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

(WT/DS257)

Oral Statement of the United States of America at the Second Meeting of the Panel

March 25, 2003

Introduction

1. Thank you, Mr. Chairman, and members of the Panel. The United States appreciates this additional opportunity to present its views on the issues in this dispute. In our oral presentation, the United States will focus on the key legal issues concerning Members' rights and obligations under the WTO *Agreement on Subsidies and Countervailing Measures* ("Subsidies Agreement").

Argument

Financial Contribution

2. I will begin by briefly commenting on financial contribution. The record demonstrates that the provinces own timber and, through provincial tenures, provide timber to lumber producers. There should therefore be no question that the provinces provide a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the Subsidies Agreement.

3. The ordinary meaning of "goods" includes standing timber. Canada's argument to the contrary is reduced to the assertion that tenures are not sales of "timber to be cut," within the meaning of the U.S. Uniform Commercial Code ("UCC"), even though the sole reason for acquiring a tenure is to harvest timber, and the tenure holder pays for and receives title to only the timber it cuts. Moreover, the UCC provides that the sale of timber to be cut is always a contract for the sale of goods, regardless of whether the timber is "identified" at the time of the

contract.[1] Identification of the timber merely determines when an interest in the timber (the goods) passes to the purchaser.[2] More to the point, however, the provinces "provide" a "good" within the meaning of Article 1.1(a)(1)(iii) of the Subsidies Agreement.

4. Canada also suggests, without citation to record evidence, that many tenures create freely transferrable "rights to harvest."[3] As discussed in our response to the Panel's questions, the record evidence establishes that the provinces retain control over tenures, which cannot be transferred without the provinces' approval.[4] The subcontracting of harvesting operations is not the sale or transfer of a "right to harvest." The tenure holder, not the subcontractor, remains at all times the province's contracting party.

5. In the final analysis, it is the substance of what occurs in the provincial tenure systems that is controlling, i.e., whether a provision of goods takes place. As discussed in our previous submissions, the ordinary meaning of the terms "provides" and "goods or services other than general infrastructure" sweeps broadly. Standing timber is a good within the meaning of Article 1.1(a)(1)(iii), and no matter how Canada characterizes provincial tenures, the fact remains that

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[1] *See Fisher v. Almeria*, 610 F. Supp. 123 (E.D.N.C. 1985) (finding that a timber sales agreement was a contract for the sale of goods even though the contract did not identify the goods at the time of the contract, that title passes when the goods are identified, and that identification occurred at the time of harvest).

[2] *See Conservancy Holdings Ltd. v. Perma-Treat Corp.*, 126 A.D.2d 114, 118 (N.Y. App. Div. 1987) (stating that "[w]hile a contract for timber to be cut constitutes a contract for the sale of goods (see UCC 2-107[2]), the goods must be existing and identified before any interest can pass (see UCC 2-105[2]). Unless these two criteria are satisfied, the contract operates as a contract to sell 'future' goods [ibid.]").

[3] *See* Canada Responses to Questions to the Parties from the Panel in Connection with the First Substantive Meeting, paras. 18-21 (February 24, 2003).

[4] *See* Answers of the United States of America to the Panel's Questions, para. 10 (February 24, 2003).

the provinces are providing timber to lumber producers. A financial contribution therefore exists.

Benefit

6. Without question, the key legal issue in this dispute is whether Article 14(d) of the Subsidies Agreement precludes, in all cases, the use of data from sources outside the country under investigation to determine the adequacy of remuneration. This issue goes to the heart of the concept of benefit under Article 1.1(b) of the Subsidies Agreement and has significant implications for the integrity of the subsidy disciplines.

7. A subsidy exists where there is a financial contribution and "a benefit is *thereby* conferred."[5] Thus, as the Appellate Body has stated, the issue is whether "the 'financial contribution' makes the recipient 'better off' than it *would otherwise have been, absent that contribution*."[6] In other words, the Appellate Body recognized that in order to determine whether a financial contribution confers a benefit, it is essential to compare the position of the recipient with the financial contribution to what the position of the recipient would have been *absent* the financial contribution. The logic of the Appellate Body's statement speaks for itself.

8. Moreover, that statement provides the context for the Appellate Body's conclusion that the point of comparison is the "marketplace." Thus, as the *Brazil – Aircraft* panel concluded, looking to the marketplace to determine whether the recipient is better off than it would

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[5] Article 1.1(b), Subsidies Agreement (emphasis added).

