BEFORE THE

WORLD TRADE ORGANIZATION

United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada

WT/DS236

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

15 April 2002

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I. INTRODUCTION

1. "No Member should cause, through the use of any subsidy. . ., adverse effects to the interests of other Members, i.e. . . .injury to the domestic industry of another Member . . ."[1] That obligation is the core of the dispute now before the Panel. When one Member causes injury to the domestic industry of another Member through the use of *any* subsidy, the injured Member has the right to take countervailing measures.

2. For decades, the Canadian market for timber has been dominated by the provincial governments, which control approximately 90 percent of the forest lands in Canada. They administer a system of timber contracts, or tenures, with a variety of features. For example, these tenures require the tenure holder to cut a minimum amount of timber, even in depressed markets, and require that the timber be processed in Canadian mills. Also, they are normally long-term to ensure a stable supply of timber to Canadian mills. The provinces also administratively set the prices for these tenures. These are not features demanded by the market. Rather, they are designed to keep Canadian mills supplied with timber and to keep Canadian mills operating, regardless of what the market might otherwise dictate. Canada does not dispute these facts. It is therefore more than a little ironic that Canada accuses the United States of protectionism.

3. Any objective assessment of these facts demonstrates that Canada's inherently non-market system of providing timber to Canadian lumber mills certainly *could* result in a subsidy to those mills. The United States has more than ample evidence on the record of this case for the preliminary determination that it, in fact, does so.

4. A substantial amount of that subsidized lumber is exported to the United States, and the United States has preliminarily determined that it is causing injury to its domestic lumber industry. The United States has therefore acted entirely within its rights under the SCM Agreement by taking provisional countervailing measures to offset the injurious subsidies.

5. In what is a disturbing trend, Canada is also asking this Panel to find an obviously discretionary U.S. law inconsistent with the SCM Agreement, thereby resolving what may, or may not, be a future dispute concerning reviews. Such claims raise serious institutional concerns regarding the fundamental structure of the WTO generally and the dispute settlement system specifically. Where, as here, a Member has broad discretion under its domestic laws, it must be presumed that the Member will exercise that discretion in good faith, consistent with its obligations. Reaching out to resolve hypothetical future disputes would place the Panel at odds with the rules of international comity and the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[2]

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[1] Article 5 of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

[2] The Dispute Settlement Body (and the panels whose reports it adopts) has authority to issue binding determinations only with respect to particular parties in a dispute before it and only with respect to *that particular dispute*. It cannot – and should not – attempt to determine how the WTO agreements might apply to possible future

6. The United States will demonstrate that Canada's claims are without merit and that, in fact, Canada is asking the Panel to ignore the text of the SCM Agreement and create exceptions to the subsidy disciplines for Canada's decades-old system of subsidies to its lumber industry. The United States will further demonstrate that Canada's claims of WTO-inconsistent U.S. laws are, in reality, an effort to resolve a future dispute that may never occur. Therefore, consistent with the SCM Agreement and the DSU, the United States asks the Panel to reject Canada's claims.

II. STATEMENT OF FACTS

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,[3] 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

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disputes. As the Appellate Body has stated:

> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the WTO Agreement. Article IX:2 of the *WTO Agreement* provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, adopted 4 October 1996, pages 14-15 (footnote omitted).

[3] *Petition for the Imposition of Countervailing Duties: Certain Softwood Lumber Products from Canada*, April 2, 2001 ("*Petition"*). The *Petition* was filed 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.

[4] *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).

to the United States, primarily through provincial "stumpage" programs.[5] In addition, the petitioners alleged that there was a reasonable basis to believe or suspect that critical circumstances existed with regard to imports into the United States of certain softwood lumber products from Canada.

A. Initiation of Investigation

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

9. In the Notice of Initiation, the Commerce Department also explained that it was not excluding the Canadian Provinces of New Brunswick, Nova Scotia, Prince Edward Island and

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[5] The term "stumpage" means: 1) "standing timber"; 2) "the value of standing timber"; 3) "a license to cut timber"; or 4) "the fee paid for the right to cut timber." *Black's Law Dictionary* 1437 (7th ed. 1999) (Exhibit U.S.-2).

[6] *Notice of Initiation*, 66 Fed. Reg. 21332 (Exhibit U.S.-1). On April 2, 2001, the International Trade Commission ("ITC") initiated an investigation to determine whether imports of softwood lumber from Canada were causing injury to the U.S. domestic lumber industry. On May 23, 2001, the ITC preliminarily determined that there was a reasonable indication that an industry in the United States was being threatened with material injury by reason of imports of softwood lumber from Canada. *Preliminary Determination, Softwood Lumber from Canada,* USITC Pub. 3426, Inv. Nos. 701-TA-414 and 721-TA-928 (May 23, 2001) (Exhibit CDA-29).

[7] Section 777A(e)(2)(B) of the Tariff Act of 1930, as amended (the "Act"), authorizes the Commerce Department to conduct an aggregate investigation when it is not practicable to determine individual company rates because of the large number of producers or exporters (Exhibit CDA-2).

[8] *See Notice of Initiation*, 66 Fed. Reg. at 21335 (Exhibit U.S.-1). No interested party objected to the Commerce Department's use of the aggregate methodology. *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, 43190-91 (August 17, 2001) ("*Preliminary Determination*") (Exhibit CDA-1).

Newfoundland (the "Maritime Provinces") from the investigation.[9] On May 8, 2001, Canada requested that the Commerce Department exclude the Maritime Provinces, a request the petitioners supported.[10] The Commerce Department reconsidered the issue and, on July 27, 2001, amended the Notice of Initiation to exempt from the investigation imports of certain softwood lumber products produced in the Maritime Provinces from timber harvested in the Maritime Provinces.[11]

B. Preliminary Determination

10. On August 17, 2001, the Commerce Department published its Preliminary Determination, which contained a preliminary affirmative countervailing duty determination and a preliminary affirmative finding of critical circumstances.[12] In the Preliminary Determination, the Commerce Department preliminarily found that provincial stumpage programs in Canada provided a countervailable subsidy to Canadian lumber producers. The Commerce Department also preliminarily determined that certain non-stumpage programs provided countervailable subsidies. In addition, the Commerce Department found reasonable cause to believe or suspect that critical circumstances existed based on evidence that lumber producers received prohibited export subsidies and that there were massive imports of the subject merchandise over a relatively short period of time.

11. Accordingly, the Commerce Department imposed provisional measures (i.e., suspension of liquidation[13] and posting of security in the form of cash deposits or bonds), effective on the date of publication of the Preliminary Determination, i.e., August 17, 2001.[14] In light of the affirmative finding of critical circumstances, the Commerce Department ordered provisional measures applied to entries of the subject merchandise made during the period 90 days prior to

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[9] *Notice of Initiation,* 66 Fed. Reg. at 21335 (Exhibit U.S.-1).

[10] Letter to the Commerce Department from the Government of Canada, dated May 8, 2001 (Exhibit U.S.-3).

[11] *See Amendment to the Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 40228 (August 2, 2001) ("*Amended Initiation*") (Exhibit U.S.-4).

[12] *Preliminary Determination,* 66 Fed. Reg. 43186 (Exhibit CDA-1).

[13] Suspension of liquidation under U.S. law means the withholding of appraisement, i.e., the withholding of final computation of the duties accruing on an entry. *See* 19 C.F.R. § 159.1

[14] *See Preliminary Determination*, 66 Fed. Reg. at 43215 (Exhibit CDA-1).

the date of the publication of the Preliminary Determination.[15]

C. WTO Proceeding

12. Canada initiated this proceeding to challenge certain aspects of the Preliminary Determination described above and certain U.S. statutory and regulatory provisions regarding expedited and administrative reviews. Canada has fully described the brief history of this proceeding in its First Submission.[16]

III. STANDARD OF REVIEW

13. Article 11 of the DSU sets forth the standard of review that applies to this case.[17] 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 SCM Agreement upon which the claim is based. 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.[18]

14. The rights and obligations of the Members are no more or no less than those expressly established in the Agreement. While it is true that Members have agreed to limit the exercise of

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[15] *Id*.

[16] Canada First Submission, paras. 8-10.

[17] *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, Report of the Appellate Body, adopted 7 June 2000, para. 51.

[18] *See* DSU Article 3.2; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, Report of the Appellate Body, adopted 27 July 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 United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* SCM/153, Report of the Panel, adopted 28 April 1994, paras. 243-46, 247-49 (finding that United States is not required to make certain adjustments in its subsidy calculation because no understanding regarding calculation had been developed); *New Zealand – Imports of Electrical Transformers from Finland*, L/5814, BISD 32S/55, Report of the Panel, adopted 18 July 1985, para. 4.3 (finding that New Zealand's reasonable cost of production calculation was not inconsistent with Article VI of the General Agreement on Tariffs and Trade ("GATT") when Article VI did not contain any specific guidelines).

their sovereignty to conform with their WTO Agreement commitments,[19] 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 issue, a panel may not fill in the gap. The role of filling any gaps in the agreements is reserved for the Members.[20] This rule is central to the fundamental structure of the WTO, as well as proper judicial method.

15. 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.[21] Moreover, the sufficiency of the evidence in this case should be judged in relation to the particular measure that Canada has challenged.[22] In conducting its review, the Panel should bear in mind the preliminary nature of the determination at issue. As an investigation moves from initiation to final determination, the investigative record is amassed and analyzed. The evidence is therefore less developed at the

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[19] "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.*" *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, adopted 1 November 1996, p. 14 (emphasis added).

[20] 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 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 the rights and obligations provided in the *WTO Agreement*.

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

[21] *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, Report of the Appellate Body, adopted 5 November 2001, para. 74.

[22] *Cf. United States - Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162, Report of the Panel, adopted 27 October 1993, para. 331 ("The Panel considered that the concept of sufficiency of evidence had to be judged in relation to the particular action contemplated in Article 2:1 of the Agreement, that of initiating a countervailing duty investigation . . . .").

time of a preliminary determination than at the time of a final determination. The consistency of a preliminary determination with the obligations imposed on Members should be based on the record evidence before the authority at the time the determination was made.[23]

IV. ARGUMENT

A. Canada Bears the Burden of Proving Its Claim

16. It is now well established that 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.[24] 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.[25]

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

17. Article 3.2 of the DSU provides that the WTO agreements are to be interpreted "in accordance with the customary rules of interpretation of public international law." It is well settled that Article 31 of the Vienna Convention on the Law of Treaties reflects such a customary rule of treaty interpretation.[26] Under the principles set forth in Article 31(1) of the Vienna Convention, a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in light of their context and in light of its object and purpose." Although most interpretive exercises commence with a consideration of the treaty's text, WTO panels have found that the elements of Article 31(1) constitute "one holistic rule of

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[23] *See United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R, Report of the Panel, as modified by the Appellate Body, adopted 23 August 2001, para. 7.7.

[24] *See, e.g., United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, p. 14; *European Communities - Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 104.

