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

WT/DS236

**Executive Summary of the**
**Answers of the United States of America**
**to the Panel's 26 April 2002 Questions**

**May 21, 2002**

Questions to the United States

1. **Q1:** At the time of the Preliminary Determination, the Commerce Department had extensive evidence on the record indicating that the vast majority of government timber in Canada was provided directly to tenure holders that owned sawmills or other wood processing facilities. Specifically, the laws and regulations of each Canadian province (with the partial exception of Ontario) generally require that tenure holders be sawmills. The evidence described below for each province consisted primarily of provincial legislation, sample tenure contracts and statistical data provided by the provincial governments.

2. More than 83 percent of the B.C. Crown softwood timber harvest is provided to holders of four types of B.C. tenures. Each of these tenures *requires* the tenure holder to own a processing facility (for these purposes, a sawmill) and process the harvested timber (or an equivalent volume) in its own mill. The remaining B.C. Crown timber is provided under licenses that are normally reserved to entities not owning timber processing facilities. However, the B.C. Forest Act requires that all timber harvested from Crown lands be processed in B.C. In addition, other legal restrictions apply to these forms of B.C. tenure, which indicate that transactions for the timber covered by these tenures are not at arm's-length.

3. Quebec ensures that only sawmills are permitted to harvest the vast majority of Crown softwood timber. For example, section 37 of the Quebec Forest Act states that "[n]o one except a person authorized under Title IV to construct or operate a wood processing plant is qualified to enter into" a Timber Supply and Forest Management Agreement, the virtually exclusive form of tenure in Quebec (covering 99 percent of the Crown harvest).

4. In its questionnaire response, Ontario stated that "[g]enerally, in order to obtain any type of license, an applicant must either own a forest resource processing facility (e.g., a sawmill, pulpmill, veneer mill, etc.) or must have a market to supply wood to some type of forest resource processing facility." Alberta stated that "[a]ll forms of commercial tenure own and operate sawmills."

5. In Saskatchewan, 86 percent of softwood sawlogs were harvested by Forest Management Agreement holders, all of whom own sawmills and process their own timber. The remainder of the harvest was provided to smaller licensees under Forest Product Permits, some of whom have their own sawmills.

6. In Manitoba, 49 percent of softwood sawlogs were provided to holders of Forest Management Licenses, who by law are required to own timber processing facilities. Virtually all of the remaining 51 percent of softwood sawlogs were provided under Timber Sales Agreements ("TSA"). The volume of softwood harvested by TSA holders owning sawmills amounted to 46 percent of the total softwood sawlog harvest. Thus, approximately 95 percent of softwood sawlogs were provided directly to sawmills in Manitoba.

7. With respect to the obligations undertaken by the tenure holders, the Commerce Department examined the obligations that tenure holders were legally obligated to assume in

Canada and compared them to those assumed by harvesters of the benchmark timber. The Commerce Department calculated a per-unit amount for each category of Canadian obligations that was above and beyond obligations incurred by parties paying stumpage charges in the United States. The Commerce Department used the values for each obligation provided by the Canadian provincial governments in their questionnaire responses, and considered the per-unit cost of these obligations as a form of "in-kind" payment, which it added to the stumpage fee.

8. **Q2(a):** Article 14(d) sets forth guidelines for determining whether the government has provided a good, within the meaning of Article 1.1(a)(1)(iii), for less than adequate remuneration. There should be no doubt that, through timber tenures, the provincial governments provide a good – timber – to lumber producers. Canada's claims to the contrary are contradicted by ordinary dictionary definitions and Canada's own laws. Because the provincial governments are unquestionably providing a good within the meaning of Article 1.1(a)(1)(iii), Article 14(d) provides the appropriate guidelines for determining the benefit.

9. **Q2(b):** The phrase "in relation to prevailing market conditions for the good . . . in the country of provision" in Article 14(d) does not restrict the authority to using only prices between buyers and sellers in the country under investigation. The concept of commercial availability is expressly incorporated in Article 14(d), which defines "prevailing market conditions for the good" to include, *inter alia*, availability. Prevailing market conditions in the country of provision may therefore encompass prices commercially available on the world market to purchasers in the country under investigation. The flexibility to use commercially available world market prices in Article 14(d) is reflected in item (d) of the Illustrative List of Export Subsidies, and was confirmed by the panel and the Appellate Body in *Canada Dairy*.