[6] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999, para. 157.

otherwise have been absent the financial contribution necessarily means looking to a marketplace undistorted by the government's financial contribution.[7]

9. It is the view of the United States, as well as the European Communities ("EC"), that Article 14(d) does not explicitly or implicitly prohibit Members from relying on data from sources outside the country of provision to determine the adequacy of remuneration if reliable, market-driven pricing data does not exist in the country of provision. We will not repeat the arguments supporting that conclusion, but will comment on what we view as Canada's flawed three-pronged analysis of Article 14(d).

10. First, Article 14(d) provides that the adequacy of remuneration must be determined "in relation to" prevailing market conditions in the country of provision. In reading the text, however, Canada substitutes the words "in relation to" found in Article 14(d) with the words "on the basis of" or "in comparison with."[8] There is, however, no basis to equate the phrase "in relation to" with "on the basis of" or "in comparison with." To the contrary, the more reasonable interpretation is that the broader phrase "in relation to" was agreed to by Members because Article 14 explicitly sets out "guidelines," i.e., general principles, not detailed rules. The phrase "in relation to" is sufficiently broad to allow for various means of performing a comparison that relates to market conditions in the country under investigation, rather than limiting Members to analyses "on the basis of," or "in comparison with," certain types of data. Permitted methods can

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

[8] Second Written Submission of Canada, para. 19 (March 6, 2003) ("Canada Second Written Submission").

include, where necessary, analyses that rely on data from sources outside the country, if the data is probative of the fair market value for the good in the country of provision.

11. Second, Canada effectively ignores the word "market" in the phrase "prevailing market conditions,"[9] as if any conditions are "market" conditions. The Panel, however, must give meaning to the word "market." In that regard, the logic of the *Brazil – Aircraft Panel Report* is compelling. In the context of determining whether the government's financial contribution confers a benefit – i.e., whether the recipient is better off with the financial contribution than it would otherwise have been absent the financial contribution – the "market" conditions must be conditions that are undistorted by the government's financial contribution.

12. Third, there is no question that the adequacy of remuneration must be determined in relation to prevailing market conditions "in the country of provision." That begs the question, however, whether there are in fact "market" conditions for the good "in the country of provision" that provide probative evidence for determining the adequacy of remuneration, that is, for determining the existence of a "benefit" as defined by the Appellate Body. Where such evidence does not exist in the country of provision, as in this case, nothing in Article 14(d) precludes a Member from relying on market data from sources outside the country that is probative of fair market value in the country of provision. To the contrary, when the Members intended to require use of particular data for a particular calculation, they did so explicitly.[10]

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[9] *Id.* at para. 20.

[10] *See* First Written Submission of the United States, para. 50 (January 22, 2003) ("U.S. First Written Submission").

13. The importance of using market benchmarks, even if they are based on data from sources outside the country of provision, is underscored by Article 15(b) of the *Protocol on the Accession of the People's Republic of China*,[11] which is cited, but misinterpreted, by Canada. The United States negotiated Article 15(b) of the China Protocol because the United States, along with other Members, recognized that China was in transition from a state-controlled economy to a market economy. Members therefore anticipated that, in many instances, it might be impossible to find reliable "market" benchmarks in China and wished to leave no doubt that in such cases external data could be used in all proceedings under the Subsidies Agreement. Although Article 14(d) of the Subsidies Agreement permits the use of market data outside China, it only applies in countervailing duty cases under Part V of the Subsidies Agreement.[12] Recognizing the importance of "market" benchmarks, the Members therefore incorporated the language that Canada references in Article 15(b) of the China Protocol to clarify that external benchmark data can be used under Article 14(d) of the Subsidies Agreement, and also to ensure that such data can be used in proceedings under Parts II and III of the Subsidies Agreement.

14. Other provisions in the China Protocol likewise repeat obligations already binding on WTO Members. For example, the China Protocol provides that "China shall ensure that internal taxes and charges . . . shall be in conformity with the GATT 1994."[13] Obviously, the inclusion of

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[11] *See* Accession of the People's Republic of China: Decision of 10 November 2001, WT/L/432, Article 15(b) (November 23, 2001) ("China Protocol") (Exhibit CDA-139).

[12] Article 14 states that "[f]or the purpose of Part V, any method used" to calculate the benefit must be consistent with the guidelines set forth therein.