[25] *See, e.g., India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

[26] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 321. *See*, *e.g.*, *Canada - Terms of Patent Protection*, WT/DS170/R, Report of the Panel, adopted 12 October 2000; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, adopted 1 November 1996, p.10; *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152R, Report of the Panel, adopted 27 January 2000, para. 307.

interpretation rather than a sequence of separate tests to be applied in a hierarchical order."[27] In light of Canada's efforts in this case to have the Panel read exemptions from, and limitations on, subsidy disciplines into the SCM Agreement, it is useful to consider at the outset the object and purpose of the Agreement.

18. A recent panel described the object and purpose of the SCM Agreement as follows: "In our view, the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade."[28] This view is consistent with the generally held view of subsidies as distortions of international trade which diminish overall wealth, leave some producers at an unfair advantage, and undermine support for trade liberalization.[29]

19. With the object and purpose of the SCM Agreement in mind, we now turn to a discussion of the text of Article 1.1(a)(1)(iii). An examination of Article 1.1(a)(1)(iii) demonstrates that Canada's claims are a flawed attempt to shield from the disciplines of the SCM Agreement a system of government timber contracts more favorable to Canadian lumber mills than the market would otherwise provide.

20. Articles 1.1 and 14 describe the types of trade-distorting subsidies subject to the disciplines of the SCM Agreement. Among them, in Articles 1.1(a)(1)(iii) and 14(d), is the government provision of goods or services on terms more favorable than the market would otherwise provide. In an effort to build a safe harbor for its system of provincial government timber contracts, Canada argues that providing timber to lumber mills is not the provision of a good, and that the government's administratively set price for the timber cannot, under any circumstances, be measured against market prices for timber sources outside the government-

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[27] *United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R, Report of the Panel, adopted 20 January 2000, para. 7.22.

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

[29] *See, e.g., Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/R, Report of the Appellate Body, adopted 20 August 1999, paras. 26, 38 (Canada and Brazil agree that the object and purpose of the SCM Agreement is to reduce economic distortions caused by subsidies); *Report on the Meeting of 27-28 July 1998 of the Working Group on the Interaction between Trade and Competition Policy (Note by the Secretariat)*, WT/WBTCP/M/5 (25 September 1998) (EC representative stating that "in the view of his delegation measures to counter unfair trade such as antidumping and countervailing duties are aimed at removing the trade-distorting effects of dumped or subsidized imports and restoring effective competition."); *GATT, The Tokyo Round of Multilateral Trade Negotiations, Report by the Director-General of GATT* 53 (1979) (cited in Patrick J. McDonough, *Subsidies and Countervailing Measures*, in Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Boston: Kluwer 1993) (referring to subsidies "which directly, or indirectly, intentionally or unintentionally, have the effect of distorting world trade and depriving other countries of legitimate trade opportunities").

dominated market in Canada. There is no logical, reasonable means of reconciling Canada's arguments with the text in light of its context and the object and purpose of the SCM Agreement.

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

21. The Canadian provincial governments own approximately 90 percent of the forested land in Canada ("Crown land"), and the provincial governments control access to the timber on Crown land. The provinces enter into contractual arrangements that allow companies to harvest the timber on Crown land in exchange for an administratively set stumpage fee and the assumption of certain forest management obligations associated with harvesting operations.[30] To be awarded such a contract, normally the company must either have a Canadian lumber mill, or have an agreement with a Canadian lumber mill to process all of the harvested timber. Other than a few minor specialized programs that involve some kind of competitive process, the vast majority of the Crown timber is awarded under long-term contracts that are not subject to competition (these contracts are usually referred to as tenures), with the fees set administratively by the provincial government.

22. In the Preliminary Determination, the Commerce Department concluded that these Canadian provincial "stumpage programs" constitute a financial contribution because they provide a good to lumber producers within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. That good is timber.

23. Canada argues that the provinces do not provide lumber producers with timber. It contends that the provincial governments merely create a bundle of intangible contractual rights and obligations that enable the lumber producers to exploit the timber.[31] Canada is effectively asking this Panel to read a "safe harbor" into the SCM Agreement that allows governments to subsidize producers by providing them with a natural resource input for less than adequate remuneration. There is no basis in the text of the SCM Agreement for a natural resource exception. As demonstrated below, a proper interpretation and application of the Agreement to the facts of this case leads to the conclusion that the provincial governments provide a good to lumber producers. A financial contribution, as defined in Article 1.1(a)(1)(iii), therefore exists.

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[30] These obligations include, for example, silviculture and fire protection.

[31] Canada First Submission, paras. 18, 32.

a. The Preliminary Determination of Financial Contribution Is Consistent with the Text of Article 1.1(a)(1)(iii)

24. As noted above, Article 31 of the 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." Because "the words of the treaty form the foundation for the interpretive process," the text is the starting point of our analysis.[32]

25. 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, *inter alia*, 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.

26. WTO panels and the Appellate Body routinely resort to dictionary definitions in order to discern the ordinary meaning of a term that is undefined in the SCM or any covered agreement.[33] The *New Shorter Oxford English Dictionary* defines "provides" as meaning, among other things, to "supply or furnish for use."[34] It defines "goods" as encompassing all "property or possessions" and "saleable commodities."[35] *Black's Law Dictionary* also defines "goods" as specifically including "growing crops, and other identified things to be severed from real property."[36] "Goods" are similarly defined under Canadian law.[37] Provincial stumpage programs therefore constitute a "financial contribution" because they "supply or furnish" an "identified thing to be

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[32] *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, adopted 1 November 1996, p. 14; *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152R, Report of the Panel, adopted 27 January 2000, para. 7.22.

[33] *See, e.g., United States - Safeguards Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia*, WT/DS/177/178R, Report of the Panel, adopted 16 May 2001, para. 7.21; *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as affirmed by the Appellate Body, adopted 20 August 1999, para. 143; *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, Report of the Appellate Body, adopted 27 October 1999, para. 97.

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

[35] *Id.* at 1116 (Exhibit CDA-18).

[36] *Black's Law Dictionary* 701-702 (7th ed. 1999) (Exhibit CDA-17).

[37] *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.-6).

severed from real property," i.e., timber.

27. The text of Article 1.1(a)(1)(iii) does not contain any exclusions for natural resources, nor can such an exclusion be read into the text. To the contrary, the Members evidently considered exceptions, and the sole exclusion from the phrase "goods and services" that they agreed on is reflected in Article 1.1(a)(1)(iii) itself, i.e., general infrastructure. It would be extraordinary if the Members intended *sub silentio* to provide a safe harbor for a broad group of government subsidies. Rather, this sole, express exclusion demonstrates that the Members intended to include all other goods and services.

28. Canada acknowledges that timber is a "market asset" and that through forest tenures and licenses (referred to collectively as stumpage systems or programs), the provincial governments relinquish ownership of those assets to the lumber companies while retaining ownership of other forest assets.[38] Nevertheless, Canada argues that provincial governments are not providing this market asset – timber – to lumber producers, but rather are merely granting certain rights in the timber: the right of access to, or the right to harvest, the timber.[39] A review of the facts demonstrates that Canada is attempting to elevate form over substance.

29. There is no meaningful distinction between providing the right to harvest timber and providing the timber itself. The provincial stumpage systems are designed for one purpose: to provide timber to Canadian mills that make lumber or wood pulp. Participation in these programs is restricted to Canadian sawmills or pulpmills, or companies that have contracts with Canadian mills to process the harvested timber.[40] Furthermore, each of the provincial stumpage programs charges the tenure holder on a "volumetric" basis.[41] 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. In light of these facts, it is obvious that the provincial governments are providing timber through these stumpage systems.

30. Canada implies that a government only "provides" a natural resource if it first harvests or

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[38] Government of Canada Case Briefs submitted to the Commerce Department February 22, 2002, Vol 2 at B6 ("Canada Case Brief").

[39] Canada First Submission, para. 32.

[40] *See Preliminary Determination*, 66 Fed. Reg. at 43192 (Exhibit CDA-1).

[41] Canada First Submission, para. 18.

extracts it, not if it merely grants the right to take the natural resource.[42] According to the *New Shorter Oxford English Dictionary*, however, "provides" means to "make available" in addition to "supply or furnish for use."[43] Thus, even if provincial tenures are viewed as simply providing the right to take timber off the land 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. Therefore, the Commerce Department's preliminary determination that provincial stumpage programs constitute the provision of a good is entirely consistent with the text of Article 1.1(a)(1)(iii) of the SCM Agreement.

b. The Preliminary Determination of Financial Contribution Is Also Consistent with the Context, Object and Purpose of Article 1.1(a)(1)(iii)

31. As noted above, the ordinary meaning of the text of the SCM Agreement must be determined in context and in light of its object and purpose, which is to impose multilateral disciplines on subsidies because of the "the trade-distorting potential" of government largesse. It is evident from Article 1.1 that the Members recognized that governments have a 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 Agreement.[44] Article 1.1(a)(1)(iii) should be interpreted in that context.

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[42] This may reflect Canada's tendency to see the "mischief' that the SCM Agreement seeks to discipline as "measures that distort the market by a) *imposing a cost on the treasury* of the providing Member, and b) an advantage to the recipient above and beyond the market." *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as modified by the Appellate Body, adopted 20 August 1999, para. 5.37 (emphasis added). This view was soundly rejected by the panel in *Canada Aircraft*, which stated that "the avoidance of net cost to government is not the object and purpose of the multilateral disciplines contained in the SCM Agreement. Rather, . . . we consider that the object and purpose of the SCM Agreement could more appropriately be summarized as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade].'" *Id.* at para. 9.119 (brackets in original).

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

[44] Article 1.1 of the SCM 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 entrust or directs a private body to carry out the types of functions listed above.

32. As noted above, with respect to the government provision of goods and services, only "general infrastructure" was excluded. The reason is simple. When the government provides producers with goods at less than their market value, the government puts the producer in a more advantageous position than those competing in the market.[45] The potential for such advantage does not depend upon whether the government made the good, acquired the good, or held land to which the good was attached. The potential for conferring an advantage lies in the government's act of *providing* the good to specific enterprises or industries for less than market value.

33. If the major input for a product is a natural resource – timber, bauxite, iron ore – a government that provides the natural resource to producers has the ability, depending upon the price charged, to provide an advantage that would not otherwise be available in the market. Canada's attempt to exempt such potentially market-distorting government practices from the disciplines of the SCM Agreement has no basis in the text of the Agreement and is entirely at odds with its object and purpose.

34. Canada attempts to overcome this flaw in its argument by citing "negotiating history" that allegedly reflects an intent to exempt harvesting and extraction rights from the disciplines of the SCM Agreement. Specifically, Canada relies on "Informal Discussion Paper No. 6."[46]

35. As a preliminary matter, Article 32 of the Vienna Convention states that such "supplementary means of interpretation, including the preparatory work of the treaty," should only be used "to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 . . . leaves the meaning ambiguous or obscure." As discussed above, the meaning of "goods" in Article 1.1(a)(1)(iii) is not ambiguous or obscure and its meaning does not need to be confirmed. Reliance on the negotiating history that Canada cites is therefore inappropriate.