10. The use of world market prices commercially available to producers in the country under investigation is therefore not *per se* inconsistent with Article 14(d). Canada has, in fact, conceded that world market prices can constitute an appropriate benchmark in certain situations. An obvious example of when commercially available world market prices may be an appropriate benchmark is where the government is the sole provider of the input in the country under investigation. The facts of this case present an analogous situation. Specifically, only two provinces provided any information on private stumpage prices, and that limited information was inadequate to serve as a benchmark for those provinces. Moreover, the evidence indicates that the Canadian provincial governments so dominate the market for timber that below-market government prices suppress prices in the small market for private timber in Canada.

11. The Commerce Department's use of U.S. prices, as opposed to other world market prices, is supported by ample record evidence indicating that Canadian companies import U.S. logs and bid on U.S. stumpage. U.S. timber is therefore "commercially available" to Canadian mills.

12. **Q2(c):** The U.S. interpretation of Article 14(d) is consistent with the general meaning of "benefit" as previously articulated by panels and the Appellate Body, i.e., a benefit is some form

of advantage that would not otherwise be available in the marketplace, absent the financial contribution. In *Canada Aircraft*, the panel stated that "[i]n order to determine whether the financial contribution . . . confers a 'benefit', *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case *but for* the financial contribution. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market." (emphasis added). The Appellate Body in *Canada Aircraft* similarly stated that "there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient *'better off' than it would otherwise have been, absent the contribution*. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the *trade-distorting potential* of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market." (emphasis added).

13. **Q2(d):** The comparison in Article 14(d) is intended to identify the potentially trade-distorting artificial advantage resulting from the government's provision of a good. Commercially available prices in the country under investigation are normally the most appropriate benchmark. However, where the evidence indicates that the government so dominates the market that non-government domestic prices for the good in question are suppressed by the alleged below-market government prices for that good, the domestic prices cannot serve as a basis to measure the potential benefit. In such cases, other prices commercially available to producers in the country under investigation can provide an appropriate benchmark.

14. **Q2(e):** The purpose of the Article 14(d) comparison is to determine what, if any, advantage flows from the government's financial contribution at issue, not other government actions.

15. **Q2(f):** The only instance in which we might even inquire into whether prices in the country under investigation are below world market prices would be where there is other evidence indicating that the non-government prices in the country under investigation may be distorted by the government financial contribution at issue.

16. **Q2(g)(i),(ii):** In this case, and in the only other case in which the Commerce Department has addressed this issue, the government's share of the market was 90 percent or more. However, each case must be evaluated on the basis of its particular facts. Normally, where the government dominates the market for a particular good and there is some evidence that government prices are suppressing the rest of the market, the non-government prices could not logically serve as a benchmark. However, that may not always be the case. For example, even where the government dominates the market, if there is an open and competitive auction for some significant portion of the market, those prices could serve as a benchmark. There may also be other instances in which the facts would indicate that the non-government portion of the

market was undistorted by the government action. In such cases, the non-government portion of the market could also serve as a benchmark.

17. **Q2(h):** The Commerce Department requested information on private stumpage prices and prices in the spot market for logs in the Maritime Provinces. In their questionnaire response, the Maritime Provinces stated that they had no information on private stumpage prices, that "[t]here is no spot market price for harvested saw logs from Crown land," that they do "not collect any data concerning spot market prices for . . . logs harvested from private land," and that surveys of prices for logs harvested from private land "appear to be based on limited sampling." Given this limited and inadequate information, the Commerce Department was unable to consider whether Maritime prices could serve as an appropriate benchmark.

