substantiate price adjustment claims during the investigation.

4.97 Consistent with Article 2.4, Commerce makes price adjustments for differences in the physical characteristics of merchandise when a party demonstrates that a physical difference between the product sold in the US market and the product sold in the foreign market has an effect on prices. But such an Article 2.4 adjustment is not automatic.[50]

4.98 In the majority of product comparisons, Commerce compared softwood lumber products of identical thickness, width and length. If identical products were not available for comparison, Commerce matched products with the most similar dimensional characteristics available.

4.99 On the question of calculation of the overall dumping margin for a given producer, Article 2.4.2 does not require Commerce to offset a dumping margin found on one particular model with non-dumping amounts found on another model. When the criteria of Article 2.4 are considered, not all export transactions will be equally comparable with all normal value transactions. Moreover, Canada's concept of a "negative margin" or an offset appears nowhere in the *AD Agreement*.

4.100 Under the *Tokyo Round Anti-Dumping Code*, many Contracting Parties made dumping calculations by comparing weighted-average normal values to individual export transactions, granting no offset for any export transaction that was not dumped. Article 2.4.2 required Members to change the dumping margin calculation, but not in the way Canada asserts. With respect to the methodology at issue here, Article 2.4.2 requires Members to establish margins of dumping by comparing weighted-average normal values with weighted averages of "all comparable export transactions".

4.101 Rather than calculating dumping margins for each individual export transaction, as before, Members are now required to weight average "all comparable export transactions" – in other words, all export transactions of the same model sold at the same level of trade. Improperly focusing on the word "all" deprives the term "comparable" of any meaning. It also nullifies the opening phrase in Article 2.4.2, which reads: "Subject to the provisions governing fair comparison in paragraph 4".

4.102 Canada relies heavily on the Appellate Body Report in *EC – Bed Linen.* While that Report dealt with the calculation of the overall dumping margin by the EC, the Report is not an interpretation of the *AD Agreement* with any broader applicability. Taking a fresh look at the issues is particularly appropriate in this case, because the United States was not a party to the *EC – Bed Linen* dispute, and that Report does not address many of the textual arguments presented by the United States in its first written submission.

[50] Panel Report, *EC – Tubes or Pipe Fittings*, para. 7.158.

4.103 Canada makes a number of company-specific claims. The *AD Agreement* provides only general guidance on how an investigating authority is to establish a producer's cost of production. There are no specific rules on issues such as allocation of general and administrative costs and calculation of offsets. What Canada seeks is to have the Panel re-weigh the evidence.

2. Closing Statement of the United States of America at the First Meeting of the Panel

4.104 Canada's acknowledgement that facts are always relevant in considering the issues presented underscores that this Panel is not considering questions in the abstract but in a particular factual context.

4.105 On its requests for preliminary rulings, the United States noted with interest Canada's statement that it will be submitting a seven page expert's memorandum explaining the methodology applied to create Exhibit CDA-77. The very fact that Canada's expert requires seven pages to explain the methodology underscores the US point that the exhibit is new evidence.

4.106 There has been some discussion of standard of review. Contrary to Canada's assertion, the United States does not advocate "total deference". US discussion on this point has emphasized the highly fact-specific nature of the issues presented and observed that re-weighing the evidence, as Canada has urged, finds no basis in Article 17.6 of the *AD Agreement*.

4.107 On Commerce's methodology for calculating an overall dumping margin for a given producer, Canada took issue with US reliance on negotiating history as additional support for US interpretation of Article 2.4.2. Canada argues that, in light of *EC – Bed Linen*, the ordinary meaning of Article 2.4.2 is clear, but is contrary to US interpretation, and, therefore, US recourse to negotiating history is not appropriate. The flaw in this reasoning is the premise that the meaning of Article 2.4.2 is clear simply because the Appellate Body has spoken to the question.

4.108 On initiation, as Canada acknowledged during US discussion of *Guatemala – Cement*, no panel has found an obligation on investigating authorities separate from the obligation under Article 5.3. This is with good reason, as Article 5.2 imposes no such obligation.

4.109 Also on initiation, discussion before the Panel highlighted the flaw in Canada's contention that Commerce did not rely on "actual transactions" in its decision to initiate. It *did* rely on actual transactions, as reflected in published data and affidavits from US producers.

4.110 When asked about its own practice regarding initiation, Canada stated that once the investigating authority is seized of jurisdiction over an investigation, it does not "look back" to the petition. That strikes us as being at odds with the rule of continuous evaluation of a petition that Canada advocates under Article 5.8.

4.111 With respect to product under consideration, Canada argues that the concept "like product" delimits the concept "product under consideration". But, it is undeniable that, under Article 2.6, "product under consideration" is the point of reference for defining like product. Under Canada's interpretation, there is no logical end to this loop.

4.112 Moreover, in its presentation, Canada went beyond arguing that Article 2.6 imposes limits and asserted where those limits should have been drawn in this case. Without any basis in the *AD Agreement*, it purported to identify a "core" category comprising "90 per cent of the products covered," and alleged that "Commerce added in another 10 per cent of products".[51] In telling the Panel where to draw the line, Canada is improperly urging the Panel to find facts as if it were the investigating authority.

[51] Canada first oral (opening) statement, paras. 34 and 35.

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

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

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

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

E. SECOND WRITTEN SUBMISSION OF CANADA

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

1. Initiation and Termination of the Investigation

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

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

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

4.121 The United States also asserts that a breach of Article 5.2 has no consequences and that the sole obligation on investigating authorities under the combination of Articles 5.2 and 5.3 is to ensure that an application contains sufficient evidence to justify initiation. To the contrary, a *Vienna Convention* analysis of Article 5.2 demonstrates that it is an independent obligation and further, that the failure to comply with Article 5.2 means that an investigating authority cannot initiate an investigation.

4.122 The United States violated Article 5.3 because an objective investigating authority could not have found that there was sufficient evidence to justify initiating the investigation based on the Application. Under Article 5.3, Commerce was required to assess whether the evidence provided by

[52] *Id.*, para. 54.
[53] *Id.*, para. 59.

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

4.123 The Applicant's cost data were flawed in at least four ways: first, the Applicant based its allegations of BC and Quebec producers' costs on US surrogate companies that were not representative of Canadian companies based on size; second, Commerce initiated the investigation without any evidence before it of how the Applicant calculated the manufacturing costs of the US surrogate companies for the SPF species or of how company costs were then allocated to the specific products for which the cost models had been constructed; third, both the BC and Quebec cost models used data from less than a full year despite the known seasonality of lumber mills' operations; fourth, there were no home market prices for western SPF available to test whether sales of this product were below cost.

4.124 The home market and export price information in the Application were also insufficient to justify initiation. Commerce initiated the investigation despite the fact that the Application contained no evidence of any actual sales transactions involving identified Canadian companies either in the domestic Canadian market or the American export market. Despite US assertions to the contrary, the Application contained no evidence of western SPF transaction prices in BC. The evidence on prices consisted of estimates from an industry publication and unsubstantiated anecdotal reports in two affidavits. Such evidence is not sufficient to justify initiation.

4.125 The United States violated Article 5.8 because Commerce failed, after initiation, in its ongoing obligation to assess the sufficiency of the evidence of dumping in the light of the Weldwood information provided to it and to terminate the investigation as an objective investigating authority would have. Contrary to the US view, the obligation in Article 5.8 cannot be made to depend on an *ex post facto* assessment of the relative merits of information, particularly where, as here, the information at issue has never been analyzed.

2. Like Product

4.126 An application for the imposition of anti-dumping duties must identify the proposed "product under consideration". Article 2.6 expressly requires that a like product be "identical" to the product under consideration, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

4.127 The plain language of Article 2.6 suggests a multi-step process. First, the investigating authority must identify the characteristics of the product under consideration. Second, it must identify the characteristics of each product proposed for inclusion in the like product. Third, it must determine whether the characteristics of each are identical or, if not, then closely resembling those of the product under consideration.

4.128 Commerce never defined the characteristics of the product under consideration, nor did Commerce compare the characteristics of each challenged product with those of the product under consideration as a whole. Instead, Commerce identified as subsets of the product under consideration various softwood lumber products. It then compared isolated characteristics of each challenged Canadian product to isolated characteristics of products selected from within the "product under consideration", considered to be "like" the challenged products. That analysis failed to establish the single, closely resembling, "like product" required by Article 2.6. No "close resemblance" exemplified by a set of shared common characteristics, was established between the challenged products and the product under consideration.

4.129 The United States uses the *Diversified Products* criteria to determine whether the product under consideration described in an anti-dumping petition comprises one or multiple "classes or

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

4.130 Commerce found a single product under consideration based on the common "characteristic" of the diversity – non-commonality – of the products sought to be covered by the applicant. A proper like product analysis in respect of the US market was never done.

4.131 The ordinary meaning of "characteristics closely resembling those of the product under consideration" requires a comparison of the characteristics of the putative like product to the characteristics of the product under consideration. In order to determine the ordinary meaning of "characteristics closely resembling those of the product under consideration", one must compare the characteristics of the putative like product to those of the product under consideration. The characteristics, defined as essential or distinctive traits, must be those of the "like product," and must be "very nearly identical" to the characteristics of the "product under consideration". This understanding is consistent with that expressed in the panel decision in *Indonesia – Autos*, in the context of the term "like product" in the *SCM Agreement*.

4.132 Article 2.6 establishes a preference for "alike in all respects". This context reinforces the ordinary meaning of "characteristics closely resembling". When the products are not "alike in all respects," then their characteristics (i.e., essential or distinctive traits) must resemble each other so closely (i.e., as near as can be) that the products are nearly identical.

4.133 The application requirements in Article 5.2(i) and (iv) and the industry support requirements of Article 5.4 depend upon the definition of the "like product". Were the like product defined too broadly, then it would lead to irrational results.

4.134 The "continuum" or "no clear dividing line" test is contrary to the plain meaning of Article 2.6. It tests only whether the item claimed to be a separate product shares some characteristics with some other item in the "diversity of product". It does not test whether the item claimed to be a separate product has characteristics (i.e., essential or distinctive traits) that closely resemble those of the product under consideration.

4.135 A failure to define the like product in accordance with the criteria of Article 2.6 means also that the product under consideration has not been properly defined. This leads to other violations of the *AD Agreement*. The investigating authority must assess industry support and the other application requirements of Articles 5.2, 5.3, and 5.4 separately for each like product. Should those requirements not be met with respect to a like product, the investigating authority may not initiate an investigation with respect to the product under consideration and must redefine the scope of the product under investigation. The improper definition of the like product, contrary to Article 2.6, would also vitiate the investigation, the establishment of dumping, the calculation of the anti-dumping margins and the imposition of anti-dumping duties in respect of the product under consideration, in violation of Articles 1, 9.3 and 18.1 of the *AD Agreement*. Therefore, a failure to define like products in accordance with the requirements of Article 2.6 must be corrected.

3. Due Allowance for Dimension Differences

4.136 Dumping is a measure to counter price discrimination between markets. To measure price discrimination, one must compare prices that are comparable, such that any difference in the price of goods in two markets cannot be attributed to other factors, such as differences in taxes, or physical differences in the products compared. In the absence of such a "fair comparison," in which differences in products are adjusted, one cannot possibly measure price discrimination. Article 2.4 of

the *AD Agreement* expressly requires not only a "fair comparison (...) between the export price and the normal value", but also 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".

4.137 The present case involves the requirement of "due allowance" for differences in physical characteristics; specifically, differences in the thickness, width, or length (collectively, "dimension") of products sold in the United States and Canada that Commerce compared without any adjustment and thus without "due allowance". With respect to differences in physical characteristics, Article 2.4 imposes an affirmative obligation upon the investigating authority; it does not establish an evidentiary standard for an individual respondent in domestic proceedings.

4.138 In making price-to-price comparisons, Articles 2.1 and 2.6 require the investigating authority to compare identical products sold in the importing country and in the home market, and permits comparisons of prices of non-identical products only if identical products cannot be compared. When prices of identical products are compared, there is no issue. When prices of non-identical products are compared, "due allowance" for the difference must be made under Article 2.4.

4.139 The United States acted inconsistently with Article 2.4 in making price comparisons of products with differences in dimension that Commerce quite explicitly identified as non-identical products, yet treating them as if they were identical by failing to make an adjustment for such dimensional differences.

4.140 Commerce used each of the three dimension characteristics to distinguish between identical and non-identical products. Based on its so-called "matching criteria", Commerce regarded lumber products to be identical only if they were identical with respect to all eleven characteristics, which included the same thickness, the same width, and the same length.

4.141 Dimension affects both supply and demand, and thus price. The physical dimensions of a particular lumber product affect the use to which the lumber can be put, thereby creating different demand for different dimensions. On the supply side, the raw materials used to produce lumber vary in diameter and length, and trees of different diameter and length will have different costs and yield lumber of different dimension. Dimension thus affects both demand and supply, which, elementary economics teaches, necessarily affects price and price comparability.

4.142 The United States provides to the Panel computer output showing a sample of average gross unit prices of random products in the Canadian home market for different respondents in the proceedings before Commerce. The United States also points the Panel to the gross prices in the home market, which are rather meaningless as they are unadjusted for other differences affecting price comparability, including differences in freight charges, volume discounts, selling expenses, and the like among individual sales. In any event, in every instance in which products vary only by dimension, the prices to which the United States looks differ. They are never the same.

4.143 Canada has also provided the Panel with further graphical representations of Commerce's own pricing data (using the meaningful, net prices after adjustments) as well as statistical representations of Commerce's Tembec data, demonstrating, through regression analyses, that dimension affects price. In addition, instead of the random product examples Commerce selected, Canada provided examples of non-identical products Commerce actually compared, along with their net Canadian prices. These charts and graphs of data already before Commerce are simply illustrative and cumulative.

4.144 Commerce unwaveringly accepted thickness, width, and length as important matching characteristics throughout its investigation, from its questionnaire, to its Preliminary and Final

Determinations. Because Commerce refused to compute either a cost-based or price-based adjustment for differences in dimension, Commerce refused to compare prices of any products that differed in any dimension characteristics. No one subsequently challenged or disputed this express factual finding that dimension affected price, nor did Commerce abandon it in its Final Determination.

4.145 The very same evidence that established that thickness, width, and length should be used as matching characteristics, and their order in the matching hierarchy, establishes that an adjustment was necessary before prices of non-identical products could be compared.

4.146 Based on its failure to adjust for dimensional differences, Commerce made a substantial number of non-identical comparisons that, in turn, significantly distorted the margins Commerce computed using such comparisons. Canada also provided examples of some of the non-identical comparisons Commerce actually made. This information quickly dispels the suggestions made by the United States that few non-identical comparisons were made, that the dimensional differences in these comparisons all were "minor", and that these "minor" differences did not impact price comparability. Commerce did not do any analysis.

4.147 The data first show that, for each company, Commerce made significant numbers of non-identical comparisons. Indeed, for two companies, the number of non-identical comparisons exceeded the number of identical comparisons. More importantly, for every company, the dumping margin calculated for non-identical companies far exceeded the margin calculated for identical comparisons. For every single company, the non-identical margin was at least double that for identical comparisons. In some cases it was four to seven times as high.

4.148 Canada has established its *prima facie* case that Commerce compared prices of products Commerce itself defined as non-identical, without due allowance for physical differences as required by Article 2.4. Canada has also supplied evidence, from the record before Commerce, that dimensional differences affect price comparability, and that all parties before Commerce agreed that this was so.

4.149 The argument that Canadian respondents did not meet the burden of proof is an *ex post facto* justification for the Commerce determination and, as such, cannot be considered by the Panel. The Panel is to review the decision "made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature", as was confirmed by the panel in *Argentina – Poultry*.

4.150 The United States offers no alternative explanation for the fact it implicitly acknowledges, i.e., that lumber products of different dimension exhibited different prices at any given time. There is no alternative theory for why the prices of softwood products of different dimension differ – other than that dimension affects price comparability.

4.151 The US argument that the evidence showed that prices for different dimension lumber "were not stable or predictable" cannot derive from any failure of the Canadian respondent companies to provide evidence or analysis. Thus, the United States, without notice to the parties, established a specific evidentiary burden, inconsistent with Article 2.4 that would be virtually impossible to meet.

4.152 The fact that neither Canadian nor US prices for any investigated lumber product were predictable or stable over the POI did not prevent Commerce from comparing prices for purposes of measuring dumping, and it cannot be allowed to prevent Commerce from making due allowance for product differences, particularly, where, as here, the comparisons made are of annual weighted-average prices. Commerce has not required showings of consistent and predictable price differences for any of the other product characteristics for which it did make an adjustment for product differences.

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

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

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

4.155 The mechanics of the US practice as described by Canada are not contested by the United States, and were acknowledged by Commerce during the investigation. Furthermore, the United States has not denied that its practice is identical to that engaged in by the EC and found by the Appellate Body in *EC – Bed Linen* to be inconsistent with the terms of Article 2.4 and 2.4.2 of the *AD Agreement*.

4.156 The terms "[a]ll comparable export transactions" require inclusion of export transactions that result in positive intermediate margins as well as those that result in negative intermediate margins. The US practice of zeroing, which introduces an artificial distinction between positive and negative intermediate margins, fails to account for all comparable export transactions, in violation of Article 2.4.2. By converting intermediate margins from model comparisons to zero where export price exceeds normal value, the United States gives less weight to these models and transactions in conducting its overall comparison. Converting negative margins to zero in effect decreases the true export price, which was greater than normal value to a value equal to the normal value.

4.157 Furthermore, zeroing fails to compare a "weighted average" normal value with a "weighted average" of prices of all comparable export transactions, as required by Article 2.4.2. Due to the conversion of some intermediate margins to zero, the overall margin of dumping that results does not reflect an actual average, in violation of Article 2.4.2.

4.158 However, the US claim that Article 2.4.2 only addresses intermediate stage calculations is contradicted by the express terms of Article 2.4.2, which establishes a single standard for the margin calculation applicable to all stages of the calculation.

4.159 When Article 2.4.2 is read in conjunction with the terms of Article 2.1, the implausibility of the US interpretation of Article 2.4.2, as limited to intermediate stage calculations, is revealed. These margins, aptly described by the Panel in *EC – Bed Linen* as margins of price difference, are of only secondary importance to Article 2.4.2. To suggest that they are the sole concern of its requirements is to ignore the most basic purpose of these provisions: to set rules governing how investigating authorities are to determine margins of dumping.

4.160 The same claim made by the United States in this case was considered and rejected by the Appellate Body in *EC – Bed Linen*. Adopted Appellate Body reports should be taken into account where, as in this case, they are relevant to a subsequent dispute.

4.161 The *AD Agreement* expressly provides that a comparison be made of weighted averages of US price and normal value for "all comparable export transactions". The ordinary meaning of these terms supports a finding that zeroing violates the *AD Agreement*. Any ambiguity or manifest absurdity that the United States might claim derives not from the text but from its own unilateral interpretation of Article 2.4.2.

4.162 Canada's interpretation of Article 2.4.2 does not deprive the term "comparable" of operative meaning. Canada agrees with the United States that Article 2.4.2 applies to intermediate stage

comparisons. For those comparisons, "comparable" ensures that model-specific comparisons only include transactions meeting the requirements of "price comparability" contained in Article 2.4. "[All]" ensures that all the transactions meeting those requirements of comparability are used.

4.163 For final stage comparisons, "comparable" describes the transactions compared at the intermediate stage and the nature of the transactions within the like product. "[All]" operates to ensure that all transactions are considered, and none are excluded. The United States argued in its first written submission that Article 2.4.2 "mak[es] plain that not all export transactions are 'comparable'." The United States now claims that all export transactions are comparable, although not "equally comparable". If all export transactions were comparable, then it would be hard to understand how the inclusion of the word "comparable" could, as the United States contended in its first written submission, demonstrate that the word "all" has a limited application, namely only to a subset of transactions which are "comparable". Ultimately, the United States fails to refute Canada's demonstration that Commerce's overall comparison, including at the final stage of the process, did not result in a "fair comparison" within the meaning of Article 2.4.

5. Company-specific Issues

(a) The Allocation of Interest Expense for Abitibi

4.164 In making this claim, Canada does not ask that the Panel choose between methodologies as the United States contends. Rather, Canada argues that Commerce failed to meet its express obligations under Articles 2.2.1.1 and 2.2.2. At the outset, in its determination, Commerce offers generic rationales that fail to show that it considered the evidence before it. Abitibi demonstrated that its newsprint and pulp and paper operations were far more capital intensive and required more financing than its lumber operations and that this difference was not captured in a COGS allocation. It also demonstrated that including depreciation expense in COGS in no way corrects this distortion or in any way adjusts for differences in asset requirements. Commerce was not guided in its selection of an allocation methodology by the specific evidence that had been submitted in this case. The evidence showed that the investigating authority: (1) mandated an allocation methodology at the outset of a case before even gathering information, (2) failed to make case-specific factual findings, (2) applied generic reasoning in defence of its methodology, and (4) asserted that established practice would be followed because it is consistent and predictable. This constitutes a failure to "consider all available evidence on the proper allocation of costs" as required by Article 2.2.1.1.

4.165 Further, Abitibi's assets are predominantly long-term and the asset requirements of its different business segments are very different, which differences are not reflected in COGS. The fatal problem with a COGS methodology is that it considers only current expenses, and effectively ignores the true, full costs of long-term capital assets. Further, the Panel must consider that Abitibi will sell the lumber soon after it is produced and then get paid. Thus, unlike capital assets which need to be financed for the full year and longer, current production expenses only need to be financed until payment is received. Thus, the "cash needs" or capital needed to finance current expense is an amount much less than the annual total of those expenses because it takes into account inventory turnover time. This is shorter for lumber than other products Abitibi sells. In ignoring this for Abitibi, Commerce grossly over-weighted current expenses in its allocation, since the working capital "cash needed" to finance current expenses over one year is not the total of such expenses, but rather that total divided by the inventory turnover time. Failure to consider these factors resulted in an interest expense that was not related to Abitibi's cost to produce softwood lumber, contrary to Article 2.2.1.1.

4.166 Commerce's COGS methodology also skewed the allocation of interest expenses to lumber in this case because Abitibi's lumber operations require 7.6 per cent of the company's total assets and therefore 7.6 per cent of its total financial expense. By allocating to lumber 13.6 per cent of total

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

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

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

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

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

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

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

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

4.172 The United States further tries to justify Commerce's classification of the hardboard siding expense as a general expense based on the claim that doing so is "supported by Weyerhaeuser Company's own books and records" and that Weyerhaeuser Company describes the expense as "generally incidental to its business". On the contrary, Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A expenses and its hardboard siding settlement expense. The evidence also demonstrates only one other line-item

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

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

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

(d) West Fraser's By-product Revenue Offset

4.175 Canada argues that Commerce improperly ignored relevant record evidence concerning 99.7 per cent of BC wood chip prices. In response, the United States characterizes Canada's claim as an "argument that Commerce should have preferred one source of evidence," and alleges that such an argument is a "request to find facts *de novo*". This characterization is incorrect. Canada argues that Commerce was required to consider all relevant record evidence. A panel must "consider whether all the evidence was considered, including facts which might detract from the decision actually reached" in determining whether an investigating authority was unbiased and objective. The United States also is incorrect in alleging that Canada is seeking a *de novo* review of the record evidence. Canada has made a *prima facie* case showing that the evidence on BC market prices is inconsistent with Commerce's determination that West Fraser's chip sales to affiliated parties were made at inflated prices. It falls within the Panel's competence to find that this determination does not constitute an "unbiased and objective" evaluation of that evidence.

4.176 Canada demonstrated that the data Commerce relied upon did not provide a reasonable benchmark for BC market prices. Canada showed that the majority of West Fraser's wood chip sales to unaffiliated parties were made through the McBride mill pursuant to a pre-existing contract early in the POI, when prices were lowest. Canada also showed that the volume of West Fraser's sales to unaffiliated parties represented just 0.28 per cent of West Fraser's total BC wood chip sales.

4.177 First, the United States argues that these are new arguments that were not advanced by West Fraser itself. As Commerce used a country-wide comparison in its Preliminary Determination, however, there was no reason why West Fraser would have argued that its sales to unaffiliated parties

in BC were too small or unrepresentative. Second, the United States asserts that Commerce acted reasonably because West Fraser's unaffiliated transactions within BC were found to be commercial transactions. As record evidence shows that the majority of West Fraser's BC sales to unaffiliated parties were made during the first two months of the POI, when prices were lowest, the average price of those sales cannot reflect market prices for the POI. Third, the United States claims that "[s]o long as the wood chip transactions were commercial in nature, the actual volume of those transactions is irrelevant". This assertion, however, is not consistent with an investigating authority's obligations under the *AD Agreement*. Under Commerce's interpretation, even one non-representative arm's length transaction could serve as a reasonable benchmark for market prices for a POI of an entire year. Finally, the United States observes that Canada has not made arguments concerning West Fraser's unaffiliated sales from its PIR sawmill. That observation is correct, and the reason for this is simple: unaffiliated sales from PIR did not distort Commerce's analysis.

4.178 Commerce applied inconsistent benchmarks to Canfor and West Fraser in determining whether their respective chip sales to unaffiliated parties were made at market prices. The United States defends this action by arguing "[unaffiliated] sales in BC made by West Fraser were of its own product mix, and thus the best evidence of the value of an offset in West Fraser's process". This argument is a false, *post hoc* justification for Commerce's dissimilar treatment of West Fraser. Commerce did not find that West Fraser's wood chip sales to unaffiliated parties provided a better benchmark because they reflect West Fraser's "own product mix", and identified no evidence that West Fraser's wood chips somehow differed from those of Canfor or other producers.

4.179 Canada also showed that Commerce re-valued certain chip sales made by West Fraser to an affiliate, QRP, even though Commerce recognized that those sales had been made at market prices. In response, the United States argues Canada is requesting the Panel to find that data from QRP was "more relevant". Canada does not argue that these data were "more relevant". Rather, Canada argues that Commerce unreasonably revalued wood chip sales made by this large sawmill to an affiliated customer, even though Commerce itself specifically recognized that the prices QRP paid West Fraser were not inflated. The US argument does not address this inconsistency. At the very least, this evidence must be considered in determining whether the finding was based on an unbiased and objective evaluation of the record evidence as a whole.

(e) Tembec's By-product Revenue Offset

4.180 Commerce had two alternatives for the data it would use to calculate Tembec's by-product revenue offset. Commerce had to choose between using internal transfer prices or unaffiliated prices for wood chip purchases. Commerce used one approach for Tembec and the opposite approach for West Fraser for the same overall purpose: artificially inflating both companies' margins.

4.181 The United States argues that "the difference between the (...) internal surrogate for cost and the external market price is the equivalent of "profit" in the normal setting where costs and sales prices are known". This *post hoc* rationalisation must be rejected. The difference between internal prices and market prices cannot be attributed to profit. By-products, by definition, have neither profits nor costs. Furthermore, Commerce made no findings about profits.

4.182 Canada submits that market price is the appropriate benchmark for valuing by-product revenue offsets. Article 2.2.1.1 requires Commerce to base its cost calculations on the records kept provided that they "reasonably reflect the costs associated with the production and sale of the product". The internal transfer pricing in Tembec's books and records does not reasonably reflect the costs associated with the production of softwood lumber because the wood chip pricing therein does not reasonably reflect the market value of the by-product.

4.183 There are three flaws in the US argument that Tembec made its best assessment of a surrogate for cost when it set its internal transfer price. First, Commerce made no such finding. Second, there

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

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

(f) Slocan's Futures Revenue Offset

4.185 Commerce rejected Slocan's position that futures revenue formed part of direct selling expenses. In doing so, Commerce asserted that it did not consider the revenue to "result from and bear a direct relationship to [a] particular sale in question". This is not correct. Article 2.4 requires that "[d]ue allowance shall be made … for differences which affect price comparability". The ordinary meaning of this provision cannot support the US interpretation. Article 2.4 does not refer to "particular sales transactions", and no reasonable interpretation of the textual language of this provision would read in such a specific requirement.

4.186 The United States argues that Article 2.4 presumes a request for adjustment and a demonstration of effect on price comparability. This interpretation contradicts the ordinary meaning of Article 2.4. The United States was required to make due allowance for all differences that affected price comparability. In this context, the "differences" referred to include the "conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics and any other differences".

4.187 Article 2.4 provides a non-exhaustive list of differences that affect price comparability. It is apparent that there is a broad requirement to adjust for any differences affecting price comparability. Moreover, Article 2.4 clearly envisages overlap between the "differences" under this provision. In other words, it would not matter whether Slocan separately demonstrated that its futures revenue was a "condition of sale" in the US market. Slocan's futures trading activity was either a "condition" of US sales, an "other difference" affecting price comparability, or both.

F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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

1. Initiation

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

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

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

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

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

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

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

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

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[54] *See, e.g.*, Canada first written submission, paras. 86, 95, and 99; Canada response to question 9 of the Panel, paras. 45-49.
[55] Canada response to question 4 of the Panel, paras. 6-7.
[56] Canada response to question 8 of the Panel, paras. 28-30.
[57] *See, e.g.*, Canada response to question 19 of the Panel, para. 61.
[58] Canada response to question 8 of the Panel, paras. 34-35.
[59] *See* US first written submission, paras. 53-54 and exhibits cited therein.
[60] Canada response to question 8 of the Panel, para. 40.
[61] Exhibit CDA-41, Petition Exhibit VI.C-9, para. 4.

2. Product under Consideration

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

4.198 This is underscored by its 30 June 2003 response to a question on this very subject. Canada first attempts to parse the phrase "characteristics closely resembling" in Article 2.6. It concludes that the phrase "must mean that the essential, distinctive traits of one product must be very nearly identical to the essential, distinctive traits of the other product".[62] In fact, this conclusion is not borne out by the definitions of key terms Canada cites.

4.199 Canada then proceeds to posit a problem that might occur if the product under consideration in a given case were defined too broadly, using a hypothetical case comprising automobiles and bicycles.[63] There are several problems with this hypothetical example. First, whatever the appropriate analysis of an investigation that might treat automobiles and bicycles as a single product under consideration would be, that is not the case presented here. Second, Canada's own analysis of its hypothetical begs the question of how Article 2.6 directs an authority to determine the appropriate number of products under consideration in a given case. Third, Canada fails to consider the implications that a narrow definition of product under consideration would have on the very same standing and injury determinations to which it alludes.

3. Due Allowance for Dimensional Characteristics

4.200 Commerce acted consistently with Article 2.4 of the *AD Agreement* in its consideration of the dimensional characteristics of softwood lumber. Canada contends that the respondent companies had no notice of Commerce's intent to consider whether or not a price adjustment should be granted for dimensional differences.[64] Its claim of procedural unfairness – specifically, that the United States violated Article 6 of the *AD Agreement* – is a new claim that falls outside the Panel's terms of reference.

4.201 In its response to the Panel's questions, Canada provided a seven-page consultant's report (contained in Exhibit CDA-129) to explain the regression analysis contained in Exhibit CDA-77. Canada's reason for presenting the regression analysis (and the consultant's background report) for the first time in this dispute, instead of during the investigation, is that "no one reasonably doubted that the inclusion of dimension for model matching would not mean its inclusion in adjustments for physical differences".[65] Canada's position is belied by the record. The parties' submissions during the investigation evidence their awareness that whether or not an adjustment would be made for differences in dimension was an open question.

4.202 Canada misinterprets Commerce's inclusion of physical characteristics in the product matching methodology as an acknowledgement that dimensional differences had an effect on price comparability, requiring "due allowance" under Article 2.4.[66] However, Commerce cannot be deemed to have concluded that dimension affected price comparability simply by having made a product matching determination. Commerce accepted that dimensional characteristics were significant for product matching purposes, at the behest of the parties, but without scrutiny of the price or cost data specifically relevant to dimension. Even assuming *arguendo*, that Commerce implicitly acknowledged that dimension affects price comparability, it made the due allowances that Article 2.4

[62] Canada response to question 20 of the Panel, para. 64.
[63] *Id.*, para. 65.
[64] Canada response to question 4 of the Panel, paras. 4 and 5.
[65] *Id.*, para. 4.
[66] Canada response to question 22 of the Panel, para. 86.

requires by comparing products on the basis of criteria that included dimension. In contrast to the Argentina authority in *Argentina – Ceramic Tiles*, by conducting a model-by-model comparison, and matching not only identical softwood lumber dimensions, but also, where identical dimensions were not available for matching, the most similar dimensions possible, Commerce *fully* accounted for dimensional differences.

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

4.204 This is not a case in which Commerce either failed to ask for data, or asked for data the respondents never provided, and therefore record evidence does not exist. Commerce reached its conclusion based on a review of the information contained in the respondents' cost and sales databases conducted in the normal course of the investigation.[67]

4.205 In response to the Panel's request to the United States for the "number of comparisons" of softwood lumber made involving different dimensions, Canada provided its own distorted response. First, Canada presented only the number of comparisons made, without weighting the results by volume.[68] Because the dumping margins are calculated according to the volume of US sales, a simple number of comparisons does not reflect the relative significance of the identical, similar, and constructed value comparisons in the margin.

4.206 Canada also provided several charts showing price differences in the Canadian market for several softwood lumber products. However, the price differences reflected in those charts may not be attributable to differences in dimension, but to the fact that the sales were made outside the ordinary course of trade.[69] Other comparisons on the record show no discernible pattern between dimension and price. They show minimal price differences for differences in dimension, significant fluctuations, and smaller lumber pieces selling for higher prices than large lumber pieces. This other record evidence demonstrates the selective nature of Canada's charts.

4. Calculation of Overall Dumping Margin

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

4.208 While it is clear that Canada disagrees with the United States on the existence of such an obligation (for purposes of this dispute), it is not clear that the disagreement extends beyond this dispute. Canadian administrative practice shows that Canada's interpretation of Articles 2.4 and 2.4.2 is similar to the United States' interpretation.[70] It is not clear how Canada reconciles its interpretation of Articles 2.4 and 2.4.2 for purposes of its own investigations with its interpretation of those provisions in the present case.

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[67] Exhibit CDA-2, IDM, Comment 4, note 60.
[68] Canada response to question 25 of the Panel, para. 97.
[69] *See* Exhibit US-76, pp.1-4 illustrating this point.
[70] *See* Exhibit US-78, "Margins of Dumping" section of "Statement of Reasons, Concerning the making of a final determination of dumping with respect to Fresh Tomatoes, Originating in or Exported from the United States of America, Excluding Tomatoes for Processing".

4.209 Further, Canada has stated positions that are: (a) inconsistent with the *EC – Bed Linen* Report and (b) internally inconsistent. First, after relying heavily on the Appellate Body Report in *EC – Bed Linen*, Canada is now espousing positions at odds with that report. Canada now agrees with the United States that a two-stage process for determining whether a producer or exporter has engaged in dumping is appropriate under Articles 2.4 and 2.4.2 of the *AD Agreement*.[71] However, the Appellate Body, in arriving at its finding in *EC – Bed Linen* found "nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished [...], nor to justify the distinctions [...] among *types or models* of the same product on the basis of these 'two stages'".[72] Thus, Canada now appears to agree with the United States that the reasoning in *EC – Bed Linen* does not account for the need to make multiple comparisons in order to comport with Articles 2.4 and 2.4.2 of the *AD Agreement*.

4.210 Second, Canada is not completely consistent in its position regarding a two-stage dumping analysis. In particular, at paragraph 109 of its response to question 31 of the Panel, Canada seems to take the position that a two-stage analysis is required by the *AD Agreement*. Yet, in the same response, and without citation or explanation, Canada claims that "the resulting dumping margin should be the same whether the authority carries out its calculation in one stage or two"[73] and that, in this case, the first stage "divided the single like product into multiple models *as an expedient* that permitted appropriate comparisons between identical or most similar products".[74] (emphasis added) Nowhere does Canada reconcile these positions.

4.211 Although Canada took issue with the appropriateness of the United States' reference to negotiating history of Articles 2.4 and 2.4.2 of the *AD Agreement*[75], Article 32 of the *Vienna Convention* expressly provides for recourse to the negotiating history in order to confirm the ordinary meaning of treaty terms in their context and in light of the treaty's object and purpose. Canada does not refute the substance of the relevant negotiating history.

5. Company-specific Issues

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

4.213 Canada raises the issue whether Commerce's decision to allocate **Abitibi's financial costs** using a COGS methodology was consistent with Articles 2.2.1.1 and 2.2.2. Commerce fully considered Abitibi's "asset-based" allocation proposal, but disagreed that assets alone should govern how financial costs were allocated.[76] Canada argues that the COGS allocation is unreasonable, not because it fails to include a value for capital assets, but because it fails to consider all assets to a sufficient degree.[77] For example, Canada argues that the COGS methodology fails to consider non-depreciable assets. However, the record reflects that the vast majority of Abitibi's assets – and all of its "capital assets" – were depreciable assets.[78]

4.214 Whether or not Abitibi's asset-based cost allocation methodology was a reasonable alternative to Commerce's COGS methodology is not the issue before this Panel. However, even on its own terms, Canada's argument is flawed, because it is based on the unsubstantiated premise that Abitibi's

[71] Canada responses to questions 28, 29, 30 and 31 of the Panel, paras. 101, 105-107, and 109.
[72] Appellate Body Report, *EC – Bed Linen*, para. 53.
[73] Canada response to question 31 of the Panel, para. 110.
[74] *Id.*, para. 111.
[75] Canada first oral (opening) statement, paras. 67-68.
[76] Exhibit CDA-2, IDM, Comment 15.
[77] Canada response to question 52 of the Panel, para. 146.
[78] Exhibit CDA-82, Abitibi's Consolidated Financial Statement, p. 35.

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

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

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

4.217 Regarding **Weyerhaeuser Canada's G&A costs**, Canada appears to reason that G&A costs that are not related *exclusively* to the production and sale of softwood lumber must not be included in a calculation of those production costs.[84] This reasoning misapprehends the very nature of G&A cost. General expenses are, by definition, expenses incurred for the benefit of a corporate group as a whole and are not specific to one or another product line. A requirement that general expense be directly related to the good produced would make it impossible to allocate general expense within a company that produces many goods because a direct relationship would never be identifiable. This would render meaningless the requirement of Article 2.2 that "a reasonable amount for administrative, selling and general costs" be included in a company's cost calculation.

4.218 In previous submissions, the United States has referred the Panel to Note 14 of Weyerhaeuser Company's audited financial statement, explaining the general nature of the company's litigation costs.[85] In its most recent submission, Canada replies that the statement in Note 14 "was not made in the context of the hardboard siding claim".[86] However, Note 14 plainly is attached to the line item in Weyerhaeuser Company's financial statement pertaining to the hardboard siding litigation. Canada also adds that Note 14 "neither attributes the expenses to any particular portion of Weyerhaeuser's business nor the business as a whole. It simply acknowledges that the company incurred certain costs".[87] But, this is not a basis for excluding the cost from G&A costs. If it were, then litigation expenses and other expenses that are general in nature would avoid inclusion in calculation of a company's total SG&A cost simply by virtue of their characterization on a company's books and records.

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[79] US first written submission, paras. 192-193.
[80] Canada response to question 53 of the Panel, paras. 149-154.
[81] *Id.*, para. 149.
[82] Exhibit US-12, Tembec's Annual Report, "Auditors' Report," p. 34.
[83] Canada response to question 53 of the Panel, para. 150.
[84] *See, e.g.*, Canada response to question 60 of the Panel, paras. 163-64.
[85] *See* US response to question 41 of the Panel, para. 65, note 41, citing Exhibit CDA-101, Weyerhaeuser 2000 Annual Report, note 14, p. 75.
[86] Canada response to question 60 of the Panel, para. 164.
[87] *Ibid.*

4.219 Canada maintains that these costs had a "clear association with the production and sale of non-like product…"[88] What Canada does not explain is how litigation occurring years after a good's production can be clearly associated with its production.

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

4.221 Applying market value as a benchmark, Commerce determined that West Fraser's BC affiliated transactions did not reasonably reflect the value of the wood chips.[89] Thus, Commerce valued the **by-product** offset for both affiliated and unaffiliated transactions using the "average sales price" for wood chips derived from the unaffiliated BC transactions.[90]

4.222 Canada now acknowledges that West Fraser never argued to Commerce that some of its unaffiliated (McBride mill) transactions were unrepresentative of a market value for wood chips.[91] It argues that, because West Fraser had a large amount of affiliated transactions during the period of investigation, it is "self-evident" that Commerce should have questioned the use of West Fraser's unaffiliated transactions for valuing wood chips in BC.[92] However, West Fraser's unaffiliated transactions were significant in number and value. Even if the quantity of transaction had been smaller, this fact, in and of itself, would not have called into question the commercial nature of the unaffiliated transactions.

4.223 Canada also argues that Commerce should have compared the values of West Fraser's wood chips to the values of *all* wood chips on the record, including those values reflected in the books and records of Tembec, Canfor, Abitibi, and Weyerhauser Canada.[93] Canada cites to no provision of the *AD Agreement* requiring that analysis.