[13] China Protocol, Article 11(2) (Exhibit U.S.-93).

this provision in the China Protocol does not mean that other WTO Members need not ensure that their internal taxes conform to GATT 1994, yet this is effectively Canada's argument.

15. In keeping with the Members' recognition of the importance of "market" benchmarks to the subsidies disciplines, the United States agrees with the EC that Article 14(d) does not prohibit the use of market data from sources outside the country of provision when no reliable market benchmark prices exist in the country of provision.

16. With respect to the facts of this case, the United States has, in its prior submissions and oral presentations, demonstrated that four of the six provinces did not provide private prices for timber that could be used for market benchmark purposes. Canada has failed to refute that fact. Rather, it argues that evidence that the provinces earn a profit on timber sales is sufficient to establish that they do not provide a benefit, even though those profit calculations do not include any cost or value for the trees themselves.[14] More importantly, however, a sale for less than adequate remuneration – even a profitable one – confers a benefit.

17. The record evidence also demonstrates that the overwhelming state control of timber sales in Canada distorts sales in the private sector. Canada responds to this evidence by inviting the Panel to conduct *de novo* review. Canada argues, for example, that the United States "ignored" evidence of market conditions in Canada.[15] In this regard, I would note that Canada argues that the United States invoked a presumption in the preamble to its regulations. In fact,

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[14] *See* First Written Submission of Canada, para. 107 (December 19, 2002) ("Canada First Written Submission"), citing Response of the Government of British Columbia to the Department of Commerce's May 1, 2001 Questionnaire, Exhibit BC-S-111 (June 28, 2001) ("B.C. June 28 Questionnaire Response") (Exhibit CDA-48).

[15] *See* Canada Second Written Submission, at para. 27.

the presumption in the preamble is that government participation in the market is normally not a factor but where the government is a majority participant the preamble notes that it *may* not be possible to find market determined benchmarks in the country under investigation. In those instances, the preamble invites further inquiry. Moreover, the record in this case demonstrates that the United States in fact considered and weighed all of the evidence and was persuaded by economic analyses, which are cited to in the *Final Determination*, and other documentary evidence that the state-controlled timber sales systems distorted the private market.[16] Finally, Canada suggests that in using prices for timber in the northern United States, the United States failed to properly apply U.S. domestic law,[17] thereby raising an issue that is not before this Panel, while misinterpreting U.S. law and practice in the process.[18]

18. Canada also now states that it has "consistently taken the position . . . that a price that is available to purchasers in the country of provision makes that price part of the prevailing market conditions in the country of provision."[19] Given that U.S. timber prices are available to purchasers in Canada, the United States' benchmark calculation is consistent with the very position Canada now endorses.

19. Canadian lumber producers can purchase U.S. timber, cut it (or have it cut), and transport it to their mills in Canada. Some Canadian mills have done so, albeit rarely, given the abundant

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[16] *See* Second Written Submission of the United States, paras. 33-45 and fn. 45 (March 6, 2003) ("U.S. Second Written Submission").

[17] *See* Canada Second Written Submission, at para. 28.

[18] *See* U.S. Second Written Submission, at fn. 91.

[19] Canada Second Written Submission, at para. 41.

supply of provincial timber available in Canada at below market prices. Canada's response to the fact that Canadian producers can and do purchase U.S. timber "on the stump" is to point out that the stumps are in the United States.[20] In Canada's view, despite the fact that a Canadian producer buys the timber standing in the United States, cuts it, and transports it to its mill in Canada for processing, the U.S. timber price is not available to that Canadian producer. By analogy, Canada's argument would lead to the illogical conclusion that the prices for any goods that are sold to Canadian purchasers FOB U.S. factory and transported by those purchasers to Canada are not prices available to the purchasers in Canada because the factory is in the United States.

20. In sum, the United States demonstrated that reliable, market-driven prices for timber do not exist in Canada. The Panel should therefore find that the United States' decision to rely on U.S. timber prices as the basis for determining the fair market value of timber in Canada was consistent with Article 14(d) of the Subsidies Agreement.

21. The United States has also established that the calculation of the market benchmarks included appropriate adjustments for conditions of sale in Canada. Canada's attempts to call those adjustments into question do not withstand scrutiny. For example, contrary to Canada's assertion,[21] the United States did use species-specific average prices for all benchmarks, including coastal British Columbia ("B.C."). For coastal B.C., the United States used the species-specific prices for the western United States published in the Timber Data Company's

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[20] *Id.* at para. 44.