36. Nevertheless, even if recourse to the negotiating history were appropriate, Informal Discussion Paper No. 6 cannot provide the Panel with any insight into the Members' intent when they agreed on the text of Article 1.1(a)(1)(iii). As stated in the Chairman's Note accompanying the discussion paper, this paper and several other such informal papers were prepared by the Chair and circulated solely to "facilitate" discussions. The Chairman's Note states that the discussion papers do not reflect the Chairman's view of "what may be included in the subsequent

[45] Economically there is no difference between the government charging a producer $50 for a good worth $100, or simply giving the producer $50 in cash.

[46] Canada First Submission, paras. 28-30.

revision, nor do they have any status relating them to the Chairman's paper."[47] Moreover, the Note further states that some of the views expressed in the discussion papers "are purposefully provocative in order to make evident technical complexities and/or workability (or its lack) of certain approaches."[48] Given the nature and purpose of the discussion paper, it is not possible to view it as representing, or shedding any light on, the consensus view of the Members concerning the scope of "goods or services."

37. The Panel should look to the text of the Agreement for the Members' intent, not to Informal Discussion Paper No. 6.[49] By examining the text of the Agreement, in light of its context and object and purpose, the Panel should find that the Commerce Department's preliminary determination that provincial stumpage programs constitute a financial contribution is entirely consistent with Article 1.1(a)(1)(iii). Canada's claim, therefore, should be rejected.

2. The Commerce Department Properly Determined that Provincial Stumpage Programs Provide a "Benefit"

38. Having determined that the Canadian provincial governments provided a financial contribution, the next step in the Commerce Department's analysis was to determine if a benefit was thereby conferred, within the meaning of Article 1.1(b) of the SCM Agreement. As the *Canada Aircraft* panel stated:

> 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

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[47] Informal Discussion Paper: Note by the Chairman, Negotiating Group on Subsidies and Countervailing Measures, 4 September 1990 (Exhibit CDA-20).

[48] *Id.*

[49] As the Appellate Body has stated: "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*." *India -Patent Protection for Pharmaceutical and Agricultural Products*, WT/DS50/AB/R, Report of the Appellate Body, adopted 16 January 1998, para. 45 (emphasis added). Moreover, the Appellate Body has stated: "The purpose of treaty interpretation under Article 31of the *Vienna Convention* is to ascertain the *common* intention of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty." *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Report of the Appellate Body, adopted 22 June 1998, para. 84 (italics in original).

> contribution . . . the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market.[50]

The *Canada Aircraft* panel's position was endorsed by the Appellate Body, which stated:

> 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 favorable than those available to the recipient in the market.[51]

39. In the Preliminary Determination, the Commerce Department used market stumpage prices from comparable regions of the United States, adjusted as appropriate, as the benchmark price to determine whether the stumpage programs administered by the Canadian provincial governments provided timber to lumber producers on a more favorable basis than the marketplace would provide.[52] The Commerce Department declined to use non-government prices between buyers and sellers within each province as the benchmark prices because provincial government sales constitute the overwhelming majority of timber sales in each of the provinces. As a result of the provincial governments' dominance of the timber market, the Commerce Department could not conclude that non-government prices within the provinces were unaffected by the very distortion a market benchmark price is intended to measure, i.e., that they reflected the market "but for" the government financial contribution.[53] In contrast, as described further below, stumpage prices in U.S. states with comparable forests, which are determined in an open, competitive process, are a reasonable measure of what the marketplace would charge for provincial timber in Canada, but for the subsidies.

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[50] *Canada Aircraft - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as affirmed by the Appellate Body, adopted 20 August 1999, para. 9.112.

[51] *Id.* at para. 157.

[52] *Preliminary Determination*, 66 Fed. Reg. at 43197 (Exhibit CDA-1).

[53] *Id.* at 43194-195. As the Commerce Department explained in the Preliminary Determination:

> Because of the provincial governments' control of the market through a system of administratively-set prices and other market distorting measures, there is no market-determined price for stumpage within Canada that is independent of the distortion caused by the governments' interference in the market. Therefore, we preliminary determine that we cannot use the private transaction prices provided by the provincial governments.

Id. at 43195.

40. Canada has, in fact, acknowledged that it is permissible and reasonable, in certain circumstances, to use world market prices to determine whether a government's price confers a benefit.[54] Nevertheless, Canada now argues that an authority may only use sales between buyers and sellers in the exporting country as a benchmark, even where, as here, the government dominates the market, the non-government sales represent only a tiny fraction of the sales in the exporting country, and the non-government sales therefore may be distorted by the government sales.[55] Canada in effect attempts to read another "safe harbor" into the SCM Agreement that would allow governments to subsidize their producers if they subsidize them to such an extent that they dominate the entire market. Canada's argument is grounded in a flawed interpretation of the Agreement and should be rejected.

a. Article 14(d) Permits the Use of Benchmark Prices Outside of the Exporting Country

41. Article 14 of the SCM Agreement sets forth guidelines for measuring the amount of the benefit to the recipient of a government's financial contribution. Article 14(d) provides as follows:

> the provision of goods . . . 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 . . . (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).[56]

42. Canada argues that Article 14(d) provides that the adequacy of remuneration must be determined *in* the country of provision, but the text does not in fact so provide. Article 14(d) provides that the adequacy of remuneration must be determined "*in relation to* prevailing market conditions" in the country of provision. Under the customary rules of treaty interpretation,

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[54] *See* Canada Case Brief, Vol 2 at B6. Canada conceded that prices of some homogeneous commodity products with negligible transportation and transaction costs may properly be compared to world market prices or to prices in other countries because such a comparison would require only minor cost adjustments. These products obey the so-called "law of one price," which holds that market prices for these goods can be expected to be the same in different geographic areas.

[55] Canada First Submission, para. 43.

[56] Emphasis added.

meaning must be given to these words.[57]

43. As discussed above, to understand the meaning of these words, the Panel should consider their ordinary meaning in context. The dictionary definition of "in relation to" is "with reference to."[58] Thus, under Article 14(d), the prevailing conditions in the country of provision are a reference point, not necessarily an end point, for the market benchmark. As previous panels have stated, the proper benchmark measures the market but for the financial contribution.[59] Thus, the issue is finding a market benchmark with reference to what the "in country" market would be but for the subsidy. It would therefore be improper to look outside a country simply to determine what the market value of a good is elsewhere in the world. It is, however, entirely proper to do so if one can use such prices, properly adjusted, to determine the market value of the good in the country under investigation.

44. Moreover, Article 14(d) states that the "prevailing market conditions" to be taken into account are the conditions of purchase or sale. Therefore, when read in context, "in relation to prevailing market conditions" requires the authority to determine the adequacy of remuneration with reference to market prices for transactions that, while not necessarily between buyers and sellers within the country of provision, are (or could be adjusted to be) comparable to the government transactions at issue with respect to the conditions of purchase or sale in the market.

45. When the Members intended to narrowly restrict the selection of market benchmarks, they did so expressly in the text. Article 14(a) of the SCM Agreement, for example, sets forth the requirements for determining whether a government equity infusion confers a benefit. Article 14(a) expressly provides that the benchmark is the "usual investment practice . . . of private investors *in the territory of that Member*."[60] If the Members intended to similarly restrict Article 14(d) to transactions between buyers and sellers in the country of provision, they would have so indicated in the text. They did not.

46. The "in relation to" language in Article 14(d) demonstrates the Members' intent to

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[57] *See United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, adopted 20 May 1996, p. 15.

[58] More specifically, 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* 467, 2526, 2534 (1993) (Exhibits U.S.-7,8,9).

[59] *Canada Aircraft - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as affirmed by the Appellate Body, adopted 20 August 1999, para. 9.112.

[60] Emphasis added.

provide more flexibility in the selection of market benchmarks for determining the adequacy of remuneration for the provision of goods and services. This flexibility is evident elsewhere in the Agreement. The "market," as generally referred to in the Agreement, is not restricted to the exporting country, but rather encompasses the entire market available to the subsidized producer or exporter. For example, Article 14(b) refers to comparable commercial loans available to the firm "on the market." In *Canada Dairy*, the panel recognized this flexibility, noting that there were two possible "benchmarks": the domestic milk price (i.e., the price of milk in Canada), or "the price of milk [that] these processors/exporters can obtain from any other source, in particular the price of milk they can source from the world market."[61] The Appellate Body recently confirmed that "[w]orld market prices do, therefore, provide one possible measure of value of milk to producers" in Canada.[62]

47. Canada's extremely narrow interpretation of the market would also seriously undermine the object and purpose of the SCM Agreement generally, and Articles 1.1(b) and 14(d) specifically. The provincial governments undisputedly dominate the market and are virtually the sole provider of the input, thus rendering the few non-government sales invalid as a benchmark. Canada's argument that an investigating authority may only use a benchmark price within the exporting country in effect reads a "safe harbor" into the SCM Agreement that would allow governments to subsidize their producers if they subsidize them to such an extent that they dominate the entire market. If the government were the sole provider of a good in the exporting country, for example, there would be no non-government benchmark prices in the exporting country to use as a point of reference and it therefore would be impossible to determine that the government had provided a benefit – even if it provided the good for a fraction of its value. An interpretation that would lead to such a result is at odds with the object and purpose of the Agreement, which is to impose disciplines on the use of government subsidies and to eliminate or offset their adverse effects.[63]

48. The object and purpose of Article 14(d) support the conclusion that the text of the Agreement requires authorities to determine the adequacy of remuneration by comparing the government price to prices, adjusted as necessary to reflect prevailing market conditions (i.e., the conditions of purchase or sale) in the country of provision, that reflect what prices would

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[61] *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* WT/DS103/R, WT/DS113, Report of the Panel, as modified by the Appellate Body, adopted 27 October 1999, para. 7.47.

[62] *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW, Report of the Appellate Body, adopted on 3 December 2001, para. 84.

[63] Article 5 of the SCM Agreement states that "[n]o Member should cause, through the use of a subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members."

otherwise be but for the financial contribution. In many cases, it may be possible, and preferable, to test the government's prices by comparison to prices between non-government buyers and sellers in the exporting country.[64] That is not, however, always the case. The trade-distorting potential of the government's provision of a good can be identified only by reference to an independent market price, i.e., a price that is unaffected by the very trade distortion the test is designed to identify. If the comparison price were entirely, or almost entirely, dependent upon the government price, as in the case where the government sales overwhelmingly dominate the market, the analysis would become circular because the benchmark price would reflect the very market distortion that the comparison is designed to detect. Using prices largely dictated by the government to measure the adequacy of government prices would therefore defeat the purpose of Article 14.

