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

Report of the Panel

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Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Argentina – Preserved Peaches	Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, adopted 15 April 2003
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2319
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Guatemala – Cement I	Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
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Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345

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Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
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
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Softwood Lumber II	Panel Report, *United States – Measures Affecting Imports of Softwood Lumber from Canada* ("*US – Softwood Lumber II*"), adopted 27 October 1993, BISD 40S/358
US – Stainless Steel	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1537
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002
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

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[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]

[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]

[Parties' arguments in Sections IV and V and Annexes deleted from this version.]

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

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 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

[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*.

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 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

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

[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).

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.

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).

[158] *See* paras. 7.230-7.232, *infra*.
[159] Exhibit CDA-83, Abitibi's Questionnaire response, p. D-44.
[160] Canada first written submission, para. 209.

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, 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.

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[161] Canada refers to Exhibit CDA-160, Tembec's Case Brief, p.4.
[162] Exhibit CDA-112, Tembec's Cost Verification Report, p. 23-25.
[163] Exhibit CDA-2, IDM, pp. 57-62.

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 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".

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[164] Exhibit CDA-1, Final Determination.
[165] Exhibit CDA-3, Amended Final Determination.
[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.

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]

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

[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.

[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.

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 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

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[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.

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 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

[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.

> 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)

(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

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[182] *Ibid.*
[183] Canada first written submission, para. 279(3).
[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.

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:

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-

[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

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 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.

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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 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.

7.29 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*.

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

[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.

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 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.

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[201] Panel Report, *EC – Bed Linen*, paras. 6.41-6-43.
[202] Panel Report, *US – Hot-Rolled Steel*, para. 7.6.
[203] This fact is not contested by the United States.

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 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

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[204] Allison, Paul A., *Multiple Regression: A Primer* (Pine Forge Press, 1998).
[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.)

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.

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

[207] Exhibit CDA-129, Memorandum on Regression Analysis.
[208] Canada response to the US preliminary objections, para. 21.
[209] *Id.*, para. 22.

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 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

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[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.*

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 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

[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.

[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.

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.

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

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[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.

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 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]

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[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.

[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).

- 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]

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

[234] Exhibit CDA-37, Application – Volume III; Exhibit CDA-40, Application Amendments; and Exhibit US-14, Application – Exhibit III-14.

[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.

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 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

[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.

[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.

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 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.

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[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.

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 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

[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.

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 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

[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.

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 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*.

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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).

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 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.

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

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

[259] Canada second written submission, para. 39.
[260] Exhibit CDA-134, Application – Exhibit VI.A, p. 4-5.

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]

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

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[261] US second written submission, p. 9.

[262] Canada second oral (opening) statement, para. 19.

[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.

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.

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.

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[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)

[267] Panel Report, *Argentina – Poultry*, para. 7.67.

> 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 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:

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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.

> "[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 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

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[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.

[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.

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 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.

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[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.

[280] US first written submission, para. 61, note 60.

[281] *Id.*, para. 60, note 62.

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:

> "[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.

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[282] *Id.*, para. 59, note 60.
[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.

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.

(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

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[286] US second written submission, para. 20.

[287] US first written submission, paras. 52 and 58.

[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))".

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.

(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.

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[293] US second written submission, para. 32.
[294] Canada second written submission, para. 58.

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, 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

[295] Panel Report, *Mexico – Corn Syrup*, para. 7.99; confirmed by Panel Report, *Guatemala – Cement II*, paras. 8.72 *et seq.*

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 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 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

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[296] Exhibit CDA-3, Amended Final Determination, p. 36068.
[297] Canada response to question 1 of the Panel, para. 1(iii).

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] 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)

[298] Canada first written submission, para. 125.
[299] WT/DS264/2.
[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*).

7.150 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)

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

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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.

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 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.

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[304] Exhibit CDA 2, IDM, p. 139.

[305] *Id.*, p. 141 and note 391.

[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.

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]

[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.
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> [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

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[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)

> *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-

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[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

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[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

[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

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[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

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[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.

[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

[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.

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[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

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[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

[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 "margin*s* of dumping", although not conclusive as to whether multiple averaging is allowed, represents an additional element in the overall picture supporting the conclusion that multiple averaging is permitted.

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

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

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

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

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

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

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

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

[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

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[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."