BEFORE THE

WORLD TRADE ORGANIZATION

United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada

WT/DS257

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

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I. INTRODUCTION

1. The recurring theme of Canada's case is succinctly presented in its assertion that no countervailing duties may be imposed on government programs "that are adopted in the context of a Member's broader economic and social policy framework, such as the sustainable exploitation of natural resources."[1] Canada's assertion rings hollow when compared to the obligations undertaken by Members in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. The subsidies that Canada provides through the state-controlled commercial exploitation of timber have nothing to do with the "sustainable exploitation of natural resources." Administratively set below-market prices, minimum cut requirements, requirements to process timber in Canada, requirements to process timber in specific mills, and mill closure restrictions – all of which are features of the provincial systems for the commercial exploitation of timber – are unrelated to "sustainable" resource management. Environmentalists, in fact, generally regard these features as the antithesis of sustainable resource management.

3. Instead, these low prices, minimum cut requirements, local processing requirements, and mill closure restrictions are designed to force-feed Canadian timber through Canadian lumber mills to keep the mills running and Canadian workers employed. That is the "broader economic and social policy framework" of the provincial systems for selling timber.

4. In reality, of course, all government subsidies – including countervailable subsidies – seek to further some broader economic and social policy goals, most often investment and employment. The disciplines in the SCM Agreement aim to strike a balance between the recognition that governments frequently use subsidies to promote social and economic objectives and the recognition that subsidies can also confer unfair commercial advantages that may cause harm to other WTO Members.

5. Over 60 percent of Canada's subsidized lumber is exported to the United States. The countervailing duty provisions of the SCM Agreement are designed to ensure that, when Canada chooses to subsidize the production of lumber in the interest of social policy, the U.S. lumber industry is not required to pay the price. The United States' right to impose countervailing duties to offset the subsidy on billions of dollars of injurious imports of Canadian lumber is protected in the SCM Agreement and, therefore, should not be denied.

6. The core issue in this dispute is the measure of the benefit from provincial timber sales. The Appellate Body and prior panels have concluded that a subsidy benefit is something better than the recipient could obtain in the marketplace, absent the government's financial

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[1] First Written Submission of Canada, para. 157 ("Canada First Written Submission").

contribution.[2] Moreover, it has been recognized that "the 'market' to which reference must be made is the *commercial* market, i.e., a market undistorted by government intervention."[3] Logically, therefore, the guidelines in Article 14(d) of the SCM Agreement cannot be read to require the use of prices distorted by the government's intervention to measure the benefit from the government's provision of goods for less than adequate remuneration. That is the principle which underlies the methodology used by the United States to measure the benefit from Canada's provincial timber sales. As demonstrated below, the United States' subsidy finding in this case is consistent with the principle enunciated by the Appellate Body and the guidelines in the SCM Agreement. Canada's claims therefore should be dismissed.

II. STATEMENT OF FACTS

A. Initiation of Investigation

7. On April 2, 2001, the U.S. Department of Commerce ("Commerce Department") received a countervailing duty petition filed on behalf of the U.S. softwood lumber industry, which alleged that subsidized imports of certain softwood lumber products from Canada were injuring a U.S. industry.[4] Specifically, the petitioners alleged that both the federal and provincial governments in Canada subsidized the production of certain softwood lumber products exported to the United States, primarily through provincial "stumpage" programs.[5]

8. On April 30, 2001, the Commerce Department initiated an investigation to determine whether Canadian producers of certain softwood lumber products received countervailable subsidies.[6] In the *Notice of Initiation*, the Commerce Department stated that, because of the extraordinarily large number of Canadian producers, it anticipated conducting the investigation on an aggregate basis.[7] In an aggregate investigation, the Commerce Department determines the aggregate amount of all subsidies provided by the government to producers of the subject merchandise and allocates that amount over total sales of the subject merchandise. The resulting

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[2] Appellate Body Report, *Canada–Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999, para. 157 ("*Canada-Aircraft Appellate Body Report*") (emphasis added). Canada also relies on the Appellate Body's definition of benefit. *See* Canada First Written Submission, at para. 65.

[3] Panel Report, *Brazil–Export Financing Programme for Aircraft*, WT/DS46/RW/2, adopted August 23, 2001, para. 5.29 ("*Brazil–Aircraft Panel Report*") (emphasis in original).

[4] *See Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21332 (April 30, 2001) ("*Notice of Initiation*") (Exhibit U.S.-1). The petition was filed on April 2, 2001 by the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union. The petition was amended on April 20, 2001 to include four additional companies as petitioners. *Id.*

[5] *Id.* at 21333-34.

[6] *Id.* at 21334-35.

[7] *Id.* at 21335.

rate (referred to as a "country-wide rate") is applied to all exporters and producers of the subject merchandise.[8]

B. Preliminary and Final Determination

9. On August 17, 2001, the Commerce Department published the *Preliminary Determination*, which contained a preliminary affirmative countervailing duty determination.[9] The Commerce Department invited interested parties to comment on the *Preliminary Determination* and held public hearings on March 6 and March 19, 2002.[10] In the *Final Determination*, the Commerce Department found that provincial stumpage programs in Canada provided a countervailable subsidy to Canadian lumber producers. The Commerce Department also determined that certain non-stumpage programs provided countervailable subsidies.[11]

10. In making its final affirmative countervailing duty determination, the Commerce Department found that certain provincial stumpage programs and other federal and provincial programs provided a financial contribution, thereby conferring a benefit to Canadian lumber producers.[12] The Commerce Department further found that these programs were specific to a group of industries.[13]

C. WTO Proceeding

11. Canada initiated this proceeding to challenge certain aspects of the *Final Determination*. Canada has fully described the brief history of this proceeding in its first written submission.[14]

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[8] *See* Section 777A(e)(2)(B) of the Tariff Act of 1930, as amended (the "Act"), which authorizes the Commerce Department to conduct an aggregate investigation when it is not practicable to determine individual company rates due to the large number of producers or exporters. *See* 19 U.S.C. § 1677f-1(e)(2)(B) (Exhibit CDA-2).

[9] *See Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43186 (August 17, 2001) (Exhibit CDA-20) ("*Preliminary Determination*").

[10] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 15545 (April 2, 2002) ("*Final Determination*") (Exhibit U.S.-2).

[11] *Id.* at 15548.

[12] *See Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada,* 26-33, 145-50 (March 21, 2002) (Exhibit CDA-1) ("*Issues and Decision Memorandum*").

[13] *Id.* at 51, 145-50.

[14] *See* Canada First Written Submission, at paras. 10-13.

III. STANDARD OF REVIEW

12. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") sets forth the standard of review that applies to this case.[15] Article 11 requires a panel to make an objective assessment of the matter before it and determine whether the identified measure is consistent with the provisions of the WTO agreement upon which the claim is based.

13. In that regard, it is important to bear in mind that panels cannot add to or diminish the rights and obligations provided in the SCM Agreement or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[16] In a recent decision, the Appellate Body reaffirmed the principle that a requirement not expressly contained in the text of a particular treaty provision is "an indication that no such requirement exists."[17] The rights and obligations of the Members are neither more nor less than those expressly established in the WTO agreements. While it is true that Members have agreed to limit the exercise of their sovereignty to conform with their WTO agreement commitments,[18] the converse is also true – to the extent that the Members have not agreed to any limitation on the exercise of their sovereign authority with respect to a particular action, that action cannot be inconsistent with the Member's WTO obligations. Moreover, where Members have not agreed to a particular limitation, or reached any agreement on a particular

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[15] *See* Appellate Body Report, *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted June 7, 2000, para. 51 ("*U.S.–Lead and Bismuth II Appellate Body Report*").

[16] *See* Article 3.2, DSU; Appellate Body Report, *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, adopted August 23, 2001, para. 166 (finding that Article 2.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") is silent as to who the parties to the relevant sales transactions should be in determining normal value and, therefore, refusing to read into Article 2.1 an additional condition that is not expressed). *See also* Panel Report, *United States–Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* SCM/153, adopted April 28, 1994, paras. 243-46, 247-49 ("*U.S. Atlantic Salmon Panel Report*") (finding that United States is not required to make certain adjustments in its subsidy calculation because no understanding regarding calculation had been developed).

[17] Appellate Body Report, *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted December 19, 2002, para. 65 ("*U.S.–Corrosion-Resistant Steel Appellate Body Report"*).

[18] "The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, *the Members of the WTO have made a bargain*. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement."* Appellate Body Report, *Japan–Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted November 1, 1996, p. 15 ("*Japan–Taxes Appellate Body Report*") (emphasis added).

issue, a panel may not fill in the gap. The role of filling any gaps in the agreements is reserved for the Members.[19] This rule is central to the fundamental structure of the WTO.

14. It is also well settled that a panel must not conduct a *de novo* review of the evidence nor substitute its judgment for that of the competent authority.[20]

IV. ARGUMENT

A. Canada Bears the Burden of Proving Its Claim

15. The complainant in a WTO dispute bears the burden of proof. This means, as an initial matter, that Canada, as the complainant, bears the burden of coming forward with evidence and argument that establish a *prima facie* case of a violation.[21] It also means that, if the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.[22]

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[19] The Appellate Body has cautioned that the panel's role is limited to the words and concepts used in the treaty:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention. But 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* . . . Both panels and the Appellate Body 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*.

Appellate Body Report, *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted January 16, 1998, paras. 45-46 ("*India-Patent Appellate Body Report*") (emphasis added).

[20] *See* Appellate Body Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted February 13, 1998, para. 117 ("*EC–Hormones Appellate Body Report*").

[21] *See, e.g.*, Appellate Body Report, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted May 23, 1997, p. 14 ("*U.S.–Wool Shirts Appellate Body Report*"); *EC–Hormones Appellate Body Report*, at para. 104.

[22] *See, e.g.*, Panel Report, *India–Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted September 22, 1999, para. 5.120.

B. The Final Countervailing Duty Determination Is Consistent with the SCM Agreement

1. The Commerce Department Properly Determined That Provincial Stumpage Programs Constitute a "Financial Contribution"

16. The Canadian provincial governments own approximately 90 percent of the forested land in Canada ("Crown land") and control access to the timber on Crown land ("Crown timber"). Canada acknowledges that Crown timber is a "market asset"[23] and that the provinces sell the Crown timber through contractual arrangements ("tenures")[24] under which companies harvest the timber on specified areas of Crown land in exchange for an administratively set stumpage fee and the assumption of certain forest management obligations associated with harvesting operations.[25] Tenure holders pay only for timber that they harvest.[26] In the *Final Determination*, the Commerce Department concluded that these Canadian provincial "stumpage programs" constitute a financial contribution because the provincial governments are providing a good to lumber producers within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[27] That good is timber.

17. Canada does not dispute that a lumber producer's sole purpose for entering into a tenure agreement is to obtain timber.[28] Nevertheless, Canada argues that the provinces are not providing the lumber producer with timber, but rather are merely creating a bundle of intangible contractual

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[23] Joint Case Brief Submitted to the Commerce Department on Behalf of the Government of Canada, Government of Alberta, Government of British Columbia, Government of Manitoba, Government of Ontario, Gouvernement du Quebec, Government of Saskatchewan, Government of the Northwest Territories, Government of the Yukon Territory, and British Columbia Lumber Trade Council, vol. 2, B6 (February 22, 2002) ("Canada Case Brief") (Exhibit U.S.-3).

[24] The provinces use a number of different types of contracts and licenses for the sale of Crown timber, with the most common being long-term tenures. Although the different types of agreements have different features, they all give the holder the right to harvest timber from Crown land. For the sake of convenience, the United States refers to all such agreements, collectively, as tenures.

[25] These obligations include, for example, silviculture and fire protection. *See* Canada Case Brief, at vol. 2, B6 (Exhibit U.S.-3). To be awarded such a contract, the company generally must either own a Canadian lumber mill or have an agreement with a Canadian lumber mill to process all of the company's harvested timber.

[26] *See Issues and Decision Memorandum*, at 29 (Exhibit CDA-1).

[27] The Commerce Department provided a detailed explanation supporting its determination that the Canadian provincial "stumpage programs" constitute a financial contribution because they provide a good to lumber producers. Specifically, the Commerce Department found that "nothing in the definition of the term 'goods' indicates that things that occur naturally on land, such as timber, do not constitute 'goods.'" Further, the Commerce Department determined that regardless of whether the provinces are supplying timber or making it available through a right of access, they are providing timber. *See Issues and Decision Memorandum*, at 29-30 (Exhibit CDA-1).

[28] *Id*. at 29.

rights and obligations that enable the lumber producers to exploit the timber.[29] Canada also argues, contrary to a plain reading of Article 1.1(a)(1)(iii), that the term "goods" is limited to "tradeable items that are capable of bearing a tariff classification."[30] Under Canada's reading of the SCM Agreement, if a government provides standing wheat, iron ore, standing timber, or other items that are not "tradeable" across borders, it does not provide a financial contribution and, therefore, does not provide a subsidy, even if the government provides those items at a fraction of their market value or even for free. The violence Canada's interpretation does to the text of the SCM Agreement and its object and purpose is obvious.

18. As demonstrated below, and as the *U.S.–Lumber Preliminary Determination* panel found,[31] the Canadian provincial governments provide a good – timber – to lumber producers. A financial contribution, as defined in Article 1.1(a)(1)(iii), therefore exists.

a. Timber Is a Good within the Meaning of Article 1.1(a)(1)(iii) of the SCM Agreement

19. Article 1.1 of the SCM Agreement defines a subsidy as a "financial contribution" by a government that confers a "benefit." Article 1.1(a)(1)(iii) states that a financial contribution shall be deemed to exist where the government "provides goods or services other than general infrastructure." The SCM Agreement does not specifically define the meaning of "provides" or "goods." The Panel therefore should look to the ordinary meaning of these terms.[32]

20. The dictionary definition that Canada itself cites explicitly defines the term "goods" as encompassing all "property or possessions," including "growing crops, and other identified things to be severed from real property."[33] "Goods" is similarly defined under Canadian law.[34]

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[29] *See* Canada First Written Submission, at paras. 26, 35, 50.

[30] *Id.* at para. 30.

[31] The panel completely rejected Canada's argument that the Canadian government is not providing a financial contribution to lumber producers. *See* Panel Report, *United States–Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted November 1, 2002, paras. 7.11-7.30 ("*U.S.–Lumber Preliminary Determination Panel Report*").

[32] Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") states 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 the light of its object and purpose." Article 31(1), Vienna Convention. *See also Japan–Taxes Appellate Body Report*, at p. 10-12; Panel Report, *United States–Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted January 27, 2000, para. 7.22.

[33] *See* Canada First Written Submission, at para. 31, fn. 17, citing *Black's Law Dictionary*, 701-702 (7th ed. 1999) (Exhibit CDA-16).

[34] *See, e.g.*, Sale of Goods Act (British Columbia), RSBC 1996, ch. 410, section 1 ("[G]oods includes . . . growing crops, whether or not industrial, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale.") (Exhibit U.S.-4).

Through their tenure systems, the Canadian provinces provide an "identified thing to be severed from real property," i.e., timber. As noted by the *U.S.–Lumber Preliminary Determination* panel, the ordinary meaning of the word "goods" is very broad and in and of itself does not seem to justify any limits on the kinds of movable personal property, other than money, that could be considered a good.[35]

21. Moreover, the context in which the term "goods" is used in Article 1.1(a)(1)(iii) of the SCM Agreement confirms the broad meaning of the term. "Goods" is used in the context of the phrase "goods or services other than general infrastructure" in the definition of "financial contribution." This phrase reflects a very wide range of things a government may provide an industry. As the *U.S.–Lumber Preliminary Determination* panel noted, the sole, limited exclusion of "general infrastructure" reinforces the broad meaning of "goods" as used in this provision.[36]

22. The ordinary meaning of the text of the SCM Agreement must also be determined in light of its object and purpose, which is to impose multilateral disciplines on subsidies.[37] It is evident from Article 1.1 that the Members recognized that governments have a wide variety of mechanisms at their disposal to confer an advantage on specific domestic enterprises or industries and that they intended to bring those mechanisms within the disciplines of the SCM Agreement.[38] While the SCM Agreement is not intended to bring all government actions within its disciplines, it is obvious from the text of Article 1.1 generally and Article 1.1 (a)(1)(iii) specifically that the Agreement is intended to sweep broadly.

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[35] The panel noted that the definition of the term "good" includes "the unborn young of animals, growing crops, and other things to be severed from real property . . . ." *U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.21, quoting *Black's Law Dictionary*, at 701 (Exhibit CDA-16).

[36] *Id.* at para. 7.23. Canada erroneously implies that the phrase "other than general infrastructure" only qualifies the term "services." *See* Canada First Written Submission, at para. 35. There is absolutely no support within the text or context of Article 1.1(a)(1)(iii) for Canada's arbitrary conclusion that the general infrastructure exception is limited to services, and the *U.S.–Lumber Preliminary Determination* panel correctly found that this exception applies to both "goods" and "services." *See U.S.–Lumber Preliminary Determination Panel Report*, at paras. 7.23, 7.26.

[37] *See* Panel Report, *Brazil–Export Financing Programme for Aircraft*, WT/DS46/R, as modified on other grounds by the Appellate Body, adopted August 20, 1999, para. 7.26.

[38] Article 1.1 of the SCM Agreement provides that "financial contributions" shall be deemed to exist where:

> (i) a government practice involves a direct transfer of funds (e.g., grants, loans and equity infusion) or potential direct transfers of funds or liabilities (e.g., loan guarantees);
> (ii) government revenue that is otherwise due is foregone (e.g., tax credits);
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out the types of functions listed above.

23. Despite the fact that the WTO agreements[39] nowhere define the term "goods," Canada makes the extraordinary contention that a good must be a tradeable product. Canada bases this conclusion on logically flawed arguments, and ignores the basic principles of treaty interpretation reflected in Article 31 of the Vienna Convention. Canada asks the Panel to infer from the use of the phrase "imported goods" in Article 3.1(b) of the SCM Agreement and the word "products" in Parts III and V of the SCM Agreement, that "goods" can only mean traded goods that fall within the GATT 1994 Article II schedules.[40] The fact that "products" are goods and "imported goods" are goods does not, however, logically give rise to the inferences that nothing else can come within the meaning of "goods."[41]

24. Canada first takes the term "goods" outside the context of the financial contribution definition in Article 1.1 of the SCM Agreement and looks to its use in the unrelated context of the prohibited import substitution subsidy definition in Article 3.1(b) of the SCM Agreement.[42] Canada notes that the adjective "imported" modifies "goods" within the definition of import substitution subsidy in Article 3.1(b) and then leaps to the erroneous and illogical conclusion that "goods," even though unmodified by the word "imported" in Article 1.1(a)(1)(iii), can only mean "goods" capable of being imported (i.e., traded across borders).

25. Canada then attempts to reinforce its erroneous leap of logic by taking the term "goods" further out of context and looking to an entirely separate agreement, the GATT 1994. Specifically, Canada argues that the scope of Part V of the SCM Agreement, which imposes disciplines on countervailing measures, must be the same as the scope of Article II of GATT 1994, which covers tariff concessions.[43] However, the scope of the SCM Agreement, including Part V, is determined by Article 1.1 of the SCM Agreement, which defines subsidy practices without any relation to tariff concessions.[44] Therefore, there is nothing textually or logically that links the definition of subsidy practices to tariff concessions.

26. Under Canada's interpretation of "goods," governments could provide a broad array of items to specific industries without discipline as long as those items are not "traded across international borders."[45] As noted above, however, this would allow a government to provide

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[39] Canada cites to the various agreements under Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization, including GATT 1994.

[40] *See* Canada First Written Submission, at paras. 37-41.

[41] This would be the logical equivalent of saying that, because office buildings are buildings and warehouses are buildings, houses cannot also be buildings.

[42] *See* Canada First Written Submission, at para. 37.

[43] *Id.* at paras. 39-40.

[44] *See* Panel Report, *United States–Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted August 23, 2001, at para. 8.38.

[45] *See* Canada First Written Submission, at para. 37.

standing wheat for free or give an aluminum manufacturer the "right" to take bauxite from a government mine for free, and these provisions would not constitute subsidies.

27. There is no basis for such a conclusion in the text or context of Article 1.1(a)(1)(iii) of the SCM Agreement. As the *U.S.-Lumber Preliminary Determination* panel noted, "general infrastructure" is an explicit exception from the "goods and services" covered by Article 1.1(a)(1)(iii). Canada's attempt to narrow the ordinary meaning of "goods" to only include tradeable items would render superfluous the only express limitation in the text itself, i.e., the exclusion for "general infrastructure."[46] If "goods" were intended to be read as narrowly as Canada suggests, it could never encompass *any* infrastructure (e.g., a building, road, etc.), let alone general infrastructure. Thus, the very existence of that express limitation demonstrates that the Members intended the term "goods" to be read in accordance with its ordinary meaning and therefore to include items other than those "traded across international borders."

28. In sum, while "goods" in Article 1.1(a)(1)(iii) certainly includes tradeable products, there is no basis to limit its meaning to such products when neither the text nor the context in which the term is used suggests such a limitation. To the contrary, the ordinary meaning of "goods," read in context and in light of the SCM Agreement's object and purpose, demonstrates that the Commerce Department's final determination that timber is a good is entirely consistent with Article 1.1(a)(1)(iii) of the SCM Agreement.

b. Provincial Tenures "Provide" Timber

29. Canada argues that provincial governments are not providing timber to lumber producers, but rather are merely granting certain property rights in the timber: the right of access to, or the right to harvest, the timber.[47] According to the *New Shorter Oxford English Dictionary*, however, "provides" means to "make available" in addition to "supply or furnish for use."[48] Thus, even if provincial tenures are viewed as simply providing the right to access or harvest the timber rather than providing the timber itself, such a provision would still constitute the provision of a good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because the government is making the timber available to lumber producers.