4.224 Finally, Canada argues that Commerce "blindly adhered" to its methodology for valuing affiliated transactions.[94] However, Commerce's methodology in BC (and applied to Alberta transactions as well) was based on an objective review of the firm's books and records.[95]

4.225 In the case of Tembec, the question is Commerce's valuation of interdivisional transfers of wood chips. A value for an interdivisional transfer of a by-product recorded on a company's books and records may be a reasonable reflection of the "costs associated with the production and sale" of the by-product, even if that value is less than market value. In this case, Commerce determined that the price paid by Tembec's pulp mills to its sawmills was a reasonable amount.[96]

4.226 Canada claims that Tembec's inter-divisional transactions were "arbitrary".[97] But, no provision in the *AD Agreement* requires an investigating authority to replace a company's own valuation of inter-divisional transfers of a product with the market value for sales of the same product. Costs of production are commonly lower than the market value of a product, due to profit paid by an unaffiliated purchaser to its supplier.

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[88] Canada response to question 58 of the Panel, para. 159.
[89] Exhibit CDA-2, IDM, Comment 11. *See* also US first written submission, paras. 218-229.
[90] *Ibid.*
[91] Canada response to question 65 of the Panel, para. 168, note 168.
[92] *Ibid.*
[93] Canada response to question 66 of the Panel, paras. 170-171.
[94] *Id.*, paras. 170 and 172.
[95] Exhibit CDA-2, IDM, Comment 11.
[96] *Id. See* also US first written submission, paras. 230-244.
[97] Canada response to question 71 of the Panel, para. 179.

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

4.228 Neither Slocan nor Canada has explained how Slocan's futures contracts could "affect" any specific prices to US customers, given that no sale or shipment of softwood lumber and no payment for lumber actually occurred under the contracts.[100] Canada has not identified a sale of lumber to a customer in the United States for which Slocan's futures contracts were a condition and term of sale.[101] Absent such a showing in the investigation, there was no basis for an adjustment for differences in conditions and terms of sale under Article 2.4.

4.229 Commerce also found, consistent with Article 2.2 of the *AD Agreement*, that the futures contracts were not linked to production, since the profits amounted to sales revenue (even though they were not tied to any particular sale of lumber in the United States). Thus, Commerce properly declined to use selling revenue to offset finance expenses included in Slocan's production costs.[102]

G. SECOND ORAL STATEMENT OF CANADA

4.230 In its second oral statement, Canada made the following arguments:

1. Initiation and Termination of the Investigation

4.231 The United States breached the *AD Agreement* because the investigation was initiated and then continued in a manner that did not respect US obligations under Articles 5.2, 5.3 and 5.8.

4.232 The panel in *Guatemala – Cement I* held that, even though the evidence needed to justify initiation is not the same as that needed to justify a preliminary or final determination, the "subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of dumping". (emphasis in original)

4.233 The United States has claimed that 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". However, the United States has now conceded this statement is untrue.

4.234 Commerce initiated the investigation without any domestic sales information from BC – by far the largest lumber-producing province in Canada. The sole allegation of dumping against BC producers was based on a constructed value comparison. Article 2.2.1 permits an authority to disregard price-to-price comparisons and resort to constructed value comparisons "only if" the authority has properly determined that home market sales are made below cost. As there were no BC home market prices, Commerce had no legal basis for using the BC constructed value comparison as evidence of dumping to justify initiation.

4.235 With respect to Quebec, the decision to initiate was improper because the estimate of producers' costs rested on assertions and not on evidence. When the applicant's Quebec home market sales information is compared with its export price information, there is no dumping. Initiation rested

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[98] Panel Report, *Egypt – Steel Rebar*, para. 7.3.
[99] *See* Exhibit CDA-2, IDM, Comment 21.
[100] *See* US first written submission, paras. 249-250.
[101] *Ibid.*
[102] *Id.*, para. 252.

on constructed value comparisons, which, in turn, rested on the Applicant's estimate or model of Quebec producer costs.

4.236 There were no data on how costs of production were incurred by Canadian mills before Commerce at initiation. The Applicant's cost model was based, in significant part, on information from two US mills chosen as surrogates to model the costs of Quebec mills.

4.237 The Applicant noted that softwood lumber manufacturing costs vary significantly by producer based on a number of identified factors. Commerce failed to ensure that the two US surrogate mills chosen were representative of Quebec mills, at least regarding the factors identified by the Applicant. The Applicant simply asserted, and Commerce accepted, that the US surrogate mills were representative. Commerce had no evidence before it to support such a conclusion.

4.238 Further, the Applicant did not provide any information on how the costs of the US surrogate mills were allocated to the products at issue.

4.239 The United States, hiding behind the pretense of confidentiality, has not provided the Panel with any information that was before Commerce about the two US surrogate mills. These US mills were at the heart of Commerce's decision to initiate. Canada has not seen, and the Panel still does not have before it, basic information in the hands of the United States, such as the names of the US mills and what Commerce knew about those mills. The United States has responded to Canada's claims with nothing but assertions.

4.240 The cost information that formed the basis of Commerce's decision to initiate was neither accurate nor adequate. Therefore, it was not sufficient to justify initiation under Article 5.3.

4.241 Turning to Article 5.2, these are the facts: the United States has admitted that the Application contained information indicating that Weldwood, a major Canadian producer, was owned by the Applicant IP; the Weldwood-IP relationship establishes that actual cost and price information from a major Canadian producer was readily available to the Applicant; and the Applicant did not provide such information to Commerce. The undisputed facts establish a breach of Article 5.2.

4.242 Concerning Article 5.8, given the lack of actual Canadian transaction price and cost data in the Application, Commerce was required to consider the Weldwood information. Any other result renders ineffective the ongoing obligation to terminate an investigation in Article 5.8.

2. Zeroing

4.243 The logic of the Appellate Body in *EC – Bed Linen* is clear. However, the United States argues that this clearly established interpretation should be rejected. Yet the United States does not deny that its practice is identical to that formerly used by the EC, until ruled inconsistent with Article 2.4.2.

4.244 In its essence, the US argument attempts to take Article 2.4.2 out of context, to read meaning into individual words when a plain reading of the whole of the article establishes a meaning that the United States does not wish to support. The plain meaning of "all comparable export transactions" requires inclusion of export transactions that result in positive margins as well as those that result in negative margins.

4.245 The Appellate Body, in *EC – Bed Linen*, noted that the language of Article 2.4.2 did not fragment the margin calculation process, as the United States suggests it does. Article 2.4.2, seen in the light of Article 2.4, requires that Members conduct a fair comparison of all comparable export transactions when determining the margin of dumping, regardless of methodology. Article 2.4.2 is

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

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

3. Like Product

4.247 The Application in this case covered a wide range of products. It covered not only construction lumber, but also each of the four products at issue – bed-frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar. Under Article 2.6, Commerce was obligated to determine the corresponding "like product" produced in the United States. It must do so, among other reasons under Articles 5.2, 5.3 and 5.4, to assess the thoroughness and accuracy of the application and the level of industry support.

4.248 The plain and controlling language is the text of Article 2.6. By virtue of this provision, it is necessary that all products within the like product have identical or closely resembling characteristics. Thus, the investigating authority must either determine that the like product and the product under consideration are "identical in all respects", or determine that the like product has "characteristics closely resembling those of the product under consideration".

4.249 Thus the investigating authority must identify the characteristics of the product claimed to be a separate like product, identify the characteristics that define the product under consideration, and compare the characteristics of the claimed separate like product to those of the product under consideration. This is not what Commerce did.

4.250 The United States can only offer its so-called "class or kind" analysis, pursuant to the *Diversified Products* criteria, as its Article 2.6 determination. That determination contains no relevant analysis or determination justifying its treatment of all softwood lumber products in the United States as like the product under consideration.

4.251 In this case, the United States subordinated its use of the *Diversified Products* criteria to a "no clear dividing line"/"continuum" test and used such criteria only to examine whether characteristics of each of the challenged products resembled some characteristics of an isolated product chosen for its similarity to the challenged products. Commerce found a single like product based on the common "characteristic" of the very *diversity* – the great variety – of the products that the applicant sought to cover. The effect of the test applied by Commerce was that the more that was included in the product under consideration, the more likely there would be discrete characteristics somewhere within that great pool of products to match against some disputed product.

4.252 The United States never tested, as it was required to do under Article 2.6, whether bed-frame components, finger-jointed flangestock, Eastern White Pine or Western Red Cedar were identical to the product under consideration, or had characteristics closely resembling those of the product under consideration.

4.253 Commerce's failure to compare, in a consistent manner, bed-frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar to all of the products covered by the product under consideration is a breach of Article 2.6. These four imported products do not closely resemble the rest of the product under consideration, and thus Commerce should have considered separately whether the application was adequate to initiate an investigation of them.

4.254 Once Commerce recognized that there were multiple, distinct "like products" supposedly corresponding to the product under consideration, there should have been several consequences.

Under Articles 5.2, 5.3 and 5.4, the investigating authority must examine the sufficiency of the application and the level of industry support separately for each of these distinct like products. Commerce did neither.

4. The Adjustment for Dimension Required by Article 2.4 of the *AD Agreement*

4.255 In the underlying investigation, the Applicant asserted that, to develop a useful price analysis, "[a] very precise comparison of products is necessary". It then specified products by thickness, width and length, among others, as factors essential to price analysis. The ITC, in the injury inquiry, determined that "lumber prices generally differ substantially depending on grades and dimensions". Canadian and US producers alike commented that thickness, width and length affect prices at which they sell lumber. Industry publications showed different values for lumber of different dimensions. Commercial invoices specify dimension. The pricing data collected by Commerce from each of the six companies investigated show each producer selling lumber of different dimensions for different prices. The evidence of record for the impact of dimension was incontrovertible. In contrast, there is no evidence to support the notion that dimension does *not* affect price.

4.256 Commerce made a significant number of price comparisons between products sold in the United States and Canada that differed in dimension, whether measured by volume or number of comparisons. The facts establish a *prima facie* breach of the requirement of Article 2.4 that the investigating authority make due allowance for differences in physical characteristics affecting price comparability. The United States does not refute these facts. Instead, the United States appears to assert that there are exceptions to the requirement of Article 2.4. The United States argues that Article 2.4 does not apply when there has been an attempt to match products by model; the differences among the products are minor; or the price relationships among physically different products are not "stable or predictable". Alternatively, the United States suggests that the Canadian respondents did not meet their burden of providing a "means to connect" differences in price to differences in dimension. None of these putative exceptions or requirements can be sustained.

4.257 First, the "due allowance" requirement in Article 2.4 is comprehensive. It does not permit an authority to ignore differences remaining after model matching, or otherwise. Second, as to "minor" differences in physical characteristics, Canada has already shown that Article 2.4 contains no such exception. Third, nothing in the language of Article 2.4 permits an investigating authority to limit due allowance to those differences that "affect price comparability in a stable and predictable manner". Finally, the new putative "means to connect" requirement is an *ex post facto* rationalization by the United States of its refusal to make an adjustment.

5. Company-specific Issues

4.258 For Abitibi, Canada has demonstrated that Commerce's reasons for using a COGS methodology contain no analysis of Abitibi's evidence and cannot meet the standard imposed by Article 2.2.1.1 or the Appellate Body's ruling in *US – Cotton Yarn* that an authority consider all facts. Canada has also demonstrated that the COGS approach, as applied to Abitibi, is contrary to Articles 2.2, 2.2.1.1 and 2.2.2. Interest expense is a function of two things: the amount of money needed to produce a product, and the amount of time for which that money is needed. Cash is needed to fund both current manufacturing costs *and* asset acquisitions. Commerce's COGS methodology, however, considers the financing of only current manufacturing costs, and does not fully consider financing needs, nor accurately reflect the length of time for which that financing is required. A COGS-based allocation does not reflect all cash needs in general, or the relative cash needs of Abitibi's product lines in particular. In Abitibi's case, the asset category was far more significant – Abitibi had to finance CAN$11 billion in assets but only CAN$4 billion in current manufacturing costs. Moreover, Abitibi's production of pulp, paper and newsprint required significantly greater assets than did its production of softwood lumber. A total asset-based allocation, by comparison, considers not just fixed or capital assets but the financing of all current manufacturing expenses *plus*

all assets. It also considers the amount of time that money is needed for each type of expense. All current production expenses are fully taken into account because every expense incurred to produce a good is included in the value of assets. Given Abitibi's facts, the COGS methodology resulted in an allocation of financial expenses that were not associated with and did not pertain to the production and sale of softwood lumber.

4.259 For Tembec, Commerce improperly rejected FPG G&A data to establish G&A expense, using company-wide data instead. The FPG's data were actual amounts pertaining to the production of softwood lumber, including a portion of company headquarters G&A expense. There is no evidence to suggest that Tembec used distortive procedures to allocate the company-wide expenses to the division nor did Commerce point to any. Commerce rejected those recorded data, not because of any fault with the data itself, but because it has a standard practice of using company-wide G&A data. The majority of Tembec's products were pulp, paper and chemicals, were sold outside North America and incurred proportionately higher G&A expenses compared to lumber. Commerce, therefore, did not use an alternative reasonable set of data – it chose distorted costs that overstated G&A attributable to lumber and calculated costs that failed to "pertain" only to softwood lumber, contrary to Articles 2.2.1.1 and 2.2.2. US arguments for rejecting the FPG data are undermined by the fact that Commerce used divisional data for all lumber cost calculations except G&A and financial expenses. Further, the United States ignores the fact that different business segments producing different products can incur G&A, in addition to G&A for the company as a whole, and record it as Tembec does. The US position that the FPG data were unusable because they were unaudited has no basis in Article 2.2.1.1. A note in Tembec's financial report indicates that the data were maintained in accordance with GAAP. Moreover, Commerce itself never made any reference to the statements being unaudited in its Final Determination, and the Panel should disregard this *ex post facto* justification by the United States.

4.260 For Weyerhaeuser, Commerce included a hardboard siding cost, related exclusively to Weyerhaeuser US's production and sales activities in the United States, in Weyerhaeuser Canada's G&A cost for softwood lumber, contrary to Articles 2.2.2 and 2.2.1.1. Canada has shown that Weyerhaeuser Company's records did not treat the hardboard siding expense as G&A allocable to all of its subsidiaries. Cost Verification Exhibit 26 breaks down the elements of Weyerhaeuser Company's G&A expense and does not include the hardboard siding expense. Moreover, Canada has shown that whether a cost is G&A does not eliminate the need to show a connection between a portion of that cost and the product under investigation, as required by Articles 2.2.1.1 and 2.2.2. An expense must at the very least relate to the cost of producing and selling the product. The US position assumes that *any* G&A cost, including all those incurred by companies merely affiliated with the producer or exporter in question, *benefits* the company as *a whole* and is allocable to all subsidiaries. This also breaches the Article 2.2 requirement that the amount allocated for G&A must be "reasonable". In this instance, the hardboard expense related only to the production and sales activities of Weyerhaeuser US in the United States, and was not a G&A expense incurred on behalf of its subsidiaries. Finally, the United States never responds in any of its submissions to the fact that Commerce's traditional practice has been to *exclude* unrelated parent company G&A, finding on numerous occasions that not all G&A is fungible.

4.261 The **by-product** offset claims turn on the level of reliance that should be placed on the records of a producer. In relation to West Fraser, the United States asserts that it was acceptable for Commerce to use unrepresentative unaffiliated sales as the basis for rejecting all of West Fraser's records for affiliated sales in BC. In contrast, the United States insists that it must use Tembec's records even though its internal transfer prices were set far below market value.

4.262 Canada first turns to the by-product offset claim relating to West Fraser. Article 2.2.1.1 states that the records kept by a producer are the preferred source for cost of production data provided that these records reasonably reflect the cost of production. The cost of production is calculated by aggregating the costs and offsets associated with the production of the product under consideration.

As a consequence, the records relating to the costs and offsets that comprise the cost of production must also be accurate. Commerce rejected West Fraser's records for affiliate wood chip sales in BC after determining that they did not reflect market value. The issue in this case is whether an unbiased and objective investigating authority could have found that these affiliate wood chip sales did not reflect market value.

4.263 The United States continues to emphasise that West Fraser never argued that its unaffiliated sales were unrepresentative. This argument, however, is incorrect. In fact, West Fraser's officials stated at verification that McBride sales were unrepresentative of the period of investigation. Moreover, Commerce's conduct also led West Fraser to believe that it had accepted these affiliated transactions.

4.264 The United States also asserts that Commerce reviewed West Fraser's unaffiliated transactions and found them to be commercial transactions that reflected a market value. There is no evidence of any such "review" by Commerce. Commerce's own verification report shows that it was aware that the majority of West Fraser's unaffiliated sales were suppressed by a long-term contract. The record also shows that unaffiliated sales from McBride occurred only during the first two months of the period of investigation, when wood chip prices were at their lowest. If Commerce had reviewed this evidence, it could not have concluded that these sales were representative of "market value".

4.265 The second by-product offset claim relates to Tembec. Commerce's reliance on Tembec's records to calculate the by-product offset for wood chips violates Article 2.2.1.1. In the underlying investigation, Commerce ignored verified record evidence concerning the market value of wood chips. Instead, Commerce relied on Tembec's internal transfer prices that were set far below market value.

4.266 Article 2.2.1.1 requires an investigating authority to calculate costs and offsets that reasonably reflect the cost of production of the product under consideration, in this case softwood lumber. When calculating costs, the offsets to those costs, such as those for by-products, must be reflected accurately. Thus, to reasonably reflect the cost of production for softwood lumber, it is necessary to determine the value for the by-products, which is their market price.

4.267 The United States asserts that Commerce is only required to determine the "surrogate" cost of an offset in inter-divisional transfers. The US position ignores the critical distinction between a by-product and a co-product. By-products do not have their own costs, nor do they generate their own profits. If they did, there would be no practical difference between by-products and co-products. The US position is also inconsistent with Article 2.2.1.1 because the fiction of a "surrogate" cost for an offset ignores the requirement that the costs must reasonably reflect the cost of production of the product under consideration. The offset for by-products is market value. Article 2.2.1.1 does not waive this requirement for internal transfers.

4.268 Article 2.4 requires Commerce to make due allowance for any differences that affect price comparability. Slocan provided Commerce with evidence concerning the revenues it earns through futures hedging activities in the US market. These futures contracts affect price comparability between the Canadian and US markets. Commerce's failure to make *any* adjustment for these revenues is inconsistent with Article 2.4.

4.269 Article 2.4 is open-ended and requires an investigating authority to adjust for *any* difference that affects price comparability. Moreover, Article 2.4 also envisages overlap between a *listed difference* and any *"other" difference* under this provision. Footnote 7 provides "that some of the *above factors* [in Article 2.4] *may overlap* …". Applied to the present situation, Slocan's futures activities may constitute a "condition" of sale, an "other" difference affecting price comparability, or both. The relevant point is that Slocan sought an adjustment for an identified difference. Even if the

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

H. SECOND ORAL STATEMENT OF THE UNITED STATES

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

1. Opening Statement

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

4.272 First, it is necessary to revisit briefly the issue of the appropriate **standard of review**. In the first written submission of the United States, the United States recalled the explanation of the Appellate Body and several panels that Article 17.6(i) precludes *de novo* review of an investigating authority's findings of fact. The United States also noted that, notwithstanding this limitation, Canada seemed to be asking the Panel to decide certain questions as if *it* were the investigating authority. For example, the United States pointed to Canada's request that the Panel examine "whether the authority has given proper weight to the facts". In the US answers to the Panel's questions, the United States identified other instances in which Canada appears to be asking for *de novo* review of Commerce's findings of fact. The United States cited, for example, Canada's presentation to the Panel of a regression analysis that was not before Commerce in the softwood lumber investigation, along with a seven-page expert's memorandum. The United States also cited arguments Canada made in connection with certain company-specific calculation issues. Now, in its rebuttal submission, Canada accuses the United States of arguing "that Commerce has absolute discretion and must be accorded absolute deference on questions of fact".[103] This accusation is patently false. The United States has never urged the standard Canada alleges.

4.273 On the question of Commerce's **initiation of the softwood lumber investigation** Canada has made arguments under Articles 5.2, 5.3, and 5.8 of the *AD Agreement*. Canada argued that Commerce violated Article 5.2 by initiating on the basis of an application that lacked certain information alleged to be reasonably available to one of the applicant companies. The US response was two-fold. First, the United States argued that Article 5.2 does not impose an obligation on investigating authorities independent of the obligation under Article 5.3 to "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". Where various paragraphs of Article 5 impose obligations on investigating authorities, they do so in unmistakable terms. Article 5.2 contains no such mandate. It describes the contents of an application and thereby provides context for an authority's obligation under Article 5.3.

4.274 Second, the United States argued that Canada improperly read into Article 5.2 a requirement that an application contain *all* information reasonably available to the applicant on the subjects enumerated in that provision. However, Article 5.2 states only that "[t]he application shall contain such information as is reasonably available to the applicant" on certain specified matters. The phrase "such information as is reasonably available" does not mean *all* information that is reasonably available.

[103] Canada second written submission, para. 6.

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

4.276 Second, Canada erroneously characterizes the US argument as rendering Article 5.2 a nullity. Canada argues that, unless Article 5.2 imposes a free-standing obligation on investigating authorities it is "reduced to redundancy and inutility". This theory fails to read Article 5.2 in its context. In particular, it fails to consider the relationship between Article 5.2 and Article 5.3. By specifying the information that must be contained in an application, Article 5.2 informs the sufficiency inquiry an authority must undertake pursuant to Article 5.3. Therefore, Article 5.2 is not rendered a nullity, as Canada contends.

4.277 In its rebuttal submission, Canada argues that if a document purporting to be an "application" under Article 5.1 does not contain "such information as is reasonably available to the applicant" on the matters described in Article 5.2, then it is not in fact an "application" and cannot serve as the basis for initiation by way of "application".[105] This is a variation on Canada's argument that an investigating authority must prove a negative before initiating. Aside from its impracticability, Canada's suggestion would require a pre-initiation investigation that simply is not contemplated by the *AD Agreement*.

4.278 Next, the United States responds to Canada's contention that its interpretation of Article 5.2 is supported by the panel report in *US – 1916 Act (Japan)*.[106] The report in that matter is not relevant to this dispute and certainly does not support the proposition that Article 5.2 imposes an independent obligation on investigating authorities. The panel in the *US – 1916 Act (Japan)* dispute said nothing about obligations of investigating authorities under Article 5.2. It spoke of a *complainant* respecting obligations under that provision.

4.279 As a final note on this provision, the United States observe that Canada persists in its argument that Article 5.2 requires an applicant to provide *all* information reasonably available to it on the specified subjects. It bases this assertion entirely on the word "such" in the phrase "such information as is reasonably available to the applicant". Nothing in the definition of that word even suggests the word "all". Thus, even if the Panel were to find an obligation on investigating authorities under Article 5.2, that obligation would not be violated by an initiation based on an application that did not contain *all* information reasonably available to the applicant.

4.280 Canada has also argued that Commerce initiated the softwood lumber investigation based on insufficient evidence of dumping, in violation of Article 5.3. On rebuttal, Canada raises new objections to the evidence of dumping in the application. For example, Canada misleadingly asserts that there was no actual cost data for purposes of initiation. It is true that, in evaluating the petition, Commerce relied on *usage factors* from US mills. However, all significant *production costs* were valued on the basis of actual cost data from Canadian sources. Canada's claim that the usage factor data in the petition were "not representative" is equally misleading. Canada purports to measure representativeness of the data in the application relative to the six companies that were ultimately examined during the investigation. But, the selection of companies after initiation to serve as respondents has nothing to do with the data relied on prior to initiation. Commerce's decision to initiate was based on costs and prices for a broad range of producers. Canada also continues to assert that the application contained insufficient evidence on prices to justify initiation, dismissing

[104] *Id.*, para. 10.
[105] *Id.*, para. 21.
[106] *Id.*, paras. 16, 24.

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

4.281 Finally, Canada continues to argue that Commerce violated Article 5.8 by declining to evaluate "the Weldwood data or any other data that may have been available in the light of the ongoing sufficiency of evidence requirement".[107] This argument is flawed for several reasons. First, the United States explained that these data *could not* have negated the sufficiency of the data on which Commerce relied at the time of initiation because they reflect the experience of a single company, whereas the data actually relied upon for initiation reflected the experience of a broad cross-section of Canada's lumber producing and exporting industry. Second, Canada ignores the fact that Weldwood's data were submitted two months after the initiation of the investigation, as a "voluntary" response. The data were received concurrently with the submissions of the six examined Canadian respondents, each of whose data demonstrated dumping. In light of the evidence of dumping obtained during the investigation, it is not at all clear how Canada believes the United States violated its obligation under Article 5.8. That provision requires termination of an investigation "as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". Yet, here, the evidence accumulated during the investigation reenforced rather than weakened the basis for concluding that there was dumping. Canada seems to argue that, having received the Weldwood data, Commerce should have looked back to determine whether there would have been sufficient evidence to initiate had the data been included in the petition. But, Article 5.8 contains no such look-back requirement.

4.282 Turning to Canada's **product-under-consideration claim**, Canada claims that Commerce's identification of "softwood lumber products" as a single product under consideration amounted to a violation of Article 2.6. The United States has responded by explaining that Article 2.6 contains no obligation on how an investigating authority is to identify the product under consideration in an anti-dumping investigation. This point is underscored by the fact that, in pending negotiations, certain WTO Members have proposed that there should be such an obligation. Such a proposal would be superfluous if the obligation already existed. Even Canada acknowledges that the support for its theory is mere inference, rather than any express rule.[108]

4.283 In its rebuttal submission, Canada focuses on two US statements. In each case, Canada mischaracterizes the statement, reading it in isolation and assigning a significance clearly not warranted when the statement is read in context. First, Canada focuses on the US statement that "[a]s part of its analysis in determining whether 'clear dividing lines' exist within the product under consideration identified within the petition, Commerce reviews [the] five [*Diversified Products*] factors".[109] Canada asserts that this means that Commerce "subordinated its use of the *Diversified Products* criteria to a 'no clear dividing line'/'continuum' test".[110] But, Canada misunderstands the analysis that was actually applied. It is clear from both the Scope Memorandum and the Final Determination that Commerce applied the *Diversified Products* criteria to each of the four products at issue. In other words, Commerce's assessment of whether there are "clear dividing lines" between products is *part of* the *Diversified Products* analysis, not subordinate to that analysis.

4.284 The second statement on which Canada focuses in its rebuttal is Commerce's statement that "[p]aradoxically, it is as much the *diversity* of lumber production as the characteristics that all softwood lumber have in common that leads us to continue to treat all softwood lumber as a single class or kind of merchandise".[111] Canada erroneously takes a passing observation by Commerce and

[107] Canada second written submission, para. 63.
[108] *Id.*, para. 70.
[109] *Id.*, para. 70 and note 66 (*citing* US first written submission, para. 103).
[110] *Id.*, paras. 70, 87.
[111] *Id.*, paras. 71, 87.

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

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

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

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

4.288 Canada's submissions also contain significant distortions of fact and mischaracterizations of the US position. For example, Canada continues to grossly misrepresent the impact on the margin of the non-identical dimensional comparisons made. Understood correctly, the vast majority of comparisons weighted by volume were of identical softwood lumber products, thereby significantly limiting the impact of these non-identical comparisons. Second, Canada mistakenly claims that the United States has created a new, unattainable standard for establishing price adjustments for physical differences, requiring a showing of stable prices. Canada has entirely misread the US submissions. In doing so, it is asking this Panel to find that Article 2.4 mandates an automatic price adjustment for physical differences, irrespective of the impact of such differences on price comparability. As the panel in *Egypt – Rebar* explained, under Article 2.4, a due allowance is warranted only if an effect on price comparability is demonstrated.[114]

4.289 What the United States has argued, and what Canada is unable to refute, is that prices of softwood lumber products of different dimensions *relative to each other* must show *some discernible relationship*. The only specific evidence Canada arguably provided demonstrating an effect on price comparability is a regression analysis based on data of one respondent company. It was presented for the first time to this Panel, and thus, as the United States explained in prior submissions, may not be considered by the Panel in its examination, under Article 17.5(ii). For all physical characteristics, except dimension, Commerce had cost data to connect the physical differences to the impact on price, pursuant to its normal methodology. Therefore, Commerce's treatment of dimension was necessarily distinct from its treatment of other physical characteristics. Because the Canadian respondents failed to demonstrate that dimensional differences affected price comparability, Commerce was not required to make a price adjustment under Article 2.4.

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[112] Canada second written submission, para. 76.
[113] *Id.*, paras. 78-81 (discussing Panel Report, *Indonesia – Autos*).
[114] Panel Report, *Egypt–Steel Rebar*, para. 7.352.

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

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

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

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

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

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

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

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

4.296 Canada makes a number of **company-specific claims**. Throughout these claims, Canada argues that the United States ignored record evidence and instead, blindly applied standard methodologies. Commerce applied its standard methodologies only after careful consideration of the record evidence. In addition, it is important to make clear that Commerce did in fact depart from its standard methodologies, and in significant respects, where the facts warranted.

4.297 In its first written submission, Canada argued that the COGS methodology for allocating **Abitibi's financial expenses** was unreasonable, because it ignored the lower capital asset requirements of its softwood lumber division. Canada now argues that an allocation based on COGS that included depreciation costs was unreasonable, because it did not consider asset values to a *sufficient* degree. Specifically, Canada argues that financial costs must be allocated based solely on total asset values. However, Canada's argument only has merit if one accepts the underlying assumption that financial costs are related *only* to assets. The United States rejects this assumption because of the fungibility of money, a concept with which Canada explicitly agrees. COGS includes all the direct production costs associated with producing goods, as well as accounting for most assets through the inclusion of depreciation expenses. Depreciation expenses reasonably account for Abitibi's assets because, as Canada admits, the vast majority of Abitibi's assets are capital assets that are depreciated.

4.298 Canada also argues that Commerce over-allocated general costs for Tembec. Canada rests its argument on the fact that Commerce refused to base **Tembec's G&A costs** on division-specific accounting records. As the United States has explained, Commerce properly rejected this argument, because general costs relate to the company as a whole rather than a particular product or division. Moreover, even if the United States assumed that general costs could be attributed to divisions within a company, neither Tembec nor Canada has presented any evidence to suggest that Tembec's division-specific internal books were a reasonable basis upon which to calculate costs. First, Tembec's division-specific records were not audited. Morever, unlike audited financial statements, internal, division-specific records are not intended as objective measures of a company's performance.

4.299 Canada also argues that Commerce over-allocated G&A expenses when it allocated a portion of **litigation costs incurred by Weyerhaeuser** Canada's parent company to softwood lumber. Canada argues that even if these settlement costs were general costs, they did not pertain to softwood lumber. Canada's argument is inconsistent with the basic definition of "general cost," because general costs do not pertain more or less to a particular product but instead relate to a company as a whole. It is uncontested that Weyerhaeuser Canada's parent company performed functions on behalf of Weyerhaeuser Canada. Thus, consistent with this fact, Commerce included an apportioned amount of

[117] Canada second written submission, para. 149.
[118] US second written submission, paras. 60-63.

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

4.300 During the period of investigation, **West Fraser** sold **wood chips** to affiliated companies in BC. In determining whether a company's records reasonably reflect costs associated with production and sale of a product, Commerce considers whether transactions between affiliated parties occurred at arm's length prices. Here, it concluded that West Fraser's affiliated sales did not occur at arm's length prices. Thus, it relied on West Fraser's unaffiliated sales of chips in valuing the offset. It found these sales to non-affiliates to be arm's-length commercial transactions at market prices and, as such, the best benchmark for West Fraser's affiliated sales. Canada now acknowledges that West Fraser indeed never argued to Commerce that some of its unaffiliated (McBride mill) transactions were unrepresentative of a market value for wood chips. It now argues that, because West Fraser had a large amount of affiliated transactions during the period of investigation, it is "self-evident" that Commerce should have questioned the use of West Fraser's unaffiliated transactions for valuing those wood chips in BC. Contrary to Canada's assertions, however, West Fraser's unaffiliated transactions were significant in number and value relative to West Fraser's total wood chip sales. Moreover, the mere existence of a large volume of affiliated transactions in BC during the period of investigation does not call into question the legitimacy of the market value of wood chips that West Fraser sold to unaffiliated parties. Nor are they called into question by the fact that sales from one of the two mills occurred early in the period of investigation, pursuant to a pre-existing contract.

4.301 Canada also challenges how Commerce measured the value of transfer prices of **Tembec's wood chips** between its divisions. Commerce analyzed the wood chip sales transactions between Tembec's sawmills and its internal pulp mill division to evaluate whether the internal transfers of wood chips were reasonable approximations of the wood chips' cost. Commerce found that those internal transfer prices were reasonable and not preferential. Canada claims that Tembec's inter-divisional transactions were "arbitrary". In fact, Canada's only real argument is to insist that the United States acted in a biased and non-objective manner by not assessing all costs on a market value basis.[119] But no provision in the *AD Agreement* requires an investigating authority to replace a company's own valuation of inter-divisional transfers of a product with a market value for sales of the same product. Costs of production are lower than a market value of a product, due to profit paid by an unaffiliated purchaser to the producer. Once Commerce determined that the difference between the market value and the inter-divisional transfer value of Tembec's wood chips was reasonable, the analysis ended, and Article 2.2.1.1 did not require Commerce to do more.

4.302 Commerce properly accounted for **Slocan's lumber futures hedging profits**, finding, consistent with Article 2.4, that these futures hedging profits are not a part of any conditions and terms of sale of lumber to the United States. Indeed, these profits had no connection with any sales transaction or any customer. Neither Slocan nor Canada has explained how the futures contracts at issue were terms and conditions related to particular sales of lumber in the United States. Absent such a showing in the investigation, there was no basis for an adjustment for differences in conditions and terms of sale under Article 2.4. Commerce also found, consistent with Article 2.2 of the *AD Agreement*, that the futures contracts were not linked to production, since the profits amounted to revenue related to sales (even though they are not tied to any particular sale of lumber in the United States). Canada asserts that Commerce should have done *something*, even though Slocan itself failed to substantiate either of the alternative treatments that it sought.[120] As the panel in *Egypt – Steel Rebar* noted, responding parties have an obligation to assert and to justify the information and the arguments required to prove their claims.[121] Contrary to Canada's assertions, there is no undefined

[119] Canada responses to questions 70 and 72 of the Panel, paras. 178 and 180.
[120] Canada second written submission, paras. 340-342.
[121] Panel Report, *Egypt– Steel Rebar*, para. 7.3.

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

2. Closing Statement

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

4.304 Stepping back to consider the big picture, the United States is struck by a pattern, in which Canada initially takes one position, then alters that position following US responses demonstrating the flaws in the initial position. This is particularly noticeable when it comes to initiation, product under consideration, and calculation of an overall dumping margin.

4.305 The inconsistency in Canada's argumentation is telling, because Canada appears to have brought this case without knowing whether and how the United States violated its WTO obligations. This should give the Panel pause. For the reasons set forth in US submissions and statements, applying the Article 17.6 standard of review, the Panel should find Commerce's initiation and conduct of the lumber investigation to have been consistent with WTO obligations.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the EC and Japan are set forth in their written and oral submissions to the Panel, which are summarized below. The summaries are based on the executive summaries that the EC and Japan submitted to the Panel. The third parties' written answers to questions posed by the Panel are set forth in the Annexes to this report (*see* list of annexes at page vii, *supra*). India, also a third party in this dispute, did not make any written and oral submissions to the Panel, nor it answered to questions posed by the Panel.

A. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.2 In its third party written submission, the EC made the following arguments:

1. The Legal Scope of Article 5.2 of the *AD Agreement*

(a) The Obligations under Article 5.2 of the *AD Agreement*

5.3 In its first written submission, Canada did not identify the specific paragraph of Article 5.2 of the *AD Agreement* which the United States has allegedly violated. Canada thus seems to infer from Article 5.2 of the *AD Agreement* a general and overall obligation to provide any "reasonably available" information.

5.4 The EC would oppose such an interpretation of Article 5.2 of the *AD Agreement*. Taking into account the wording and the structure of the provision it is evident that Article 5.2 of the

[122] US responses to questions 81 and 84 of the Panel, paras. 132-138, and 146.
[123] Canada first written submission, para. 280; Canada second written submission, para. 346.
[124] Panel Report, *US – Hot-Rolled Steel*, paras. 8.5-8.14.

AD Agreement does not contain an obligation of the applicant to provide any information that is reasonably available but only to the extent that it would fall under one of the paragraphs (i) to (iv).

5.5 While the EC acknowledges that Article 5.2(i) or (ii) of the *AD Agreement* ("identity of the applicant" and "identity of each known exporter" respectively) could be pertinent in a case where one of the companies subject to the anti-dumping investigation is a wholly-owned subsidiary of one of the applicant companies it would, however, take no view given the rather peculiar circumstances of the case.

(b) Article 5.2 of the *AD Agreement* Only Imposes an Obligation on the Applicant

5.6 Canada argues that Article 5.2 of the *AD Agreement* imposes an obligation on the investigating authority. The EC takes issue with this conclusion. Subject of Article 5.2 of the *AD Agreement* is "the application". Under the third sentence of Article 5.2 of the *AD Agreement* the application shall contain information that is "reasonably available to the applicant". Thus, according to the wording of Article 5.2 of the *AD Agreement* the obligation is solely addressed to the petitioner.

5.7 In this context, Article 5.1 of the *AD Agreement* provides also relevant guidance. Under this provision an application should be made "by or on behalf of the domestic industry". Therefore, any objective requirements that the application has to meet should be discharged by the domestic industry, i.e., the applicant.

5.8 The *Guatemala – Cement I* Panel Report, quoted by Canada, does not support Canada's argument. The Panel merely stated that an investigating authority may be "allowed" to reject an application. However, such a possibility to reject an application does not imply that there is any obligation under Article 5.2 of the *AD Agreement* on the investigating authority to do so. Furthermore, in the respective passage of the *Guatemala – Cement I* Report the panel concluded that Article 5.2 of the *AD Agreement* imposes a requirement "on the applicant", while Article 5.3 of the *AD Agreement* is addressed to the "investigating authority". The panel thus made clear that the content of the obligation and the addressees are different and should be distinguished.

5.9 The EC notes that the question of whether Article 5.2 of the *AD Agreement* imposes an obligation on the investigating authority has been briefly addressed in the recent case *Argentina – Poultry*. While the panel declined to rule on this matter, as both parties affirmatively agreed to such an obligation, the EC, for the reasons set out above, considers that Article 5.2 imposes no such obligation on the investigating authority. As the EC will explain below, the issue must be addressed under Article 5.3 of the *AD Agreement*.

5.10 Canada maintains that the United States violated Article 5.3 of the *AD Agreement* by relying solely on the evidence and information in the application and by failing to objectively judge that information. Even if the applicant had provided all "reasonably available" information under Article 5.2 of the *AD Agreement*, this was insufficient to justify the initiation of the investigation.

5.11 In the EC's view, Article 5.3 of the *AD Agreement* imposes a comprehensive obligation on the investigating authority to determine whether the initiation of an investigation would be justified in view of the objectively available evidence. This obligation does not only encompass an examination of the application and whether it fulfils for instance the requirements under Article 5.2 or Article 5.4 of the *AD Agreement* but it may also require the investigating authority to take further steps in assembling the necessary evidence before initiating an investigation.

5.12 In this respect, the EC would concur with the panel findings in the recent *Argentina – Poultry* case under paragraph 7.60.

5.13 Furthermore, the EC would agree with the panel findings in *Guatemala – Cement I*, whereby the question of the existence of "sufficient evidence " in a particular case has to be adjudicated in the light of the standard set in Article 17.6(i) of the *AD Agreement*.

5.14 As a third party, the EC does not comment on whether the DOC effectively discharged its obligations under Article 5.3 of the *AD Agreement*.

2. The Scope of Article 5.8 of the *AD Agreement*

5.15 Canada argues that the United States did not abide by its obligations under Article 5.8 of the *AD Agreement* because DOC did not terminate the investigation on the ground of insufficient evidence. Even if DOC had initiated the investigation in accordance with Article 5.3 of the *AD Agreement* it should have terminated the examination at a later stage in the light of the insufficient evidence on the commercial relationship and the cost and pricing data.

5.16 Article 5.8 of the *AD Agreement* thus distinguishes two scenarios:

- either the application did not contain sufficient evidence in which case it should be rejected; or

- during the investigation it becomes apparent that evidence is insufficient thus requiring a prompt termination of the proceedings.

5.17 Regarding the first alternative, the EC would agree with the panel findings in *Mexico – Corn Syrup* whereby Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of the investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application.

5.18 To put it differently, the EC concurs that before an investigation is initiated Articles 5.3 and 5.8 of the *AD Agreement* have the same scope of application with regard to the question of whether there is "sufficient evidence".

5.19 As to the second alternative, i.e., after the initiation of the investigation, it is evident that the investigation must reveal "sufficient evidence" of dumping, injury and a causal link to proceed with the investigation and, eventually, to impose measures. If the investigation fails to produce this evidence the authorities should terminate the examination as promptly as possible. Under this scenario, the question of whether "sufficient evidence" exists would have to be adjudicated in a more flexible way depending on the respective state of investigation.