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

stumpage price report ("Stumpage Price Report"), which is a widely-used price reporting service. In the *Final Determination*, the United States addressed Canada's concern about some lump-sum price data from Washington State, which was the basis for certain species-specific prices in the Stumpage Price Report.[22]

22. Canada also mischaracterizes the basis for the adjustments to Quebec's benchmark.[23] As is readily apparent from the lengthy analysis in the *Final Determination*, the United States based the adjustments to the Quebec benchmark on a thorough comparison of conditions of sale in Maine and Quebec.[24] Canada is, in effect, criticizing the United States for using data actually submitted by Quebec to identify conditions of sale in Quebec and to value the differences.

23. Finally, Canada has not made a *prima facie* case that the United States erred in failing to conduct a market distortion analysis as part of the benefit determination. Canada has failed to identify any obligation in the Subsidies Agreement to conduct such an analysis because no such obligation exists. The guidelines for calculating the benefit to the recipient, which are contained in Article 14 of the Subsidies Agreement, contain no such obligation. As we have demonstrated, the United States' benefit calculation is consistent with Article 14. Nothing further is required, and obligations that are not found in the Agreement may not be imposed on the United States.

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[22] *See Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber from Canada*, 81-82 (March 21, 2002) (Exhibit CDA-1) ("*Issues and Decision Memorandum*").

[23] *See* Canada Second Written Submission, at para. 31.

[24] *See Issues and Decision Memorandum*, at 62-73 (Exhibit CDA-1).

Specificity

24. Under Article 2.1 of the Subsidies Agreement, a subsidy is specific if it is used by a limited number of industries or group of industries. The unrefuted record facts demonstrate that provincial tenures are used by a very limited group of timber processing industries. To construct an argument that these provincial programs are, nonetheless, not specific, Canada artificially inflates the very limited group of industries.

25. Canada interprets the term "industry" so narrowly that almost every product becomes an industry unto itself. Canada's claim that the provinces provide timber to 23 different industries producing 201 different products[25] rests on a survey of tenure holders that were asked to indicate the products they produced.[26] Applying Canada's idiosyncratic definition of industry to the survey results, a single sawmill that produces six types of products ("lumber," "door trim," "floor baseboards," "pallets," "trusses," and "poles") becomes six distinct industries (the "sawmill and planing mill industry," the "wooden door and window industry," the "other mill work industry," the "wooden box and pallet industry," the "engineered wood products industry," and the "other wood industries").

26. Canada's dissection of the timber processing industries flies in the face of the ordinary meaning of the term "industry" as the term is used in Article 2 of the Subsidies Agreement. Moreover, Canada's position with respect to the timber processing industries is inconsistent with

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[25] *See* Canada Second Written Submission, at para. 50.

[26] *See* Survey of Provincial Forest Product Industries, appended to Letter from Weil, Gotshal & Manges to Secretary of Commerce Donald Evans (December 21, 2001) (Exhibit CDA-73).

its acknowledgment that a subsidy used by a single large industry, such as automobiles or textiles, may be specific notwithstanding the diverse range of products the industry produces.[27]

27. The subsidy at issue in this dispute is unquestionably specific. Use of the provincial tenure systems is limited to the timber processing industries. In fact, in most instances, only timber processing facilities – such as sawmills that produce lumber – are eligible to obtain a tenure.[28] As the United States found in the *Final Determination,* whether the users of provincial tenure systems are classified as sawmills and pulp mills, the primary timber processing group, the wood products industry, or the forest products industries, the subsidies are provided through these tenure systems to a "limited number" of industries. The vast majority of companies and industries in Canada do not receive benefits under these programs. Thus, the record clearly demonstrates that provincial stumpage is used by an extremely limited group of industries in Canada.

28. Canada also challenges the United States' specificity finding by inventing criteria that do not exist in Article 2.1(c). For example, under the specificity standard that Canada proposes, a government program to sell automobile engines at a fraction of their market value would not be specific, even if the engines were purchased only by the automobile industry, unless additional evidence demonstrated that the government targeted the automobile industry when it sold the engines.[29] Nothing in Article 2.1(c), however, requires an investigating authority to consider the

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[27] *See* Canada Second Written Submission, at paras. 147, 149.

[28] *See* U.S. Second Written Submission, at fn. 48; *see also* U.S. First Written Submission, at para. 144, fn. 193.