49. Whether a particular market benchmark price for the adequacy of remuneration is consistent with Article 14(d) must depend upon the facts of the particular case. Canada has failed to make a *prima facie* case that the Commerce Department's use of stumpage prices for comparable U.S. forests, adjusted to take into account differences in the conditions of sale (i.e., in relation to prevailing market conditions) in the Canadian timber market, is *per se* inconsistent with Article 14(d) where the government sales dominate the Canadian market.

b. The Commerce Department's Preliminary Decision to Use Stumpage Prices in U.S. States with Comparable Forests, Adjusted to Reflect Prevailing Market Conditions in Canada, Was Consistent with Article 14(d) of the SCM Agreement

50. In the Preliminary Determination, the Commerce Department established market benchmark prices for each Canadian province based on stumpage prices in U.S. states with comparable forests, adjusted to account for differences in the prevailing market conditions (e.g., species and tenure obligations such as silviculture) in Canada.[65] The Commerce Department properly determined that stumpage prices in the United States, as adjusted, represent market

[64] The Commerce Department's regulations provide a hierarchy for the selection of the benchmark for assessing the adequacy of remuneration. The hierarchy establishes a preference for actual transactions in the country of provision. For a detailed description of that regulatory hierarchy, which was applied in this case, *see Preliminary Determination*, 66 Fed. Reg. at 43193-94 (Exhibit CDA-1).

[65] The Commerce Department selected province-specific, cross-border benchmarks upon the basis of comparability with the Canadian markets. With respect to Quebec, for example, the Commerce Department used data from Maine. Although Quebec is bordered by four states (Maine, New Hampshire, New York and Vermont), the Commerce Department selected Maine because the data from Maine was the most comprehensive, Maine shares the longest border with Quebec, and the softwood species grown in Quebec are comparable to those grown in Maine. *Preliminary Determination*, 66 Fed. Reg. at 43200 (Exhibit CDA-1).

prices under prevailing market conditions in Canada. The adjusted U.S. prices therefore represent an appropriate measure of what Canadian prices would be but for the subsidy.

51. Although Canada argues that U.S. timber is not available to Canadian lumber producers, Canadian producers can and, in fact, do bid to harvest U.S. timber and buy U.S. logs.[66] However, even if Canadian lumber producers had not actually purchased stumpage in the United States and imported the logs into Canada, U.S. stumpage prices would be a valid benchmark under Article 14(d) because they represent commercially viable sources that could be purchased by Canadian lumber producers absent the provincial subsidies in Canada.[67] More importantly, they represent the price that Canadian mills would pay in a market but for the government's financial contribution.

52. Canada also argues that the use of U.S. prices is inconsistent with past U.S. cases, but the Panel is charged with determining whether the Preliminary Determination at issue is consistent with the SCM Agreement. Prior U.S. cases are irrelevant to that inquiry.[68] Moreover, in the

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[66] As the Commerce Department explained in the Preliminary Determination:

> There are no restrictions on obtaining stumpage on private and state lands in the United States. Furthermore, timber harvested in the United States is imported into Canada, and imports from the United States account for almost 100 percent of all Canadian timber imports. Such imports represent a decision made by Canadian mills to purchase U.S. stumpage instead of Canadian stumpage. Finally, we note that some of the largest softwood producers in Canada have operations in both Canada and the United States and obtain stumpage in both countries.

Preliminary Determination, 66 Fed. Reg. at 43195 (Exhibit CDA-1).

[67] The *Canada Dairy* panel deemed irrelevant the fact that Canadian milk processors did not in fact import milk from outside of Canada. The panel noted that "fluid milk *could be imported from the United States* (given its proximity) to Canada" and that "one can assume that imports of fluid milk are, in principle, technically and commercially viable." *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, Report of the Panel, as modified by the Appellate Body, adopted 27 October 1999, para. 7.54 (emphasis added).

[68] 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, Commerce frequently used benchmarks that did not fully reflect the market value of the good at issue. Commerce's benchmark selections under an obsolete legal standard in previous lumber cases are irrelevant to the Panel's inquiry in this case into whether the Preliminary Determination at issue is consistent with the SCM Agreement. *See Preliminary Determination*, 66 Fed. Reg. at 43196 (Exhibit CDA-1).

cases cited by Canada, the most recent of which is 10 years old, the Commerce Department applied pre-Uruguay Round U.S. law and methodology.

53. In this case, the Commerce Department determined the adequacy of remuneration by analyzing stumpage prices in U.S. states with comparable forests, analyzing prevailing market conditions in Canada and making appropriate adjustments to the U.S. stumpage prices to reflect those conditions.[69] The resulting market benchmark price was therefore fully consistent with Article 14(d).

3. The Commerce Department's Calculation Did Not Overstate the Subsidy Found to Exist

a. The Exclusion of Maritime Lumber from the Subsidy Calculation Did Not Overstate the Subsidy in Violation of Article 19.4

54. When the Commerce Department initiated the underlying investigation, the investigation covered softwood lumber products from all Canadian provinces.[70] Canada and the Maritime Provinces subsequently submitted comments requesting that the Commerce Department exclude the Maritime Provinces from the investigation, which the petitioners supported.[71]

55. In light of these comments, the Commerce Department reconsidered the issue and ultimately agreed that the Maritime Provinces presented a unique situation.[72] The Commerce Department did not, however, exclude producers in the Maritime Provinces *per se*. The Commerce Department instead excluded from the investigation imports of softwood lumber products produced in the Maritime Provinces from timber harvested in the Maritime Provinces

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[69] *Preliminary Determination*, 66 Fed. Reg. at 43197-210 (Exhibit CDA-1).

[70] *Notice of Initiation*, 66 Fed. Reg. at 21335 (Exhibit U.S.-1).

[71] *See* Letter to the Commerce Department from the Government of Canada, dated May 8, 2001, at 2 (Exhibit U.S.-3); Letter to the Commerce Department from the Maritime Provinces, dated May 8, 2001, at 2-3 (Exhibit U.S.-10); Letter to the Commerce Department from the Petitioners, dated May 15, 2001, at 7 (Exhibit U.S.-11).

[72] Unlike in the other Canadian provinces, the majority of timber harvested in the Maritime Provinces is from private land, and the Maritime Provinces tie stumpage fees for timber on the small amount of Crown land in those provinces to market indices. *See* Letter to the Commerce Department from the Maritime Provinces, dated May 8, 2001, at 9 (Exhibit U.S.-10).

("Maritime Lumber").[73] Accordingly, in calculating the country-wide subsidy rate applicable to the subject merchandise (i.e., merchandise within the scope of the investigation), the Commerce Department excluded the non-subject Maritime Lumber.

56. Canada now argues that excluding the Maritime Lumber from the subsidy calculation resulted in a subsidy rate and the imposition of provisional measures "in excess of the amount of the subsidy found to exist" in violation of Article VI:3 of GATT 1994 and Articles 17 and 19.4 of the SCM Agreement. The United States disagrees.

57. Canada's argument is based on two flawed premises. First, Canada misconstrues the Commerce Department's Maritime Lumber exclusion and erroneously argues that Maritime Lumber is subject to the investigation ("subject merchandise") and that the Commerce Department simply excluded producers of the subject merchandise in the Maritime Provinces from application of the provisional measures.[74] Second, Canada misconstrues the methodology that the Commerce Department used to calculate the country-wide rate in this case.

i. Canada Misconstrues the Commerce Department's Maritime Lumber Exclusion

58. In response to Canada's request, the Commerce Department narrowed the scope of the merchandise subject to the investigation to exclude Maritime Lumber, i.e., lumber produced in the Maritime Provinces from timber harvested in the Maritime Provinces. Lumber produced or sold by a mill in the Maritime Provinces from timber harvested in another province does not fall within the exclusion. Specifically, the Commerce Department stated:

> In light of all of the unique circumstances in this case, we have determined that it is appropriate to exempt exports of certain softwood lumber products produced in the Maritime Provinces from this investigation. As in the earlier proceedings and agreements concerning softwood lumber, this exemption does not apply to certain softwood lumber products produced in the Maritime Provinces from Crown timber harvested in any other Province.[75]

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[73] *See Amended Initiation*, 66 Fed. Reg. at 40228 (Exhibit U.S.-4).

[74] *See* Canada First Submission, paras. 75-78.

[75] *See Amended Initiation*, 66 Fed. Reg. at 40229 (Exhibit U.S.-4).

Thus, the Commerce Department did not exempt Maritime producers, but instead exempted certain softwood lumber products produced in the Maritime Provinces.

59. In accordance with its aggregate methodology, the Commerce Department then calculated a single, country-wide rate based on the ratio of the total subsidy provided to producers of the subject merchandise to the total sales of the subject merchandise. In this calculation, neither the numerator nor the denominator included the excluded Maritime Lumber because Maritime Lumber was not subject merchandise, i.e., it was not within the scope of the investigation.

60. Canada argues that the Commerce Department improperly excluded the value of Maritime Lumber from the calculation of the country-wide rate. Canada argues that exclusion of the Maritime Lumber from the calculation caused provisional measures to be imposed "in excess of the amount of the subsidy found to exist."[76]

61. Canada's claim appears to rest, implicitly, on the notion that the Commerce Department excluded certain *producers* of subject merchandise. As is evident from the quote above from the Preliminary Determination, however, the Commerce Department instead excluded certain *products*, i.e., Maritime Lumber, from the scope of the investigation. Maritime Lumber is therefore not subject merchandise. Canada's proposed methodology would require the Commerce Department to allocate some portion of the aggregate subsidy found for subject merchandise to non-subject merchandise. The result of such a calculation would be a rate that would require the United States to impose duties in an amount *less* than the subsidy found to exist with respect to the subject merchandise. Articles VI:3 and 19.4 do not require such a result.

62. As described below, the calculation for the Preliminary Determination was based on the subsidy found to exist with respect to the subject merchandise – no more, no less. The Panel should therefore deny Canada's claim.[77]

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[76] Canada First Submission, paras. 75-76.

[77] Canada's argument that the Commerce Department must include Maritime Lumber for purposes of the preliminary subsidy calculation because the United States relied upon import statistics (including imports from the Maritime Provinces) to find threat of material injury is equally flawed. The ITC made its preliminary injury determination before the Commerce Department's decision to amend the scope of the investigation to exclude Maritime Lumber. *Preliminary Determination, Softwood Lumber from Canada,* USITC Pub. 3426, Inv. Nos. 701-TA-414 and 721-TA-928 (May 23, 2001) (Exhibit CDA-29). Nothing in the SCM Agreement precludes a Member from narrowing the scope of an investigation after the preliminary injury determination and proceeding to complete the investigation on the basis of the narrower scope.

ii. Canada Misconstrues the Commerce Department's Aggregate Methodology

63. Canada's argument also exhibits a fundamental misunderstanding of the methodology the Commerce Department employed in this investigation. In an aggregate case such as this one, the Commerce Department uses aggregate data from government records to determine the total amount of the subsidy provided to domestic producers and exporters of the subject merchandise from each subsidy program. The Commerce Department then adds the subsidies from all programs and divides the total amount of the subsidies to the subject merchandise by the total sales of the subject merchandise. The resulting ratio, based on the total subsidy found to exist, is the country-wide rate applied to all imports of the subject merchandise into the United States.