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

5.20 The EC submits that the Panel should find that the US practice of "zeroing" is incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement*. The European Communities considers that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology already found to be incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement* in *EC – Bed Linen*. The EC compared the weighted average normal value and export price of different product types within the like product. It attributed a zero value to any types for which the resulting dumping margin was negative, while aggregating the positive dumping margins and dividing them over the total value of the export sales to obtain a percentage rate of dumping. It, thus, allowed no "offset" for negative dumping across product types. The United States has done exactly the same in this case.

5.21 The United States does not dispute the similarity of the two methodologies, but confines itself to rejecting the precedential value of the decision of the Appellate Body in *EC – Bed Linen* and attempts to reargue the case. Although the Appellate Body's decision in *EC – Bed Linen* only binds the parties to that case, the Appellate Body expects Panels to take account of the legal clarifications concerning Articles 2.4 and 2.4.2 of the *AD Agreement*. Of course, the panels and the Appellate Body may reconsider or refine certain legal interpretations on the basis that certain legal arguments were not made by the parties and therefore not addressed by the Appellate Body. However, the arguments advanced by the United States in addition to those already addressed in *EC – Bed Linen* to defend its "zeroing" methodology are not of such a nature.

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

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

5.24 As to the reference to the negotiating history of the *AD Agreement*, the EC considers that according to Article 32 of the *Vienna Convention*, there is no need for considering the negotiating history of a text where the interpretation thereof can be based on the letter as is the case for Article 2.4.2, first paragraph. Therefore, the arguments advanced by the United States are of no relevance to the matter before this Panel.

B. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

5.25 In its third party written submission, Japan made the following arguments:

1. Article 2 of the *AD Agreement* Prohibits the Authorities from Zeroing Negative Margins

5.26 Japan agrees with Canada that use of dumping margins with "zeroed-out" negative margins for the purpose of "dumping" determination is inconsistent with the *AD Agreement*. The practice of "zeroing" selectively calculates margins only for those sales of products with positive margins and rejects sales with negative margins. This methodology thus creates an artificially high margin. As discussed below, the existence of dumping margins, which is the basis of the "dumping" determination under the *AD Agreement*, must be established by making a "fair comparison" across all product types under consideration, not some of these types.

5.27 Article 2.1 defines that a product is dumped if the export price is lower than its normal value. "A product" under Article 2.1 incorporates all types of the product that are subject to a particular anti-dumping proceeding, not some types of the product. The Appellate Body in *EC – Bed Linen* confirmed this. *See* paragraph 53 of the *EC – Bed Linen* Appellate Body Report.

5.28 Article 2.1 informs the interpretation of Article 2.4 and the "fair comparison" and "price comparability" requirements. Essentially these requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body in *EC – Bed Linen, id.*, paragraph 58, stated "[h]aving defined the product at issue and the 'like product' on the Community market as it did, the European Communities could not, as a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not 'comparable'. All types or models falling within the scope of a "like" product must necessarily be 'comparable'".

5.29 The practice of zeroing in establishing dumping margins of a product under consideration, therefore, is inconsistent with Article 2.4 of the *AD Agreement* in conjunction with Article 2.1 thereof.

5.30 The established practice of DOC is, however, to apply the zeroing methodology to the calculation of dumping margins. The DOC's dumping determination, which is based on dumping margins used by DOC, thus is inconsistent with Article 2.4 in conjunction with Article 2.1 thereof.

5.31 Importantly, if zeroing had not been applied in this case, certain Canadian respondents in this softwood lumber case would have had *de minimis* dumping margin. *See* Exhibit CDA-3, and Canada's first written submission, footnote 3. This could affect not only DOC's "dumping" analysis but also the "injury" determination, including the finding of "dumped imports", by the ITC under Article 3 of the *AD Agreement*.

2. DOC's Calculation of Selling, Administrative and General Expenses is Inconsistent with Article 2.2.1.1. of the *AD Agreement*

5.32 Japan respectfully requests that this Panel carefully review whether DOC satisfied its burden to find that respondents' SG&A in their ordinary accounting records did not reasonably reflect the costs associated with the production and sale of softwood lumber. Japan also respectfully requests that the Panel carefully examine whether DOC correctly considered and evaluated all evidence submitted by respondents when DOC calculated the respondents' SG&A.

5.33 As Canada correctly argued, Article 2.2.1.1 requires the authorities to base costs calculation on the "records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles". The authorities, however, may decide to deviate from these accounting records if the authorities find that these records do not "reasonably reflect the costs associated with the production and sale of the product under consideration," as provided in Article 2.2.1.1. In order for the authorities to reject a respondent's accounting records, therefore, the authorities must first determine based on the accounting records of a specific respondent on a case-by-case basis that the respondent's records do not "reasonably reflect" the costs of the product under consideration.

5.34 In the instant case, DOC would have acted inconsistently with Article 2.2.1.1, if DOC requested Canadian softwood lumber respondents to recalculate their SG&A in a predetermined methodology without first reviewing their recorded SG&A.

5.35 Furthermore, also as Canada correctly stated, Article 2.2.1.1 provides "[a]uthorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation...". Thus, the authorities are required to base their determination on the proper allocation of costs, including the SG&A, upon reviewing all evidence made available by respondents.

5.36 In this connection, Article 17.6(i) of the *AD Agreement* provides that the authorities' establishment of facts must be proper and their evaluation of the facts must be unbiased and objective.

Although this Article is directed to the panel, the obligation of unbiased and objective evaluation of facts applies equally to the authorities because the panel reviews the authorities' evaluation of facts through this standard. *See* Appellate Body Report in *US – Hot-Rolled Steel*, paragraph 56.

5.37 The authorities, therefore, must determine the SG&A based on all evidence submitted by respondents, and on unbiased and objective evaluation of facts. If DOC applied its pre-determined methodology to a particular respondent without reviewing any evidence submitted by the respondent, such application would be inconsistent with Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof.

3. DOC's Practice on Valuation of by-products Revenues is Inconsistent with Article 2.2.1.1 of the *AD Agreement*

5.38 Japan agrees with Canada that the DOC's established practice with respect to valuation of by-products revenues, as applied to this case, is inconsistent with Article 2.2.1.1 of the *AD Agreement*. Japan considers that the DOC's valuation practice of by-products sales prices to affiliated parties is inconsistent with Article 2.2.1.1 in conjunction with Article 17.6(i) thereof because the DOC's practice works only unfavourably to respondents.

(a) DOC's Established Practice on Valuation of Sales of by-products to Affiliated Parties

5.39 It is a DOC's established practice that, where a respondent evaluates by-product value based on sales prices from the respondent to its affiliated party ("affiliated sales price") in its cost accounting records, DOC considers whether it should adjust the recorded by-products value based on the weighted-average sales price of identical by-product from a respondent to unaffiliated parties ("unaffiliated sales price"). DOC disregards the recorded by-product value based on the affiliated sales price, and instead uses an unaffiliated sales price, if the affiliated sales price is higher than the unaffiliated sales price. DOC performs this revaluation, even if the respondent's accounting records are in accordance with the GAAP of the respondent's country. DOC, however, does not adjust the recorded by-product value, if the recorded affiliated sales price is lower than the unaffiliated sales price.

5.40 The value of by-product revenues offsets the total production cost of the product under consideration. *See* Canada's first written submission, paragraph 233. Thus, the lower the amount of the offset, the higher the cost of production of the product under consideration. Thus, DOC's established practice to adjust by-product value works only to increase respondents' cost of production.

(b) The Limit on the Authorities' Discretion under the *AD Agreement*

5.41 The authorities have discretion to recalculate the respondent's recorded cost of production in certain situations under Article 2.2.1.1, as discussed above. This discretion, however, is not unlimited. The *AD Agreement* does not confer unfettered discretion on the authorities to pick and choose whatever the methodology they fit. As discussed in the previous section, such discretion must be exercised based on proper establishment of facts and on an unbiased and objective evaluation of established facts as set forth in Article 17.6(i) of the *AD Agreement*. The *Vienna Convention*, Article 26, further requires that the discretion must be exercised in good faith.

5.42 To be unbiased, objective and fair, the authorities must exercise its discretion in an even-handed manner without favouring the interest of any particular party in an anti-dumping proceeding. In this regard, the Appellate Body in *US – Hot-Rolled Steel* explained at paragraph 148 "[i]f a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.'" The Appellate Body also stated in the other

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

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

(c) DOC's Valuation of Wood Chips, to which DOC Applied its Established Practice, is Inconsistent with Article 2.2.1.1 of the *AD Agreement*

5.44 DOC's established practice, as applied to this softwood lumber case, is contrary to this even-handed rule. Canada demonstrated that DOC applied its established practice in the instant case. DOC re-evaluated the respondents' cost of production only when a recorded affiliated sales price of the wood chips, a by-product, was higher than the unaffiliated sales price of wood chips. DOC did not re-evaluated the recorded affiliated sales price when the affiliated sales price was lower than the unaffiliated sales price. (*See* Canada's first written submission, paragraphs 237-265) DOC's practice thus works only to increase the respondents' cost of production.

5.45 If DOC considers that the unaffiliated sales price must be the appropriate benchmark to value by-products, DOC then should substitute the unaffiliated sales price for all affiliated sales prices, irrespective of whether the affiliated sales price was either higher or lower than the unaffiliated sales price. DOC's picking and choosing method, which was designed only to increase the cost of production and to increase the likelihood of DOC's finding of dumping in favour of the domestic industry, is not even-handed, and does favour the domestic industry. Such practice is beyond the permissive exercise of DOC's discretion, and thus is, and was, as applied to this instant case, inconsistent with the authorities' obligations under Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof.

5.46 For the reasons set forth above, Japan respectfully requests this Panel to review the inconsistency of DOC's practices with Article 2.4 of the *AD Agreement* in conjunction with Article 2.1, as well as with Article 2.2.1.1, in conjunction with Article 17.6(i).

C. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.47 The EC, in its oral statement, made the following arguments:

1. Article 5.2 of the *AD Agreement*

5.48 Canada argued that the United States initiated its investigation contrary to Article 5.2 of the *AD Agreement* because the applicant did not provide all "reasonably available" information, i.e., the commercial relationship between the various companies and the pricing and cost data of the exporting company.[125]

5.49 The EC disagrees with such an interpretation of Article 5.2 of the *AD Agreement*. As already explained in its third party submission the EC considers that neither the wording nor the context does lend support for the idea that Article 5.2 of the *AD Agreement* imposes a *direct* obligation upon the investigating authority.

5.50 First, the EC would highlight that under the third sentence of chapeau of Article 5.2 of the *AD Agreement* the application "shall contain such information as is reasonable available *to the applicant*" (emphasis added). Accordingly, Article 5.2 of the *AD Agreement* provides for minimum requirements for an application that only the applicant can fulfil. The language of Article 5.2 of the

[125] Canada first written submission, paras. 89 *et seq.*

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

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

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

2. Article 5.3 of the *AD Agreement*

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

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

3. Article 5.8 of the *AD Agreement*

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

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

5.57 As concerns the first alternative, the EC would agree with the Panel findings in *Mexico – Corn Syrup* which determined that Article 5.8 of the *AD Agreement* did not impose an additional substantive obligation beyond those in Article 5.3 of the *AD Agreement.*[129]

5.58 With regard to the second alternative, the investigating authorities are called upon to decide at the end of the anti-dumping investigation whether the imposition of anti-dumping measures would be justified or not. This necessitates a determination on whether the investigation reveals "sufficient evidence" of dumping, injury and a causal link.

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[126] US first written submission, paras. 73 *et seq.*
[127] Canada first written submission, paras. 100 *et seq.*
[128] *Ibid.*
[129] Panel Report, *Mexico – Corn Syrup*, para. 7.99; confirmed by Panel Report, *Guatemala – Cement II*, paras. 8.72 *et seq.*

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

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

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

5.61 The EC considers that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology already found to be incompatible with Articles 2.4 and 2.4.2 of the *AD Agreement* in *EC – Bed Linen*.[130] The EC compared the weighted average normal value and export price of different product types within the like product. It attributed a zero value to any types for which the resulting dumping margin was negative, while aggregating the positive dumping margins and dividing them over the total value of the export sales to obtain a percentage rate of dumping. It, thus, allowed no "offset" for negative dumping across product types. The United States has done exactly the same in this case.

5.62 The United States does not dispute the similarity of the two methodologies, but confines itself to rejecting the precedent value of the decision of the Appellate Body in *EC – Bed Linen* and attempts to reargue the case.[131] Although the Appellate Body's decision in *EC – Bed Linen* only binds the parties to that case, the Appellate Body expects Panels to take account of the legal clarifications concerning Articles 2.4 and 2.4.2 of the *AD Agreement*. Of course, panels and the Appellate Body may reconsider or refine certain legal interpretations on the basis that certain legal arguments were not made by the parties and therefore not addressed by the Appellate Body. However, as already explained in its written brief the EC considers that none of the arguments advanced by the United States in addition to those already addressed in *EC – Bed Linen* to defend its "zeroing" methodology are of such nature.

5.63 As regards the US arguments relating to the product definition[132], the EC notes that the Appellate Body clarified that the rules governing comparison under Articles 2.4 and 2.4.2 of the *AD Agreement* are legally separate from those concerning the definition of the product under consideration (and the like product according to Article 2.6 of the *AD Agreement*).

5.64 It is true that a broad determination of the product under consideration and the like domestic product may lead the authority to make multiple comparisons, some of which can show negative dumping margins. However, the prohibition of zeroing by virtue of Articles 2.4 and 2.4.2, first paragraph of the *AD Agreement*, as interpreted in *EC – Bed Linen*, ensures that negative dumping margins found for some product types will offset the positive dumping margin of others when the margin of dumping is established for the product under consideration *as a whole*. As noted by the Appellate Body, to address in particular dumping of certain types or models of products, the United States investigating authorities "could have defined, or redefined the product under

[130] Appellate Body Report, *EC – Bed Linen*, para. 47.
[131] US first written submission, para. 175.
[132] US first written submission, paras. 160-164.

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

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

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

D. THIRD PARTY ORAL STATEMENT OF JAPAN

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

1. The Basic Principle of Good Faith

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

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

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

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[133] Appellate Body Report, *EC – Bed Linen*, para. 62.
[134] The EC does not address the issue of product definition in this submission, but reserves its position.
[135] US first written submission, paras. 161 and 167 *et seq*.
[136] EC third party submission, paras. 36-39.
[137] *See, e.g.*, Appellate Body Report, *US – Line Pipe*, para. 110 and note 117; Panel Report, *US – Hot-Rolled Steel*, para. 101.
[138] Panel Report, *US – Hot-Rolled Steel*, para. 101.
[139] Appellate Body Report, *US – Shrimp*, para. 158.
[140] *Id*., note 156, quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), p. 125.
[141] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148 and note 142. *See* also Appellate Body Report, *EC – Hormones*, para. 133.
[142] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[143] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, as modified by the Appellate Body, paras. 132-133.

2. Prohibition of Zeroing

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

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

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

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

5.75 The term "margins" in Article 2.4.2 is not an indication that the practice of zeroing is permitted. A multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of the administrative convenience to take into account the differences in physical characteristics among several models of a product.[147] Such multiple comparisons are, however, just in the middle of the entire process to calculate an individual margin of dumping for an exporter/producer. At the end, the authorities must aggregate all of these intermediate margins obtained from multiple comparisons to arrive in a single margin for a producer. The principle of good faith, as expressed in Article 2.4 which was informed by Article 2.1, requires that the authorities calculate the margin in an even-handed manner without giving unfair advantage to one interested party. Article 2.4.2 is also subject to this principle, as the chapeau of this Article expressly provides "subject to the provisions governing the fair comparison in paragraph 4". The practice of zeroing, which ignores all negative margins and uses only positive margins for such calculation, is against the basic principle of good faith and Article 2.4.

5.76 Finally, the argument by the United States on "comparable" products is without merits. The authorities may not be permitted to argue in a segment of the proceeding that "product under consideration" consisted of multiple types because they are not "comparable", and then argue in other segments of the proceeding that these types constitutes a comparable single product. Throughout the

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[144] US first written submission, paras. 150-155.

[145] Article 6.10 of the *AD Agreement*.

[146] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 143, quoting the original Panel Report, para. 6.136.

[147] US first written submission, para. 154.

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

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

3. Calculation of Selling, General and Administrative Expenses

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

5.79 In this investigation, it appears that the United States preferred to apply its established "standard methodology"[150], which allocates financial expenses based on COGS. The United States argues that the COGS method is proper. The US argument, however, missed the point. The question here is not whether the COGS method is proper. The question is whether DOC determined an appropriate method to calculate SG&A based on all the evidence on a company-specific basis, or DOC applied its own established method without considering all the evidence.

5.80 Japan respectfully requests that the Panel review DOC's application of its own SG&A calculation methodology to Canadian respondents from this viewpoint.

4. Revaluation of by-product

5.81 Finally, Japan submits that DOC's revaluation of by-product, wood chip, for the purpose of the production cost of softwood lumber is contrary to Article 2.2.1.1 of the *AD Agreement* and the good faith obligation.

5.82 It appears that the United States misunderstands the limit on the authorities' discretion under Article 2.2.1.1 of the *AD Agreement*. Article 2.2.1.1 permits the authorities to deviate their production cost calculation from the respondent's recorded costs, if the recorded costs do not reasonably reflect the costs associated with the production of the product under consideration. Article 2.2.1.1 does not confer complete and unfettered discretion to the authorities to determine what "reasonably reflect" the production of the product under investigation. As discussed during the first substantive meeting and in Japan's third party written submission, the basic principle of good faith, which informs the provisions of the *AD Agreement*, including Article 2.2.1.1, obliges the authorities

[148] *Id.*, para. 104. *See* also paras. 103-106.
[149] *Id*., para. 105.
[150] *Id*., para. 191.

to exercise their discretion in an even-handed and fair manner without giving "unfair advantage" to one interested party.

5.83 DOC, applying its established practice in this case, determined that certain respondents' recorded wood chip values based on sales price to affiliated parties did not "reasonably reflect" the production of softwood lumber. DOC made such revaluation, however, only where the recorded value was higher than the sales price to unaffiliated parties. In such case, DOC lowered the recorded chip value down to the sales price to unaffiliated parties. DOC did not revaluate the recorded wood chip value, where the recorded value was lower than the sales price to non-affiliated parties. According to the United States, such "understated" value is not unreasonable.[151] As the wood chip value offsets the production cost of softwood lumber, DOC's affiliated party rule, as applied to this case, is designed to work only to increase the production cost of softwood lumber, and thus increase the margins of dumping of respondents.

5.84 The basic principle of good faith and fundamental fairness target precisely this situation: the authorities' practice, which creates an "unfair advantage" to one interested party. To act in good faith and to avoid creating an "unfair advantage," the authorities' decision standard must be even-handed and fair to all parties. DOC's practice, as applied to this softwood lumber case, is contrary to this good faith obligation.

5.85 Moreover, DOC's practice did not take account of usual variation of prices in the marketplace. The Appellate Body has explained in *US – Hot-Rolled Steel*, "the sales price may be *lower* than the "ordinary course" price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price".[152] DOC's practice simply re-evaluated the chip costs without considering any other factors affecting the sales price to affiliated party. The DOC's practice thus has no justification.

5.86 DOC's application of its own method to re-evaluate the wood chip value is, therefore, impermissible exercise of its discretion under Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof and the basic principle of good faith and fundamental fairness. Japan thus submits that the Panel find that the DOC's practice as applied to this case is inconsistent with Article 2.2.1.1.

5. Conclusion

5.87 As such, Japan asks this Panel to find that the United States violated its WTO obligations under Articles 2.4 and 2.2.1.1 of the *AD Agreement* in conjunction with Articles 2.1 and 17.6(i) thereof, and the basic principle of good faith and fundamental fairness.

VI. INTERIM REVIEW

6.1 On 30 January 2004, both Canada and the United States submitted written requests for the Panel to review precise aspects of the Interim Report issued on 16 January 2004. As Canada did not direct us to the record to substantiate its comments and proposals regarding changes to the text of the Interim Report, we requested Canada on 4 February 2004 to identify exactly where in the record support for its requested adjustments to the Interim Report could be found. Canada submitted its response on 6 February 2004. On 9 February 2004, both parties submitted written comments on the other party's request for interim review. Neither party requested an interim review meeting. The

[151] *Id*., para. 241.
[152] Appellate Body Report, *US – Hot-Rolled Steel*, para. 141.

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

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

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

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

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

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

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

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

issue, Article 2.4.2 – as a whole. In the view of Canada, the Panel's statement in footnote 341 is connected logically and directly to the Panel's explanation of its legal reasoning. Therefore, footnote 341 should not be removed. Canada further argues that, it was the United States, in paragraph 151 and following of its first written submission, that referred to the other two methodologies provided for in Article 2.4.2 and first raised the issue of the relevance of these methodologies. Finally, **Canada** argues that, the United States is making a legal argument seeking to have the Panel reconsider a substantive position related to the core of submissions on this matter. Canada submits that this goes beyond the scope of the requirement of Article 15.2 of the *DSU* that a request for review pertain to "precise aspects of the interim report".

6.7 We have considered the parties' comments and have adjusted the text of the relevant footnote (*see* note 361, *infra*, in this Report). We are of the view that we are not precluded by any provisions of the *DSU* to make the comments as reflected in this footnote.

6.8 With respect to "Claim 7: Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 – Allocation of Financial Expenses: Abitibi", **Canada** requests us to amend the sixth sentence of paragraph 7.227 of the Interim Report. Canada asserts that the parties' positions, in relation to Abitibi's net interest allocation, are not reflected in that sentence. In its first written submission, Canada submits that the United States asserted that "Abitibi's theory (...) incorrectly assumed that fixed-asset purchases are the principal activities of a company requiring working capital".[155] Canada contends that the US position assumes that net interest allocation is limited to fixed assets. In contrast, Canada asserts that it argued that allocated net interest expense was based on total assets, which included non-fixed assets such as inventories and accounts receivable.[156] Canada proposes the addition of a sentence to that paragraph to reflect the parties' position. The **United States** asserts that Canada is correct that Abitibi's allocation methodology was based on total assets, not fixed assets. In the view of the United States, the Panel should nonetheless reject Canada's proposed adjustment, because it states incorrectly and without citation that it was DOC's position that Abitibi's interest expense allocation methodology was based on fixed assets, instead of total assets. In fact, DOC discussed Abitibi's methodology with regard to "assets", not "fixed assets".[157] The United States asserts that Canada does not dispute this point in its letter dated 6 February 2004. In this letter Canada refers only to a statement in the US first written submission about the theory underlying Abitibi's argument on allocation of interest expense. That sentence does not purport to describe how Abitibi allocated interest expense, according to the United States. To clarify the sixth sentence in paragraph 7.227 accurately, the United States proposes that the Panel simply strike the term "fixed."

6.9 At the outset, we note that paragraph 7.227 of the Interim Report (identical paragraph in this Report) falls under the section "Factual Background". This section purports to report facts that are relevant to our examination of the issues before us, rather than the arguments of the parties. The purpose of the sixth sentence *et seq.* is therefore only to describe how Abitibi computed the portion of the company's net interest expense related to lumber assets and operations in its questionnaire response. Keeping this in mind, we do not consider it appropriate to include in this section the different positions of the parties on the issues at stake. The arguments are reflected in the section "Arguments of the parties".[158] In addition, the description of the methodology contained in the sixth sentence *et seq.* of paragraph 7.227 of the Interim Report was taken directly from Abitibi's questionnaire response.[159] Thus, we regard this to be the most objective description of how Abitibi proposed DOC to determine the portion of that company's net interest expense related to lumber. For the foregoing reasons, we have not made any changes to paragraph 7.227 of this Report.

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[155] US first written submission, para. 192.

[156] Canada second written submission, para. 212; and Canada response to question 52 of the Panel, para. 146.

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

[158] *See* paras. 7.230-7.232, *infra*.

[159] Exhibit CDA-83, Abitibi's Questionnaire response, p. D-44.

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

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

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

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

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

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

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

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

6.18 **Canada** requests us to add in paragraph 7.299 of the Interim Report (identical paragraph in this Report) – addressing "Claim 10: Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 – Reasonable Amounts for By-Product Revenues from the Sale of Wood Chips: Tembec and West Fraser" – that Tembec had submitted information on arm's length sales by its sawmills. In support of its request, Canada refers to statements contained in paragraphs 256 and 302 of its first and second written submissions,

[160] Canada first written submission, para. 209.
[161] Canada refers to Exhibit CDA-160, Tembec's Case Brief, p.4.

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

6.19 We note Canada's statement in paragraph 256 of its first written submission that "Tembec (...) makes arm's length sales of wood chips at market prices in Western Canada." The correctness of this statement is not disputed by the United States. Bearing this in mind, we agree with the change, as shown in paragraph 7.299 of this Report, *infra*. We note the US request that we add a reference to the fact that Tembec had submitted a selective number of examples of arm's length sales by its sawmills to unaffiliated purchasers. The United States directs us to DOC's findings in Comment 11 of the IDM.[163] However, the only reference we could find in the section containing DOC's findings on this issue to data selectively provided by Tembec concerns information regarding prices for wood chip purchases made by its pulp mills from unaffiliated parties. For this reason, the addition proposed by the United States has not been accepted.

6.20 For the sake of clarity, we have made minor adjustments to paragraphs 7.24, 7.30, 7.98, 7.168, 7.255, 7.260, 7.263, 7.285, 7.331, 7.344, 7.366, and 7.373-7.374 of the Interim Report (which correspond to paragraphs 7.24, 7.30, 7.98, 7.168, 7.255, 7.260, 7.263, 7.285, 7.333, 7.336, 7.368 and 7.376-7.378 of this Report, respectively). Moreover, we have slightly amended and moved the fifth sentence of paragraph 7.312 of the Interim Report (identical paragraph in this Report) to paragraph 7.317 of this Report. We have also amended paragraph 7.316 of the Interim Report (identical paragraph in this Report) in order to take into account our interpretation of the obligation imposed by the proviso of Article 2.2.1.1, as set forth in paragraphs 7.236-7.237 of the Interim Report (identical paragraphs in this Report). As a consequence of our amendments, we have also adjusted "Section VIII. Conclusions and Recommendations".

6.21 In addition to the above-cited amendments, we have added and amended a number of footnotes to indicate sources of the information of record. Footnote 406, setting forth the scope of the examination undertaken by the Panel, has been added to this Report. Finally, we have deleted some footnotes which we considered redundant.

6.22 Finally, we have made some typographical and style-related improvements to the Interim Report.

VII. FINDINGS

A. INTRODUCTION

7.1 Canada challenges DOC's final anti-dumping duty determination with respect to certain softwood lumber from Canada published in the Federal Register on 2 April 2002[164], as amended on 22 May 2002.[165] Canada asserts numerous claims against the Final Determination. Canada's first seven claims refer to the *AD Agreement*. The first three claims relate to the initiation and non-termination of the anti-dumping investigation. With respect to these claims, Canada alleges violations of Articles 5.2, 5.3 and 5.8 of the *AD Agreement*. Canada's fourth claim is that DOC erroneously determined that there was a single "like product", in violation of Article 2.6 of the *AD Agreement* and

[162] Exhibit CDA-112, Tembec's Cost Verification Report, p. 23-25.
[163] Exhibit CDA-2, IDM, pp. 57-62.
[164] Exhibit CDA-1, Final Determination.
[165] Exhibit CDA-3, Amended Final Determination.

that this non-compliance with Article 2.6 caused non-compliance with other substantive obligations of the *AD Agreement*, e.g., Articles 5.1, 5.2, and 5.4. The fifth claim is that DOC erred by failing, in comparing non-identical types, to make "due allowance" for certain physical differences in softwood lumber products to maintain price comparability and to ensure a fair comparison between normal value and export price, in violation of Article 2.4 of the *AD Agreement*. The sixth claim relates to DOC's "zeroing" of margins in comparisons where the export price was higher than the normal value, a methodology which Canada claims is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. The seventh claim consists of six company-specific issues. Canada claims that DOC (i) failed to calculate and/or allocate reasonable amounts for administrative, selling and general expenses in computing costs for specific exports, including an improper allocation for financial expenses and for litigation settlement expenses involving product liability claims for a non-investigated product; (ii) failed to apply reasonable amounts for by-product revenues from the sale of wood chips as offsets in calculating costs; and (iii) failed to offset a difference in price comparability arising from futures contracts profits after concluding that such a difference existed, in violation of the provisions of Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement*. Canada also claims that the above-described violations constitute violations of the US obligations under Articles 1, 9.3 and 18.1 of the *AD Agreement*, as well as Article VI of *GATT 1994*.

7.2 As we noted in Canada's first written submission that the provisions allegedly violated by the United States in some instances did not include all the provisions cited in the Panel Request, we requested Canada to confirm the provisions forming the basis of its claims.[166] We therefore limit our analysis and findings only to those provisions which were referred to in Canada's restatement of its claims.[167]

B. GENERAL ISSUES

1. Rules of Treaty Interpretation

7.3 Article 3.2 of the *DSU* indicates that Members recognize that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the *Vienna Convention*[168], which is generally accepted as reflecting such customary rules, reads as follows:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

7.4 It is clear that interpretation must be based, first and foremost, on the text of the treaty, while context and object and purpose may also play a role.[169] It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[170] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*".[171]

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[166] Question 1 of the Panel to Canada.
[167] Canada response to question 1 of the Panel.
[168] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 *International Legal Materials* 679.
[169] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11. The Appellate Body has recently emphasized the importance of the "ordinary meaning" of the terms used in the treaty text in, for example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*.
[170] Appellate Body Report, *India – Patents (US)*, para. 45.
[171] *Id.*, para. 46.

2. Standard of Review

7.5 In light of the claims and arguments made by the parties in the course of these Panel proceedings, we recall, at the outset of our examination, the standard of review we are required to apply to the matter before us.

7.6 Article 11 of the *DSU*[172] sets forth the appropriate standard of review, in general, for panels for all covered agreements. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.7 Furthermore, Article 17.6(i) of the *AD Agreement* sets forth the special standard of review applicable to anti-dumping disputes. It provides with regard to factual issues that:

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

7.8 Assuming that we conclude that the establishment of the facts with regard to a particular claim in this case was proper, we then may consider whether, based on the evidence before the US authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the US authorities reached on the matter in question.[173]

7.9 Article 17.6(i) requires us to determine whether the investigating authority's establishment of the facts was proper, and whether their evaluation of those facts was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves, that is, we may not engage in a *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the *AD Agreement* establishes that we are to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.10 With respect to questions of the interpretation of the *AD Agreement*, Article 17.6(ii) provides:

> "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the *Agreement admits of more than one permissible interpretation*, the panel shall find the authorities' measure to be in *conformity with*

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[172] Article 11 of the *DSU*, entitled "Function of Panels", states:

> "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…"

[173] We note that this is the same standard as that applied by the panels in *Argentina – Poultry*, paras. 7.43-7.49; and *US – Stainless Steel*, para. 6.3.

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

7.11 Article 17.6(ii) requires us to apply the customary rules of interpretation of treaties, which are reflected in Articles 31-32 of the *Vienna Convention*. As noted above, Article 31 of the *Vienna Convention* provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Thus, our task is in this respect no different from the task of all panels in interpreting the text of the WTO agreements pursuant to Article 3.2 of the *DSU*. What Article 17.6(ii) of the *AD Agreement* adds is an explicit acknowledgement that the relevant provision/s of the *AD Agreement* may admit of more than one permissible interpretation, and an instruction that, if this process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity with the *AD Agreement* if it is based on that permissible interpretation.

7.12 Together, Article 11 of the *DSU* and Article 17.6 of the *AD Agreement* set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[174] Therefore, we see our task as not to perform a *de novo* review of the information and evidence on the record of the underlying final anti-dumping determination, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.

3. Burden of Proof

7.13 We recall that, in WTO dispute settlement proceedings, the burden of proof rests with the party that asserts the affirmative of a particular claim or defence.[175] Canada as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements, which the respondent must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[176] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".[177]

4. Presentation of Facts in Proceedings

7.14 During these proceedings we were on a number of occasions directed, through footnotes, to annexes attached to the relevant submissions, in a general way, without clear and precise indications of exactly where in the annex at issue the referenced evidence could be found. Because some of the annexes contained lengthy documents, it was not always easy to find the evidence referenced. Furthermore, the arguments and/or facts were sometimes presented in the annexes, rather than in submissions themselves.

7.15 In our view, an annex to a submission should serve only to direct the reader to the underlying substantiating evidence of what has been presented in the main document, or in other words, to enable the reader to verify the facts. We therefore requested the parties during the first substantive meeting with the parties to "present the facts and legal arguments in their written and oral statements so that they are understandable and exhaustive by themselves" and that "the references to annexes should not

[174] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 54-62.
[175] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, *et seq.*
[176] *See* note 175, *supra*.
[177] Appellate Body Report, *Thailand – H-Beams*, para. 136.

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

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

C. PRELIMINARY OBJECTIONS

1. Introduction

7.17 The **United States** raised two preliminary objections, but did not request us to rule on them on a preliminary basis. The two objections raised are: (i) that Canada has included in its first written submission claims with respect to a number of provisions of the *AD Agreement* that were not included in its Panel Request[178] and are therefore outside our terms of reference[179], and (ii) that Canada has introduced certain new evidence in the context of these proceedings which was not before the investigating authority during the course of the investigation.[180]

2. Terms of Reference

(a) Factual Background

7.18 In paragraph 2 of its Panel Request[181], Canada states that:

> "[DOC] erroneously determined there to be a single like product (under US law, termed "class or kind" of merchandise) rather than several distinct like products, thereby failing to assess domestic industry support in respect of each distinct like product and failing to assess the sufficiency of evidence of dumping in respect of each distinct like product, thereby resulting in violations by the United States of *Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 [of the AD Agreement] and Article VI:1 of the GATT 1994*. The like product and industry support determinations by [DOC] were made without a proper establishment of the facts, were based on an evaluation of the facts that was neither unbiased nor objective and do not rest on a permissible interpretation of the [*AD Agreement*]. Accordingly, the like product and industry support determinations by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6".[182] (emphasis added)

7.19 In its first written submission, concerning the "like product" determination, Canada requests the Panel to find that:

> "DOC erroneously determined [there] to be only one like product and product under consideration, thereby, rendering the conduct of the investigation inconsistent with US obligations under *Articles 2, 3, 4.1, 5, 6.10 and 9* [of the *AD Agreement*]…"[183] (emphasis added)

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[178] WT/DS264/2. This document is included in Annex D to this Report.
[179] US first written submission, para. 15.
[180] *Id.*, para. 22.
[181] WT/DS264/2.
[182] *Ibid.*
[183] Canada first written submission, para. 279(3).

(b) Arguments of the Parties

7.20 The **United States** asserts that Canada claims in paragraph 2 of its Panel Request that the United States has violated Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *AD Agreement* and Article VI:1 of *GATT 1994*. However, according to the United States, Canada has added claims in its first written submission, by alleging that the following provisions of the *AD Agreement* have also been violated: Article 2 (not just Article 2.6), all of Article 4 (not just Article 4.1), all of Article 5 (not just Articles 5.1, 5.2, 5.3, 5.4 and 5.8), as well as Articles 3, 6.10, and 9.[184] The United States considers that these claims fall outside the Panel's terms of reference under Article 7 of the *DSU*. The United States points to Article 6.2 of the *DSU*, which states that a panel request "shall (...) identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The United States considers that a panel request must always identify the treaty provisions claimed to have been violated[185] and that, if a *claim* is not specified in the panel request, it cannot be subsequently "cured" by a complaining party's argumentation in its submissions to a panel.[186] The United States therefore requests us to rule that Canada's claims of violations of provisions other than those set forth in its Panel Request are beyond our terms of reference.

7.21 **Canada** contends that it has not added new claims in addition to those contained in its Panel Request by referring to additional provisions of the *AD Agreement* in its first written submission. Rather, Canada has made arguments in support of the claim clearly identified in its Panel Request (i.e., the over-broad product coverage of the investigation resulting from an improper application of Article 2.6 "like product" definition). Canada asserts that in order to address whether and how the definition of Article 2.6 delimits the scope and range of different products an investigating authority may cover in a single investigation, the Panel must explore the full context of Article 2.6, including the manner in which the term "like product" is used throughout the *AD Agreement*. The additional provisions referred to in its first written submission provide context for the interpretation of Article 2.6 and arguments for its claim that DOC erred in finding only one "like product" and conducting only one investigation. Furthermore, Canada asserts that the United States did not suffer any identifiable prejudice as Canada has not supplemented its claim or altered the nature of the alleged error in the Panel Request. The legal basis for Canada's claim in its first written submission remained Article 2.6 of the *AD Agreement* and the United States was clearly able to respond to Canada's arguments.[187] Canada therefore requests us to reject the US preliminary objection.

(c) Evaluation by the Panel

7.22 The issue that we need to decide is whether the provisions of the *AD Agreement* identified in Canada's first written submission as allegedly being violated by the United States, but which were not included in Canada's Panel Request, are within our terms of reference.

7.23 In examining this matter, we note the following *differences* between the provisions of the *AD Agreement* quoted by Canada in its Panel Request with regard to the "like product" issue and those provisions claimed by Canada as being violated in its first written submission, and in its subsequent replies to questions 1 and 85 of the Panel to confirm which provisions have allegedly been violated by the United States:

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[184] US first written submission, para. 17 which refers to Canada first written submission, paras. 11, 115, 118, 119 and 142.

[185] Appellate Body Report, *Korea – Dairy*, para. 124, and also Panel Report, *EC – Bed Linen*, para. 6.17.

[186] Appellate Body Report, *EC – Bananas III*, para. 143.

[187] Canada response to the US preliminary objections, para. 15, and note 5 thereto.

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

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

7.24 In examining these differences, it appears to us, on its face, that Canada has, in its first written submission, alleged violations of Articles 2 and 5 as a whole, rather than only the sub-sections claimed to have been violated in the Panel Request. In Canada's first written submission, violations of provisions not included at all in the Panel Request, specifically Articles 3, 6.10 and 9, are also alleged. We note that, in its restatement and confirmation of its claims contained in its replies to questions 1 and 85, respectively, Canada has limited the scope of its claim to an alleged violation of Article 2.6 and, "*e.g.*, Articles 5.1, 5.2, and 5.4".[191]

7.25 It is now well-established that a panel's terms of reference are governed by the panel request. These terms of reference define the scope of the dispute, and serve the due process objective of notifying the parties and third parties of the nature of the complainant's case.[192] It is also well-established that the identification of the treaty provision in the panel request is the minimum prerequisite for defining the terms of reference. [193] Finally, we note that defects in a panel request

[188] WT/DS264/2.

[189] This table reports the provisions claimed by Canada as being violated in Canada first written submission, Section IV. Relief Requested, paras. 279(3) and 280, rather than those referred to by the United States in para. 7.20, *supra*.

[190] We note that, in its response to question 1 of the Panel, para. 1(iii), Canada claims that:

> "[n]on-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *Anti-Dumping Agreement*, e.g., Articles 5.1, 5.2, and 5.4".

[191] *Ibid.*

[192] We note the Appellate Body statement in *US – Carbon Steel* that:

> "… pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests.
>
> (....)
>
> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU". (Appellate Body Report, *US – Carbon Steel*, paras. 124-127)

[193] As the Appellate Body stated in *Korea – Dairy*:

> "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such

cannot be "cured" in subsequent submissions to a panel. Thus, a statement in a written submission can be "consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced", but not to "cure" deficiencies in the panel request, or to add additional provisions of a treaty allegedly being violated or to add additional sub-sections of a provision included in the panel request.[194]

7.26 Canada does not contest that additional provisions of the *AD Agreement* have been included in its first written submission that were not identified in its Panel Request with regard to its claim on the scope of the investigation. However, Canada asserts that these "additional provisions" are cited only in support of its claims as set out in the Panel Request, and to put the interpretation of the provisions allegedly being violated in context.

7.27 We also note that, in response to our request to Canada to list the provisions of the *AD Agreement* allegedly violated by the United States[195], Canada states, with regard to its claim[196] on the "like product" and "product under consideration" issue, that:

> "[t]his claim is grounded in Article 2.6. (...) Non-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *Anti-Dumping Agreement, e.g.*, Articles 5.1, 5.2, and 5.4".[197]

7.28 From this statement by Canada, it is clear to us that Canada does *not* request us to make findings on the additional provisions cited in its first written submission with regard to the claim under paragraph 2 of its Panel Request.

7.29 The Appellate Body has made it clear that the minimum requirement that a complainant has to meet is the identification of the treaty provisions at issue, and that any deficiencies in this regard cannot be "cured" at a later stage. We note Canada's clarification that the additional provisions of the *AD Agreement* identified in its first written submission, in addition to those quoted in its Panel Request, are not the basis for additional claims, but are merely quoted in support of its arguments and to give context to the interpretation of the Article 2.6. We also note Canada's confirmation that the legal basis for its claim regarding the "like product" issue is an alleged violation of "*e.g.*, Articles 5.1, 5.2, and 5.4" of the *AD Agreement*.