[29] *See* Canada Second Written Submission, at para. 59 ("If these factors do not indicate government targeting action, the subsidy is not specific in fact.").

government's intent or the "nature" of the good – whether it is a manufactured good or a natural resource – when determining whether a subsidy is specific. It is entirely permissible under Article 2.1(c) to find specificity based *solely* on the limited number of users.

29. Canada cites to the negotiating history of the Subsidies Agreement in an effort to overcome the lack of any support in the text of Article 2.1(c) of the Subsidies Agreement for its claim that Article 2.1(c) requires consideration of factors such as the "inherent characteristics" of the good and evidence of intentional targeting. In fact, the negotiating history that Canada cites demonstrates that such concepts ultimately were *not* adopted by the Members.[30] For example, the Members abandoned language on intent and "inherent characteristics" after the second Cartland draft.[31] Moreover, the "inherent characteristics" language Canada cites appeared in a footnote to the second Cartland draft, which noted that, "[i]t remains for signatories to address the issue of limited access as a result of the inherent characteristics of goods, services, or extraction or harvesting rights provided by a government."[32] It is evident from the final text of Article 2.1 that the Members chose *not* to include inherent characteristics as an additional factor, and such factors may not be read into the Agreement.

30. The only additional factors that a Member must take into account under Article 2.1(c) of the Subsidies Agreement are the extent of diversification of economic activities within the

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[30] *Id.* at fn. 68.

[31] *See* Article 2.1(c), Draft Text by the Chairman, 2 November 1990, MTN.GNG/NG10/W/38/Rev. 2 (Exhibit CDA-151); Article 2.2, Draft Text by the Chairman, 6 November 1990, MTN.GNG/NG10/W/38/Rev. 3 (Exhibit CDA-152); Article 2.1(c), Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 20 December 1991, MNT.TNC/W/FA (Exhibit CDA-153); Article 2, Subsidies Agreement.

[32] Draft Text by the Chairman, 4 September 1990, MTN.GNG/NG10/W/38/Rev. 1 (Exhibit CDA-150).

granting authority's jurisdiction and the length of time the subsidy program has been in operation. No one argued that the number of subsidy recipients is limited because the program had not been in operation long enough to be more widely distributed. Thus, the length of time the programs were in operation was not an issue. The issue of economic diversification was raised only by B.C. The evidence B.C. submitted, however, demonstrated that the timber processing industries accounted for approximately 6 percent of B.C.'s economy. Thus, based on B.C.'s own data, 94 percent of B.C.'s economy did not use the provincial tenure system.[33] The evidence therefore demonstrated that these additional factors supported a determination that the subsidy is specific.

31. Finally, the United States disagrees with Canada's suggestion that Japan and the EC support its claim against the United States' specificity determination.[34] Japan's third-party written submission does not address the issue of specificity at all. Moreover, the EC stated that "[s]ince stumpage rights can, in fact, only be used by a narrow category of users, the effect of the subsidy is limited to 'certain enterprises' in a similar way to a *de jure* limitation and can therefore be considered *de facto* specific."[35]

32. The United States' determination that provincial stumpage subsidies are specific is therefore consistent with Article 2.1(c) of the Subsidies Agreement and is amply supported by the record evidence.

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[33] *See* B.C. June 28 Questionnaire Response, at vol. 1, II-9 (Exhibit CDA-156).

[34] *See* Canada Second Written Submission, at para. 51.

[35] Oral Statement by the European Communities as a Third Party, para. 17 (February 12, 2003).

Calculation and Process

33. The United States' views on Canada's claims regarding the calculation of the ad valorem subsidy rate and the conduct of the investigation have been presented in our prior submissions and statements to the Panel. We would like to make only a few additional points in response to Canada's second submission.

34. First, Canada mischaracterizes the United States' views on Article 19.4 of the Subsidies Agreement. Article 19.4 provides that the countervailing duty rate must be calculated on a per-unit basis. It also provides that the countervailing duty levied may not exceed the subsidy found to exist. That is the extent of the obligations in Article 19.4. The United States' argument that Canada has failed to identify any obligation in Article 19.4 to conduct an upstream subsidy analysis or to allocate subsidies by volume rather than by value is a far cry from arguing that a Member may impose countervailing duties at any rate it wishes.[36] The fact remains, however, that Canada has failed to identify any obligation in Article 19.4 that supports its claim.