64. Accordingly, in the underlying investigation, the Commerce Department determined the total amount of the subsidies to producers and exporters of the subject merchandise (which does not include Maritime Lumber) for each subsidy program, aggregated the subsidy amounts and divided the total subsidy by the total sales of the subject merchandise to determine the subsidy rate. In this case, the major subsidy program – stumpage – was provided by provincial rather than federal authorities. It was therefore necessary to calculate province-specific subsidy rates[78] and then weight average the provincial rates based on each province's share of total U.S. exports of the subject merchandise to obtain the country-wide rate.

65. Canada erroneously equates the need to weight average the provincial rates to account for sub-federal programs with a totally different methodology used under the pre-Uruguay Round U.S. law in which the Commerce Department investigated specific companies and then weight averaged the company-specific rates to establish a country-wide rate.[79] The cases that Canada cites[80] were decided pursuant to this old methodology under the old U.S. law. Under the old methodology, the Commerce Department calculated company-specific rates for the companies it

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[78] For the stumpage programs administered by the provincial governments, Commerce calculated the subsidy rate by dividing the total aggregate benefit conferred by each province by the total sales of softwood lumber and co-products (e.g., chips) from that province. *Preliminary Determination*, 66 Fed. Reg. at 43191 (Exhibit CDA-1).

[79] Before the conclusion of the WTO Agreements, U.S. law provided two options for conducting a subsidy investigation: (1) a country-wide rate based on a weighted average of specific rates for investigated producers and exporters, or (2) an aggregate methodology like the one provided for in the current law and used in this case. *See* Tariff Act § 706(a)(2) (pre-Uruguay Round practice of calculating a country-wide countervailing duty rate) (Exhibit CDA-40); *see also Certain Softwood Lumber Products from Canada*, United States - Canada Free Trade Agreement Article 1904 Binational Panel Review, Decision of the Panel, May 6, 1993 (explaining the Commerce Department's methodologies used pre-Uruguay Round U.S. law to calculate a country-wide rate).

[80] *See* Canada First Submission, paras. 54-68.

investigated and extrapolated from this information the country-wide rate.[81] By contrast, in an aggregate case, no extrapolation is necessary because the total amount of subsidy provided to all exporters of subject merchandise is known. Canada's citations to U.S. cases based on the old methodology are therefore inapposite. Furthermore, and more important, the task of this Panel is to review the consistency of the United States' actions with the WTO Agreements, not with the United States' domestic laws, regulations, or practice.[82]

66. Article 19.4 provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, *calculated in terms of subsidization per unit of the subsidized and exported product.*"[83] Even if the Commerce Department did not exempt Maritime Lumber from the investigation - i.e., even if Maritime Lumber were subject merchandise, Canada's claim that the United States has imposed provisional measures in excess of the amount of subsidy found to exist would still fail. If Maritime Lumber were subject merchandise, the subsidized and exported product would include Maritime Lumber. Because the total amount of the subsidy is known, this would simply result in a lower per unit rate of subsidization being applied to a larger pool of exports, and the net

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[81] As the Commerce Department explained in *Kajaria Iron Casting Pvt. Ltd. v. United States* (a case that Canada cites):

> [T]he Department is required to calculate a country-wide CVD rate, i.e., the all-other rate, by 'weight averaging the benefits received by all companies by their proportion of exports to the United States, inclusive of zero rate firms and *de minimis* firms.' Therefore, we first calculated a subsidy rate for each company subject to the administrative review. We then weight-averaged the rate received by each company using as the weight its share of total Indian exports to the United States of subject merchandise. We then summed the individual companies' weight-averaged rates to determine the subsidy rate from all programs benefitting exports of subject merchandise to the United States.

Kajaria Iron Castings Pvt. Ltd. v. United States, 156 F.3d 1163, 1177 (Fed. Cir. 1998) (Exhibit CDA-26). Under this methodology, the Commerce Department would calculate a country-wide rate, but assign a company-specific rate to any of the investigated companies whose rate was significantly different from the country-wide rate. The cases cited by Canada addressed the issue of whether the Commerce Department should recalculate the country-wide rate to exclude any significantly different rates that it found for specific companies.

[82] *See* Article 3.2 of the DSU (stating that the purpose of the dispute settlement system of the WTO is to "preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements"); Article 7.2 of the DSU (requiring panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute"); Article 3.7 of the DSU (providing that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements").

[83] Emphasis added.

monetary amount of duties would be exactly the same. Canada cannot have it both ways. Either Maritime Lumber is exempted, resulting in a higher per unit rate of subsidization being applied to a smaller pool of exports, or Maritime Lumber is included, resulting in a lower per unit rate of subsidization being applied to a larger pool of exports.

b. The Commerce Department Calculated the Country-Wide Subsidy Rate Based on the Total Value of All Sales that Canada Provided in Its Questionnaire Response

67. In the Preliminary Determination, the Commerce Department calculated a country-wide *ad valorem* subsidy rate. Consistent with its normal practice, the Commerce Department calculated this rate using as the numerator the total value of all benefits, and dividing that amount by a denominator comprised of the total value of softwood lumber sales, as submitted to the Department by Canada. That rate was applied to the entered value of imports of the subject merchandise for purposes of determining the estimated provisional duties to be secured by bond or cash deposit.

68. Canada argues that, in fact, the Commerce Department calculated the *ad valorem* rate based on the total "first mill" value, rather than the total sales value of the subject merchandise. As a result, Canada argues that by calculating the *ad valorem* rate on one basis (i.e., first mill) and applying it on another (i.e., entered value), the United States imposed provisional measures in excess of the subsidy found to exist, in violation of Article 19.4 of the SCM Agreement.

69. The fatal flaw in Canada's claim is that it rests on information not known to the Commerce Department at the time it made the Preliminary Determination. The Panel should review the WTO consistency of the Commerce Department's Preliminary Determination based on the record before the Department at the time the determination was made.

70. In its questionnaire, the Commerce Department asked Canada to provide the total value of sales of the subject merchandise. At the time of the Preliminary Determination, the Commerce Department had no knowledge that the information provided by Canada in response to that request was anything other than what had been requested, i.e., total sales value. The Commerce Department's decision to apply the preliminary duties on the basis of entered value was, therefore, entirely consistent with the information on the record at the time of the Preliminary Determination.

71. The vast majority of the subject merchandise consists of lumber produced when timber is first milled at a sawmill ("first mills"). A small percentage of the subject merchandise consists of lumber that undergoes minor further processing ("final milling"), which is referred to as "remanufactured" lumber. An appreciable portion of the remanufactured lumber is produced by

sawmills, which produce both "first mill" and remanufactured products. In addition, sawmills ship some lumber to other mills to produce "final mill" remanufactured products.

72. In its questionnaire, the Commerce Department instructed Canada to report the "value of all sales of softwood lumber" for each province and specifically noted that Canada should "be certain to include this information for remanufactured products which fall within the scope of the investigation."[84] The Commerce Department therefore specifically requested that Canada report the total value of all sales, not just the value of first mill products. In reporting its total sales amounts for each province, Canada appeared to have complied with these instructions. Canada indicated in its questionnaire response that it was including shipments of *all* subject merchandise in the total value of softwood lumber sales that it reported, including all first mill products and final mill remanufactured products.[85]

73. The Commerce Department used the total sales value that Canada reported in its questionnaire response for each province in the denominators of the province-specific subsidy calculations. The Preliminary Determination stated, for example, that the Commerce Department calculated the province-specific subsidy rates by "divid[ing] the sum" of the total benefits by the "total value of softwood lumber" within each province.[86] The Commerce Department also used the total sales values that Canada reported in its questionnaire response for each province in the

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[84] Specifically, the questionnaire stated as follows:

> Please provide the following statistical information for the period of investigation, separately for each province and territory in Canada, and indicate the source . . . . For all lumber values, please indicate the exact calculation method used, and explain each assumption made in the calculation; further, *be certain to include this information for remanufactured products* which fall within the scope of the investigation, as appropriate.
>
> 1. total volume and f.o.b. *value of all sales of softwood lumber*. . .

Questionnaire to the Government of Canada from the Department of Commerce, at II-1, II-6, II-20, II-34, III-1, IV-1, V-1, VI-1, VII-1, VIII-1, IX-1, X-1, XII-1 (May 1, 2001) (emphasis added) (Exhibit U.S.-12).

[85] Indeed, the Government of Canada Questionnaire Response states that in compiling the reported data "it was not possible to exclude 'remanufacturers' from [the] results." Government of Canada Questionnaire Response, Exhibit GOC-GEN 2, at 2 (June 29, 2001) (Exhibit U.S.-13).

[86] *Preliminary Determination*, 66 Fed. Reg. at 43203 (discussing subsidy rate calculation for British Columbia) (Exhibit CDA-1). *See also id.* at 43200 (discussing subsidy rate calculation for Quebec and noting that the Commerce Department "calculated the provincial benefit by dividing" the total benefits by "the total value of softwood lumber shipments").

denominator of the overall subsidy calculation.[87] The record at the time of the Preliminary Determination therefore establishes that the Commerce Department used in the denominator of its subsidy calculations the amount that Canada reported as the total value of softwood lumber sales, including all sales of first-mill lumber products and remanufactured products.

74. *After* the publication of the Preliminary Determination, Canada asserted, *for the first time,* that the total amount reported in its questionnaire response as the total value of softwood lumber sales did not, as indicated in its questionnaire response, include the value of remanufactured lumber shipments. Canada asserted that the amounts it had reported as its "total sales" included only the value of first mill softwood lumber products, and did not include the value of remanufactured softwood lumber products.[88]

75. Whatever the merits of this late claim by Canada that the data it submitted did not include sales of "remanufactured" products, that question is not before this panel. As the *U.S. Shirts and Blouses from India* panel noted, a panel must limit its analysis "to the evidence used by the

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[87] The Commerce Department's subsidy calculation worksheets clearly demonstrate that the Commerce Department used the data that Canada reported in the denominator of the country-wide subsidy calculation. For example, Canada reported that the total value of softwood lumber sales for Quebec was C$2,799,542,300. *See* Canada's Questionnaire response, "Total Volume and Value of Softwood Lumber Sales" (response for Quebec) (Exhibit CDA-30). The Commerce Department's subsidy calculation worksheets demonstrate that the Commerce Department used this same amount, C$2,799,542,300, in the denominator for its overall subsidy calculation. *See* Calculations for the Notice of Preliminary Affirmative Countervailing Duty Determination (August 9, 2001) (Exhibit U.S.-14). Similarly, Canada reported that the total value of softwood lumber sales for British Columbia was C$7,588,963,300, which the Commerce Department used in the denominator for the overall subsidy calculation. *See* Canada's Questionnaire Response, "Total Volume and Value of Softwood Lumber Sales" (response for British Columbia) (Exhibit CDA-30), see also Calculations for the Notice of Preliminary Affirmative Countervailing Duty Determination (August 9, 2001) (Exhibit U.S.-14).