30. A review of the facts further demonstrates that Canada is attempting to elevate form over substance. The Commerce Department found, and the *U.S.–Lumber Preliminary Determination*

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[46] The Appellate Body has cautioned that "an interpreter is not free to adopt a reading that would result in reducing whole clauses and paragraphs of a treaty to redundancy or inutility." *See* Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted May 20, 1996, p. 23 ("*U.S.–Reformulated Gasoline Appellate Body Report*").

[47] *See* Canada First Written Submission, at paras. 27-28.

[48] *The New Shorter Oxford English Dictionary*, 2393 (1993) (Exhibit U.S.-5).

panel agreed,[49] that from the tenure holder's point of view, there is no difference between the government granting a right to harvest timber and the government actually supplying the timber through the holder's exercise of this right. In fact, the only way to provide standing timber (the good in question) is by providing the right to harvest the timber. It should be beyond dispute that when a government gives a company the right to take a good, whether it is the right to take widgets from a government warehouse or timber from government land, the government is "providing" that good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

31. The provincial governments own the timber provided within the stumpage programs, and from the point of view of the lumber producer, these programs have one purpose: to provide them with timber to make lumber or other wood products. Participation in these programs is restricted to Canadian sawmills or pulpmills, or companies that have contracts with Canadian mills to process the harvested timber.[50] Moreover, each of the provincial stumpage programs charges the tenure holder on a "volumetric" basis. In other words, stumpage fees are based on the volume of timber harvested. Tenure holders do not pay stumpage fees for timber that they do not harvest. The evidence thus demonstrates that companies obtain tenures for the sole purpose of obtaining timber, leaving no doubt that through the tenure systems the provincial governments are "providing" a "good" – timber.

32. By examining the text of the SCM Agreement, in light of its object and purpose, the Panel should find that the United States' final determination that provincial stumpage programs constitute a financial contribution is entirely consistent with Article 1.1(a)(1)(iii). Canada's claim, therefore, should again be rejected.

2. The United States Properly Determined That Provincial Stumpage Programs Provide a Benefit

33. The United States, having properly determined that a financial contribution was provided to Canadian softwood lumber producers, was required to determine whether a benefit was "thereby conferred" within the meaning of Article 1.1(b) of the SCM Agreement. As we demonstrate below, it is well established that a benefit from a governmental financial contribution is to be determined in comparison to the commercial market. It has also been acknowledged that the commercial market used for the comparison must, necessarily, be undistorted by the government's intervention.

34. In this case, the provincial governments' overwhelming control of the Canadian timber market made it impossible to use non-government prices in Canada as the basis for determining the benefit. The majority of provinces submitted little, if any, data on non-government prices.

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[49] *See U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.17.

[50] *See Issues and Decision Memorandum*, at 51-52 (Exhibit CDA-1).

Moreover, the evidence demonstrated that the small non-government sector of the Canadian timber market is not a "commercial market," i.e., a market undistorted by the government intervention.

35. There is no dispute that the fair market value of timber in Canada is the appropriate benchmark for measuring the benefit in this case. The crux of this dispute is the factual basis for the United States' assessment of the fair market value of timber in Canada. In the absence of a reliable source of market-determined, fair market value, prices in Canada, the United States used prices for comparable timber from alternate sources – the bordering regions of the northern United States – which are commercially available to Canadian lumber producers, as the starting point for its fair value assessment. Before making the comparison, however, the United States made adjustments based upon prevailing market conditions in Canada. This provided a reasonable, reliable assessment of the fair market value of timber in Canada, consistent with Article 14(d) of the SCM Agreement.

36. Canada's claim that this methodology is inconsistent with the SCM Agreement is based on the premise that Article 14(d) prohibits, under any circumstances, the use of price data for comparable goods from commercially available sources outside of the country of provision as the basis for an assessment of the fair market value of goods in the country of provision. As demonstrated below, Canada's claim is based upon a flawed interpretation of Article 14(d) and a mischaracterization of the United States' methodology.

a. A Benefit Is Something More Favorable Than the Market Would Provide Absent the Financial Contribution

37. The SCM Agreement does not define the term "benefit."[51] The meaning of the term as used in Article 1.1(b) has, however, been explored by previous WTO panels and the Appellate Body. As the *Canada–Aircraft* panel stated:

> [I]n our opinion the ordinary meaning of "benefit" clearly encompasses some form of advantage. . . . [The authority must] determine whether the financial contribution places the recipient in a *more advantageous position than would have been the case but for the financial contribution*. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market.[52]

In reviewing the panel decision, the Appellate Body agreed:

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[51] "[A] subsidy shall be deemed to exist" if there is a "financial contribution by a government" and "a benefit is thereby conferred." Articles 1.1(a)(1), 1.1(b), SCM Agreement.

[52] Panel Report, *Canada–Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted August 20, 1999, para. 9.112 (*"Canada-Aircraft Panel Report")* (emphasis added).

> We . . . believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient *"better off" than it would otherwise have been, absent that contribution*. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[53]

38. It is thus well established that a benefit is something better than the market would otherwise provide, absent the financial contribution. The United States, therefore, disagrees with the *U.S.–Lumber Preliminary Determination* panel's contrary conclusion that it is *not* the goal of the benefit analysis to determine what the market price would have been absent the government's financial contribution.[54] On the contrary, as the Appellate Body has stated, the very essence of the benefit analysis is to determine whether the recipient is better off than it would have been absent the government action, and the only way to make that determination is to assess whether the recipient obtained something "on terms more favourable than those available in the market."

39. Moreover, following the reasoning of the Appellate Body, the *Brazil–Aircraft* panel concluded that "the 'market' to which reference must be made is the *commercial* market, i.e., a market undistorted by government intervention."[55] As discussed further below, therefore, the United States disagrees with the *U.S.–Lumber Preliminary Determination* panel's conclusion that prices in the country of provision must be used, even if they are not commercial market prices, i.e., market prices undistorted by government intervention.

40. It is within the context of this general understanding of what constitutes a "benefit" that the guidelines in Article 14 of the SCM Agreement must be interpreted.

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[53] *Canada–Aircraft Appellate Body Report*, at para. 157 (emphasis added). Canada also relies on the Appellate Body's definition of benefit. *See* Canada First Written Submission, at para. 65.

[54] *See U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.51. Although the panel cited to this section of the *Canada–Aircraft Appellate Body Report*, it made no attempt to reconcile the inconsistencies between its position and that of the Appellate Body.

[55] *Brazil–Aircraft Panel Report*, at para. 5.29 (emphasis in original).

b. Comparing the Government's Price for a Good to the Fair Market Value of the Good in the Country of Provision Is Consistent with Article 14(d) of the SCM Agreement

41. Article 14 of the SCM Agreement contains guidelines for calculating a subsidy benefit. Specifically, with respect to the government provision of a good or service, the guidelines in Article 14(d) provide:

> the provision of goods or services . . . by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration . . . . The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

42. "Adequate remuneration" is not defined in the text of the SCM Agreement. In the context of Article 14(d), however, "adequate" remuneration must mean remuneration that is sufficient to eliminate any benefit. As discussed above, a benefit is something more favorable than would otherwise be available in the commercial market, i.e., fair market value.[56] Logically, therefore, "adequate" remuneration is fair market value.

43. Article 14(d) therefore provides that the benefit should be measured by comparing the government's price for goods or services with the fair market value of the goods or services in the country of provision. This method is, in fact, codified in Canadian law.[57] The United States

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[56] The ordinary meaning of "fair market value" is the price between a willing buyer and seller, in an arm's-length transaction, in an open market. *Black's Law Dictionary*, at 1549 (Exhibit U.S.-6). An "open market" is "a market in which any buyer or seller may trade and in which prices and product availability are determined by free competition." *Id.* at 983 (Exhibit U.S.-7); *accord The New Shorter Oxford English Dictionary,* at 2004 (defining "open market" as an "unrestricted market with free competition both of buyers and sellers") (Exhibit U.S.-8); *The Dictionary of Canadian Law*, 719 (2nd ed. 1995) (defining "market value" as "[t]he amount of money a willing and informed buyer would pay to a willing and informed seller on usual terms and conditions in a competitive market where neither party was acting under abnormal pressure") (Exhibit U.S.-9).

[57] Canada's regulation implementing the "adequate remuneration" inquiry contained in Article 14(d) provides that with respect to goods and services the amount of the subsidy shall be:

> the difference between (a) the fair market value of the goods or services in the territory of the government providing the subsidy, and (b) the price at which the goods or services were provided by that government.

Special Import Measures Regulations, C.R.C. SOR/84-927 (Exhibit U.S.-10). Canada's suggestion that remuneration that is less than market value could nevertheless be "adequate" is therefore inconsistent with the concept of benefit, as defined in prior panel and Appellate Body decisions, as well as its own regulations. *See* Canada First Written Submission, at para. 72.

and Canada therefore agree that, consistent with Article 14(d), the adequate remuneration benchmark is the fair market value of timber in Canada. The issue is what evidence may be used to establish that fair market value pursuant to the guidance in Article 14(d) of the SCM Agreement that adequate remuneration must be measured "in relation to prevailing market conditions . . . in the country of provision."

44. Canada's argument that the benchmark used in this case was inconsistent with Article 14(d) is based on a mischaracterization of the United States' methodology. Specifically, Canada erroneously asserts that the United States determined adequate remuneration based on market conditions in the United States rather than market conditions in Canada.[58]

45. As discussed more fully below, observed prices in Canada were either unavailable or unreliable indicators of fair market value. Thus, after a thorough analysis to ensure comparability, the United States used market prices for timber from the northern U.S. border states as the starting point for the calculation of fair market value benchmarks for each of the provinces. The United States then analyzed the prevailing market conditions in Canada (e.g., obligations for road building, silviculture, and fire and disease protection) and, as detailed in Attachment 1 to this brief, adjusted the benchmark calculation accordingly to arrive at the fair market value of timber *in Canada*. Obviously, if the United States were assessing the fair market value of Canadian timber in relation to market conditions in the United States, as Canada claims, none of those adjustments would have been made.[59]

46. Considered in light of the actual methodology used by the United States, it is evident that Canada's claim rests on the erroneous premise that Article 14(d) mandates the use of particular evidence to determine adequate remuneration. Canada argues that Article 14(d) prohibits the use of price data for comparable goods from commercially available sources outside of the country of provision, adjusted for market conditions in the country of provision, as the basis for an assessment of the fair market value of goods in the country of provision. Every relevant consideration – the text, its context, Member's interpretations of the text, and its object and purpose – confirm that Article 14(d) permits, in appropriate circumstances, the use of evidence from outside the exporting country, adjusted as appropriate for market conditions in the country of provision, to establish fair market value.

i. The Text of Article 14(d)

47. Article 14(d) does not address the type of evidence to be used in evaluating the question of benefit. It mandates a type of inquiry: adequate remuneration (fair market value) must be

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[58] *See, e.g.*, Canada First Written Submission, at para. 80.

[59] A substantial portion of the *Final Determination* was dedicated to explaining in painstaking detail the adjustments that were considered and, if appropriate, made by the United States. *See Issues and Decision Memorandum*, at 62-73, 83-90, 101-106, 114-125, 129-133, and 139-142 (Exhibit CDA-1).

assessed "in relation to prevailing market conditions for the good . . . in the country of provision."[60] Article 14(d) defines "prevailing market conditions" as "price, quality, availability, marketability, transportation and other conditions of purchase or sale." Article 14(d) therefore provides that fair market value is to be determined "in relation to" conditions of sale in the country of provision.

48. As the Appellate Body has noted, a benefit analysis involves a comparison. The government price must be compared to a market value, and that market value must be undistorted by government intervention. It is obvious therefore that "conditions of sale" in the country of provision cannot themselves be the benchmark to which the government's remuneration is to be compared if the commercial market is distorted by government intervention.[61]

49. The guideline in Article 14(d) thus must be interpreted to address circumstances in which there are no commercial market prices available in the country of provision. Therefore, the most logical interpretation of "in relation to" is that adequate remuneration, i.e., fair market value, must be determined "with reference to" or "taking account of" conditions of sale in the country of provision.[62]

50. What Article 14(d) does *not* say is also significant. Article 14(d) defines "prevailing market conditions" as "price, quality, availability, marketability, transportation and other conditions of purchase or sale." Article 14(d) therefore provides that fair market value is to be determined "in relation to" conditions of sale in the country of provision. When the Members intended to specify the use of particular data for a particular calculation, they did so explicitly.[63] They have not done so here. Article 14(d) is silent on the data to be used to determine adequate remuneration, i.e., fair market value. As another panel recently stated, "[t]he most logical conclusion to be drawn from this silence is that the choice . . . is up to the investigating authority."[64]

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[60] Article 14(d), SCM Agreement.

[61] The United States therefore disagrees with the statement in the *U.S.– Lumber Preliminary Determination Panel Report* that in this context the logical meaning of "in relation to" is "on the basis of" or "in comparison with." Under the panel's interpretation, Article 14(d) would provide that the price "charged by the government is to be compared with the prevailing market conditions in the country of provision." *U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.44.

[62] *Issues and Decision Memorandum*, at 32. The *New Shorter Oxford English Dictionary* defines "in relation to" as meaning "as regards." In turn, it defines "as regards" as "concerning" and defines "concerning" as "in reference to." *The New Shorter Oxford English Dictionary,* at 467, 2526, 2534 (Exhibit U.S.-11).

[63] *See, generally*, Article 2, Antidumping Agreement.

[64] Panel Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/RW, circulated November 29, 2002, para. 6.82 ("*EC–Bed Linen Panel Report*"). The panel found that nothing in the text of Article 2.2.2(ii) of the Antidumping Agreement specified the factor to be used in calculating weighted averages. The panel recalled the finding of the Appellate Body that

ii. The Context of Article 14(d)

51. Article 14(d) must also be interpreted in context. Article 14 sets forth "guidelines" that must be followed with respect to "any method used" to calculate the benefit.[65] Article 14, therefore, is not intended to establish detailed obligations regarding specific sources of data, but rather general guidelines that must be followed by an investigating authority in establishing a methodology.[66] The Members used the phrase "in relation to" to establish the general principle in Article 14(d) that the fair market value benchmark must relate to prevailing market conditions in the country of provision.

52. There is a distinction between the general principle established in Article 14(d), i.e., the necessity for determining fair market value in relation to conditions of sale in the country of provision, and the specific data that may or may not be used in establishing a methodology consistent with that principle. Article 14(d) does not restrict that data to "in-country" sources. The *U.S.–Lumber Preliminary Determination Panel Report* acknowledged, for example, that import prices, i.e., prices from sources outside the country of provision, can be used to determine adequate remuneration.[67]

53. Interpreting Article 14(d) as permitting the use of data from sources outside the country of provision as the basis for an assessment of fair market value in the country of provision does not, as Canada argues, read the language "in relation to prevailing market conditions" out of

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> [t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But 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.

Id. at para. 6.82, quoting *India–Patent Appellate Body Report*, at para. 45.

[65] A "guideline" is "a directing or standardizing principle laid down as a guide to procedure, policy, etc." *The New Shorter Oxford English Dictionary*, at 1159 (Exhibit U.S.-12).

[66] This is confirmed in the negotiating history as well. Although more detailed proposals on benchmarks were submitted during the negotiations, the Members rejected the details in favor of general principles. *See The GATT Uruguay Round: A Negotiating History (1986-1992)*, 935-42 (Terence P. Stewart ed., 1994) (Exhibit U.S.-13).

[67] The panel stated that "prices of *imported* goods in the market of provision can indeed form part of the prevailing market conditions in the sense of Article 14(d) SCM Agreement." *U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.48 (emphasis in original). While agreeing that import prices could be used, the panel went on to state, without any factual support, that the import prices at issue are not the same as prices in the country of export. It is the view of the United States that there is no basis for that panel's restrictive interpretation, which implicitly rejected the use of *potential* import prices while accepting *actual* import prices. The panel's reasoning has the perverse effect of making it more difficult to measure a benefit when the government controls all or virtually all of the domestic supply and obviates the need for imports by ensuring that the domestic supply is sold at below market rates.

Article 14(d). To the contrary, any method used by an investigating authority, including one that uses data from outside sources, must result in a fair market value assessment that relates to conditions of sale (i.e., prevailing market conditions) in the country of provision.[68]

54. Moreover, although Article 14(d) is silent on the types of data that may be used to assess fair market value in the country of provision, that does not mean that an investigating authority may arbitrarily reject probative evidence of fair market value in the country of provision (such as prices in domestic commercial markets in the country of provision) in favor of other data. Nevertheless, a panel may not import into the guideline in Article 14(d) detailed obligations that are not present in the text. Article 14(d) is appropriately drafted so as to permit an investigating authority the flexibility, on a case-by-case basis, to use the most appropriate method and data, to assess fair market value in the country of provision.[69] The resulting finding of fair market value is, of course, subject to review on a case-by-case basis.[70]

iii. Members' Interpretation of the Text

55. The European Communities ("EC") also agrees that "a proper analysis of the 'market conditions in the country of provision' may include all commercially available alternative sources for the recipient, including the price for imports into that market."[71] The EC has, in fact, promulgated a regulation that permits the use, in certain circumstances, of prices on the world market to assess adequate remuneration.[72] The new EC regulation amends Article 6 of Regulation (EC) No. 2026/97, which contains guidelines for calculating the benefit to the recipient. The revised Article 6 provides that

> when appropriate, the terms and conditions prevailing in the market of another country or on the world market which are available to the recipient shall be used.

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[68] Article 14, SCM Agreement.

[69] Article 14 requires that "any method used by the investigating authority to calculate the benefit . . . shall be provided for in national legislation or implementing regulations of the Member concerned and *its application to each particular case* shall be transparent and adequately explained." (Emphasis added). The methodology used by the United States in this case is codified in its regulations at 19 C.F.R. §351.511 (Exhibit U.S.-14). Canada does not allege that the regulation is inconsistent with Article 14(d) of the SCM Agreement.

[70] *See* Article 11, DSU ("[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case . . . .").

[71] *U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.48, fn. 85, quoting European Communities Third Party Submission, para. 26.

[72] *See* Notification of Laws and Regulations Under Article 32.6 of the Agreement, European Communities, G/SCM/N/1/EEC/2/Suppl.3 (November 18, 2002) (Exhibit U.S.-15).

56. The preamble to the EC regulation emphasizes that Article 14(d) provides "guidelines for the calculation of the benefit to the recipient" and provides the rationale for the amendment as follows:

> It is prudent to provide for a clarification as to what rules should be followed in cases where a market benchmark does not exist in the country concerned. In such a situation the benchmark should be determined by adjusting the terms and conditions prevailing in the country concerned on the basis of actual factors available in that country. If this is not practicable because, inter alia, such prices or costs do not exist or are unreliable, then the appropriate benchmark should be determined by resorting to terms and conditions in other markets.[73]

57. Moreover, Canada itself acknowledged that price data from sources outside of the country of provision can be used as the basis for assessing fair market value in the country of provision. In the underlying investigation, Canada acknowledged that it is permissible and reasonable in certain circumstances to use world market prices, i.e., prices from sources outside of the country of provision, to determine whether a government's price confers a benefit.[74]

iv. Object and Purpose

58. Consistent with the customary rules of treaty interpretation, as reflected in Article 31 of the Vienna Convention, a treaty shall be interpreted "in light of its object and purpose." The object and purpose of the SCM Agreement confirm that Article 14(d) should not be construed to establish a ban on the use of evidence from outside the exporting country to establish fair market value in the exporting country.

59. The GATT 1994 and the SCM Agreement are intended to provide a remedy to offset or "countervail" an artificial financial advantage provided by the government.[75] Canada's interpretation of Article 14(d) would, in circumstances such as those present in this case, place the provision of such an artificial financial advantage outside the reach of countervailing measures.

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[73] *Id.* The EC's regulation, which was promulgated after the *U.S.–Lumber Preliminary Determination Panel Report* was issued, may properly be taken into account in interpreting the SCM Agreement. *See* Article 31(3)(b), Vienna Convention.

[74] *See* Canada Joint Case Brief, at vol. 2, C-6 (Exhibit U.S.-16); *see also*, Canada's Responses to the Panel's Questions from the First Substantive Meeting, para. 29 (May 8, 2002) ("[I]f the government's monopoly was over domestic production of the goods in question and there were imports of the same good, then the government price could be compared to the price of those imports.") (Exhibit U.S.-17).

[75] *See Canada–Aircraft Panel Report*, at para. 9.119; *Canada–Aircraft Appellate Body Report*, at para. 220; *see also* Appellate Body Report, *Brazil–Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted August 20, 1999, paras. 26, 38; *Brazil–Aircraft Panel Report*, at para. 7.26.

60. If a government subsidy is so pervasive – as in the Canadian timber industry – as to distort and depress the non-government market, the ensuing calculation of countervailing duty will be substantially underestimated or nullified if an investigating authority must rely only on domestic market prices. The object and purpose of the SCM Agreement thus requires an interpretation of Article 14(d) that permits the use of external evidence of fair market value when it is shown, based on positive evidence, that domestic prices are heavily distorted by the very financial contribution whose benefit is being measured.[76]

61. Mandating the use of in-country prices even where those prices have been shown to be depressed and distorted by the financial contribution at issue would lead to a perverse outcome: the greater the control the government exercises over inputs, including natural resources such as trees, iron ore, natural gas, or oil, the more protected the provision of the resource would be from the subsidy disciplines. This result would be inconsistent with the *U.S.–Lumber Preliminary Determination* panel's observation that there is no "natural resource" exception to the SCM Agreement, as Canada's position would effectively produce just this outcome.[77]

62. Article 14(d) should be construed in accordance with the object and purpose of the SCM Agreement. In the view of the United States, the only reasonable interpretation of Article 14(d) is that it permits the use of probative evidence from outside the exporting country in appropriate circumstances. It certainly should not, as Canada effectively urges, be interpreted to yield an outcome that defeats that purpose.