35. Second, the United States calculated the ad valorem duty rate by dividing the total amount of the subsidy by the value of the output of the lumber production process. I would also note here that the subsidy at issue in this case is not a subsidy to trees. The subsidy is the provision of timber for less than adequate remuneration. Canada argues that the numerator in that ad valorem rate calculation was impermissibly inflated by the inclusion of that portion of the Crown timber that ended up as products other than lumber, such as wood chips. Canada's

[36] *See* Canada Second Written Submission, at para. 67.

numerator argument is, in fact, simply an argument that the United States was required to allocate the subsidy on the basis of volume rather than on the basis of value.

36. As discussed previously, Article 19.4 simply obligates Members to calculate the countervailing duty rate on a per-unit basis. There is no requirement to allocate an input subsidy based on volume rather than value. As another panel recently stated, "[t]he most logical conclusion to be drawn from this silence is that the choice . . . is up to the investigating authority."[37]

37. Third, Canada continues to suggest that the Minnesota Public Stumpage Price Report ("Minnesota Price Report") specifies a conversion factor of 6.25 for converting from thousand board feet to cubic meters.[38] It does not. The Minnesota Price Report contains sawtimber prices that are reported in thousand board feet and pulpwood prices that are reported in cords. The price report contains a factor that Minnesota uses to convert between cords and board feet.[39] The United States, however, only used the sawtimber prices, which are bid, sold, and reported in thousand board feet, and therefore needed to convert from board feet to cubic meters. The Minnesota Price Report does not contain such a conversion factor.

38. We note, however, that the timber sales manual of the Minnesota Department of Natural Resources ("Minnesota Timber Sales Manual"), which publishes the Minnesota Price Report, was on the record. The Minnesota Timber Sales Manual provides a conversion factor of 3.48

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[37] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/RW, circulated November 29, 2002, para. 6.82.

[38] *See* Canada First Written Submission, at para. 188, fn. 165. *See also* Canada Second Written Submission, at para. 69-71.

[39] *See* Minnesota 2000 Corrected Public Stumpage Price Review and Price Index, 1 (Exhibit CDA-113).

cubic meters per thousand board feet.[40] Canada does not, however, advocate using that conversion factor. Rather, Canada derived its own conversion factor from selected information in the Minnesota Price Report.

39. As the United States explained in the *Final Determination*, there is no one conversion factor that is universally accepted.[41] The record evidence suggested a wide range of possible conversion factors, ranging from 3.48 to 8.51.[42] The United States considered all of that evidence and provided a reasoned explanation for its decision to rely on the factors in the report by the International Trade Commission. The choice of conversion factor is therefore entirely consistent with the United States' obligations under the Subsidies Agreement.

40. Finally, Canada suggests that, even though the provinces knew the criteria the United States was using to select the benchmark states and had all the data on the states under consideration, Alberta and Saskatchewan were not on notice of the possibility that the United States could select a state more than 1,000 kilometers away. That assertion is contradicted by the record of the investigation. Alberta and Saskatchewan both argued that the United States should not use Montana as a benchmark state because of differences in the species mix. Saskatchewan also proposed using data from Alaska,[43] which is more than 1,000 kilometers from, and

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[40] *See* Minnesota Department of Natural Resources, *Timber Sales Manual*, 138 (1998) (Exhibit U.S.-94), appended to David G. Briggs, *Evaluation of Criticisms of "Department of Commerce's Selection of a Conversion Factor in the Softwood Lumber Case,"* Attachment 6 (January 2002), appended to Letter from Dewey Ballantine to Secretary of Commerce Donald Evans, vol. 1 (January 28, 2002).

[41] *See Issues and Decision Memorandum*, at 143 (Exhibit CDA-1).

[42] *Id.* at 144.

[43] *See* Case Brief of the Government of Saskatchewan, vol. 12, at 25-27 (February 22, 2002) (Exhibit U.S.-95).

obviously not contiguous with, Saskatchewan. Thus, it is evident that the provinces knew that factors such as climate, terrain, and species mix – not proximity – were the key considerations, and that a non-contiguous state might be selected for the benchmark. The record of the investigation therefore establishes that the provinces knew the essential facts under consideration by the United States.

Conclusion

41. For the reasons discussed today and in our prior submissions and presentations to the Panel, the United States asks the Panel to dismiss Canada's claims and enforce the United States' right under the Subsidies Agreement to impose countervailing measures to offset the subsidies to softwood lumber from Canada. That concludes our oral presentation. Once again, the United States appreciates the time the Panel has devoted to resolving these issues and welcomes any questions the Panel may have.