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identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all". (Appellate Body Report, *Korea – Dairy*, para. 124)

[194] As the Appellate Body explained in *US – Carbon Steel*:

"compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the *First Written Submission* of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances". (footnotes omitted) (Appellate Body Report, *US – Carbon Steel*, para. 127)

[195] Question 1 of the Panel to Canada.
[196] WT/DS264/2, Claim under para. 2 of the Panel Request.
[197] Canada responses to questions 1 and 85 of the Panel.

7.30 We therefore find that the alleged violation of Articles 2 (with the exception of Article 2.6), 3, 5 (with the exception of Articles 5.1, 5.2, 5.3, 5.4 and 5.8), 6.10 and 9 of the *AD Agreement* do not fall within the scope of our mandate as set out in the Panel Request.

3. Introduction of Evidence that was not before the Investigating Authority

(a) Factual Background

7.31 Canada claims that the United States has violated Article 2 of the *AD Agreement* in that DOC failed to make due allowance for differences that affect price comparability when comparing prices of products sold in the United States and prices of products with different physical characteristics sold in Canada. In support of its claim Canada attached a document, Exhibit CDA-77, purporting to substantiate its view that the record data show that the relevant physical differences between the products affect price comparability. Exhibit CDA-77 is a regression analysis of the record data, produced by Tembec, one of the respondent companies.

7.32 However, Exhibit CDA-77 was not submitted to DOC during the investigation. The record of the underlying investigation shows that DOC announced the Final Determination in March 2002, whereas the document now submitted to us as Exhibit CDA-77, appears to have been prepared for Tembec on 4 October 2002, that is, 6 months after the conclusion of the investigation.

(b) Arguments of the Parties

7.33 The **United States** asserts that Exhibit CDA-77 did not form part of the record of the underlying investigation, and therefore does not constitute "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" as required by Article 17.5(ii) of the *AD Agreement*. According to the United States, Exhibit CDA-77 contains a statistical regression which was created more than six months after the investigation was completed.[198] The United States asserts that "Exhibit CDA-77 presents newly derived data calculated and reorganized in a different manner than was available to the US investigating authority in the original investigation".[199] As the information contained in Exhibit CDA-77 was not made available to the investigating authority in conformity with the appropriate domestic procedures during the investigation, the United States asserts that considering it would be inconsistent with Article 17.5(ii). In addition, the United States contends that, in asking us to consider this new evidence, Canada effectively is requesting the Panel to undertake its own establishment and evaluation of the facts, contrary to Article 17.6(i). The United States therefore requests us to decline to consider Exhibit CDA-77.

7.34 **Canada** responds that, although Exhibit CDA-77, as such, was not on the record when DOC made its final determination, all of the underlying data used in the regression analysis were on the record before DOC. [200] Thus, according to Canada, Articles 17.5(ii) and 17.6(i) do not prevent us from considering Exhibit CDA-77. The purpose of submitting Exhibit CDA-77 was to enable the Panel to determine whether DOC's establishment of the facts was proper and whether its evaluation of the facts before it was unbiased and objective, pursuant to Article 17.6(i). Canada asserts that a similar issue arose before the *EC – Bed Linen* panel, which found that, although Article 17.5(ii) requires a panel to examine the matter based upon the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member, it does not require that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority.[201] Canada also argues that, if the United States had respected its obligation

[198] The lumber regression analysis contained in Exhibit CDA-77 is dated 4 October 2002.
[199] US first written submission, para. 27.
[200] Canada response to the US preliminary objections, para. 20.
[201] Panel Report, *EC – Bed Linen*, paras. 6.41-6-43.

under Article 6.1 of the *AD Agreement* "to give all parties notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation..", Exhibit CDA-77 would have been put on the record of the investigation prior to the Final Determination by DOC.

(c) Evaluation by the Panel

7.35 The issue that we need to decide is whether Exhibit CDA-77 is properly before us as evidence to substantiate Canada's claim with regard to an Article 2.4 adjustment for physical differences affecting price comparability, that is, whether Exhibit CDA-77 complies with the requirements of Article 17.5(ii) of the *AD Agreement*.

7.36 Article 17.5(ii) of the *AD Agreement* provides that:

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

7.37 Article 17.5(ii) makes clear that we must examine the matter before us based on facts made available to DOC in accordance with the US domestic procedures, and that we cannot base our findings on any other facts not complying with this requirement. Thus, we agree with a previous panel that we "may not, when examining a claim of violation of the *AD Agreement* in a particular determination, consider facts or evidence presented (…) by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country *during the investigation*".[202] (emphasis added; footnote omitted) If this were not the case, we find it difficult to envisage how an investigating authority could be expected to have taken these facts into consideration when making its relevant determinations – the very reason why facts are submitted to an investigating authority.

7.38 Canada does not dispute that CDA-77 was submitted to DOC only on 4 October 2002, that is, more than 6 months after DOC published its Final Determination. It argues, however, that the underlying data on which Exhibit CDA-77 was based were taken from the database that DOC used in calculating the dumping margin for Tembec[203], and that it therefore contains no new facts – the facts of the case are therefore similar to those in *EC – Bed Linen.* We therefore need to determine whether Exhibit CDA-77 contains facts that were not before DOC and therefore constitutes evidence in its own right, and whether the relevant finding of the panel in *EC – Bed Linen* is applicable to the case in hand.

7.39 It is undisputed that Exhibit CDA-77 contains the results of a regression analysis performed by a consultant on instruction from Tembec, one of the mandatory respondent Canadian companies. We note that multiple regression is a statistical method for studying the relationship between a single dependent variable and one or more independent variables.[204] The use of regression allows the user to infer whether there is a positive, inverse (negative) or no relationship between the explanatory and dependent variables. The procedure also enables the relationship to be measured – how will a unit change in the independent variable affect the value of the dependent variable. The method involved

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[202] Panel Report, *US – Hot-Rolled Steel*, para. 7.6.
[203] This fact is not contested by the United States.
[204] Allison, Paul A., *Multiple Regression: A Primer* (Pine Forge Press, 1998).

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

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

7.41 Canada relies upon the panel report in *EC – Bed Linen* for the proposition that Article 17.5(ii) does not preclude a panel from reviewing data which are presented to it in a different format than they were presented to the investigating authority.[206] We note, however, that the exhibit at issue in that dispute was a recapitulative table of the declarations of support for the application received from other domestic EC producers. The exhibit was therefore a "marshalling" of the already submitted evidence and *not* a manipulation thereof. It seems clear to us that that factual situation differs substantially from the facts of this case: the evidence at issue was before the investigating authority during the investigation itself, and the very same information was submitted to the panel in a different format only – nothing was added to it, nor was anything subtracted from it. It was therefore merely a "mechanical" exercise. The same cannot be said of the evidence in Exhibit CDA-77 – we note that the memorandum by the consultant who developed the regression analysis explaining how Exhibit CDA-77 was developed, covers seven pages, explaining the methodologies employed and the different options used.[207] This, in itself, confirms to us that Exhibit CDA-77 contains more than the mere data which were already before DOC. We are therefore of the view that Canada's reliance on *EC – Bed Linen* is misplaced.

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[205] Exhibit CDA-129, Memorandum on the Regression Analysis, p. 2.

[206] The panel in *EC – Bed Linen* found that:

> "Article 17.5(ii) of the AD Agreement provides that a panel shall consider a dispute under the AD Agreement 'based upon: … the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member'. It does not require, however, that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion in support of their arguments and to elucidate the parties' positions. Based on our review of the information ... we conclude that the Exhibit in question does not contain new evidence. Thus, we conclude that the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation. There is in our view no basis for excluding the document from consideration in this proceeding, and we therefore deny India's request". (emphasis in original) (Panel Report, *EC – Bed Linen*, para. 6.43.)

[207] Exhibit CDA-129, Memorandum on Regression Analysis.

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

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

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

(a) Factual Background

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

(b) Arguments of the Parties/Third Parties

7.45 **Canada** asserts that Article 5.2 of the *AD Agreement* requires that an application for initiation of an anti-dumping investigation contain such information on prices "as is reasonably available to the applicant". Canada asserts that the applicant misrepresented to DOC that it: (1) did not have access to Canadian producer transaction prices for softwood lumber sales in Canada; (2) had only limited information on prices at which Canadian softwood lumber was exported to the United States and (3) did not have access to detailed Canadian producer costs of production. Specifically, Canada asserts that, because Weldwood is a wholly-owned subsidiary of an Executive Committee member of the Coalition, sales price and cost data of a major Canadian exporter were "reasonably available to the applicant". Canada further alleges that the record subsequently established that four members of the Coalition had in fact imported softwood lumber from Canada. There was therefore no justification for failing to include the pricing and cost data on actual sales of softwood lumber in Canada and to the United States, and no need for the applicant to construct prices or costs of Canadian softwood lumber sales to support the application. Because the application did not include all the information that was reasonably available to the applicant, it failed to meet the requirements of Article 5.2. Canada also argues that DOC's failure to seek further information (i.e., actual price and cost data), including its blind acceptance of the applicant's claim that it did not have such information, although aware of the relationship between Weldwood and IP, did not comply with the obligation under Article 5.2 to

[208] Canada response to the US preliminary objections, para. 21.
[209] *Id*., para. 22.

ensure that the application contains information which is "reasonably available" to the applicant. According to Canada, an unbiased and objective investigating authority would not have concluded that the applicant had submitted information that was "reasonably available" to it.

7.46 The **United States** argues that the information submitted by the applicant was sufficient to support a decision to initiate an investigation and that the Weldwood cost and price data to which Canada refers could not have detracted from the sufficiency of the evidence in the application. According to the United States, Article 5.2 does not require that an applicant submit certain information which is reasonably available to it in the application if the information submitted as part of the application is sufficient to support initiation of an investigation. The United States also asserts that the information on prices which the applicant did submit was more representative of the prices of the Canadian exporters of softwood lumber products than that of only one Canadian producer, Weldwood, would have been, had it been submitted, or required to be submitted.

7.47 As a third party, the **EC** argues, firstly, that Article 5.2 does not contain an obligation for the applicant to submit to the investigating authority *any* information reasonably available, but only to the extent that it falls under one of the elements identified under the paragraphs (i) to (iv) of Article 5.2, and secondly, that Article 5.2 imposes an obligation only on the applicant, but not on the investigating authority.

(c) Evaluation by the Panel

7.48 The issue before us is whether the application for the initiation of the investigation underlying this dispute is consistent with Article 5.2 of the *AD Agreement.* It seems to us that the relevant threshold issue is whether an application that contains information on all the specific items specified in Article 5.2 may nevertheless be inconsistent with Article 5.2 because additional information regarding those specific items and which was reasonably available to the applicant was not included in the application. Once we have resolved this question, we will review the information in the application with a view to determining whether it included the required information.

7.49 As a starting point, we note that Article 5.1 of the *AD Agreement* provides that:

> "[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry".

7.50 The application is therefore normally the starting-point in the process, activated by the domestic industry of the importing country, for examining whether "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated" by the investigating authority.

7.51 We next examine the requirements, established by Article 5.2, with which an Article 5.1 written application to initiate an investigation must comply. Bearing in mind the rules of treaty interpretation referred to in section B.1, *supra,* we start our analysis with the text of Article 5.2, looking at the ordinary meaning of the provision. Article 5.2 reads in relevant part as follows:

> "[a]n application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:
>
> (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.56 Canada's interpretation would require us to conclude that the "reasonably available" language serves to *toughen* the obligation, to such an extent that, even if all specified information is provided, the application would not meet the requirements of Article 5.2 if *all* relevant information that is "reasonably available" is not provided in the application. If this is what the drafters had intended, they could have included "shall contain *all* such information as is reasonably available", rather than "such information". We are of the view that the drafters had good reasons why they did not include the word "all" in the text as it would mean that an investigating authority would have to review even the best-documented application to make sure some additional information could not have been provided. In this very case, with Canada stating that the applicant companies do regular business with Canadian companies which results in thousands of transactions[216], it would have meant that the applicant had to submit information and documents covering all these transactions. Furthermore, the investigating authority would then be required to review the information covering all these transactions for purposes of the initiation of an investigation, and furthermore, to ascertain whether all transactions were covered by this process. In our view, such a requirement would render the provision totally unworkable.

7.57 Considering the requirements of Article 5.2, we are of the view that we have to establish, when considering the specific facts of this case, whether the application contained information on the matters specified in Article 5.2, in particular as required by sub-paragraph (iii) thereof, and not whether it contained all such information as is reasonably available to the applicant.

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[215] If the requirement were to be that all information reasonably available to the applicant must be submitted in the application, it could lead to absurd results in that the applicant might be required to submit a large volume of information for purposes of the initiation of the investigation.

[216] Canada first oral (opening) statement, para. 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  (ii) A POI average of weekly reported prices for kiln-dried ESPF 2x4 8-foot studs delivered to Boston and the Great Lakes region, respectively;

  (iii) An average transaction price for kiln-dried ESPF 2x4 8-foot PET studs delivered to Boston during the week of 19 January 2001.[227]

- Information on the constructed value of the product:

  - Provincial stumpage charges in BC and Quebec in 2000;[228]

  - Data on harvesting costs in BC from a 1999 independent study by a consultant of BC sawmills;[229]

  - Data on harvesting costs for Quebec during the last quarter of 2000, from a market research report;[230]

  - Data on direct labour costs for BC and Quebec, from surveys of sawmills by the BC government and Canadian Federal government, respectively;[231]

  - Data on electricity costs from a Canadian Federal Government survey of electrical suppliers;[232]

  - Data on per-unit financial expenses from the public 2000 financial statements for Canadian lumber producer Tembec;[233]

  - Press-clippings from daily newspapers in various Canadian cities describing widespread below-cost sales of softwood lumber in Canada;[234]

  - An amount for profit was substantiated by the public financial statements of Tembec, a major Canadian producer – the same financial statements used when calculating the cost of production.[235]

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[225] Exhibit CDA-10, Initiation Checklist, pp. 7-8.
[226] *Ibid.*
[227] *Ibid.*
[228] Exhibit US-4, Application – Exhibit VI.C-2; and Exhibit US-59, Application – Exhibit VI.D-2.
[229] Exhibit US-5, Application – Exhibit VI.D-4; and Exhibit US-6, Application – Exhibit VI.D-5.
[230] Exhibit US-7, Application – Exhibit VI.C-4.
[231] Exhibit US-8, Application – Exhibit VI.C-5; and Exhibit US-9, Application – Exhibit VI.D-6.
[232] Exhibit US-10, Application – Exhibit VI.C-6; and Exhibit US-11, Application – Exhibit VI.D-7.
[233] Exhibit US-12, Application – Exhibit VI.B-1; Exhibit US-13, Application – Exhibit VI.B-2; and Exhibit CDA-40, Application Amendments (revised Tembec financial calculations from Exhibit VI.B).
[234] Exhibit CDA-37, Application – Volume III; Exhibit CDA-40, Application Amendments; and Exhibit US-14, Application – Exhibit III-14.

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

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

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

(a) Factual Background

7.62 DOC received an application requesting it to initiate an anti-dumping investigation concerning allegedly dumped imports of softwood lumber from Canada. The application contained certain information on prices at which the product in question was sold when destined for consumption in Canada, on the constructed value of the product, as well as on export prices of softwood lumber products exported from Canada to the United States. The application did not contain any price or cost information from Weldwood, a significant Canadian producer and exporter to the US which is wholly owned by IP, one of the applicant companies, nor did it contain any export price information on any imports of the subject product by other applicant companies from Canadian exporters. The application was examined by DOC and in the process a deficiency letter was sent to the applicant with the request to submit additional data and provide clarifications with respect to certain matters. The applicant responded to the request by submitting additional data and clarifications. DOC subsequently prepared a document in which it explained its analysis of the application and the basis for its decision to initiate the investigation.

(b) Arguments by the Parties/Third Parties

7.63 **Canada** claims that DOC did not properly examine the accuracy and adequacy of the information provided in the application and did not properly determine, based on the facts before it, that there was sufficient evidence to justify the initiation of the investigation, in violation of Article 5.3 of the *AD Agreement*.

7.64 Canada asserts that an unbiased and objective investigating authority would have known that certain highly pertinent transaction-specific information reasonably available to one of the applicant companies (IP) through its wholly-owned Canadian company, Weldwood, was not submitted, as the application contained a Canadian newspaper article referring to the relationship between the two companies.[238] Canada also asserts that, given the magnitude of the cross-border trade in lumber and the well-recognised fact of cross-border ownership, DOC ought to have concluded on further examination of the application that the evidence on dumping was inadequate, as the applicant companies had access to more price and cost information. Furthermore, Canada posits that, at least four members of the Executive Committee of the Coalition for Fair Lumber Imports, one of the applicants, purchased and imported softwood lumber products from three of the mandatory Canadian respondents during the period of the investigation and therefore had access to export prices.[239] It was

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[235] Exhibit US-12, Application – Exhibit VI.B-1; Exhibit US-13, Application – Exhibit VI.B-2; and Exhibit CDA-40, Application Amendments.

[236] Exhibit CDA-37, Application – Volume III.

[237] In light of our findings, we need not and do not address the question, raised by the EC, as to whether Article 5.2 imposes an obligation on the Member or on the applicant itself.

[238] Confirmed by the United States in its response to question 12 of the Panel, para. 12.

[239] Canada response to question 8 of the Panel, para. 17 and Canada second written submission, note 7.

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

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

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

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

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

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

[240] Canada second written submission, paras. 30-32.
[241] *Id.*, paras. 34-35.
[242] *Id.*, para. 37 and Canada response to question 8 of the Panel, para. 33 and note 32 thereto. In the footnote, Canada compares the prices to substantiate its point.
[243] *Id*, para. 38.
[244] US first written submission, paras. 52-62, and US response to question 13 of the Panel, para. 14.
[245] US first written submission, paras. 65-69, and US response to question 16 of the Panel, paras. 25-30.

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

7.70 As a third party to this dispute, the **EC** submits that Article 5.3 of the *AD Agreement* obliges an investigating authority to determine whether the initiation of an investigation would be justified in view of the objectively available evidence. This obligation not only encompasses an examination of the application and whether it fulfils for instance the requirements under Articles 5.2 or 5.3 of the *AD Agreement,* but may also require the investigating authority to take further steps to assemble the necessary evidence before initiating an investigation. The EC therefore agrees with the Panel in *Argentina – Poultry* that it is not merely the accuracy and the adequacy of the evidence *per se* which is the legal standard under Article 5.3, but the sufficiency of that evidence.[246] The EC also agrees with the panel in *Guatemala – Cement I* that the existence of "sufficient evidence" in a particular case has to be adjudicated in the light of the standard set forth in Article 17.6(i) of the *AD Agreement* and that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.[247]

(c) Evaluation by the Panel

7.71 The issue which we need to address under this claim is whether DOC acted consistently with the requirements of Article 5.3 of the *AD Agreement* when it decided that there was sufficient evidence to initiate the investigation. In other words, could an unbiased and objective investigating authority have concluded that the application contained accurate and adequate evidence sufficient to justify the initiation of the anti-dumping investigation?[248] We need, therefore, to address the nature of the obligation contained in Article 5.3 before we consider the facts of the case in light of these obligations to determine whether Article 5.3 has been violated by the United States.

7.72 We start our analysis by looking at the text of Article 5.3, which provides as follows:

> "[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

7.73 As Article 5.2 of the *AD Agreement* deals with the information required to be submitted as evidence to substantiate the allegation of dumping, and in light of our finding that the United States did not violate the provisions of Article 5.2, we need to address the context of Article 5.3, as well as the relationship between Article 5.2 and Article 5.3.

7.74 We note that a number of panels have addressed the different obligations contained in and the functions of Article 5.2 and Article 5.3 of the *AD Agreement*. Article 5.2 provides that the written application shall contain certain evidence of dumping, injury and causality in the form of specified information to be submitted to the extent such evidence is reasonably available to the applicant. At this stage, the only requirement is that information described in the sub-paragraphs of Article 5.2 has been included in the application. This does not mean that the investigation can be initiated on the basis of compliance with Article 5.2 only, as Article 5.3 makes it clear that a further step is required, that is, that the investigating authority has to examine the accuracy and adequacy of the evidence

[246] Panel Report, *Argentina – Poultry*, para. 7.60.

[247] Panel Report, *Guatemala – Cement I*, para. 7.57; confirmed in Panel Report, *Mexico – Corn Syrup*, paras. 7.94, *et seq*.

[248] There is no assertion in this case that DOC obtained any information independently; thus, its decision to initiate was based solely on the information in the application.

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

> "… the fact that the applicant has provided, in the application, all the information that is "reasonably available" to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied"[249],

and:

> "Article 5.3 is a requirement imposed on the investigating authority: once it has accepted the application, that is, determined that it contains evidence on dumping, injury, and causal link, as well as "such information as is reasonably available to the applicant" on the factors set forth in Article 5.2 (i) - (iv), the investigating authority must undertake a further examination of the evidence and information in the application. If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation. Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant."[250]

7.75 Although the information contained in the application therefore forms the basis for the determination of sufficiency of the evidence for purposes of the initiation of the investigation, an investigating authority is not precluded from gathering information itself to ensure that it is satisfied that it has sufficient evidence before it, although it is not obliged to do so.[251]

7.76 In this case, we have found that the requirements of Article 5.2 have been satisfied, as set forth in paragraph 7.61, *supra*. The next question we therefore have to address is whether DOC was entitled to conclude that there was sufficient evidence to justify the initiation of the investigation. We note that DOC did not gather information on its own, in addition to the information in the application as submitted to it, but that it based its decision to initiate the investigation on the information in the application, as supplemented by additional information and clarifications submitted by the applicant as requested by DOC.

7.77 Before addressing the issue of what constitutes sufficient evidence, we first need to address the question of "sufficient evidence" of what? In this regard, we find the first part of Article 5.3 instructive, where it states that "[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application", as well as the chapeau of Article 5.2 which states that "[a]n application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury ... and *(c)* a causal link between the dumped imports and the alleged injury". We are therefore of the view that, although

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[249] Panel Report, *Guatemala – Cement I*, para. 7.49.
[250] *Id.*, para. 7.50. (emphasis in original omitted)
[251] Panel Report, *Guatemala – Cement II*, para. 8.62.

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

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

7.79 Having regard to our standard of review, we shall therefore examine whether an objective and unbiased investigating authority, looking at the facts before DOC at the time of the initiation of the investigation, could properly have determined that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation. In making this determination, Article 5.3 requires an investigating authority to examine the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authority's determination whether there is sufficient evidence to justify the initiation of an investigation. However, it is not merely the fact of the accuracy and adequacy of the evidence *per se* which is the legal standard under Article 5.3, but the *sufficiency* of that evidence.[253] In analysing the sufficiency of evidence, we agree with previous panels that statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence within the meaning of Article 5.3.[254]

7.80 We note that, although Article 5.2 does not define the term "dumping", Article 2 provides guidance regarding the meaning of that term for the purpose of the *AD Agreement*. We agree with the findings of the *Guatemala – Cement II* panel on this issue[255], which were also followed by the panel in *Argentina – Poultry*, that, in order to determine whether there is sufficient evidence of dumping, an investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Article 2.[256] This does not, of course, mean that an investigating authority must perform a full-blown determination of dumping in order to initiate an investigation. Rather, it means simply that an investigating authority should take into account the general parameters as to what dumping is when inquiring about the sufficiency of the evidence. The requirement is that the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation. We will therefore follow the same approach in our analysis of Canada's claims. With these considerations in mind, we now turn to the examination of Canada's claim.

7.81 According to Canada, cost and price information were required to justify initiation of the investigation under Article 5.3. Canada is basing this assertion on the contextual relevance of Article 2 of the *AD Agreement* to an interpretation of Article 5.3, as discussed in paragraph 7.80, *supra*. An investigating authority must therefore have regard to the basis of the allegation of dumping in order to determine whether there is sufficient evidence of dumping to justify initiation. As the

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[252] Panel Reports, *Mexico – Corn Syrup*, paras. 7.91-7.110; *Guatemala – Cement II*, paras. 8.29-8.58; and *Argentina – Poultry*, paras. 7.60-7.89.

[253] Panel Report, *Argentina – Poultry*, para. 7.60.

[254] Panel Reports, *Guatemala – Cement II*, paras. 8.51-8.53; and *Argentina – Poultry*, para. 7.60.

[255] Panel Report, *Guatemala – Cement II*, para. 8.35.

[256] Panel Report, *Argentina – Poultry*, para. 7.62.

applicant in this case alleged that sales in Canada were made below cost, they submitted information regarding constructed (normal) value in support of its allegation that dumping existed.

7.82 According to Canada, Article 2, and specifically Article 2.2, permits a dumping margin to be calculated based on a constructed (normal) value where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country. In order to disregard home market sales, Article 2.2.1 requires that there be an analysis of costs and a determination that the home market sales "are at prices which do not provide for the recovery of all costs within a reasonable period of time". These provisions provide context for the sufficiency determination under Article 5.3 in this case. Therefore, Canada argues, DOC was required to assess whether the evidence provided by the applicant on each of the relevant elements – home market prices, export prices and costs – were adequate, accurate and therefore sufficient, to justify initiation under Article 5.3. In Canada's view, an objective investigating authority could not have determined that the evidence on each of the necessary elements provided by the applicant was sufficient to justify initiation.

7.83 Although we agree that Article 2 provides context for the interpretation of Article 5.3, we are of the view that a clear distinction should be made between the determination of a margin of dumping according to the requirements of Article 2.2 for purposes of a preliminary or a final determination, and the evaluation of evidence of dumping for purposes of determining whether there is sufficient evidence to justify initiation of an investigation. We note that several panels have noted the difference between evidence required to initiate an anti-dumping investigation and evidence required to make an affirmative determination of dumping. For example, in *Guatemala – Cement II*, the panel stated:

> "[w]e do not mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward".[257]

7.84 We agree with the above position taken by panels on this issue, namely that the quantity and quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination of dumping.

7.85 In applying these considerations to the case before us, the issue we need to address is therefore whether an unbiased and objective investigating authority, could have come to the same conclusion as DOC did, after examining the evidence on which DOC relied for purposes of determining the sufficiency of the evidence before it in terms of Article 5.3 of the *AD Agreement*.

7.86 We will first examine the issue regarding the Weldwood data. We recall that Canada argues that the price and cost data of Weldwood, which were reasonably available to the applicant company "IP", should have been submitted in the application.[258] Canada implies that the Weldwood data were of a superior quality to that which were contained in the application and on which DOC based its decision to initiate the investigation. The position of the United States is that the information contained in the application was examined by DOC and found to be sufficient to justify the initiation

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[257] Panel Report, *Guatemala – Cement II*, para. 8.35. *See* also Panel Reports, *Argentina – Poultry*, para. 7.67 (finding evidence that sales in a major market of exporting country, though not the entire country, was sufficient for initiation); and *Guatemala – Cement I*, para. 7.64 (evidence at initiation need not be of same quantity or quality as would be necessary to support preliminary or final determination).

[258] The United States did not argue that the Weldwood data was not reasonably available to the applicant.

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

7.87 We recall our finding above that Article 5.2 of the *AD Agreement* requires that the application shall contain such information which is reasonably available to the applicant to substantiate its claim of, *inter alia*, alleged dumping, meaning that the application need not contain *all* information reasonably available to the applicant, but only information to support a *prima facie* case. We further note that Article 5.3 requires that the investigating authority "shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation". From the wording of Article 5.3, it is clear that the requirement is that there should be *sufficient* evidence to justify the initiation of the investigation. The requirement is therefore not to examine whether more probative evidence is reasonably available to the investigating authority, but whether an unbiased and objective investigating authority could have found that the evidence before it is sufficient to justify initiation of the investigation.

7.88 The application contained certain cost data which were constructed on the basis of part Canadian data and part US data and information, and price data sourced from *Random Lengths*, a reputable industry publication. Canada posits that actual Canadian cost data and price information were available through Weldwood. We note that the Weldwood data would have related to only one company, whereas the *Random Lengths* price information covered a large number of transactions by different sellers and could therefore be regarded as more representative. As the Weldwood data were not examined by the DOC, it is not known whether it would have shown dumping or not. Even if it is assumed that it would have shown no dumping, we are of the view that, in principle, it could not have detracted from the sufficiency of the data actually submitted in the application and the decision of DOC to base its initiation decision on that evidence. However, if the data in the application had been shown to suffer from inadequacy and inaccuracy to such an extent that an unbiased and objective investigating authority could not have found that the application in this case contained sufficient evidence to justify its decision to initiate the investigation, the Weldwood data would have become relevant.

7.89 Canada claims that, in a number of instances, the price and cost information which was submitted to DOC, and on which it relied to determine whether the evidence was sufficient, was challengeable to such an extent that an unbiased and objective investigating authority could not have found that the evidence before it was sufficient to justify the initiation of the investigation and that Article 5.3 of the *AD Agreement* was therefore violated by the United States.

7.90 Although we are mindful when examining Canada's assertions regarding the sufficiency of the evidence on which DOC based its decision to initiate an investigation, that we are not to do a *de novo* review of the facts, we are of the view that, considering Canada's challenge of various aspects of the cost and price evidence, we need to examine the specific facts of this case in some detail in order to determine whether an unbiased and objective investigating authority could have come to the same conclusion that DOC did.

7.91 According to Canada, the cost evidence in the application was flawed in a number of ways which rendered it insufficient to support the decision to initiate the investigation:

(i) Efficiencies of scale of Canadian sawmills in cost calculation

7.92 The applicant did not provide actual cost data for significant or representative Canadian producers, but based the allegations regarding the cost of BC and Quebec producers on four US mills' costs as surrogates. Canada asserts that reliance on the data regarding these four mills was justified

by "nothing more than unsubstantiated assertions about the appropriateness of the mills chosen".[259] DOC accepted the cost data on the basis on the applicant's assertions. Canada asserts that these mills were not representative of Canadian mills based on size, as the US companies chosen as surrogates for Quebec costs were less than one-tenth the size of any of the six largest Canadian companies and smaller than over 75 per cent of all Canadian companies that export to the United States. The US mills therefore could not have had the efficiencies of scale of the Canadian companies, and the applicant's cost model therefore overestimated the costs which resulted in an inflated constructed (normal) value calculation.

7.93 The United States responded that, with respect to the majority of the costs, data from US mills were used only to provide production factors, which were then valued using cost data of a Canadian producer. Canada does not dispute that these cost data were representative of Canadian costs of production. However, with regard to certain cost factors, US data were used as the basis, and then adjusted to reflect Canadian costs. According to the United States, the US mills whose information was used as surrogates in this calculation were themselves significant and representative producers of softwood lumber in the United States, two in a lumbering area in the eastern United States, and two in a major lumbering area in the western United States. Given the great disparity in size of lumber mills in both Canada and the United States, a particular US mill need not be among the largest to be both a significant and representative producer of softwood lumber for purposes of being used as a source of data representative of an equally broad range of Canadian mills.

7.94 In considering this issue, we are mindful that we are dealing with the initiation of an investigation, and furthermore, we keep in mind the Article 17.6 standard of review that we have to apply. It seems to us that Canada's argument revolves mainly around its assertion that the Canadian mills are much larger, and therefore have greater efficiencies of scale than the US mills could have. Although we agree that efficiency of scale does have an impact on cost, we also note that the applicant stated in the application that "softwood lumber manufacturing costs vary significantly by producer depending upon a number of factors, such as each producer's level of efficiency, type of equipment, physical location and wood fibre source material".[260]

7.95 In light of the nature of the lumber industry in both the United States and Canada, and the dynamic interrelationship of the different cost elements, we are of the view that it would almost be impossible for an applicant to be able to submit information to address all these variables for purposes of the initiation of an investigation. We are therefore of the view that an unbiased and objective investigating authority could have accepted the evidence of the four surrogate mills in the context of the normal value calculation in the application, and therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(ii) Calculation / allocation of costs

7.96 Canada states that DOC initiated the investigation without any evidence before it of how the applicant calculated the cost of manufacturing of the US surrogate companies for the SPF species or of how company costs were then allocated to the specific products (2x4 kiln-dried dimension or stud lumber) for which the cost models had been constructed. The United States responds that, as most costs were calculated on a per-species, per-MBF basis, the applicant followed the normal industry practice, and also that the issue of precisely how to allocate costs to products is not an issue that needed to be definitively resolved prior to initiation of the investigation.[261] Canada challenges this statement and asserts that DOC never made such a finding.[262]

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[259] Canada second written submission, para. 39.
[260] Exhibit CDA-134, Application – Exhibit VI.A, p. 4-5.
[261] US second written submission, p. 9.
[262] Canada second oral (opening) statement, para. 19.

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

(iii) Period covered by the cost model data

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

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

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

7.100 Canada asserts that, as DOC rejected the price information on western SPF submitted by the applicant as support for the allegation that western SPF softwood lumber was being sold below cost, there were no home market prices for western SPF available to test whether sales of this product were below cost.[266] As there were no home market prices, or surrogate prices, for sales of western SPF, there was no basis for a finding that these sales were below the calculated costs – therefore DOC could not objectively have based its decision to initiate the investigation on the constructed value comparison for eastern SPF offered by the applicant. The United States responds that Canada's argument incorrectly implies that the quality and quantity of evidence at initiation should be the same as at the conclusion of an investigation. As the application contained evidence of home market sales below cost in Quebec, it provided a basis for using constructed value to establish normal value.

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[263] Canada response to question 8 of the Panel, para. 36.

[264] The mills provided cost data for the following periods: East-1: July-December 2000, East-2: January-September 2000, West-1: July-December 2000, West-2: January-December 2000.

[265] Exhibit CDA-135, Application – Exhibit VI.C-1 and Exhibit CDA-136, Application – Exhibit VI.D 1.

[266] DOC rejected the submitted price information, sourced by the applicant from the BC Ministry of Forestry's published market pricing system, as the applicant did not indicate that the prices were restricted to sales in Canada only. (Exhibit CDA-9, Initiation, p. 21330)

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

(v) Evidence on prices of domestic sales transactions

7.102 According to Canada, DOC initiated the investigation despite the fact that the application did not contain evidence of actual sales transactions involving identified Canadian companies in the domestic Canadian market. The evidence on prices consisted of estimates from an industry publication, *Random Lengths*, which in some instances commingled Canadian and US price data. Canada states that the *Random Lengths* data could therefore not have been regarded as sufficient to justify the initiation of the investigation. The United States contests these allegations and asserts that the *Random Lengths* data are based on actual prices and that the data do not commingle US and Canadian data.

7.103 We note that there is no disagreement between the parties regarding the reliability of the *Random Lengths* data as such. Rather, they disagree as to whether the data refer to prices or informal estimates of prices, and whether they commingle US and Canadian price data.

7.104 We note that *Random Lengths* explains how it determines the reported price information as follows:

> "[t]he staff conducts hundreds of telephone interviews with sellers and buyers each week. (…) Information is also obtained via e-mail and fax.
>
> Based on information gathered from these sources, we determine the prices that appear in the Random Lengths price Guide. These prices reflect sales from producers to their customers.
>
> Because of these variables, a price reported in Random Lengths is not the only price at which an item has traded. Each price shown falls within the range of prices reported by our sources. A reported price is a representative trading level for the item just prior to publication. The reported prices reflect levels at which stock has actually traded between manufacturers and their customers.
>
> But keep in mind that there is no single price that can fully describe the market for an item at a given moment, let alone on weekly basis. (…) Only through our telephone

[267] Panel Report, *Argentina – Poultry*, para. 7.67.

> interviews can the many variables be tracked and accounted for in determining the representative prices that are reported in the Price Guide"[268],

and:

> "[a] price reported by Random Lengths is a benchmark, or indicator, of the general trading level of an item at the time of publication.
>
> A reported price is not an arithmetic average of the prices reported to the Random Lengths staff. It is not the price for the item for the week following publication (that 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.
>
> Prices reported in Random Lengths represent transactions between manufacturers and their customers.".[269]

7.105 After considering these explanations on how the *Random Lengths* price information is actually collected and reflected in the weekly publication, we are of the view that the published price information, although it reflects a number of sales, and is not related to a specific sale, does reflect actual sales prices that indicate price levels at which softwood lumber has actually traded between manufacturers and their customers. Thus, in our view, the *Random Lengths* data certainly qualifies as the type of price information contemplated in Article 5.2(iii) of the *AD Agreement*. We are furthermore of the view that, in the case of a commodity product, such as softwood lumber, a reputable industry price publication, covering a wide range of products, with price data over a period of time, might be preferable as a more representative source of price information than price data sourced from a single exporter or importer.

7.106 Canada also asserts that the *Random Lengths* data commingle US data with Canadian data[270], as *Random Lengths* defines eastern SPF as:

> "[l]umber of the Spruce-Pine-Fir group produced in the eastern provinces of Canada, including Saskatchewan and Manitoba. Also used in references to some lumber produced in the northeastern United States".[271]

7.107 The United States counters this statement by referring to a letter received from the publishers of *Random Lengths* which states:

> "[e]astern S-P-F prices reported in the weekly Random Lengths Price Guides are representative of lumber produced in the Eastern Canadian provinces".[272]

7.108 According to the United States, this definition itself reflects the fact that the *primary* meaning of the term SPF is limited to certain Canadian-produced lumber. Its use as a "term of the trade" in connection with US-produced lumber is not only secondary, but also separate. As confirmation of this interpretation by the United States, the United States referred to a letter from *Random Lengths* which had been placed on the record of the case in a submission made by the applicant, which states:

> "[w]e do receive information about production and prices of S-P-F dimension coming out of mills in the New England states. However, as we discussed, the current

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[268] Exhibit CDA-133, Random Lengths – How Reported Prices are Determined, p. 1.
[269] *Id.*, p. 6.
[270] Canada first oral (opening) statement, para. 23.
[271] Exhibit CDA-147, Application – Exhibit III.9, p. 114.
[272] Exhibit US-1 mistakenly included a different submission made by the applicant on the same date. The United States provided the correct record document to the Panel as Exhibit US-60, p. 79.

> grading rules require that this output be designated as "SPF-S". (…) While "SPF-S" sales and prices can and do affect "Eastern S-P-F" prices and markets, we focus our information gathering and price reporting on Eastern S-P-F coming out of Eastern Canadian sawmills".[273]

7.109 Canada interprets the word "focus" as indicating an "unexplained degree of focus on Canadian data" which would lead an objective investigating authority to determine that these data should be rejected in considering whether to initiate an anti-dumping investigation.[274]

7.110 According to the United States, however, the combination of evidence shows that *Random Lengths* recognizes a market distinction between Canadian-produced and US-produced SPF and does not commingle data on the Canadian-produced "Eastern S-P-F" with data on US-produced (Eastern) "S-P-F-south" lumber.[275]

7.111 Taking the facts into account, as well as that this issue relates to the initiation of the investigation, and as it is clear to us that the investigating authority considered this matter carefully, and requested clarification from the applicant[276], with which it was satisfied, we are of the view that an unbiased and objective investigating authority could reasonably have concluded that the potential for commingling of the data did not detract from its reliability for purposes of initiation.

7.112 We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

(vi) Affidavits containing export price information

7.113 Canada asserts that the two affidavits on export price information submitted by the applicant and relied upon by DOC for purposes of initiation of the investigation were inadequate. With respect to the affidavit containing BC price information, the "price quote" 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.[277] According to Canada, neither a Canadian producer/exporter, nor a US company affiliated with a Canadian producer/exporter provided the quote. With respect to the affidavit containing a "price quote" for Quebec sales, it does not identify a Canadian producer as the seller of the merchandise, identifies no buyer and contains little information about the terms of the sale.[278] According to Canada, these price quotes are little more than unsubstantiated assertions which an objective investigating authority would have rejected as a basis for initiation of an investigation.

7.114 The United States asserts that the affidavit containing the BC price information was made by a knowledgeable industry source testifying to an offer from a US trading company for Canadian western SPF kiln-dried random length 2x4s from the interior of BC for sale in March 2001 at a delivered price to a specified destination in the US market.[279] The affidavit also contained information on the historical mark-up received by lumber wholesalers, and on the likely means of shipment. The "lost sales" affidavit regarding price information from Quebec was, according to the United States, from a US lumber producer reporting four separate instances in which the affiant lost sales on 15 December 2000 as the potential buyers reported that Quebec producers offered eastern SPF kiln-dried 2x4s in mid-December 2000 at the board foot price as reflected in the affidavit, which

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[273] *Ibid*.
[274] Canada second written submission, para. 54.
[275] US response to question 15 of the Panel, para. 23.
[276] Exhibit CDA-86, Letter from DOC to the applicant requesting information/clarification; and Exhibit CDA-40, Applicant's response.
[277] Exhibit US-16, Application – Exhibit VI.D-14.
[278] Canada second written submission, paras. 55-56.
[279] US first written submission, para. 59; Exhibit CDA-10, Initiation Checklist; and Exhibit US-16, Application – Exhibit VI.D-14.

was lower that the affiant's price, with the terms of sale being the same, being FOB-Boston for both products.

7.115 As it is not clear to us whether the Canadian claim rests on the fact that the affidavits were relied upon as evidence, or on the fact that certain information in the affidavits was not disclosed to interested parties, we will address both issues.