63. A careful reading of Canada's arguments demonstrates that the issue at the heart of Canada's complaint is not whether Article 14(d) precludes the use of "out of country" prices (e.g., import prices) to assess fair market value in the country of provision. As noted above, Canada has acknowledged that the use of such data is consistent with Article 14(d). Rather, the issues at the heart of Canada's claim are questions of fact: (1) did the United States have a reasonable basis to reject private prices in Canada as a basis for assessing fair market value; and (2) in any event, could price data for comparable timber in the northern United States provide a reasonable factual basis for assessing the fair market value of timber in Canada. As discussed below, the answer to both inquiries is yes; therefore, Canada's claim must fail.

c. Private Prices in Canada Did Not Provide a Reliable Basis to Determine Fair Market Value

64. It is the view of the United States, as reflected in its regulations, that the best and preferred evidence of fair market value in the country of provision is usually the commercial

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[76] *See Brazil–Aircraft Panel Report*, at para. 5.29.

[77] *U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.26 ("We note that the text of the SCM Agreement does not in any way provide an exception for the right to exploit natural resources.").

transactions in the country of provision for comparable goods. Thus, the U.S. investigating authority may not arbitrarily decline to use such transactions in determining fair market value. As noted above, however, the "the marketplace provides an appropriate basis for comparison" and, following the reasoning of the Appellate Body[78] and the *Brazil–Aircraft* panel, "the 'market' to which reference must be made is the *commercial* market, i.e., a market undistorted by government intervention."[79] The United States therefore disagrees with the contrary statement in the *U.S.–Lumber Preliminary Determination Panel Report.* The panel disregarded, and essentially read out of Article 14(d), the word "market." As a result, that panel concluded that an investigating authority may not decline to use private prices in the country of provision, even if those prices are suppressed by the government's financial contribution.[80] Following the reasoning of the Appellate Body and *Brazil–Aircraft* panel, however, prices suppressed by the government's financial contribution do not represent a commercial market price against which a benefit can be measured because they do not represent a "market undistorted by government intervention."

65. In the present case, the United States sought evidence on non-government prices for Canadian timber. The record evidence demonstrates, however, that the limited non-government price data submitted by the Canadian parties was inadequate and that such prices were significantly affected by the financial contribution itself, i.e., the supply of provincial government timber. These observed prices were simply uninformative of adequate remuneration, i.e., fair market value.

66. Because the sale of Crown timber is controlled by each province, the United States calculated province-specific fair market value benchmarks (a position supported by the provinces). Canada claims that there was "substantial information" on non-government market prices. The record, however, is far from substantial, despite the United States' numerous requests for information. A brief review of the evidence submitted by each province is illuminating.

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[78] *Canada–Aircraft Appellate Body Report*, at para. 157.

[79] *Brazil–Aircraft Panel Report*, at para. 5.29 (emphasis in original). The Appellate Body and the *Brazil–Aircraft* panel logically recognized that a subsidy benefit cannot be measured by comparing the government's financial contribution to a market distorted by government intervention. The United States is not of the view, and has never argued, that the point of comparison is a "hypothetical undistorted or perfectly competitive market." *See U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.50. Rather, following the reasoning of the Appellate Body and the *Brazil–Aircraft* panel, the United States expressed the view, as it does here, that the appropriate point of comparison is a "commercial market" price undistorted by government intervention. *See U.S.–Lumber Preliminary Determination*, United States' Responses to the Panel's Questions from the First Substantive Meeting, para. 24 (May 8, 2002) (Exhibit U.S.-18).

[80] *See U.S–Lumber Preliminary Determination Panel Report*, at paras. 7.51-7.52.

Alberta: Alberta did not provide any prices for non-government market transactions. The only price data provided by Alberta were "Timber Damage Assessments" ("TDAs"), which are not market values for non-government timber sales.[81]

British Colombia ("B.C."): B.C. did not provide data for non-government market transactions. The province provided government auction data from the small and very restricted Small Business Forest Enterprise Program ("SBFEP"),[82] and a study[83] prepared for purposes of the investigation containing a small number of selected prices, which were not broken down by species or grade, and one example of a private timber sale contract. [84]

Manitoba: Manitoba did not provide any non-government price data.[85]

Ontario: Ontario's information on non-government prices consisted of two studies prepared for purposes of the investigation which were predicated on an analysis that does

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[81] TDAs are not "market values," as Canada suggests. *See* Canada First Written Submission, at para. 103. Rather, they are estimated values for trees that are damaged or destroyed as a result of industrial operations. A TDA is a single price for all species, calculated annually by a consultant based on prices for logs (mostly Crown logs) purchased by tenure holders. These are not actual arm's-length transaction prices. The only "negotiation" with private parties was their agreement to accept these calculated prices as compensation for damaged timber. As Canada concedes, the purpose of TDAs is to "forestall litigation" over market value. *Id.* at para. 104. They are therefore a dispute settlement mechanism driven by the risk of litigation, not a market value driven by market forces.

[82] *See* Canada First Written Submission, at para. 107. The SBFEP auctions are limited to small businesses that are registered as small business forest enterprises. *See* B.C. Reg. 265/88 Small Business Forest Enterprise Regulation, Forest Act (Exhibit U.S.-19). Because the overwhelming majority of the purchasers of timber in British Columbia are explicitly excluded from these auctions, and other limitations restrict their demand and use, the United States rejected them as the basis for a fair market value assessment.

[83] With respect to the study that Canada cites in footnote 85 of its first written submission, the United States noted in the *Final Determination* that "there is insufficient evidence to conclude that the data provided is fully representative of timber prices on private lands or that the data even represent arm's-length transactions . . . ." Moreover, "there is nothing about the study to indicate that the prices are market-based or to indicate that the distortion resulting from the government's involvement in the market is minimal." *Issues and Decision Memorandum*, at 76-77 (Exhibit CDA-1).

[84] Canada also argues, using B.C. as an example, that the provincial governments receive adequate remuneration because they make a profit. That is, however, not the measure of adequate remuneration. The issue is not whether the provincial government made a profit, but rather, as the Appellate Body has stated, whether it charged less than market value for its Crown timber.

[85] *See* Response of the Government of Manitoba to the Department's May 1, 2001 Questionnaire, vol. 1, MB-55-MB-56 (June 28, 2001) (Exhibit U.S.-20).

not apply in a market dominated by a single supplier, as is the case in the Canadian timber market. Thus, the United States found the information to be flawed and unreliable.[86]

Saskatchewan: Saskatchewan did not provide any non-government price data.[87]

Quebec: Quebec was the only province that submitted actual prices from non-government transactions. As discussed below, however, there was substantial evidence that the non-government prices were distorted by the government's intervention in the market.

67. That is the sum total of the "extensive" record evidence Canada claims the United States should have used to calculate the province-specific, species-specific benchmarks.

68. In addition to the inadequacies in the data submitted, the record established that the non-government market for timber is driven not by market forces, but rather by the overwhelming government control over the market for Canadian timber.[88] Following the reasoning of the Appellate Body and the *Brazil–Aircraft* panel, therefore, the non-government market for Canadian timber does not provide an appropriate basis for assessing the fair market value of timber in Canada.

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[86] The studies were by Resource Information Systems, Inc. ("RISI Study") and Charles River Associates ("CRA Report"). In particular, the United States found unpersuasive the RISI Study's premise that evidence that private sellers are price takers indicates that prices are competitive. This was also one of the three conditions that the CRA Report found must exist to have a competitive market. As the United States explained, however, both studies failed to take account of the presence of a dominant market player:

> We recognize that having price takers in a given market could be one sign of a competitive market, as we explained in the *Preliminary Determination*. 66 FR at 43195. However, the question in this instance is, "Who are they taking the price from?" That is, the idea of a large number of price takers in a market carries with it the notion that no one player in the market is controlling the price. This would normally be the sign of a true competitive market with a true market price. However, where there is one overwhelmingly dominant market player, and that player happens to set prices without regard to market forces, it is impossible to conclude that the mere fact that the few remaining private suppliers in the market are price takers shows that a truly competitive market exists, or that the prices of those private suppliers are market-based. That is the situation in the Ontario stumpage market.

Issues and Decision Memorandum, at 97-98 (Exhibit CDA-1).

[87] *See* Response of the Government of Saskatchewan to the Department's May 1, 2001 Questionnaire, SK-81-SK-82 (June 28, 2001) (Exhibit U.S.-21).

[88] *See*, *e.g., Issues and Decision Memorandum*, at 97-98 (Exhibit CDA-1); Economists Inc., *Economic Analysis of Price Distortions in a Dominant-Firm/Fringe Market*, appended to Letter from Dewey Ballantine to Donald Evans (January 7, 2002) (Exhibit U.S.-22).

69. The most salient feature of the market for Canadian timber is the extensive state control. The provinces control over 90 percent of the timber in Canada. The record established that in each province (1) government timber sales were dominant relative to the private timber sales, ranging from 83 percent to 98 percent of the total market;[89] (2) the price of government-supplied timber is set on a nonmarket basis; (3) there are substantial supply-and-demand interactions between the government-supplied timber segment of the market and the private timber segment of the market; and (4) economic analysis establishes that, given these conditions, it is not reasonable (or indeed possible) to conclude that the small amount of private timber sales is unaffected by the dominant government-supplied timber.

70. It is also evident from the record that the Canadian provinces do not operate their stumpage systems on a market basis. The provinces administratively, rather than competitively, set prices for the timber, set minimum and maximum cut requirements, set minimum processing requirements, and designate where the timber must be processed (appurtenancy requirements). In addition, tenures are normally long-term to ensure a stable supply of timber to Canadian mills. The provinces also restrict mill closures even in down markets. These are not market features. Rather, these features distort the operation of normal market forces and are designed to keep Canadian mills supplied with timber and to keep the mills operating and the workers employed, regardless of what the market might otherwise dictate.[90] Given the dominance of the government in the market, these non-market government systems impact the small private sector as well.

71. It is therefore evident from the record that, as governments often do when they inject themselves into the commercial sector, the provinces use their stumpage systems to pursue public

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[89] Provincial government market share is, in fact, well in excess of the 70 percent threshold at which economists normally presume market power in monopoly cases. *See* Duncan Cameron and Mark Glick, *Market Share and Market Power in Merger and Monopolization Cases*, 1 (1997) (Exhibit U.S.-23). Of the total timber harvested in each province during the period of investigation, the following are the percentages, by province, of Crown timber:

British Columbia - 90 percent
Quebec - 83 percent
Ontario - 92 percent
Alberta - 98 percent
Manitoba - 94 percent
Saskatchewan - 90 percent

See Issues and Decision Memorandum, at 37 (Exhibit CDA-1).

[90] Canada acknowledges that provincial systems for selling timber are part of a broader economic and social policy framework. *See* Canada First Written Submission, at para. 157.

policy objectives such as job creation and maintenance in rural areas.[91] It is public policy, not market forces, that drive the prices of provincial timber.

72. Thus, the United States' concerns about distortions in the non-government market for Canadian timber were more than theoretical.[92] The impact in the private timber market of the pervasive market distorting features in the dominant government sector was also confirmed by substantial record evidence.[93] For example, studies by economists and other experts demonstrated that private timber prices in Canada were depressed and distorted by the overwhelming volume of government-supplied timber in the provinces. One such study concluded that a large government presence in the market will tend to make much smaller private suppliers price-takers. The authors stated that, while it is not unusual for small suppliers to be price-takers even in a market with no government involvement, the government-dominated market will distort the market as a whole if the government itself does not sell at market-determined prices. In such a situation, true market prices may not exist in the country, or it may be difficult to a find a market price that is independent of the distortions caused by the government's action.[94] The study also showed that the lower the share of the private sector relative to the administered sector, the lower the private sector's ability to raise its prices above

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[91] For example, the Annual Report of the Ministere des Ressources Naturelles in Quebec states:

> Objective *Between now and 2001, to contribute to creating 5,600 new jobs, maintaining 23,000 existing jobs and attracting at least $1 billion in investment in the timber processing industry by working to diversify products and markets, improve plant competitiveness.*

Response of the Gouvernement du Quebec to the Department's May 1, 2001 Questionnaire, Exhibit QC-S-11, 16 (June 28, 2001) (emphasis in original) (Exhibit U.S.-24). In addition, the United States learned at verification that the minimum stumpage charge in Ontario is set to produce a steady revenue stream for the province, but the charge is not based on timber values. *See Issues and Decision Memorandum*, at 98 (Exhibit CDA-1), referring to Memorandum from Robert Copyak and David Salked to Melissa Skinner, Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Verification of Questionnaire Responses Submitted by the Government of Ontario, 25 (February 15, 2002) (Exhibit U.S.-25).

[92] As discussed above, to the extent the *U.S.–Lumber Preliminary Determination Panel Report* concluded that a government's distortion of the marketplace is not relevant, we must disagree. *See U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.51. The panel concluded that "prevailing" meant that investigating authorities had to take the market "as it exists" and therefore ignored the provincial governments' distortion of the timber market. *Id.* at paras. 7.52-7.53.

[93] Much of this data was obtained after the *Preliminary Determination* and therefore was not available to the *U.S.–Lumber Preliminary Determination* panel.

[94] *See, e.g.*, Economists Inc., *Economic Analysis of Price Distortions in a Dominant-Firm/Fringe Market*, appended to Letter from Dewey Ballantine to Donald Evans, vol. 6 (January 7, 2002) (Exhibit U.S.-22). The authors applied basic industrial organization theory to characterize the market equilibrium in Canadian provincial timber markets. The study employed the "dominant firm/competitive fringe" model to analyze the interaction of two sources of supply: the dominant administered sector and the private sector, which is the fringe supplying the residual demand. The study found that the existence of the administered sector that is willing to supply the preponderance of the market at an artificially low price drove the price that the private sector could obtain lower.

the administered price. A Canadian forestry expert also concluded that, "[t]he quasi-monopolistic importance of the State in the supply of the industries obligates the small producers to align their prices with those of the public forest."[95] Thus, given the very small private timber market in Canada, the United States' conclusion that the private prices are driven by the government prices is amply supported.

73. A study commissioned by the B.C. Ministry also explained that "independent log producers complain that there are insufficient buyers for truly competitive marketing and pricing" and that "independent sawmillers and manufacturers find that the market is not a reliable source of raw material for those who do not have logs of their own to trade."[96] A report prepared by a Canadian environmental group similarly noted with respect to British Columbia that "since loggers bidding on Small Business sales have no choice but to dispose of their timber in an environment where timber prices are artificially low, even the bonus bids in the Small Business Program will tend to underestimate timber value."[97]

74. Further, an official from the Quebec private wood lot owners' association stated that if the Government of Quebec "sets fees at an arbitrarily low level, it would depress stumpage fees and log prices in the entire Province."[98] The Quebec Ministere des Ressources Naturelles acknowledged that private prices in Quebec could be affected by the administratively set price for public stumpage.[99] Another report similarly concluded that Crown stumpage rates in "Ontario depress stumpage values on private lands."[100]

75. In addition, the record shows that, in the major timber-producing provinces, the tenure holders' needs can be met from their provincial tenures within the flexibility provided under the "Annual Allowable Cut" ("AAC") requirements in their provincial tenures. For example, in

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[95] Luc Parent, *A Financial Strategy for the Development of Private Timber Lands in Quebec*, 87 (translated) (June 1995), attached to Petition for the Imposition of Countervailing Duties Pursuant to Section 701 of the Tariff Act of 1930: Certain Softwood Lumber Products from Canada, Exhibit IV, G-6 (April 2, 2001) ("Petition") (Exhibit U.S.-26).

[96] Peter H. Pearse, *Ready for Change: Crisis and Opportunity in the Coast Forest Industry*, 24 (November 2001), appended to Letter from Dewey Ballantine to Donald Evans, vol. 1, Exhibit 6 (January 7, 2002) (Exhibit U.S.-27).

[97] *Issues and Decision Memorandum*, at 38 (Exhibit CDA-1), referring to Tom Green and Lisa Matthaus, *Cutting Subsidies or Subsidized Cutting?*, 9, appended to Letter from Dewey Ballantine to Donald Evans (July 17, 2001) (Exhibit U.S.-28). This statement refers to the SBFEP discussed above.

[98] Memorandum from Eric Greynolds to Melissa Skinner, Countervailing Duty Investigation of Softwood Lumber Products from Canada: Verification of the Questionnaire Responses Submitted by the Government of Quebec, 28-29 (February 15, 2002) (Exhibit U.S.-54).

[99] *See Issues and Decision Memorandum,* at 38 (Exhibit CDA-1), referring to Petition, vol. II, at 119.

[100] *Issues and Decision Memorandum*, at 38 (Exhibit CDA-1), referring to David Cox *et al.*, *Examining the Market Value of Public Softwood Sawtimber in Canada*, 107 (July 27, 2001), appended to Letter from Dewey Ballantine to Donald Evans (July 27, 2001) (Exhibit U.S.-29).

B.C., Ontario, and Quebec, provincial harvests are consistently well below each province's AAC.[101] This means that, as a general rule, mills will not have to resort to the private market and strongly suggests that private sellers must tailor their prices to the predominant government administered price. Even if the private timber may, in some circumstances, be a convenient source, the price cannot go significantly higher than the government price.

76. Based on this and other evidence, the United States reasonably concluded that prices in the non-government market for Canadian timber do not provide a reliable basis for determining the fair market value of timber in Canada, absent the government's financial contribution.

d. Prices for Comparable Timber in Northern U.S. States, Properly Adjusted, Provide a Reasonable Basis for Assessing the Fair Market Value of Timber in Canada

77. A determination of adequate remuneration, i.e., fair market value, is inevitably a question of fact. While fair market value assessments are routinely made in commercial markets, there is no single formula. The analyses are case-by-case, relying on available data to make certain judgments.

78. As discussed above, there was no appropriate market price data from Canadian sources on which to base a fair market value assessment. Canada's claims notwithstanding, starting with prices for comparable timber of the same species immediately across the border and adjusting those prices, as appropriate, for provincial market conditions is a reasonable basis to assess the

[101] In B.C., Ontario, and Quebec, provincial harvests are consistently below each province's AAC. *See* Response of the Government of British Columbia to the Department's May 1, 2001 Questionnaire, vol. 3, Exhibit BC-S-1, Attachment F (June 28, 2001) (Exhibit U.S.-30) (showing that the public B.C. harvest – total harvest less private harvest, which is not included in the AAC – is consistently below the provincial AAC); Response of the Government of Ontario to the Department of Commerce's May 1, 2001 Questionnaire, vol. 5, Exhibits ON-TNR-4, ON-TNR-5 (June 28, 2001) (Exhibit U.S.-31); Response of the Government of Quebec to the Department of Commerce's May 1, 2001 Questionnaire, vol. 3, Exhibit QC-S-14, at 3 (June 28, 2001) (Exhibit U.S.-32). In Alberta, harvests have been consistently above the AAC in each of the three most recent years as fire-damaged timber is harvested. *See* Questionnaire Response of the Government of Alberta, Exhibit AB-S-34 (Table 16) (June 28, 2001) (Exhibit U.S.-33); Response of the Government of Alberta to the Department's November 19, 2001 Questionnaire, vol. 1, Exhibit AB-S-64 (Amended Table 16) (December 17, 2001) (Exhibit U.S.-34), which also demonstrates the flexibility of nominal AAC levels.

fair market value of timber in Canada.[102] An examination of the underlying facts and the assessment performed by the United States in this case demonstrates this point.

79. It is undisputed that the North American market for lumber is highly integrated. Canada, in fact, exports over 60 percent of its softwood lumber to the United States.[103] U.S. and Canadian timber are therefore supplying the same North American demand for lumber products. Thus, because of the derived nature of timber prices, market prices for U.S. timber are a logical and reasonable starting point for an assessment of the fair market value of Canadian timber.

80. U.S. timber is also commercially available to lumber producers in Canada. Canada does not contest the fact that Canadian mills actually do purchase U.S. timber – both on the stump[104] and as logs[105] – and consume it in their mills in Canada. Although U.S. imports are small, this is consistent with the availability of timber in Canada at below market rates.

81. To compensate for any differences in species mix, the United States calculated species-specific fair market value benchmarks.[106] The United States also used averages – an average,

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[102] Canada also argues that the use of U.S. prices as the basis for the benchmark calculation is inconsistent with past U.S. cases. *See* Canada First Written Submission, at paras. 87-91. The Panel is charged with determining whether the United States' Final Determination is consistent with the SCM Agreement. Prior U.S. cases are irrelevant to that inquiry. In any event, the subsidy benefit in those cases was determined under the then-prevailing U.S. legal standard, which measured the benefit in terms of "preferential" pricing, rather than by the current Uruguay Round standard of "adequate remuneration." These tests can produce substantially different results because preferentiality merely measures government price discrimination. For example, if a government provided widgets to one group at 50 cents and to another group at 55 cents, the "preferentiality" test would measure the subsidy at 5 cents even if the market price (and, thus, adequate remuneration) for widgets was $1. Thus, prior to the Uruguay Round, the United States frequently used benchmarks that did not fully reflect the market value of the good at issue. The United States' benchmark selections under an obsolete legal standard in previous lumber cases are irrelevant to the Panel's inquiry in this case into whether the *Final Determination* at issue is consistent with the SCM Agreement.

[103] *See* U.S. International Trade Commission, Softwood Lumber From Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Table VII-2 (May 2002) (Canadian exports to the United States in 2001 equaled 60.9 percent) (Exhibit U.S.-35).

[104] *See Issues and Decision Memorandum*, at 39 (Exhibit CDA-1) referring to (1) a letter from the Michigan Department of Natural Resources indicating that Canadian firms purchased stumpage in the United States, (2) a letter from a Forest Industry Specialist with the University of New Hampshire Cooperative Extension indicating that as much as 30 percent of the sawlog harvests in certain New England states is sold to Quebec to be processed, (3) the company exclusion verification report, which discusses Canadian imports of U.S. logs and purchases of U.S. stumpage, and (4) the fact that Canadian firms purchase and actively harvest U.S. timberlands.