18. **Q3:** The Commerce Department asked a series of questions regarding private prices in each province or territory. Only the governments of Alberta, Quebec and Ontario provided any information in response to this request. And, as described below, only Quebec and Ontario actually provided private prices. This limited information was insufficient to form the basis for a benchmark for these provinces. In addition, there was information on the record indicating that these private stumpage prices were depressed by the government prices. The largest province in terms of softwood lumber production, British Columbia (representing approximately 60 percent of Canada's softwood lumber production), did not provide any private prices for stumpage.

19. Alberta did not provide private prices. In its questionnaire response, it stated: "Alberta does not track private timber harvesting and does not have any data on any private timber used in mills." It also stated that it "does not collect spot price information for logs from provincial or private lands" and it therefore was "not providing such spot log price information" to the Commerce Department. The only information Alberta did provide was a two-page excerpt from a KPMG survey, which contained a single estimated stumpage value derived from some price data for log sales. No supporting evidence or source information for the estimate was provided.

20. In its questionnaire response, Quebec stated: "Private market standing timber prices are obtained through a market survey of forestry companies that trade standing timber for harvesting every year in Quebec." However, the Commerce Department also had evidence that private stumpage prices in Quebec are suppressed by the administratively-set price for Crown stumpage.

21. Ontario stated that over ten percent of the timber consumed in Ontario's "forest products industry" is harvested from private lands. However, that figure covers the entire forest products industry, including companies that do not produce the subject merchandise (e.g., pulp mills). Moreover, Ontario stated that it does not regulate or monitor the private timber market on an ongoing basis, and therefore does not collect these data in the course of normal operations. Ontario commissioned an independent forestry research firm to conduct a survey, but the Commerce Department found numerous flaws with this study.

22. The record also contained evidence indicating that private stumpage prices were depressed by the overwhelming majority of government-supplied timber in the market. For example, a Canadian forestry expert concluded that "[t]he *quasi-monopolistic importance of the State in the supply* of the industries *obligates the small producers to align their prices with those of the public forest.*" (emphasis added). Even a provincial forestry official stated in writing that private stumpage prices were affected by the administratively-set price for public stumpage.

23. **Q4:** The statement the Panel refers to pertained to the small private market for stumpage, not log sales. The evidence at the time of the Preliminary Determination indicated that Crown and private stumpage sales were the following percentages of the harvest in each province:

| | Crown Sales | Private Sales |
|---|---|---|
| British Columbia: | 90 percent | 10 percent |
| Quebec: | 83 percent | 17 percent |
| Ontario: | 92 percent | 8 percent |
| Alberta: | 98 percent | 2 percent |
| Manitoba: | 94 percent | 6 percent |
| Saskatchewan: | 90 percent | 10 percent |

Only two of the provinces provided data on private stumpage prices, and record evidence indicated that those prices were suppressed by the governments' administratively-set prices.

24. **Q5:** As stated in the chapeau to Article 14, and confirmed by the Appellate Body in *Canada Aircraft*, the benefit for purposes of Article 1 is the benefit to the recipient. It is the artificial advantage – or benefit – that the Appellate Body in *Canada Aircraft* referred to as the "trade-distorting potential" of a financial contribution. It is to that trade-distorting artificial advantage that the United States was referring in the passage cited by the Panel.

25. **Q6:** *Lead and Bismuth II* concerned subsidies to a government-owned entity, British Steel, which was subsequently sold to private investors. The panel stated that the presumption that the benefit flowing from a financial contribution continues to flow, even after a change in ownership that created an apparently new and distinct producer, could not be irrebuttable. The panel found that the circumstances in that proceeding, in which British Steel's specialty steels business was first transferred to the partnership UES and then re-acquired by BSplc, rebutted the presumption that the benefit to British Steel continued in UES and BSplc. The panel also found that UES and BSplc were distinct legal persons which, because they had paid fair market value for the assets of British Steel, obtained no benefit from the prior subsidies to British Steel.