7.116 We consider first the question whether an affidavit can be regarded as evidence regarding prices for purposes of the decision whether to initiate an investigation. We note that the *AD Agreement* does not prescribe the nature and form of the information or evidence applicants are required to submit, and which the investigating authority must consider in deciding whether to initiate an investigation. We note the statement by the United States that:

> "[a]ffidavits from persons in the industry are frequently used in petitions to present company or industry information. The reliability of the information derives not only from the fact that it is sworn testimony, but also, in a different sense, from the fact that an affiant's professional position and expertise in the industry gives that person access to such information and permits that person to speak credibly to general industry practices";[280]

and that:

> "'[l]ost sales' affidavits are another common way of establishing prices of merchandise imported into the United States. One way in which a producer may learn of non-published prices being quoted by foreign competitors in the U.S. market is when habitual customers advise that the same goods are available at a given lower price from the foreign competitor. Such communications may permit the domestic producer to try to match that price, but if it is unable to sell that low, this can also become evidence of both export prices and injury."[281]

7.117 We note that the *AD Agreement* does not contain any guidance on this issue and that affidavits are accepted in the legal systems of many jurisdictions as evidence. In light of the explanations submitted by the United States, we therefore see no reason why affidavits regarding price information may not be considered as relevant evidence in deciding whether there is sufficient evidence to justify the initiation of the investigation.

7.118 On the second issue, that is, the non-disclosure of certain information regarded as confidential by the investigating authority, we note the following explanation submitted by the United States:

> "[a]s is generally the case, to avoid retaliation, the name, affiliation, location and other potential identifying characteristics of the affiant, as well as proprietary details with respect to the transactions at issue are given only in the Business Confidential versions of the exhibits. The United States has provided only the public versions of such documents, as they are sufficient to demonstrate the nature of the evidence contained in the Business Confidential versions, and because Canada has never contested the *bona fides* of the confidential affiant."[282]

7.119 We note that Article 6.5 of the *AD Agreement* specifically requires the non-disclosure of confidential information, as follows:

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[280] US first written submission, para. 61, note 60.
[281] *Id.*, para. 60, note 62.
[282] *Id.*, para. 59, note 60.

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

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

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

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

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

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

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

(viii) Information on freight costs

7.124 Canada asserts that the application did not contain adequate information regarding freight costs.[288] Although freight is a significant component of the price for lumber, Canada asserts that the application lacked reasonably obtainable Canadian freight information from either of the two Canadian national railways and instead relied on freight information that was not even for Canadian rail or international freight. Canada cites the following examples in support of its allegation:

- In the case of Quebec, DOC relied upon an average freight cost from Quebec to the United States including in that average an estimate for freight cost from the Maritime provinces. In doing so, it included freight costs unrelated to transport between Quebec and the United States.[289] There was also no evidence to support the applicant's allegation that truck rather than rail is used by Quebec producers to ship lumber.

- In the case of BC, DOC relied on an affidavit indicating that rail freight charges incurred for what appears to be a Southern-Yellow-Pine shipment which weighs considerably more than the WSPF for which the applicant purported to be creating a cost model.[290]

7.125 The United States responds that the relevant exhibit simply provided a rate for truck freight, one of the shipment methods used, based on the affiant's experience in using truck freight for softwood lumber in the region in question. As no evidence was submitted to DOC that the producers ship lumber only by rail, or predominantly by rail, the evidence was adequate for purposes of initiation. With regard to the allegation about the differences in weight between western SPF and the heavier southern Yellow Pine, the United States asserts that the affidavit provided a rail freight rate for softwood lumber.[291] The United States stated further that it was not necessary for DOC to search out information on the relative weights of different groups of pines, all of which are softwood lumber, for purposes of initiation of an investigation.[292] On the issue of the freight costs from the Maritime Provinces, the United States contends that the freight affidavit that Canada relies upon provides separate per-MBF freight rates for shipment to Boston from four regions, one of which is the Maritime Provinces. The average per-MBF freight cost DOC relied upon for sales from Quebec to the United States was US$29, the average of the cost for shipment from Northern Quebec, Southern Quebec and the Gaspe Peninsula (also part of Quebec). Had the cost for the Maritime Provinces been included, the average would have been US$30 per MBF.[293]

7.126 We note that nothing before the investigating authority indicated that only rail was used to transport softwood lumber, or even that rail was mostly used. In these circumstances, we consider that an objective and unbiased investigating authority could reasonably have relied on information regarding truck freight rates in the context of an initiation determination. In addition, it seems clear that the inclusion of some freight costs for transport of US produced lumber did not materially affect the information relied upon. We therefore conclude that an unbiased and objective investigating authority could reasonably have concluded that the information was sufficient to justify initiation on this basis. We therefore find that DOC did not err in concluding that there was sufficient evidence to justify initiation on this basis.

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[288] Canada response to question 8 of the Panel, paras. 39-42.

[289] Exhibit CDA-41, Application – Exhibit VI.C-9.

[290] Exhibit CDA-40, Application Amendments, Attachment 1 "Average MBF per rail car is 92,160 MBF. Average weight is approximately 195,000 lbs", and Exhibit CDA-51, Request for Termination, pp. 29-30.

[291] US second written submission, para. 31.

[292] We also note the following statement by the United States in para. 31 of its second written submission: "…the freight calculation was conservatively based on costs for transport over significantly shorter distances than those for delivery of the US sales in the application (including from the interior of BC to Chicago (at least 1800 miles) and to Atlanta (at least 2444 miles))".

[293] US second written submission, para. 32.

(ix) Conclusion

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

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

(a) Factual Background

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

(b) Arguments of the Parties/Third Parties

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

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

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

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

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

(c) Evaluation by the Panel

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

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

> "[a]n application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

7.134 From the wording of Article 5.8, it is clear that it addresses two situations. The first one addressing the situation where the application is to be rejected before the initiation of the investigation, and the second dealing with the termination of the investigation after it has been initiated. In addressing the first part of Canada's claim, relating to the initiation of the investigation, we note that a similar issue, was addressed by the panel in *Mexico – Corn Syrup.* That panel stated the following regarding the obligations under Article 5.8, after having found no violation of Article 5.3:

> "[i]n our view, Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of the investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application."[295]

7.135 We agree with this statement. As we found that an unbiased and objective investigating authority could have found that there was sufficient evidence to justify the initiation of the investigation, and that the United States has therefore not violated Article 5.3, we find that the United States has not violated Article 5.8 with regard to the initiation of the investigation.

7.136 We now turn to the second part of Canada's claim, that is, whether DOC should have terminated the investigation on the basis that more "probative" evidence available in the form of the Weldwood data, rendered the evidence on the basis of which DOC justified the initiation of the investigation insufficient, and that the investigation should have been terminated in terms of Article 5.8 of the *AD Agreement*.

7.137 When examining the plain meaning of the relevant text of Article 5.8, we note that it states that "an investigation shall be terminated as soon as *the authorities concerned are satisfied that there is not sufficient evidence of dumping*". (emphasis added) In our view, this means that the investigating authority has to terminate the investigation, as soon as it is satisfied that its *investigation* shows that there is not sufficient evidence of dumping. We can however find no basis to conclude that Article 5.8 imposes upon an investigating authority a continuing obligation after initiation to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence. Once an investigation has been initiated on the basis of sufficient evidence of dumping, the application has

[295] Panel Report, *Mexico – Corn Syrup*, para. 7.99; confirmed by Panel Report, *Guatemala – Cement II*, paras. 8.72 *et seq.*

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

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

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

(a) Factual Background

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

> "[t]he products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090 and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:
>
> > (1) coniferous wood, sawn or chipped lengthwise, slice or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimetres;
> >
> > (2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;
> >
> > (3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and
> >
> > (4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed."[296]

(b) Arguments of the Parties

7.140 **Canada** claims that DOC erroneously determined there to be a single like product notwithstanding the disparate nature of the softwood lumber products covered by the investigation. This claim is grounded in Article 2.6, in particular, the ordinary meaning of the words "characteristics

[296] Exhibit CDA-3, Amended Final Determination, p. 36068.

closely resembling". Canada's position is that the group of products within the "like product" as defined by DOC did not have "characteristics closely resembling" those of the group of products in the "product under consideration". The facts of the case before DOC demonstrated that bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar did not have characteristics closely resembling those of the product under consideration and, therefore, should have been dealt with separately. Non-compliance by the investigating authority with the obligation contained in Article 2.6 has also caused non-compliance with other substantive obligations of the *AD Agreement*, e.g., Articles 5.1, 5.2, and 5.4.[297]

7.141 Canada asserts that an application must identify the proposed "product under consideration". Article 2.6 expressly requires that a like product be "identical" to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. According to Canada, the plain language of Article 2.6 suggests a multi-step approach: *First*, the investigating authority must identify the characteristics of the product under consideration. *Second*, it must identify the characteristics of each product proposed for inclusion in the like product. *Third*, it must determine whether the characteristics of each are identical or, if not, then closely resembling those of the product under consideration.

7.142 According to Canada, DOC never defined the characteristics of the product under consideration, nor did DOC compare the characteristics of each challenged product with those of the product under consideration as a whole. Instead, DOC identified as subsets of the product under consideration various softwood lumber products. It then compared isolated characteristics of each challenged Canadian product to isolated characteristics of products selected from within the "product under consideration", considered to be "like" the challenged products. That analysis failed to establish the single, closely resembling, "like product" required by Article 2.6. No "close resemblance" exemplified by a set of shared common characteristics was established between the challenged products and the product under consideration.

7.143 Canada further asserts that a failure to define the like product in accordance with the criteria of Article 2.6 means also that the product under consideration has not been properly defined. This leads to other violations of the *AD Agreement*. The investigating authority must assess industry support and the other application requirements of Articles 5.2, 5.3, and 5.4 separately for each like product. Should those requirements not be met with respect to a like product, the investigating authority may not initiate an investigation with respect to the product under consideration and must redefine the scope of the product under consideration.

7.144 According to the **United States,** Canada cites no provision of the *AD Agreement* governing the way in which an investigating authority must define the product under investigation. Therefore Canada has not identified an obligation arising out of Article 2.6 of the *AD Agreement* that the United States violated in this case. Instead, it asserts the existence of an obligation to explain how different articles within the product under consideration "closely resemble each other" and asserts that DOC has violated that obligation.[298] The United States posits that the *AD Agreement* contains no rules on how the product under investigation should be defined and that Canada has therefore not made a *prima facie* case of a violation of a provision of the *AD Agreement*.

(c) Evaluation by the Panel

7.145 We first note that Canada's claim, as set out in its Panel Request, is posited on violations of Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *AD Agreement* and Article VI:1 of *GATT 1994*.[299]

[297] Canada response to question 1 of the Panel, para. 1(iii).
[298] Canada first written submission, para. 125.
[299] WT/DS264/2.

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

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

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

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

7.148 From the wording of Article 2.6, it is clear that it addresses the issue of the definition of the product which is to be regarded as "alike" to the product under consideration. The question then arises as to what is the product referred to as the "product under consideration"?

7.149 We find guidance on this issue in the wording of Article 2.1 of the *AD Agreement*, which provides in relevant part as follows:

> "[f]or the purpose of the Agreement, a product is to be considered as being dumped, (...) if the export price of the product exported from one country to another is less that the comparable price, in the ordinary course of trade, for *the like product when destined for consumption in the exporting country*." (emphasis added)

7.150 We note that similar terminology is used in the relevant provisions of the *AD Agreement* dealing with the injury analysis – Article 3.1 of the *AD Agreement* states that:

> "[a] determination of injury ... shall be based on positive evidence and involve an objective examination of both (a) the volume of the *dumped imports* and the *effect of the dumped imports on prices in the domestic market for like products*, and (b) the consequent impact of these imports on domestic producers of such products." (emphasis added)

7.151 More generally, the term "domestic industry" in Article 4.1 of the *AD Agreement* is defined in relevant part as referring to "domestic producers as a whole *of the like product*, or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products…". Similarly, Article 5.4 provides that an investigation is not to be initiated unless the investigating authority determines, "on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers *of the like product*" that the application has been made by or on behalf of the domestic industry. (emphasis added, footnote omitted)

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[300] Canada response to question 1 of the Panel, para. 1(iii).

[301] In light of this, we will not address at this stage the exact provisions included in our mandate with regard to the alleged consequential violations (*see* paras. 7.22-7.30, *supra*).

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

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

7.154 DOC defined the product allegedly being dumped, and therefore the "product under consideration", as certain softwood lumber, flooring and siding (softwood lumber products), as fully described in the Notice of Initiation.[303] During the course of the investigation, DOC considered a number of requests to exclude certain products from the investigation. According to the United States, these scope-related "requests could be classified into one of two categories: (1) scope exclusion requests, and (2) scope exclusion requests premised upon the theory that various products constitute separate classes or kinds of merchandise when analyzed under the *Diversified Products* criteria, and as such, are outside the scope of the petition".[304] As a result of these requests, certain softwood lumber products were excluded from the scope of the investigation.[305] DOC did not, however, exclude bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar from the scope of the investigation.

7.155 We note that Canada is not claiming that any of the individual softwood lumber products, constituting collectively the product under consideration, were not identical, or not having characteristics closely resembling those of the product under consideration when taken on an individual basis. In fact, we do not understand Canada to argue that, having determined the product under consideration, DOC defined the "like product" differently in any respect. Canada's argument is rather that the range of products included in the scope of the investigation, being the product under consideration, was so broad that all the individual products, constituting collectively the "like product", were not alike to each and every of the products collectively forming the product under consideration as they did not have characteristics closely resembling those of each and every of the

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[302] *See* also footnote 2 to the *AD Agreement* which states:

> "[s]ales of the *like product* destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of *the product under consideration* to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison". (emphasis added)

[303] Exhibit CDA-9, Initiation.
[304] Exhibit CDA 2, IDM, p. 139.
[305] *Id.*, p. 141 and note 391.

individual products constituting collectively the product under consideration. In particular, it considers that DOC should for this reason have excluded bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar from the scope of the investigation.

7.156 As stated in paragraph 7.153, *supra*, we could find no explicit guidance in the *AD Agreement* as to how the investigating authority should define the product under consideration. In this case, DOC defined the product under consideration, certain softwood lumber, on the basis of a technical definition involving narrative description and tariff classification. For the purpose of establishing normal value, DOC based itself upon goods destined for consumption in the exporting country which fell within exactly the same definition. Similarly, when considering whether the application was made by, or on behalf of, the domestic industry, DOC identified the domestic industry on the basis of the same definition. Canada has not identified any instance in which DOC has defined the like product differently than it has defined the product under consideration. Specifically, Canada has not suggested that there was any difference between the product under consideration and the like product in respect of bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar. In other words, having defined the "product under consideration", it seems to us that DOC has used an identical definition for the "like product".[306] In particular, both the product under consideration and the like product included the products Canada argues should have been excluded from the investigation. On its face, therefore, it would appear that DOC has defined the "like product" in this investigation in a manner consistent with the definition found in Article 2.6.

7.157 Canada has a different interpretation of Article 2.6. In effect, Canada considers that, rather than comparing the overall scope of the product under consideration with the overall scope of the like product, Article 2.6 requires that each individual item within the "like product" must be "like" each individual item within the "product under consideration". This in effect means that there must be "likeness" within both the product under consideration and within the like product. As Canada itself has stated, "[t]he terms 'product under consideration' and 'like product' must be limited to a single group of products sharing characteristics".[307] Once again, however, we see no basis to imply such a condition into the *AD Agreement.* While there might be room for discussion as to whether such an approach might be an appropriate one from a policy perspective, whether to require such an approach is a matter for the Members to address through negotiations. It is not our role as a panel to create obligations which cannot clearly be found in the *AD Agreement* itself.

7.158 In light of our analysis, we conclude that the DOC's approach to "like product" was not inconsistent with the definition of "like product" in Article 2.6 of the *AD Agreement.* We further note that all Canada's claims regarding this issue are dependent upon the proposition that DOC deviated from the approach to "like product" set forth in Article 2.6. Accordingly, we conclude that Canada has failed to establish that the United States has acted inconsistently with Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *AD Agreement* and Article VI:1 of *GATT 1994* by failing to exclude bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar from the scope of the investigation.[308]

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[306] As opposed, for example, to defining the product under consideration as lighters and the like product as including both lighters and matches.

[307] Canada first oral (opening) statement, para. 33.

[308] We note that Canada's arguments regarding an alleged violation of Article 2.6 of the *AD Agreement* with regard to the non-exclusion of these products from the scope of the investigation as not being "like products" are based exclusively on the application of the *Diversified Products Doctrine*, a legal concept developed through US domestic courts of law as a methodology to assist DOC in defining the product under consideration in each investigation. As we have found that the *AD Agreement* does not contain any guidance on how the product under investigation should be defined, and as the *Diversified Products Doctrine* is a domestic legal doctrine in the United States, there is no need for us to address the issue whether DOC followed its domestic procedures with regard to these products.

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

(a) Factual Background

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

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

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

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

[311] *Ibid.*

[312] *Ibid.*

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

As explained in the *Preliminary Determination* and in *Policy Bulletin 92.2: Differences in Merchandise; 20% Rule* (July 29, 1992), [DOC] has "rarely been able to determine the direct price effect of a difference in merchandise". As a result, difmer "adjustments are based almost exclusively on the cost of the physical difference". [DOC] ordinarily calculates its difmer adjustment on the basis of differences in the variable costs of manufacturing between products given that, in the typical antidumping investigation, [DOC] has found that such data approximates the effect that differences in physical characteristics have on product prices. Nevertheless, in addressing comments to its proposed regulations in 1997, [DOC] specifically retained language preserving, as an option, the use of market value in measuring a difmer. We acknowledge that there may be circumstances in which a difmer based on market value may be appropriate. Specifically in this case, where products have differences in dimension (i.e., length, width or thickness) we recognize that these physical differences could result in differences in market value. However, we have concluded in this case that there is no information on the record by which we can calculate a difmer adjustment to account for differences in dimension based either on cost or value.

We disagree with certain respondents' suggestions on how to quantify a value-based difmer adjustment in this case. First, we note that the *Random Lengths* data do not cover all of the products for which an adjustment would be required. Second, as we stated in the *Preliminary Determination*, we do not believe it would be appropriate to use the respondents' prices as a basis for calculating a difmer adjustment where there were home market sales outside the ordinary course of trade during the POI for certain products involved here. To do so would adjust normal values back to prices already determined to be outside the ordinary course of trade, the whole reason why we would be disregarding such prices and comparing to a similar product. Therefore, no value-based difmer adjustment could be calculated for many of the comparisons based on POI sales.

(…)

In the *Final Determination*, as a consequence of our having made a value-based cost allocation for wood and sawmill costs (see Comment 4), [DOC] is now able to make a difmer adjustment for differences in grade. As a result, the only physical differences remaining for which a difmer adjustment was potentially necessary were differences in dimension. Regarding dimensions, however, we have determined that no difmer adjustment is appropriate, given that there is no basis for calculating a difmer for dimensions based on value or cost. There are no cost-based differences with which to calculate a difmer for dimensional differences. Also, for the reasons discussed above, we have not used a value-based difmer. However, in this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as Abitibi argued, the record shows that lumber prices for different products fluctuated in relation to each other over the course of the POI. Consequently, there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared, especially where those dimensional differences were minor.

As a result of [DOC]'s revised methodology, we have made many more comparisons to similar products than in the *Preliminary Determination*. In an effort to match sales of similar merchandise before resorting to constructed value, and consistent with *Cemex*, [DOC] has made no adjustment for differences in dimension among similar products. We agree with West Fraser and Slocan that such an approach is appropriate in these circumstances.

(…)

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

(b) Arguments of the Parties

7.160 In the view of **Canada**, Article 2.4 provides that, in its comparison between export price and normal value, the investigating authority must make due allowance in every instance for differences which affect price comparability, including physical differences. Canada contends that the fact that lumber size affected the price per board foot at which softwood lumber products were sold was undisputed by all parties. Canada asserts that DOC did not conclude that differences in dimension could *not* affect market value. In the view of Canada, DOC's decision not to grant an adjustment was based on the fact that DOC allegedly had no basis to adjust for physical differences between products based on market value rather than because it had not been demonstrated that those differences in dimension affected price comparability. Canada asserts that it was DOC's responsibility to obtain the necessary information to make a fair comparison. In the view of Canada, DOC's premise "that there is no information on the record by which we [DOC] can calculate a difmer" is false. In this regard, Canada contends that the record is replete with transaction and pricing data from the Canadian exporters that would permit the calculation of the adjustment based on differences in market values.

7.161 The **United States** acknowledges that Article 2.4 requires that due allowance be made for certain differences that affect price comparability. However, the United States asserts that Article 2.4 unambiguously provides that due allowance will be made in "each case, on its merits" for differences that are "demonstrated" to affect price comparability. The United States asserts that the Canadian exporters failed to demonstrate that differences in dimension of softwood lumber had an effect on price comparability in this case. In response to an argument of Canada, the United States asserts that DOC cannot be deemed to have concluded that dimension affected price comparability simply by having made a product matching determination. For the words "affect price comparability" under Article 2.4 to have any meaning, the United States claims that there must be some connection established between the differences in physical characteristics at issue and prices. This connection could not be established in this case. The United States asserts that DOC reached its conclusion based on a review of the information contained in respondents' cost and sales databases. The United States argues that Canada has tried to refute DOC's determination by *selectively* pointing to certain record data. In the view of the United States, DOC's conclusion in the Final Determination that differences in prices were not attributable to differences in dimension, especially where those differences were minor, is supported by the record.

7.162 **Canada** asserts that DOC's administrative record reveals that it performed no analysis whatsoever of the *non*-identical comparisons generated by its product matching methodology. According to Canada, DOC never looked at any specific non-identical comparison pair or pairs it used to analyze pricing or other data relating to those two products in order to ascertain whether the actual product differences involved affected price comparability. Canada argues that the US argument that the Canadian respondents failed to meet their burden of proof with respect to the demonstration that differences in dimension affected price comparability constitutes *ex post* justification which cannot be considered by the Panel.

(c) Evaluation by the Panel

7.163 In its Final Determination, DOC made price-to-price comparisons between certain *non*-identical types of softwood lumber without adjusting for differences in dimension. Canada argues that Article 2.4 required DOC to grant an adjustment because those differences in dimension affected

[314] Exhibit CDA 2, IDM, Comment 8, pp. 50-53.

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

7.164 Article 2.4 provides in pertinent part:

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

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

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

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

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

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

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

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

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

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

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

7.168 Before proceeding with the analysis, we recall that we have considered the comments of both parties with respect to whether certain evidence presented by the parties in this dispute was properly before us and that we have concluded in paragraph 7.43, *supra*, that we are precluded from taking into consideration the regression analysis contained in Exhibit CDA-77. As Exhibit CDA-186 also contains a regression analysis that neither Canada nor the respondents had submitted to DOC in the context of the investigation, we will not consider Exhibit CDA-186 for the same reasons we have rejected Exhibit CDA-77. In its submission of 5 September 2003, we understand Canada to question whether the charts submitted by the United States as Exhibits US-42, 43, 76 and 81 are properly

[319] For example, a difference in colour between two cars is undeniably a difference in physical characteristics, but that difference would not necessarily have any impact either on the price of the cars nor their cost. The United States has provided its own example in its response to question 27 of the Panel, para. 43.

[320] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.157-7.158. In the same vein, *see* the views expressed by the panel in *Egypt – Steel Rebar*, para. 7.352.

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

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

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

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

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

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

[322] These agencies are the ITC and DOC.

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

[324] *Ibid.*

[325] *Ibid.*

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

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

7.173 We note that the situation before us is not one in which the investigating authority did not undertake any step in order to ensure a "fair" comparison, as set forth in Article 2.4. Indeed, DOC, in agreement with, *inter alia*, respondents, identified the physical factors which could have an impact on prices and compared, where possible, identical types, that is, types having identical physical characteristics – including identical dimensions – both at provisional and definitive stages. At the provisional stage DOC decided that, because it could not find that certain differences in physical characteristics (grade and the dimensional characteristics at issue) yielded variable cost of manufacturing differences, it would *not* compare *non*-identical types.[329] That is, it would for instance not compare two types belonging to the same product category; species; and grade group; and having the same moisture content; thickness; width; length; surface finish; end trimming; and, further processing characteristics but having different *grade*. For those characteristics where the cost allocations did not generate a difference in variable manufacturing costs, DOC constructed (normal) values which were then compared to the export prices for the respective types reported in the exporters' databases.[330] It is also clear to us that DOC changed its approach between the provisional and definitive stages at the request of certain respondents. For the purpose of the Final Determination, where there were no identical types, DOC compared non-identical types. It is undisputed that, in these instances, adjustments were made to account for differences in physical characteristics other than differences in dimensions. For all these differences, the United States argues DOC could determine, based on differences in variable cost among the compared *non*-identical types, that differences in physical characteristics affected price comparability and, consequently, made an adjustment to compare "apples-to-apples". This is not disputed by Canada. All of the above shows to us that DOC made *significant* efforts in order to ensure that, for a very large portion of the comparisons made, a fair comparison was carried out, in spite of the difficulty of the exercise because of the many types involved. The issue before us is therefore very limited, in that it affects only a small share of the comparisons made at the definitive stage – those of *non*-identical types only.[331] It is

[327] *See* para. 7.159, *supra*.
[328] *Ibid.*
[329] Exhibit CDA-11, Preliminary Determination, p. 56066.
[330] We do not understand Canada to have argued that DOC had not made the required adjustments under Article 2.4 when comparing constructed (normal) values and export prices.
[331] Comparisons of *non*-identical types represented less than 20 per cent of the total volume exported by respondents. The precise figure cannot be provided for confidentiality reasons. (US response to question 25 of the Panel, para. 40)

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

7.174 Nor is the situation before us one in which the respondents were passive. Quite on the contrary. In its answer to a question from us limited to the issue of the demonstration that differences in dimension affected price comparability, Canada has referred to (and provided copies of) more than *20* submissions made by parties in the course of the investigation.[332] In addition, Canada provided references of submissions made by the applicant as well as references to documents issued by DOC and ITC in the context of the investigation. The amount of comments and information before the investigating authority was therefore considerable. In our view, the situation before us is therefore quite different from that examined by the panels in *Argentina – Ceramic Tiles* and *Egypt – Steel Rebar*.

7.175 Having set the factual framework under which we are to conduct our examination, we must examine relevant evidence in order to determine whether, based on it, an unbiased and objective investigating authority could have concluded that no adjustment was warranted for differences in dimensions when *non*-identical types of softwood lumber were compared.

7.176 Bearing in mind the discussion in the IDM cited in paragraph 7.159, *supra*, we are in no doubt that DOC "applied its mind" to the facts before it. In particular, DOC examined first whether differences in dimensions yielded variable cost of manufacturing differences.[333] This test did not yield any difference. DOC next examined the sales databases submitted by the respondents, concluding that "in this case, to the extent that we compared products having different dimensions, those differences were generally small. Furthermore, as Abitibi argued, the record shows that lumber prices for different products fluctuated in relation to each other over the course of the POI. Consequently, there appears to be little, if any, difference in home market prices that is attributable to differences in dimensions of the products compared".[334] In support of these conclusions, the United States has provided us with copies of some comparisons looked at by DOC. These are included in Exhibits US-42, 43, 76 and 81. We consider that DOC's finding with respect to the fluctuation of lumber prices for the different types which are compared therein is supported by those charts. A discernible pattern of price differences is in our view necessary for a conclusion that a given difference affects price comparability. If, as here, prices of types compared fluctuated against each other, criss-crossing themselves in many instances, without following any established pattern, we fail to see how an unbiased and objective investigating authority could be obligated to come to a conclusion that differences in dimension affect price comparability. Bearing this in mind, we are of the view that an objective and unbiased investigating authority could have concluded that data before DOC did not demonstrate that the remaining differences in dimensions affected price comparability because those data did not demonstrate how dimensions affected price comparability nor that there was a pattern or standard deviation that would have allowed an adjustment to be made as the correlations ran by DOC showed different results and random as well.

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[332] Canada response to question 22 of the Panel, para. 87 and Exhibit CDA-142, Respondents' Record Data regarding DIFMER.

[333] We note, in this regard, the following statement contained in the IDM:

> "[w]e do not consider it appropriate to use a value-based cost allocation method for allocating different costs to a large number of varying products with only minor physical differences (e.g., the hundreds or even thousands of differing combinations of dimensions and grade of lumber cut from logs) and no clear significant differences in value. Where minor differences in values occur among products having minor physical differences and are inconsistent due to frequent and inconsistent price fluctuations, any resulting cost differences would be artificial and meaningless". (Exhibit CDA-2, IDM, Comment 4, note 60)

[334] *See* para. 7.159, *supra*.

7.177 This conclusion is not altered by Canada's response to question 22 of the Panel, in which Canada refers us to a number of documents in support of its arguments. We have carefully examined them. A first group of documents, relating to the product matching mechanism, contains submissions of respondents and applicant and various communications of DOC. A second group of submissions contains requests for guidance on what additional data should be submitted in order to permit the calculation of value-based adjustments for differences in physical characteristics. A third group contains specific comments on breaks in commercial value of softwood lumber products and on comparisons of prices of individual lumber products. Finally, Canada refers to ITC and DOC's Preliminary Injury and Dumping Determination, respectively.

7.178 With respect to the first group, while Canada may be correct that, if dimension did not affect price comparability, there would have been no reason to include dimension in the product matching mechanism, we find that the question whether those differences are actually demonstrated to affect price comparability must be determined in light of positive evidence before investigating authorities. Thus, even if Canada's argument were correct, a concession at such an early stage of the investigation would not preclude the investigating authority to change its position if positive evidence were to point to another conclusion. In any event, the issue before us is not whether dimensional differences in the abstract could affect price comparability, but whether those *remaining* dimensional differences that existed after DOC engaged in product matching were demonstrated to affect price comparability.

7.179 As far as the second group of submissions is concerned, it is undisputed that DOC had sufficient data before it during the investigation to examine whether differences in dimensions were demonstrated to affect price comparability. We do not consider that there could be data more probative than the actual data on costs and prices of respondents for the POI, and it is undisputed that those were before DOC. In any case, we note that respondents submitted historical average price data as well as *Random Lengths* data. Thus, we do not consider that DOC acted unreasonably in not giving guidance on which other additional data could be submitted.

7.180 Regarding the third group, Abitibi, Slocan and the applicant commented on breaks in commercial value of softwood lumber products, especially with respect to length. Those exporters proposed the establishment of length bands. In our view, the linkage of commercial value considerations and length groupings was a step in the direction of demonstrating that, at least, differences in length could have affected price comparability. However, we note that, when comparing *non*-identical types for the purpose of the Final Determination, DOC first attempted to compare within the bands agreed with exporters, and matched across length bands only when a similar match was not available within the band.[335] Thus, in our view, DOC addressed the concerns of the exporters in that regard.

7.181 Furthermore, Abitibi referred to price comparisons of specific models. Abitibi submitted two graphs with monthly average prices during the POI for four different grades of types 2x4x8 and 2x6x16. "For example, at the beginning, of the period, in April 2000, Abitibi's average net price for No. 2 grade 2x4x8 was around [[****]] whereas the No. 2 2x6x16 price was [[****]]. The comparable figures for economy grade were [[****]] for the smaller size and [[****]] for the larger".[336] It is obvious that, in submitting the referred charts, Abitibi was in fact assessing data it had submitted in its databases. However, we consider that what Abitibi did, was, at most, to advance a possible methodology to marshal the cost and pricing data previously submitted. Canada has not argued, nor shown to us, that Abitibi requested DOC to analyse the data before it in the manner in which Abitibi had presented it, that is on a monthly-basis, nor the reasons why DOC should have analysed it in such a manner.

[335] US response to question 25 of the Panel, para. 38.
[336] For confidentiality reasons, information inside the brackets has been erased.

7.182 Finally, Canada refers to several statements by DOC and ITC that – it considers – concede that the dimensional differences at issue here affected price comparability. Specifically, Canada refers to DOC's finding in the Preliminary Determination that "there are several significant differences in physical characteristics which affect price..."[337] and to the ITC's statement in its Preliminary Injury Determination that "[s]oftwood lumber prices generally differ substantially depending on grades and dimensions".[338] We note that the first statement refers to differences in physical characteristics generally, and the second to grade and dimension together. Both are abstract statements about such differences, rather than specific statements about the particular dimensional differences remaining after DOC performed product matching. We cannot conclude on the basis of these general statements that those US agencies had conceded that the particular differences in dimension remaining for *non*-identical matches were demonstrated to affect price comparability.

7.183 In sum, we do not consider that the above-examined communications show that it was demonstrated in the investigation that the remaining differences in dimension which were not resolved by product matching affected price comparability. In our view, exporters could have been more forthcoming in suggesting ways in which DOC should have marshalled the data before it.[339] Had the respondents argued that DOC should have examined data in a particular way, in light of the specific facts of the case, and had DOC analysed that data in an unreasonable manner, thus determining that differences in dimension were not demonstrated to have affected price comparability, we might have found that the United States acted inconsistently with Article 2.4. This, however, we do not find to be the case.

7.184 For the foregoing reasons, and keeping in mind the standard of review we are bound to apply to the examination of the matter before us, we find that Canada has not established that the United States acted in a manner inconsistent with Article 2.4 of the *AD Agreement* in not granting the requested adjustment for differences in dimension.[340]

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[337] Exhibit CDA-11, DOC's Preliminary Determination, p. 56066.

[338] Exhibit CDA-31, ITC's Preliminary Determination, p. 16.

[339] In so concluding, we note that Canada is of the view that the United States should have conducted its examination differently. In particular, Canada takes issue with the US approach of using individual transaction data in the charts presented in Exhibits US-43, 76 and 81. We are of the view that the United States used one of the possible methodologies to assess the data it had received from respondents. We understand Canada to argue that it would have been more appropriate to use monthly or annual average price data because "averages smooth out data fluctuations caused by the different mechanisms and times at which prices are set in relation to invoice date". (Canada first written submission, para. 148; Exhibit CDA-76, POI Average Prices for Different Lengths and Widths; and Canada comments to the US response to question 97 of the Panel, para. 11) However, Article 2.4 does not mandate the use of any particular methodology. Furthermore, we have found in para. 7.176, *supra*, that an objective and unbiased investigating authority could have concluded that data before DOC did not demonstrate that differences in dimensions affected price comparability. If Canada – or the respondents – considered that DOC should have examined the data in another manner, they should have motivated to DOC why their proposed methodology should have been used.

[340] Canada asserts that:

> "[t]he United States had an affirmative duty under Article 6 to notify Canadian parties that it did not intend to use dimension for price because it had put the Canadian parties on notice to the contrary in the questionnaires and in every other aspect of the investigation. All requisite data for the analysis were on the record. The Canadian parties had no reason to submit analyses of the data to prove a point on which Commerce and all parties seemed to have agreed. Had Commerce put the parties on notice about this issue, as required under Article 6.1, the respondents would have prepared and filed with Commerce analyses similar to the Tembec Regression Analysis, which in any event is derived entirely from record evidence and could have as easily been performed by Commerce itself if it had doubts about the importance of dimension". (Canada response to question 4 of the Panel, para. 5)

I. CLAIM 6: ARTICLES 2.4 AND 2.4.2 – ZEROING

(a) Factual Background

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

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

(b) Arguments of the Parties/Third Parties

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

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

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

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

7.189 The **United States** replies that Articles 2.4 and 2.4.2 do not address the manner in which particular model-specific or level-of-trade-specific dumping margins are to be combined to determine an overall dumping margin. The United States asserts that, by arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation," Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all", which immediately precedes it. In the view of the United States, the comparison obligations contained in Article 2.4.2 are "[s]ubject to the provisions governing fair comparison in paragraph 4". Thus, Article 2.4, which provides explicit context for the methods for establishing the existence of dumping under Article 2.4.2, means that, under the instruction in Article 2.4.2 to compare "a weighted average normal value with a weighted average of prices of all comparable export transactions," not all export transactions will be equally comparable with all transactions used for normal value purposes. Consequently, once the comparison has been identified pursuant to Article 2.4, it would be improper to compare a weighted average normal value with respect to one model or level of trade to a weighted average of prices for a different model or level of trade. According to the United States, Canada's prescription for combining particular dumping margins for purposes of developing a single, overall dumping margin would require precisely that, contrary to the requirements of Articles 2.4.2 and 2.4.

7.190 The United States further argues that the use of plural term "margins" in Article 2.4.2 operates to limit the scope of that provision to intermediate stage calculations only, which confirms its interpretation of Article 2.4.2. The United States also argues that the purpose of an anti-dumping investigation is to determine whether or not dumping exists, and that the *AD Agreement* does therefore not require that "positive" margins of dumping be offset by "negative" margins of dumping.

7.191 In the view of **Canada**, the term "margins" refers to the overall dumping margin for a product, as there is no language in Article 2.4.2 that suggests that the overall dumping margin would not be among the "margins" referred to in Article 2.4.2. Canada also finds support for its position in the function of Article 2. Thus, reading Article 2.4.2 in conjunction with Article 2.1, Canada states the "margins of price difference" calculated in the first stage are of secondary importance to Article 2.4.2, as the sole concern of that provision is to set rules governing how investigating authorities are to determine margins of dumping. Canada asserts that the US reading of Article 2.4.2 would lead to the absurd result that an investigating authority could carefully consider positive and negative margins at the intermediate stage, and then discard all but the single highest positive dumping margin in establishing the overall margin for each exporter. Canada also argues that zeroing is by definition inconsistent with the calculation of a "true "weighted average"".[342]

7.192 In the view of the **United States**, Articles 2.4.2 and 2.4 do not mandate any particular method for combining model-specific, level-of-trade-specific individual dumping margins to establish a single, overall margin. According to the United States, this is corroborated by the negotiating history of the *AD Agreement*. In the view of the United States, that negotiating history demonstrates that the question whether to address zeroing was presented to the negotiators, and that the draft text, as compared to the *AD Agreement*'s predecessor, the *GATT Anti-Dumping Code*, was not modified to prohibit this methodology. Further, the negotiating history demonstrates that insertion of the word "comparable" into Article 2.4.2 was intended precisely to ensure that the term "all" not be interpreted to imply that an average export price is to be established on the basis of sales both within and outside of the category of comparison.

7.193 **Canada** asserts that the negotiating history does not support the US view. In the first place, contrary to the US assertion, Canada contends that participants in the negotiations did not view the term "all" as a mere "drafting error" and understood the text to prohibit zeroing. With respect to the US interpretation of the purpose of the inclusion of the term "comparable", Canada states that the US assertion that its concerns with regard to zeroing were satisfied by the addition of the term

[342] Canada response to question 28 of the Panel, para. 102.

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

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

7.195 The **EC** asserts that the US methodology for determining the numerator for the purposes of the weighted average margin calculation in no way differs from the EC "zeroing" methodology, already found to be incompatible with Articles 2.4 and 2.4.2. The EC requests the Panel to reject the arguments put forward by the United States concerning the compatibility of that methodology with the *AD Agreement*.

(c) Evaluation by the Panel

7.196 The issue before the Panel is whether the methodology used by DOC in the underlying anti-dumping investigation whereby it attributed a value of zero to those instances where the weighted average export price was greater than the weighted average normal value when aggregating the different values determined for the different product types to compute the overall margin of dumping, is consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.[343,344]

7.197 Article 2.4.2 of the *AD Agreement* provides in relevant part as follows:

> "[s]ubject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account

[343] We note that, in the IDM, DOC justified its use of the methodology at issue by referring to Sections 771(35)(A) and 771(35)(B) of the US Tariff Act as follows:

> "[t]hese sections, taken together, direct [DOC] to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not apply on an aggregate basis". (Exhibit CDA-2, IDM, Comment 12, p. 66)

We do not understand Canada to challenge the above-referred sections of the US statute but DOC's application of zeroing when determining the overall margin of dumping for the Canadian exporters involved in the softwood lumber investigation. For this reason, we do not examine the consistency of Sections 771(35)(A) and 771(35)(B) with relevant provisions of the *AD Agreement*.

[344] We do not understand Canada to dispute that DOC was entitled to make adjustments within each product type to ensure an "apples-to-apples" comparison within that product type, calculate a weighted average normal value and a weighted average export price for each product type, and compare the two.

> appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.198 Article 2.4 provides in relevant part that:

> "[a] fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."

7.199 Article 2.4 of the *AD Agreement* provides that a fair comparison shall be made between export price and normal value, and sets out specific parameters for how such comparisons are to be made. The two sub-paragraphs of Article 2.4 deal with specific aspects of the comparison of normal value and export price. Article 2.4.1 – which is not at issue in this dispute – provides rules for the conversion of currencies, when such conversion is necessary for the purposes of a comparison under Article 2.4. Article 2.4.2 establishes that, subject to the requirement of a fair comparison, dumping margins should normally be established on the basis of a comparison between a weighted average export price to a weighted average normal value, or on the basis of a transaction-to-transaction comparison. A comparison between a weighted average normal value to individual export transactions is allowed only in limited circumstances.