[105] According to data maintained by Statistics Canada ("StatsCan"), an agency of the Canadian Government, approximately 2.5 million cubic meters of softwood logs were imported from the United States into Canada during the period of investigation. *See Issues and Decision Memorandum*, at 39 (Exhibit CDA-1).

[106] *See Issues and Decision Memorandum*, at 60-62, 80-83, 99-101, 112, 128-129, and 137-139 (Exhibit CDA-1).

species-specific fair market value benchmark for each province[107] and an average administered price for each province – to account for other differences that may affect the value of specific stands of timber. The use of averages is an accepted and widespread aspect of Canadian stumpage systems. For example, Ontario calculates stumpage charges using an average of U.S. lumber prices and subtracting out average mill costs and harvesting costs. Using this data, Ontario calculates only five different stumpage prices covering the entire softwood harvest. Similarly, Quebec, B.C., and other provinces use average cost data to calculate one stumpage charge for each predominant species in the province.

82. In addition, the United States made appropriate adjustments to the U.S. price data to arrive at an assessment of the fair market value of timber in Canada. As evidenced in the *Final Determination*, the United States conducted a thorough analysis of the conditions of sale in Canada and made necessary adjustments for obligations such as road building and silviculture that are conditions of sale in Canada. The result was a reasonable assessment of the fair market value of timber in Canada that is entirely consistent with Article 14(d) of the SCM Agreement.

83. Canada asserts, without any citation to record evidence, that there are a host of factors, such as an alleged comparative advantage, that make it impossible to rely on prices in the United States as a basis for assessing the fair market value of timber in Canada. A careful examination of the facts, however, demonstrates the fallacies in Canada's claims. For example, Canada implies that it has a comparative advantage in its natural resource endowments.[108] In fact, the size of the forest resource is comparable between Canada and the United States. Moreover, the most important natural resource endowments, the so-called dendrological characteristics of the forest, are in fact more comparable between the selected northern U.S. states and the respective provinces, than between provinces across Canada. For example, the forest resource in Coastal B.C. is far more comparable to Western Washington than it is to Ontario. A brief rebuttal of Canada's other points is provided in Attachment 2 to this brief.

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[107] As noted in the *Final Determination*, the United States used a variety of public sources to establish the base prices for the various species groupings reported by the provinces. *See Issues and Decision Memorandum*, at 60, 82, 99, 112, 129, 139 (Exhibit CDA-1) (Maine Forest Service *Stumpage Price Reports* for calendar year 2000; Washington Department of Natural Resources data as reported in the *Stumpage Price Report* published by the Timber Data Company and Western Washington U.S. Forest Service ("USFS") data, Eastern Washington USFS data, Northern Idaho USFS data, Southwestern Idaho USFS data, Idaho Department of Lands data, Montana Department of Natural Resources and Conservation data, and Montana USFS data from the *Stumpage Price Report*; *Minnesota 2000 Corrected Public Stumpage Price Review and Price Index* published by the State of Minnesota, Department of Natural Resources, Division of Forestry; *Michigan Stumpage Price Report* published by the Michigan Department of Natural Resources, Forest Management Division, which lists average stumpage prices for all sales from state lands from April 1, 2000 to March 31, 2001; USFS's *Timber Cut and Sold* report for Michigan, which contains prices for timber sold by the USFS in Michigan during calendar year 2000). In complete contrast to the private Canadian prices that were submitted, the prices derived from the northern United States are prices for timber offered on a competitive basis in open markets.

[108] *See* Canada First Written Submission, at para. 84.

84. In sum, in the absence of "commercial market" prices for timber in Canada it was reasonable and permissible for the United States to assess the fair market value of Canadian timber using prices for comparable U.S. timber, adjusted for prevailing market conditions in Canada. That conclusion is supported by the text of Article 14(d) and is consistent with the object and purpose of the SCM Agreement.

e. The SCM Agreement Does Not Define "Benefit" in Terms of Increased Output or Lower Prices for the Subject Merchandise and Does Not Create an Exception for Natural Resource Inputs

85. The SCM Agreement's definition of a subsidy is clear and unambiguous. Article 1 provides that if there is a government financial contribution, and if a benefit (calculated in terms of the benefit to the recipient) is thereby conferred, then "a subsidy shall be deemed to exist." According to the Appellate Body, "the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[109]

86. Nonetheless, without any justification in the text of the WTO agreements, Canada asserts that the Panel should graft onto the SCM Agreement a special rule for financial contributions that take the form of a government provision of a natural resource that is allegedly fixed in supply.[110] According to Canada, the conditions that prevail in such a market are such that no failure by the government to collect adequate remuneration can result in increased output or have an adverse trade impact. Thus, Canada claims that "any benefit analysis should assess" the trade effects of the subsidy.[111]

87. This argument is completely without foundation in the SCM Agreement.[112] Article 14, which is in fact titled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient," provides that the existence of a benefit to the recipient, not the existence of demonstrable trade effects, is determinative of whether a benefit exists for purposes of Article

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[109] *Canada–Aircraft Appellate Body Report*, at para. 157.

[110] *See* Canada First Written Submission, at paras. 117-126.

[111] *Id.* at para. 124; *see also id.* at para. 125 (asserting that "the analysis of remuneration in relation to prevailing market conditions in this case *should* include a review of whether provincial stumpage fees or charges are capable of causing trade distortion" (emphasis added)).

[112] In fact, certain WTO Members, particularly the EC, suggested during the negotiation of the SCM Agreement that subsidies with no or *de minimis* identifiable trade effects should automatically be non-actionable. These suggestions were not incorporated in the text of the SCM Agreement. *See The GATT Uruguay Round: A Negotiating History (1986-1992)*, at 864 (Exhibit U.S.-13), citing "Elements of the Negotiating Framework, Submission by the European Community," GATT Doc. No. MTN.GNG/NG10/W/3, at 7, 10 (November 27, 1989). Therefore, the Panel should not read into the SCM Agreement what is not there.

1.1.[113] The provisions of Article 14 describe the benefit analysis in terms of lower costs than the recipient would otherwise incur, absent the financial contribution – lower capital (financial inputs) or other input costs (goods or services). Nothing in Article 14 describes benefit in terms of the effect on the output of the recipient.

88. If the government makes a financial contribution, and the recipient obtains a benefit, then the definition of a subsidy in the SCM Agreement is fulfilled.[114] What Canada asserts "should" be added to this definition cannot supersede the actual text of the SCM Agreement. Rather, "the existence of a benefit should be determined only with reference to the terms on which a financial contribution could be obtained by the recipient on the market."

89. Trying yet again to carve natural resources out of the subsidy disciplines, Canada argues that the government sale of natural resource inputs cannot provide a benefit. This argument is premised on the economic "rent" theory, which holds that no matter how low the price is for a natural resource, there will be no impact on price or output for the downstream products.[115] That is, however, not the question the SCM Agreement poses. The Appellate Body has plainly stated that "benefit," within the meaning of Article 1.1(b), i.e., *the benefit to the recipient*, is something that makes the *recipient* better off than it would otherwise be in the marketplace. The benefit to the recipient from a government financial contribution, whether it is cash or natural resource inputs, is in no way dependent upon downstream effects of the subsidy.

3. The United States Calculated the Subsidy Rate in a Manner Consistent with the SCM Agreement and GATT 1994

90. In industries, such as softwood lumber, with an extremely large number of producers, it is not feasible, in an investigation, to examine the subsidies received by each individual producer. Given the deadline in the SCM Agreement for completing an investigation, other investigative methods are therefore necessary.[116] As reflected in Article 19.3 of the SCM Agreement, Members are accorded the flexibility to conduct investigations other than on a company-specific basis, and Canada does not argue to the contrary.

91. In this case, as discussed more fully below, rather than investigate specific producers, the United States examined the government subsidy programs at issue and, based on data supplied by

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[113] *See Canada–Aircraft Appellate Body Report*, at para. 155 ("[T]he reference to 'benefit *to the recipient*' in Article 14 also implies that the word 'benefit,' as used in Article 1.1, is concerned with the 'benefit *to the recipient*' and not with the 'cost to government,' as Canada contends." (emphasis in original)).

[114] *Id.* at para. 156 ("[S]ubparagraphs (a) and (b) of Article 1.1 define a 'subsidy' by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient.").

[115] *See* Canada First Written Submission, at paras. 117-126.

[116] Pursuant to Article 11.11 of the SCM Agreement, the investigation must be completed within one year (or 18 months in special circumstances) of initiation. The deadline for this investigation was March 21, 2001.

the provincial and federal governments, calculated the aggregate amount of all subsidies to producers of the subject merchandise (the numerator). The United States then allocated the aggregate subsidies over all sales of merchandise that benefitted from the subsidies (the denominator).

92. This type of aggregate subsidy investigation is entirely consistent with the SCM Agreement and, again, Canada does not argue to the contrary. Rather, Canada claims that certain aspects of the calculation methodology are inconsistent with Article 19 of the SCM Agreement and Article VI:3 of GATT 1994.

93. It is axiomatic that Canada has the burden of establishing a *prima facie* case of a violation,[117] i.e., Canada must establish (1) that there is an obligation in the provisions of the agreement it has cited in support of its claim,[118] and (2) that the United States has acted inconsistently with that obligation. As demonstrated below, Canada has failed to make such a *prima facie* case.

a. The Obligations in Article 19 of the SCM Agreement

94. Canada argues that the manner in which the United States calculated the countervailing duty is inconsistent with Articles 19.1 and 19.4 of the SCM Agreement, and Article VI:3 of GATT 1994.

95. Article 19.1 of the SCM Agreement states:

> *If*, after reasonable efforts have been made to complete consultations, *a Member makes a final determination* of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, *it may impose a countervailing duty* in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.[119]

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[117] *See, e.g., U.S.–Wool Shirts Appellate Body Report*, at p. 14; *EC–Hormones Appellate Body Report*, at para. 104.

[118] Canada must "identify the specific measures at issue and provide a brief summary of the legal basis for the complaint" in its request for the establishment of the panel. Article 6.2, DSU. A panel may only address the relevant provisions of the covered agreements "cited by the parties to the dispute" in the panel's terms of reference. Article 7.2, DSU; *see also*, Appellate Body Report, *Brazil–Measures Affecting Desiccated Coconut*, WT/DS/22/AB/R, adopted March 20, 1997, p. 22 (finding that the terms of reference "establish the jurisdiction of the panel by defining the precise claims at issue in the dispute"); Panel Report, *Egypt–Definitive Anti-Dumping Measures on Rebar from Turkey*, WT/DS211/R, adopted October 1, 2002, para. 7.141; *EC–Bed Linen Panel Report*, at para. 6.67 (rejecting a claim that was dependent upon a violation of a provision of the Antidumping Agreement not cited by India in its panel request); *US–Corrosion-Resistant Steel Appellate Body Report*, at paras. 164-172.

[119] Emphasis added.

Article 19.1 therefore requires a final determination of the amount of the subsidy and a final determination of injury as pre-conditions to the imposition of a countervailing duty. Article 19.1 does not, however, establish any requirements concerning how a subsidy or injury is to be determined. Those obligations are found elsewhere in the SCM Agreement.[120]

96. Article 19.4 of the SCM Agreement states:

> No countervailing duty shall be levied on any imported product *in excess of the amount of subsidy found to exist*, calculated in terms of subsidization per unit of the subsidized and exported product.[121]

Article 19.4 of the SCM Agreement therefore establishes an upper limit on the amount of the countervailing duty that may be levied, i.e., the amount of the subsidy found to exist. The issue addressed by Article 19.4 expressly is the *levying* of duties *after* a subsidy has been "found to exist."[122] The sole calculation requirement in Article 19.4 is a requirement to calculate the subsidy on a per-unit basis. Article 19.4 does not establish any other requirements concerning how the subsidy is to be calculated.[123]

97. Canada, in fact, concedes that its claim under Article 19.4 is dependent upon the existence of an inconsistency with some other provision of the SCM Agreement that imposes obligations with respect to the subsidy calculation:

> A Member violates Article 19.4 where it imposes countervailing duties on a product in excess of the actual amount of the subsidy

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[120] *See, e.g.*, Articles 14 and 15, SCM Agreement.

[121] Emphasis added; footnote omitted.

[122] Article 20.3 of the SCM Agreement provides that, "[i]f the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed . . . ." The possibility that the duty actually levied may be lower than the definitive duty "found to exist" in the investigation unavoidably includes the possibility that the duty actually levied may be zero because, on examination in a review, the particular producer in question may be found not to have received a subsidy. Therefore, the SCM Agreement does not require that each exporter be found to have received a subsidy in order to be subject to countervailing duties.

[123] Similarly, Article VI:3 of GATT 1994 states:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party *in excess of an amount equal to the estimated bounty or subsidy determined to have been granted*, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation . . . .

(Emphasis added). Article VI:3 of GATT 1994, like Article 19.4 of the SCM Agreement, establishes that the amount of the subsidy found is the upper limit on the amount of the countervailing duty that may be levied. Article VI:3 of GATT 1994 does not, however, address how the subsidy is to be calculated.

> attributable to that product. *This happens where, for example, a countervailing duty is based on a subsidy calculation in which the amount of a subsidy is higher than permitted by the methodologies set out in the SCM Agreement*, or the subsidy is allocated over a product sales value that is too low to reflect the actual sales value of the subsidized products.[124]

Canada has therefore acknowledged that where the amount of the duty imposed is equal to the subsidy found to exist, there can be no violation of Article 19.4 without first finding a violation of some other provision of the SCM Agreement addressing the calculation of the subsidy itself.[125]

98. Article 19.3 of the SCM Agreement provides:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports *are subject to a definitive countervailing duty but who was not actually investigated* for reasons other than a refusal to cooperate, *shall be entitled to an expedited review* in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.[126]

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[124] Canada First Written Submission, at para. 179 (emphasis added). Canada cites to no authority to support the second part of the last sentence, that a violation of Article 19.4 occurs when the "subsidy is allocated over a product sales value that is too low to reflect the actual sales value of the subsidies products." Indeed the language of Article 19.4 itself does not address this issue.

[125] At most, therefore, Canada's claims under Article 19.4 and Article VI:3 of GATT 1994, like its claims under Articles 10 and 32.1, are dependent on a finding of a violation of another provision of the SCM Agreement. GATT panels interpreting the identical language in Article 4:2 of the Subsidies Code refused to find violations of Article 4:2 based on the use of methodologies that were not specifically prohibited by the language of that article. *See U.S.–Atlantic Salmon Panel Report*, at para. 245 (finding Article 4:2 did not require the subsidy rate calculation to take into account the secondary tax effect of a payroll tax exemption); *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, circulated November 15, 1994, para. 666 (finding Article 4:2 did not preclude a Contracting Party from using a net present value concept in calculating a benefit stream from a one-time subsidy).

[126] Emphasis added.

Article 19.3 thus establishes two obligations: (1) when countervailing duties are "imposed," they must be "levied" on a non-discriminatory basis; and (2) when an uninvestigated exporter is "subject to" countervailing duties, the exporter is entitled to an expedited review to establish an individual countervailing duty rate. Nothing in the text of Article 19.3 establishes any obligations concerning the methodology used to calculate the amount of the subsidy, either in the aggregate or with respect to a specific exporter.

99. It is evident from a plain reading of the provisions of Article 19 that, unlike Article 14, Article 19 does not address the calculation of the subsidy benefit. Thus, while other provisions of the SCM Agreement contain obligations regarding the calculation of the benefit, Canada has failed to identify any such obligations in Article 19 or GATT 1994 in support of its claims concerning the subsidy calculation. It has, therefore, failed to establish a *prima facie* case of a violation.

100. Furthermore, to the extent Canada's claims relate to factual findings used to support the United States' methodology, the Panel may, of course, make an objective assessment of the facts.[127] The Panel is not, however, charged with conducting a *de novo* review of the facts. Rather the Panel is to determine whether the United States "evaluated *all relevant factors*, and . . . provided a *reasoned and adequate explanation* of how the facts support [its] determination."[128]

101. The United States will address each of Canada's claims under Article 19. To facilitate the Panel's understanding of the issues, we will first provide a brief summary of the calculation methodology used in this case.

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[127] *See* Article 11, DSU ("[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 . . . .").

[128] Appellate Body Report, *United States –Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted May 16, 2001, para. 103 ("*U.S.–Lamb Meat Appellate Body Report*") (emphasis in original, footnote omitted). In this case, the Appellate Body noted that "the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts.'" *Id*. at para 101, quoting *EC–Hormones Appellate Body Report*, at para 117. The Appellate Body went on to state that an "objective assessment" has two elements:

> First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination.

Id. at para 103 (emphasis in original, footnote omitted).

b. The Aggregate Subsidy Calculation

102. As noted above, there are hundreds of companies in Canada producing softwood lumber products subject to the United States' investigation. In light of this situation, the United States elected to conduct this investigation on an aggregate basis, i.e., based on aggregate data from the provincial governments, rather than through an investigation of individual exporters or producers.

103. The vast majority of the subject merchandise consists of lumber produced when softwood timber from Crown lands is processed at a sawmill. A small fraction of the subject merchandise consists of lumber that undergoes limited further processing, which is referred to as "remanufactured" lumber. The remanufacturing operations consist of such processes as cutting to odd lengths or widths, edging, finger-jointing (that is, serrating the edges of two boards and gluing them together to form one longer board), planing, and surfacing.[129] An appreciable portion of the remanufactured lumber is produced by companies that both process timber at sawmills and perform these minor cutting and finishing operations at shops owned by the sawmills.[130] In addition, sawmills ship some lumber to unrelated shops to perform these minor cutting and finishing operations.[131]

104. To calculate the total subsidy to producers of the subject merchandise (the numerator) provided by each province, the United States multiplied the total volume of *Crown softwood timber that entered sawmills* by the amount of the provincial subsidy (i.e., the difference between the provincial timber price and the benchmark price).[132] The United States then allocated the total subsidy over the sales of all products resulting from the processing of the Crown timber,

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[129] These processes are so limited that there is no substantial transformation, and the product that enters the United States is still covered by the Harmonized Tariff Schedule category for lumber. *See* Letter from Dewey Ballantine to Donald Evans, Attachment 1, D-6 (August 9, 2001) (Exhibit U.S.-36).

[130] Under the methodology used by StatsCan, if primary lumber products constitute the majority of the producer's production, the producer is referred to as a "sawmill." If the majority of the producer's production is remanufactured lumber products, the producer is referred to as a "remanufacturer." *See* Memorandum from Eric Greynolds to Melissa Skinner, Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Verification of Questionnaire Responses Submitted by the Government of Canada, 5 ("GOC Verification Report") (stating classification may change based on the category of the majority of the firm's production) (Exhibit CDA-34).

[131] *See* Letter from Dewey Ballantine to Donald Evans, Attachment 1, D-6 (August 9, 2001) (Exhibit U.S.-36).

[132] Canada confuses the issues when it refers to general data on the timber harvest. *See*, *e.g.*, Canada First Written Submission, at para. 140. Such data may include hardwood timber, softwood and other timber harvested from private forests, or timber that was harvested by mills that do not produce softwood lumber (e.g., pulp and paper mills). The data that Canada relies upon is, therefore, misleading. The methodology that the United States used is based on a much narrower database for the numerator calculation, i.e., only Crown softwood timber that entered sawmills. The general information that Canada cites does not address that database and therefore can only confuse rather than inform the discussion.

both products produced by sawmills (i.e., lumber, the remanufactured lumber products produced in shops owned by sawmills, and non-subject merchandise "co-products")[133] and the small fraction of total subject merchandise produced by independent remanufacturers (the denominator).[134]

105. The United States then determined the country-wide rate by weight averaging the provincial rates based on each province's share of total exports to the United States of the subject merchandise. The resulting country-wide rate is applied to all imports of the subject merchandise.[135] Other than considering a limited number of requests for exclusion from the countervailing duty order, the United States did not investigate any individual exporters or producers.[136]

c. The United States Did Not Impermissibly Presume a Benefit to Softwood Lumber Producers

106. The vast majority of Crown softwood timber is sold under tenure agreements that require the tenure holder to own a mill or to enter into a contract to sell the timber to a specific mill.[137] The persons that hold tenures are overwhelmingly sawmills (including many that own

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[133] To determine the denominator, the United States used data on lumber shipments supplied by StatsCan. The United States included in the denominator the StatsCan data for shipments from sawmills of softwood lumber products, and "co-products" that are not subject merchandise. As a result of verification, the United States determined that the "co-products" category included fuel wood, chips, particles, sawdust, waste, and scrap resulting from softwood products. *See* GOC Verification Report, at 10-11 (Exhibit CDA-34).

[134] This calculation is conservative in two respects. First, although the United States included sales of remanufacturers in the denominator, the United States did *not* include any Crown softwood timber that may have gone directly to remanufacturers in the numerator. To the extent that Crown softwood timber is being provided directly to remanufacturers at less than adequate remuneration, the numerator is therefore understated because it does not capture the benefit provided directly to remanufacturers. Second, the denominator included all shipments of softwood lumber from sawmills *to* remanufacturers, as well as shipments *by* remanufacturers. This methodology, therefore, may have overstated the denominator due to the double counting of the value of softwood lumber used to produce remanufactured softwood lumber products. The record did not contain sufficient information to eliminate the double counting. As the Commerce Department stated, however, "[t]o the extent that Exhibit 36 includes any double counting of lumber inputs, this merely makes our approach to deriving the values for remanufactured products more conservative." *Issues and Decision Memorandum*, at 25 (Exhibit CDA-1).

[135] *See Final Determination*, 67 Fed. Reg. at 15547 (Exhibit U.S.-2).

[136] *See Issues and Decision Memorandum*, at 4-13 (discussing the company exclusion process and determinations) (Exhibit CDA-1).