26. *Lead and Bismuth II* addressed circumstances that are not present in this case. Most significantly, in the present case the subsidies at issue were bestowed directly on the current producers of the subject merchandise. The evidence simply does not support Canada's claim of a

significant volume of timber harvested by independent loggers who sell at arm's-length to lumber mills. The vast majority of Crown sawtimber is provided to Canadian lumber mills under tenures held directly by those mills. Record evidence also indicates that most "independent" loggers are in fact bound by law or by contract to those very same sawmill/tenure holders. Thus, the entity receiving the financial contribution (the provision of timber) and the entity receiving the benefit (below-market stumpage prices) are generally one and the same. As discussed below in response to question 7 to the United States, the other two situations in this case in which the issue of whether a financial contribution to one entity confers a benefit on another may arise – logs harvested by one sawmill and then sold in arm's-length transactions to other sawmills, and lumber sold in arm's-length transactions to companies that produce remanufactured lumber products – are not relevant in an aggregate case.

27. **Q7:** In an aggregate case, the Commerce Department determines the total amount of the subsidy to producers of the subject merchandise and allocates that amount over all sales of the subject merchandise. When all of the alleged recipients of the financial contribution and the benefits are producers of the subject merchandise, no further analysis is required. The precise amount of the benefit received by any specific producer would only be determined in a company-specific review. However, if the government made the financial contribution to an entity that does *not* produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that *does* produce the subject merchandise. In this case, the only allegation of a financial contribution to an entity that does not produce the subject merchandise is Canada's claim that there is a significant volume of Crown timber that the provincial governments provide to independent loggers who then sell the timber at arm's-length to lumber mills. However, the evidence does not support Canada's claim.

28. Canada also argues that the Commerce Department was required to perform a pass-through analysis to address two other situations: (1) logs harvested by one sawmill and then sold in arm's-length transactions to other sawmills; and (2) lumber sold in arm's-length transactions to companies that produce remanufactured lumber products. However, in both of these situations, all of the entities involved are producers of the subject merchandise. Therefore, no further analysis is required in an aggregate case. Specifically, a separate benefit analysis is not required in an aggregate case for logs harvested by one sawmill and allegedly sold at arm's-length to another, as the full benefit is always enjoyed by a sawmill, i.e., a producer of the subject merchandise. Likewise, the remanufactured articles at issue are within the scope of the investigation. The Commerce Department therefore properly matched the total benefit received by producers of the subject merchandise (the numerator) to the total sales of the subject merchandise, including remanufactured products (the denominator), without determining any company-specific rates. If any individual producer of subject merchandise believes that it has not received any countervailable benefit, the procedures for review exist.

29. **Q8:** There seems to be no question that provisional countervailing duties would constitute a provisional measure within the meaning of Article 17. Although Article 17.2 is

somewhat ambiguous, a cash deposit or bond requirement would also appear to constitute a provisional measure within the meaning of Article 17. While the United States did not impose a provisional duty, it did require security in the form of cash deposits or bonds.

30. There is no reference in Article 17.2 to withholding of appraisement, which is referred to in the United States as suspension of liquidation. Suspension of liquidation is merely a legal status that enables the assessment of additional duties when all of the issues related to final duty liability are resolved. Nevertheless, under the U.S. countervailing duty law, suspension of liquidation is treated as a provisional measure.

31. **Q9:** Under U.S. law, absent suspension of liquidation, final duties are assessed and no additional duties can be imposed on that entry. Suspension of liquidation is therefore essential to preserve the possibility of exercising the right under Article 20.6 to impose duties retroactively.

32. **Q10:** Suspension of liquidation would enable the Commerce Department to delay final determination of total duty liability. However, if no amount is guaranteed by a cash deposit or bond, Article 20.3 would, on its face, preclude the collection of duties retroactively.

33. The absence of an analogue in the SCM Agreement to Article 10.7 of the Anti-Dumping Agreement does not alter this analysis. Article 10.7 authorizes authorities to take measures even before there is a preliminary determination of dumping or injury. In the case concerning *Hot-Rolled Steel from Japan*, the panel viewed these special "precautionary measures" as something other than provisional measures. Because there is no analogue to Article 10.7 in the SCM Agreement, there is no exception to the requirements of Article 17.1 of the SCM Agreement that would permit early "precautionary measures." However, the Commerce Department did not take such measures in this case. Where, as in this case, provisional measures are imposed in accordance with Article 17 (i.e., after preliminary determinations of subsidization and injury), Article 20.1 permits a Member to expand the scope of those provisional measures to encompass entries 90 days prior to the preliminary determination if there is sufficient evidence that the circumstances described in Article 20.6 exist.