7.200 The issue before us is whether zeroing is allowed when an investigating authority is calculating an overall margin of dumping under the first – weighted average-to-weighted average – methodology set forth in Article 2.4.2. We note that, in practice, the issue of zeroing arises in the context of the weighted average-to-weighted average methodology only where the investigating authority engages in so-called "multiple averaging", that is, where it sub-divides the product under investigation into groups and performs a weighted average-to-weighted average comparison for each group. Specifically, the issue of zeroing arises in the context of aggregating the results of these multiple comparisons into an overall margin for each exporter/producer for the product under investigation. Where only a single weighted average-to-weighted average comparison is performed, it seems to us that the issue of zeroing *per se* could not arise (although there might still be issues about the manner in which the averaging was performed).

7.201 In this case, DOC engaged in multiple averaging on the basis of differing physical characteristics of the product under investigation. As mentioned in paragraph 7.159, *supra*, DOC identified eleven physical characteristics and, with some exceptions, performed weighted average-to-weighted average comparisons only on the basis of transactions involving merchandise which shared these physical characteristics (this could be characterized as multiple averaging based on product type or model). Although multiple averaging based on different types or models may be particularly common, multiple averaging may also be used in other contexts. For example, an investigating authority might perform multiple averaging in respect of sales made at different levels of trade (e.g., retail versus wholesale) or on the basis of sub-periods of the period of investigation[345] (the latter may arise in cases where hyper-inflationary economies are involved). Thus, an investigating authority might well resort to multiple averaging to ensure comparability even in a case of absolute product homogeneity, i.e., where all of the product under investigation is identical and is being compared to transactions involving identical goods in the market of the exporting country.

7.202 There is no dispute between the parties as to the appropriateness or consistency with the *AD Agreement* of this multiple averaging approach to calculating dumping margins *per se*. To the

[345] Panel Report, *US – Stainless Steel*, paras. 6.105-6.136.

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

7.203 We begin our analysis with Article 2.4.2, which provides that the existence of margins of dumping shall normally be established "on the basis of a comparison of a weighted average normal value with a weighted average of *all comparable* export transactions". (emphasis added) The word "comparable", in its ordinary meaning, indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions, but only to comparable export transactions. Further, we are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning.[348] If the drafters had intended to require that the existence of a dumping margin for a product always be calculated by comparing a single weighted average normal value and a single weighted average of prices of all export transactions, we do not believe that they would have included the word "comparable" in Article 2.4.2, as that word would serve no purpose in the text. The fact that the word "comparable" was added to the text of Article 2.4.2 towards the end of the negotiating process, confirms our view that it was included for a purpose and should not simply be disregarded as surplus verbiage.[349]

7.204 We are as treaty interpreters of course required to give meaning to all the terms of a treaty, and we must therefore arrive at an interpretation of Article 2.4.2 that gives meaning both to the words "all" *and* "comparable". In our view, however, there is no need to choose between the two terms. Rather, the phrase "all comparable export transactions" would in its ordinary meaning appear to signify that Members may only compare those export transactions which are comparable, but that it must compare *all* such transactions. Thus, the term "all" plays an important role in the provision by ensuring that Members do not exclude relevant transactions from their comparisons.

7.205 We note that a number of panels have expressed the view that multiple averaging is permitted by Article 2.4.2. The issue has been considered by both the *US – Stainless Steel* and *Argentina – Ceramic Tiles* panels. Both panels concluded that multiple averaging was permitted by Article 2.4.2 in appropriate circumstances.[350]

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[346] Canada response to question 30 of the Panel, para. 106 and Canada second written submission, para. 143.

[347] Appellate Body Report, *EC – Bed Linen*, paras. 46-66.

[348] *See, e.g.,* Appellate Body Report, *US – Gasoline*, p. 23 where it is stated that:

> "... [o]ne of the corollaries of the 'general principle of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty".

[349] The insertion of the word "comparable" into Article 2.4.2 represented the only modification to the draft text of the Article between the date of the Draft Final Act and the text as adopted at the conclusion of the Uruguay Round, reflecting the current Article 2.4.2. (*See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991) We agree with the panel in *US – Stainless Steel* that this suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters. (Panel Report, *US – Stainless Steel*, para. 6.111, note 114)

[350] Panel Report, *US – Stainless Steel*, para. 6.111, where it is stated that:

> "[t]he inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. It flows from this

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

7.207 Of course, one way to ensure comparability is to make due allowance for certain differences, but given the inclusion of the term "comparable" in Article 2.4.2 we are not convinced that this method, however important, is the exclusive means allowed by the *AD Agreement* to ensure comparability. Nor, from a practical perspective, do we believe that such an approach would be desirable. In theory, of course, any difference between products/transactions can be accounted for by adjustments. In many cases, however, it may be difficult to determine whether a difference affects price comparability such that an adjustment is required, much less to establish the amount of the adjustment that would be appropriate. While some differences, such as differences in taxation, may be easy to quantify and adjust for, adjustments for differences in physical characteristics may be complex and highly uncertain, depending upon the number and extent of the differences in physical characteristics, and the extent to which those reflect differences in costs of production. The issue of whether or not DOC should have made due allowance for differences in dimension, addressed elsewhere in this Report, is a demonstration of how complex adjustment questions may be. The quantification of other types of adjustments, such as for differences in level of trade, may be even more problematic. It is therefore not surprising that many investigating authorities – and respondent exporters – prefer to limit to the extent possible the need for such adjustments by performing their comparisons on the basis of groups of transactions sharing common characteristics. Thus, we consider that the use of multiple averaging is consistent with the overall objective of Article 2.4, which is to ensure a fair comparison when comparing export price to normal value.

7.208 We find further support for our view from the fact that Article 2.4.2 allows dumping margins to be calculated on the basis either of weighted-average-to-weighted-average or transaction-to-transaction comparisons. When an investigating authority uses a transaction-to-transaction methodology, it is in a position to select the most similar products/transactions possible for

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> conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value". (footnote omitted)
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> *See* also Panel Report, *Argentina – Ceramic Tiles*, para. 6.99, where it is stated that:
>
> "[w]e consider that the use of types or models is a valid method of ensuring a fair comparison between normal value and export price under Article 2.4".

[351] Appellate Body Report, *EC – Bed Linen*, para. 58.

[352] We are also of the view that the authorization in Article 6.10 of the *AD Agreement* to use certain sampling techniques where "the number of (...) types of products" is too large, confirms our interpretation that there may be differences in physical characteristics between products being compared, and should dispel those doubts entirely.

[353] Appellate Body Report, *EC – Bed Linen*, para. 58.

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

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

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

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

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

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

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

[355] We note further that Article 2.4.2 requires that the "existence of margins of dumping during the investigation phase shall normally be established *on the basis of* a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. . . ". (emphasis added) We note that the ordinary meaning of the word "basis" is "the underlying support for a process". (*The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 113) This suggests to us that, while the determination of the existence of margins of dumping must be based on weighted average-to-weighted average comparisons, Article 2.4.2 was not intended to spell out in detail all elements of that calculation.

normal-value and a weighted-average-export-price in accordance with Article 2.4.2 of the *AD Agreement* when the product under investigation is divided into sub-categories based on types or models, levels of trade or other differences. The question of zeroing arises in the process of aggregating the weighted averages for the different types or models, levels of trade or other differences, into a single, overall margin of dumping. With regard to this process, parties express diverging views as to whether Article 2.4.2 applies to the determination and comparison of weighted average normal values and weighted average export prices only for each of the types or models (the so-called "first stage") – as the United States argues – or whether it also applies to the aggregation of the results for each of the comparisons made (the so-called "second-stage") – as Canada argues.[356] Thus, the United States asserts that the text "all comparable export transactions" in Article 2.4.2 is – because of the insertion of the word "comparable" – applicable only to the first stage of the calculation process. The United States argues that Article 2.4.2 does not apply to the second stage in the calculation process; thereby not disallowing the use of zeroing by an investigating authority. Canada does not dispute that there are two stages, as asserted by the United States. However, it disagrees with the US argument that Article 2.4.2 does not discipline the second stage.

7.214 In our examination of this question, we keep in mind the Appellate Body's findings with regard to the issue of whether Article 2.4.2 contemplates whether the calculation of the margin of dumping, as envisaged in Article 2.4.2, can be divided into two distinct stages[357], as well as the parties' submissions on this issue. In our view, whether Article 2.4.2 contemplates one or two stages in the calculation of the overall margin of dumping and whether the term "comparable" in "all *comparable* export transactions" relates only to the first stage or to both – in case there were two stages – are related questions. We note that the calculation of the margin of dumping is a process which starts with the determination of the normal value, and it continues with the establishment of the export price. Both prices are subsequently adjusted in order to ensure a "fair comparison", as required by Article 2.4. Finally, these two values – normal value and export price – are compared, for the purpose of computing the overall margin of dumping. Thus, in our view, a determination of the margin of dumping in an anti-dumping investigation could be sub-divided into a whole range of steps or stages, forming a coherent process. At issue are the last two steps in this process of calculating the overall margin of dumping. We do not consider that the question before us is whether there are several steps or stages contemplated in Article 2.4.2 and, if this is the case, whether the obligation imposed by Article 2.4.2 with respect to the calculation of the margin of dumping under the weighted-average-to-weighted-average methodology applies to the first stage only because of the term "comparable" in "all *comparable* export transactions". Rather, we are of the view that the question before us is whether an investigating authority is allowed to partially exclude from the aggregation process those results of comparing types or models for which the weighted-average-normal-value was determined to be less than the weighted-average-export-price in the aggregation process.

7.215 It is clear that Article 2.4.2 requires that all comparable export transactions have to be taken into account when the weighted average normal value is compared to the weighted average of prices of all comparable export transactions. We note that this interpretation of the requirement of Article 2.4.2 is the same as that of the Appellate Body in *EC – Bed Linen*.[358]

7.216 Through the use of zeroing, it is clear to us that the entirety of the prices of some export transactions, i.e., those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, in the second stage of the process, are not taken into account.[359]

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[356] The two "stages" are described by the United States in its response to question 109 of the Panel, para. 52.

[357] Appellate Body Report, *EC – Bed Linen*, para. 53.

[358] *Id.*, para. 55.

[359] The panel in *EC – Bed Linen* explained how zeroing affects prices of the export transactions to which is applied:

Recalling our view that the calculation of the margin of dumping is a continuous process, we fail to understand why the negotiators of the *AD Agreement* would have included an obligation in the provisions of the *AD Agreement* (the term "all" in "all comparable export transactions"), if, in the very next step of the calculation process – through zeroing – investigating authorities were to be allowed to ignore this very same obligation (certain values which they were obligated to take into account in the first stage of the process). In other words, we do not interpret the requirement of Article 2.4.2 to bear only on the first stage of the process, but rather view that obligation as applying to the process as a whole. We are of the view that, if the drafters had intended that Article 2.4.2 applies only to the first stage of the process, they would have made this clear. The United States has not advanced any argument explaining why an interpretation that Article 2.4.2 is applicable to the pre-aggregation stage should be accepted by us, apart from the argument that the *AD Agreement* does not contain any requirements as to the second stage of the process. We find this argumentation of the United States not convincing.

7.217 Considering the requirement of Article 2.4.2 that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation, we are of the view that the United States did not take into account all comparable export transactions when DOC calculated the overall margin of dumping in the investigation at issue.

7.218 The United States also argues that:

> "[t]hus, interpreting the language of the first methodology [average-to-average] as requiring authorities to offset dumping margins implies that the negotiators addressed the offset issue with respect to that methodology, but not the other two [transaction-to-transaction and average normal value-to-individual transaction export price], leaving the issue to the Members' discretion when utilizing either of the other two methodologies. Canada offers no interpretation of Article 2.4.2 that justifies such an anomalous result, nor does it offer any explanation as to why the negotiators might have intended to create such an anomaly."[360]

7.219 We note that Canada has not raised any claim with regard to DOC's use of "the other two methodologies". Thus, it is not within the Panel's terms of reference to rule on whether zeroing can, or cannot, be used when determining the overall margin of dumping under the other comparison

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> "[b]y counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2". (Panel Report, *EC – Bed Linen*, para. 6.115)

We agree with the above explanation of how zeroing manipulates the outcome of what should be a determination of dumping which, up to the point of aggregation of the margins of dumping, is consistent with Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4 and 2.4.1 of the *AD Agreement*.

[360] US first written submission, paras. 158-159.

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

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

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

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

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

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

7.223 As we consider that the meaning imparted by the text of Article 2.4.2 of the *AD Agreement* itself, is neither equivocal nor inconclusive as to whether zeroing is inconsistent with Article 2.4.2 of the *AD Agreement*, we do not deem it necessary in the case before us to have recourse to the negotiating history in order to confirm the correctness of our reading of the text of that provision.

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[361] Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*. As for the use of zeroing when determining a margin of dumping based on the third (weighted average-to-individual) methodology, we note that this methodology is exceptional in nature and can only be used in specific defined situations. Without intending to express any view as to the permissibility of zeroing when this third methodology is used, we do not agree with the United States that it would be an "anomaly" if zeroing were prohibited in the case of average-to-average comparisons but not in the exceptional case of weighted average-to-individual comparisons.

[362] Appellate Body Report, *US – Shrimp*, para. 114. *See* also Appellate Body Report, *US – Carbon Steel*, paras. 61-62, where it is stated that:

> "… we recall that Article 3.2 of the DSU recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules.
>
> … the task of interpreting a treaty provision *must begin with its specific terms*". (emphasis added)

7.224 We therefore find that the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation.

7.225 Canada raises a separate claim of violation of Article 2.4 of the *AD Agreement*. In support of its claim, Canada argues that "[a] "fair comparison" requires equitable, unbiased treatment of all transactions being compared. Zeroing does not produce a fair comparison because it arbitrarily eliminates certain transactions from the calculation, resulting in a margin that does not equally reflect all transactions".[363] The United States disagrees.[364]

7.226 Having found in paragraph 7.224, *supra*, that the methodology applied by DOC when calculating the overall margin of dumping in the investigation on certain softwood lumber products from Canada is inconsistent with Article 2.4.2 of the *AD Agreement*, we consider that it is neither appropriate, nor necessary for us to rule on Canada's Article 2.4 claim.

J. CLAIM 7: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – ALLOCATION OF FINANCIAL EXPENSES: ABITIBI

(a) Factual Background

7.227 In its questionnaire, DOC requested Abitibi to calculate financial expenses based on DOC's normal methodology. In its response, Abitibi did not follow DOC's instructions and used a different methodology. Abitibi argued that lumber production requires fewer assets, and thus less financing, than other products.[365] Abitibi also asserted that the standard terms of sale for lumber require prompter payment than do the terms of sale for newsprint, paper and pulp products. Thus, Abitibi contended that the assets and financing needs of lumber were significantly less than those of pulp, value-added papers, and newsprint. In order to compute the portion of the company's net interest expense related to lumber assets and operations, Abitibi first allocated net interest expense to the fixed assets of each of the company's divisions based on average assets balances for the year 2000. Abitibi then divided the interest associated with its lumber operations by the lumber division COGS for year 2000. Finally, Abitibi multiplied the resulting ratio by the total cost of manufacturing for each product reported in its cost of production database to derive the reported per-unit net interest expense.

7.228 DOC rejected Abitibi's approach and, consistent with its "established practice", derived financial costs attributable to softwood lumber production through a proportionate allocation among all goods, as explained in the following excerpt from the IDM:

> "[DOC] disagree[s] with Abitibi that [it] should depart from its established practice of calculating the financial expense ratio based on the financial expenses and cost of goods sold from the parent company's audited consolidated financial statements (i.e., based on the concept that money is fungible). Because there is no bright-line definition in the Act of what a financial expense is or how the financial expense rate should be calculated, [DOC] has developed a consistent and predictable practice for calculating and allocating financial expenses. This method is to calculate the rate as

[363] Canada response to question 108 (b) of the Panel, paras. 59-61.
[364] US comments on Canada's responses to question 104 of the Panel, para. 7.
[365] Thus, in year 2000, lumber sales were CDN$638 million, requiring assets of CDN$859 million, meaning that each dollar of assets produced CDN$0.74 in sales. Newsprint, however, required assets of CDN$7,276 million to produce CDN$3,438 million in sales, or a ratio of 0.47. Value-added paper and pulp required assets of CDN$3,120 million to produce sales of CDN$1,601 million, for a ratio of 0.51. (Exhibit CDA-83, Abitibi's Questionnaire Response, p. D-45)

> the percentage of net interest expense over cost of sales, based on the consolidated financial statements of the respondent's parent company. Further, the record of this investigation does not support the conclusion that [DOC]'s methodology distorts the allocation of Abitibi's financial expenses. Setting aside Abitibi's assumptions that the debt of the company only relates to assets belonging to the pulp and paper activities, [DOC]'s method addresses Abitibi's concern that those activities are more capital intensive. Specifically, those activities would have a higher depreciation expense on their equipment and assets. Thus, when the consolidated financial expense rate is applied to the cost of manufacturing of lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense. In view of the above factors, [DOC has] used the verified cost of goods sold including depreciation submitted as part of Abitibi's revised financial expense ratio calculation to allocate the company's net financial expenses."[366] (footnote omitted)

7.229 Thus, DOC determined the amount for financial expense for softwood lumber as follows: First, DOC determined Abitibi's total financial cost. Second, DOC took total financial cost and compared it, as a ratio, to Abitibi's total COGS. Third, this ratio was applied to the total cost of manufacturing for the product under investigation (softwood lumber) in order to calculate a financial expense specific to that product.

(b) Arguments of the Parties/Third Parties

7.230 **Canada** asserts that, in disregarding Abitibi's proposed methodology and calculating the financial expense ratio as it did, DOC failed to "consider all available evidence on the proper allocation of costs", as required by Article 2.2.1.1 of the *AD Agreement*. In addition, Canada asserts that, in light of the facts before DOC, the methodology used by DOC over-allocated Abitibi's company-wide interest expense to softwood lumber by attributing to softwood lumber interest expense that related to other products manufactured by Abitibi, and thus failed to result in an allocation that "reasonably reflects the costs associated with the production and sale of the product under consideration" for Abitibi in contravention of Article 2.2.1.1. In support of this claim, Canada identifies a number of problems with the methodology used by DOC. First, it does not include the full value of long-term capital assets, nor does it include non-depreciable capital assets at all. Second, unlike capital assets which need to be financed for the full year and longer, current production expenses do not need to be financed for the full one-year period that DOC considered. According to Canada, they need to be financed until payment is received. Finally, Canada argues that the methodology used by DOC resulted in an inflated interest expense that included cost data on financial expense that did not "pertain to production and sales" of softwood lumber, as required by Article 2.2.2.

7.231 The **United States** replies that the theory underlying the use of the methodology applied by DOC to determine the amount for financial expense is that financial costs should be allocated based on the overall expenses incurred by a company to produce products, because financial costs are directly related to a company's working capital requirements. In the view of the United States, the methodology used by DOC is reasonable, as required by Article 2.2. Specifically related to Canada's claim, the United States asserts that DOC considered Abitibi's arguments on the calculation of the amount for financial expense, but ultimately disagreed with them, and as explained in the IDM allocated Abitibi's financial cost based on its own methodology. The United States notes that DOC found in the IDM that, because money is fungible, a company can use proceeds for a variety of corporate purposes, and it is irrelevant which cash outlay came from a specific loan or sales transaction. What is relevant is the company's overall need to borrow money to fund its overall production operations (i.e., equipment purchases as well as cost of production inputs). Contrary to

[366] Exhibit CDA-2, IDM, Comment 15, p. 77.

Canada's arguments that DOC ignored the asset-laden nature of Abitibi's non-lumber producing divisions, the United States asserts that DOC found in the IDM that DOC's methodology addresses Abitibi's concern that those activities are more asset-intensive. Specifically, those activities would have a higher depreciation expense on their equipment and assets. Thus, when the consolidated financial expense rate is applied to the cost of manufacturing of lumber products, less interest will be applied because the total cost of manufacturing for lumber products includes a lower depreciation expense. Thus, the United States argues that the methodology applied by DOC to allocate financial costs to Abitibi's softwood lumber production was based on a proper establishment, and on an unbiased and objective evaluation, of the facts.

7.232 **Japan** asserts that Article 2.2.1.1 imposes an obligation on an investigating authority to accept a respondent's accounting records for the production and sale of the product under consideration, including SG&A, unless that authority finds that those records do not "reasonably reflect" the costs. In the view of Japan, a determination of an investigating authority to depart from the respondent's records must, therefore, be based on its review of the accounting records of a specific respondent on a case-by-case basis. Japan further asserts that, an investigating authority must determine the amounts for SG&A costs based on all evidence submitted by respondents, and on an unbiased and objective evaluation of the facts. Japan argues that, if DOC applied a pre-determined methodology to a particular respondent without reviewing any evidence submitted by that respondent, such application would be inconsistent with Article 2.2.1.1 of the *AD Agreement* in conjunction with Article 17.6(i) thereof.

(c) Evaluation by the Panel

7.233 We note that in the Panel Request Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*.[367] However, in its restatement of claims and in its submissions to the Panel, Canada only asserts violations of Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 with respect to Abitibi's determination of the amounts for financial expense for softwood lumber.[368] Accordingly, we will limit our examination to those claims.

7.234 Bearing this in mind, we note that DOC derived the amounts for financial costs attributable to Abitibi's softwood lumber production through a proportionate allocation among all goods produced by that company, based on COGS.[369] Canada raises several claims in respect of these facts. *First*, Canada asserts that, in selecting its allocation methodology for calculating the amounts for financial/interest costs, DOC failed to "consider all available evidence on the proper allocation of costs", as required by Article 2.2.1.1. *Second*, Canada argues that, in determining the amounts for financial costs as it did, DOC over-allocated Abitibi's group-wide interest expense to Abitibi's cost of production and sale for softwood lumber by attributing to softwood lumber amounts for financial expense that related to Abitibi's other products, and thus failed to result in an allocation that "reasonably reflects the costs associated with the production and sale of the product under consideration" for Abitibi, as required by Article 2.2.1.1. *Third*, the application of DOC's methodology resulted in an inflated amount for interest costs because it included actual cost data on financial expense that did not "pertain to production and sales" of softwood lumber, in breach of Article 2.2.2.

7.235 Because Canada's first two claims relate to Article 2.2.1.1 of the *AD Agreement*, we first examine the nature of the obligations in that article. Article 2.2.1.1 provides in pertinent part:

> "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

[367] WT/DS264/2, para. 3(c).
[368] Canada response to question 1 of the Panel, para. 1(vi).
[369] *See* paras. 7.227-7.229, *supra*.

> generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer... "

7.236 Article 2.2.1.1 contains a number of obligations relating to an investigating authority's cost calculations for the purpose of determining whether home market sales are in the ordinary course of trade and for calculating a constructed (normal) value. *First*, it provides guidance regarding the preferred data source for performing such calculations. Specifically, Article 2.2.1.1 requires that costs be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Where records are not kept in accordance with the GAAP of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority may calculate costs on another basis.[370] *Second*, Article 2.2.1.1 requires that investigating authorities consider all available evidence on the proper allocation of costs including that which is made available by respondents in the context of an anti-dumping investigation, provided that such allocations have been historically utilised by the exporter or producer. *Third*, and not at issue here, Article 2.2.1.1 provides for the adjustment of costs under certain circumstances.

7.237 In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if ("*provided*") certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, Article 2.2.1.1 does *not* require that all allocations made by an investigating authority have been historically utilised by the exporter or producer; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *insofar as* such allocations have been historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada's arguments relating to Article 2.2.1.1.

7.238 We note that DOC stated in the IDM that it had developed "a consistent and predictable practice for calculating and allocating financial expenses".[371] We also note that, in the questionnaire, DOC directed Abitibi to calculate the finance expense ratio on the basis of that methodology.[372] Canada asserts that DOC failed to make case-specific findings, applied generic reasoning in defence of its methodology and asserted that its established practice would be followed because it is consistent and predictable. In the view of Canada, this proves that DOC failed to "consider all available evidence on the proper allocation of costs", as required by Article 2.2.1.1. After having carefully read the relevant portion of the IDM[373], we are in no doubt that DOC made case-specific factual findings with respect to Abitibi's financial expense determination. We do not consider that using generic reasoning in support of a specific determination constitutes, in and of itself, a reason which would

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[370] *See*, in this regard, paras. 169 and 170 of Canada second written submission.
[371] *See* para. 7.228, *supra*.
[372] We do not understand the United States to contest these facts.
[373] *See* para. 7.228, *supra*.

justify a conclusion that the United States has failed to comply with Article's 2.2.1.1 requirement that "[a]uthorities shall consider all available evidence on the proper allocation of costs". In our view, reasoning – whether generic or specific – is similarly valid and both can be used in support of any given conclusion. In the case before us, the IDM shows that not only generic but also specific reasoning was used by DOC in support of its conclusion as to how financial expense should be allocated, as discussed in further detail below. Canada's next argument concerns DOC's alleged assertion that "established practice would be followed because it is consistent and predictable".[374] DOC stated in the IDM that: "[b]ecause there is no bright-line definition in the [Tariff] Act of what a financial expense is or how the financial expense rate should be calculated, [DOC] has developed a consistent and predictable practice for calculating and allocating financial expenses".[375] Having examined this statement in context, we consider that what DOC stated in the IDM is that it disagreed with Abitibi that DOC should depart from its established practice of calculating the amounts for financial costs based on the financial expense and COGS from the parent company's consolidated financial statements. The statement contained in the IDM that DOC has developed "a consistent and predictable practice for calculating and allocating financial expenses" does not prove in our view that DOC's "established practice would be followed in Abitibi's case because it is consistent and predictable." This brings us to the examination of Canada's assertion that DOC did not make case-specific factual findings for Abitibi on this matter. There are several references in the IDM that indicate to us that DOC considered at the time of determination evidence and arguments put forth by Abitibi on the issue at stake. First, DOC asserts that the "record of this investigation does not support the conclusion that [DOC's] methodology distorts the allocation of Abitibi's financial expenses". Such a statement could not be made without DOC having examined the evidence and considered the arguments relevant to the issue at issue. An examination of the ensuing discussion in the IDM shows that DOC considered the main argument that Abitibi put forward in support of its proposed allocation methodology, i.e., that DOC should allocate financial expense on the basis of an asset-based methodology. Finally, Canada argues that DOC could not have complied with its obligations under Article 2.2.1.1 without assessing the advantages and disadvantages of the methodology used by DOC and asset-based allocation methodologies in light of the evidence submitted by Abitibi. In our discussion of Article 2.2.1.1 in paragraphs 7.236-7.237 *supra*, we have set out our understanding with respect to the obligations imposed by that provision. In our view, Article 2.2.1.1, when stating that "[a]uthorities shall consider all available evidence on the proper allocation of costs", does not require that investigating authorities compare various allocation methodologies to assess their advantages and disadvantages but to "consider" all available evidence on the proper allocation of costs. We find that DOC met the requirement set forth in Article 2.2.1.1.

7.239 For the foregoing reasons, we cannot agree with the arguments submitted by Canada and therefore we reject Canada's contention that the United States failed to "consider all available evidence on the proper allocation of costs".

7.240 The second issue before us is whether the United States is in breach of Article 2.2.1.1 by failing to make an allocation of financial expense to softwood lumber which "reasonably reflects the costs associated with the production and sale of the product under consideration". Specifically, Canada argues that DOC over-allocated Abitibi's group-wide interest expense to Abitibi's cost of production and sale for softwood lumber by attributing to softwood lumber amounts for financial expense that related to Abitibi's other products. The parties agree on that Article 2.2.1.1 does not impose on investigating authorities any particular methodology for the purpose of allocating costs.[376]

7.241 In examining this issue, we first recall our findings with respect to the obligations imposed by Article 2.2.1.1 in paragraphs 7.236-7.237, *supra*, in particular our conclusion that we do *not* consider that Article 2.2.1.1 imposes positive obligations on investigating authorities other than those explicitly

[374] Canada second written submission, para. 199.
[375] *See* para. 7.228, *supra*.
[376] Canada response to question 38 of the Panel, para. 117 and US first written submission, para. 182.

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

7.242 Furthermore, even if Article 2.2.1.1 had contained such an obligation, we should still dismiss Canada's claim under Article 2.2.1.1. This provision establishes that authorities must consider "all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been *historically utilized* by the exporter or producer". (emphasis added) Canada has not argued that the allocation methodology proposed had been "historically utilized" by Abitibi.[378] In addition, the methodology proposed by Abitibi had a number of shortcomings.[379] During the course of the proceedings, it has become evident to us that DOC's methodology could also be criticised.[380] On balance, however, it is evident to us that both methodologies have shortcomings and advantages and hence, it is up to the investigating authority, as a trier of facts, to decide which one of the possible methodologies would lead to the most accurate result. This is a determination that, we believe, a panel cannot overturn without involving a *de novo* review. In any case, Canada bears the burden to prove that the methodology used by the United States had lead to unreasonable results and that an unbiased and objective investigating authority could not have calculated the amounts for finance expense for softwood lumber for Abitibi on the basis of the methodology used by DOC. We are of the view that Canada has not met this burden. Hence, even if Canada's argument had found support in the text of Article 2.2.1.1 – which as we found in paragraph 7.241, *supra*, does not, we would have rejected it on this ground.

7.243 Canada argues that the calculation of the amounts for financial expense was not based on "actual data pertaining to production and sales" of softwood lumber, as required by Article 2.2.2 of the *AD Agreement*. Canada asserts that, based on evidence from Abitibi's financial statement, Abitibi's lumber operations required 7.6 per cent of the company's total assets; hence, softwood lumber should have been allocated 7.6 per cent of the company's total financial expense. However, Canada asserts that DOC allocated 13.6 per cent of the total amount for financial expense to the product under consideration; thus ignoring the evidence submitted by Abitibi that financial expense was incurred in relation to assets. In so doing, Canada asserts that DOC attributed to softwood lumber amounts for financial expense that did not "pertain" to the production and sale of softwood lumber, contrary to Article 2.2.2.

7.244 The issue before us is therefore whether, in determining the amount for financial expense in the manner DOC did, DOC attributed to softwood lumber interest costs beyond those "pertaining to"

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[377] Canada second written submission, para. 200.

[378] In fact, based on the information made available to us in the context of these proceedings, it would appear that this allocation methodology was developed by Abitibi for the purposes of the anti-dumping investigation at issue. Thus, Canada acknowledges that "Canadian GAAP do not permit companies to report interest expenses incurred by business segment or product. Instead, all financial expenses must be aggregated and reported separately as a distinct line item on the Income Statement". (Canada second written submission, para. 183)

[379] *See* e.g. US second oral (opening) statement, para. 68.

[380] *See* e.g. Canada response to question 116 of the Panel, paras. 89-97.

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

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

K. CLAIM 8: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – DETERMINATION OF GENERAL & ADMINISTRATIVE EXPENSES: TEMBEC

(a) Factual Background

7.246 Tembec divides its operations into five separate divisions. One of those divisions, the FPG, consists primarily of sawmill operations which produce *inter alia* softwood lumber. In its consolidated audited financial statement for the year 2000, as reflected in its Annual Report, Tembec reports an amount for SG&A costs for the company as a whole. The Annual Report also contains certain segmented information for the five divisions, but does not break out G&A costs by division. However, internal divisional financial statements kept by Tembec report separate amounts for G&A expenses for each division, including those amounts for G&A costs that are charged directly by Tembec to each of its divisions, plus an allocated portion of the corporate-level G&A. DOC's questionnaire requested that the exporter calculate the G&A ratio by dividing total company-wide G&A expenses by total company-wide COGS.[382] In addition to calculating the G&A ratio as requested by DOC, Tembec calculated the G&A ratio by dividing the total amount of G&A expenses for the FPG – which included those amounts for G&A costs directly charged to that division and an allocated portion of the corporate-level G&A expenses – by the total cost of sales (minus packing) for the FPG divisional data.[383] That is, instead of calculating the G&A ratio on the basis of company-wide data, Tembec did so on the basis of divisional data (FPG). For the reasons set out in detail *infra*, DOC rejected Tembec's proposed G&A calculation methodology and determined Tembec's G&A ratio using a factor derived from its company-wide financial earnings statement:

> "[t]he statute at sections 773(b)(3)(B) and 773(e)(2)(A) directs [DOC] to calculate an amount for selling, general and administrative expenses based on actual data pertaining to the production and sale of the merchandise under consideration. The

[381] It is not disputed by parties that the financial expense at issue is part of the SG&A costs referred to in Article 2.2.2.

[382] Canada first written submission, para. 209.

[383] Exhibit CDA-159, Tembec's Questionnaire Response, Section D, p. D-28. *See* also Exhibit US-73, Tembec's Cost Verification Report, p. 26.

> antidumping law does not prescribe a specific method for calculating the G&A expense rate. When a statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of [DOC]. Because there is no definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, [DOC] has developed a consistent and predictable practice for calculating and allocating G&A expenses. This consistent and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a divisional or product-specific basis. This practice is identified in [DOC]'s standard section D questionnaire, which instructs that the G&A expense rate should be calculated as the ratio of total company-wide G&A expenses divided by cost of goods sold. See Section D Questionnaire, page D-14. *This approach is consistent with Canadian GAAP's treatment of such period costs and recognizes the general nature of these expenses and the fact that they relate to the activities of the company as a whole rather than to a particular production process.* [DOC]'s methodology also avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions. Therefore, we normally calculate the G&A expense rate based on the respondent's unconsolidated operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent.
>
> Tembec deviated from [DOC]'s normal methodology and calculated its G&A expenses using an internal accounting methodology, under which the company charged some G&A expenses directly to each of its divisions. However, Tembec divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation. Thus, we agree with petitioners that we cannot consider the divisional P&L statements as "unconsolidated financial statements". For the final determination, we have based Tembec's G&A expense rate calculation on Tembec Inc's company-wide income statement."[384] (footnote omitted; emphasis added)

(b) Arguments of the Parties/Third Parties

7.247 **Canada** asserts that the approach adopted by DOC in order to determine the amounts for G&A costs for Tembec resulted in a distorted allocation of costs associated with the production of softwood lumber. Canada asserts that, by rejecting the verified evidence from Tembec and calculating G&A expenses based on costs incurred on a company-wide basis, DOC allocated G&A expenses in a manner that did not reasonably reflect the costs associated with the production and sale of softwood lumber, in violation of Article 2.2.1.1. In this respect, Canada asserts that DOC did not engage in an unbiased and objective evaluation of the facts presented by Tembec in selecting the methodology for allocating G&A costs in violation of Article 2.2.1.1. Canada further argues that, in adopting the above methodology, DOC acted inconsistently with Article 2.2.2. Referring to the *Thailand – H-Beams* Panel Report, Canada states that DOC's use of company-wide expenses resulted in the inclusion of amounts for G&A costs pertaining to the production of non-investigated products and accordingly, failed to result in total cost figures that accurately represented the cost of producing softwood lumber. Canada requests the Panel to reject the US argument that Tembec's FPG data were not "audited" and not kept in accordance with Canadian GAAP as *ex post* rationalization. In any case, Canada argues that the FPG divisional data were audited and maintained in accordance with GAAP.

7.248 The **United States** replies that DOC refused Tembec's proposed methodology on two grounds. First, DOC determined that, because the division-specific amount at issue was un-audited, it was inherently less reliable than audited books and records that had been certified to be consistent

[384] Exhibit CDA-2, Comment 33, pp. 105-106.

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

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

(c) Evaluation by the Panel

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

7.251 Canada argues that the record demonstrated that the FPG G&A data more accurately "pertained to" the production of softwood lumber. By contrast, in the view of Canada Tembec's company-wide data could not be said to "pertain to" the production and sale of the like product in Canada because those figures represent the company's world-wide production of a broader range of products. Canada asserts that DOC's method effectively required reliance on data that did not pertain to the production and sale of softwood lumber and distorted Tembec's margin of dumping in violation of Article 2.2.2. In addition, Canada argues that DOC's methodology resulted in the calculation of costs that were not "associated with" the actual cost to Tembec of producing and selling softwood lumber, contrary to Article 2.2.1.1. The United States replies that DOC determined that relying on division-specific costs was inconsistent with the very nature of G&A expenses, which are, by definition, company-wide expenses.

7.252 We note that parties have differing views regarding the nature of the obligations contained in Articles 2.2.1.1 and 2.2.2, and, in particular, regarding the manner in which an investigating authority is to derive the amounts for G&A costs for the product under investigation. In essence, Canada

[385] Canada first written submission, para. 220.

[386] We note that, in the Panel Request, Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*. (WT/DS264/2, section 3(c)) In its restatement of claims, however, Canada only claims violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement* – in addition to those under Articles 2.2.1.1 and 2.2.2 – with respect to this specific claim. (Canada response to question 1 of the Panel, para. 1(vi)) For the foregoing reasons, we will refrain from addressing claims not contained in the restatement of claims and from ruling on those claims.

contends that Articles 2.2.1.1 and 2.2.2 obliged DOC to base its G&A calculations for softwood lumber on product-specific G&A costs, at least to the extent possible, and that DOC was thus obliged to calculate the amounts for G&A costs for softwood lumber on the G&A data for the narrower FPG division rather than on the G&A data for the company as a whole. The United States on the other hand considers that G&A costs are by definition company-wide, and that neither Article 2.2.1.1 nor 2.2.2 requires an investigating authority to link particular G&A expenses to particular products. We note, however, the US argument that DOC's determination not to use the FPG divisional G&A data was justified under Article 2.2.1.1 because the FPG records did not reasonably reflect the (G&A) costs associated with the production and sale of the product under consideration.

7.253 Article 2.2.1.1 provides, in relevant part, as follows:

> "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer... "

7.254 In accordance with this provision, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that, *inter alia*, such records are in accordance with the GAAP of the exporting country.[387] Data which are not GAAP-compliant might be found *not* to be reliable and, hence, not be used as the basis for the cost calculation.

7.255 We note that DOC calculated the amounts for G&A costs for Tembec dividing the company-wide G&A by the total COGS, as explained in the IDM (see paragraph 7.246, *supra*). We do not understand Canada to argue that the use of this methodology is *per se* inconsistent with Article 2.2.1.1. In any case, we do not read in Article 2.2.1.1 a requirement that the determination of the amounts for G&A costs must be done in any particular manner or based on any particular methodology.

7.256 Furthermore, we note that the respondent requested DOC to determine the amount for G&A costs using an "internal accounting methodology", as stated in the IDM.[388] The United States asserts that, because the division-specific amount at issue was unaudited, it was inherently less reliable than audited books and records that had been certified to be in accordance with Canadian GAAP. According to the United States, there was greater certainty that audited GAAP-consistent books and records would "reasonably reflect the costs". Canada notes that Tembec had argued in its Case Brief that the G&A based on data from the FPG was most accurate. According to Canada, data from both the FPG division and the overall company, both fully audited and compiled according to GAAP, were on the record and verified by DOC officials. In addition, Canada argues that the US assertion that Tembec's FPG divisional G&A data were not audited and not kept in accordance with Canadian GAAP constitutes *post hoc* rationalization. Canada asserts that, in the context of the investigation, DOC considered the FPG data reliable for all costs purposes, except for the calculation of the amounts for G&A costs.

7.257 DOC justified its decision not to calculate Tembec's amount for G&A costs on the basis of the methodology proposed by the exporter on two bases.[389] First, DOC calculates the amount for G&A

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[387] *See* paras. 7.236-7.237, *supra*.
[388] *See* para. 7.246, *supra.*
[389] It is stated in relevant portion of the IDM (*see* para. 7.246, *supra*) that:

based on the respondent's *unconsolidated* operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent. In the case of Tembec, DOC found that "Tembec['s] divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation". DOC's second justification is that using its methodology "avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions".

7.258 We are therefore faced with a situation where DOC, in the course of the investigation, had examined the methodology proposed by Tembec and, on several grounds, DOC rejected it and used another methodology to determine the amounts for G&A costs for Tembec's softwood lumber operations. DOC's arguments, as we understand them, revolve around the issue of the *incompleteness* of the amounts for G&A costs resulting from the application of the methodology proposed by the exporter. In other words, they reflect the investigating authority's concern that amounts for G&A costs calculated from G&A data for the FPG division, including an allocated amount from the corporate G&A, might not include *all* the G&A costs associated with the production and sale of the product under consideration. Hence, the resulting amounts for G&A costs would not reflect all the G&A costs pertaining to the production and sale of softwood lumber. We can imagine situations where, for various reasons, a company might decide to charge a certain G&A cost item to a particular division, even where other divisions might benefit from that particular item. A good example to illustrate this, might be car park costs. The car park is used by divisions A and B. The costs of the car park are recorded in the books of division A and do not form part of the corporate G&A costs. In the event of an anti-dumping investigation targeting a product manufactured by division B, an amount for G&A costs based on data on G&A costs from division B plus a duly apportioned part of the corporate G&A costs, in our view, would not include all G&A costs associated with the production and sale of the product subject to investigation. For the foregoing reasons, we do not consider that rejecting a methodology that would have the effect of excluding certain G&A cost items from the calculation of the amounts for G&A costs for the product under investigation would not be consistent with Article 2.2.1.1 of the *AD Agreement*. In our view, a determination as to whether such a rejection would be consistent or not with Article 2.2.1.1 can only be made after carefully considering the specific facts before an investigating authority.