[137] The record evidence establishes that more than 95 percent of the harvest in Alberta is under tenure to sawmills; at least 83 percent of the harvest in British Columbia; 95 percent of the harvest in Manitoba; over 90 percent of the harvest in Ontario; over 86 percent of the harvest in Saskatchewan; and 99 percent of the harvest in Quebec. *See U.S.–Lumber Preliminary Determination Panel Report*, Answers of the United States of America to the Panel's 26 April 2002 Questions, paras. 2-8 (May 8, 2002) (Exhibit U.S.-37).

remanufacturing shops) and, in certain rare instances, independent remanufacturers.[138] Canada claims that the United States acted inconsistently with Articles 19.1 and 19.4 of the SCM Agreement by impermissibly "presuming" that all producers of the subject merchandise received countervailable subsidies.[139] More specifically, Canada claims that the subsidy calculation methodology used by the United States impermissibly "presumes" that (1) remanufacturers that bought lumber from sawmills received a benefit; and (2) sawmills that bought logs from independent harvesters received a benefit.[140]

107. As discussed above, however, the provisions of Articles 19.1 and 19.4 do not address the calculation of the amount of the subsidy. It is thus not surprising that, other than simply alleging a violation of Articles 19.1 and 19.4, Canada fails to provide any support in the text of those provisions for its claim. Rather, Canada's claim rests entirely on prior decisions that are, for the reasons discussed below, inapposite.

d. Rates Applied to Uninvestigated Exporters Do Not Impermissibly Presume That Those Exporters Received a Benefit

108. Article 19.3 of the SCM Agreement explicitly recognizes that exporters who were "*not actually investigated*" may be "*subject to*" definitive countervailing duties.[141] The SCM Agreement, therefore, expressly contemplates that a Member, in an investigation, may adopt a methodology, such as an aggregate methodology, that may subject individual exporters or producers to countervailing duties without individually investigating those exporters or producers to determine whether or to what extent they actually received a subsidy.

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[138] Canada acknowledges that some remanufacturers may hold stumpage rights. *See* Canada First Written Submission, at para. 127. Thus, as noted above, some remanufacturers produce primary lumber as well as remanufactured lumber. *See, e.g.,* Letter from Dewey Ballantine to Donald Evans, Attachment 1, D-5 - D-7 (August 9, 2001) (stating that the so-called "remanufactured" products cannot be distinguished from other lumber products) (Exhibit U.S.-36). There are, however, some remanufacturers that only produce remanufactured lumber from primary lumber products obtained from sawmills.

[139] *See* Canada First Written Submission, at para. 129.

[140] *Id*. at para. 128.

[141] Article 19.3 makes a distinction between exports that are "subject to" countervailing duties (or the imposition of countervailing duties) and exports upon which countervailing duties are actually "levied." Footnote 51 to Article 19.4 provides that, "[a]s used in this Agreement 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax." Article 19.3 provides that countervailing duties shall be "levied" on imports "in the appropriate amounts . . . from all sources found to be subsidized . . . ." It does not, however, require a finding that a particular exporter received a subsidy prior to its exports being "subject to" countervailing duties. The United States also notes that, under U.S. law, all exporters are entitled to a review upon request to determine the actual duties to be "levied" on their exports. *See* 19. U.S.C. § 1675(a) (Exhibit CDA-2).

109. It is, in fact, a standard practice among many investigating authorities, including that of Canada, to calculate, in an investigation, a countervailing duty rate for exporters that were not actually investigated. The SCM Agreement does not require that any particular methodology be used to calculate the rate for uninvestigated exporters. Members have the flexibility to use a variety of methodologies, including, for example, an aggregate methodology such as the United States used in this case, or a methodology based on the subsidy found for a limited number of investigated exporters.[142] None of these methodologies impermissibly presumes that the exporters that were not investigated received a subsidy benefit, and Canada does not argue to the contrary. Rather, the SCM Agreement addresses this issue by requiring, in Article 19.3, that an investigating authority provide an "expedited review" of an uninvestigated exporter to establish "an individual countervailing duty rate for that exporter."

110. As explained above, the United States did not examine individual softwood lumber producers in this investigation. A single, country-wide rate was calculated for all producers of the subject merchandise by allocating the total amount of the subsidy over all sales by producers of the subject merchandise.[143] As is the case with any rate calculated in an investigation for uninvestigated exporters, the actual amount of the subsidy received by any individual producer subject to that rate – whether it be a sawmill or an independent remanufacturer – may be more or less than the country-wide rate.[144] As discussed above, however, this methodology is not inconsistent with the SCM Agreement, even though it does not establish whether or to what extent each producer of subject merchandise received a portion of the total subsidy.[145]

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[142] *See Statement of Reasons Concerning a Final Determination of Dumping and Subsidizing Regarding Certain Grain Corn Originating in or Exported from the United States of America, for Use or Consumption West of the Manitoba/Ontario Border*, Nos. 4237-88 AD/1242, 4218-10 CV/91 (February 5, 2001) ("Grain Corn Determination") (Exhibit U.S.-38). Similar to the U.S. investigation of softwood lumber, in the Grain Corn Determination Canada sent requests for information to the U.S. Government regarding the aggregate amount of the subsidy and ultimately calculated an aggregate rate that would apply to all U.S. corn imported into Canada. *See also* Council Regulation (EC) 2026/97 of 6 October 1997 on Protection Against Subsidized Imports from Countries Not Members of the European Community, art. 15.3, 1997 O.J. (L 288) (Exhibit U.S.-39) (providing that countervailing duties applied to imports from exporters or producers that "were not included in the examination shall not exceed the weighted average amount of countervailable subsidies established for the parties in the sample").

[143] Alternatively, under U.S. law, and consistent with the SCM Agreement, the United States could have investigated the largest integrated producers of the subject merchandise and then calculated an "all others" rate based on the weighted average of the rates found for the investigated producers and applied that rate to all other imports of the subject merchandise.

[144] Determining whether or to what extent a remanufacturer received a portion of the subsidy benefit does not alter the calculation of the aggregate benefit. The fact that the sawmill may not have passed on any of the benefit to the remanufacturer does not alter the fact that the sawmill received it in the first place. This is purely a matter of which specific producers of the subject merchandise received what, if any, portion of the total subsidy.

[145] Canada asserts that the record contains the information necessary to deduct the subsidy attributable to arm's-length sales. *See* Canada First Written Submission, at para. 144. Canada does not, however, cite to any such record information. Rather, Canada makes a totally irrelevant reference to the record in a prior lumber case. *Id.* at fn. 129. Moreover, Canada fails to explain how the record could contain the information necessary to evaluate

111. The subsidies at issue are subsidies to the production of softwood lumber. Remanufacturers produce softwood lumber. As Canada acknowledges, remanufacturers may use both their own provincial tenures to furnish their mills and purchase lumber from sawmills.[146] Most remanufacturers only use lumber from sawmills that hold provincial tenures. In either case, however, the only way to determine whether and to what extent each individual remanufacturer actually received a portion of the total subsidy is to examine the remanufacturers individually. Without an examination of the individual remanufacturers, it is impossible to determine either the amount of any subsidy for a sawmill, or any subsidy benefit received through the purchase of lumber from a sawmill. The latter subsidy determination requires an examination of the relationships (or lack thereof) and actual transactions between the sawmills and the remanufacturers.[147]

112. Canada does not dispute that independent remanufacturers may receive some portion of the subsidies. It is evident from the discussion above that when Canada claims that the SCM Agreement required the United States to conduct a "pass-through" or "upstream" subsidy analysis to determine whether remanufacturers received a benefit, it is really claiming that the United States was required to specifically examine individual producers of the subject merchandise in the investigation. There is no requirement in the SCM Agreement for such a company-specific analysis in an investigation, however, and Canada's attempt to read such a requirement into Article 19.1 and 19.4 directly contradicts the text of Article 19.3 of the SCM Agreement.

113. Similarly, Canada claims that the United States was required to determine whether or to what extent some of the aggregate subsidy was in fact bestowed upon "independent" harvesters who sold the logs to sawmills and remanufacturers in arm's-length transactions.[148] This claim also fails. First, the record demonstrates that the vast majority of Crown timber entering sawmills (i.e., the basis for the subsidy calculation) is obtained from the sawmills' own tenures. To the extent that some portion of that timber was purchased from independent harvesters, the record evidence indicates that it could only constitute a comparatively small portion of the

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whether transactions were at arm's length without an investigation of the individual producers in question.

[146] *See* Canada First Written Submission, at para. 127.

[147] The fact that companies applied for exclusion from the order claiming that they purchased their inputs in arm's-length transactions does not establish that those transactions were, in fact, at arm's length or "significant," as Canada suggests. *Id.* at para. 140.

[148] *Id.* at para. 129. Canada equates the remanufacturer issue with the harvester issue, but the issues are, in fact, distinct. As noted above, with respect to remanufacturers that purchase lumber from sawmills, the issue is not the total amount of the subsidy benefit to the production of softwood lumber, but rather whether and to what extent each remanufacturer received a portion of the benefit. Sawmills that purchase logs at arm's length from independent harvesters could have a measurable effect on the total subsidy calculation only if there were a significant number of such sales. The record evidence, however, indicates that there were few, if any, such sales.

total.[149] Moreover, as discussed above, independent company subsidies can only be addressed through an examination of individual producers of the subject merchandise because of the necessity to examine the specific relationships and transactions that may be at issue.[150]

114. Because the SCM Agreement permits investigating authorities to subject exporters to countervailing duties without calculating an individual rate for the exporters in the investigation, Canada's reliance on the *U.S.–Lead and Bismuth II Appellate Body Report* is misplaced.[151] The three proceedings at issue in *U.S.– Lead and Bismuth II* were all company-specific administrative reviews, not investigations.[152] The United States notes that, consistent with Article 19.3 of the SCM Agreement, it is now conducting individual expedited reviews for all Canadian producers that filed timely and complete requests.[153] Among this group are companies that state that they do not have tenure rights but source a majority of their timber from contracts with timber holders.[154] The United States is conducting a pass-through analysis of these companies, as they have requested.

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[149] Canada grossly inflates this issue by citing data much broader than the data used to calculate the subsidy benefit. As discussed above, the vast majority of Crown softwood timber is under tenure to sawmills. Moreover, the record establishes that those tenures are generally more than sufficient to meet the tenure holders' needs. *See* footnote 101.

[150] The United States made clear from the outset that it was conducting an aggregate case. Canada did not object and made no attempt to supply any data to support its current claim that some of the timber entering sawmills was, in fact, coming from independent harvesters.

[151] *See* Canada First Written Submission, at para 134, citing *U.S.–Lead and Bismuth II Appellate Body Report*, at para. 68. For the same reason, the United States disagrees with the *U.S.–Lumber Preliminary Determination Report*, which also relies on the *U.S.–Lead and Bismuth II Appellate Body Report* in concluding that a pass-through analysis was required to establish the amount of the subsidy benefitting the producers of the subject merchandise. *See U.S.–Lumber Preliminary Determination Report*, at para. 7.71. The panel's decision would require the United States to establish, *in the investigation,* the amount of the subsidy benefit provided to *each individual producer* of the subject merchandise.

[152] The three proceedings were: (1) *Final Results of Countervailing Duty Administrative Review; Certain Hot-rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 61 Fed. Reg. 58377 (November 14, 1996); (2) *Final Results of Countervailing Duty Administrative Review; Certain Hot-rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 62 Fed. Reg. 53306 (October 14, 1997); and (3) *Final Results of Countervailing Duty Administrative Review; Certain Hot-rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 63 Fed. Reg. 18367 (April 15, 1998).

[153] *See Notice of Initiation of Expedited Reviews of the Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 46955, 46956 (July 17, 2002) ("*Initiation of Expedited Reviews*") (Exhibit U.S.-40). In fact, the United States has already completed the review of 13 producers. *See Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67388, 67389 (November 5, 2002) (Exhibit U.S.-41).

[154] *See Initiation of Expedited Reviews*, 67 Fed. Reg. at 46957 (Exhibit U.S.-40).

e. Canada's Claim with Respect to the Methodology Used to Calculate the Numerator of the *Ad Valorem* Subsidy Rate Has No Basis in GATT 1994 or the SCM Agreement

115. Canada claims that the United States acted inconsistently with Article 19.4 by basing the calculation of the total subsidy (the numerator) on the total volume of softwood timber from Crown lands that entered sawmills. Specifically, Canada claims that the United States should have used only that portion of the timber that actually became subject merchandise.[155] As discussed above, Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994 do not contain any obligation to use a specific methodology to calculate the "subsidy found to exist." Moreover, Canada's proposed methodology, which is not required in the first instance, would in fact understate the amount of the subsidy, particularly when coupled with Canada's proposed methodology for calculation of the denominator.

116. When a province sells one million cubic meters of timber to a sawmill for one dollar under the market value, the sawmill receives a benefit of one million dollars, regardless of what the sawmill makes from the timber. Thus, because the subsidy is not tied to the production of a specific product, the United States allocated the total subsidy over all products resulting from the timber processing,[156] including by-products that are not subject to the countervailing duty order.[157] Thus, the numerator and denominator are calculated on the same basis, i.e., total subsidy over total sales affected by that subsidy.

117. Canada's claim that the United States was required to calculate the total subsidy based solely on the volume of timber that resulted in the production of subject merchandise would, of course, understate the subsidy unless the denominator were likewise recalculated to eliminate all non-subject merchandise. However, as discussed further below, Canada actually argues that the United States was required to further expand the denominator to include additional non-subject merchandise, while reducing the numerator. Canada cannot have it both ways.

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[155] Canada alleges that less than 40 percent of the log volume in certain provinces becomes softwood lumber. *See* Canada First Written Submission, at para. 189, fn. 166. This allegation, however, was never established as a fact in the investigation.

[156] Indeed, the denominator is based on StatsCan data of all shipments of softwood lumber products from sawmills. This data includes softwood lumber shipments resulting from Crown softwood timber and from timber harvested on private lands.

[157] Because money is fungible, the United States' methodology recognizes that the subsidy benefits all of these products.

118. In reality, Canada's claim is nothing more than an argument that the United States was required to allocate the subsidy benefit based on volume[158] rather than on value.[159] This is a subject on which Article VI:3 of GATT 1994 and Article 19.4 of the SCM Agreement are silent.[160] "The most logical conclusion to be drawn from this silence is that the choice . . . is up to the investigating authority."[161] Canada, therefore, has failed to establish a *prima facie* case of a violation of either Article VI:3 of GATT 1994 or Article 19.4 of the SCM Agreement with regard to the calculation of the numerator of the *ad valorem* subsidy rate.

f. The United States Calculated an Appropriate Denominator Including All Relevant Sales

119. Canada's claim that the United States understated the denominator is simply a challenge to the United States' underlying findings of fact based on the record evidence. The United States "evaluated *all relevant factors*, and . . . provided a *reasoned and adequate explanation* of how the facts support [its] determination."[162]

120. Canada's claim that the United States violated Article VI:3 of GATT 1994 and Article 19.4 of the SCM Agreement is based solely on its disagreement with the United States' decision to rely on the data in Exhibit 36 of Canada's December 17, 2001 supplemental response ("GOC

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[158] Limiting the calculation of the numerator to the "volume" of timber that results in subject merchandise is a volume-based allocation.

[159] The United States' methodology of allocating the total subsidy over the total value of sales of all products resulting from the timber processing operation results in a value-based allocation. Even assuming *arguendo* that 40 percent of the volume of the timber resulted in softwood lumber, as Canada suggests, softwood lumber is the primary product of the sawmill. The entire log must be milled to produce this product. Products such as wood chips, sawdust, and fuel wood are merely portions of the timber left over once the lumber has been produced.

[160] Where the drafters of the SCM Agreement intended to impose a specific obligation concerning the methodology for calculating the *ad valorem* subsidy rate, they did so expressly. Specifically, paragraph 3 of Annex IV of the SCM Agreement requires that the denominator of subsidies tied to a certain product be calculated based on "the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted."

Moreover, the United States' methodology logically flows from the treatment of tied subsidies in paragraph 3 of Annex IV. That is, a tied subsidy benefits only a company's sales of the merchandise to which it is tied. Thus, the subsidy should be allocated over only those sales. An untied subsidy benefits all of the company's sales. Therefore, the entire amount of the untied subsidy should be allocated over all of that company's sales. To the extent that the SCM Agreement does not otherwise contain any similar obligation with respect to subsidies not tied to any specific product, such as those at issue here, the Panel may not impute such an obligation.

[161] *EC–Bed Linen Panel Report*, at para. 6.87 (finding that because nothing in the text of Article 2.2.2(ii) of the Antidumping Agreement specified whether averages should be weighted by volume or value, the choice is up to the investigating authority); *see also id*. at para. 6.82, quoting *India-Patent Appellate Body Report*, at para. 45.

[162] *U.S.–Lamb Meat Appellate Body Report*, at para. 103 (emphasis in original, footnote omitted).

Exhibit 36") to calculate the denominator, rather than using the Pacific Forestry Centre ("PFC") data, or calculating the countervailing duty rate using a "first mill" approach. As demonstrated below, however, the United States' findings of fact were well supported and well reasoned.

121. The scope of this investigation includes both lumber products (i.e., products resulting from the original processing of the timber at a sawmill) and certain "remanufactured" lumber products as described above. Sawmills may produce both primary lumber products and some remanufactured products. Sales of remanufactured products produced by sawmills are included in the StatsCan data on softwood lumber shipments from sawmills, which the United States included in the denominator.

122. The United States also included in the denominator a value for sales of the remanufactured lumber products produced by independent remanufacturers. To determine this value, the United States considered two alternative sources from the administrative record: (1) GOC Exhibit 36;[163] and (2) information derived from a study conducted by the PFC, which allegedly estimated the total value of remanufactured lumber shipments in British Columbia.[164] After an evaluation of both sources, the United States concluded that the data in GOC Exhibit 36 was more accurate.

123. Specifically, the United States found that the total value of shipments identified by the PFC as remanufactured shipments was overstated. The PFC included the total value of shipments reported by companies without deducting the amount of shipments that were not remanufactured softwood lumber products, despite the fact that it possessed the necessary information to make the deduction.[165] Second, the PFC study included in the total value of shipments a value for kiln drying, which is a service, not a product.[166] Moreover, as the PFC acknowledged, the absence of certain data made it "difficult to evaluate the reasonableness of the projections."[167]

124. In contrast, GOC Exhibit 36 contained information from StatsCan's 1997 Annual Survey of Manufacturers ("ASM"), the most recent ASM completed. In the ASM, industry group 25 included all producers of wood products within Canada. A subcategory of group 25, category 2512, included only sawmill shipments.[168] In GOC Exhibit 36, Canada deducted products

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[163] *See* Response of the Government of Canada to U.S Department of Commerce Supplemental Questionnaire, Exhibit GOC-GEN-36 (December 17, 2001) ("GOC Exhibit 36") (Exhibit CDA-96).

[164] *See* Letter from Weil, Gotshal & Manges to U.S. Department of Commerce, Estimated Added Value of Remanufacturer Shipments, Attachment 1 (January 7, 2002) (Exhibit CDA-97).

[165] *See* PFC Verification Report, 5-7 (February 15, 2002) (Exhibit CDA-98).

[166] *Id*. at 6.

[167] *Id*. at 7.

[168] *See* GOC Verification Report, at 3 (Exhibit CDA-34).

shipped by companies classified in group 2512 (sawmills) from the total lumber products shipped by all companies in group 25.[169] Based on this data, the United States could determine the value of remanufactured products in Alberta and British Columbia.[170] For the remaining provinces, the United States used this data to calculate a ratio of remanufactured shipments from independent remanufacturers to the total shipments of softwood lumber products, which it then applied to the value of shipments from the remaining provinces to calculate an estimate of the remanufactured products produced by independent remanufacturers from those provinces.

125. Finally, after a thorough review of all of the relevant evidence, the United States issued a reasoned and adequate explanation of its evidentiary choice.[171]

g. Calculating the Countervailing Duty Rate as a Percentage of the Entered Value Is Not Inconsistent with Article VI:3 of GATT 1994 or Article 19.4 of the SCM Agreement

126. Canada implies that the United States acted inconsistently with Article VI:3 of GATT 1994 and Article 19.4 of the SCM Agreement by failing to impose the countervailing duties on the "first-mill" value (i.e., value of the lumber when it left the sawmill) of all imports of the subject merchandise (including remanufactured lumber), rather than imposing duties on the entered value of the subject merchandise, which in the case of remanufactured products is the "final mill" value (i.e., the value of the lumber after it is further processed by the remanufacturer).[172]

127. Nothing in the language of either Article VI:3 of GATT 1994 or Article 19.4 of the SCM Agreement imposes an obligation on the United States to assess countervailing duties against the sawmill value rather than the entered value of the subject merchandise. (The only difference between sawmill value and entered value is the tiny volume of remanufactured products

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[169] *Id*. at 11.

[170] StatsCan officials contended that GOC Exhibit 36 only contained data from Alberta and British Columbia due to confidentiality restrictions. *Id*. at 11 (Exhibit CDA-34).

[171] *See U.S–Lamb Meat Appellate Body Report*, at para. 103. The United States explained its preference for GOC Exhibit 36 as follows:

> The verification report makes clear that the data in Exhibit 36 are based on the same data sources, and applied the same basic methodology, as the rest of the volume and value data reported by StatsCan. Despite the data limitations alleged by respondents, the information in Exhibit 36 is clearly a reasonable measure of the total value of in-scope remanufactured lumber shipments.

Issues and Decision Memorandum, at 25 (Exhibit CDA-1).

[172] *See* Canada First Written Submission, at paras. 195-203.

produced by independent remanufacturers.) Accordingly, such methodological choices are left to the Member.[173] Canada has, therefore, failed to establish a *prima facie* case of a violation.