34. **Q11:** Both suspension of liquidation and the posting of bonds or cash deposits are necessary to ensure the possibility of exercising the right to retroactive relief provided for in Article 20.6. The reference to "suspension of liquidation" in the Preliminary Determination is a short form of reference sometimes used by the Commerce Department when discussing provisional measures generally, including posting of bonds or cash deposits.

35. **Q12:** Article 20.6 requires a finding of "injury which is difficult to repair," but does not contain an evidentiary standard for that determination. However, this issue was addressed by the panel in *Hot-Rolled Steel from Japan*, which concerned the evidentiary standard in the U.S. anti-dumping law for a preliminary critical circumstances finding. That evidentiary standard is "a reasonable basis to believe or suspect" that critical circumstances exist. That is also the standard

in the U.S. countervailing duty law for a preliminary critical circumstances finding. The *Hot-Rolled Steel from Japan* panel found that in applying that standard, the Commerce Department has "made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied." As the *Hot-Rolled Steel from Japan* panel noted, "sufficient evidence" refers to the quantum of evidence necessary to make a determination. What constitutes "sufficient evidence" varies depending on the nature of the determination in question. The approach taken by other panels "has been to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination."

36. **Q13:** Section 351.213(b) of the regulations does not apply to aggregate cases but it does not restrict the Commerce Department's authority to conduct reviews. The inquiry required in Article 21.2 of the SCM Agreement, on which Canada's claim is based, is whether continued imposition of the duty is necessary to offset subsidization. Under section 351.213(k) of the regulations, exporters have the opportunity for a review to determine whether imposition of a duty is necessary on future entries, i.e., whether their subsidy rate is zero. If no subsidy is found, the cash deposit and assessment rate on future entries will be zero, unless the results of a subsequent review demonstrate that subsidies have recurred. Section 351.213(k) therefore fulfills the requirements of Article 21.2.

Questions to Both Parties

37. **Q1:** While some financial contributions take place at a single point in time, that is not always the case. The Canadian timber tenures are long-term contracts that provide recurring subsidies. As long as the tenure contract remains in force the provincial government is providing the lumber producer with timber, and the producer receives a benefit each time it pays below-market prices for the timber.

38. **Q2:** While there is no uniform world market price for softwood lumber and softwood logs, lumber and logs are traded internationally in all regions of the world. It is possible to calculate average unit import values for lumber and logs in various countries based on either import or export statistics. However, because these statistics are kept on a broad product category basis, the average unit import values are not useful for comparison purposes.

39. **Q3:** The United States negotiated the language of Article 15(b) of the China Protocol, which was intended to clarify that Article 14 of the SCM Agreement allows authorities to measure the benefit on the basis of a benchmark outside the country of investigation when prevailing terms and conditions in the country of investigation are "not . . . available as appropriate benchmarks." Although Article 14 of the SCM Agreement already allows Members to use such benchmarks, the Members incorporated this clarifying language into Article 15(b) of the China Protocol because they were concerned that prices in China would not be appropriate benchmarks while China was transitioning to a market economy and they wanted to leave no

doubt that Article 14 allowed authorities to use external benchmarks in such instances. In addition, because Article 14 only addresses countervailing duty proceedings under Part V of the SCM Agreement, they wanted to make clear that external benchmarks would also remain available were a Member to pursue a WTO proceeding under Part II or III of the Agreement.

40. Article 15(b) is only one of several provisions of the China Protocol that simply restate and clarify existing WTO obligations that apply to all Members. Article 10.1 of the China Protocol, for example, restates existing obligations in Article 25 of the SCM Agreement. Several articles of the China Protocol also restate and clarify existing WTO most-favored nation and national treatment obligations.

41. **Q4:** This information has been provided in response to question 1 to the United States.