7.259 In the case before us, we recall that DOC found that "Tembec['s] divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation".[390] This finding has not been contested by Canada. The question before us is to determine whether Tembec had demonstrated that the G&A data from the FPG division, including an allocated portion from G&A's corporate expenses, was complete. We have examined in particular Exhibits CDA-95, 96 and 149. The "Revised Calculation of the G&A Ratio for the FPG Division", contained in Exhibit CDA-95 shows that G&A cost data for that division was verified and that some

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> "[DOC's] methodology (…) avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions. Therefore, we normally calculate the G&A expense rate based on the respondent's unconsolidated operations plus, if applicable, a portion of G&A expenses incurred by affiliated companies on behalf of the respondent.
>
> Tembec deviated from [DOC]'s normal methodology and calculated its G&A expenses using an internal accounting methodology, under which the company charged some G&A expenses directly to each of its divisions. However, Tembec divisions are not separate entities that require consolidation but merely separate business units that make up a single corporation. Thus, we agree with petitioners that we cannot consider the divisional P&L statements as "unconsolidated financial statements". For the final determination, we have based Tembec's G&A expense rate calculation on Tembec Inc's company-wide income statement". (footnote omitted)

[390] *See* para. 7.246, *supra*.

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

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

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

7.262 Article 2.2.2 provides in relevant part:

> "[f]or the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation".

7.263 We consider that the text of the provision is self-explanatory: investigating authorities are required to calculate the amounts for, *inter alia*, G&A costs based on actual data pertaining to production and sale in the ordinary course of trade of the like product. Article 2.2.2 does not provide for any particular methodology in order to determine those amounts.[393] Canada focuses on the terms "pertain to" in that provision. In our view, it is important however to start our examination from the term "general and administrative costs". We note that this provision does not define "general" and "administrative" costs nor does it state which cost items should be considered to be "general" or "administrative" costs.[394] The term "general" is defined as "**1 b** including or affecting all or nearly all parts or cases of things".[395] Thus, "general costs" would be costs affecting all or nearly all products

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[391] The parties disagree as to whether or not the divisional statements – including that of the FPG – were audited. While this might have been relevant, after a careful examination of Tembec's Annual Report contained in Exhibits CDA-94 and 148 and US-12 we cannot conclude that the divisional statements were audited.

[392] Canada argues that DOC considered the FPG data reliable for all costs purposes, except for the purpose of calculating the amounts for G&A costs. We do not consider that this argument would alter our conclusion, even if Canada's statement were to be correct. The fact that DOC might have used cost data from the FPG division for purposes other than calculating the amounts for G&A costs does not constitute an acknowledgement on the part of DOC that the FPG division G&A records were complete. We are of the view that, if they had been complete, Tembec would not have had to allocate a portion of the corporate G&A to the FPG division in order to arrive at the amounts for G&A costs for softwood lumber.

[393] *See* in this regard Canada response to question 38 of the Panel, para. 117.

[394] As the parties' arguments revolve around the terms "general" and "administrative" costs, we will focus our examination on those concepts and will not examine the term "selling" costs.

[395] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 564.

manufactured by a company. On the other hand, "administrative" is defined as "concerning or relating to the management of affairs".[396] "Administrative" costs are therefore costs concerning or relating to the management of the company's affairs. Bearing this in mind, we consider that such costs can only have a bearing on all the products manufactured by a company, although in varying degrees. Thus, by their *nature*, G&A costs are costs that will normally affect all products produced or sold by a company. In this regard, Canada has stated before us that:

> ""Administrative, selling and general costs" (...) are costs that are not directly attributable to the product under investigation or any particular product. They
>
> - include such costs as management salaries and other corporate-level expenses that benefit *all* products that a company (or division within a company) may produce rather than specific products.
> - are usually listed on a company's consolidated financial statement, as a separate line item labelled G&A or SG&A. They are recorded as an aggregate amount and are not attributed to specific products.
> - must be allocated to the product under investigation. Where the company that produces the investigated product is the subsidiary of another company, an amount of the parent company's G&A that is attributable to the subsidiary's production of the investigated product will be allocated to it. These are typically referred to as "headquarters" expenses and are costs that would be incurred by the subsidiary if the parent did not exist (i.e., accounting staff salaries, information technology expenses, etc.). Only G&A costs that actually relate to the investigated product can be allocated to it. An over-allocation of G&A expense that is incurred in relation to its other products results in an inflation of overall costs for the product at issue."[397] (emphasis added)

7.264 Canada acknowledges that, *inter alia*, G&A costs "benefit all products that a company (or division within a company) may produce rather than specific products". This confirms our interpretation about the terms "G&A costs". In addition, Canada asserts that they "are not directly attributable to the product under investigation or [to] any particular product". This is a reflection of the nature of those costs: because they are intended to affect a plurality of products, businesses, etc. within a company, it is normally not possible for a company to attribute these costs directly to any particular product. It is clear that these are costs actually incurred by a company and, hence, that must be recovered by that company in order to make a profit. However, due to the very nature of these costs it is normally not possible to ascertain the precise contribution by each product to these costs. If a company were able to ascertain the precise contribution to these costs by a particular product, one would normally have expected the company to treat these costs as part of the cost of production of that product.

7.265 We next examine the term "pertain to" within the meaning of the chapeau of Article 2.2.2. "Pertain" is defined as "**1 a** relate or have reference to".[398] In our view, a meaningful interpretation of the term "pertain[ing] to" must take into account the nature of those costs because, as Canada acknowledges, they "are not directly attributable to the product under investigation or [to] any particular product". Thus, it would appear to us that, unless a particular G&A cost can be tied to a particular product manufactured by a company, G&A costs – because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods – pertain or relate to all of those goods. Canada's argument that G&A costs "benefit all products that a company (or division within a company) may produce rather than specific products"

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[396] *Id.*, p. 18.
[397] Canada second written submission, para. 166.
[398] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 1021.

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

7.266 The next issue we address is the attribution of G&A costs to discrete products produced or sold by a given company. Article 2.2.2 of the *AD Agreement* does not provide any guidance on this issue. Different investigating authorities use different allocation keys. In the case before us, the United States used as an allocation key the following: total company-wide G&A divided by the total company-wide COGS, thereby obtaining the G&A ratio for Tembec. This was then multiplied by the cost of production for softwood lumber in order to obtain the amounts for G&A costs for softwood lumber. As we do not understand Canada to have challenged the allocation methodology *per se* used by the United States, but the use of company-wide G&A data, we will refrain from ruling on whether that allocation methodology is consistent with Article 2.2.2.[399]

7.267 Canada claims that DOC calculated an amount for G&A costs based on (company-wide) G&A data which, at least in part, did not pertain to softwood lumber in violation of Article 2.2.2. Canada refers to the fact that the figures used by DOC to calculate the G&A ratio "represent the worldwide production, 70 per cent of which is made up of paper, pulp and chemicals".[400] Canada argues that DOC should have used instead the G&A ratio provided by Tembec. However, we have found in paragraph 7.260, *supra*, that DOC was entitled not to use the data as proposed by Tembec because of concerns regarding its completeness. Canada has not argued that there was any specific general or administrative cost item that – in its view – did not "pertain to" softwood lumber. Rather, Canada's contention is of a general nature: company-wide figures "represent the worldwide production, 70 per cent of which is made up of paper, pulp and chemicals". As we have noted above and acknowledged by Canada, G&A costs – because of their nature – are in principle intended to have a bearing on all the products produced and sold by a specific company. For this reason, we consider that, unless a producer/exporter can demonstrate that the product under investigation did not benefit from a particular G&A cost item, an investigating authority is not precluded to attribute at least a portion of that cost to the product under investigation. The general assertions of the type made by Canada cannot, in our view, qualify as a demonstration that the amounts for G&A costs as allocated by DOC did not relate to softwood lumber in any way. We therefore find that the United States did not violate Article 2.2.2 by determining the G&A ratio – and the resulting amounts for G&A for softwood lumber – based on Tembec's company-wide G&A data.[401] Canada's claim under Article 2.2.2 therefore fails.

7.268 We next address Canada's claims under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. With respect to Articles 2.2 and 2.2.1, Canada asserts that an incorrect calculation of costs under Articles 2.2.1.1 and 2.2.2 impacts the determination of which sales may be used in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. Regarding Article 2.4, Canada argues that any action taken by the investigating authority that is inconsistent with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 would result in an "unfair comparison" between normal value and export price, in violation of Article 2.4 of the *AD Agreement*.

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[399] The methodology proposed by Tembec differs from the one used by DOC in that the numerator would include Tembec's FPG G&A data plus an allocated portion of the "corporate headquarters" G&A data instead of the total company-wide data. In turn, Tembec's denominator would have included the FPG's COGS rather than the total company-wide COGS.

[400] Canada second written submission, para. 221.

[401] We do not understand Canada to argue that the United States could not have complied with the requirement just discussed because Tembec's company-wide figures represent the company's world-wide production, i.e., production and sales outside Canada.

7.269 We recall that, in paragraphs 7.260 and 7.267, *supra*, we have concluded that Canada has not established that the United States has acted inconsistently with Articles 2.2.1.1 and 2.2.2 of the *AD Agreement*. Given that Canada's claims of violation of Articles 2.2, 2.2.1 and 2.4 are premised on violations of Articles 2.2.1.1 and 2.2.2, we conclude that Canada has not established that the United States acted inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[402]

L. CLAIM 9: ARTICLES 2.2, 2.2.1, 2.2.1.1, 2.2.2 AND 2.4 – DETERMINATION OF GENERAL & ADMINISTRATIVE EXPENSES: WEYERHAEUSER

(a) Factual Background

7.270 In its questionnaire response, Weyerhaeuser Canada, one of the Canadian producers subject to investigation, reported G&A costs incurred by Weyerhaeuser Canada as well as G&A costs incurred by Weyerhaeuser Company (Weyerhaeuser Canada's parent company located in the United States), which, in its view, related to the production and sale of Canadian softwood lumber, the product under investigation. Charges concerning the settlement of legal claims relating to hardboard siding were *not* included in the G&A costs which Weyerhaeuser Company reported in its questionnaire response.[403] These legal claims originated from sales of hardboard siding in the US between 1981 and 1999. Following verification of the exporter's response, DOC suggested that the amount for settlement of those claims (US$130 million) might be more appropriately included in Weyerhaeuser Company's G&A expenses, rather than in that company's COGS as reflected in the IDM:

> "[s]ettlement claims are not a cost of goods sold, which is the base [DOC] typically uses to allocate G&A expenses. Instead, these costs represent the settlement of claims against products sold in prior years. We note that these costs are included on the consolidated financial statements under the forest products group companies. While the costs relate to non-subject product, hardboard siding, [DOC] typically allocates business charges of this nature over all products because they do not relate to an production activity, but to the company as a whole. We recognize that one time charges like this are ultimately a cost of doing business for the company. Therefore, we have included them in the headquarters G&A, but allocated them over all products in deriving the rate."[404]

7.271 Thus, DOC concluded that the costs relating to the settlement of legal claims on hardboard siding should be included in Weyerhaeuser Company's G&A, and allocated them over all products – including softwood lumber – in deriving the amounts for G&A costs for Weyerhaeuser Canada.

(b) Arguments of the Parties/Third Parties

7.272 **Canada** argues that DOC calculated an inflated amount for the G&A costs included in Weyerhaeuser Canada's cost of producing softwood lumber, contrary to Article 2.2.2, by including in its G&A calculation a US$130 million charge incurred by Weyerhaeuser Company's for costs related exclusively to hardboard siding, a product Weyerhaeuser Company produced and sold in the United States. In the view of Canada, that cost did not "pertain to" Weyerhaeuser Canada's production and sale of Canadian softwood lumber. Canada claims that the finding of the panel in *Egypt – Steel Rebar* that Articles 2.2.1.1 and 2.2.2 advocate a "relationship test" between costs and the production and sale of the like product at issue supports its argument. In addition, Canada argues that

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[402] Accordingly, we need not address the United States' argument, based upon the findings of the *Egypt – Steel Rebar* panel (para. 7.333), that Article 2.4 relates only to the *comparison* of export price and normal value, and does not regulate the establishment of the normal value as such.

[403] Canada first written submission, para. 226.

[404] Exhibit CDA-2, IDM, Comment 48b, pp. 133-134.

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

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

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

(c) Evaluation by the Panel

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

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

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

[406] We note that, in the Panel Request, Canada claims violations of Articles 2 of the *AD Agreement* and VI:1 of the *GATT 1994*. (WT/DS264/2, section 3(c)) In its restatement of claims, however, Canada only claims violations of the provisions cited in para. 7.275, *supra*, i.e., Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and 2.4 of the *AD Agreement*. (Canada response to question 1 of the Panel, para. 1(vi)) For the foregoing reasons, we will refrain from addressing claims not contained in the restatement of claims and from ruling on those claims.

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

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

7.278 We note that this general provision concerns the establishment of an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used. Furthermore, if an investigating authority resorts to the last methodology contained in Article 2.2 – the construction of normal value – a *reasonable* amount for SG&A costs must be used.

7.279 The chapeau of Article 2.2.2 provides that:

> "[f]or the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation."

7.280 The text of the provision is self-explanatory: investigating authorities are required to calculate the amounts for, *inter alia*, G&A costs based on actual data pertaining to production and sale in the ordinary course of trade of the like product. We recall our views expressed in paragraphs 7.263-7.265, *supra*, with respect to our interpretation of the terms "general" and "administrative" costs in the chapeau of Article 2.2.2, as well as on the nature of such costs. In particular, we recall that such costs normally have a bearing on all the products manufactured by a company, although in varying degrees. By their *nature*, G&A costs are costs that, in our view, will *normally* affect all products produced or sold by a company. Canada's comments, cited in paragraph 7.263, *supra*, support our views. Thus, Canada acknowledges that G&A costs "benefit all products that a company (or division within a company) may produce rather than specific products" and that they "are not directly attributable to the product under investigation or any particular product".[407] We also recall that Article 2.2.2 does not provide for any particular methodology in order to determine those amounts.[408]

7.281 We further recall our finding that, unless a producer/exporter can demonstrate that the product under investigation did not benefit from a particular G&A cost item, an investigating authority is not precluded from attributing at least a portion of that cost to the product under investigation.[409] Both in the underlying investigation before DOC and in the proceedings before us, it is being asserted that the charge at issue does not pertain to the production and sale of the product under investigation. Canada's arguments – and the underlying facts upon which those arguments are based – in this claim thus differ significantly from those in Tembec's claim, where Canada put forward only general arguments in support of its assertion that the amounts for G&A costs calculated for softwood lumber could not be considered to be based on actual data "pertain[ing] to" the production and sale of softwood lumber.[410]

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[407] Canada second written submission, para. 166.
[408] *See* in this regard Canada response to question 38 of the Panel, para. 117.
[409] *See* para. 7.267, *supra*.
[410] *Ibid.*

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

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

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

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

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

[411] US first written submission, para. 209.
[412] Canada second written submission, para. 235.
[413] Canada second written submission, para. 238 *et seq*.
[414] We do not refer to "selling" and "administrative" costs because parties have focused on the term "general" costs only.
[415] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 564.
[416] Canada second written submission, para. 230, note 220.

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

7.286 In addition, Canada refers to the uniqueness of this charge based on the fact that Weyerhaeuser Company's consolidated financial statement provides separate line items for Weyerhaeuser Company's SG&A costs and the settlement of legal claims relating to hardboard siding.[418] In our view, the fact that the cost at issue is reported separately is *per se* not a convincing argument. There might be several reasons for reporting this cost separately, especially in the published financial statements of the company, for example, to increase the transparency regarding a specific non-recurring cost item of a significant amount for the benefit of third parties. Of course, bundling a charge such as the one at issue with other G&A costs could give the misleading impression to any third party (e.g. investors) that G&A costs have extraordinarily increased during the year under review. The uniqueness of the charge at issue, i.e., the fact that it was specifically meant to fund future claims, in our view, does not determine whether this is a "general" cost or not. Unique charges such as the set-up of a new line for the production of the product under consideration during the period of investigation are acknowledged in Article 2.2.1.1 to be part of the cost of production of the product under consideration. Similarly, extraordinary items which cannot be considered part of the cost of production but of the SG&A costs of a company must be able to be taken into account in the calculation of the margin of dumping, provided that other requirements in the *AD Agreement*, in particular Article 2.2.2, are met.

7.287 For the foregoing reasons, we are of the view that an unbiased and objective investigating authority could have treated the cost item at issue as part of the "general" costs of the exporter under consideration.

7.288 Canada's next argument is that the cost item at issue did not relate to the production and sale of softwood lumber, i.e., to the product under consideration. Canada is of the view that:

> "Article 2.2.2 requires that G&A be based on costs "pertaining to production and sales in the ordinary course of trade of the *like product* by the exporter or *producer under investigation*" [emphasis added]. Expenses will "pertain" to the production and sale of a product where they "belong or be attached to, spec. (a) as a part, (b) as an appendage or accessory ..."
>
> As noted, in *Egypt – Steel Rebar*, the panel clearly stated this obligation as a relationship test: that a cost may be attributed to the production and sale of the like product only if the facts of the case point out that the cost was associated with the product under investigation."[419] (footnote omitted; emphasis in original)

7.289 Applied to the specific facts of the case, Canada asserts that:

> "[the] facts (...) demonstrate that the expense is associated with hardboard siding, not Canadian softwood lumber. The hardboard siding expense is a settlement fund concerning a product unrelated to the like product, produced in the United States by Weyerhaeuser US. Accordingly, the hardboard siding expense did not "pertain to" the production and sale of softwood lumber as required by Article 2.2.2.

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[417] Canada second written submission, para. 235.
[418] *See* para. 7.283, *supra.*
[419] Canada second written submission, paras. 244-245. *See* also paras. 166 and 174 of Canada second written submission.

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

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

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

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

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

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

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

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

> "does not disagree with the general proposition that the words "associated with" and "pertaining to" suggest some relationship between G&A costs and costs of producing and selling the product under consideration". (US response to question 63 of the Panel, para. 121)

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

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

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

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

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

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

7.297 Canada raises several consequential claims under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*. Having rejected the claims on which they are dependent in paragraphs 7.293 and 7.296, *supra*, we must also reject Canada's claims under Articles 2.2, 2.2.1 and 2.4.

M. CLAIM 10: ARTICLES 2.2, 2.2.1, 2.2.1.1 AND 2.4 – REASONABLE AMOUNTS FOR BY-PRODUCT REVENUES FROM THE SALE OF WOOD CHIPS: TEMBEC AND WEST FRASER

(a) Factual Background

7.298 Wood chips are produced as a by-product in the process of producing softwood lumber. These wood chips are subsequently sold by the sawmills to pulp mills through different types of transactions. In the calculation of the cost of production of softwood lumber, DOC took into account the income from sales of wood chips as an offset to softwood lumber's cost of production, i.e., it reduced the cost of producing softwood lumber. This claim concerns the determination of reasonable amounts from the sales of wood chips made by West Fraser and Tembec.

[425] US response to question 124 of the Panel, para. 75.
[426] *See* paras. 7.236-7.237, *supra*.

7.299 Tembec's sawmills sold wood chips to Tembec's own pulp mills through interdivisional transactions, i.e., through sales within the same company. In reporting its cost of producing softwood lumber, Tembec argued against the use of the internal transfer price for wood chips as an offset to the cost of producing softwood lumber because the internal transfer price did not allegedly reflect market prices. Tembec submitted information to DOC on arm's length purchases of wood chips made by its pulp mills and arm's length sales by its Western sawmills. West Fraser, on the other hand, sold most wood chips to affiliated parties in BC. Only a negligible volume was sold by two of its sawmills in BC (McBride and PIR) to unaffiliated parties. West Fraser submitted data for wood chip purchases made by one of its affiliated pulp mills in BC, QRP, to show that prices paid by QRP for wood chips purchased from unaffiliated parties were in line with prices paid by QRP to West Fraser's sawmills.

7.300 We note that DOC stated in the IDM that:

> "[w]e agree with the petitioners that, under section 773(f)(2) of the Act, [DOC] may disregard transactions between affiliated parties if they do not fairly reflect the amount usually charged in the market under consideration. When a respondent sells the same by-product to affiliated and unaffiliated parties at different prices, [DOC] considers the prices received from unaffiliated parties by the respondent to be at arm's-length and to represent market prices. (…)
>
> Specific to Canfor, the verified information shows that the fair market value that Canfor's mills obtain for sales of wood chips to unaffiliated purchasers is clearly distorted due to its contractual agreements. Since Canfor did not have any sales of wood chips to unaffiliated parties in B.C., we have compared Canfor's sales of wood chips to affiliated parties in B.C. to the weighted-average market price of the other respondents' wood chip sales in B.C. Based on this comparison we find that Canfor's sales of wood chips to affiliated parties in B.C. during the POI were made at arm's-length prices and no adjustment is necessary for the final determination.
>
> With respect to West Fraser, for purposes of the final determination, we have compared West Fraser's sales of wood chips to affiliated and unaffiliated parties separately for Alberta and British Columbia. Based on this comparison we find that West Fraser's sales of wood chips to affiliated parties in Alberta during the POI were made at arm's-length prices. We also find, however, that West Fraser's sales of wood chips to affiliated parties in British Columbia during the POI were not made at arm's-length prices. Thus, for sales of wood chips in British Columbia, we used the average sales price for wood chips received from unaffiliated parties to value the sales to affiliated parties and adjusted West Fraser's by-product offset for the final determination.
>
> (…)
>
> With respect to Tembec, the facts of this case differ slightly in that the wood chip transactions are between divisions of the same legal entity. Our practice with regards to transactions between divisions within the same legal entity is to use the actual cost of the input. Due the fact that wood chips are a by-product of the production of softwood lumber, there is no separately identifiable cost associated with the wood chips that are transferred between Tembec divisions. Therefore, we analyzed the wood chip sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices are reasonable.
>
> Based on the comparison of Tembec's B.C. sawmills' internally set transfer prices for wood chips to the B.C. sawmills' chip sales to unaffiliated purchasers, we concluded that the internally set transfer prices are not preferential. Accordingly, we relied on

> the B.C. transfer prices for the final determination. For Tembec's Quebec and Ontario wood chip sales we do not have usable market price data for Tembec. However, since we have determined that its B.C. mills do not sell wood chips to other Tembec divisions at preferential prices, we deem it reasonable to conclude that their Ontario and Quebec saw mills did not receive preferential prices for its internally transferred wood chips. Thus, we relied on their internal transfer prices for the final determination.
>
> (…)
>
> For West Fraser and Tembec we also disagree that the documentation presented at verification demonstrated that the prices it received from its affiliates for sales of wood chips reflected market prices. While we acknowledge that the documentation submitted at verification showed that certain affiliated pulp mills selected by these respondents paid similar prices to their sawmills and to unaffiliated parties for purchases of wood chips, we note that the comparisons provided by each respondent were selectively provided by the companies and not based on a sample chosen by [DOC]. These comparisons represented only a portion of the total wood chip purchases by both Tembec and West Fraser's pulp mills and there is no record evidence to determine what the results might be if all mills were included."[427] (footnotes omitted)

(b) Arguments of the Parties/Third Parties

7.301 **Canada** asserts that, in failing to use reasonable amounts for by-product revenues from the sale of wood chips as offsets in calculating the cost of production of softwood lumber for Tembec and West Fraser, the United States acted inconsistently with Articles 2.1, 2.2, 2.2.1, 2.2.1.1 and 2.4 of the *AD Agreement*. With respect to Tembec, Canada argues that Article 2.2.1.1 requires investigating authorities to disregard the exporter's records where they do not reasonably reflect the costs associated with the production and sale of the product under consideration. Canada asserts that Article 2.2.1.1 reflects the requirement that market price is the appropriate benchmark for valuing by-product revenue offsets, or the calculation of the cost of the main product will be either overstated or understated. According to Canada, the internal Tembec transfer prices as contained in its records and relied upon by DOC do not reasonably reflect the market value of wood chip sales, because Tembec discounts internal wood chip sales below market values. The records, therefore, do not reasonably reflect the costs associated with the production and sale of softwood lumber. Accordingly, Canada argues that DOC was obligated to disregard such internal transfer prices and determine revenues from wood chip sales on the basis of representative market values. In sum, Canada asserts that DOC's use of Tembec's internal transfer prices as an offset did not "reasonably reflect" the costs associated with the production and sale of softwood lumber and violated Article 2.2.1.1. In addition, DOC's use of Tembec's internal transfer prices in lieu of market values, while disregarding West Fraser's affiliated sales prices, also violates DOC's obligation to exercise discretion in an even-handed manner. Finally, Canada asserts that by-products, by definition, have neither profits nor costs. Moreover, Canada points out that the argument of the United States that "the difference between the [internal surrogate for cost and the external market price] is the equivalent of "profit" in the normal setting where costs and sales prices are known" is *ex post* rationalization, which the Panel must reject.

7.302 As far as West Fraser is concerned, Canada puts forward four arguments against DOC's conclusion that West Fraser's affiliated party sales occurred at "non-arm's length" (i.e., at inflated) prices. *First*, Canada argues that DOC's determination was inconsistent with the evidence as a whole concerning market prices in BC. In determining whether West Fraser's sales to affiliates were made at inflated prices, DOC used as its benchmark for market prices *only* West Fraser's BC wood chip sales

[427] Exhibit CDA-2, IDM, Comment 11, pp. 59-62.

to unaffiliated parties, and ignored the evidence of market prices charged by the other respondents for their sales to non-affiliates in BC. *Second*, the benchmark used by DOC for determining whether West Fraser's sales to affiliates were made at inflated prices was unreliable. Canada asserts that DOC relied on West Fraser's tiny quantity of sales to unaffiliated parties as its benchmark for BC market prices. In addition, Canada asserts that over half of the very low volume of sales used by DOC for the benchmark were made early in the POI by West Fraser's McBride mill, when chip prices were lowest and not reflective of BC prices during the entire POI. *Third*, Canada claims that DOC applied different benchmarks for two respondents – Canfor and West Fraser – that were similarly situated. *Finally*, Canada contends that DOC disregarded the figures reported in West Fraser's records even though the verified data demonstrated that its highest priced sales to an affiliate – QRP – had been made at market prices. Presented with the facts on the record, Canada claims that an unbiased and objective investigating authority would not have made the determination made by DOC, selectively disregarding West Fraser's recorded figures for sales which were at market prices and arbitrarily employing different standards for different respondents.

7.303 As a matter of introduction, the **United States** asserts that, in calculating respondents' cost of producing softwood lumber, DOC treated sales of wood chips as an offset, reducing a given respondent's total cost of production. The United States asserts that DOC's calculation of the wood chip offset for West Fraser and Tembec was consistent with Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 of the *AD Agreement*. Consistent with Article 2.2.1.1, the United States contends that DOC determined that the transfer prices between Tembec's BC sawmills to various Tembec-owned pulp mills reasonably reflected Tembec's actual costs associated with wood chip production. The United States asserts that there was no evidence in the record before DOC supporting Canada's contention that Tembec's inter-divisional wood chip sales were "set arbitrarily to provide an internal preference". With respect to Canada's argument that DOC should have used the weighted average sales price received from Tembec's non-affiliates, the United States asserts that that would have been proper under Article 2.2.1.1 only if Tembec's books and records did not reasonably reflect the costs associated with wood chip production. The United States disagrees with Canada's argument 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". In the view of the United States, Article 2.2.1.1 addresses the "costs associated with the production and sale" of the product under consideration and does not address consideration of the "market value" of offsets to those costs. The United States asserts that market value will include the cost of a good as well as other elements such as selling expenses and profit.

7.304 In the case of West Fraser, the United States notes that Article 2.2.1.1 of the *AD Agreement* is silent as to how to assess affiliated party transactions relating to costs. The United States asserts that DOC considers whether transactions between affiliated parties occurred at arm's length prices. This is what, according to the United States, DOC did when determining the value to be attributed to West Fraser's BC sales of wood chips to its affiliated parties. To the specific arguments advanced by Canada, the United States replies as follows. With respect to Canada's first argument, the United States asserts that the evidentiary preference expressed by Canada 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. To Canada's second argument, the United States replies that it was not raised by West Fraser in the context of the investigation before DOC. The United States asserts that the facts before DOC did not show that the volumes sold by the two West Fraser-owned BC sawmills to unaffiliated parties were "too low". In addition, 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 PIR's sawmill. Regarding Canada's argument on the different treatment granted to Canfor and West Fraser, the United States asserts that Canfor was not similarly situated to West Fraser. With respect to Canada's last argument, the United States asserts that DOC found that West Fraser submitted to DOC only selective examples of the secondary evidence on which Canada says DOC should have relied. The United States argues that West Fraser failed to place the entirety of its affiliated pulp mill

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

7.305 **Japan** asserts that Article 2.2.1.1 of the *AD Agreement* allows the authorities to deviate from a respondent's recorded cost of production if these records do not "reasonably reflect the costs associated with the production and sale of the product under consideration". This discretion must be exercised in good faith based on a proper establishment of facts and on an unbiased and objective evaluation of those facts. Referring to the Appellate Body Report in *US – Hot-Rolled Steel*[428], Japan asserts that, to be unbiased, objective and fair, the authorities must exercise their discretion in an even-handed manner without favouring the interests of any particular party. Japan asserts that DOC's established practice, as applied in this investigation, is contrary to the even-handed rule. Japan further argues that DOC's revaluation of by-product revenues is contrary to a good faith obligation derived from Articles 26 and 31 of the *Vienna Convention* and the Appellate Body Reports in *US – Hot-Rolled Steel* and *US – Shrimp*.

(c) Evaluation by the Panel

7.306 This claim relates to the valuation of by-product revenues for Tembec and West Fraser, two of the Canadian respondents. The sawing of logs into softwood lumber, i.e., the product under consideration, generates by-products such as saw dust, wood chips, etc. Parties acknowledge that these products have commercial value and can be sold to generate revenues. For instance, wood chips are sold to pulp mills in order to produce paper. It is undisputed that DOC took into account the revenue from by-products – including wood chips – in calculating the cost of production for Tembec and West Fraser in this investigation.[429] Specifically, DOC treated the revenues obtained from the sale of these by-products as income that was used to offset the cost of production of softwood lumber.[430] Thus, the only issue before us is the valuation of these by-product revenues, and specifically the revenues from wood chips. This issue of valuation is significant to the calculation of the margin of dumping, as a higher valuation of wood chip revenue means a lower cost of production for softwood lumber, and a lower cost of production generally will entail a lower margin of dumping.[431]

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[428] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 148 and 193. Japan also refers to the Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 132-133.

[429] For the purpose of resolving this dispute, we are therefore not required to examine in – and decide on – which circumstances an investigating authority should offset the cost of production of the product under consideration with revenues from by-products generated in its process of production.

[430] That is, DOC reduced the exporters' cost of production of softwood lumber by the by-product revenue.

[431] This is true for several reasons. First, a lower cost of production will likely mean more sales found to be in the ordinary course of trade. A higher number of sales in the ordinary course of trade would normally result in a lower normal value, which would lower the amount of any margin of dumping. Should an investigating authority construct (normal) value in accordance with Article 2.2, a lower cost of production would result in a lower constructed (normal) value, which would also lower the amount of any margin of dumping. A higher valuation of wood chip revenue would therefore normally be in the interest of an exporter. Conversely, a lower valuation of wood chip revenue would result in a higher cost of production, which would make a finding of sales outside the ordinary course of trade more likely. The lower the number of sales in the ordinary course of trade, the higher the normal value should normally be, which would raise the amount of any

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

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

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

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

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

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

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

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

[434] *Ibid.*

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

costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. It simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Canada appears to have a similar understanding of the obligations under Article 2.2.1.1.[436]

7.311 We note furthermore that there is no reference in the text of that provision to the issue of by-products, much less to the methodology that should be used in order to value them. Both parties agree that Article 2.2.1.1 does *not* prescribe any particular methodology for calculating cost of production.[437] In particular, we note Canada's statement that Article 2.2.1.1:

> "does not set out a specific test or methodology for determining whether transactions between affiliated parties can reasonably be used in determining a respondent's costs for producing and selling the product under consideration. (…) Canada believes that transactions between affiliated parties are subject to the general requirements of Article 2.2.1.1 of the *Anti-Dumping Agreement* and, as such, must be disregarded by an administering authority where a respondent's records for those sales would lead to a calculation of costs that do not "reasonably reflect the costs associated with the production and sale of the product under consideration". Otherwise, such recorded data should be used in the determination of costs of production."[438]

7.312 We agree with the parties. We are of the view that, if negotiators had intended to include in the *AD Agreement* an obligation for an investigating authority to select a particular methodology when determining a by-product revenue offset, such an obligation would be found in Article 2.[439] This does not mean that an investigating authority's decision on the valuation of by-product revenue is not subject to the disciplines of the *AD Agreement*. We recall that Article 2.2.1.1 requires an investigating authority to calculate costs on the basis of records kept by an exporter or producer provided that such records *inter alia* reasonably reflect the costs associated with the production and sale of the product under consideration. We fail to see how an unbiased and objective investigating authority could find that records regarding by-product revenue reasonably reflect the costs associated with the production and sale of the product under consideration if those records do not reasonably reflect the extent to which the existence of the by-product reduces the costs to the producer.

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[436] Canada acknowledges that Article 2.2.1.1 expresses

> "a clear preference for the use of actual transaction data from records kept by an exporter. An investigating authority may only disregard such data where the transactions do not accord with GAAP and do not reasonably reflect costs associated with the production and sale of the product at issue. Canada believes that transactions between affiliated parties are subject to the general requirements of Article 2.2.1.1 of the *Anti-Dumping Agreement* and, as such, must be disregarded by an administering authority where a respondent's records for those sales would lead to a calculation of costs that do not "reasonably reflect the costs associated with the production and sale of the product under consideration". Otherwise, such recorded data should be used in the determination of costs of production". (Canada response to question 39 of the Panel, para. 119)

[437] Canada response to question 38 of the Panel, para. 117; US response to question 41 of the Panel, para. 69.

[438] Canada response to question 39 of the Panel, para. 119. In a similar vein, in para. 107 of its response to question 44 of the Panel the United States argues that "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".

[439] We note that the Appellate Body has repeatedly rejected arguments of parties adding to covered agreements obligations or conditions which, in the view of the Appellate Body, could not be found in the text of those agreements. *See*, for instance, Appellate Body Reports, *US – Hot-Rolled Steel* and *EC – Tube or Pipe Fittings*, paras. 166 and 77, respectively.

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

(i) Tembec

7.314 DOC concluded that the values entered into Tembec's records for internal transfers of wood chips were reasonable. In so doing, DOC rejected Tembec's arguments that the values recorded in its books for internal transfers were well below market prices, and that DOC should therefore value the internally transferred wood chips in accordance with actual market prices from arm's length transactions entered into by Tembec with third parties. Canada asserts that, in valuing wood chip revenue on the basis of the values recorded in Tembec's books, DOC contravened Article 2.2.1.1 by using records kept by the exporter which did *not* reasonably reflect the costs associated with the production and sale of the product under consideration. In addition, Canada argues that an incorrect calculation of costs impacts the determination of which sales are useable in establishing normal value contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. Finally, Canada argues that, where the calculation of costs results in an improper normal value, a fair comparison will not be possible and Article 2.4 will also be violated.[440]

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

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

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

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

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

> "[i]n determining a "reasonable" amount for valuing the *by-product offset* in interdivisional transactions, [DOC] uses the same methodology that it uses for valuing *costs* in interdivisional transactions. As a standard corporate practice, interdivisional transfer values reflect actual costs of production (since the company does not need to include a profit in its price to itself). With respect to by-products, absent any independent costs, [DOC] normally *takes the internal value assigned by the company to a by-product as a surrogate for an appropriate value for the by-product, and then tests that value for reasonableness*… Because [DOC] normally values interdivisional transfers at actual cost, which is less than market value (because of the existence of profit in market value), a value assigned to a by-product is also commonly less than market value.
>
> Canada argues that this makes no sense, because if a by-product has no cost, then there can be no "profit". However, even a by-product with no independent cost can be assigned a company's best assessment of a surrogate cost. This is what Tembec did when it set its internal transfer price."[442] (emphasis in original)

7.319 Canada's first argument concerns the fact that the methodology used in the case of Tembec was different from that used in West Fraser's determination. Canada asserts that this methodology cannot be applied in an even-handed manner "as it would penalize corporations that consume their own by-products rather than selling them to affiliated or unaffiliated purchasers".[443]

7.320 It is undisputed that two different methodologies were used by DOC for the purpose of determining the reasonableness of the valuation of by-product (wood chip) revenues in West Fraser's records, on the one hand, and Tembec's records, on the other. We note that West Fraser and Tembec were in different factual situations. While Tembec was a single entity including, *inter alia*, sawmills and pulp mills, West Fraser was divided in legally separate companies. For this reason, we do not consider that DOC discriminated against Tembec by treating it differently from West Fraser. In addition, we note the assertion made by the United States that the methodology used in the case of Tembec is the same DOC uses for valuing costs in interdivisional sales. This has not been disputed by Canada. Thus, DOC's treatment of Tembec is *consistent* with its approach with respect to cost valuations when faced with interdivisional sales. This being the case, we are unable to conclude that DOC acted in a biased, non-objective or non-even-handed manner in applying a methodology to Tembec different from that used with respect to West Fraser.

7.321 Canada argues that Article 2.2.1.1 requires that a by-product offset must reasonably reflect the market value for the by-product at issue; otherwise, the cost of production of the main product – in our case, softwood lumber – would be either overstated or understated.[444] The United States disagrees.[445] We do not find any textual basis in Article 2.2.1.1 on which we could conclude – as

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[442] US response to question 42 of the Panel, paras. 97-98. *See* also US response to question 129 of the Panel, para. 85.

[443] Canada second written submission, para. 312.

[444] Canada responses to questions 44 and 70 of the Panel, paras. 123 and 178, respectively. *See* also Canada second written submission, para. 307.

[445] The United States asserts that:

> "Article 2.2.1.1 addresses the "costs associated with the production and sale" of the product under consideration and does not address consideration of the "market value" of offsets to

Canada argues – that, for the requirements of Article 2.2.1.1 to be met, it is necessary that the by-product revenue offset reflect the *market value* of those by-products.[446] Nor, has Canada pointed to any justification.[447] For this reason, we do not consider that DOC was precluded from using the actual cost of the input – as it appeared in Tembec's records – as the benchmark for valuing the by-product revenue offset in the case of Tembec.[448] Nor, we consider that using the actual cost of the input in case of transactions between divisions of the same legal entity – where this is done in a consistent and non-discriminatory fashion – is inconsistent with Article 2.2.1.1 or shows any bias or non-objectiveness on the part of an investigating authority.

7.322 DOC outlined in the IDM the methodology used in order to examine whether the valuation recorded in Tembec's books was reasonable.[449] In particular, we note that the methodology used in this case – the actual cost of the input – was the normal test that DOC applies with regard to transactions between divisions within the same legal entity.[450] The United States explained in its submissions before us that it determined that the value recorded in Tembec's books for internal transfers of wood chips was reasonable once DOC had taken into account "the critical factor of the amount of profit. (...) In th[e] case [of Tembec], an adjustment for profit led to the conclusion that prices for inter-divisional transfers [[**********]] from prices to non-affiliates. In fact, once [DOC] took into account profit and the varying quality and types of wood chips, it determined "no preferential prices" existed".[451] In other words, after applying that test DOC concluded that the value recorded for the internal transfers of wood chips was reasonable. Canada asserts that this constitutes *post hoc* rationalization that must be rejected. In addition, Canada contends that the reference to costs and profits in the case of by-products finds no support in accounting. First, we note that Canada has not raised any claim under Articles 6.9 or 12.2 of the *AD Agreement*. Thus, we are precluded from examining the consistency of DOC's determination in light of the obligations imposed under those provisions. Furthermore, we note that the methodology used by DOC is outlined in the IDM. While we would have preferred that more information had been disclosed in the IDM, we are of the view that the information contained therein is sufficient for us to review the consistency of DOC's determination. We note, in this regard, that DOC's practice is to use the "actual cost of the input". As noted by the United States, the "actual cost of the input" will normally be lower than the market value – as in the case of Tembec. Bearing this in mind, we fail to see how DOC could have determined that the valuation for internal transfers of wood chips recorded in Tembec's books was reasonable – as the IDM shows DOC determined in the context of the investigation at issue – when compared to

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> those costs. "Market value" is different from "cost". Commerce has used market value as a benchmark for determining the reasonableness of prices paid by a company to purchase a by-product from an affiliated company. It also has used market value as a benchmark for determining the reasonableness of values assigned to a by-product in interdivisional-transactions. However, this does not mean that a "reasonable amount" will *equal* "market value". Market value will include the cost of a good, but it will also include other elements, such as selling expenses and profit". (emphasis in original) (US second written submission, para. 92)

[446] Indeed, to accept Canada's argument that Article 2.2.1.1 requires an investigating authority to ensure that the by-product offset reasonably reflects the market value "would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so". (Appellate Body Report, *India – Quantitative Restrictions*, para. 94)

[447] Although we asked Canada to explain its statement that Article 2.2.1.1 requires that market price is the appropriate benchmark for valuing by-product revenue offsets, it did not provide any convincing basis on which we could conclude that Article 2.2.1.1 contains such a requirement. (Canada response to question 70 of the Panel, para. 178)

[448] We recall that the United States normally values interdivisional transfers at actual cost, as stated in the IDM (*see* para. 7.300, *supra*).