The United States notes that the Commerce Department inadvertently referred to "first mill" values in the Preliminary Determination when discussing the province-specific subsidy calculations for Ontario and Alberta. *See Preliminary Determination*, 66 Fed. Reg. at 43205, 43207 (Exhibit CDA-1). These references in the Preliminary Determination were errors and do not reflect the actual calculations the Commerce Department made. The subsidy calculation worksheets referred to above demonstrate that the Commerce Department used the total sales values that Canada reported in its questionnaire response (including all shipments of first mill and remanufactured products) in the denominator for all of its subsidy calculations. *See* Calculations for the Notice of Preliminary Affirmative Countervailing Duty Determination (August 9, 2001) (Exhibit U.S.-14).

[88] In making this claim, Canada "explained" that the statement in its questionnaire response indicating that "it was not possible to exclude remanufacturers from its results" was meant simply to clarify that Statistics Canada was unable to distinguish between primary lumber products and remanufactured products produced by sawmills only. Letter to the Commerce Department from the Government of Canada, dated August 21, 2001 (Exhibit U.S.-15).

importing Member in making its determination to impose the measure."[89] Factual determinations should be reviewed "as perceived by the [administering authority] at the time it made its determination based upon the record before it . . . ."[90]

4. Canada's "Pass-through" Argument Is Inapposite

76. As explained fully above, the Preliminary Determination was based on an analysis of data concerning the aggregate amount of subsidies provided by Canadian federal and provincial governments to producers and exporters of softwood lumber. No company-specific data was examined and no company-specific rates were determined.

77. Nevertheless, Canada argues that the Preliminary Determination is inconsistent with Article 1.1 of the SCM Agreement because the Commerce Department did not conduct an indirect subsidy analysis under Article 1.1(a)(1)(iv).[91] Canada further argues that, as a result, the Preliminary Determination is inconsistent with Articles 17 and 19.4 of the SCM Agreement because the calculation results in the imposition of provisional measures in excess of the subsidy found to exist.[92] Again, Canada's argument ignores or misconstrues the nature of the subsidy at issue and the methodology employed in the underlying investigation.

78. The stumpage subsidies at issue in this case are direct subsidies. As noted above, the provincial governments enter into tenure contracts with producers of the subject merchandise. As a general matter, there is no "private body" intermediary between the government and the recipient, as that term is used in Article 1.1(a)(1)(iv). Therefore, the provisions of Article 1.1(a)(1)(iv) do not apply to this case.

79. Furthermore, nothing in the SCM Agreement precludes a Member from issuing a preliminary determination and imposing provisional measures based on data establishing the total

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[89] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, Report of the Panel, adopted 23 May 1997, para. 7.21.

[90] *See United States - Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, Report of the Panel, adopted 2 February 2001, para. 6.29 (upholding the Commerce Department's factual finding that a Korean company's sales were paid in Korean won (and not in U.S. dollars), in part because the questionnaire response indicated the sales were made in won. The panel noted that the Korean company had failed to correct "the initial misimpression that the won amount reported" was not correct.) *Id.* at para. 6.27.
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[91] *See* Canada First Submission, paras. 54-68.

[92] *Id.*

amount of the subsidy that the government provides to the subject merchandise. Although company-specific subsidy calculations may be preferred, they are not required.[93] Canada does not contest this point.

80. The SCM Agreement simply requires that the countervailing duty rate applied not exceed the subsidy found to exist.[94] As explained above, the Commerce Department in this case properly determined that Canadian federal and provincial governments provided subsidies to producers and exporters of softwood lumber, and properly calculated a country-wide subsidy rate based on the total amount of the subsidy preliminarily found to exist for the subject merchandise. The Preliminary Determination is therefore consistent with Articles 1.1, 17 and 19.4 of the SCM Agreement.

81. The Panel should reject Canada's argument that the Commerce Department should have conducted a "pass-through" analysis. While such an analysis might be relevant for purposes of determining the level of subsidy received by a specific producer or exporter, no producer or exporter-specific subsidy rates are calculated in an aggregate investigation. The Commerce Department did not collect company-specific information, and Canada neither objected to the aggregate approach taken in this case nor recommended a company-specific approach. Nor did Canada supply any company-specific data to support is claim of the necessity of a "pass-through" analysis. In the one instance where Canada claims a "pass-through" analysis was imperative, i.e., with respect to remanufactured products, Canada did not disaggregate those remanufactured products produced by independent remanufacturers and those produced by the sawmill/tenure holders themselves. Sawmills/tenure holders produce a wide array of products, including an appreciable portion of the remanufactured products covered by this investigation. Surely Canada is not suggesting that the Commerce Department was required to conduct a pass-through analysis with respect to products manufactured by such entities.

C. The Preliminary Critical Circumstances Finding Is Consistent with the SCM Agreement

82. In the Preliminary Determination, the Commerce Department made a preliminary finding of critical circumstances. Specifically, the Commerce Department preliminarily found that there was a reasonable basis to believe or suspect that: (1) Canada was providing subsidies inconsistent with the SCM Agreement, and (2) there had been "massive imports" of the subject merchandise

[93] Indeed, Article 19.3 of the SCM Agreement specifically envisions something other than company-specific rates. In such cases, Article 19.3 obligates Members to provide expedited reviews in order to establish company-specific rates.

[94] *See* Article 19.4 of the SCM Agreement.

over a relatively short period. Accordingly, the Commerce Department ordered the provisional measures (i.e., suspension of liquidation and security in the form of cash deposits or bonds) applied retroactively to subject merchandise imported into the United States on or after the date 90 days prior to the date of the publication of the Preliminary Determination.[95] The Commerce Department explained that "the purpose of the Department's preliminary critical circumstances determination is to preserve the possibility of . . . retroactive relief where there is reasonable cause to believe or suspect that such relief may be warranted . . . ."[96] The Commerce Department's preliminary critical circumstances determination was fully consistent with its obligations under the SCM Agreement.

1. As a Matter of Judicial Economy, the Panel Should Decline to Address Canada's Critical Circumstances Claim Because It Has Already Been Resolved in Canada's Favor

83. As an initial matter, the United States notes that, following a full investigation, the Commerce Department issued a final negative critical circumstances finding in this case.[97] Therefore, the Commerce Department's preliminary critical circumstances finding is no longer of any practical consequence; retroactive provisional measures have been terminated and no retroactive assessment will be imposed.

84. The Panel should not address Canada's critical circumstances claim because it is not "necessary to resolve the particular matter."[98] As the Appellate Body noted in *U.S. Woolshirts*, "a panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[99] In this case, the normal course of the investigative process has resolved Canada's critical circumstances claim and has provided Canada with the relief it seeks.

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[95] *See Preliminary Determination*, 66 Fed. Reg. at 43215 (Exhibit CDA-1).

[96] *Id.*

[97] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15545, 15547 (April 2, 2002).

[98] *See United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 18; *E.C. - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26, 48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 250.

[99] *See United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, p. 18.

2. The Commerce Department's Preliminary Critical Circumstances Finding Is Consistent with the SCM Agreement

85. If the Panel decides to resolve this issue on the merits, it should conclude that Canada has failed to make a *prima facie* case that the Commerce Department's preliminary critical circumstances finding was inconsistent with the SCM Agreement.

a. Authority to Impose Provisional Measures Retroactively

86. In the Preliminary Determination, the Commerce Department made an affirmative finding of "critical circumstances" based on evidence that a Canadian province provided prohibited export subsidies to producers or exporters of the subject merchandise, and that there had been massive imports of the subject merchandise since the filing of the petition.[100] Accordingly, the Commerce Department took the limited step of imposing provisional measures on entries made during the period 90 days prior to the publication of the Preliminary Determination, pending the outcome of the full investigation. Provisional measures are essential to preserve the possibility of retroactive relief if warranted by the results of the investigation.

87. The Commerce Department's imposition of provisional measures on merchandise entered during the 90-day period prior to the publication of the Preliminary Determination is consistent with the text of Article 20 of the SCM Agreement, as well as with its object and purpose. Article 20.1 generally provides that provisional measures and final countervailing duties shall only be applied prospectively, i.e., to products that enter for consumption after the date of the preliminary determination under Article 17.1 or the final determination under Article 19.1, respectively. This rule, however, is not absolute. Article 20.1 expressly provides that the prospective application of provisional measures and final duties is "subject to the exceptions set out in this Article."

88. Article 20.6 of the SCM Agreement provides that a Member may assess final, definitive duties retroactively for a period "not more than 90 days prior to the date of application of provisional measures," if critical circumstances are present. Canada argues that, because Article 20.6 specifically addresses only the actual assessment of definitive countervailing duties, the retroactive imposition of provisional measures is not permitted under the Agreement. Essentially, Canada argues that the SCM Agreement provides for a retroactive remedy in certain situations, but does not permit a Member to take any provisional measures, no matter how

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[100] *See Preliminary Determination*, 66 Fed. Reg. at 43190 (Exhibit CDA-1). Specifically, the Commerce Department determined that imports of softwood lumber from Canada had increased more than 23 percent. *See Critical Circumstances Analysis Memorandum from Bernard T. Carreau to Faryar Shirzad*, August 9, 2001, at 10. The Commerce Department generally considers any such increase in excess of 15 percent to be "massive" for critical circumstances purposes (Exhibit U.S.-16). *See* 19 C.F.R. § 351.206(h)(2).

limited, to preserve its ability to exercise that remedy. The Panel should reject such an interpretation, which would effectively render Article 20.6 a nullity.[101]

89. Article 20.6 is intended specifically to provide retroactive relief in a "critical" situation. At the time of the preliminary determination, there may be a reasonable basis to believe or suspect that such a situation exists. However, retroactive assessment of definitive duties cannot be ordered until a final determination has been made many months later, following a full investigation. Absent suspension of liquidation, entries made 90 days prior to the preliminary determination might be liquidated during the intervening period. If the entries are liquidated, the possibility of retroactive relief, even though fully warranted, no longer exists.

90. Articles 17 and 20 of the SCM Agreement do not intend such an outcome. Article 17 of the SCM Agreement provides for the imposition of provisional measures to preserve a Member's right to relief once there is sufficient evidence to determine preliminarily that such relief is warranted. Retroactive provisional measures are essential to enable a Member to avail itself of the special remedy provided under Article 20.6. Therefore, consideration of the object and purpose of provisional measures leads to the conclusion that the phrase "subject to the exceptions set out in this Article" in Article 20.1 should be interpreted as providing for retroactive provisional measures where there is preliminary evidence of critical circumstances.