128. Canada appears to be arguing that the United States violated its own domestic law in declining to calculate the duty rate on a sawmill basis. Whether a Member may have violated its own domestic law, however, is not an issue within this Panel's scope of review.[174] In any event, it is the United States' normal practice to assess countervailing duties against the entered value of the subject merchandise.[175]

h. The United States Chose Appropriate Conversion Factors After Weighing All of the Relevant Evidence

129. Canada also claims that the United States acted inconsistently with Article VI:3 of GATT 1994 and Article 19.4 of the SCM Agreement by using what it considers to be an inappropriate conversion factor. Again, nothing in the cited provisions establishes any obligation with respect to the calculation methodology generally, or with respect to the selection of a conversion factor specifically.[176] Canada's claim is simply another disagreement with one of the factual findings made by the United States in this case.

130. Specifically, in the United States, stumpage volumes are recorded in thousand board feet, and in Canada they are recorded in cubic meters. As discussed above, the United States used prices from U.S. northern border states as the basis for the benchmark calculation. To do the

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[173] *See EC–Bed Linen Panel Report*, at para. 6.82.

[174] The purpose of the WTO dispute settlement system is to determine whether a Member's measure is inconsistent with any of the covered agreements. *See* Articles 3.2, 3.7, 7.2, 11, 19.1, DSU. As the *U.S.–Hot-Rolled Steel* panel stated, "It is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation." Panel Report, *United States–Anti-Dumping Measures on Certain Hot-Rolled Products from Japan*, WT/DS183/R, circulated February 28, 2001, para. 7.267 ("*U.S.–Hot-Rolled Steel Panel Report*") (The Appellate Body Report, which was adopted on August 23, 2001, did not disturb this finding of the panel).

[175] Canada erroneously asserts that the prior lumber investigation reflects a practice of assessing duties against the first-mill value of the lumber. In the prior lumber investigation, however, the United States in fact stated that it it preferred to assess countervailing duties based on the entered (or "final-mill") value of the remanufactured lumber products, i.e., the value of the lumber after it has been further processed by a remanufacturer. *See* Memorandum from Melissa Skinner to Bernard Carreau, Basis of the Countervailing Duty Deposit Rate, 3 (August 31, 2001) ("CVD Deposit Rate Memorandum") (Exhibit CDA-93), citing *Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22570, 22575 (May 28, 1992) (Exhibit CDA-28). Based on the lack of evidence in that particular investigation, the United States departed from its normal practice and assessed the countervailing duty rate against the "first mill" value. In contrast, the necessary evidence to assess based on the entered value is on the record in this investigation.

[176] As discussed above, Canada's claims of a violation of Article VI:3 of GATT 1994 and Article 19.4 of the SCM Agreement are dependent upon a finding of a violation of some other provision of the WTO agreements. Canada, however, has cited to no other provisions of the WTO agreements in support of this claim.

benchmark comparison, therefore, the United States needed one or more conversion factors, i.e., numerical values expressed in cubic meters per thousand board feet, in order to compare prices. What constitutes an appropriate conversion factor is purely a question of fact. The United States selected the conversion factor used in this case after an examination of the record evidence, and it provided a reasoned explanation for its choice. It therefore fulfilled its obligations.[177]

131. The United States found that "[t]he selection of an appropriate conversion factor is an extremely technical matter," about which even experts in the field disagree.[178] Parties submitted numerous conflicting proposals for the appropriate conversion factors to use in this investigation, which were developed specifically for purposes of the investigation. The proposals suggested a wide range of possible conversion factors, from 3.48 to 8.51.[179]

132. The United States examined each proposal and decided that, due to the conflicting sources, the most objective course would be to rely "exclusively on published information prepared in the ordinary course of business by public agencies."[180] The United States reasoned that private studies conducted at the request of an interested party solely for the purpose of arguing a case before the Commerce Department could contain biases that would not exist in a study conducted by an objective public agency discharging its duties in the normal course of business.

133. The record contains two public sources for conversion factors that had been actually used to compare timber prices – the U.S. International Trade Commission ("ITC") and the U.S. Forest Service. After examining both sources, the United States found the conversion factors used by the ITC to be the better choice. The United States explained its rationale for this choice:

> Of these two sources, the Sawmill Study [of the U.S. Forest Service] is more current; however, there is no explanation given of how the numbers were derived. In contrast, the ITC study contains a reasonably detailed explanation of how the numbers were derived. Given this, we find that the ITC study is more reliable and have chosen to use the factors set forth in that study.[181]

134. The United States notes that had it used the conversion factors from the U.S. Forest Service Sawmill Study, or conversion factors published by other public agencies – including the

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[177] *See U.S.–Lamb Meat Appellate Body Report*, at para. 103.

[178] *Issues and Decision Memorandum*, at 144 (Exhibit CDA-1).

[179] The United States concluded that "there is no one conversion factor that is universally accepted." *Id.* at 143-44.

[180] *Id.* at 144.

[181] *Id.*

factors published by the Government of Canada itself[182] – the calculated subsidy would have been greater still.

135. Canada bases its claim on the erroneous assertion that the United States used a single "national" conversion factor without accounting for differences in scaling methods.[183] The conversion factor used actually differed depending on the scaling method used in the U.S. jurisdiction. The ITC study applied a 5.66 conversion factor for all U.S. jurisdictions using the Scribner Long Log scale, and a conversion factor of 4.81 for U.S. jurisdictions using the Scribner Short Log scale. Of the U.S. states used as starting points for benchmark prices, only Western Washington used the Scribner Long Log scale. Thus, the United States used a conversion factor of 5.66 for Western Washington, and a factor of 4.81 for all other states.[184]

136. Whether Canada, or the Panel, would have weighed the evidence and chosen a different factor is irrelevant.[185] The United States weighed the evidence and made a well reasoned choice. It is required to do no more.

4. Canadian Provincial Stumpage Subsidies Are Specific within the Meaning of the SCM Agreement

137. Pursuant to Article 1.2 of the SCM Agreement, a countervailable subsidy must be "specific" within the meaning of Article 2. Article 2, in turn, provides several bases for finding a subsidy to be specific, including the provision of the subsidy, in fact, to a limited group of industries. The United States found, and Canada does not dispute, that Canadian provincial stumpage programs were used by a limited group of lumber and pulp and paper industries and that the vast majority of companies and industries within Canada did not receive stumpage benefits. On this basis, the United States found that these programs were, in fact, specific.

138. In the face of this compelling conclusion, Canada attempted to change the question, to redefine the specificity test in a manner more to its liking. Thus, it attempts to redefine "industry," and to embellish the plain text of Article 2.1 of the SCM Agreement with a panoply

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[182] The standard timber conversion factor of 4.53 cubic meters per thousand board feet is used in numerous official Canadian government publications. *See, e.g.*, Statistics Canada, *Survey of Manufactures 1997: Guidelines and Instructions*, 16 (1997), attached to David G. Briggs, "Department of Commerce's Selection of a Conversion Factor in the Softwood Lumber Case" ("Briggs Report") (Exhibit U.S.-42); Canadian Forest Service, *Selected Forestry Statistics Canada 1995*, iv (1996), attached to David G. Briggs, "Evaluation of Criticisms of 'Department of Commerce's Selection of a Conversion Factor in the Softwood Lumber Case'" (Exhibit U.S.-42); Canadian Council of Forest Ministers, *National Forestry Database Program: Background*, attached to Briggs Report (Exhibit U.S.-42).

[183] *See* Canada First Written Submission, at para. 187.

[184] *See Issues and Decision Memorandum*, at 144-45 (Exhibit CDA-1).

[185] *See U.S.–Lamb Meat Appellate Body Report*, at para. 103.

of additional requirements and non-existent exceptions to the specificity test, including intent, "inherent characteristics," and "social policy."[186] As we demonstrate below, however, Canada's objections are without foundation in the SCM Agreement and merely seek to create confusion. For these reasons, the Panel should find that the United States' specificity determination was fully consistent with its obligations under the SCM Agreement and GATT 1994.

a. The United States Correctly Interpreted Its Obligations under the SCM Agreement with Respect to Specificity

139. Under the SCM Agreement, a subsidy "shall be deemed to exist" where "there is a financial contribution by a government or any public body within the territory of a Member" and a benefit is thereby conferred.[187] Pursuant to Article 1.2 of the SCM Agreement, a program that otherwise meets the definition of a subsidy shall be subject to countervailing measures if it is "specific" within the meaning of Article 2 of the SCM Agreement. Article 2.1 of the SCM Agreement provides three principles that must be applied to determine whether a subsidy is specific to "an enterprise or industry or group of enterprises or industries" — referred to collectively by the SCM Agreement as "certain enterprises" — within the jurisdiction of the granting authority.

140. First, a subsidy is specific as a matter of law if the granting authority *explicitly* limits access to a subsidy to certain enterprises. Second, a subsidy is *not* specific as a matter of law where the granting authority establishes objective criteria or conditions governing eligibility for, and the amount of, a subsidy, provided that eligibility is automatic and the criteria or conditions are strictly adhered to.

141. Third, even where the law under which the granting authority operates does not appear to create a *de jure* specific subsidy under the first two steps of the analysis, Article 2.1(c) of the SCM Agreement provides that other factors may be considered to determine if the subsidy is, *in fact*, specific, including:

> use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises,

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[186] *See, e.g.*, Canada First Written Submission, at para. 155 ("Where these factors do not indicate that a Member is *deliberately* limiting access to a program (that is, if the factors may be explained by other circumstances), then the program is not specific." (emphasis added)); para. 172 (seeking to avoid a specificity finding where "the inherent characteristics of the alleged good . . limit the number of users of the program, rather than any deliberate government favouritism"); para. 157 (claiming that countervailing measures may not be imposed on programs "that are adopted in the context of a Member's broader economic and social policy framework, such as the sustainable exploitation of natural resources").

[187] Article 1.1, SCM Agreement.

> and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[188]

Thus, Article 2.1(c) establishes that, even if a subsidy has the "appearance" of being widely available throughout an economy, it may nevertheless be specific if, as a matter of fact, the subsidy is used only or predominantly or disproportionately by a limited number of certain enterprises. The criteria set forth in Article 2.1(c) are objective criteria relating to the actual users of a subsidy program, rather than the structure, legal eligibility, or intent behind a subsidy program. Nothing in Article 2 or any other provision of the SCM Agreement requires an investigating authority to consider the government's intent in establishing the program or the nature of the mechanism by which the government bestowed the subsidy (i.e., by virtue of the provision of a natural resource or an input product with limited uses).[189] Nor does anything in Article 2 suggest that a government's social or political reasons for providing a subsidy have any relevance to a specificity determination. Article 2.1(c) is not concerned with the reasons *why* a granting authority provided a subsidy to specific industries, but only with *whether* it did so.

b. As a Factual Matter, the United States Properly Determined That Provincial Stumpage Subsidies Were Specific within the Meaning of Article 2.1(c) of the SCM Agreement

142. The United States acted consistently with its obligations under the SCM Agreement in finding that Canada's provincial stumpage programs are specific. The subsidy at issue in this

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[188] Article 2.1(c), SCM Agreement (footnote omitted). As indicated in the text of Article 2.1(c), an investigating authority must consider the extent of economic diversification within the subsidizing jurisdiction when assessing specificity-in-fact. The text does not, however, prescribe any particular methodology for taking this factor into account.

[189] Articles 3.2 and 19.2 of the DSU provide that neither the Dispute Settlement Body's ("DSB") recommendations and rulings, nor a panel, nor the Appellate Body, can add to or diminish existing WTO rights and obligations. Article 3.4 of the DSU requires the DSB to make recommendations and rulings in accordance with those rights and obligations:

> Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter *in accordance with the rights and obligations* under this Understanding and under the covered agreements.

Emphasis added. Panels therefore must respect the carefully drawn balance between Members' rights and obligations in the WTO agreements. *See U.S. – Wool Shirts Appellate Body Report*, at 16.

case is the provision of Crown timber to lumber manufacturers at below-market prices.[190] Thus, the proper inquiry under Article 2.1(c) of the SCM Agreement is whether the actual recipients of Crown timber (or stumpage), whether considered on an enterprise, industry, or group basis, are limited.

143. The facts of record clearly demonstrate that provincial stumpage subsidy programs were used by a "limited number of certain enterprises" within the meaning of Article 2.1(c) of the SCM Agreement. The SCM Agreement does not define the term "limited number." As a factual matter, the Commerce Department found that stumpage subsidy programs were used by a single group of industries, comprised of pulp and paper mills, and the saw mills and remanufacturers that produce the subject merchandise.[191] Such a small number of users would count as "limited" by any reasonable definition.[192]

144. Moreover, there is absolutely no evidence on the record to suggest that subsidized timber is generally available, or even widely used by industries other than those in the lumber and pulp and paper sector.[193] When the enormous diversity of the provincial economies is factored in, as provided by Article 2.1(c) of the SCM Agreement, it is obvious that stumpage programs are not broadly available or widely used across the almost endless variety of economic endeavors outside the timber processing industries. In fact, as the United States noted in its *Final Determination*, "[t]he vast majority of companies and industries in Canada does not receive benefits under these programs."[194]

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[190] *See Issues and Decision Memorandum,* at 29 (Exhibit CDA-1).

[191] *Id.* at 51-52.

[192] As required by Article 2.4 of the SCM Agreement, the United States has clearly substantiated its specificity determination on the basis of positive evidence. The record facts establishing that the users of timber contracts are limited to sawmills (including remanufacturers) and pulp and paper mills, and no other industries, constitute positive evidence that the recipients of timber (or stumpage) are limited.

[193] The vast majority of the timber contracts in Canada are entered into directly between the provincial governments and Canadian forest products producers, which we refer to generally as "wood processing facilities." In most instances, in fact, only wood processing facilities, such as sawmills that produce lumber, are eligible to obtain a timber contract. For example, the Quebec Forest Act states that "[n]o one except a person authorized to construct or operate a wood processing plant is qualified to enter into" a Timber Supply Forest Management Agreement, a form of tenure covering 99 percent of the Crown harvest in Quebec. *See* Quebec Forest Act § 37 (Exhibit U.S.-43). Similarly, the record indicates that approximately 95 percent of the Crown softwood harvest in Alberta goes to tenure holders that own sawmills. The United States refers the Panel to Exhibit U.S.-44, which is derived from Alberta's questionnaire response. (The United States notes that Exhibit U.S.-44 is drawn from proprietary information, which we cannot disclose without consent. If Canada provides consent, the United States would be pleased to provide the underlying data to the Panel). What the data show, as summarized in the exhibit, is that all of the 155 tenure holders in Alberta own a processing facility and that 143 of those 155 tenure holders own a sawmill.

[194] *Issues and Decision Memorandum*, at 52 (Exhibit CDA-1). Unlike a general corporate tax provision, the subsidy benefit at issue here is not widely available across a broad spectrum of industries. Canadian automobile manufacturers do not use timber contracts, nor do textile manufacturers, or electronics manufacturers, or a whole

145. Under Article 2.1(c), these findings are fully sufficient to establish the specificity of the provincial stumpage programs; no further analysis is required or appropriate. Therefore, the United States' specificity finding is entirely consistent with its obligations under the SCM Agreement.

c. Canada's Attempts to Redefine the Specificity Test Have No Basis in the SCM Agreement

146. Canada does not deny that there are no recipients of timber outside of the lumber and pulp and paper industries. In each province, it is the lumber and pulp and paper industries that receive the subsidy — that is, Crown timber at below-market prices.[195] The simple fact is that the users of the subsidy are limited to certain enterprises — a small group of lumber and pulp and paper industries — and the subsidy therefore is specific under Article 2.1(c) of the SCM Agreement. Canada does not and cannot contest these facts; instead, it attempts to redefine the specificity test. Canada would have this Panel ignore the plain language of the SCM Agreement, and instead establish obligations and requirements that exist nowhere in the SCM Agreement.

i. Canada's Attempt to Graft Special Exceptions onto Article 2 of the SCM Agreement Violates the Plain Language of the Agreement

147. As noted earlier, Canada attempts to read an intent requirement into the SCM Agreement, notwithstanding that nothing in the text requires any findings as to the granting authority's intent to limit a subsidy.[196] To the contrary, the very purpose of Article 2.1(c) is to let the facts speak for themselves. Thus, Article 2.1(c) refers simply to whether a limited number of enterprises use a subsidy, not why that is so. When Members agreed that other factors should be taken into account, they expressly stated so. The only additional factors identified in Article 2.1(c) are diversification of economic activity and the length of time a subsidy has been in operation. The Panel should not read any additional factors into the SCM Agreement.

148. Next, without any foundation in the SCM Agreement, Canada claims that subsidies are not specific if they are "adopted in the context of a Member's broader economic and social policy

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host of other industries.

[195] *Id.* at 29.

[196] *See* Canada First Written Submission, at para. 155 ("Where these factors do not indicate that a Member is *deliberately* limiting access to a program (that is, if the factors may be explained by other circumstances), then the program is not specific." (emphasis added)); para. 156 ("A Member may find that the alleged subsidy is specific in fact only where the total configuration of facts and evidence relating to these factors points to a *deliberate* limiting of access." (emphasis added)); para. 157 ("Article 2.1(b) confirms that the objective of the specificity requirement is to discipline subsidies granted to *deliberately* favour some entities over others . . . ." (emphasis added)).

framework, such as the sustainable exploitation of natural resources."[197] A "policy" exception would, however, obliterate the specificity requirement to the extent that *all* subsidies fall within some broader social or economic policy framework. The SCM Agreement clearly defines the government actions that constitute countervailable subsidies without any reference to what social or policy goals the government is pursuing in providing the subsidies: if a government provides a subsidy to a specific enterprise, industry, or group thereof, it is actionable.[198]

149. Finally, Canada seeks to create an exception to Article 2 that would explain away a finding of specificity where "the *inherent characteristics* of the alleged good . . . limit the number of users of the program, rather than any deliberate government favouritism."[199] However, the "inherent characteristics" of the subsidized good are also not a factor under Article 2.1. The fact that a subsidized input has economic utility for a limited number of potential recipients does not and cannot exempt it from the subsidy disciplines of the SCM Agreement.[200] If a government sells iron ore, bauxite, or auto engines at below-market prices, for example, the subsidy is still specific within the meaning of Article 2.1(c) as long as the evidence establishes that only or predominantly steel producers, aluminum producers, or auto manufacturers, respectively, used the government subsidy.[201] If it were otherwise, a government could subsidize with impunity merely by carefully selecting limited-use inputs to provide to particular industries.[202] The SCM Agreement provides no such exception for "inherent characteristics," and

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[197] Canada First Written Submission, at para. 157.

[198] Likewise, the SCM Agreement contains no exception from specificity, express or implied, for subsidies involving the provision of natural resources.

[199] Canada First Written Submission, at para. 172 (emphasis added). *See also id.* at para. 150 ("[C]ircumstances other than provincial government action, such as the nature of the alleged good in this case, may explain the limited number of users.").

[200] The Panel likewise should reject Canada's arguments regarding what it claims to be U.S. precedent on the "inherent characteristics" issue. *See* Canada First Written Submission, at para. 172, fn. 151. Canada cites a U.S. determination that is 20 years old and that was subsequently rejected by Congress, well before there was any international obligation with respect to specificity. In the absence of any WTO obligation with respect to inherent characteristics, Canada's claims should be rejected.

[201] Canada's statement that the provision of natural resources will always be specific under a "limited users" standard (absent consideration of "inherent characteristics") is factually incorrect and irrelevant. *See* Canada First Written Submission, at para. 173. Many industries, for example, use water or gold as an input. However, if an input, whether it be a natural resource or a manufactured component, has limited utility, that does not prevent a finding of specificity. In Canada's view, almost *no* natural resources subsidy could ever be specific, even where it is not widely used, since there always would be some "natural limitation" on its use that could not be attributed to "government intent." Following Canada's logic, even a custom-designed manufacturing component would not be specific because of the "natural limitation" on its use. As we have outlined above, however, "natural limitations" and "government intent" are wholly irrelevant under Article 2.1(c).

[202] Canada's positions are akin to saying that a government program that involved the provision of automobile engines at below-market prices to manufacturers of automobiles would not be specific if the government were willing also to provide automobile engines to the textile industry (even though the textile industry does not avail itself of the engines), or could not be found to be specific if the government claimed that it was adopted in the

to imply one would be inconsistent with the plain meaning of the SCM Agreement.[203] What matters is whether the actual users of the government-provided good — for whatever reasons — are limited in number, whether considered on the basis of enterprises, industries, or groups thereof.[204]

ii. Canada's Claim That the Department Incorrectly Defined the Industry Rests on a Distortion of the Plain Language of the Agreement

150. Canada claims that the United States undercounted the number of industries that used stumpage subsidies because it used an improper definition of the word "industry."[205] According to Canada, the word "industry," as used in Article 2 of the SCM Agreement, "requires an examination of production-based criteria,"[206] such that "in the absence of a product-based definition of industries, no 'group of industries' may be found."[207] In making this argument, Canada is *not* referring to the common practice of referring to industries by the general type of products they produce, e.g., the steel industry, the auto industry, or the electronics industry. Canada seeks to constrict the natural meaning of "industry" such that an industry would be identified not by the general class of products it produces, but by a particular product or narrow

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context of some broader economic and social policy framework, such as providing employment in towns where the factories were located. Such requirements are not only absent from the terms of the SCM Agreement, but they are also inconsistent with the basic structure of Article 2.1(c) of the SCM Agreement, which envisions an objective examination of the actual users of a subsidy program rather than the reasons why the government provides the subsidy.