[449] Exhibit CDA-2, IDM, Comment 11.

[450] *Id.*, pp. 60-61.

[451] US first written submission, para. 243. Confidential information contained in the bracketed section has been removed.

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

7.323 Canada argues that by-products neither have costs nor do they yield profits. We do not understand the United States to argue that by-products have costs. Indeed, the IDM reads: "[d]ue to the fact that wood chips are a by-product of the production of softwood lumber, there is no separately identifiable costs associated with the wood chips that are transferred between Tembec divisions. Therefore, we analysed the wood chips sales transactions between Tembec's sawmills and its internal divisions to evaluate whether the internally set transfer prices are reasonable".[452] While the IDM could have been more explicit on this point, we are satisfied with the explanations of the United States that the internal transfer price was treated as a surrogate for cost.[453] Canada may be correct in that for accounting purposes by-products do not have a cost. However, we are of the view that when selling wood chips the producer must, at least, recover certain costs it may incur with respect to the by-product. This could include *inter alia* storage and transport of the by-product at issue to the purchasers' premises. Even though for accounting purposes this may not be "costs", *strictu sensu*, for the purposes of the cost determination in an anti-dumping investigation we do not consider it unreasonable for an investigating authority to treat those items as costs. In addition, DOC appears to have taken into account other factors (the varying quality and types of wood chips) when assessing the reasonableness of the valuation of internal transfers in Tembec's books. With respect to the profit, we recall that the United States has asserted that interdivisional transfer values reflect actual costs of production, since a company does not need to include a profit in its price to itself.[454] Canada has not disputed this. As in the case of costs, we are not convinced by Canada's arguments that by-products may not yield profits. While for accounting purposes Canada may be correct in its statement, we do not consider that this would invalidate a determination that the difference between an amount booked in the exporter's records for internal transfers of by-products – the surrogate for costs – and the amount received for sales in the open market – i.e., to unaffiliated parties – can be treated as profit in the context of an anti-dumping determination. Article 2.2.1.1 would not seem to support Canada's position.

7.324 For the foregoing reasons, we consider that an unbiased and objective investigating authority could have used the actual cost of the input as recorded in Tembec's books as a benchmark for valuing internal transfers of wood chips. We further consider that an unbiased and objective investigating authority, based on the facts before DOC at the time of determination, could have determined that the valuation in Tembec's books for internal transfers of wood chips was not unreasonable. Hence, we reject Canada's claim that the United States acted inconsistently with Article 2.2.1.1.

7.325 Canada claims that an incorrect calculation of costs impacts the determination of which sales may be used in establishing normal value, contrary to Article 2.2.1, as well as the calculation of constructed (normal) value, contrary to Article 2.2. It further argues that the use of an amount for costs of production that does not reasonably reflect costs for producing and selling the product under investigation results in an improper calculation of normal value which in turn results in an unfair comparison between that normal value and export price for purposes of Article 2.4.[455]

7.326 We have, however, determined that Canada has *not* established that the United States acted inconsistently with Article 2.2.1.1. Hence, we cannot agree with the premise on which Canada bases the alleged violations, i.e., that DOC calculated the cost of production for Tembec incorrectly. For the

[452] Exhibit CDA-2, IDM, Comment 11, p. 61.
[453] US response to question 42 of the Panel, para. 98.
[454] *See* para. 7.316, *supra*.
[455] Canada response to question 51 of the Panel, paras. 144-145.

foregoing reasons, we consider that Canada has *not* established that the United States acted inconsistently with its obligations under Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[456]

(ii) West Fraser

7.327 Unlike Tembec's case, DOC rejected the valuation in West Fraser's books for sales of wood chips to affiliated parties (pulp mills) in BC. DOC re-valued those sales transactions based on the price of wood chips in West Fraser's unaffiliated transactions. In so doing, Canada asserts that DOC acted inconsistently with Article 2.2.1.1 of the *AD Agreement*. As in the case of Tembec, Canada claims consequential violations of Articles 2.2, 2.2.1 and 2.4 of the *AD Agreement*.[457]

7.328 The main issue is therefore whether, in re-valuing West Fraser's revenue from sales of wood chips to affiliated parties instead of using the value recorded in West Fraser's books, DOC acted inconsistently with Article 2.2.1.1.[458] In examining this issue, we recall that Article 2.2.1.1 establishes that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation" provided certain conditions are met. In the case at issue, the United States explains that:

> "[i]n determining whether a company's records reasonably reflect costs associated with production and sale of a product, [DOC] considers whether transactions between affiliated parties occurred at arm's length prices. It did that analysis [in the case of West Fraser] and concluded that affiliated sales did not occur at arm's length prices. Accordingly, it relied on unaffiliated sales in valuing the West Fraser's wood chip offset."[459] (footnote omitted)

7.329 We do not understand Canada to argue that the test applied by the United States is *per se* inconsistent with Article 2.2.1.1.[460] For the purpose of resolving this dispute, we therefore assume that the *AD Agreement* did not preclude DOC from carrying out an arm's length test in order to determine whether prices of wood chips charged to affiliated parties are reliable, and therefore can be used as an offset to the cost of production of the product under consideration. We understand Canada's argument to be that, had DOC taken into account information available on the record, it could not have disregarded the revenue for sales of wood chips to affiliated parties in BC appearing in West Fraser's books. It is our task to examine whether, as claimed by Canada, based on the information on the record at the time of determination, an unbiased and objective investigating authority could not have determined that the valuation of sales of wood chips to affiliated parties in BC contained in West Fraser's records was unreasonable.

7.330 In the course of the investigation, West Fraser put forth two arguments in support of its contention that DOC should use the revenue booked by West Fraser from sales of wood chips to

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[456] Accordingly, we need not address the United States' argument, based upon the findings of the *Egypt – Steel Rebar* panel (para. 7.333), that Article 2.4 relates only to the *comparison* of export price and normal value, and does not regulate the establishment of the normal value as such.

[457] *See* para. 7.314, *supra*.

[458] Canada response to question 1 of the Panel, para. 1(vi).

[459] US first written submission, para. 222.

[460] Canada asserts that it:

> "does not dispute that a determination of non-arm's length pricing could support a determination that books and records containing such prices might not reasonably reflect the costs associated with the production and sale of the product under consideration. In such an instance, the investigating authority might legitimately resort to alternative data and disregard the books and records". (Canada first written submission, para. 243)

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

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

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

7.332 We note that Canada has not contested DOC's statements that West Fraser did not provide all the information on the sample chosen by DOC.[466] Nor has Canada pointed to any justification of record for West Fraser's non-submission of the sample data requested by DOC. We do not consider that it could be required from an unbiased and objective investigating authority to use the partial information submitted by West Fraser in order to carry out the arm's length test, especially where no explanation is provided as to why the information requested could not be submitted.[467] Bearing all these facts in mind, we consider that Canada has not established that the United States has acted

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[461] Canada response to question 37 of the Panel, Annex I, pp. A8-10.
[462] Exhibit CDA-161, Comments Regarding Ministerial Errors, pp. 4-6.
[463] *Id.*, p. 6.
[464] *Ibid.*
[465] Exhibit CDA-2, IDM, Comment 11, pp. 61-62.
[466] Rather, Canada argues that, had DOC considered the information provided by the exporter inadequate, then DOC should have notified West Fraser of this fact. (Canada second written submission, para. 290)
[467] In so concluding, we have taken into account Canada's argument that West Fraser provided DOC with information by QRP to illustrate that, if West Fraser's highest priced sales to affiliated parties were not made at inflated prices, then its lower priced sales similarly could not have been made at inflated prices. However, Canada has not pointed to any evidence on the record in support of its assertions.

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

7.333 In examining Canada's second argument, we note that, in its Comments Regarding Ministerial Errors, West Fraser requested DOC not to use the average prices of the McBride and PIR sawmills to unaffiliated parties in BC as a benchmark against which the average price of wood chips sales to affiliated parties would be compared. Furthermore, we note that the Final Determination and the IDM were issued *before* the submission of West Fraser's Comments Regarding Ministerial Errors.[469] Bearing these facts in mind, we do not consider that it could be required from an unbiased and objective investigating authority to take into account West Fraser's comments. The fact that, at that stage, DOC could still have made changes to the Final Determination – under the form of correction of ministerial errors[470] – does not alter our conclusion. Article 5.10 of the *AD Agreement* imposes strict deadlines on investigating authorities for investigations to be concluded. In our view, the right of exporters to submit new data or arguments must therefore respect that fundamental principle enshrined in the *AD Agreement*. Bearing in mind the timing of West Fraser's submission and the substantive nature of its comments, we consider that DOC was not required to reopen its investigation to analyse the comments submitted by the exporter. In sum, we are of the view that Canada has not established that the United States acted inconsistently with Article 2.2.1.1 of the *AD Agreement* in disregarding West Fraser's arguments contained in its Comments Regarding Ministerial Errors.[471]

7.334 In reaching this conclusion, we have taken into account Canada's comment that, in light of the methodology used by DOC at the preliminary stage for the purpose of valuing the by-product revenue offset, "there was no reason why West Fraser would have (or should have) argued that its sales to unaffiliated parties *in British Columbia* were too small or unrepresentative to constitute reliable evidence of market prices in British Columbia."[472] (emphasis in original)

7.335 In this regard, it is stated in the IDM that:

> "West Fraser maintains that chip prices vary significantly by region and that any comparison in the aggregate is meaningless. West Fraser contends that it explained at verification that chip prices vary significantly between British Columbia and Alberta and that they therefore should not be compared directly."[473]

7.336 In addition, it is stated in West Fraser's Cost Verification Report that:

> "[DOC] noted that the schedule for wood chips was divided between sales in Alberta and sales in British Columbia. For sales in Alberta, the average affiliated per-unit sales value of CAN$ [****] compared to an average unaffiliated per-unit sales of CAN$ [****]. For the sales in British Columbia, the average affiliated per-unit sales

[468] While issues relating to the rejection of data and use of facts available by an investigating authority might fall under the coverage of Article 6.8 and Annex II of the *AD Agreement*, Canada has not made any claim under that provision.

[469] The IDM and the Final Determination were published on 21 March 2002 (Exhibit CDA-2, IDM, cover page) and 2 April 2002 (Exhibit CDA-1, Final Determination), respectively. West Fraser's Comments Regarding Ministerial Errors are contained in a letter addressed to DOC dated 9 April 2002 (Exhibit CDA-161, Comments Regarding Ministerial Errors).

[470] We note that the concept of "ministerial errors" is not contained in the *AD Agreement*. Rather, it reflects a practice of the United States.

[471] We note that a recent panel expressed a similar view. (Panel Report, *Argentina – Poultry*, paras. 7.196-7.197)

[472] Canada second written submission, para. 276.

[473] Exhibit CDA-2, IDM, Comment 11, p. 57.

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

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

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

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

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

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

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

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

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

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

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

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

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

7.342 The United States replies that West Fraser made no argument that the long-term contract by the McBride mill 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 in BC (PIR).

7.343 We recall that West Fraser sold wood chips to unaffiliated parties from two sawmills in BC, namely McBride and PIR. We understand Canada to argue that DOC should not have relied on McBride's sales of wood chips to unaffiliated parties in its arm's length determination because:

- McBride's sales to unaffiliated parties were made pursuant to a long-term contract that prevented raising wood chips prices to its (unaffiliated) customer when market prices for wood chips rose; and

- McBride's sales to unaffiliated parties took place when chip prices were lowest and not reflective of BC prices during the entire POI.[480]

7.344 With respect to the contract, Canada explained that prices under the long-term contract of the McBride mill were recalculated on a quarterly basis in order to reflect developments in market prices for wood chips during the previous quarter.[481] Bearing in mind that prices were periodically recalculated, we do not consider that the terms of the contract are *per se* sufficient justification for a conclusion that prices of wood chips sold by McBride to unaffiliated parties were not reliable. Canada's second argument has to do with the timing of McBride's sales to unaffiliated prices. Thus, Canada asserts that they took place at the beginning of the POI, when wood chips prices were at their lowest. This has not been contested by the United States. We note that West Fraser's average price of wood chips to unaffiliated parties in BC was calculated based on sales of wood chips to unaffiliated parties made by the McBride and PIR sawmills. Therefore, the average price of wood chips to unaffiliated parties included not only data of McBride but also of PIR. Canada has argued and shown that all sales of wood chips to unaffiliated parties in BC made by McBride took place in the first two months of the POI, but has not directed us to any information on the record on the timing and conditions of sale of PIR. We are therefore unable to determine whether the average price calculated by DOC for sales of wood chips to unaffiliated parties was impacted at all by McBride's data to such an extent that an unbiased and objective investigating authority could not have averaged McBride and PIR's sales data, as DOC did. Having reached this conclusion, we reject Canada's argument.

7.345 In addition, West Fraser argued during the investigation that DOC should have evaluated whether West Fraser's affiliated party sales were made at arm's length prices using the same method used for affiliated chip sales made by Canfor. This treatment was justified because, according to West Fraser, both companies were in similar situations. Canada therefore argues before us that DOC should not have applied different benchmarks for West Fraser and Canfor. The United States contends that Canfor was not similarly situated to West Fraser. The United States asserts that West Fraser had sales to unaffiliated parties in BC, while Canfor did not. In addition, the United States argues that sales in BC made by West Fraser were of its own product mix, and thus the best evidence of the value of an offset in West Fraser's process. By contrast, Canfor had no sales in BC, and therefore, the best evidence of the value of an offset for Canfor was other companies' arm's length sales in that market.

7.346 We note that Canada has not disputed the fact that, while Canfor did *not* have any sales of wood chips to unaffiliated parties in BC during the POI, West Fraser did. In our view, the factual situations of Canfor and West Fraser are therefore significantly different. In Canfor's case, there were no sales of wood chips to unaffiliated parties in BC; hence, the investigating authority was left with no choice but to use data other than that of the exporter itself in order to carry out the arm's length

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

[481] Canada asserted that "[t]he McBride contract set prices at the beginning of each calendar quarter based on market conditions in the previous quarter". (Canada response to question 132 of the Panel, para. 120)

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

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

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

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

(a) Factual Background

7.349 Canada's claim concerns DOC's treatment of Slocan's profits and losses from lumber futures hedging contracts traded on the CME. Slocan entered into two types of lumber futures hedging contracts during the POI. Under the first type of contract, Slocan actually delivered the lumber under the terms of the futures contract. These transactions were included in Slocan's reported sales and are *not* in dispute. Other contracts were sold/traded "before and instead of physical delivery".[482] The revenues obtained through these operations were recorded in Slocan's books as lumber selling activity. In response to DOC exporters' questionnaire, Slocan reported the net revenue earned on futures contracts as an offset to direct selling expenses. DOC rejected the claimed adjustment in its Preliminary Determination on the ground that that income was investment revenue, rather than a direct selling expense; hence, it should not be treated as a sales specific deduction/addition. After DOC's Preliminary Determination, Slocan restated its claim for an adjustment to direct selling expenses or, in the alternative, requested DOC to account for futures profits and losses as an offset to financial expenses. In its Final Determination, DOC rejected Slocan's request as follows:

> "[a]ny sales of subject merchandise that occurred during the POI as a result of a futures contract have been included in Slocan's reported sales list. However, we have not included in our analysis profits on the sale of a futures contracts that did not result in the shipment of subject merchandise. Such profit is realized from Slocan's position on the CME and as a producer of softwood lumber, but not from its actual sale of subject merchandise.
>
> We also have not applied these profits as an offset to Slocan's direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs [DOC] to make circumstance of sales adjustments only for direct selling expenses and assumed expenses. Section 351.410(c) defines direct selling expenses as "expenses . . . that result from and bear a direct relationship to the particular sale in question". Accordingly, where no sale of subject merchandise occurred, there can be no circumstance of sale adjustment for direct selling expenses.

[482] Canada second written submission, para. 315.

> Slocan suggests that as an alternative, [DOC] apply the profits as an offset to Slocan's financial expenses. In support of this argument, Slocan disputes [DOC]'s statement in its preliminary determination calculation memo that these profits are "investment revenues" by stating that Slocan is engaging in hedging rather then speculative activity, and that sales on the futures market are integral parts of the company's normal sales and distribution process. While we agree that Slocan's lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are related to Slocan's financing activity. As such, the futures profits should not be used to offset the company's interest expense".[483]

(b) Arguments of the Parties

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

7.351 The **United States** replies that DOC found that Slocan's lumber hedging activity is linked to overall selling activities and reduction of Slocan's exposure to price changes. The United States asserts that hedging is only *indirectly* linked to selling activities, because there is no actual sale and delivery of lumber to a buyer. Because the revenue from trading softwood lumber futures contracts could not be directly related to sales of softwood lumber, the United States asserts that DOC was justified in finding that Slocan's futures hedging contracts are not direct selling expenses. Bearing in mind that futures profits were recorded as lumber sales revenues rather than production expenses, the United States argues that DOC was justified in rejecting Slocan's request for the futures profits to offset financial expenses.

(c) Evaluation by the Panel

7.352 Canada claims that, based on the facts before it, DOC's refusal to grant Slocan an adjustment under Article 2.4 of the *AD Agreement* for the net revenue it earned through its trading of softwood lumber futures contracts on the CME, resulted in the United States being in violation of its obligations

[483] Exhibit CDA-2, IDM, Comment 21, pp. 92-94.

under Article 2.4 of the *AD Agreement*. Canada claims that, if we concluded that the United States has not violated Article 2.4, we should find that DOC should have accounted for that revenue when determining the constructed (normal) value and that the United States, by not doing so, has violated Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2. From the record, it is clear to us that DOC did not dispute the existence of this revenue and that DOC accepted that the revenue was earned from hedging activities, rather than from speculation in futures contracts. The issue before us, is to determine whether DOC should have made an adjustment under Article 2.4 to take the net revenue from Slocan's futures contracts into account, and if we find in the negative, to determine whether the United Stated has acted inconsistently with Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 in not having taken that income into account in the dumping calculation. We note that the revenue at issue was generated by the buying and selling of futures contracts that did *not* result in the shipment of subject merchandise.[484]

7.353 We understand Canada's first argument to be that DOC should have granted an adjustment under Article 2.4, either under the language "conditions and terms of sale" or "any other differences which are also demonstrated to affect price comparability". The United States asserts that it was not demonstrated that the differences at issue affected price comparability. In addition, the United States argues that the futures contracts at issue were not conditions and terms of sale related to particular sales transactions of lumber.

7.354 Article 2.4 provides, in relevant portion, as follows:

> "[a] fair comparison shall be made between the export price and the normal value. (…) Due allowance shall be made in each case, on its merits, for differences which affect *price comparability*, including differences in conditions and terms of sale (…) and any other differences which are also demonstrated to affect price comparability." (emphasis added; footnote omitted)

7.355 We recall our discussion of the obligations imposed by this provision in paragraphs 7.165-7.167, *supra*, and in particular, the Appellate Body statement in *US – Hot-Rolled Steel* that:

> "Article 2.4 of the *Anti-Dumping Agreement* provides that, where there are "differences" between export price and normal value, which affect the "comparability" of these prices, "[d]ue allowance shall be made" for those differences". The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "*any other differences* which are also demonstrated to affect price comparability". (emphasis added) There are, therefore, no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance"".[485] (emphasis in original)

7.356 An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a *difference* between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, an adjustment would not be required to be made by that provision.

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[484] Thus, our examination and conclusions below do not cover Slocan's sales on the CME that resulted in the shipment of subject merchandise.

[485] Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

7.357 The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are all black. The difference is obvious; in fact, it is one of those differences listed in Article 2.4 itself – a difference in physical characteristics. However, there might be no variable cost difference among the two cars because the cost of the paint – whether red or black – might be the same. If instead of differences in cost, we were looking at market value differences, we might reach the same conclusion if, either the seller or the purchaser, would be willing to sell or purchase at the same price, regardless whether the car is red or black.[486]

7.358 It is also important to note that there are no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an *allowance*. In addition, we consider that the obligation on an investigating authority is to examine the merits of each claimed adjustment and to determine whether the difference affects price comparability between the allegedly dumped product and the like product sold on the domestic market of the exporting country.[487]

7.359 Recalling the standard of review which we are applying and the requirement that we are not to perform a *de novo* review, we will examine the submissions of the parties to determine whether an unbiased and objective investigating authority could have concluded that, based on the facts before DOC at the time of determination, the granting of an Article 2.4 adjustment was required.

7.360 The first issue that must be examined, is whether there were *differences* affecting the normal value and the export price in the two markets compared, i.e., the United States and Canada. It is undisputed that Slocan's hedging activities took place in the United States only, that is, on the CME. Neither party has argued that Slocan hedged softwood lumber futures contracts in Canada.

7.361 We note that Canada asserts that:

> "[a]s Slocan demonstrated during the investigation, particularly in Verification Exhibit 21, hedging through futures trading activity affects all sales in a particular market. Slocan Sales Verification Exhibit 21 *Random Length--An Introductory Hedge Guide,* at VE2381 to VE2384 (Exhibit CDA-119). Slocan has greater flexibility to respond to changes in price trends because it knows in advance the minimum price that a certain percentage of its sales, will achieve. This affects the other prices that Slocan is willing to offer and accept in that market.";[488]

and that:

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[486] In our view, whether a particular factor affects price comparability might be considered from the point of view of the purchaser. The question is whether a purchaser would be willing to make a price differentiation between two products. For example, would a purchaser be prepared to pay more for a car painted black than for the very same car when painted red, although the costs for both cars are identical? In other words, if the behaviour of the purchaser would change, depending on the colour of the car, it could be considered that that difference in physical characteristics, that is, the difference in colour, affects price comparability.

[487] In addition to these comments, we recall that we have set out our understanding of Article 2.4 in paras. 7.165-7.167, *supra*.

[488] Canada second written submission, para. 336, note 356.

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

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

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

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

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

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

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

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

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

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

7.367 Article 2.2.1.1 reads as follows:

> "[f]or the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those 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." (footnote omitted)

7.368 We recall our understanding of the obligations imposed under Article 2.2.1.1 in paragraphs 7.236-7.237, *supra*. We recall that Article 2.2.1.1 provides that costs must normally be calculated on the basis of records kept by the exporter, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. In addition, it establishes that investigating authorities must consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation, provided certain conditions are met. Canada asserts that, consistent with Article 2.2.1.1, DOC should have offset financial expense with the futures profits in determining the constructed (normal) value. In light of our analysis of the obligations contained in Article 2.2.1.1, we do not consider that Canada's argument relate to any of the obligations imposed in Article 2.2.1.1. Having rejected the sole basis on which Canada supported its claim of an Article 2.2.1.1 violation, we must reject Canada's claim.[493]

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[492] Canada response to question 1 of the Panel, para. 1(vi).

[493] In addition, we note that Slocan treated this income as "sales revenue" rather than as a COGS or a SG&A item. For DOC to have treated it differently – either as a COGS or SG&A item – Slocan should have argued and shown in the context of the investigation that there were reasons for DOC to depart from "the records kept by the exporter", which we do not have any indication it did. Failing to do so, the proviso of

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

7.370 Article 2.2 reads as follows:

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

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

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

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

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

[494] Canada response to question 1 of the Panel, para. 1(vi). We note that, in the restatement of claims, Canada did not include Article 2.1 of the *AD Agreement* as one of the provisions allegedly violated by the United States. In view of this, we consider that the Article 2.1 claim is not before us and, hence, we will not examine it.

[495] In any case, we understand that Slocan had not treated in its records this income as a SG&A item but rather as a "sales revenue". As discussed in paragraphs 7.236-7.237, *supra*, Article 2.2.1.1 expresses a preference for the costs to be determined on the basis of the records kept by the exporter. In this instance, Canada is requesting us to find that DOC should have departed from the records kept by Slocan and treat the income at issue as part of the company's SG&A costs. However, we recall that Slocan did not treat the revenue at issue as a SG&A item but rather as a "sales revenue". For us to conclude along the lines of Canada's request, we are of the view that Slocan should have argued and demonstrated that there were reasons, based on the proviso of Article 2.2.1.1, for DOC to depart from Slocan's records, that is to treat the income at issue as a SG&A item rather than as a "sales revenue". Canada has not pointed to any evidence on record showing that Slocan did so in the context of the investigation.

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

(a) Arguments of the Parties

7.374 **Canada** argues that, by improperly initiating and continuing the investigation, failing to properly determine the "like product", failing to make an adjustment for physical differences which affected price comparability, zeroing negative margins and improperly calculating each respondent's costs, the United States applied inflated margins of dumping to Canadian softwood lumber products and applied a measure against dumping that was contrary to Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994*.

(b) Evaluation by the Panel

7.375 Under this claim, we understand Canada to argue that, because the United States has acted inconsistently with certain provisions of the *AD 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 – which constitute separate claims examined in Sections VII.D-VII.N, *supra* – the United States has also acted inconsistently with Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994*.[496] This is therefore a consequential claim.[497]

7.376 At the outset, we note that, in its Panel Request, a reference to Article 9.3 can only be found in section 3 thereof. This section covers Canada's claims examined in Sections VII.H-VII.N of this Report only. Bearing this in mind, and that there is no general reference to a violation of Article 9.3 elsewhere in the Panel Request, we are of the view that our examination and findings with regard to Article 9.3 must be restricted to the claims examined in Sections VII.H-VII.N of this Report.

7.377 Our decision on this claim of violation of various provisions of the *AD Agreement* and of *GATT 1994* will depend entirely on our findings with respect to the claims to which this claim is related. We recall that in Sections VII.D-VII.N, *supra*, we have ruled that, in using "zeroing" in determining the existence of margins of dumping, the United States has acted inconsistently with Article 2.4.2 of the *AD Agreement* and that we have dismissed the remaining claims of Canada. Bearing in mind our conclusions with regard to the claims examined in those Sections and what is stated in paragraph 7.376, *supra*, we find that:

- Canada's claim of violation of Articles 1 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994* predicated on claims that we have rejected in Sections VII.D-VII.G fails; and that

- Canada's claim of violation of Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994* predicated on claims that we have rejected in Sections VII.H, VII.J-VII.N also fails.

7.378 With respect to the claim regarding "zeroing" – examined in Section VII.I, *supra*, we recall that we have decided that the United States has *not* acted consistently with Article 2.4.2 of the *AD Agreement*. It is therefore with respect to this claim that we must determine whether – as Canada argues – the United States "applied a measure against dumping that was contrary to Articles 1, 9.3 and 18.1 of the *AD Agreement* and Article VI of *GATT 1994*". We note that a panel "need only address

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[496] Canada response to question 1 of the Panel, para. 1 (vii).

[497] We understand that this is a consequential or dependent claim based on the arguments that Canada has put forward in support of the alleged violations of Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994*. (*See* para. 7.374, *supra* and Canada response to question 1 of the Panel, para. 1(vii))

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

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

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

(a) the United States has acted inconsistently with:

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

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

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

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

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

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

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

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

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

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

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

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

(ix) Articles 2.2, 2.2.1, 2.2.1.1 and 2.4 of the *AD Agreement* in its calculation of the amounts for by-product revenue from the sale of wood chips as offsets for Tembec and West Fraser;

(x) Article 2.4 of the *AD Agreement* by not granting Slocan an adjustment for the net revenue earned on its trading of softwood lumber futures contracts, or Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 by not taking this net revenue into account when determining the constructed (normal) value;

(xi) Articles 1 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994* with respect to Canada's claims referred to in paragraphs 8.1.(b)(i)- 8.1.(b)(iv), *supra*;

(xii) Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994* with respect to Canada's claims referred to in paragraphs 8.1.(b)(v)- 8.1.(b)(x), *supra*.

(c) in light of the findings in Sections 8.1(a) and 8.1(b), *supra*, we apply judicial economy and do not rule on Canada's claims under:

(i) Article 2.4 of the *AD Agreement* ("fair comparison") in respect of zeroing; and

(ii) Articles 1, 9.3 and 18.1 of the *AD Agreement*, and Article VI of *GATT 1994* with respect to the matter referred to in paragraph 8.1.(a)(i), *supra*.

B. NULLIFICATION OR IMPAIRMENT

8.2 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to Canada under that Agreement.

C. RECOMMENDATION

8.3 In its Panel Request, Canada requested us to recommend the Dispute Settlement Body that "the United States revoke the anti-dumping order in respect of softwood lumber from Canada".[500] In addition to the revocation of the measure at issue, in its first written submission Canada requested us to suggest that the United States could implement the Panel's recommendation by "return[ing] the cash deposits collected pursuant to an illegal investigation and an illegal determination of dumping".[501]

8.4 In considering Canada's request, we first recall that Article 19.1 of the *DSU* provides in relevant part that:

> "[w]hen a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or

[500] WT/DS264/2.

[501] Canada first written submission, para. 550. *See* also Canada second oral (opening) statement, para. 112.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[507] Thus, the Appellate Body stated that "[a]ll types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2." (Appellate Body Report, *EC – Bed Linen*, para. 58)

9.6 My colleagues have attempted to develop such an alternative to the reasoning found in *EC – Bed Linen*. They have concluded that the obligation to include in the weighted average export price "all comparable export transactions" applies not only to the comparison stage but *also* to the aggregation of the results of multiple comparisons. They consider that through zeroing the United States partially excluded from the aggregation process the results of comparisons for types for which the weighted average normal value was less than the weighted average export price. They conclude that the United States therefore violated Article 2.4.2 by not taking into account all comparable export prices when calculating the overall margin of dumping. I must respectfully disagree.

9.7 It will be recalled that, when an investigating authority engages in multiple averaging, it first divides the subject merchandise (and the foreign like product) into groups based upon common characteristics (which may relate to physical characteristics, level of trade, date of sale, etc). It calculates a weighted average normal value and export price for each group, and then compares the weighted averages in order to determine the extent of the dumping, if any, for that group. The result will be multiple margins of dumping (or amounts of dumping, if one prefers), one for each group. In order to determine an overall margin for the product under investigation, however, it will be necessary in some way to aggregate the results from the comparisons for each group. An analogous process will be involved where an investigating authority performs its calculations on a transaction-to-transaction basis. In that case as well, the investigating authority will derive margins (or amounts) of dumping for a number of specific transactions, and will then have to aggregate those margins in order to determine an overall margin of dumping for the product.

9.8 There is no doubt that, as the investigating authority in the case of multiple averaging is calculating weight-averaged normal values and export prices for each group, it is required in the investigation phase to respect Article 2.4.2. This includes the obligation under Article 2.4.2 to include in each of the average-to-average comparisons "all comparable export transactions". In this case, however, there is no suggestion that DOC has failed to include any comparable export transactions in any of the average to average comparisons DOC made in this case. Nor is there any indication that DOC failed to *fully* take into account any export transaction in the conduct of each average to average comparison. Based on the record before us, it must be considered that each and every one of the export transactions considered by DOC was fully taken into account when performing the comparison between normal value and export price for a given type. Rather, the claim of Canada, and the reasoning of my colleagues on this Panel, is based upon the view that the United States breached the obligation to include "all comparable export transactions" as a result of the manner in which the United States aggregated the results of its multiple comparisons.

9.9 It seems to me that my colleagues are trying to reconcile two mutually incompatible positions. They conclude that Article 2.4.2 does not require that the overall margin of dumping for a product be calculated on the basis of a single weighted average export price and single weighted average normal value. At the same time, they seem to conclude that the ultimate result of the aggregation of multiple average to average comparisons must be the same as if DOC had conducted a single average to average comparison, or in any event that once it has performed multiple averages DOC is required to average those averages, using negative dumping margins to offset positive margins. In my view, these conclusions are unconvincing. Article 2.4.2 allows multiple averaging, and the obligations of Article 2.4.2 relate to each of the average to average comparisons performed. This is all the guidance that can be determined from the text of Article 2.4.2. I can see nothing in Article 2.4.2 that specifically dictates how those "intermediate" margins are to be aggregated in order to calculate an overall margin of dumping for the investigated product for a given exporter, any more than I can see anything in Article 2.4.2 that prescribes how the results of transaction-by-transaction comparisons are aggregated.

9.10 In this respect, it is noteworthy that the *AD Agreement* is silent as to aggregation not only with respect to the first (average-to-average) comparison methodology. I note as a matter of relevant

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

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

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

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

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

[509] My colleagues decline to address the issue of zeroing in the context of individual to individual transactions on the grounds that it is not within the Panel's terms of reference. While it is certainly true that no such claim is before us, I believe that the language in Article 2.4.2 regarding transaction to transaction comparisons is highly relevant context for interpreting other parts of Article 2.4.2.

[510] In fact, the EC and Japan were involved in a high-profile dispute with respect to zeroing throughout the later stages of the anti-dumping negotiations, beginning with a request for consultations on 8 July 1991 and culminating in the circulation of a Panel Report in *EC –Audio Cassettes*. (Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, 28 April 1995, ADP/136.) This Report was never adopted.

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

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

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

9.16 In terms of approach, I believe that a claim based on a highly general test such as "fair comparison" should be approached with caution by treaty interpreters. The concept of fairness in the abstract is highly subjective, and a too-ready reliance on the "fair comparison" requirement could result in interpretations that were highly unpredictable. Further, I am not inclined to accept that the drafters intended that the Members abdicate their responsibility to negotiate rules in this area and leave the rule-making function in the hands of the dispute settlement system. Taking this into account, I approach Article 2.4's "fair comparison" requirement with two elements in mind. First, any conception of "fairness" (and "unfairness") should be solidly rooted in the context provided by the *AD Agreement* (and perhaps the *WTO Agreement* more generally). Second, given the subjectivity of the concept of fairness, the principles of Article 17.6(ii) of the *AD Agreement* regarding permissible interpretations are particularly relevant.

9.17 Canada has made only general statements regarding why the application of the zeroing methodology by DOC in this case failed to produce a "fair comparison". In response to a question from the Panel on this issue, Canada responded that a comparison conducted on the basis of zeroing cannot be considered to produce a "fair comparison" within the meaning of Article 2.4, because it unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value, than to those for which the export price is greater than the normal value.[514] In response to another question to Canada regarding the benchmark against

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[511] "We are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and 2.4.2." (Appellate Body Report, *EC – Bed Linen*, para.55)

[512] The Appellate Body has stated that "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'." (Appellate Body Report, *EC – Bed Linen*, para.59)

[513] As compared with the drafting of its predecessor provision in the *Tokyo Round AD Code*, Article 2.6, which provided that ""[i]n order to affect a fair comparison . . . the two prices shall be compared at the same level of trade . . . .".

[514] Canada response to question 108(a) of the Panel.

which Canada would test whether a comparison is fair or unfair[515], Canada responded in general terms and did not explain how it applied its "benchmark" to this case.

9.18 In my view, Canada's explanation amounts to little more than an assertion that because zeroing (when combined with multiple averaging) may result in a margin of dumping which is higher than that which would have resulted from comparing a single weighted average export price to a single weighted average normal value, it does not produce a fair comparison. If Article 2.4.2 required that a margin of dumping be based on a single average to average comparison, then Canada's assertion that greater weight was given to some transactions than to others might be correct (if superfluous). It has however been established that multiple averaging is not prohibited by Article 2.4.2 (as of course neither is a transaction-by-transaction methodology). I further note that Canada does not contend that DOC gave greater weight to certain export transactions than to others in its performance of each average-to-average comparison. Nor did DOC fail to take into account any export transactions, as the overall amount of dumping found was divided over the full amount of all export transactions in order to calculate a margin of dumping. Rather, Canada is simply arguing that it is unfair not to provide credit for negative dumping margins, apparently purely because this results in a higher dumping margin than would be the case if such credit were given.

9.19 I note that the differing views of the parties regarding interpretation of Article 2.4 appear to reflect an underlying difference regarding the concept of "dumping". One school of thought is that "dumping" relates to the average pricing behaviour of an exporter/producer over time. For those who hold this view, the fact that a particular export transaction is made at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost) does not necessarily mean that dumping has occurred, if another export transaction is made at a price which is higher than the home market price. They believe that exporters should be given "credit" for selling above normal value, and consider zeroing to be illogical. Others consider that any time a particular export transaction occurs at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost), dumping has occurred. From this perspective, overall margins of dumping are calculated simply because it is impractical to calculate and impose anti-dumping duties with respect to each export transaction, and the idea that such a transaction should not be viewed as dumped merely because another export transaction occurs at a higher price makes no sense.

9.20 The difference between these two approaches can be understood on the basis of a simple example. Assume there are two home market sales and two export sales of a product during the period of investigation. Both home market sales are made at a price of 100. One of the export sales is made at a price of 50, the other at a price of 150. Under one school of thought, what is relevant is average pricing behaviour. Since the average normal value and average export price are both 100, there is no dumping and no duties should be imposed. Under the second school of thought, one of the two sales was at a dumped price while the other was not. Duties should therefore be collected on the dumped sale. However, a dumping margin should be calculated that would reflect that only some sales were dumped. Using zeroing, the total amount of dumping (50) would be divided by total export sales (200), resulting in a 25 per cent margin. Imposition of a 25 per cent duty on the two export transactions would result in the collection of duties in the amount of 50, the same amount of duties as would have been collected had dumping been determined and duties assessed for each transaction.[516]

9.21 Arguments may be advanced for each of the conceptual approaches identified above. For the "average pricing behaviour" advocates, it is simply not consistent with commercial reality to expect that exporters will be able to fine-tune their pricing on a transaction by transaction basis to avoid

[515] Question 108(b) by the Panel.

[516] *See EC – Audio Cassettes* (unadopted) for an analysis of the "fair comparison" requirement which reflects this analytical approach.

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

9.22 My task is not of course to decide which conceptual approach *I* prefer, but to examine whether the *AD Agreement* shows such a preference. The Agreement does not contain any preamble or statement of object and purpose[517], and in my view there is no basis to conclude that the Agreement is premised on the "average pricing behaviour" approach. In fact, an early GATT Group of Experts Report on antidumping noted that "the ideal method . . . was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned . . .", and this could be taken to suggest the contrary.[518] The fact that the *AD Agreement* permits the use of variable duties as a basis for duty collection is a further basis to conclude that, at a minimum, the *AD Agreement* is not premised exclusively on an "average pricing behaviour" approach.[519,520] Thus, I fail to see how it may be concluded, based upon the *AD Agreement* itself, that a calculation methodology that does not reflect the "average pricing behaviour" approach is unfair in the sense of Article 2.4.

9.23 I am aware that the Appellate Body in *EC – Bed Linen* expressed the view that zeroing is inconsistent with the "fair comparison" requirement in Article 2.4. I note however that this statement is *obiter dictum*, as Article 2.4 was not part of a claim before the Appellate Body. More importantly, I note that the Appellate Body did not set out any of its reasoning underlying this statement. I do not consider that I would be acting in a manner consistent with my obligations under Article 11 of the *DSU* to perform a "objective assessment of the matter" if I were simply to find in favour of Canada on the basis of such an unsupported statement.

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[517] Article VI of *GATT 1994* does however state that "dumping . . . is to be condemned if it causes or threatens material injury . . . ."

[518] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts adopted by the CONTRACTING PARTIES on 27 May 1960, BISD 9th Supp. p. 194. It is clear that under the "ideal method" identified in the Report non-dumped transactions would neither be subject to anti-dumping duties nor used to offset dumped transactions. In their Report, the Group of Experts however concluded that such a method was "clearly impracticable", in particular as regards injury, and for this reason a pre-selection system – i.e. a system where the margin of dumping for future imports is established, at least provisionally, on the basis of a prior period – seemed to be the most satisfactory. This "pre-selection" approach is the basis for virtually all anti-dumping systems today. The application of an *ad valorem* duty for a product, calculated based on the transaction-by-transaction methodology comparison method in paragraph 2.4.2 combined with the aggregation of the results of the individual comparisons using zeroing, is mathematically equivalent and would result in the collection of anti-dumping duties on the product as a whole in the same amount as if the "ideal method" had been applied. Zeroing when aggregating the results of multiple comparisons under a multiple averaging approach would of course generally result in collection of a *lower* amount of total duties than the "ideal method".

[519] Under a "variable duty" approach to duty collection, a Member that has established in an investigation that injurious dumping exists does not impose an *ad valorem* or specific duty, but rather imposes duties *on a transaction by transaction basis* where the export price is below the normal value determined during the investigation. Under such a system, the fact that one transaction occurs at a price in excess of normal value does not excuse the exporter from paying duties on another transaction that occurs at a price that is less than normal value. This approach which is referred to in Article 9.4(ii) of the *AD Agreement* as a "prospective normal value", has recently been found to be consistent with the *AD Agreement*. *See* Panel Report, *Argentina – Poultry*, paras. 7.345 – 7.367.

[520] It is also interesting to note that, when under Article 9.4 an investigating authority is called upon to determine a rate for un-investigated exporters, it is not required to give credit for any "negative dumping" by investigated exporters. Thus, the *AD Agreement* does not in this context even consider the possibility that negative margins should be taken into account when aggregating the results of dumping calculations for selected exporters or producers in order to establish a margin of dumping for un-investigated exporters or producers.

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