91. The *Hot-Rolled Steel from Japan* panel reached a similar conclusion. The panel found that Members have broad authority to take measures to preserve the right to retroactive relief when the Member has reasonable cause to believe or suspect that critical circumstances exist. The panel reasoned that such authority exists because "measures of a purely conservatory or precautionary kind . . . serve the purpose of preserving the possibility of later deciding to collect duties retroactively . . . ."[102]

92. The panel's reasoning in *Hot-Rolled Steel from Japan* is sound. This Panel should reach a similar conclusion that Canada's contrary interpretation of the SCM Agreement would render

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[101] 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 United States Standards for Reformulated and Conventional Gasoline*, WG/DS2/AGR, Report of the Appellate Body, adopted on 16 May 1996, p. 15.

[102] *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, as affirmed by the Appellate Body, adopted 23 August 2001, para. 7.155.

Article 20.6 a nullity.[103]

b. Basis for Critical Circumstances Findings

93. The Department's preliminary finding that critical circumstances exist is consistent with the SCM Agreement. Article 20.6 of the SCM Agreement states as follows:

> In critical circumstances, where for the subsidized product in question the authorities find that injury which is difficult to repair *is caused by massive imports in a relatively short period* of a product benefitting from *subsidies paid or bestowed inconsistently* with the provisions of GATT 1994 and of this Agreement, . . . definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.[104]

94. Thus, in order to find critical circumstances, the authority must determine that there have been "massive imports" within a relatively short period, and that the imported product benefitted from "subsidies paid or bestowed inconsistently" with the SCM Agreement. The Commerce

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[103] Canada also alleges that the imposition of provisional measures in this case is inconsistent with the timing requirements of Articles 17.3 and 17.4 because, pursuant to the preliminary critical circumstances determination, those measures covered entries during the 90-day period prior to the Preliminary Determination. *See* Canada First Submission, paras. 109-113. Once again, Canada proposes an interpretation of the Agreement that would grant a remedy with one hand and take it away with the other.

Article 17 governs the nature and timing of provisional measures. Specifically, Articles 17.1 and 17.3 provide that provisional measures may not be imposed before the preliminary determination and, in no event, sooner than 60 days after initiation of the investigation. Article 17.4 further provides that provisional measures must be terminated within four months. Normally, these timing provisions operate to define the universe of entries to which those measures may apply. As discussed above, however, Articles 20.1 and 20.6 establish an exception which, although not altering the date when provisional measures may be imposed, expands the universe of "*entries"* of the subject merchandise to which those measures apply. Specifically, Article 20.1 refers to "products which enter for consumption" after the preliminary determination and Article 20.6 refers to "imports which were entered for consumption not more than 90 days prior" to the preliminary determination. Canada's interpretation is therefore not supported by the text of the Article 17, or the general principles of treaty interpretation, and, therefore should be rejected. *See United States - Antidumping Measures on Certain Hot-rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, as affirmed by the Appellate Body, adopted 23 August 2001, paras. 7.163-168.

[104] Emphasis added.

Department's preliminary finding of critical circumstances satisfied each of these requirements. Specifically, the Commerce Department preliminarily determined that a Canadian province provided an export subsidy, which is prohibited under Article 3.1 of the SCM Agreement, and that imports of Canadian softwood lumber had increased more than 23 percent since initiation of the investigation.

95. Canada disputes the Commerce Department's factual finding concerning the existence of an export subsidy. Canada also alleges that the Commerce Department's massive imports methodology was flawed. Finally, Canada argues that the Commerce Department failed to find that the imports caused "injury which is difficult to repair".[105]

96. Canada's challenges to the Commerce Department's preliminarily critical circumstances finding are without merit and should be rejected. As an initial matter, we note that sufficient evidence to support an authority's determination must be judged in relation to the particular action contemplated.[106] In this regard, the evidentiary standard for reviewing the sufficiency of a preliminary determination must necessarily be lower than that applied to final determinations because of the greater opportunity to engage in more complete fact gathering and analysis prior to the final determination. In the United States' view, a "reasonable basis to believe or suspect critical circumstances" constitutes sufficient evidence to impose retroactive provisional measures.[107]

97. Turning to the individual findings at issue, the Commerce Department had a reasonable factual basis to preliminarily find that a Canadian provincial subsidy program was an "export subsidy," and therefore "inconsistent" with the SCM Agreement within the meaning of Article 20.6.[108] As the Commerce Department noted, the purpose of this program was to promote Quebec's economic development by encouraging, *inter alia*, "the growth of exports . . . ."[109]

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[105] Canada First Submission, para. 100.

[106] *United States - Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162, Report of the Panel, adopted 27 October 1993, para. 331.

[107] *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, as affirmed by the Appellate Body, adopted 23 August 2001, para. 7.155.

[108] *Preliminary Determination*, 66 Fed. Reg. at 43189 (Exhibit CDA-1). This export subsidy program, known as Investissement Quebec, was originally investigated as two separate programs: 1) Export Assistance from Investissement Quebec; and 2) Export Assistance from the Societe de Developpment Industriel du Quebec. However, information placed on the record by Canada subsequently indicated that these two separate programs had been combined into a single export subsidy program administered through Investissement Quebec. *Id.* at 43189 fn 5.

[109] *Id.* at 43213.

Moreover, the program benefitted "mainly . . . businesses whose growth was dependent on technological innovation *and exports*." [110] Thus, record evidence supports the Commerce Department's preliminary finding that this program constituted a prohibited export subsidy. Finally, Canada itself states that it is "clear that assistance under the program was available to businesses attempting to increase sales in domestic markets . . . *as well as export markets (outside Canada*).[111]

98. Canada also argues that any benefits provided by this program were *de minimis*.[112] Putting aside the question of whether the *de minimis* rule applies to critical circumstances determinations under Article 20.6[113], the preliminary calculation of the prohibited subsidy in a preliminary critical circumstances finding would not be decisive. The subsidy benefit calculation can be complex and requires the verification of considerable information. As discussed above, the purpose of retroactive provisional measures is to preserve the possibility of retroactive relief pending the outcome of that investigative process. The level of the prohibited subsidies will be determined over the course of the investigation. The existence of the prohibited subsidy itself, however, provides a reasonable basis to believe or suspect that critical circumstances may exist.[114]

99. Canada also argues that the Commerce Department improperly found "massive imports of lumber from Canada over a relatively short period of time."[115] As a preliminary matter, nothing in Article 20.6, or elsewhere in the SCM Agreement, specifies a particular standard or methodology that investigating authorities must use to determine whether there have been

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[110] *Id.* (Emphasis added).

[111] Canada First Submission, para. 122 (emphasis added).

[112] *Id.* paras. 99, 123-125.

[113] The United States disagrees that the *de minimis* standard in Article 11.9 of the SCM applies to critical circumstances determinations under Article 20.6. Article 11.9 states only that a *de minimis* subsidy rate must result in termination of the investigation. An investigation may cover multiple subsidy programs. Although the benefit from an individual subsidy program may be *de minimis*, termination of the investigation is not required unless the total rate from all subsidy programs is *de minimis*. Therefore, nothing in Article 11.9 suggests that it is relevant to other determinations, such as specific findings concerning specific programs.

[114] The United States also disagrees with Canada's argument that retroactive duties are limited to the amount of the prohibited subsidies. Article 20.6 provides that, where critical circumstances exist, "the definitive countervailing duties may be assessed" retroactively. The term "definitive countervailing duty" is used in the SCM Agreement to refer to the total duties assessed on the basis of the subsidies found to exist. *See* Articles 18.6, 19.3, 20.3, 20.4, 21.2 and 21.3.

[115] *Preliminary Determination*, 66 Fed. Reg. at 43190 (Exhibit CDA-1).

massive imports over a short period.[116] As indicated in the *Hot-Rolled* decision, an authority should retain flexibility to determine how best to analyze data, particularly where the authority is undertaking a preliminary determination of critical circumstances, in order to preserve the possibility of collecting final retroactive duties later in the proceeding.[117]

100. An objective review of the facts in this case demonstrates that the Commerce Department had a reasonable factual basis to find massive imports of the subject merchandise over a relatively short period. Specifically, the Commerce Department "compare[d] the import volume of the subject merchandise for three months immediately preceding the filing of the petition . . . with the three months following the filing of the petition."[118] Based on this comparison, the Commerce Department determined that imports of softwood lumber from Canada had increased more than 23 percent over the base period.[119] The Commerce Department's analysis included consideration of the "seasonality" of lumber sales, as well as the impact of the expiring Softwood Lumber Agreement.[120] The record contained no evidence demonstrating that expiration of the 1996 Softwood Lumber Agreement "skewed" or otherwise "distorted" the analysis of the surge in imports after initiation of the investigation.

101. Finally, before the Commerce Department made its preliminary critical circumstances determination, the ITC preliminarily found that imports of softwood lumber from Canada were

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[116] In *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, as affirmed by the Appellate Body, adopted 23 August 23 2001, para. 7.165, the panel acknowledged in interpreting analogous provisions of the Antidumping Agreement (i.e., Articles 10.6 and 10.7) that "the agreement does not determine what period should be used . . . to assess [whether] there were massive imports over a short period of time."

[117] *See United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, as affirmed by the Appellate Body, adopted 23 August 2001, paras. 7.165-7.168.

[118] *Preliminary Determination*, 66 Fed. Reg. at 43190 (Exhibit CDA-1). *See also* 19 C.F.R. § 351.206(h)(1).

[119] Section 351.206(h) of the Commerce Department's regulations provide that an increase in imports of "15 percent or more during a relatively short period of time" may be considered massive. *See* 19 C.F.R. 351.206(h). In performing this analysis, the Commerce Department normally compares "the import volume of the subject merchandise for three months immediately preceding the filing of the petition with the import volume of the subject merchandise for the three months following the filing of the petition." *Id.* In performing this analysis, the Commerce Department constructed and applied a seasonal adjustment factor based on a standard seasonal adjustment program used by several statistical agencies, including the U.S. Bureau of the Census, the U.S. Bureau of Labor Statistics, and Statistics Canada.

[120] *Preliminary Determination*, 66 Fed. Reg. at 43190 (Exhibit CDA-1).

injuring the U.S. industry.[121] This preliminary injury determination, together with the evidence concerning prohibited subsidies and massive imports described above, constitutes sufficient evidence to take the limited step of imposing provisional measures retroactively, pending the outcome of the full investigation.

D. Expedited and Administrative Reviews

102. Canada claims that the U.S. laws governing reviews are inconsistent with the SCM Agreement. It is important to focus at the outset on the posture of this claim. In the lumber case, no reviews have been requested, much less denied by the Commerce Department, for the simple reason that the United States has not yet made a final decision to impose definitive countervailing duties.[122] This is simply the most recent in a series of attempts by Canada to seek advisory opinions related to the lumber dispute.[123]

103. With regard to the doctrine of judicial economy, the Appellate Body has stated:

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either Panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. * * * We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the "exclusive authority" to adopt interpretations of the *WTO Agreement* and the Multilateral

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[121] *See Preliminary Determination, Softwood Lumber from Canada,* USITC Pub. 3426, Inv. Nos. 701-701-TA-414 and 721-TA-928 (May 23, 2001) (Exhibit CDA-29).