[203] Indeed, it is not at all uncommon for natural resource and agricultural inputs to have a limited number of users or a predominant user by virtue of their "inherent characteristics." For example, bauxite is primarily used by the aluminum industry, iron ore by the steel industry, and wheat by the bread and pasta industries. The inherent characteristics argument amounts to an attempt to create a natural resources exception to the subsidy disciplines of the SCM Agreement. Yet Canada points to nothing in the SCM Agreement that would exempt such a narrowly targeted subsidy from these disciplines merely because the subsidy provided would not be widely useable beyond the specified recipients. A panel may not import into Article 2 words that are not there or concepts that were not intended. *See India–Patents Appellate Body Report*, at paras. 45-46.

[204] Canada claims, erroneously, that "countervailing measures may not be imposed except on subsidies that are restricted to certain enterprises over other *eligible* enterprises." Canada First Written Submission, at para. 154 (emphasis added). Canada reads in a qualifier, "eligible," that is not there. The relevant comparison is not with other *eligible* enterprises, but with all other enterprises or industries, or groups of enterprises or industries, within the granting jurisdiction.

[205] *See* Canada First Written Submission, at para. 149.

[206] *Id.* at para. 158.

[207] *Id.* at para. 162.

set of products. Based on its narrow, product-based definition of "industry," Canada finds that stumpage subsidies were used not by two, but by 23 industries that produced over 200 goods.[208]

151. Canada further claims that a "group of industries" is similarly restricted to individual members that make similar products.[209] There is absolutely no basis in the text, or logic, for Canada's argument. Under Canada's theory, an income tax exemption granted solely to two industries — the auto industry and the textile industry — is not specific under Article 2.1 of the SCM Agreement because the two industries in the group manufacture dissimilar products. Canada's reading contradicts the ordinary meaning of the word "group," which in the context of Article 2.1 plainly and simply means "one or more" enterprises or industries; it does not require that all of its members be identical, or even similar, to be called a group. By insisting that "groups" of enterprises or industries be relatively homogeneous, Canada attempts to nullify the meaning of "group" and reduce it to redundancy, a result the Appellate Body has expressly cautioned against.[210]

152. Canada's approach would mean that even a subsidy limited to a single large industry — whether steel, autos, textiles, telecommunications, or the like — could not be specific because of the diversity of products each of those industries produces. A large vertically integrated steel or textile firm may produce a variety of products covering hundreds of tariff categories. Far from being dispositive, the number of products produced by a given industry is wholly irrelevant to a determination of specificity under Article 2. The plain language of Article 2 indicates that the specificity test is concerned not with products, but with *enterprises* and *industries*. Indeed, the shorthand for "enterprise or industry or group of enterprises or industries" is "certain enterprises."[211]

153. The Panel thus should likewise reject Canada's argument that the term "domestic industry," as defined in Article 16.1 of the SCM Agreement, forms the context for understanding what is meant by "industry" in Article 2.1. Article 16.1 defines "domestic industry" within the context of the determination of the domestic "like product," whereas specificity determinations under Article 2 are not limited to particular "like products." There is no logical connection between defining the domestic industry that is injured by a specific imported product and

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[208] *Id.* at para. 168. Under Article 2, only the actual users of a subsidy program are relevant to a determination of specificity — not how many products they produce. Nothing in the SCM Agreement requires an investigating authority to subdivide the recipient industries into sub-industries for specificity purposes, nor to trace the downstream uses of subsidized merchandise that is under investigation — in this case, lumber, and so-called remanufactured lumber — once it is produced. Thus, the United States did not count homebuilders in determining specificity of subsidies to lumber producers any more than it would count automobile makers in determining specificity of subsidies to the steel industry.

[209] Canada First Written Submission, at paras. 161-162.

[210] *See U.S.–Reformulated Gasoline Appellate Body Report,* at 23.

[211] Article 2.1, SCM Agreement.

determining whether a subsidy is limited to certain enterprises or industries. For example, in a case involving imports of limes, the relevant domestic industry may be lime growers — but that has no bearing on whether a subsidy program limited to the citrus fruit industry is specific. Once again, Canada seeks to read words into the SCM Agreement that are not there and create obligations to which the Members did not agree.

d. The United States Properly Considered the Extent of Economic Diversification within the Subsidizing Jurisdiction

154. As discussed above, the United States based its specificity determination on its finding that the provincial stumpage subsidies were used by a limited number of certain industries, within the meaning of Article 2.1(c) of the SCM Agreement. Article 2.1(c) further provides that an investigating authority must take into account "the extent of diversification of economic activities within the jurisdiction of the granting authority . . . ."

155. The inherent logic of this provision is simple. When the economy of a subsidy-granting jurisdiction is not diverse and is dependent on a small number of industries — or even a single industry — a subsidy that is provided to all industries may appear to be specific in fact, within the meaning of Article 2.1(c) of the SCM Agreement. In other words, such a subsidy may be widely distributed within the economy, and yet appear specific, simply due to the limitations of the domestic economy where the subsidy was granted. To prevent Article 2.1(c) of the SCM Agreement from functioning as a *per se* rule under which any subsidy within a small or undiversified economy automatically would be specific, the "diversification" language requires a consideration of the broader economic context within which the particular subsidy program functions.

156. Recognizing this aspect of the specificity test, the United States explicitly found:

> Respondents [Canadian parties] are incorrect that the Provincial stumpage subsidies are "broadly available and widely used throughout an economy." Applying the standard set forth in the statute and [Statement of Administrative Action], whether we classify the users of the stumpage programs as sawmills and pulp mills, the primary timber processing group, the wood products industry, the forest products industries, the wood fiber user industry, the "industries" suggested by respondents, or any combination thereof, the subsidies provided by these stumpage programs are not "broadly available and widely used." *The vast*

> *majority of companies and industries in Canada does not receive benefits under these programs.*[212]

157. No matter how Canada attempts to subdivide or redefine the industries that received the subsidy, the simple fact remains that the Canadian economy as a whole and each of the provincial economies are large and diversified, and provincial stumpage programs are used by a single group of forest product industries within those diverse economies. The United States recognized the obvious fact that the Canadian provinces are far from being undiversified economies; rather, they are modern and heavily industrialized, with productive capacities ranging widely across the economic spectrum, from financial services to high technology, from agriculture and fisheries to resource extraction and processing, from steel and autos to aircraft. Both on the national and the provincial level, the overwhelming majority of enterprises and industries in Canada does not receive stumpage. Canada's claims with respect to the economic diversification provisions of Article 2.1(c) therefore should be rejected by the Panel.[213]

C. The Conduct of This Investigation Was Consistent with the Obligations of Article 12 of the SCM Agreement

158. The United States conducted this investigation in full compliance with the obligations outlined in Article 12 of the SCM Agreement. The United States ensured that all parties were given notice of the information it required for the investigation, had ample opportunity to submit relevant information, had access to all information submitted to the United States during the course of the investigation, and were informed of the essential facts under consideration. The United States thus ensured that all interested parties had ample opportunity to defend their interests before the Commerce Department. Neither of Canada's two claims of error bears scrutiny under the facts of record.

1. Consistent with Article 12 of the SCM Agreement, the United States Ensured that Interested Parties Had Notice of the Information Required, Access to Information on the Record, and the Ability to Use that Information in Defending Their Interests

159. Article 12.1 of the SCM Agreement states:

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[212] *Issues and Decision Memorandum*, at 52 (emphasis added) (Exhibit CDA-1).

[213] The Panel likewise should reject Canada's claims under Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement. Article 19.4 is improperly raised in the specificity context because it is limited to the obligation to levy final countervailing duties that do not exceed the amount of subsidy found to exist. It thus has no direct relevance to specificity concerns. Articles 10, 19.1, and 32.1 provide that a Member can only impose duties in accordance with GATT 1994 and the SCM Agreement. In other words, these provisions may only be applied derivatively, if the United States has breached its obligations under Article 2 with regard to its specificity finding. Because Canada has failed to prove that the United States has violated Article 2, it has failed to prove a breach of these articles as well.

> Interested Members and all interested parties in a countervailing duty investigation shall be given 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 in question.

160. Article 12.3 further requires Members "whenever practicable" to "provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases . . . that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information."

161. Article 12.8 of the SCM Agreement states:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

162. A prior panel, interpreting identical language in Article 6.9 the Antidumping Agreement, noted that nothing in the Antidumping Agreement dictates or suggests any particular method for *how* parties are to be informed of the "essential facts under consideration." The Antidumping Agreement, like the SCM Agreement, only requires that parties be informed in a timely manner such that they are able to defend their interests, and "the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways."[214] The panel considered that this obligation could be met in the following ways:

> through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters – which actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures.[215]

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[214] Panel Report, *Argentina–Anti-Dumping Measures on Imports of Certain Floor Tiles from Italy*, WT/DS189/R, adopted November 5, 2001, para. 6.125 ("*Argentina–Floor Tiles Panel Report*") (interpreting Article 6.9 of the Antidumping Agreement). As Canada notes, the only difference between Article 6.9 of the Antidumping Agreement and Article 12.8 of the SCM Agreement is that Article 12.8 requires authorities to inform interested Members of the essential facts under consideration in addition to interested parties. *See* Canada First Written Submission, at para. 218, fn. 182.

[215] *Argentina–Floor Tiles Panel Report*, at para. 6.125.

163. The countervailing duty law of the United States, and regulations adopted by the Commerce Department and followed in this investigation, ensure that the procedural obligations of the SCM Agreement are met.[216] Under its regulations, the Commerce Department must send a questionnaire to the respondents identifying the information required for the investigation and provide the respondents with at least 30 days to respond.[217] The Commerce Department's service requirements ensure that all information submitted in an investigation is provided to participating interested parties.[218] Moreover, the Commerce Department maintains a copy of all public submissions in its Central Records Unit, which is open to the public. The issuance of the preliminary determination[219] and verification reports are examples of just two ways that the Commerce Department gives interested parties notice of facts that the Department considers essential to the investigation.[220] Parties may submit factual information up to seven days prior to the date on which the verification of any party is scheduled to commence, which in a countervailing duty determination occurs after the issuance of the preliminary determination,[221] and have the opportunity to submit information to rebut, clarify, or correct data submitted by other parties.[222] All interested parties may submit a case brief and rebuttal brief to present written arguments for the Commerce Department's consideration.[223] Moreover, interested parties have the opportunity to request a hearing.[224] These procedural steps ensure that interested parties are informed of the issues under consideration and the essential facts related to those issues, and have the ability, and ample opportunity, to defend their interests before the issuance of the final determination. As discussed below, the United States fully complied with all of these procedures in this case. Indeed, Canada and the provincial governments availed themselves of these procedural rights by filing hundreds of pages of case briefs and participating in an eight-hour hearing.

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[216] Canada is not challenging either the countervailing duty law of the United States, or the Commerce Department's regulations, as such.

[217] *See* 19 C.F.R. § 351.301(c)(2) (Exhibit CDA-74).

[218] *See* 19 C.F.R. § 351.303(f)(1)(I) (Exhibit U.S.-45).

[219] *See* 19 U.S.C. § 1671b(b) (Exhibit CDA-2).

[220] Other examples include correspondence from interested parties, which is placed on the record and served on all interested parties, interested parties' case briefs and rebuttal briefs, and, if requested, the Commerce Department's hearing.

[221] *See* 19 C.F.R. § 351.301(b)(1) (Exhibit CDA-74).

[222] Pursuant to 19 C.F.R. § 351.301(c)(1) (Exhibit CDA-74), "[a]ny party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party" within "10 days after the date such factual information is served on the interested party, or, if appropriate, made available under APO [Administrative Protective Order] to the authorized applicant."

[223] *See* 19 C.F.R. § 351.309 (Exhibit U.S.-45).

[224] *See* 19 C.F.R. § 351.310 (Exhibit CDA-74).

2. The Selection of the Benchmark for the Stumpage Programs of Alberta and Saskatchewan Was Consistent with the Requirements of Article 12 of the SCM Agreement

164. In written submissions filed with the United States after the issuance of the *Preliminary Determination*, Alberta and Saskatchewan argued that the United States erred in preliminarily basing the benchmark calculation on data from Montana. After considering their arguments, the United States agreed and, in the *Final Determination*, based the benchmark calculations for these provinces on data from Minnesota. Alberta and Saskatchewan made these arguments because they were aware of the essential facts. They were able to persuasively argue this point, and ultimately to prevail on this point, precisely because they had at their disposal all of the underlying data and the criteria the Commerce Department was using to select appropriate benchmark data. Ironically, after prevailing on this point, Canada now argues that this process was inconsistent with the requirements of the SCM Agreement. In reality, the process of vigorous debate on this issue that took place in the investigation is precisely what is envisioned by, and is entirely consistent with, the SCM Agreement. Canada simply disagrees with the outcome.

165. The benchmarks for assessing the adequacy of provincial stumpage rates were identified as a central issue in the case from the moment the petition was filed. The petitioners proposed using various U.S. border states, including Minnesota and Montana, as the beginning point for benchmarks, and provided information regarding stumpage prices from U.S. Forest Service auctions in the northern United States, including Minnesota.[225]

166. Prior to the issuance of the *Preliminary Determination*, the United States received numerous comments from interested parties on the appropriate benchmark, including comments on whether the United States could use U.S. stumpage prices as the basis for the benchmark calculations.[226] In its *Preliminary Determination*, the United States chose to use stumpage prices from northern U.S. border states as the basis for the benchmark calculations. The United States announced that it considered the timber quality, species of trees, terrain, the availability of timber, and the marketability of the timber in choosing the data for the benchmark calculation.[227]

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[225] *See* Petition, at Exhibit IV, A-18 (Exhibit U.S.-46). Initially, the petitioners proposed Minnesota for measuring the adequacy of remuneration of Ontario's and Manitoba's stumpage programs. In discussing Alberta, the petitioners stated that "[p]rivate timber in Montana, Idaho, and Washington, *and, indeed, anywhere in the United States* is freely available to Alberta producers without restrictions." Petition, at vol. II, 213 (emphasis added) (Exhibit U.S.-46). This gave notice that U.S. states other than those specifically mentioned by the petitioners could potentially serve as benchmarks for Alberta's stumpage programs.

[226] *See* Letter from Weil, Gotshal & Manges to Donald Evans (July 20, 2001) (Exhibit U.S.-47); Letter from Dewey Ballantine to Donald Evans (July 27, 2001) (Exhibit U.S.-48); Letter from Weil, Gotshal & Manges to Donald Evans (August 7, 2001) (Exhibit U.S.-49).

[227] *See Preliminary Determination*, 66 Fed. Reg. at 43197 (Exhibit CDA-20).

Among the U.S. states the United States used as a starting point for the benchmark calculation in the *Preliminary Determination* were Minnesota, Montana, Michigan, Idaho, Maine, and Washington.[228]

167. As a result, the parties were aware of the issue of how the United States would calculate the benchmarks and the essential facts related to that issue. Moreover, the parties had the ability and opportunity to defend their interests.

168. Alberta and Saskatchewan availed themselves of that opportunity. In challenging the use of the Montana data as the basis for the benchmark calculation for their respective stumpage programs, the governments of Alberta and Saskatchewan argued that the forests of Montana were not sufficiently similar to compare with those of Alberta and Saskatchewan. Saskatchewan proposed Alaska as an alternative, while Alberta simply argued that no U.S. data should be used and did not argue in the alternative for use of data from a different state. As noted above, the United States ultimately agreed with Alberta and Saskatchewan and rejected data from Montana, using data from Minnesota instead.[229]

169. Because Alberta and Saskatchewan took advantage of this opportunity to use record information to argue that the forests of Montana were not sufficiently similar to compare to those of Alberta and Saskatchewan, neither government can now credibly claim surprise when the Commerce Department considered their arguments, and agreed that Montana was not the appropriate basis for the benchmark. The United States assumes that Canada is not arguing that the obligations in Article 12 have the perverse effect of precluding the Commerce Department from altering the benchmark calculation in response to the argument of Alberta and Saskatchewan. Moreover, nothing in Article 12 imposes on the investigating authority an obligation to engage in an endless cycle of notice and comment. To the contrary, Article 12.3, reflecting the time constraints imposed on completion of the investigation,[230] requires only that relevant information be provided "whenever practicable."

170. In an argument short on factual discussion, Canada cites to *Guatemala–Cement II*[231] to support its claim that the United States violated Article 12.8. In *Guatemala–Cement II*, the panel found that disclosing the essential facts in the interim determination was insufficient to fulfill Guatemala's obligations with respect to Article 6.9 of the Antidumping Agreement in an

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[228] *Id.* at 43197-43210. In the *Preliminary Determination*, the United States used Montana as the benchmark to measure the benefit provided by stumpage programs in Alberta and Saskatchewan. *Id.* at 43207, 43210. The United States used Minnesota as the benchmark for Ontario and Manitoba. *Id.* at 43205, 43208.

[229] *See Issues and Decision Memorandum*, at 112, 138-39 (Exhibit CDA-1).

[230] Article 11.11 of the SCM Agreement requires the investigating authority to complete the investigation within one year (or 18 months in special circumstances) after initiation.

[231] Panel Report, *Guatemala–Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted November 17, 2000, para. 8.228 ("*Guatemala–Cement II Panel Report*").

investigation where: (1) the basis of the interim determination was threat of material injury, whereas the basis of the definitive determination was actual material injury; (2) the period of investigation was different for the interim determination and the definitive determination; and (3) much of the evidence was obtained after the interim determination.

171. The facts of this investigation are much different from those of *Guatemala–Cement II*. Unlike *Guatemala–Cement II*, the basis of the Commerce Department's benchmark calculations in this case, i.e., data on U.S. timber prices in the northern United States, did not change, nor did the criteria the Department used to select the appropriate benchmark database. Most of the U.S. price data and the data concerning the characteristics of the forests in each northern U.S. state, including Minnesota, was on the record prior to the issuance of the *Preliminary Determination*.[232] Any additional evidence was provided directly to Alberta and Saskatchewan well in advance of the *Final Determination* through the service requirements of the Commerce Department's regulations.

172. Moreover, the *Guatemala–Cement II* panel made a distinction between the right of interested parties to have access to the factual information during the course of the investigation, and the right of interested parties to be informed of the investigating authority's legal determination.[233] Specifically, Mexico argued that in changing the basis of the injury determination from that of a threat of material injury in the preliminary determination to one of actual material injury in the final determination, Guatemala had violated Articles 6.1, 6.2, and 6.9 of the Antidumping Agreement.[234] The panel found, however, that Guatemala had not violated Articles 6.1, 6.2, or 6.9 by changing the basis for its injury determination.[235]

173. As in *Guatemala– Cement II*, Canada cannot argue that it did not have access to the facts. As demonstrated above, all of the facts concerning Minnesota were placed in the administrative record and provided to the interested parties. Canada instead challenges the change in the basis for its legal determination, from using the Montana data to the Minnesota data as the basis for calculating the benchmark for Alberta and Saskatchewan. As in *Guatemala–Cement II*, this change in the legal determination between the *Preliminary Determination* and the *Final Determination* is not inconsistent with Article 12.9 of the SCM Agreement.

174. In sum, the United States fully complied with Articles 12.1, 12.3, and 12.8 of the SCM Agreement. Consistent with Article 12.1, all interested parties were informed that the United

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[232] *See* Memorandum from the Team to File, Calculations for the Notice of Preliminary Affirmative Countervailing Duty Determination: Stumpage Programs in the Investigation of Certain Softwood Lumber Products from Canada (August 9, 2001) (Exhibit U.S.-50).

[233] *See Guatemala–Cement II Panel Report*, at para. 8.238.

[234] *Id.* at para. 8.233.

[235] *Id.* at para. 8.239.

States required information on the U.S. northern border states in order to choose appropriate benchmarks for the Canadian stumpage programs. Because all information submitted to the United States was actually served on all of the interested parties participating in the investigation, the United States' procedures were consistent with Article 12.3. Because the *Preliminary Determination* announced that the United States was using U.S. northern border states as the benchmarks for the Canadian stumpage programs, set forth the criteria the United States used in selecting the benchmarks, identified Minnesota as one alternative the Commerce Department might use, and because all information submitted to the United States regarding Minnesota was provided to all of the interested parties, the United States informed the interested parties of the "essential facts under consideration" and therefore acted consistently with Article 12.8.

3. The United States Ensured That the Interested Parties Had Access to Record Information in Sufficient Time to Use It in the Preparation of Their Legal Arguments

175. On December 20, 2001, in response to a request by the United States, the Maine Forest Products Council ("MFPC") submitted information relevant to the benchmark for Quebec ("MFPC letter"). The MFPC was not a participant in this investigation. Therefore, this letter was not filed in accordance with the Commerce Department's regulations and was not initially placed in the administrative record. As Canada has stated, Quebec filed a letter conforming to the Commerce Department's regulations,[236] which brought to the Commerce Department's attention the fact that the MFPC letter had not been filed in accordance with the regulations and therefore not placed in the administrative record.

176. The United States examined the information contained in the MFPC letter and determined that it was "important to certain issues in the proceeding, and relate[d] to an ongoing exchange of expert advice on a technical matter."[237] Therefore, on February 20, 2002, the United States placed the MFPC letter in the administrative record and provided copies to all interested parties.[238] The United States also gave all interested parties an opportunity to comment on the information:

> To ensure a complete record, we are asking parties who wish to submit information that clarifies, corrects or rebuts this new factual information to do so within 10 days, i.e., on or before March 4, 2002. *See* section 351.301(c). Alternatively, parties will be

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[236] *See* Letter from Arent Fox to U.S. Department of Commerce (February 8, 2002) (Exhibit CDA-101).

[237] Letter from Melissa Skinner to Interested Parties, 1 (February 20, 2002) ("New Factual Information Letter") (Exhibit CDA-100).

[238] Letter from MFPC to U.S. Department of Commerce (Dec. 20, 2001), attached to New Factual Information Letter (CDA-100).

> allowed to comment on the new factual information in their rebuttal briefs.[239]

177. The United States' conduct was in full compliance with the SCM Agreement.[240] As noted above, the United States provided copies of the MFPC letter to all interested parties and afforded them the opportunity to submit information "that clarifies, corrects or rebuts" the information contained in that letter. By providing copies of the letter to all of the interested parties, the United States also ensured that it met the requirements of Article 12.1. Moreover, the opportunities to comment on and rebut the information more than met the requirements of Article 12.3.