42. **Q5:** In an aggregate case, the Commerce Department determines the total amount of the subsidy to producers of the subject merchandise and allocates that amount over all sales of the subject merchandise. When all of the alleged recipients of the financial contribution and the benefits are producers of the subject merchandise, no further analysis is required to perform the aggregate calculation. Benefits that potentially shift from one producer to another in an arm's-length transaction would still be part of the overall numerator, as long as both companies produce subject merchandise. Therefore, for two of the three categories that Canada claims a pass-through analysis was necessary – logs harvested by one sawmill and then sold to another, and lumber sold to remanufacturers – the question of pass-through is moot in an aggregate context and the Commerce Department did not request any information on these types of transactions.

43. For the remaining category where Canada claims a pass-through analysis is necessary – independent loggers selling to sawmills – the Commerce Department asked questions about logs sold domestically at arm's-length prices. In response, Quebec indicated that there were essentially no arm's-length transactions involving Crown timber sold by independent loggers to sawmills. Ontario suggested that 30 percent of Crown timber was sold in arm's-length transactions, but tenure holders who do not own a sawmill are limited with respect to where such harvested timber can be sold and evidence indicated that log swapping was common among large tenure holders. Alberta's questionnaire response suggested that only a small portion of the harvest was characterized by arm's-length transactions. B.C. suggested that as much as 30 percent of Crown timber was sold in arm's-length transactions, but this figure is misleading because loggers operate as employees or contractors for tenure holders, various requirements serve to narrow the range of purchasers available to any harvester of Crown timber who is not a mill owner, and log swapping is a major part of the so-called arm's-length transactions. These factors combine to ensure that the great majority of Crown timber is force-fed to tenure-holding lumber producers. As such, the evidence does not support Canada's claim that a pass-through analysis is necessary or appropriate.

Questions to Canada

44. **Q5:** A Member is not always obliged to determine the benefit using as a benchmark market prices from the country under investigation. This is confirmed by numerous references in WTO agreements and prior WTO decisions. The United States also notes that the Panel's example of a government monopoly over the supply of a good is no different in principle from the circumstances of the instant case, where the provincial governments control 85 to 95 percent of the market for timber. If it is shown that the government supply significantly distorts the market, the benchmark can be found outside the country, so long as a reasonable effort is made to measure the benefit provided in the country under investigation.

45. **Q8:** Given the ordinary meaning of "arm's-length," a so-called independent logger should only be viewed as operating at "arm's-length" from lumber producers if the harvester is freely negotiating, under no outside control or influence and under no compulsion to sell. The record establishes that not only are there very few transactions by independent harvesters, but even in such transactions, the provincial governments impose numerous restrictions and requirements on the transactions. In light of this evidence, the only reasonable conclusion is that there are no true arm's-length transactions for Crown timber.

46. **Q10:** Past determinations by the Commerce Department, which apply U.S. law on the basis of different factual records, are of no relevance in determining whether the United States has acted consistently with its obligations in the present case. That is particularly true where, as here, the prior determinations at issue were decided under a different domestic legal standard, as well as different international obligations. At the time of the *Lumber III* determination cited by Canada, under U.S. law the government provision of a good was deemed to provide a benefit if the good "was provided at preferential rates." That standard is fundamentally different than the current "adequate remuneration" standard and therefore the issue of an appropriate benchmark is fundamentally different as well. The Commerce Department rejected cross-border prices in *Lumber III* because it had "sufficient and reliable nonpreferential price data" from within Canada. Other factors, such as comparability, were therefore moot and were simply noted in passing to underscore the Commerce Department's primary rationale.

47. **Q14(b):** The Commerce Department did not investigate and, therefore, did not conclude that the Maritime Provinces received no support or that lumber sales from the Maritime Provinces were not subsidized.

48. **Q14(e):** Nothing in the SCM Agreement addresses the calculation of a "country-wide rate." The "country-wide rate" at issue is a creature of U.S. law, not the WTO. Under current U.S. law, the calculation of the country-wide rate is based on the total amount of the subsidy found to exist with respect to the *subject merchandise*, allocated across all sales of the *subject merchandise*. Nothing in U.S. law or practice requires that non-subject merchandise be included in a country-wide rate calculation.