[122] Canada implies that the obligation in Article 19.3 of the SCM Agreement to provide expedited reviews applies to provisional measures. Canada First Submission, fn 87. The United States notes, however, that Article 17.5 of the SCM Agreement provides that the *relevant* provisions of Article 19 shall be followed in the application of provisional measures, e.g., a provisional duty cannot exceed the amount of the subsidy found to exist, in accordance with Article 19.4. Article 19.3 is *not* relevant to provisional measures. The Article 19.3 provision on expedited reviews applies to "exporters whose exports are subject to a definitive countervailing duty." Provisional measure do not constitute "a definitive countervailing duty." Definitive duties are only imposed after a final determination.

[123] In *United States - Measure Treating Export Restraints as Subsidies*, WT/DS194, the panel rejected Canada's claim that U.S. law mandated the treatment of export restraints as countervailable subsidies; in *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221, Canada is alleging that U.S. law mandates WTO-inconsistent action in connection with the implementation of panel decisions.

Trade Agreements.[124]

Accordingly, Canada's effort to have the Panel exceed its mandate by reaching out to resolve theoretical future disputes should be rejected.

104. Under established WTO jurisprudence, a Member's law violates that Member's WTO obligations only if the law *mandates* action that is inconsistent with those obligations. If the law provides discretion to authorities to act in a WTO-consistent manner, the law, as such, does not violate a Member's WTO obligations. This rule balances concerns about unnecessary litigation, international conflict, and unreliable speculation. On the one hand, a Member's mandatory laws warrant review (provided that they actually constitute "measures" under the relevant international agreement) even if not hitherto implemented because, if a particular set of circumstances arises, it is inevitable that the Member will take action that would purportedly impair another Member's rights.[125] On the other hand, if such a law gives a Member discretion not to violate its international obligations, a violation will not necessarily occur. Refraining from review in such circumstances avoids unnecessary adjudication, and also respects international comity and the presumption that Members will ultimately implement their obligations in good faith.[126]

105. As discussed below, none of the U.S. laws that Canada challenges mandates that the United States take action inconsistent with its obligations under the SCM Agreement. U.S. law gives the Commerce Department broad discretion to conduct reviews. Until the Commerce Department exercises that discretion in a particular case, any exploration of the issues raised by Canada would be hypothetical. That is particularly true in this case because aggregate cases are extremely rare.[127]

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[124] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, p. 19.

[125] *See Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, Report of the Appellate Body, adopted 27 March 1998, para. 62 (where mandatory Argentine tariff provision "will result" in at least some instances in an infringement of Argentina's obligations, the violation is actionable even though an infringement will not occur under all circumstances).

[126] *See Chile - Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, Report of the Appellate Body, adopted 12 January 2000, para. 74 (cautioning against presumptions that a Member will act in bad faith).

[127] The Commerce Department has only employed the aggregate, country-wide rate methodology in one other investigation since the adoption of the Uruguay Round Agreements Act ("URAA") in 1995. *See Honey* from *Argentina*, 66 Fed. Reg. 50613 (October 4, 2001).

1. Section 777A(e)(2)(A) and (B) of the Act

106. Section 777A of the Act implemented several changes to U.S. law to meet obligations under the SCM Agreement by eliminating the presumption in favor of country-wide rates and establishing a general rule in favor of company specific rates. Section 777A(e)(2) contains two exceptions to the general rule to address cases, such as the lumber case, where there is such a large number of exporters and producers that it is not practicable to investigate each company individually.[128]

107. Canada, without explanation and without citing to a single provision in the SCM Agreement that prohibits the investigative procedures set out in Section 777A(e)(2),[129] claims that the provision is inconsistent with that Agreement. Canada merely describes the statutory provision and, without further explanation, lists it as a WTO inconsistent measure.[130] Moreover, nothing in Section 777A(e)(2) limits the Commerce Department's broad authority to conduct reviews, which is discussed below. Canada's claim that the decision to conduct an aggregate investigation constitutes a denial of an expedited or company-specific review is therefore equally unfounded. In short, Canada has failed to establish a *prima facia* case of a violation because it has utterly failed to establish that Section 777A(e)(2) is inconsistent with any provision of the SCM Agreement.

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[128] As explained in the Statement of Administrative Action (SAA) accompanying the URAA:

> Section 265(1) of the implementing bill repeals section 706(a)(2). It eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter or producer individually investigated. Section 777A(e)(2) provides for an exception from this general rule in cases involving a large number of exporters or producers. In such situations, Commerce may limit its examination to a reasonable number of exporters or producers by (1) using statistically valid sampling techniques or (2) examining those exporters and producers accounting for the largest volume of the subject merchandise that Commerce determines can be reasonably examined. In addition, instead of examining a limited number of individual exporters and producers, section 777A(e)(2)(B) would permit Commerce to calculate, on the basis of aggregate data, a single country-wide subsidy rate to be applied to all exporters and producers of the subject merchandise.

SAA at 941.

[129] Article 19.3 of the SCM Agreement specifically contemplates investigations in which specific exporters are not investigated and do not receive individual rates. Nothing in Article 19.3, or elsewhere in the SCM Agreement, restricts a Member's right to limit an investigation in the manner provided for under U.S. law.

[130] Canada First Submission, para. 150.

2. Expedited Reviews

108. Article 19.3 of the SCM Agreement provides that "[a]ny 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 the exporter." Canada argues that the Commerce Department's regulation found at 19 C.F.R. § 351.214(k) prohibits the Department from conducting an expedited review for individual exporters when the investigation has been conducted on an aggregate basis, in violation of Article 19.3. That is, in fact, not the case.

109. Section 351.214(k)(1) sets out procedures for conducting expedited reviews in cases where the Commerce Department investigated a limited number of exporters and producers. That regulation does not cover aggregate cases. As noted above, aggregate cases are rare and, because they have only been used in cases involving industries with an extremely large number of producers and exporters, they present unique issues with respect to expedited reviews. Because these cases are so rare, the Commerce Department has not yet addressed these issues, by regulation or in practice.[131] Canada leaps to the erroneous conclusion that U.S. law *prohibits* expedited reviews in aggregate cases simply because the Commerce Department has not yet promulgated implementing regulations.

110. In fact, however, Section 751 of the Act gives the Commerce Department broad authority to conduct reviews. Section 751 authorizes reviews to "determine the amount of any net countervailable subsidy" at least annually, upon request.[132] It also authorizes reviews of "new shippers."[133] In addition, the statute authorizes the Commerce Department to conduct a review "whenever [Commerce or the ITC] receives information concerning, or a request from an interested party for a review . . . which shows changed circumstances sufficient to warrant a review of," *inter alia*, a countervailing duty order.[134] Section 751 of the Act thus provides the Commerce Department with ample authority to fulfill all of the United States' obligations under

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[131] In fact, the Commerce Department has never received a request for an expedited review in an aggregate countervailing duty case.

[132] Section 751(a)(1) of the Act.

[133] The Act defines "new shippers" as exporters and producers that did not export the subject merchandise to the United States during the period of the investigation ("POI") and are not affiliated with exporters or producers who did export during the POI. *See* Section 751(a)(2) of the Act.

[134] Section 751(b) of the Act.

the SCM Agreement.

111. In fact, the SAA expressly acknowledges that:

> Article 19.3 of the Subsidies Agreement provides that any exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter.[135]

112. The fact that the Commerce Department has not elected to codify specific rules for handling what could potentially be an extremely large number of expedited reviews in an aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews. Statutory authority is sufficient; regulations are not essential.[136] Therefore, the fact that 19 C.F.R. § 351.214(k)(1) does not cover expedited reviews in aggregate cases does not in any way prohibit such reviews. The Panel therefore should reject Canada's claim that 19 C.F.R. § 351.214(k)(1) mandates that the United States violate its obligation to provide expedited reviews.

3. Administrative Reviews

113. The statutory provisions described above also provide broad authority for the Commerce Department to conduct administrative reviews. Again, Canada erroneously concludes that the Commerce Department's regulations limit that authority and require the Department to deny administrative reviews in aggregate cases, in violation of Article 21.2 of the SCM Agreement.[137]

114. As an initial matter, the United States disagrees with Canada's characterization of the obligations imposed under Article 21.2. Canada argues that Article 21.2 entitles exporters and producers to a company-specific review upon request. What Article 21.2 actually says is:

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[135] SAA at 941 (Exhibit CDA-38).

[136] Indeed, it is a long-established principle of U.S. law that administrative agencies have the discretion to promulgate formal procedures or to proceed on a case-by-case basis, especially when the agency has not had sufficient experience with a particular issue to formulate binding regulations. *See Securities & Exchange Commission v. Chenery Corporation,*, 332 U.S. 194, 202-203 (1947).

[137] As the Commerce Department discussed above, the absence of a regulation providing procedures for reviews in aggregate cases does not limit the Department's statutory authority to conduct such reviews. In addition, nothing in the statute or regulations requires the Commerce Department to conduct reviews on an aggregate basis, although it has the authority to do so under U.S. law when there is an extraordinarily large number of companies to be reviewed.

> The authorities shall review the need for the continued imposition of the duty, *where warranted*, on their own initiative or, *provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty*, upon request by any interested party which submits *positive information sustaining the need for a review*. Interested parties shall have the right to request the authorities to examine whether the *continued imposition of the duty is necessary to offset subsidization*, whether the injury would be likely to continue to recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it *shall be terminated immediately*.[138]

115. It is thus obvious that Article 21.2 does not provide an unfettered right to a review upon request, as Canada claims. Article 21.2 simply requires the authorities to "examine whether continued imposition of the duty is necessary to offset subsidization." Article 21.1 does not address assessment proceedings or require authorities to determine a company-specific assessment rate.[139]

116. The Commerce Department's regulations cannot violate a non-existent obligation. Therefore, Canada's claim under Article 21.2 should be dismissed.

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[138] Emphasis added.

[139] The purpose of Article 21.2 is "to examine whether continued imposition of the duty is necessary to offset subsidization." If not, the duty "shall be terminated immediately." This is an inherently prospective inquiry, quite different from a proceeding to determine a current assessment rate, on either an aggregate or a company-specific basis. *See United States-Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*, WT/DS99/R, Report of the Panel, adopted 19 March 1999, para. 6.27 (examining whether U.S. regulations governing revocation of antidumping duties were consistent with Article 11.2 of the Antidumping Agreement, which is identical to Article 21.2 of the SCM Agreement). Footnote 52 to Article 21 also recognizes the difference between an assessment proceeding, such as those governed by 19 C.F.R. § 351.213, and reviews to determine whether definitive duties should be terminated.

V. CONCLUSION

117. For the reasons set forth above, the United States requests that the Panel reject Canada's claims in their entirety.[140]

[140] Canada asserts violations of Articles 10 and 32.1 of the SCM Agreement, which are dependent on the more specific claims addressed herein. The dependent claims are therefore also without merit for the reasons stated above.