178. Beyond the requirements of Article 12.8, the United States specifically identified the information contained in the MFPC letter as "important to certain issues in the proceeding, and relate[d] to an ongoing exchange of expert advice on a technical matter."[241] The United States, therefore, informed the interested parties that the information in the MFPC letter was part of the "essential facts under consideration," and specifically provided them with the opportunity to use this information in the presentation of their case, or to submit additional information to clarify, correct, or rebut this information. Thus, the disclosure took place in sufficient time for parties to defend their interests.

179. Indeed, the Government of Quebec took advantage of the opportunity to use the information contained in the MFPC letter in its rebuttal brief.[242] The fact that Quebec had notice of, and access to, these essential facts and used them in defending its interests demonstrates that the United States' conduct with regard to the MFPC letter was consistent with Articles 12.1, 12.3, and 12.8.[243]

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[239] New Factual Information Letter, at 2 (Exhibit CDA-100).

[240] Canada asserts that the United States violated its own statute, 19 U.S.C. § 1677m(g) (Exhibit CDA-2), by allegedly denying the interested parties an opportunity to see the information contained in the MFPC letter. *See* Canada First Written Submission, at para. 221, fn. 190. This assertion is both irrelevant and incorrect. First, as the *U.S.–Hot-Rolled Steel* panel stated, "It is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation." *U.S.–Hot-Rolled Steel Panel Report*, at para. 7.267. (The Appellate Body Report, which was adopted on August 23, 2001, did not disturb this finding of the panel). In any event, Canada's assertion is incorrect because the United States specifically provided interested parties with the opportunity to see and comment on the information contained in the MFPC letter.

[241] New Factual Information Letter, at 1 (Exhibit CDA-100).

[242] *See* Rebuttal Brief of the Gouvernement du Quebec, 10-14 (March 1, 2002) (Exhibit U.S.-51).

[243] Because the Government of Quebec was able to use this information in the presentation of its case before the Commerce Department, there cannot be a nullification or impairment as contemplated by Article 3.8 of the DSU.

180. Canada appears to argue that interested parties should have had additional time to respond to the information submitted by the petitioners on March 4, 2002 to rebut the MFPC letter. This argument finds no basis in the language of the SCM Agreement. The SCM Agreement does not require the United States to engage in an unending cycle of allowing each interested party to reply to every submission made by every other interested party. Indeed, Article 12.3 only requires Members to provide interested parties an opportunity to view information relevant to the presentation of their case, and to prepare presentations on the basis of this information, "*whenever practicable*." With the deadline for completing the investigation in mind,[244] the United States must have the ability to stop accepting new factual information and arguments and to consider the information already on the record to make its *Final Determination*. It simply was not practicable to give Quebec an additional opportunity to sur-rebut the petitioners' rebuttal comments.[245] Accordingly, Canada has failed to show that the United States acted inconsistently with the procedural requirements of Article 12 of the SCM Agreement. Likewise, the Department's imposition of a countervailing duty order was fully in accord with Articles 10 and 32.1 of the SCM Agreement.

D. The United States Initiated the Softwood Lumber Investigation Based on Adequate Domestic Industry Support Consistent with the Requirements of Article 11.4 of the SCM Agreement

181. The softwood lumber petition contained uncontested evidence establishing that U.S. softwood lumber producers representing 67 percent of total U.S. softwood lumber production supported the petition. That level of industry support unquestionably satisfies the criteria in Article 11.4 of the SCM Agreement. Canada does not contest this fact, much less point to any evidence on the record that even remotely suggests that 67 percent of the industry did not, in fact, support the petition. Canada has, therefore, failed to meet its burden to establish a *prima facie* violation of the SCM Agreement.

182. Canada is not challenging the provisions of U.S. law governing industry support, but rather the specific factual determination of industry support in this case. Nevertheless, the sole argument presented by Canada is the unsubstantiated claim that the very existence of the Continued Dumping Subsidy Offset Act of 2002 ("CDSOA" or "Byrd Amendment") induced support for the petition, thereby precluding an objective determination of industry support. In effect, Canada would inject a requirement into the SCM Agreement that investigating authorities examine the motives of prospective petitioners. As discussed below, however, a recent Appellate

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[244] Article 11.11 of the SCM Agreement requires the United States to complete its investigation within one year of initiation (or 18 months in special circumstances). In this case, the deadline for the completion of the investigation was March 21, 2002.

[245] The petitioners' submission was only two weeks prior to the deadline for completing the investigation. Moreover, the Department had to address numerous complex issues in its *Final Determination*.

Body Report has unequivocally rejected this argument.[246] Canada's claim is without any support in the text of Article 11.4 or the facts of record.

1. Objective Numerical Criteria Alone Determine the Adequacy of Domestic Industry Support under Article 11.4

183. Pursuant to Article 11.4 of the SCM Agreement, investigating authorities must determine whether a countervailing duty application "has been made by or on behalf of the domestic industry." The conditions under which an application will be considered to have been made "by or on behalf of the domestic industry" are expressed as objective, numerical benchmarks:

> The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than *50 per cent* of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than *25 per cent* of total production of the like product produced by the domestic industry.[247]

184. The evidence of record demonstrates that the domestic producers of softwood lumber supporting the countervailing duty petition represented 67 percent of the total production of the domestic like product.[248] Canada does not dispute this evidence.[249]

185. However, without any support from the SCM Agreement, Canada claims that "[a] Member's authorities may not simply rely on quantitative criteria for the establishment of level of domestic support."[250] Arguing that the mere existence of the CDSOA precluded an objective examination of industry support in this case, Canada attempts to read into Article 11.4 a

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[246] Canada relied on the panel report in *United States–Continued Dumping and Subsidy Offset Act*, WT/DS217/R, WT/DS234/R, circulated September 16, 2002, which addressed the consistency of the CDSOA *per se* with certain Antidumping Agreement and SCM Agreement provisions. The United States appealed the panel report to the Appellate Body, which issued its report on January 16, 2003, "reversing the Panel's finding that the CDSOA, *as such*, is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*." Appellate Body Report, *United States–Continued Dumping and Subsidy Offset Act*, WT/DS217/AB/R, WT/DS234/AB/R, circulated January 16, 2003, para. 294 (*"U.S.–CDSOA Appellate Body Report"*).

[247] Article 11.4, SCM Agreement (emphasis added). The numerical criteria found in the relevant U.S. statute at 19 U.S.C. §1671a(c)(4) (Exhibit CDA-2) are the same as in Article 11.4.

[248] *See Notice of Initiation*, 66 Fed. Reg. at 21333 (Exhibit U.S.-1).

[249] *See* Canada First Written Submission, at para. 227.

[250] *Id*. at para. 231.

requirement that investigating authorities examine the underlying motivation of each of the supporters of the petition. The Appellate Body, however, has unequivocally rejected this argument as contrary to a proper textual reading of Article 11.4.[251] Specifically, the Appellate Body confirmed that the terms of Article 11.4 contain

> no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms "expressing support" and "expressly supporting" clarify that Articles 5.4 and 11.4 require only that authorities "determine" that support has been "expressed" by a sufficient number of domestic producers. Thus, in our view, an "examination" of the "degree" of support, and not the "nature" of support is required. In other words, it is the "quantity", rather than the "quality", of support that is the issue.[252]

186. The Appellate Body explained that by its terms, Article 11.4 requires "no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application."[253] Therefore, once the United States conducted its examination of domestic industry support and concluded that the numerical thresholds had been met, it had satisfied its obligations under Article 11.4. The text of Article 11.4 requires nothing further.[254]

2. Canada's Claim Is Entirely without Factual Support

187. As noted above, Canada's claim rests solely on the mere existence of the CDSOA, not on any evidence that the U.S. softwood lumber industry did not, in fact, support the petition. Canada has therefore failed to establish a *prima facie* case and its claim should be rejected.

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[251] According to the Appellate Body, the "task of interpreting a treaty provision must begin with the specific words of that provision." *U.S.–CDSOA Appellate Body Report*, at para. 281.

[252] *Id*. at para. 283.

[253] *Id*. at para. 286.

[254] Canada concludes that "Commerce initiated the Lumber IV investigation and imposed definitive countervailing duties in violation of Articles 10, 11.4 and 32.1 of the SCM Agreement." Canada First Written Submission, at para. 242. Although Canada references Articles 10 and 32.1, it has made no argument with respect to these articles to which the United States could reasonably respond. To the extent Canada has claims under Articles 10 and 32.1, they are dependent upon Article 11.4 and must likewise fail. *See* Panel Report, *United States–Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted August 30, 2002, para. 6.133 (consequential claims rejected when main claims not successful).

188. The alleged violation is initiation without an adequate determination of industry support. Canada has failed, however, to point to a single piece of evidence even suggesting that the facts of record, which establish that 67 percent of the industry supported the petition, were false or inaccurate.

189. The only "evidence" Canada proffers is a letter in which an attorney for one of the petitioners purportedly "used Byrd Amendment payments as inducement to garner support for the Lumber IV petition."[255] This letter fails to satisfy Canada's burden of proof. As discussed above, nothing in Article 11.4 requires an investigating authority to inquire into the reasons that motivated a producer to submit an application, which must, in the first instance, be based on sufficient evidence of the existence of a subsidy and injury.[256] Moreover, in examining the impact of the CDSOA on the finding of industry support, the Appellate Body stated that it is incorrect to consider whether "certain motives to support an application would be WTO-consistent, whereas others would not. We see no basis in Article . . . 11.4 for such an approach."[257] Therefore, whether or not the existence of the CDSOA motivated any of the domestic producers to file a petition in this case or not (a claim Canada has not proven) is irrelevant.

190. Finally, Canada's conclusory statement that "Commerce initiated the investigation without an objective and meaningful examination and determination"[258] is completely unsupported by any evidence. Although Canada claims that Article 11.4 must be read to require that industry support be substantiated,[259] it is not surprising, given the actual record evidence of overwhelming industry support, that Canada makes no reference to the record indicating how the United States failed in this regard.[260] Its claim rests solely on the mere existence of the CDSOA. In *U.S.–CDSOA*, however, the Appellate Body found that a determination of industry support is an issue of "quantity" not "quality,"[261] and is not rendered meaningless by the CDSOA.[262] Having failed to demonstrate any flaw in the quantitative finding of industry support in this case, Canada's claim must fail.

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[255] Canada First Written Submission, at para. 240.

[256] *See* Article 11.2, SCM Agreement.

[257] *U.S.–CDSOA Appellate Body Report*, at para. 290. The Appellate Body also noted that an examination of motive "would be difficult, if not impossible, as a practical matter." *Id.* at para. 291.

[258] Canada First Written Submission, at para. 237.

[259] *Id.* at para. 230.

[260] The record demonstrates that the United States examined the domestic industry's support and considered the arguments presented by the Government of Canada. *See Notice of Initiation*, 66 Fed. Reg. at 21333 (Exhibit U.S.-1).

[261] *U.S.–CDSOA Appellate Body Report*, at para. 283.

[262] *Id.* at para. 289.

191. For the foregoing reasons, the United States requests that the panel reject Canada's arguments and conclude that the United States' initiation of the softwood lumber countervailing duty investigation was consistent with its obligations under Articles 10, 11.4, and 32.1 of the SCM Agreement.

V. CONCLUSION

192. For the reasons set forth above, the United States requests that the Panel reject Canada's claims in their entirety.[263]

[263] Canada referenced the operation of U.S. law concerning administrative reviews in its panel request and summarized certain statements made by the United States in the consultations in this case. Canada did not, however, make a claim regarding the United States' conduct of administrative reviews and, instead, "reserve[d] the right to advance additional arguments in respect of these claims . . . ." Canada First Written Submission, at para. 244. By failing to make any claims or arguments regarding this issue in its submission, Canada appears to have abandoned this issue and the Panel therefore need not make any findings on this issue.

ATTACHMENT 1

BENCHMARK ADJUSTMENTS

The following are examples of the adjustments made in the benchmark calculation for the Final Determination. The great majority of this data is based on the information provided by the Government of Canada[264]; the U.S. data are based on publicly available published stumpage price data.

ALBERTA

(All Figures, Canadian Dollars per Cubic Meter)

2.70	Species-Specific Administered Stumpage Rate - SPF (UNADJUSTED)
5.66	Basic Reforestation Adjustment: Expenses for silviculture administration that are not credited by the government.
1.51	Road Construction/Maintenance Adjustment: Road construction and maintenance costs for permanent roads required for logging operations. These roads are available for public use and must meet government standards.
0.94	Forest Management Planning: Required by government in Timber Management Regulations.
0.51	Reforestation Levy: Required fee for tenure holders permitted not to undertake their own reforestation under the Timber Management Regulation.
0.36	Inventory: Costs of developing forest inventory as required of certain tenure holders.
0.26	Holding & Protection Charges: Required fee of all tenure holders, nominally for holding tenure rights.

[264] A small portion of this was not used in the calculation, *see, e.g.*, road building costs.

0.16	Fire, Insect and Disease Protection Adjustment: Administrative costs in order to comply with government fire prevention and insect/disease control requirements.
+ 0.16	Environmental Protection Adjustment: Administrative costs in order to comply with government environmental regulations.
12.26	Species-Specific Administered Stumpage Rate - SPF (ADJUSTED)
* * *	
41.74	Species Weight-Averaged Minnesota Sawlog Stumpage Rate - SPF
- 12.26	Species-Specific Administered Stumpage Rate - SPF (ADJUSTED)
= 29.48	Difference between Adjusted SPF Administered Rate and Montana Rate

BRITISH COLUMBIA

(All Figures, Canadian Dollars per Cubic Meter)

Coast	Interior	
16.11	20.10	Species-Specific Administered Stumpage Rate (UNADJUSTED)
0.26	0.26	Ground Rent: A charge for reserving the use of the resource under license; imposed regardless of whether or not timber is actually harvested.
2.64	4.89	Basic Silviculture Adjustment: Includes surveys, site preparation, planting, brushing/weeding, other, recoveries reimbursements (negative adjustment), field overhead, and administrative costs.
0.35	0.20	Forest Protection Adjustment: Includes fire & pest management, and G&A allocation.
6.51	5.83	Road Costs: Includes road & bridge building, road & bridge maintenance, and an allocation of G&A.

	12.11	n/a	Logging Camps: Costs incurred for remote logging camps on B.C. Coast.
+	0.43	1.57	Sustainable Forest Management: Includes forest resource management, and G&A allocation.
=	38.41	32.85	Species-Specific Administered Stumpage Rate (ADJUSTED)
	* * * * * * *		
	97.03	61.80	Species-Specific Washington Rate (*Coast compared to Western Washington and Interior compared to Eastern Washington, Idaho, and Montana*)
-	38.41	32.85	Species-Specific Administered Stumpage Rate (ADJUSTED)
=	58.62	28.95	Difference between Adjusted Administered Stumpage Rate and Washington Rate

Note: The B.C. unadjusted stumpage rate and Washington State price are species-specific. This particular example is Douglas Fir (Coast) and Douglas Fir/Larch (Interior).

ONTARIO

(All Figures, Canadian Dollars per Cubic Meter)

8.81	Administered Stumpage-Weighted Average All Species (UNADJUSTED)
-0.40	Weight-Averaged Silviculture Adjustment: To account for silviculture reimbursement, we subtracted forest renewal charges and overhead reimbursement for the POI from the overall total of stumpage payments to arrive at a new total for stumpage payments because tenure holders are reimbursed for basic silviculture. This figure is on a per unit basis.
2.31	Road Construction/Maintenance Adjustment: Road construction and maintenance costs for harvesting operations. These roads are available for public use and must meet government standards.
0.02	Fire Protection and First Nations Adjustment: Costs incurred by tenure holders to meet government regulations for fire prevention, and costs

	incurred by tenure holders to meet regulations that promote aboriginal participation in forestry.
+ 0.16	Forest Management and Planning: Expenses for forestry management and planning administration that are not credited by the government.
= 10.90	Administered Stumpage-Weighted Average All Species (ADJUSTED)
* * *	
30.10	Species Weight-Averaged Michigan/Minnesota Sawlog Stumpage Rate[265]
- 10.90	Administered Stumpage-Weighted Average All Species (ADJUSTED)
= 19.80	Difference between Adjusted Administered Rate and Michigan/Minnesota Rate

[265] Species-specific prices were weight-averaged by species mix in Ontario.

QUEBEC

(All Figures, Canadian Dollars per Cubic Meter)

11.69	Administered Stumpage-Weighted Average All Species (UNADJUSTED)
0.55	Fire Protection & Extinction Adjustment: Required dues to government fire prevention and extinction agency.
0.06	Insect & Disease Prevention/Extinction Adjustment: Mandated fees to the government insect and disease prevention agency.
1.51	Forestry Fund Adjustment: Mandated contributions to the Forestry Fund, a forestry research organization.
0.49	Forest Planning Adjustment: Expenses for forest management and administration.
1.74	Road Construction/Maintenance Adjustment: Road construction and maintenance costs for logging operations. These roads are available for public use and must meet government standards.
1.05	Logging Camps Adjustment: Expenses for logging camps in remote regions.
-0.19	Stumpage Credits: Deduction for credits.
+ 0.26	Control and Planning Adjustment: Expenses for silviculture administration that are not credited by the government.
= 17.16	Administered Stumpage-Weighted Average All Species (ADJUSTED)
* * *	
40.10	Species Weight-Averaged Maine Sawlog Stumpage Rate[266]
- 17.46	Administered Stumpage-Weighted Average All Species (ADJUSTED)
= 22.64	Difference between Adjusted Administered Rate and Maine Rate

[266] Species-specific prices were weight-averaged by species mix in Quebec.

Attachment 2

Canada Claims In Its First Written Submission That:	***But The Record of the Investigation Demonstrates That:***
• Logs harvested from U.S. comparison areas for over half of Canadian exports subject to CVDs cannot be exported to Canada because of U.S. log export restrictions (para. 75, n.53).	• The prices for U.S. logs subject to export restrictions were set by reference to competitive auction prices and therefore reflect market value. That timber markets are dominated by non-export controlled private timber means that any price impact of export restrictions would be modest. *See Issues and Decision Memorandum*, at 80-81 (Exhibit CDA-1). • In any event, any price impact of export restrictions on the starting timber prices would be *downward*, such that any price impact would have resulted in *underestimating* the subsidy.
• Cross-border comparisons do not reflect differences in natural resource endowments between the two countries, i.e., comparative advantages (para. 84).	• Canada does not have a comparative advantage in resource endowments related to lumber production. The size of the forest resources are comparable between Canada and the United States. Moreover, the most important natural resource endowments, the so-called dendrological characteristics of the forest, are, in fact, more comparable between the selected northern U.S. states and the respective provinces than between provinces across Canada. For example, the forest resource in Coastal B.C. is far more comparable to Western Washington than it is to Ontario. *See* David Cox, *et al.*, *Evaluation of "Critique of Certain Aspects of Petitioners' Submissions Dated July 23, 24, 25 and 27, 2001 Concerning Cross-Border Comparisons of Certain Provincial Stumpage Programs,"* 5-7 (January 7, 2002), appended to Letter from Dewey Ballantine to Donald Evans, vol. 2 (January 7, 2002) ("Evaluation of Critique") (Exhibit U.S.-52); *Issues and Decision Memorandum*, at 42 (Exhibit CDA-1).
• Differences in economic conditions (e.g., wages, capital costs, taxes and governmental regulatory policies) affect stumpage values. United States only adjusted for exchange rates (paras. 83, 86).	• Forestry experts concluded that government and legal policy distinctions (other than those involving the provision of timber) such as tax policies would have a *de minimis* impact. *See* David Cox, *et al.*, *Examining the Market Value of Public Softwood Timber in Canada*, 3-4, 38-44, 63-65 (July 27, 2001), appended to Letter from Dewey Ballantine to Donald Evans (July 27, 2001) ("Examining Market Value") (Exhibit U.S.-53). • U.S. states and counties, as well as Canadian provinces, also have varying legal and regulatory arrangements that might marginally affect the value of timber (and all other assets). Evaluation of Critique, at 7 (Exhibit U.S.-52).
• Locational differences (e.g., topography, soil conditions, climate, availability of ground and water transport, and distance to mills and to	• The United States used starting prices from northern U.S. states with forests, topography, climate, etc. that are comparable to the Canadian provinces at issue. *See Issues and Decision Memorandum*, at 41-45 (Exhibit CDA-1). Forestry experts demonstrate that geography, terrain, topography and related factors that affect timber accessibility do not

markets) differentiate the Canadian and U.S. market conditions (para. 86).	differ significantly across comparison regions. *See* Examining Market Value, at 3, 6-9, 12-13, 16, 18-19, 22-25, 33-38 (Exhibit U.S.-53).
• Timber differences (e.g., quality and stand density) affect stumpage values, but U.S. made no adjustment for these (para. 86).	• Record information suggests that timber is reasonably comparable on either side of the border. *See* Examining Market Value, at 3, 5-6, 12, 15-16, 18, 25-33 (Exhibit U.S.-53); Evaluation of Critique, at 3-4 (Exhibit U.S.-52). • Just as one tree may not be of the same value as another tree six feet away, so focusing on individual variations rather than on the broad patterns of data decreases reliability and accuracy. By using averages, the United States accounted for such differences. *See* Evaluation of Critique, at 15-16 (Exhibit U.S.-52). • The use of averages is an accepted and widespread aspect of Canadian stumpage systems. For example, Ontario calculates stumpage charges using an average of U.S. lumber prices and subtracting average mill costs and harvesting costs. Using this data, Ontario calculates only five different stumpage prices covering its entire softwood harvest. Similarly, Quebec, B.C., and other provinces use average cost data to calculate one stumpage charge for each predominant species in the respective province.